

Received 6/25/09

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STATE OF NEW MEXICO
DEPARTMENT OF WORKFORCE SOLUTIONS
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KEN ORTIZ
DEPUTY SECRETARY

June 23, 2009

Ms. Cheryl Atkinson
Administrator
Office of Workforce Security
200 Constitution Avenue NW
Room S-4231
Washington, DC 20210

**Re: Application for One-Third Modernization Incentive Payment to
New Mexico**

Dear Ms. Atkinson:

Pursuant to the Assistance for Unemployed Workers and Struggling Families Act, Title II of Division B of Public Law No. 111-5, enacted February 17, 2009, and pursuant to Unemployment Insurance Program Letter No. 14-09, I am making application on behalf of the State of New Mexico for distribution of the one-third portion of the Unemployment Insurance Modernization Incentive Payment for the "alternative base period" provision.

New Mexico's Unemployment Compensation Law provides for an alternative base period at N.M.S.A. 1978, § 51-1-42(A) and 11.3.300.305 N.M.A.C. for individuals who do not qualify under the "first four of the last five completed calendar quarters" definition of base period. The alternative base period provision permits an individual who does not have sufficient wages in the base period to qualify for benefits using the last four completed calendar quarters immediately preceding the first day of the individual's benefit year. Copies of the provisions cited herein are attached to this application.

I hereby certify that the statutory provision cited above is currently in effect and has been in effect since January 1, 2005, as permanent law and is not subject to discontinuation, suspension, or nullification under any circumstances other than repeal by the legislature and that this plan is submitted in good faith.

Enclosed with this application is a plan identifying how New Mexico intends to use the one-third incentive payment to improve and strengthen its unemployment compensation program.

Please contact me if you need additional information or documentation to approve this application for distribution of the one-third Modernization Incentive Payment.

Sincerely,



Betty Sparrow Doris
Secretary

Enclosure

cc: Governor Bill Richardson
NMORR



LEXSTAT N.M. STAT. ANN. § 51-1-42

MICHIE'S ANNOTATED STATUTES OF NEW MEXICO
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*** THIS SECTION IS CURRENT THROUGH THE RESULTS OF THE NOVEMBER 4, 2008 GENERAL ELECTION ***

*** ANNOTATIONS CURRENT THROUGH 2008-NMCA-165 AND 2008-NMSC-067 ***

CHAPTER 51. UNEMPLOYMENT COMPENSATION
 ARTICLE 1. UNEMPLOYMENT COMPENSATION

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N.M. Stat. Ann. § 51-1-42 (2008)

§ 51-1-42. Definitions

As used in the Unemployment Compensation Law [51-1-1 NMSA 1978]:

A. "base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except that "base period" means for benefit years beginning on or after January 1, 2005 for an individual who does not have sufficient wages in the base period as defined to qualify for benefits pursuant to Section 51-1-5 NMSA 1978, the individual's base period shall be the last four completed calendar quarters immediately preceding the first day of the individual's benefit year if that period qualifies the individual for benefits pursuant to Section 51-1-5 NMSA 1978; provided that:

(1) wages that fall within the base period of claims established pursuant to this subsection are not available for reuse in qualifying for a subsequent benefit year; and

(2) in the case of a combined-wage claim pursuant to the arrangement approved by the federal secretary of labor, the base period is that base period applicable under the unemployment compensation law of the paying state;

B. "benefits" means the cash unemployment compensation payments payable to an eligible individual pursuant to Section 51-1-4 NMSA 1978 with respect to the individual's weeks of unemployment;

C. "contributions" means the money payments required by Section 51-1-9 NMSA 1978 to be made into the fund by an employer on account of having individuals performing services for the employer;

D. "employing unit" means any individual or type of organization, including any partnership, association, cooperative, trust, estate, joint-stock company, agricultural enterprise, insurance company or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or successor thereof, household, fraternity or club, the legal representative of a deceased person or any state or local government entity to the extent required by law to be covered as an employer, which has in its employ one or more individuals performing services for it within this state. An individual performing services for an employing unit that maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of the Unemployment Compensation Law [51-1-1 NMSA 1978]. An individual performing services for a contractor, subcontractor or agent that is performing work or services for an employing unit, as described in this subsection, which is within the scope of the employing unit's usual trade, occupation, profession or business, shall be deemed to be in the employ of the employing unit for all purposes of the Unemployment Compensation Law unless the contractor, subcontractor or agent is itself an employer within the provisions of Subsection E of this section;

E. "employer" includes:

(1) an employing unit that:

(a) unless otherwise provided in this section, paid for service in employment as defined in Subsection F of this section wages of four hundred fifty dollars (\$ 450) or more in any calendar quarter in either the current or preceding calendar year or had in employment, as defined in Subsection F of this section, for some portion of a day in each of twenty different calendar weeks during either the current or the preceding calendar year, and irrespective of whether the same individual was in employment in each such day, at least one individual;

(b) for the purposes of Subparagraph (a) of this paragraph, if any week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed one calendar week and the days beginning January 1, another such week; and

