CHAPTER 51
Unemployment Compensation

ARTICLE 1
Unemployment Compensation

51-1-1. Short title.

Chapter 51 NMSA 1978 may be cited as the "Unemployment Compensation Law".

History: Laws 1936 (S.S.), ch. 1, § 1; 1941 Comp., § 57-801; 1953 Comp., § 59-9-1; Laws 1982, ch. 41, § 1.

ANNOTATIONS

Cross references. — As to prisoners working under inmate-release program as not entitled to benefits under Employment Security Act, see 33-2-47 NMSA 1978.

Purpose of Unemployment Compensation Law is to grant benefits promptly to those persons entitled thereto. Int'l Minerals & Chem. Corp. v. Emp't Sec. Comm'n, 78 N.M. 272, 430 P.2d 769 (1967).

Administrative bodies to comply with law. — Administrative bodies, however well intentioned, must comply with the law; and it is necessary that they be required to do so to prevent any possible abuse. Int'l Minerals & Chem. Corp. v. Emp't Sec. Comm'n, 78 N.M. 272, 430 P.2d 769 (1967).

Dual payments not prohibited. — Nothing under New Mexico law prohibits dual payment of unemployment compensation, so long as such payments are not duplicative in nature. 1953-54 Op. Att'y Gen. No. 53-5635.

Law reviews. — For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 4, 5, 13 to 18.

Constitutionality of unemployment insurance legislation, 109 A.L.R. 1346, 118 A.L.R. 1220, 121 A.L.R. 1002.

Judicial questions regarding unemployment provisions of federal Social Security Act and state legislation adopted to set up "state plan" contemplated by that act, 118 A.L.R. 1220, 121 A.L.R. 1002.

Independent contractor distinguished from employee within Unemployment Compensation Law, 124 A.L.R. 682.

Trucker using own truck as an independent contractor or an employee of concern for which he transports goods, within Unemployment Compensation Act, 151 A.L.R. 1331.

Vendor-vendee or lessor-lessee relationship, what amounts to, as distinguished from employment or service relation, within Unemployment Compensation Act, 152 A.L.R. 520, 164 A.L.R. 1411.

Exemption of corporations or institutions of a religious, charitable or educational character, construction and application of provision of Unemployment Compensation Act as to, 155 A.L.R. 369.

Power of administrative officer to limit period of disqualification for unemployment benefits, 155 A.L.R. 411.

Circumstances of abandonment of employment, availability for work or nature of excuse for refusing reemployment, as affecting right to social security unemployment compensation, 158 A.L.R. 396, 165 A.L.R. 1382.

Election to be subject to Unemployment Compensation Act by employer not otherwise within act, 158 A.L.R. 601.

Musicians or other entertainers as employees of establishment in which they perform within meaning of Unemployment Compensation Act, 158 A.L.R. 915, 172 A.L.R. 325.

Validity, construction and application of provisions of Unemployment Compensation Act as to employment units which are affiliated or under common control, 158 A.L.R. 1327.

Construction and application of provision in Unemployment Compensation Act excluding from the basis of contribution remuneration in excess of a named amount paid to employee, 159 A.L.R. 1197.

Who is "member of a crew" within meaning of social security and unemployment compensation acts, 161 A.L.R. 842.

Foreign corporations, what amounts to presence in state, so as to render it liable to action therein to recover unemployment compensation tax, 161 A.L.R. 1068.

State banks, insurance companies or building and loan associations which are members of federal reserve bank or similar federal agency or national banks, as within state Unemployment Compensation Act, 165 A.L.R. 1250.

Conclusiveness in review of administrative determination under statutory provisions requiring filing of payroll reports for purposes of unemployment insurance, 174 A.L.R. 410.

Unemployment insurance taxes as payable in respect of claims for wages earned before bankruptcy of employer, 174 A.L.R. 1295.

Outside piece workers as within Unemployment Compensation Act, 1 A.L.R.2d 555.

Successor's treatment under provision of act subjecting to its provisions an employer purchasing or succeeding to the business of another employer, 4 A.L.R.2d 721.

Unemployment compensation benefits where, during the base year, employee worked in different states for the same employer, 9 A.L.R.2d 646.

Taxicab driver as employee of owner of cab, or independent contractor, within social security and unemployment compensation statutes, 10 A.L.R.2d 369.

Unemployment compensation as affected by employee's or employer's removal from place of business, 13 A.L.R.2d 874, 21 A.L.R.4th 317.

Declaratory relief with respect to unemployment compensation, 14 A.L.R.2d 826.

Sickness or disability, leaving employment or unavailability for particular job or duties because of, as affecting right to unemployment compensation, 14 A.L.R.2d 1308.

Vested right of applicant for unemployment compensation in mode and manner of computing benefits in effect at time of his discharge or loss of employment, 20 A.L.R.2d 963.

Unemployment compensation: right of successor in business to experience, or rating of predecessor for purpose of fixing rate of contributions, 22 A.L.R.2d 673.

Salesmen on commission as within Unemployment Compensation Act, 29 A.L.R.2d 751.

Right to unemployment compensation as affected by vacation or holiday or payment in lieu, 30 A.L.R.2d 366, 3 A.L.R.4th 557, 14 A.L.R.4th 1175.

