

New Mexico Occupational Health and Safety Act

50-9-1. Short title.

Sections 50-9-1 through 50-9-25 NMSA 1978 may be cited as the "Occupational Health and Safety Act".

50-9-2. Purpose.

It is the purpose of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] to assure every employee safe and healthful working conditions by providing for:

- A. the establishment of occupational health and safety regulations applicable to places of employment in this state;
- B. the effective enforcement of the health and safety regulations;
- C. education and training programs for employers and employees in recognition of their responsibilities under the Occupational Health and Safety Act and advice and assistance to them about effective means of preventing occupational injuries and illnesses; and
- D. appropriate job-related accident and illness reporting procedures that will help achieve the objectives of the Occupational Health and Safety Act.

50-9-2.1. Legislative findings.

The legislature finds that:

- A. the proliferation of hazardous chemicals in the environment poses a growing threat to the public health, safety and welfare; and
- B. it is in the public interest to establish a comprehensive program for the disclosure of information about hazardous substances in places of employment and to provide a procedure whereby employees may gain access to this information.

50-9-3. Definitions.

As used in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]:

- A. "person" means any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency or any other legal entity or their legal representatives, agents or assigns;
- B. "employee" means an individual who is employed by an employer, but does not include a domestic employee or a volunteer nonsalaried firefighter;
- C. "employer" means any person who has one or more employees, but does not include the United States;
- D. "board" means the environmental improvement board;
- E. "department" means the department of environment;
- F. "place of employment" means any place, area or environment in or about which an employee is required or permitted to work;
- G. "commission" means the occupational health and safety review commission established under the Occupational Health and Safety Act;
- H. "chemical" means any element, chemical compound or mixture of elements or compounds;
- I. "hazardous chemical" means any chemical or combination of chemicals that has been labeled hazardous by the chemical manufacturer, importer or distributor in accordance with regulations promulgated by the federal Occupational Safety and Health Act of 1970;
- J. "label" means any written, printed or graphic material displayed on or affixed to containers of chemicals which identifies the chemical as hazardous;
- K. "material safety data sheet" means written or printed material concerning a hazardous chemical that contains information on the identity listed on the label, the chemical and common names of the hazardous ingredients, the physical and health hazards, the primary route of entry, the exposure limits, any generally applicable control measures, any emergency or first aid procedures, the date of preparation and the name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet;
- L. "mobile work site" means any place of employment in standard industrial classification codes 13, oil and gas extraction, and 15 through 17, construction, where work is performed in a different location than the principal office in a fixed location used by the employer; and
- M. "secretary" means the secretary of environment.

50-9-4. State occupational health and safety agency.

The department is the state occupational health and safety agency for all purposes under federal legislation relating to occupational health and safety and may take all action necessary to secure to this state the benefits of that legislation.

50-9-5. Employer and employee duties.

- A. Every employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

- B. Every employer shall furnish and maintain a place of employment that must comply with the health and safety regulations promulgated by the board. The regulations shall provide for the adoption of practices, means, methods, operations, conditions and processes in order to provide safe and healthful employment and places of employment.
- C. Each employer shall, through posting of notices at the place or places where notices to employees are normally posted or other appropriate means, keep his employees informed of their protections and obligations under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], including provisions of applicable regulations.
- D. Each employee shall comply with the provisions of the Occupational Health and Safety Act and any rules and orders promulgated pursuant thereto which are applicable to his own actions and conduct in the course of his employment.

50-9-5.1. Employer duties; hazardous chemicals.

A. All incoming containers labeled as hazardous shall be subject to this section. The employer shall not remove or deface any label which indicates on an incoming container that a chemical is hazardous, unless the container is immediately marked with the required information.