(c) for purposes of defining an "employer" under Subparagraph (a) of this paragraph, the wages or remuneration paid to individuals performing services in employment in agricultural labor or domestic services as provided in Paragraphs (6) and (7) of Subsection F of this section shall not be taken into account; except that any employing unit determined to be an employer of agricultural labor under Paragraph (6) of Subsection F of this section shall be an employer under Subparagraph (a) of this paragraph so long as the employing unit is paying wages or remuneration for services other than agricultural services;

(2) any individual or type of organization that acquired the trade or business or substantially all of the assets thereof, of an employing unit that at the time of the acquisition was an employer subject to the Unemployment Compensation Law [51-1-1 NMSA 1978]; provided that where such an acquisition takes place, the secretary may postpone activating the separate account pursuant to Subsection A of Section 51-1-11 NMSA 1978 until such time as the successor employer has employment as defined in Subsection F of this section;

(3) an employing unit that acquired all or part of the organization, trade, business or assets of another employing unit and that, if treated as a single unit with the other employing unit or part thereof, would be an employer under Paragraph (1) of this subsection;

(4) an employing unit not an employer by reason of any other paragraph of this subsection:

(a) for which, within either the current or preceding calendar year, service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or

(b) that, as a condition for approval of the Unemployment Compensation Law [51-1-1 NMSA 1978] for full tax credit against the tax imposed by the Federal Unemployment Tax Act [26 USCS § 3301 et seq.], is required, pursuant to that act, to be an "employer" under the Unemployment Compensation Law;

(5) an employing unit that, having become an employer under Paragraph (1), (2), (3) or (4) of this subsection, has not, under Section 51-1-18 NMSA 1978, ceased to be an employer subject to the Unemployment Compensation Law [51-1-1 NMSA 1978];

(6) for the effective period of its election pursuant to Section 51-1-18 NMSA 1978, any other employing unit that has elected to become fully subject to the Unemployment Compensation Law [51-1-1 NMSA 1978];

(7) an employing unit for which any services performed in its employ are deemed to be performed in this state pursuant to an election under an arrangement entered into in accordance with Subsection A of Section 51-1-50 NMSA 1978; and

(8) an Indian tribe as defined in 26 USCA Section 3306(u) for which service in employment is performed;

F. "employment":

(1) means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

(2) means an individual's entire service, performed within or both within and without this state if:

(a) the service is primarily localized in this state with services performed outside the state being only incidental thereto; or

(b) the service is not localized in any state but some of the service is performed in this state and: 1) the base of operations or, if there is no base of operations, the place from which such service is directed or controlled, is in this state; or 2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state;

(3) means services performed within this state but not covered under Paragraph (2) of this subsection if contributions or payments in lieu of contributions are not required and paid with respect to such services under an unemployment compensation law of any other state, the federal government or Canada;

(4) means services covered by an election pursuant to Section 51-1-18 NMSA 1978 and services covered by an election duly approved by the secretary in accordance with an arrangement pursuant to Paragraph (1) of Subsection A of Section 51-1-50 NMSA 1978 shall be deemed to be employment during the effective period of the election;

(5) means services performed by an individual for an employer for wages or other remuneration unless and until it is established by a preponderance of evidence that:

(a) the individual has been and will continue to be free from control or direction over the performance of the services both under the individual's contract of service and in fact;

(b) the service is either outside the usual course of business for which the service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and

(c) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service;

(6) means service performed after December 31, 1977 by an individual in agricultural labor as defined in Subsection Q of this section if:

(a) the service is performed for an employing unit that: 1) paid remuneration in cash of twenty thousand dollars (\$ 20,000) or more to individuals in that employment during any calendar quarter in either the current or the preceding calendar year; or 2) employed in agricultural labor ten or more individuals for some portion of a day in each of twenty different calendar weeks in either the current or preceding calendar year, whether or not the weeks were consecutive, and regardless of whether the individuals were employed at the same time;

(b) the service is not performed before January 1, 1980 by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to Sections 214(c) and 101(15)(H) of the federal Immigration and Nationality Act [8 USCS § 1184(c) and 8 USCS § 1101(a)(15)(H)]; and

(c) for purposes of this paragraph, an individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for a farm operator or other person shall be treated as an employee of the crew leader: 1) if the crew leader meets the requirements of a crew leader as defined in Subsection L of this section; or 2) substantially all the members of the crew operate or maintain mechanized agricultural equipment that is provided by the crew leader; and 3) the individuals performing the services are not, by written agreement or in fact, within the meaning of Paragraph (5) of this subsection, performing services in employment for the farm operator or other person;

(7) means service performed after December 31, 1977 by an individual in domestic service in a private home, local college club or local chapter of a college fraternity or sorority for a person or organization that paid cash remuneration of one thousand dollars (\$ 1,000) in any calendar quarter in the current or preceding calendar year to individuals performing such services;

(8) means service performed after December 31, 1971 by an individual in the employ of a religious, charitable, educational or other organization but only if the following conditions are met:

(a) the service is excluded from "employment" as defined in the Federal Unemployment Tax Act solely by reason of Section 3306(c)(8) of that act; and

(b) the organization meets the requirements of "employer" as provided in Subparagraph (a) of Paragraph (1) of Subsection E of this section;

(9) means service of an individual who is a citizen of the United States, performed outside the United States, except in Canada, after December 31, 1971 in the employ of an American employer, other than service that is deemed "employment" under the provisions of Paragraph (2) of this subsection or the parallel provisions of another state's law, if:

- (a) the employer's principal place of business in the United States is located in this state;
- (b) the employer has no place of business in the United States, but: 1) the employer is an individual who is a resident of this state; 2) the employer is a corporation organized under the laws of this state; or 3) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or
- (c) none of the criteria of Subparagraphs (a) and (b) of this paragraph are met, but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state.