Political views or conduct as ground for discharge from private employment as affecting right to compensation, 51 A.L.R.2d 742, 29 A.L.R.4th 287, 38 A.L.R.5th 39.

What constitutes agricultural or farm labor within social security or unemployment compensation acts, 53 A.L.R.2d 406.

Refusal of nonunion employment as affecting eligibility for unemployment compensation benefits, 56 A.L.R.2d 1015.

Right to unemployment compensation or social security benefits of one working on his own projects or activities, 65 A.L.R.2d 1182.

Service charges, made by hotels or restaurants and later distributed to waiters or similar employees, as "wages" upon which federal or state unemployment taxes or contributions are required to be paid, 83 A.L.R.2d 1024.

Garnishment or harassment by employee's creditor as misconduct connected with employment so as to bar unemployment compensation, 86 A.L.R.2d 1013.

Termination of employment as a result of union action or pursuant to union contract as "voluntary," 90 A.L.R.2d 835.

Payments received under private supplemental plans as affecting rights under state unemployment compensation, 91 A.L.R.2d 1211.

Severance payment as affecting right to unemployment compensation, 93 A.L.R.2d 1319.

Failure or delay with respect to filing or reporting requirements, as ground for denial of unemployment compensation benefits, 97 A.L.R.2d 752.

Construction, application and effect, with respect to withholding, social security and unemployment compensation taxes, of statutes imposing penalties for tax evasion or default, 22 A.L.R.3d 8.

Insubordination of employee as barring unemployment compensation, 26 A.L.R.3d 1333, 20 A.L.R.4th 367.

Negligence or work-connected inefficiency as "misconduct" barring unemployment compensation, 26 A.L.R.3d 1356.

Refusal to work at particular times or on particular shifts as affecting eligibility, 35 A.L.R.3d 1129, 12 A.L.R.4th 611, 2 A.L.R.5th 475.

Hearsay evidence in proceedings before state administrative agencies, 36 A.L.R.3d 12.

Insurance agents or salesmen as within coverage of social security or unemployment compensation acts, 39 A.L.R.3d 872.

Political party's liability for contributions under unemployment compensation acts, 43 A.L.R.3d 1351.

Retirement pursuant to employer's mandatory retirement plan as grounds for unemployment compensation benefits, 50 A.L.R.3d 880.

Right to unemployment compensation as affected by receipt of pension, 56 A.L.R.3d 520.

Right to unemployment compensation as affected by receipt of Social Security benefits, 56 A.L.R.3d 552.

Absenteeism, discharge for, effect upon unemployment compensation, 58 A.L.R.3d 674.

Labor disputes or strikes, provisions of unemployment compensation acts regarding disqualification for benefits because of, 63 A.L.R.3d 88.

Unemployment compensation: eligibility as affected by claimant's insistence upon conditions not common or customary to particular employment, 88 A.L.R.3d 1353.

Repayment of unemployment compensation benefits erroneously paid, 90 A.L.R.3d 987.

Unemployment compensation: eligibility as affected by claimant's refusal to work at reduced compensation, 95 A.L.R.3d 449.

Part-time or intermittent workers as covered by or as eligible for benefits under state unemployment compensation act, 95 A.L.R.3d 891.

Unemployment compensation: burden of proof as to voluntariness of separation, 73 A.L.R.4th 1093.

Propriety of telephone testimony or hearings in unemployment compensation proceedings, 90 A.L.R.4th 532.

Liability for discharge of employee from private employment on ground of political views or conduct, 38 A.L.R.5th 39.

Eligibility for unemployment compensation as affected by claimant's voluntary separation or refusal to work alleging that the work is illegal or immoral, 41 A.L.R.5th 123.

What constitutes "agricultural" or "farm" labor within social security or unemployment compensation acts, 60 A.L.R.5th 459.

Eligibility for unemployment compensation of employee who retires voluntarily, 75 A.L.R.5th 339.

Offsetting unemployment benefits received against award for backpay in employment discrimination actions, 66 A.L.R. Fed. 880.

81 C.J.S. Social Security and Public Welfare §§ 75 to 252.

51-1-2. Definitions.

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

A. "department" means the workforce solutions department;

B. "division" means the workforce transition services division of the department, the director of the division or an employee of the division exercising authority lawfully delegated to the employee by the director; and

C. "secretary" means the secretary of workforce solutions or an employee of the department exercising authority lawfully delegated to the employee by the secretary.

History: 1978 Comp., § 51-1-2, enacted by Laws 1979, ch. 280, § 11; 1991, ch. 122, § 1; 2001, ch. 249, § 1; 2007, ch. 200, § 22.

ANNOTATIONS

Repeals and reenactments. — Laws 1979, ch. 280, § 11, repeals former 51-1-2 NMSA 1978, relating to definitions of "commission" and "executive director," and enacts the above section.

The 2007 amendment, effective July 1, 2007, adds references to the workforce solutions department, workforce transition services division, and the secretary of workforce solutions.

The 2001 amendment, effective June 15, 2001, inserted "the director of the division or an employee of the division exercising authority lawfully delegated to the employee by the director" in Subsection B; and inserted "or an employee of the department exercising authority lawfully delegated to the employee by the secretary" in Subsection C.