- B. Each employer shall obtain and maintain material safety data sheets for each chemical used in his place of employment and labeled as hazardous. Each employer shall ensure that the information on material safety data sheets for hazardous chemicals is readily accessible to employees during each work shift. The board shall promulgate regulations which assure reasonable compliance with this provision at mobile work sites. If a material safety data sheet has not been supplied from the manufacturer, importer or distributor of the hazardous chemical, the employer shall obtain the material safety data sheet by writing the manufacturer, importer or distributor and requesting that he send the material safety data sheet immediately.
- C. Each employer shall maintain a current inventory of all chemicals that have been labeled as hazardous in his place of employment.
- D. Each employer shall develop and implement a written hazard communication program for his place of employment which describes how the criteria specified for labels and other forms of warning, material safety data sheets and employee information and training will be met and which also includes the following:
 - (1) a list of the hazardous chemicals known to be present, using an identity that is referenced on the appropriate material safety data sheet. The list may be compiled for the place of employment as a whole or for individual work areas;
 - (2) the methods the employer will use to inform employees of the hazards of nonroutine tasks, for example, the cleaning of reactor vessels and the hazards associated with chemicals contained in unlabeled pipes in their work areas; and

- (3) the methods the employer will use to inform any contract employers whose employees work in the employer's place of business of the hazardous chemicals their employees may be exposed to while performing their work and any suggestions for appropriate protective measures. The employer may rely on an existing hazard communication program to comply with these requirements provided that it meets the provisions of this subsection. The employer shall make the written hazard communication program available upon request to employees, their designated representatives and the occupational health and safety bureau of the environmental improvement division of the health and environment department [department of environment].
- E. Each employer shall provide employees with information and training on hazardous chemicals they use or may become exposed to during the course of employment.
- F. The requirements of Subsection E of this section shall not apply to any hazardous chemical received by an employer in a sealed package or container and subsequently sold or transferred if the seal is maintained.
- G. Nothing in this section shall supersede any other requirements in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978].

50-9-6. Training; assistance; consultation; research.

- A. The department shall provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe working conditions in employment and places of employment and consult with, advise and assist employers and employees about effective means of preventing occupational injuries and illnesses.
- B. Upon an employer's request, the department shall provide an on-site consultation inspection of conditions and practices of the employer's work place without issuing citations or proposing penalties for violations noted, provided that imminent danger situations found during the on-site consultative visit must be pointed out to the employer. In the event the imminent danger is pointed out by the department consultant but immediate steps are not taken by the employer to eliminate such danger, the emergency procedures provided in Section 50-9-14 NMSA 1978 shall be pursued by the department to assure timely abatement of the imminent danger situation.
- C. The secretary is responsible for programs involving research in occupational health and safety, for surveys and recommendations for occupational health and safety programs and for promotional, educational and advisory activities in occupational health and safety.
- D. The board or the secretary may appoint special committees composed of technicians or professionals specializing in occupational health or safety to assist in carrying out the objectives of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. Members of such committees shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

50-9-7. Duties and powers of the board.

- A. The board shall promulgate regulations that are and will continue to be at least as effective as standards promulgated pursuant to the federal Occupational Safety and Health Act of 1970 to prevent or abate detriment to the health and safety of employees. In adopting, amending and repealing its regulations, the board shall provide an opportunity for representatives of employers and employees affected by the regulations to be heard and shall give weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:
 - (1) character and degree of injury to or interference with the health and safety of employees proposed to be abated or prevented by the regulation;
 - (2) technical practicability and economic reasonableness of the regulation and the existence of alternatives to the prevention or abatement of detriment to the health and safety of employees proposed by the regulation; and
 - (3) the public interest, including the social and economic effects of work-related accidents, injuries and illnesses.
- B. In promulgating regulations dealing with toxic materials or harmful physical agents, the board shall provide regulations that most adequately assure to the extent feasible, on the basis of the best available technology, that no employee will suffer material impairment of health or functional capacity even if the employee has regular exposure to the hazard dealt with by the regulations for a period of his working life. Whenever practicable, the regulation promulgated shall be expressed in terms of objective criteria and of the performance desired.
- C. The regulation shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and proper conditions and precautions of safe use or exposure. Where appropriate, the standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with the hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to the hazards in order to most effectively determine whether the health of the employees is adversely affected by the exposure. Cost of medical examinations for research as ordered by the secretary shall be paid for by the department. Results of examinations shall be made available to the secretary, to the employer and, upon the request of the employee, to the employee's physician. The board may make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring and medical examinations, as may be warranted by experience, information or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

50-9-8. Duties and powers of the department.