"American employer" for the purposes of this paragraph means a person who is: 1) an individual who is a resident of the United States; 2) a partnership if two-thirds or more of the partners are residents of the United States; 3) a trust if all of the trustees are residents of the United States; or 4) a corporation organized under the laws of the United States or of any state. For the purposes of this paragraph, "United States" includes the United States, the District of Columbia, the commonwealth of Puerto Rico and the Virgin Islands;

(10) means, notwithstanding any other provisions of this subsection, service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or which as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act [26 USCS § 3301 et seq.] is required to be covered under the Unemployment Compensation Law [51-1-1 NMSA 1978];

(11) means service performed in the employ of an Indian tribe if:

(a) the service is excluded from "employment" as defined in 26 USCA Section 3306(c) solely by reason of 26 USCA Section 3306(c)(7); and

(b) the service is not otherwise excluded from employment pursuant to the Unemployment Compensation Law [51-1-1 NMSA 1978];

(12) does not include:

(a) service performed in the employ of: 1) a church or convention or association of churches; or 2) an organization that is operated primarily for religious purposes and that is operated, supervised, controlled or principally supported by a church or convention or association of churches;

(b) service performed by a duly ordained, commissioned or licensed minister of a church in the exercise of such ministry or by a member of a religious order in the exercise of duties required by such order;

(c) service performed by an individual in the employ of the individual's son, daughter or spouse, and service performed by a child under the age of majority in the employ of the child's father or mother;

(d) service performed in the employ of the United States government or an instrumentality of the United States immune under the constitution of the United States from the contributions imposed by the Unemployment Compensation Law [51-1-1 NMSA 1978] except that to the extent that the congress of the United States shall permit states to require any instrumentalities of the United States to make payments into an unemployment fund under a state unemployment compensation act, all of the provisions of the Unemployment Compensation Law shall be applicable to such instrumentalities, and to service performed for such instrumentalities in the same manner, to the same extent and on the same terms as to all other employers, employing units, individuals and services; provided that if this state shall not be certified for any year by the secretary of labor of the United States under Section 3304 of the federal Internal Revenue Code of 1986, 26 U.S.C. Section 3304, the payments required of such instrumentalities with respect to such year shall be refunded by the department from the fund in the same manner and within the same period as is provided in Subsection D of Section 51-1-36 NMSA 1978 with respect to contributions erroneously collected;

(e) service performed in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving that rehabilitation or remunerative work;

(f) service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(g) service performed in the employ of a foreign government, including service as a consular or other officer or employee or a nondiplomatic representative;

(h) service performed by an individual for a person as an insurance agent or as an insurance solicitor, if all such service performed by the individual for the person is performed for remuneration solely by way of commission;

(i) service performed by an individual under the age of eighteen in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(j) service covered by an election duly approved by the agency charged with the administration of any other state or federal unemployment compensation law, in accordance with an arrangement pursuant to Paragraph (1) of Subsection A of Section 51-1-50 NMSA 1978 during the effective period of the election;

(k) service performed, as part of an unemployment work-relief or work-training program assisted or financed in whole or part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving the work relief or work training;

(l) service performed by an individual who is enrolled at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at the institution that combines academic instruction with work experience, if the service is an integral part of such program and the institution has so certified to the employer, except that this subparagraph shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(m) service performed in the employ of a hospital, if the service is performed by a patient of the hospital, or services performed by an inmate of a custodial or penal institution for any employer;

(n) service performed by real estate salespersons for others when the services are performed for remuneration solely by way of commission;

(o) service performed in the employ of a school, college or university if the service is performed by a student who is enrolled and is regularly attending classes at the school, college or university;

(p) service performed by an individual for a fixed or contract fee officiating at a sporting event that is conducted by or under the auspices of a nonprofit or governmental entity if that person is not otherwise an employee of the entity conducting the sporting event;

(q) service performed for a private, for-profit person or entity by an individual as a product demonstrator or product merchandiser if the service is performed pursuant to a written contract between that individual and a person or entity whose principal business is obtaining the services of product demonstrators and product merchandisers for third parties, for demonstration and merchandising purposes and the individual: 1) is compensated for each job or the compensation is based on factors related to the work performed; 2) provides the equipment used to perform the service, unless special equipment is required and provided by the manufacturer through an agency; 3) is responsible for completion of a specific job and for any failure to complete the job; 4) pays all expenses, and the opportunity for profit or loss rests solely with the individual; and 5) is responsible for operating costs, fuel, repairs and motor vehicle insurance. For the purpose of this subparagraph, "product demonstrator" means an individual who, on a temporary, part-time basis, demonstrates or gives away samples of a food or other product as part of an advertising or sales promotion for the product and who is not otherwise employed directly by the manufacturer, distributor or retailer, and "product merchandiser" means an individual who, on a temporary, part-time basis builds or resets a product display and who is not otherwise directly employed by the manufacturer, distributor or retailer; or