The 1991 amendment, effective April 3, 1991, substituted "labor department" for "employment security department" in Subsection A; inserted present Subsection B; redesignated former Subsection B as present Subsection C and substituted "labor" for "employment security" therein; and made a related stylistic change.

51-1-3. Declaration of state public policy.

As a guide to the interpretation and application of this act, the public policy of this state is declared to be as follows: economic insecurity due to unemployment is a

serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state requires the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.

History: Laws 1936 (S.S.), ch. 1, § 2; 1941 Comp., § 57-802; 1953 Comp., § 59-9-2.

ANNOTATIONS

Meaning of "this act". — The term "this act," referred to in the first sentence, refers to Laws 1936 (S.S.), ch. 1, which is presently compiled as 51-1-1, 51-1-3, 51-1-7, 51-1-8, 51-1-18, 51-1-19, 51-1-33, 51-1-34, 51-1-36, 51-1-37, 51-1-38, 51-1-40 to 51-1-42, 51-1-50, 51-1-52 and 51-1-53 NMSA 1978. Laws 1982, ch. 41, § 1, amended 51-1-1 NMSA 1978, substituting a reference to "Chapter 51 NMSA 1978" for "this act."

Section adheres to rule of liberal construction to accomplish the remedial and humanitarian ends intended by the legislature. Parsons v. Emp't Sec. Comm'n, 71 N.M. 405, 379 P.2d 57 (1963).

Unemployment Compensation Law calls for liberal construction to the end its remedial and humanitarian purposes may be given effect and recognizing that statutory definitions modify the common-law definitions of master and servant. Graham v. Miera, 59 N.M. 379, 285 P.2d 493 (1955).

Unemployment compensation is substantial right as matter of public policy, and benefits may not be denied on the basis of controverted hearsay alone. Trujillo v. Emp't Sec. Comm'n, 94 N.M. 343, 610 P.2d 747 (1980).

Claimant has burden of establishing rights. — It is the general rule that the claimant has the burden of establishing his right to benefits. Moya v. Emp't Sec. Comm'n, 80 N.M. 39, 450 P.2d 925 (1969).

Employer claiming exemption carries heavy burden. — An employer claiming an exemption from the unemployment tax carries a heavy burden because of the rule of decision that the grant of an exemption from the tax is strictly construed against the claimant. Graham v. Miera, 59 N.M. 379, 285 P.2d 493 (1955).

Unemployment benefits given to individual owing to forced retirement pursuant to a mandatory retirement plan is completely in accord with the declaration of state policy as concerns New Mexico in this section. Duval Corp. v. Emp't Sec. Comm'n, 83 N.M. 447, 493 P.2d 413 (1972).

Denial of benefits to employee discharged for misconduct is consistent with public policy of the unemployment compensation law. Warren v. Emp't Sec. Dep't, 104 N.M. 518, 724 P.2d 227 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation § 2.

81 C.J.S. Social Security and Public Welfare §§ 147, 158, 212, 225.

51-1-4. Monetary computation of benefits; payment generally.

A. All benefits provided herein are payable from the unemployment compensation fund. All benefits shall be paid in accordance with rules prescribed by the secretary through employment offices or other agencies as the secretary approves by general rule.

B. Weekly benefits shall be as follows:

(1) an individual's "weekly benefit amount" is an amount equal to fifty-three and one-half percent of the average weekly wage for insured work paid to the individual in that quarter of the individual's base period in which total wages were highest. No benefit as so computed may be less than ten percent or more than fifty-three and one-half percent of the state's average weekly wage for all insured work. The state's average weekly wage shall be computed from all wages reported to the department from employing units in accordance with rules of the secretary for the period ending June 30 of each calendar year divided by the total number of covered employees divided by fifty-two, effective for the benefit years commencing on or after the first Sunday of the following calendar year. An individual is not eligible to receive benefits unless the individual has wages in at least two quarters of that individual's base period. For the purposes of this subsection, "total wages" means all remuneration for insured work, including commissions and bonuses and the cash value of all remuneration in a medium other than cash;

(2) an eligible individual who is unemployed in any week during which the individual is in a continued claims status shall be paid, with respect to the week, a benefit in an amount equal to the individual's weekly benefit amount, less that part of the wages, if any, or earnings from self-employment, payable to the individual with respect to such week that is in excess of one-fifth of the individual's weekly benefit amount. For purposes of this subsection only, "wages" includes all remuneration for services actually performed in a week for which benefits are claimed, vacation pay for a period for which the individual has a definite return-to-work date, wages in lieu of notice and back pay for

loss of employment but does not include payments through a court for time spent in jury service;

(3) notwithstanding any other provision of this section, an eligible individual who, pursuant to a plan financed in whole or in part by a base-period employer of the individual, is receiving a governmental or other pension, retirement pay, annuity or any other similar periodic payment that is based on the previous work of the individual and who is unemployed with respect to any week ending subsequent to April 9, 1981 shall be paid with respect to the week, in accordance with rules prescribed by the secretary, compensation equal to the individual's weekly benefit amount reduced, but not below zero, by the prorated amount of the pension, retirement pay, annuity or other similar periodic payment that exceeds the percentage contributed to the plan by the eligible individual. The maximum benefit amount payable to the eligible individual shall be an amount not more than twenty-six times the individual's reduced weekly benefit amount. If payments referred to in this section are being received by an individual under the federal Social Security Act, the division shall take into account the individual's contribution and make no reduction in the weekly benefit amount;