The department shall:

- A. prevent or abate detriment to the health and safety of employees arising out of and in the course of employment;
- B. develop an effective and comprehensive program for the prevention or abatement of detriment to the health and safety of employees within the state;
- C. advise and recommend an effective and comprehensive program of occupational health and safety applicable to all employees of public agencies of the state and its political subdivisions;
- D. cause to be instituted legal proceedings to compel compliance with the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or any regulation of the board;
- E. accept, receive and administer grants or other funds or gifts from public or private agencies, including the federal government;
- F. take reasonable steps to inform employees of their protections and obligations under the Occupational Health and Safety Act, including the provisions of applicable regulations; and
- G. make reports to the secretary of the United States department of labor in the form and containing the information as the secretary may from time to time require.

50-9-9. Occupational health and safety review commission; creation; organization.

- A. The occupational health and safety review commission is hereby established. The commission shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate, from among persons who by reason of training, education or experience are qualified to carry out the functions of the commission under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. One member each shall be chosen to reflect the views of labor, industry and of the general public. The governor shall designate one of the members of the commission to serve as chairman.
- B. Terms of commission members shall be six years except that members of the commission first taking office shall serve as designated by the governor at the time of appointment: one for a term of two years, one for a term of four years and one for a term of six years. A vacancy caused by death, resignation or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the commission may be removed by the governor for inefficiency, neglect of duty or malfeasance in office.
- C. For the purpose of carrying out its functions under the Occupational Health and Safety Act, two members of the commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

- D. Every official act of the commission shall be entered of record and its hearings and records shall be open to the public. The commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings.
- E. The commission may order testimony to be taken by deposition in any proceedings pending before it. Any person whose testimony may be material may be compelled to appear and testify, and to produce books, papers or documents in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the commission.
- F. The commission may designate a hearing officer to take evidence in the hearing. The commission will then make its decision based on the evidence in the transcript of the hearing proceedings. G. Members of the commission shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

50-9-10. Right of entry and inspection; complaints; consultation; notification.

- A. In order to carry out the purposes of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], the department's authorized representatives, upon presenting appropriate credentials to the owner, operator or agent in charge, are authorized to and may:
 - (1) enter and inspect any place of employment at reasonable times and without delay; and
 - (2) question privately the employer and employees and to inspect and investigate during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein. The department's representative is not authorized to question privately the employer or employees until the board has adopted regulations protecting the rights of such employer and employees.
- B. Any employee or representative of employees may file a written complaint with the department concerning any alleged violation of a regulation or any hazardous condition. A copy of the complaint shall be provided to the employer at the time of the inspection. However, upon the request of the complainant, the complainant's shall not appear on the copy. The department shall investigate the complaint and notify the complainant and employer in writing of the results of the investigation and any action to be taken. If no action is contemplated, the department shall notify the complainant and include in the notice the reasons therefor. The department shall provide for the informal review of decisions not to take compliance action at the request of the complainant. The review shall not be by those who investigated the complaint.
- C. In order to aid inspections, a representative of the employer and a representative authorized by employees shall be given an opportunity to accompany the department inspector during the physical inspection of the work place. If there is no authorized employee representative, the department inspector shall consult with a reasonable number of employees.

- D. Prior to or during any inspection of a work place, any employees or representative of employees employed in such work place may notify the department or the department inspector in writing of any violation of the Occupational Health and Safety Act which they have reason to believe exists in such work place. The department shall establish procedures for informal review of the decision made by the inspector, and, if no citation is issued with respect to the alleged violation, it shall furnish the employee requesting such review a written statement of the reasons for the department's final disposition of the case.
- E. If an inspection reveals that employees are exposed to toxic materials or harmful physical agents at levels in excess of those prescribed by regulations of the board, the department shall provide the employees with access to the results of the inspection. The employer shall promptly notify the employees who are being exposed to the agents or materials in excess of the applicable regulations and inform them of the corrective action being taken or that review has been requested in accordance with Section 50-9-17 NMSA 1978.
- F. It is unlawful for any person to give advance notice of any inspection to be conducted under the Occupational Health and Safety Act without the written approval of the secretary or the secretary's authorized representative.
- G. The board shall adopt regulations to implement this section.

50-9-11. Reports and record keeping by employers.

A. An employer shall keep such records and make such reports to the department as the board, by regulation, may require to carry out the purposes of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. Such regulation regarding records and reports shall be at least as effective as and consistent with the occupational safety and health record and report requirements of the United States department of labor. These records and reports shall be obtained with a minimum burden upon employers, especially those operating small businesses. Unnecessary duplication of efforts in obtaining information shall be reduced to the maximum extent feasible.