(r) service performed for a private, for-profit person or entity by an individual as a landman if substantially all remuneration paid in cash or otherwise for the performance of the services is directly related to the completion by the individual of the specific tasks contracted for rather than to the number of hours worked by the individual. For the purposes of this subparagraph, "landman" means a land professional who has been engaged primarily in: 1) negotiating for the acquisition or divestiture of mineral rights; 2) negotiating business agreements that provide for the exploration for or development of minerals; 3) determining ownership of minerals through the research of public and private records; and 4) reviewing the status of title, curing title defects and otherwise reducing title risk associated with ownership of minerals; managing rights or obligations derived from ownership of interests and minerals; or utilizing or pooling of interest in minerals; and

(13) for the purposes of this subsection, if the services performed during one-half or more of any pay period by an individual for the person employing the individual constitute employment, all the services of the individual for the period shall be deemed to be employment, but, if the services performed during more than one-half of any such pay period by an individual for the person employing the individual do not constitute employment, then none of the services of the individual for the period shall be deemed to be employment. As used in this paragraph, the term "pay period" means a period, of not more than thirty-one consecutive days, for which a payment of remuneration is ordinarily made to the individual by the person employing the individual. This paragraph shall not be applicable with respect to services performed in a pay period by an individual for the person employing the individual where any of such service is excepted by Subparagraph (f) of Paragraph (12) of this subsection;

G. "employment office" means a free public employment office, or branch thereof, operated by this state or maintained as a part of a state-controlled system of public employment offices;

H. "fund" means the unemployment compensation fund established by the Unemployment Compensation Law [51-1-1 NMSA 1978] to which all contributions and payments in lieu of contributions required under the Unemployment Compensation Law and from which all benefits provided under the Unemployment Compensation Law shall be paid; provided that, for the purposes of paying contributions, "fund" may also include the state unemployment trust fund and contributions paid to that fund pursuant to contribution schedule B in Paragraph (5) of Subsection I of Section 51-1-11 NMSA 1978 and Section 51-1-19.1 NMSA 1978;

I. "unemployment" means, with respect to an individual, any week during which the individual performs no services and with respect to which no wages are payable to the individual and during which the individual is not engaged in self-employment or receives an award of back pay for loss of employment. The secretary shall prescribe by rule what constitutes part-time and intermittent employment, partial employment and the conditions under which individuals engaged in such employment are eligible for partial unemployment benefits, but no individual who is otherwise eligible shall be deemed ineligible for benefits solely for the reason that the individual seeks, applies for or accepts only part-time work, instead of full-time work, if the part-time work is for at least twenty hours per week;

J. "state", when used in reference to any state other than New Mexico, includes, in addition to the states of the United States, the District of Columbia, the commonwealth of Puerto Rico and the Virgin Islands;

K. "unemployment compensation administration fund" means the fund established by Subsection A of Section 51-1-34 NMSA 1978 from which administrative expenses under the Unemployment Compensation Law [51-1-1 NMSA 1978] shall be paid. "Employment security department fund" means the fund established by Subsection B of Section 51-1-34 NMSA 1978 from which certain administrative expenses under the Unemployment Compensation Law shall be paid;

L. "crew leader" means a person who:

(1) holds a valid certificate of registration as a crew leader or farm labor contractor under the federal Migrant and Seasonal Agricultural Worker Protection Act [29 USCS § 1801 et seq.];

(2) furnishes individuals to perform services in agricultural labor for any other person;

(3) pays, either on the crew leader's own behalf or on behalf of such other person, the individuals so furnished by the crew leader for service in agricultural labor; and

(4) has not entered into a written agreement with the other person for whom the crew leader furnishes individuals in agricultural labor that the individuals will be the employees of the other person;

M. "week" means such period of seven consecutive days, as the secretary may by rule prescribe. The secretary may by rule prescribe that a week shall be deemed to be "in", "within" or "during" the benefit year that includes the greater part of such week;

N. "calendar quarter" means the period of three consecutive calendar months ending on March 31, June 30, September 30 or December 31;

O. "insured work" means services performed for employers who are covered under the Unemployment Compensation Law [51-1-1 NMSA 1978];

P. "benefit year" with respect to an individual means the one-year period beginning with the first day of the first week of unemployment with respect to which the individual first files a claim for benefits in accordance with Subsection

A of Section 51-1-8 NMSA 1978 and thereafter the one-year period beginning with the first day of the first week of unemployment with respect to which the individual next files such a claim for benefits after the termination of the individual's last preceding benefit year; provided that at the time of filing such a claim the individual has been paid the wage required under Paragraph (5) of Subsection A of Section 51-1-5 NMSA 1978;

Q. "agricultural labor" includes all services performed:

(1) on a farm, in the employ of a person, in connection with cultivating the soil or in connection with raising or harvesting an agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training and management of livestock, bees, poultry and fur-bearing animals and wildlife;

(2) in the employ of the owner or tenant or other operator of a farm, in connection with the operation, management, conservation or maintenance of the farm and its tools and equipment, if the major part of the service is performed on a farm;