(4) in the case of a lump-sum payment of a pension, retirement or retired pay, annuity or other similar payment by a base-period employer that is based on the previous work of the individual, the payment shall be allocated, in accordance with rules prescribed by the secretary, and shall reduce the amount of unemployment compensation paid, but not below zero, in accordance with Paragraph (3) of this subsection; and

(5) the retroactive payment of a pension, retirement or retired pay, annuity or any other similar periodic payment as provided in Paragraphs (3) and (4) of this subsection attributable to weeks during which an individual has claimed or has been paid unemployment compensation shall be allocated to those weeks and shall reduce the amount of unemployment compensation for those weeks, but not below zero, by an amount equal to the prorated amount of the pension. Any overpayment of unemployment compensation benefits resulting from the application of the provisions of this paragraph shall be recovered from the claimant in accordance with the provisions of Section 51-1-38 NMSA 1978.

C. An individual otherwise eligible for benefits shall be paid for each week of unemployment, in addition to the amount payable under Subsection B of this section, the sum of twenty-five dollars ($25.00) for each unemancipated child under the age of eighteen, up to a maximum of two and subject to the maximum stated in Subsection D of this section, of the individual who is in fact dependent upon and wholly or mainly supported by the individual, including:

(1) a child in the individual's custody pending the adjudication of a petition filed by the individual for the adoption of the child in a court of competent jurisdiction; or

(2) a child for whom the individual, under a decree or order from a court of competent jurisdiction, is required to contribute to the child's support and for whom no other person is receiving allowances under the Unemployment Compensation Law if the child is domiciled within the United States or its territories or possessions, the payment to be withheld and paid pursuant to Section 51-1-37.1 NMSA 1978.

D. Dependency benefits shall not exceed fifty percent of the individual's weekly benefit rate. The amount of dependency benefits determined as of the beginning of an individual's benefit year shall not be reduced for the duration of the benefit year, but this provision does not prevent the transfer of dependents' benefits from one spouse to another in accordance with this subsection. If both the husband and wife receive benefits with respect to a week of unemployment, only one of them is entitled to a dependency allowance with respect to a child. The division shall prescribe standards as to who may receive a dependency allowance when both the husband and wife are eligible to receive unemployment compensation benefits. Dependency benefits shall not be paid unless the individual submits documentation satisfactory to the division establishing the existence of the claimed dependent. If the provisions of this subsection are satisfied, an otherwise eligible individual who has been appointed guardian of a dependent child by a court of competent jurisdiction shall be paid dependency benefits.

E. An otherwise eligible individual is entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of twenty-six times the individual's weekly benefit amount, plus any dependency benefit amount pursuant to Subsections C and D of this section, or sixty percent of the individual's wages for insured work paid during the individual's base period.

F. A benefit as determined in Subsection B or C of this section, if not a multiple of one dollar ($1.00), shall be rounded to the next lower multiple of one dollar ($1.00).

G. The secretary may prescribe rules to provide for the payment of benefits that are due and payable to the legal representative, dependents, relatives or next of kin of claimants since deceased. These rules need not conform with the laws governing successions, and the payment shall be deemed a valid payment to the same extent as if made under a formal administration of the succession of the claimant.

H. The division, on its own initiative, may reconsider a monetary determination whenever it is determined that an error in computation or identity has occurred or that wages of the claimant pertinent to such determination but not considered have been newly discovered or that the benefits have been allowed or denied on the basis of misrepresentation of fact, but no redetermination shall be made after one year from the date of the original monetary determination. Notice of a redetermination shall be given to all interested parties and shall be subject to an appeal in the same manner as the original determination. In the event that an appeal involving an original monetary determination is pending at the time a redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from redetermination.

History: 1978 Comp., § 51-1-5, enacted by Laws 2003, ch. 47, § 8; 2005, ch. 3, § 1; 2005, ch. 3, § 6; 2007, ch. 137, § 1; 2009, ch. 97, § 1; 2010, ch. 55, § 1; 2011, ch. 184, § 1.

ANNOTATIONS

Cross references. — As to the definition of "secretary", see 51-1-2 NMSA 1978.

As to unemployment compensation fund, see 51-1-19 NMSA 1978.

Social Security Act. — The federal Social Security Act, referred to in the last sentence in Subsection B(3), appears as 42 U.S.C. § 301 et seq.

Repeals and reenactments. — Laws 1969, ch. 213, § 1, repealed former 59-9-3, 1953 Comp., relating to benefits, and enacted a new 59-9-3, 1953 Comp.

Laws 2003, ch. 47, § 8 repeals Laws 1969, ch. 213, § 1, as amended, and reenacts set forth above. Laws 2003, ch. 47, § 15 provides that the effective date of Laws 2003, ch. 47, §§ 8 through 12 is the earliest of the following: 1) June 30, 2007; or 2) the date that the unemployment compensation fund is less than three and three-fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-11 NMSA 1978. Laws 2003, ch. 47, § 8 would repeal this section and reenact the section set out below.

Laws 2007, ch. 137, § 6 repealed Laws 2005, ch. 3, § 6 through 11 and 13 effective July 1, 2007.