B. Employers shall maintain accurate records of employee exposures to potentially toxic material or harmful physical agents which are required to be monitored or measured as the board may prescribe by regulations. Employees and their representatives shall be given an opportunity to observe such monitoring and measuring. Employees and former employees shall be granted access to their own records as will indicate their own exposure to toxic material or harmful agents. Each employer shall promptly notify any employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or levels that exceed those prescribed by an applicable regulation adopted pursuant to the Occupational Health and Safety Act and shall inform any employee who is being thus exposed of the corrective action being taken. Employers shall retain the records of exposure of employees to specific toxic material and harmful agents for periods of time to be specified in regulations.

50-9-12. Adoption of regulations; notice and hearing.

- A. Any person may recommend or propose regulations to the board for promulgation. The board shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.
- B. No regulations shall be adopted, amended or repealed until after a public hearing by the board. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, time and place of the hearing and the manner in which interested persons may secure copies of any regulations proposed to be adopted, amended or repealed. The notice shall be published in a newspaper of general circulation in the state. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing. Any person heard or represented at the hearing shall be given written notice of the action by the board. The board may designate a hearing officer to take evidence in the hearing and present the evidence to the board. A record shall be made of each hearing.
- C. Notwithstanding the provisions of Subsection B of this section, the secretary may adopt an emergency regulation to take immediate effect upon its filing under the State Rules Act [Chapter 14, Article 4 NMSA 1978] if the secretary determines:
 - (1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and
 - (2) that the emergency regulation is necessary to protect employees from the danger.
- D. The emergency regulation shall be effective until superseded by a final regulation promulgated in accordance with the procedures prescribed in Subsection B of this section. The final regulation shall be promulgated within one hundred twenty days of the date of promulgation of the relevant emergency regulation.
- E. If the emergency regulation is promulgated in response to an emergency temporary standard issued pursuant to the federal Occupational Safety and Health Act of 1970, then such regulation shall only be enforceable to the same extent as the federal emergency temporary standard.
- F. If the federal emergency temporary standard is superseded by a federal permanent standard, then the state emergency regulation shall remain in effect for an additional one hundred twenty days after promulgation of the superseding standard. During this additional one hundred twenty days, the board shall promulgate a regulation in accordance with the procedures prescribed in Subsection B of this section.

50-9-13. Adopting standards by reference.

In the event the board wishes to adopt regulations that are identical with standards approved by an agency of the federal government, the board, after notice and hearing,

may adopt the regulations by reference to the standards without setting forth the provisions of the standards.

50-9-14. Emergency procedures.

- A. The district courts shall have jurisdiction, upon petition of the secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided by the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove the imminent danger and prohibit the employment of any individual in locations or under conditions where the danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations or, where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.
- B. Upon the filing of a petition, the district court may grant injunctive relief or a temporary restraining order in accordance with the New Mexico rules of civil procedure pending the outcome of an enforcement proceeding pursuant to the Occupational Health and Safety Act.
- C. When the secretary or the secretary's representative determines that an emergency exists, he shall immediately inform the employees and employers of the hazards and take steps to obtain immediate abatement of the hazards by the employer.
- D. If the secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employee, may bring an action against the secretary in the district court for the district in which the imminent danger is alleged to exist for a writ of mandamus to compel the secretary to seek an order of the court as provided in this section.

50-9-15. Validity of regulation; variance determination; judicial review.

- A. Any person who is or may be affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days after filing of the regulation pursuant to the State Rules Act [Chapter 14, Article 4 NMSA 1978]. The board shall be made a party to the action.
- B. Upon appeal, the court of appeals shall set aside a regulation only if it is found to be:
 - (1) arbitrary, capricious or an abuse of discretion;
 - (2) not supported by substantial evidence in the record; or
 - (3) otherwise not in accordance with law.

- C. A variance petitioner may appeal to the district court from an order of the department denying the variance. The appeal shall be filed pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

50-9-16. Variances; temporary variances.