(3) in connection with the operation or maintenance of ditches, canals, reservoirs or waterways used exclusively for supplying and storing water for farming purposes when such ditches, canals, reservoirs or waterways are owned and operated by the farmers using the water stored or carried therein; and

(4) in handling, planting, drying, packing, packaging, processing, freezing, grading, storing or delivery to storage or to market or to a carrier for transportation to market any agricultural or horticultural commodity but only if the service is performed as an incident to ordinary farming operations. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal and truck farms, plantations, ranches, nurseries, greenhouses, ranges and orchards;

R. "payments in lieu of contributions" means the money payments made into the fund by an employer pursuant to the provisions of Subsection B of Section 51-1-13 NMSA 1978 or Subsection E of Section 51-1-59 NMSA 1978;

S. "department" means the labor department; and

T. "wages" means all remuneration for services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash. The reasonable cash value of remuneration in any medium other than cash shall be established and determined in accordance with rules prescribed by the secretary; provided that the term "wages" shall not include:

(1) subsequent to December 31, 1977, that part of the remuneration in excess of the base wage as determined by the secretary for each calendar year. The base wage upon which contribution shall be paid during any calendar year shall be sixty percent of the state's average annual earnings computed by the division by dividing total wages reported to the division by contributing employers for the second preceding calendar year before the calendar year the computed base wage becomes effective by the average annual employment reported by contributing employers for the same period rounded to the next higher multiple of one hundred dollars (\$ 100); provided that the base wage so computed for any calendar year shall not be less than seven thousand dollars (\$ 7,000). Wages paid by an employer to an individual in the employer's employ during any calendar year in excess of the base wage in effect for that calendar year shall be reported to the department but shall be exempt from the payment of contributions unless such wages paid in excess of the base wage become subject to tax under a federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund;

(2) the amount of any payment with respect to services performed after June 30, 1941 to or on behalf of an individual in the employ of an employing unit under a plan or system established by the employing unit that makes provision for individuals in its employ generally or for a class or classes of individuals, including any amount paid by an employing unit for insurance or annuities, or into a fund, to provide for any payment, on account of:

(a) retirement if the payments are made by an employer to or on behalf of an employee under a simplified employee pension plan that provides for payments by an employer in addition to the salary or other remuneration normally payable to the employee or class of employees and does not include any payments that represent deferred compensation or other reduction of an employee's normal taxable wages or remuneration or any payments made to a third party on behalf of an employee as part of an agreement of deferred remuneration;

(b) sickness or accident disability if the payments are received under a workers' compensation or occupational disease disablement law;

(c) medical and hospitalization expenses in connection with sickness or accident disability; or

(d) death; provided the individual in its employ has not the option to receive, instead of provision for the death benefit, any part of such payment, or, if such death benefit is insured, any part of the premiums or contributions to premiums paid by the individual's employing unit and has not the right under the provisions of the plan or system or policy of insurance providing for the death benefit to assign the benefit, or to receive a cash consideration in lieu of the benefit either upon the individual's withdrawal from the plan or system providing for the benefit or upon termination of the plan or system or policy of insurance or of the individual's service with the employing unit;

(3) remuneration for agricultural labor paid in any medium other than cash;

(4) a payment made to, or on behalf of, an employee or an employee's beneficiary under a cafeteria plan within the meaning of Section 125 of the federal Internal Revenue Code of 1986 [26 USCS § 125];

(5) a payment made, or benefit furnished to or for the benefit of an employee if at the time of the payment or such furnishing it is reasonable to believe that the employee will be able to exclude the payment or benefit from income under Section 129 of the federal Internal Revenue Code of 1986 [26 USCS § 129];

(6) a payment made by an employer to a survivor or the estate of a former employee after the calendar year in which the employee died;

(7) a payment made to, or on behalf of, an employee or the employee's beneficiary under an arrangement to which Section 408(p) of the federal Internal Revenue Code of 1986 [26 USCS § 408(p)] applies, other than any elective contributions under Paragraph (2)(A)(i) of that section;

(8) a payment made to or for the benefit of an employee if at the time of the payment it is reasonable to believe that the employee will be able to exclude the payment from income under Section 106 of the federal Internal Revenue Code of 1986 [26 USCS § 106]; or

(9) the value of any meals or lodging furnished by or on behalf of the employer if at the time the benefit is provided it is reasonable to believe that the employee will be able to exclude such items from income under Section 119 of the federal Internal Revenue Code of 1986 [26 USCS § 119].

HISTORY: Laws 1936 (S.S.), ch. 1, § 19; 1937, ch. 129, § 6; 1939, ch. 175, § 9; 1941 Comp., § 57-822; Laws 1941, ch. 205, § 11; 1943, ch. 107, § 1; 1947, ch. 209, § 8; 1953 Comp., § 59-9-22; Laws 1971, ch. 209, § 6; 1973, ch. 216, § 9; 1977, ch. 321, § 6; 1979, ch. 280, § 44; 1980, ch. 50, § 4; 1981, ch. 354, § 10; 1983, ch. 199, § 8; 1985, ch. 31, § 6; 1987, ch. 207, § 1; 1993, ch. 209, § 6; 1994, ch. 27, § 1; 1997, ch. 120, § 1; 1998, ch. 91, § 9; 2000, ch. 3, § 4; 2000, ch. 7, § 4; 2001, ch. 249, § 2; 2003, ch. 47, § 12; 2005, ch. 3, § 5; 2007, ch. 137, § 5.