The 2011 amendment, effective July 1, 2011, in Subsection C, lowered the maximum number of emancipated children for which an individual may be paid benefits.

Applicability. — Laws 2011, ch. 184, § 6 provided that the amendments to the Unemployment Compensation Law made in Laws 2011, ch. 184, § 1 apply to benefit years beginning on or after July 1, 2011.

The 2010 amendment, effective July 1, 2010, in Subsection B(1), deleted "except as provided in Paragraph (2) of this subsection"; deleted former Subsection B(2), which provided that from July 1, 2009 through June 30, 2011, an individual’s weekly benefit amount was equal to sixty percent of the average weekly wage for insured work paid to the individual in the quarter of the individual’s base period in which total wages were highest, but not less than ten percent or more than sixty percent of the state’s average weekly wage for all insured work; renumbered succeeding paragraphs accordingly; in Subsection B(4), after "Paragraph", changed "(4)" to "(3)"; and in Subsection B(5), changed "Paragraphs (4) and (5)" to "Paragraphs (3) and (4)".

The 2009 amendment, effective June 19, 2009, in Paragraph (1) of Subsection B, added "except as provided in Paragraph (2) of this subsection" and added Paragraph (2) of Subsection B.

The 2007 amendment, effective July 1, 2007, increases the weekly benefit amount to fifty-three and one-half percent of the states' average weekly wage and increases the dependent allowance benefit to $25 of each child under the age of eighteen. See also Laws 2005, ch. 3, § 13 for contingent effective date.

Laws 2003, ch. 47, § 15, provides a contingent effective date for this section. The compiler was advised that the event described took place prior to the 2005 amendment.

The 2005 amendment, effective February 8, 2005, amends 51-1-4 NMSA 1978, as enacted by Laws 2003, ch. 47, § 8, to substitute in Subsection A, "fifty-two and one-half percent of the average weekly wage" for "one twenty-sixth of the total wages"; add new Subsections C and D; and amend former Subsection C (relettered Subsection E) "plus any dependency benefit amount pursuant to Subsections C and D of this section". Former Subsections C through F were relettered Subsections E through H.

Laws 2005, ch. 3, § 6 repeals that version of 51-1-4 NMSA 1978 enacted by Laws 2003, ch. 47, § 8 as amended by Laws 2005, ch. 3, § 1 and enacts a new section 51-1-4 NMSA 1978.

The 2003 amendment, effective March 19, 2003, amended Laws 1969, ch. 213, § 1, as amended by Laws 2003, ch. 3, § 1, and by Laws 2003, ch. 7, § 1. The 2003 amendment, in Subsection A substituted "rules prescribed by" for "such regulations as" and deleted "may prescribe" following "the secretary" near the middle, substituted "approves" for "may" near the end and deleted "approve" at the end; substituted "Effective July 1, 2003, weekly" for "Weekly" at the beginning of Subsection B; in Paragraph B(1) substituted "fifty-two and one-half percent of the average weekly wage" for "one twenty-sixth of the total wages" near the beginning; added present Subsections C and D and redesignated the subsequent paragraphs accordingly; inserted "plus any dependency benefit amount pursuant to Subsections C and D of this section" following "weekly benefit amount" near the middle of present Subsection E; and substituted "rules" for "regulations" throughout the section.

2000 amendments. — Identical amendments to this section were enacted by Laws 2000, ch. 3, § 1, effective July 1, 2000, and approved February 15, 2000, and Laws 2000, ch. 7, § 1, also effective July 1, 2000, and approved later on February 15, 2000, which substituted "he has wages in at least two quarters of his base period" for "his total base period wages equal at least one and one-fourth times the wages for insured work in that quarter of his base period in which such wages are highest" in the next-to-last sentence of Subsection B(1). The section is set out as amended by Laws 2000, ch. 7, § 1. See 12-1-8 NMSA 1978.

The 1998 amendment, effective July 1, 1998, added the last sentence in Paragraph B(1).

The 1993 amendment, effective April 5, 1993, rewrote the second sentence of Subsection B(2) and added the final sentence of Subsection B(3).

The 1991 amendment, effective April 3, 1991, rewrote the catchline, which read "Benefits"; in Subsection B, inserted "during which he is in a continued claims status" near the beginning and added the language beginning "for purposes of this section" at the end of Paragraph (2) and substituted "April 9, 1981" for "the effective date of this act" and "secretary" for "department" near the middle of Paragraph (3); substituted "or" for "and" preceding "sixty percent" in Subsection C; and added Subsections E and F.

The 1990 amendment, effective February 28, 1990, in Paragraph (3) of Subsection B, made minor stylistic changes in the first sentence and substituted "amount not more than" for "amount equal to" in the second sentence; and in Paragraph (4) of Subsection B, made a stylistic change and deleted "to applicable periods to which such payments are reasonably attributable, following the last week worked prior to retirement" following "the secretary".

Law unambiguous and in harmony with federal law. — The Unemployment Compensation Law is not ambiguous with regard to the definition of "regular" and "extended" benefits and is not in conflict with federal statutes and regulations. N.M. Hosp. Ass'n v. Emp't Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).