- A. The department may grant an individual variance from any regulation adopted pursuant to the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] setting health or safety standards whenever it is found by a preponderance of the evidence that the conditions, practices, means, methods, operations or processes used by the petitioner will provide employment and places of employment to his employees which are as safe and healthful as those that would prevail if he complied with the existing regulation.
- B. No variance shall be granted until the department has considered the relative interests of the petitioner, his employees and the general public. The order so issued shall describe the conditions the employer must maintain and the practices, means, methods, operations and procedures which he must adopt and utilize to the extent they differ from the regulation in question. The secretary may at any time on his own motion, or upon application by an employer or employee after six months have elapsed from the date of issuance of the order granting a variance, after a hearing, modify or revoke such order.
- C. A petitioner for a variance shall file a petition with the department in the manner prescribed by regulation. The department shall give the affected employees prompt notice of the application for a variance and an opportunity to request a hearing. When properly filed, the secretary shall promptly investigate the petition and provide for the disposition thereof.
- D. The department may grant the variance without hearing when no hearing has been requested by either employees or employer and if it deems that no substantial public interest is involved. If the department is opposed to the granting of the variance, then a hearing shall be held upon the request of the petitioner. A record shall be made of the hearing. In the hearing, the burden of proof shall be upon the petitioner.
- E. Any employer may apply to the department for a temporary order granting a variance from a regulation promulgated under the Occupational Health and Safety Act by submitting a petition to the department in the manner prescribed by regulation. A temporary variance may be granted only if the employer establishes:
 - (1) that he is unable to comply with a regulation by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the regulation or because necessary construction or alteration of facilities cannot be completed by the effective date;
 - (2) that he is taking all available steps to safeguard his employees against the hazards covered by the regulation; and
 - (3) that he has an effective program for coming into compliance with the regulation as quickly as practicable.

- F. Any temporary order issued under this section shall prescribe the practices, means, methods, operations and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the regulation. Such a temporary variance may be granted only after notice to employees and an opportunity for a hearing. Provided that the department may issue one interim order to be effective until a decision is made or a decision rendered if a hearing is requested. No temporary variance may be in effect for longer than the period needed by the employer to achieve compliance with the regulation or one year, whichever is shorter, except that such variance may be renewed not more than twice, so long as the requirements of this subsection are met and if an application for renewal is filed at least ninety days prior to the expiration date of the variance. No renewal of a temporary variance may remain in effect for longer than one hundred eighty days.
- G. The department is authorized to grant a variance from any regulation whenever it determines that such a variance is necessary to an employer to participate in an experiment approved by the department designated to demonstrate or validate new and improved techniques to safeguard the health or safety of workers. H. The department shall keep an appropriately indexed record of all variances granted under this section. The record shall be open for public inspection.

50-9-17. Enforcement; appeals.

- A. If as a result of investigation the department has good cause to believe that any employer is violating any provision of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or any rule of the board, the department shall send prompt notice of the violation by certified mail to the employer believed to be in violation. The citation shall describe with particularity the provision of the Occupational Health and Safety Act or rule alleged to have been violated. The notice shall also state the time for abatement of the violation. Each citation issued pursuant to this section, or a copy thereof, shall be promptly and prominently posted by the cited employer, as prescribed in rules issued by the board, at or near the place where the violation occurred. No citation may be issued under this section after the expiration of six months following the occurrence of any violation. The board may issue a regulation prescribing procedures for the use of a notice in lieu of a citation with respect to de minimis violations that have no direct or immediate relationship to safety or health.
- B. If the department issues a citation as provided in Subsection A of this section, it shall, within a reasonable time after issuance of the citation, notify the employer by certified mail of the penalty, if any, proposed to be assessed and that the employer has fifteen working days within which to notify the department in writing that he wishes to contest the citation or proposed penalty. If within fifteen working days from the receipt of the notice issued by the department the employer fails to notify the department that he intends to contest the citation or proposed penalty and no notice is filed by an employee or employee representative as provided by Subsection D of this section within that time, the