NOTES:

STATUTORY NOTES

CROSS REFERENCES. --Benefit eligibility conditions, 51-1-5 NMSA 1978.

Contributions; computation; payment, 51-1-9 NMSA 1978.

Future rates based on benefit experience, 51-1-11 NMSA 1978.

Financing benefits paid to employees of nonprofit organizations, 51-1-13 NMSA 1978.

Period, election and termination of employer's coverage, 51-1-18 NMSA 1978.

Unemployment compensation fund, 51-1-19 NMSA 1978.

THE 2007 AMENDMENT, effective July 1, 2007, added the proviso in Subsection H.

EDITOR'S NOTES. --Laws 2005, ch. 3, § 13 provides that the effective date of the Laws 2005, ch. 3, § 10 repeal of this section would be the earlier of January 1, 2008, or the date that the unemployment compensation fund is less than two and one-half percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-11 NMSA 1978. Laws 2007, ch. 137, § 6, effective July 1, 2007, repealed Laws 2005, ch. 3, §§ 6 through 11 and 13 which repealed the contingency of this section.

LexisNexis 50 State Surveys, Legislation & Regulations

1. Migrant Farm Workers
2. Employer Contributions to Unemployment Insurance

JUDICIAL DECISIONS

ANALYSIS
 COMMUNITY ASSET
 ELIGIBILITY
 EMPLOYEES
 EXCEPTIONS
 TAX LIEN SUPERIOR

COMMUNITY ASSET

Tax lien claimed by the New Mexico Department of Labor under 51-1-42D NMSA 1978 for unemployment taxes that a husband failed to pay in the course of a business operated by him during the marriage was a community debt within the meaning of 40-3-9B NMSA 1978; the husband's and his wife's marital residence, which was a community asset within the meaning of 40-3-8B NMSA 1978, was therefore liable for this debt pursuant to 40-3-11A NMSA 1978. *Chavez v. Skehen* (In re Chavez), 305 Bankr. 381 (Bankr. D.N.M. Dec. 18, 2003).

ELIGIBILITY

The State labor department finding that farm operators and crew leaders are not covered employers under 51-1-42F(5) and (6)(c) NMSA 1978 is reasonable; farm workers are not eligible for unemployment benefits under the New Mexico Unemployment Taxation Act, 51-1-1 NMSA 1978. *Macias v. N.N. Dep't of Labor*, 21 F.3d 366 (10th Cir. 1994).

For the purposes of unemployment compensation, there was no distinction between a claimant being discharged for misconduct and suspension without pay under 51-1-421 NMSA 1978; thus the claimant's request for unemployment benefits was properly denied when he was terminated. *Warren v. Employment SEC. Dep't*, 104 N.M. 518, 724 P.2d 227 (1986).

Unemployment Security Commission of the State of New Mexico properly denied a real-estate broker a declaration that he was not liable for unemployment tax for salesmen that operated from and in his office because real-estate salesmen were employees of the broker and their services constituted "employment" under the Unemployment Compensation Law of New Mexico (Act) and the salesman were protected by the Act. *Graham v. Miera*, 59 N.M. 379, 285 P.2d 493 (1955).

EMPLOYEES

Salesperson was not an employee and not entitled to unemployment since he had control over what price he charged and how much he sold, his services were performed outside employer's place of business, and he could have sold anyone's products. *Solar Age Mfg. v. Empl. Sec. Dep't*, 103 N.M. 780, 714 P.2d 584 (1986).

EXCEPTIONS

Exception contained in 40-3-11B NMSA 1978 did not apply to a tax lien claimed by the New Mexico Department of Labor under 51-1-42D NMSA 1978 for unemployment taxes that a husband failed to pay in the course of a business operated by him during his marriage because the tax lien was a creature of statute and was not created by any writing. *Chavez v. Skehen* (In re Chavez), 305 Bankr. 381 (Bankr. D.N.M. Dec. 18, 2003).

TAX LIEN SUPERIOR

Because 42-10-11 NMSA 1978 provided that the New Mexico homestead exemption statutes do not apply to taxes, the tax lien claimed by the New Mexico Department of Labor under 51-1-42D NMSA 1978 for unemployment taxes that a husband failed to pay in the course of a business operated by him during his marriage was superior to the wife's homestead exemption in the marital residence under 42-10-9 NMSA 1978. *Chavez v. Skehen* (In re Chavez), 305 Bankr. 381 (Bankr. D.N.M. Dec. 18, 2003).

OPINIONS OF ATTORNEY GENERAL

APPLICABILITY

The New Mexico arts division is not liable for unemployment compensation claims by artists participating in the artists-in-the-schools program. 1980 Op. Atty. Gen. No. 80-8, 1980 N.M. AG LEXIS 33.

**TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 3 EMPLOYMENT SECURITY
PART 300 CLAIMS ADMINISTRATION**

11.3.300.1 ISSUING AGENCY: New Mexico Department of Labor, Employment Security Division, P.O. Box 1928 Albuquerque, NM 87103.
[7-15-98; 11.3.300.1 NMAC - Rn & A, 11 NMAC 3.300.1, 01-01-2003]

11.3.300.2 SCOPE: General Public
[7-15-98; 11.3.300.2 NMAC - Rn, 11 NMAC 3.300.2, 01-01-2003]

11.3.300.3 STATUTORY AUTHORITY: NMSA 1978 Sections 51-1-1 to 51-1-59.
[7-15-98; 11.3.300.3 NMAC - Rn & A, 11 NMAC 3.300.3, 01-01-2003]

11.3.300.4 DURATION: Permanent
[7-15-98; 11.3.300.4 NMAC - Rn, 11 NMAC 3.300.4, 01-01-2003]

11.3.300.5 EFFECTIVE DATE: July 15, 1998, unless a different date is cited at the end of a section.
[5-15-97, 7-15-98; 11.3.300.5 NMAC - Rn & A, 11 NMAC 3.300.5, 01-01-2003]

11.3.300.6 OBJECTIVE: The purpose of this rule is to provide clarification of the Unemployment Compensation Law. This rule assists claimants in better understanding how specific sections of the law are administered by the department. The rule assists claimant to better comply and better understand the department's procedures.
[5-15-97, 7-15-98; 11.3.300.6 NMAC - Rn & A, 11 NMAC 3.300.6, 01-01-2003]

11.3.300.7 DEFINITIONS: [RESERVED]

11.3.300.8 THROUGH 300 [RESERVED]

11.3.300.301 FILING INITIAL, ADDITIONAL AND REOPENED CLAIMS:

A. As used in 11.3.300.301 NMAC:

(1) "Claimant" means an individual who has filed an initial claim, additional claim or reopened claim for unemployment compensation benefits and this filing is within a benefit year or other eligibility period.

(2) An "initial claim" means a new claim application submitted by the claimant to establish a benefit year and to obtain a determination of weekly and maximum benefit amounts.

(3) An "additional claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a period of employment other than self-employment which occurred subsequent to the date of filing the last initial, additional or reopened claim.

(4) A "reopened claim" means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a continuous period of unemployment for which the claimant did not file timely continued claims and during which the claimant either remained unemployed or had a period of self-employment since last reporting on this claim.

(5) "A transitional claim" means a claim filed to request a determination of eligibility and establishment of a new benefit year having an effective date within a seven-day period immediately following the benefit year ending date and a week for which compensation or waiting week credit was claimed; i.e. continuous certification.

B. Unless otherwise prescribed, any claimant wishing to claim benefits shall register for work, file an initial, additional, transitional or reopened claim for benefits and provide the name and address of his last employer. For purposes of this section, "last employer" means:

(1) The most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or

(2) In the event of a separation for lack of work, the employer or employing unit from which the claimant separated for reasons other than lack of work if the claimant, subsequent to his separation for reasons other than lack of work, has not worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant's weekly benefit amount.

C. The date of filing of any initial, additional or reopened claim shall be the Sunday of the week in which filed. Upon a showing of good cause, any initial claim or additional claim may be back-dated to the Sunday of the week immediately following the week in which the claimant was separated, and any reopened claim may be back-dated up to a maximum of twenty-one days from the preceding Sunday of the date of the request for back-dating. "Good cause," as used in this section, exists when it is established that factors or circumstances beyond the reasonable control of the claimant caused the delay in filing. All requests for back-dating or post-dating shall include a fact-finding report.

[7-15-98; 11.3.300.301 NMAC - Rn & A, 11 NMAC 3.300.301, 01-01-2003]

11.3.300.302 FILING CONTINUED CLAIMS: In order to establish and maintain eligibility for benefits or for waiting-period credit during a continuous period of unemployment a claimant shall continue to report weekly as directed and file continued claims for benefits through the interactive voice response (IVR) system, or through the Internet. The assistant unemployment bureau chief for claims may approve paper certification where that person deems necessary to provide prompt, appropriate, accurate, efficient service to a claimant.

[5-15-97; 11.3.300.302 NMAC - Rn & A, 11 NMAC 3.300.302, 01-01-2003]

11.3.300.303 TIMELY RESPONSE TO REQUEST FOR INFORMATION:

A. Any response to a request for additional information from the department prior to issuance of an initial determination must be received by the department at the state office claims within ten calendar days from the date transmitted. The response may be transmitted in writing, by facsimile, by electronic mail or by telephone to the state office claims.

B. The ten calendar day period shall begin to run on the first day after the date the request was transmitted to the claimant or to the employer. If the tenth calendar day falls on a date when the department offices are closed, receipt on the first business day thereafter shall be timely.

[7-15-98; 11.3.300.303 NMAC - Rn & A, 11 NMAC 3.300.303, 01-01-2003]

11.3.300.304 LATE FILING OF CONTINUED CLAIMS:

A. If the department finds good cause for a claimant's failure to timely file his continued claim, the claimant may file a late continued claim provided the certification is filed not later than the thirteenth day following the last day of the week requiring the certification.

B. A certification not processed due to a department request for additional information from the claimant shall be considered timely if the requested information is received by the state office claims no later than ten calendar days after the request for additional information is transmitted to the claimant.