"Regular" and "extended" benefits defined. — "Regular" benefits are those benefits provided under this section for 26 weeks and "extended" benefits are those benefits payable under Section 51-1-48 NMSA 1978 during an extended benefit period to those claimants who have exhausted all their rights to regular benefits. N.M. Hosp. Ass'n v. Emp't Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).

Social security payments were not deductible from unemployment benefits under the 1991 version of Subsection B(3). The 1993 amendment was meant to clarify the existing law rather than change the law. Wasko v. N.M. Dep't of Labor, 118 N.M. 82, 879 P.2d 83 (1994).

No private right of action for interference with recovery of unemployment compensation. — A terminated employee who alleged that her employer's testimony prevented her from receiving unemployment benefits had no private right of action against the employer for interference with recovery of unemployment compensation. Stock v. Grantham, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125, cert. denied, 125 N.M. 322, 961 P.2d 167.

Law reviews. — For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 13 to 16.

Alien's right to unemployment compensation benefits, 87 A.L.R.3d 694.

Reductions to back pay awards under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 135 A.L.R. Fed. 1

Period of time covered by back pay award under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 137 A.L.R. Fed. 1

Allowance and rates of interest on backpay award under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 138 A.L.R. Fed. 1

Additions to back pay awards under Title VII of Civil Rights Act of 1964 (42 USCA §§ 2000(e) et seq.), 146 A.L.R. Fed. 403.

81 C.J.S. Social Security and Public Welfare §§ 146, 213, 241 to 246, 274, 292 to 294.

51-1-5. Benefit eligibility conditions.

A. An unemployed individual shall be eligible to receive benefits with respect to any week only if the individual:

(1) has made a claim for benefits with respect to such week in accordance with such rules as the secretary may prescribe;

(2) has registered for work at, and thereafter continued to report at, an employment office in accordance with such rules as the secretary may prescribe, except that the secretary may, by rule, waive or alter either or both of the requirements of this paragraph as to individuals attached to regular jobs and as to such other types of cases or situations with respect to which the secretary finds that compliance with such requirements would be oppressive or would be inconsistent with the purposes of the Unemployment Compensation Law. No such rule shall conflict with Subsection A of Section 51-1-4 NMSA 1978;

(3) is able to work and is available for work and is actively seeking permanent full-time work or part-time work in accordance with Subsection I of Section 51-1-42 NMSA 1978 and in accordance with the terms, conditions and hours common in the occupation or business in which the individual is seeking work, except that the secretary may, by rule, waive this requirement for individuals who are on temporary layoff status from their regular employment with an assurance from their employers that the layoff shall not exceed four weeks or who have an express offer in writing of substantially full-time work that will begin within a period not exceeding four weeks;

(4) has been unemployed for a waiting period of one week. A week shall not be counted as a week of unemployment for the purposes of this paragraph:

(a) unless it occurs within the benefit year that includes the week with respect to which the individual claims payment of benefits;

(b) if benefits have been paid with respect thereto; and

(c) unless the individual was eligible for benefits with respect thereto as provided in this section and Section 51-1-7 NMSA 1978, except for the requirements of this subsection and of Subsection D of Section 51-1-7 NMSA 1978;

(5) has been paid wages in at least two quarters of the individual's base period;

(6) has reported to an office of the division in accordance with the rules of the secretary for the purpose of an examination and review of the individual's availability for and search for work, for employment counseling, referral and placement and for participation in a job finding or employability training and development program. An individual shall not be denied benefits under this section for any week that the individual is participating in a job finding or employability training and development program; and

(7) participates in reemployment services, such as job search assistance services, if the division determines that the individual is likely to exhaust regular benefits and needs reemployment services pursuant to a profiling system established by the division, unless the division determines that:

(a) the individual has completed such services; or

(b) there is justifiable cause for the individual's failure to participate in the services.

B. A benefit year as provided in Section 51-1-4 NMSA 1978 and Subsection P of Section 51-1-42 NMSA 1978 may be established; provided an individual may not receive benefits in a benefit year unless, subsequent to the beginning of the immediately preceding benefit year during which the individual received benefits, the individual performed service in "employment", as defined in Subsection F of Section 51-1-42 NMSA 1978, and earned remuneration for such service in an amount equal to at least five times the individual's weekly benefit amount.

C. Benefits based on service in employment defined in Paragraph (8) of Subsection F of Section 51-1-42 and Section 51-1-43 NMSA 1978 are to be paid in the same amount, on the same terms and subject to the same conditions as compensation payable on the basis of other services subject to the Unemployment Compensation Law; except that:

(1) benefits based on services performed in an instructional, research or principal administrative capacity for an educational institution shall not be paid for any week of unemployment commencing during the period between two successive academic years or terms or, when an agreement provides for a similar period between two regular but not successive terms, during such period or during a period of paid sabbatical leave provided for in the individual's contract, to any individual if the individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that the individual will perform services in any such capacity for any educational institution in the second of such academic years or terms;

(2) benefits based on services performed for an educational institution other than in an instructional, research or principal administrative capacity shall not be paid for any week of unemployment commencing during a period between two successive academic years or terms if the services are performed in the first of such academic years or terms and there is a reasonable assurance that the individual will perform services for any educational institution in the second of such academic years or terms. If compensation is denied to an individual under this paragraph and the individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, the individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a claim and certified for benefits in accordance with the rules of the division and for which benefits were denied solely by reason of this paragraph;