- citation and the assessment of penalty, if any, as proposed shall be deemed the final order of the commission and not subject to review by any court or agency.
- C. If the department has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the abatement period permitted, which period shall not begin to run until the entry of a final order by the commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties, the department shall notify the employer by certified mail of the failure to correct and of the penalty proposed to be assessed by reason of the failure and that the employer has fifteen working days within which to notify the department in writing that he wishes to contest the department's notification or the proposed assessment of penalty. If within fifteen working days from the receipt of notification issued by the department the employer fails to notify the department that he intends to contest the notification or proposed assessment of penalty, the notification and assessment as proposed shall be deemed a final order of the commission and not subject to review by any court or department.
 - D. If any employer notifies the department in writing that he intends to contest the citation issued to him pursuant to provisions of Subsection A of this section or notification issued pursuant to provisions of Subsection B or C of this section or if within fifteen working days of the receipt of notice pursuant to the provisions of this section any employee of an employer cited or any employee's representative files a notice with the department alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the department shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the petitioner may request a hearing before the commission within fifteen days after the administrative review. The commission shall afford an opportunity for a hearing within thirty days after receipt of the petition. The commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the department's citation or the proposed penalty fixed by the department or directing other appropriate relief.
 - E. At any time prior to the expiration of an abatement period, an employer may notify the department in writing that he is unable to take the corrective action required within the period of abatement. The department shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the petitioner may request a hearing before the commission after the administrative review. The commission shall afford prompt opportunity for a hearing after receipt of the petition. The only grounds for modifying an abatement period provided by this subsection are a showing by the employer of a good-faith effort to comply with the abatement requirement of a citation and that abatement has not been completed because of factors beyond the employer's control.
 - F. Affected employees or their representatives shall be provided an opportunity to participate as parties at both informal administrative review and commission hearings provided for in this section. G. Any person, including the department, adversely affected by an order of the commission issued pursuant to provisions of

this section may obtain a review of the order in the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

50-9-18. Subpoena power.

In connection with investigations or enforcement hearings conducted under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], the department may apply to the district court for an order requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the state. Any district court, upon application by the department, shall have jurisdiction to issue to such person an order requiring the person to appear and to produce evidence if, as and when so ordered and to give testimony relating to the matter under investigation if the court finds that the evidence or testimony sought is discoverable under the Rules of Civil Procedure for The District Courts. Any failure to obey an order of the court may be punished by the court under its powers of contempt.

50-9-19. Accident reports and records.

- A. Every employer shall keep records and submit reports of occupational injuries and illnesses as prescribed by the department. Reports shall not require employee identification by name.
- B. The department shall publish annually a detailed summary of the statistical data received from employers. The department shall make a copy of such summary available on request to each employer, and the summary shall be made available upon request to any person having an interest in the report. In the preparation, publication or release of the statistical summary, the department shall not in any manner disclose information identifying any employer unless prior permission has been obtained from the employer in writing. The reports of each employer shall remain confidential and shall not be released, revealed or otherwise disclosed to any person other than the bureau of labor statistics and the occupational safety and health administration of the United States department of labor without prior permission of the employer unless pursuant to an administrative hearing of the board or an order of a court of competent jurisdiction.

50-9-20. Coordination.

For the purpose of carrying out the provisions of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], the department shall coordinate, to the greatest extent practicable, the occupational health and safety activities of all state and local agencies. It shall advise, consult and cooperate with other agencies of the state, federal government, other states and interstate agencies and with affected public and private organizations.

50-9-21. Civil actions; admissibility as evidence; confidentiality of trade secrets.

- A. Nothing in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] shall be construed or held to supersede or in any manner affect the Workers' Compensation Act [52-1-1 to 52-1-70 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 to 52-3-60 NMSA 1978] or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases or death of employees arising out of or in the course of employment.
- B. Statements, reports and information obtained or received by the department in connection with an investigation under or the administration or enforcement of the provisions of the Occupational Health and Safety Act shall be made available except to the extent privileged by law. Information obtained under the provisions of Subsection B of Section 50-9-6 NMSA 1978 shall remain confidential. The information may be used for statistical purposes if the information revealed is not identified as applicable to any individual employer.
- C. All information reported to or otherwise obtained by the secretary or the secretary's authorized representative in connection with any inspection or proceeding under this section which contains or might reveal a trade secret, as defined in Paragraph (2) of this subsection, shall be considered confidential, except that such information may be disclosed to other officers or employees concerned with carrying out the Occupational Health and Safety Act. In any such proceeding, the secretary, the secretary's authorized representative or a court of competent jurisdiction, as the case may be, shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.
 - (1) It is unlawful for any employee of the agency to reveal to any individual other than another employee of the department the trade secrets of any employer except in response to an order of a district court, the court of appeals, the supreme court or a federal court in an action to which the state is a party and in which the information sought is material to the inquiry.
 - (2) For the purposes of this subsection, "trade secrets" means the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value. A trade secret shall be presumed to be secret when the owner takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes.