[7-15-98; 11.3.300.304 NMAC - Rn & A, 11 NMAC 3.300.304, 01-01-2003]

11.3.300.305 ALTERNATE BASE PERIOD:

A. "Base period", also called the "regular base period", means the first four of the last five completed quarters as provided in NMSA 1978 Section 51-1-42 A or the alternate base period.

B. "Alternate base period" means the last four completed quarters immediately preceding the first day of the individual's benefit year.

C. Application of alternate base period: If a claimant is determined ineligible because the individual does not have sufficient wages during the base period to qualify for benefits and the claimant's work history reflects that the claimant may qualify using the alternate base period, the department will advise the claimant that he may elect to file a reconsideration of the wages regarding the wages in the "regular base period" or he may elect to utilize the "alternate base period" by affirmatively declining reconsideration or failing to apply for reconsideration within the time limits provided in Subsection C of 11.3.500.8 NMAC. If the department applies the "alternate base period" and the wages for the most recent quarter have not yet been reported by the employer or processed by the department, the claimant will be required to provide proof of wages consisting of payroll check ("check stubs"), W-2s or an appropriate affidavit. If the employer's reported wages are available for the most recent quarter, proof is not required from the claimant. On its own initiative and within its own discretion, if and when the department receives new or additional information regarding wages, it may initiate a reconsideration of the regular base period.

D. Reconsideration of regular base period: If the claimant elects to file a request for reconsideration of the base period and is determined monetarily ineligible, the claimant will then be provided with the option to file under the "alternate base period".

E. Election final: If the claimant elects to use the alternate base period, once elected, the claimant may not change his election to the primary or regular base period regardless of whether such a change would provide higher or lower benefits.

F. Effect of election: Wages that fall within the regular base period or the alternate base period established pursuant to this section are not available for reuse in qualifying for a subsequent benefit year.

G. Procedure:

(1) Upon receipt of the claimant's documentary evidence of wages, wages will be processed by the department and used on the claim.

(2) Upon processing of the most recent quarter's wages, a "Notice of Initial Determination of Benefits" will be issued utilizing the wage information provided by the claimant for the alternate base period.

(3) Employers will be notified of the wages used for the alternate base period on the "Notice to Employer of Claim Determination", which may include wages based upon proof provided by the claimant. The employer will have 15 calendar days from date of transmission of determination to provide the actual wages or to object to the wages being used on the claim, and may also protest charges based upon the reason for separation pursuant to Sections A and C of 11.3.500.8 NMAC.

H. The provisions of this section apply to all claims filed on or after January 1, 2004. [5-15-97; 11.3.300.305 NMAC - Rn, 11 NMAC 3.300.305, Repealed 01-01-2003; N, 7-1-2003]

11.3.300.306 CLAIM REGISTRATION FORM: Unless otherwise prescribed, claims for regular benefits shall be made on the claims application form, Form ES-400, giving all information required thereby. A claimant shall also separately register for work with the department within fourteen business days. If the claimant fails to register, his benefits may be temporarily withheld until he registers, and, after a further review, may be denied unless good cause for the failure to register is shown.

[7-15-98; 11.3.300.306 NMAC - Rn & A, 11 NMAC 3.300.306, 01-01-2003]

11.3.300.307 WAITING PERIOD CREDIT AND CONTINUED CLAIM FORM: Unless otherwise prescribed, waiting-period credit or continued claims for benefits for unemployment shall be made through IVR, Internet, on paper or as otherwise provided by the department from time to time, providing the information is in substantially the same form as that on the certification form, Form ES-408, setting forth that:

A. The claimant continues his claim for benefits;

B. He is unemployed or partially unemployed;

C. He registers for work;

D. Since he last registered for work he has performed no services and earned no wages, except as indicated;

E. He is able to work, available for work and actively seeking work; and

F. Such other information as is required by the department from time to time.

[7-15-98; 11.3.300.307 NMAC - Rn & A, 11 NMAC 3.300.307, 01-01-2003]

11.3.300.308 SEPARATION REPORTS AND EMPLOYER NOTICE OF CLAIM:

A. NOTICE TO EMPLOYER OF FILING OF CLAIM: Whenever an individual files an initial claim for benefits or an additional claim, the department shall immediately transmit to his last known employer, at the address of the employer as registered with the department, if so registered, and, if not registered, to the address provided by the claimant, a dated notice of the filing of the claim. The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to state office claims within ten calendar days from the date of the transmittal of the notice of claim.

B. REQUEST FOR ADDITIONAL INFORMATION: Prior to issuance of a determination pursuant to Subsection C of 11.3.300.308 NMAC, the department may request additional information from the employer, the claimant or witnesses by telephone, fax, electronic mail or other written report relative to the separation of the claimant from employment. Information obtained by telephone shall be fully documented by the department's representative, and may be used as evidence in any determination or decision of such claim.

C. INITIAL DETERMINATION: When a non-monetary issue is not raised in an application for unemployment compensation benefits and the employer's response is not received by the state office claims within ten calendar days after the transmission of the notice of claim, a determination shall be made based upon the information on the application. Payment of benefits may be commenced without further notice.