(3) benefits shall be denied to any individual for any week that commences during an established and customary vacation period or holiday recess if the individual performs any services described in Paragraphs (1) and (2) of this subsection in the period immediately before such period of vacation or holiday recess and there is a reasonable assurance that the individual will perform any such services in the period immediately following such vacation period or holiday recess;

(4) benefits shall not be payable on the basis of services specified in Paragraphs (1) and (2) of this subsection during the periods specified in Paragraphs (1), (2) and (3) of this subsection to any individual who performed such services in or to or on behalf of an educational institution while in the employ of a state or local governmental educational service agency or other governmental entity or nonprofit organization; and

(5) for the purpose of this subsection, to the extent permitted by federal law, "reasonable assurance" means a reasonable expectation of employment in a similar capacity in the second of such academic years or terms based upon a consideration of all relevant factors, including the historical pattern of reemployment in such capacity, a reasonable anticipation that such employment will be available and a reasonable notice or understanding that the individual will be eligible for and offered employment in a similar capacity.

D. Paragraphs (1), (2), (3), (4) and (5) of Subsection C of this section shall apply to services performed for all educational institutions, public or private, for profit or nonprofit, which are operated in this state or subject to an agreement for coverage under the Unemployment Compensation Law of this state, unless otherwise exempt by law.

E. Notwithstanding any other provisions of this section or Section 51-1-7 NMSA 1978, no otherwise eligible individual is to be denied benefits for any week because the individual is in training with the approval of the division nor is the individual to be denied benefits by reason of application of provisions in Paragraph (3) of Subsection A of this section or Paragraph (3) of Subsection A of Section 51-1-7 NMSA 1978 with respect to any week in which the individual is in training with the approval of the division. The secretary shall provide, by rule, standards for approved training and the conditions for approving training for claimants, including any training approved or authorized for approval pursuant to Section 236(a)(1) and (2) of the federal Trade Act of 1974, as amended, or required to be approved as a condition for certification of the state's Unemployment Compensation Law by the United States secretary of labor.

F. Notwithstanding any other provisions of this section, benefits shall not be payable on the basis of services performed by an alien unless such alien is an individual who was lawfully admitted for permanent residence at the time the services were performed, was lawfully present for the purposes of performing the services or was permanently residing in the United States under color of law at the time the services were performed, including an alien who was lawfully present in the United States as a result of the application of the provisions of Section 212(d)(5) of the federal Immigration and Nationality Act; provided that:

(1) any information required of individuals applying for benefits to determine their eligibility for benefits under this subsection shall be uniformly required from all applicants for benefits; and

(2) an individual shall not be denied benefits because of the individual's alien status except upon a preponderance of the evidence.

G. Notwithstanding any other provision of this section, benefits shall not be paid to any individual on the basis of any services substantially all of which consist of participating in sports or athletic events or training or preparing to so participate for any week that commences during the period between two successive sport seasons, or similar periods, if the individual performed the services in the first of such seasons, or similar periods, and there is a reasonable assurance that the individual will perform the services in the latter of such seasons or similar periods.

H. Students who are enrolled in a full-time course schedule in an educational or training institution or program, other than those persons in an approved vocational training program in accordance with Subsection E of this section, shall not be eligible for unemployment benefits unless the individual can demonstrate to the division's

satisfaction that the individual is able, available and actively seeking full- or part-time work in accordance with rules prescribed by the secretary.

I. As used in this subsection, "seasonal ski employee" means an employee who has not worked for a ski area operator for more than six consecutive months of the previous twelve months or nine of the previous twelve months. An employee of a ski area operator who has worked for a ski area operator for six consecutive months of the previous twelve months or nine of the previous twelve months shall not be considered a seasonal ski employee. The following benefit eligibility conditions apply to a seasonal ski employee:

(1) except as provided in Paragraphs (2) and (3) of this subsection, a seasonal ski employee employed by a ski area operator on a regular seasonal basis shall be ineligible for a week of unemployment benefits that commences during a period between two successive ski seasons unless the individual establishes to the satisfaction of the secretary that the individual is available for and is making an active search for permanent full-time work;

(2) a seasonal ski employee who has been employed by a ski area operator during two successive ski seasons shall be presumed to be unavailable for permanent new work during a period after the second successive ski season that the individual was employed as a seasonal ski employee; and

(3) the presumption described in Paragraph (2) of this subsection shall not arise as to any seasonal ski employee who has been employed by the same ski area operator during two successive ski seasons and has resided continuously for at least twelve successive months and continues to reside in the county in which the ski area facility is located.

J. Notwithstanding any other provision of this section, an otherwise eligible individual shall not be denied benefits for any week by reason of the application of Paragraph (3) of Subsection A of this section because the individual is before any court of the United States or any state pursuant to a lawfully issued summons to appear for jury duty.