50-9-22. Preemption.

- A. Nothing in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] shall affect the jurisdiction of any state agency or any political subdivision performing like functions or exercising like responsibilities with regard to occupational health and safety matters except as provided in Subsection B or C of this section.
- B. Whenever the board prescribes or adopts a regulation under the procedures provided in the Occupational Health and Safety Act, the regulation shall, when a

- copy thereof is filed with the clerk of the political subdivision to which it applies, establish a minimum requirement concerning the matters covered by the regulation and shall be construed in connection with any local requirement relative to the same matter. The regulation of the board amends or modifies any requirement of the local standard which does not meet the regulation.
- C. The Occupational Health and Safety Act and regulations promulgated under it, and not the acts and regulations enforced by the state mine inspector, shall apply to places of employment subject to the jurisdiction of the United States department of labor acting under the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended.
 - D. Compliance with a regulation of the board does not relieve any person from the obligation to comply with a stricter state agency or political subdivision health or safety requirement, but the state agency or political subdivision shall be responsible for the enforcement of the health and safety requirements established by that state agency or local authority.

50-9-23. Limitation on applicability of the act to certain employers and their employees.

The Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] and regulations promulgated under it do not apply to a specific activity of an employer or to a specific occupational health or safety condition of his employees if the specific activity or specific occupational health or safety condition is subject to the jurisdiction of and is regulated by:

- A. any federal agency except the United States department of labor acting under the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590); or B. the board pursuant to the agreement specified in Section 74-3-15 NMSA 1978.

50-9-24. Penalties.

- A. Any employer who willfully or repeatedly violates any provision of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or any regulation or order promulgated pursuant to that act may be assessed a civil penalty not to exceed seventy thousand dollars (\$70,000) for each violation; provided that a civil penalty shall not be less than five thousand dollars (\$5,000) for each willful violation.
- B. Any employer who has received a citation for a serious violation of any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act shall be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each such violation.
- C. Any employer who has received a citation for a violation of any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act that is determined not to be of a serious nature may be

assessed a civil penalty of up to seven thousand dollars (\$7,000) for each such violation.

- D. Any employer who fails to correct a violation for which a citation has been issued within the period permitted for its correction, which period shall not begin to run until the date of the final order of the commission in the case of any review proceeding under Section 50-9-17 NMSA 1978 initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each day during which the failure or violation continues.
- E. Any civil penalty assessed against the state, a political subdivision of the state or any agency of either pursuant to Subsection B, C or G of this section shall not be collected during the time permitted for correction of the violation, and if the violation is corrected within such time, the civil penalty shall be deemed paid without further action of the state, political subdivision or agency.
- F. For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition that exists or from one or more practices, means, methods, operations or processes that have been adopted or are in use in the place of employment unless the employer did not and could not with the exercise of reasonable diligence know of the presence of the violation.
- G. Any employer who violates any of the posting requirements as prescribed by the Occupational Health and Safety Act shall be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each violation.
- H. The commission has authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the history of previous violations.
- I. Civil penalties imposed under this section shall be paid into the general fund.
- J. Any employer who willfully violates any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act causing death to any employee by that violation shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) or by imprisonment for not more than six months or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for less than one year or by both.
- K. Any person who gives advance notice of any inspection to be conducted under the Occupational Health and Safety Act without authority of the secretary shall, upon conviction, be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than six months or by both.
- L. Whoever knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the Occupational Health and Safety Act shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000)

for each such violation or by imprisonment for not more than six months or by both.

- M. A person who reveals a trade secret in violation of Section 50-9-21 NMSA 1978 violates this subsection and shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) or by imprisonment for less than one year or both.

50-9-25. Discrimination.

- A. No person or employer shall discharge or in any manner discriminate against any employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of himself or others of any right afforded by the Occupational Health and Safety Act.
- B. Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such alleged violation occurs, file a complaint with the secretary, in writing and acknowledged by the employee, alleging such discrimination. Upon receipt of the complaint, the secretary shall cause such investigation to be made as he deems appropriate. Within sixty days of the receipt of a complaint filed under this section, the secretary shall notify the complainant of his determination. If, upon such investigation, the secretary determines that the provisions of this section have been violated, he shall file a petition in the district court for the political subdivision in which the alleged violation occurred to restrain the violation of Subsection A of this section and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.