History: 1953 Comp., § 59-9-4, enacted by Laws 1969, ch. 213, § 2; 1971, ch. 209, § 1; 1977, ch. 321, § 2; 1978, ch. 165, § 1; 1979, ch. 280, § 13; 1981, ch. 354, § 2; 1982, ch. 41, § 2; 1983, ch. 199, § 2; 1984, ch. 45, § 1; 1987, ch. 63, § 1; 1987, ch. 302, § 1; 1988, ch. 130, § 1; 1990, ch. 18, § 2; 1991, ch. 122, § 3; 1993, ch. 209, § 2; 1995, ch. 196, § 1; 2000, ch. 3, § 2; 2000, ch. 7, § 2; 2003, ch. 47, § 2; repealed and reenacted by Laws 2003, ch. 47, § 9; 2005, ch. 3, § 2; 2011, ch. 184, § 2.

ANNOTATIONS

Repeals and reenactments. — Laws 1969, ch. 213, § 1, repealed former 59-9-4, 1953 Comp., relating to benefit eligibility condition, and enacted a new 59-9-4, 1953 Comp.

The 2011 amendment, effective July 1, 2011, prohibited the payment of unemployment benefits to full-time students unless they demonstrate that they are seeking full or part time work.

Applicability. — Laws 2011, ch. 184, § 6 provided that the amendments to the Unemployment Compensation Law made in Laws 2011, ch. 184, § 2 apply to benefit years beginning on or after July 1, 2011.

Laws 2007, ch. 137, § 6 repeals Laws 2005, ch. 3, § 7 effective July 1, 2007. Laws 2005, ch. 3, § 7 would have repealed 51-1-5 and enacted a new section 51-1-5 effective January 1, 2008 or earlier upon certification by the secretary of labor.

Laws 2005, ch. 3, § 2, effective February 8, 2005, amends 51-1-5 NMSA 1978, as enacted by Laws 2003, ch. 47, § 9, to replace in Subsection A(3) for "and substantially full-time work" with "full-time work or part-time work in accordance with Subsection I of Section 51-1-42 NMSA 1978 and"; insert in Subsection E "or attending school on a full time basis" after "individual is training"; delete former Subsection H relating to students who are enrolled in a full time course schedule"; and relettered Subsections I and J as Subsections H and I.

Laws 2005, ch. 3, § 7 would have repealed and reenacted this section and enacted a new section 51-1-5 NMSA 1978, however it was repealed by Laws 2007, ch. 137, § 6 prior to taking effect. For contingent repeal and reenactment see Laws 2005, ch. 47, § 15.

The 2003 amendment, amended Laws 1969, ch. 213, § 2, as amended by Laws 2003, ch. 3, § 2 (repealed by Laws 2003, ch. 47, § 14), and Laws 2000, ch. 7, § 2, effective January 1, 2004, substituted "rules" for "regulations" throughout the section; in Paragraph A(3) deleted "and substantially" following "seeking permanent" near the beginning, inserted "work or part-time" following "full-time", inserted "in accordance with Subsection I of Section 51-1-42 NMSA 1978 and" following "work"; substituted "D" for "E" near the end of Subparagraph A(4)(c); in Subsection E(2) inserted "or attending school on a full-time basis" following "in training" near the beginning, substituted "Paragraph (3) of Subsection A" for "Subsection C" near the middle, inserted "or attending school on a full-time basis" following "is in training" near the middle; and deleted former Subsection H and redesignated subsequent subsections accordingly.

Delayed effective date. — Laws 2003, ch. 47, § 15 provides that the effective date of the provisions of Laws 2003, ch. 47, §§ 8 through 12 is the earliest of (1) June 30, 2007; or (2) the date that the unemployment compensation fund is less than three and three - fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of Section 51-1-11 NMSA 1978.

Compiler's note. — The compiler has been informed that the event described in Laws 2003, ch, 47, § 15 occurred prior to the enactment of the 2005 amendment.

2000 amendments. — Identical amendments to this section were enacted by Laws 2000, ch. 3, § 2, effective July 1, 2000 and approved February 15, 2000, and Laws 2000, ch. 7, § 2, also effective July 1, 2000 and approved later on February 15, 2000, which substituted "been paid wages in at least two quarters of his base period" for "during his base period, been paid wages for insured work totaling not less than one and one-fourth his high-quarter wages" in Subsection A(5) and substituted "at least five" for "the lesser of three-thirteenths of the individual's high-quarter wages and six" near the end of Subsection B. The section is set out as amended by Laws 2000, ch. 7, § 2. See 12-1-8 NMSA 1978.

The 1995 amendment,effective April 6, 1995, substituted "employers" for "employer" in Paragraph (3) of Subsection A, added Paragraph (7) of Subsection A, and made minor stylistic changes throughout the section.

The 1993 amendment, effective April 5, 1993, substituted "Section 212(d)(5)" for "Sections 203(a)(7) or 212(d)(5)" near the end of the introductory paragraph of Subsection F.

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section; inserted "operator" following "ski area" throughout Subsection I; in Paragraph (3) of Subsection (I), inserted "facility" preceding "is located" and deleted "if that county has an unemployment rate of more than twelve percent" at the end of the paragraph; added Subsection J; and made a minor stylistic change in Subsection G.

The 1990 amendment, effective February 28, 1990, rewrote Subsection F which read "Notwithstanding any other provisions of this section, benefits based on services performed by an alien shall not be payable unless such alien is an individual who was lawfully admitted for permanent residence, was lawfully present for purposes of performing such services, or was permanently residing in the United States under color of law at the time such services were performed; provided that" and made stylistic changes in paragraph (3) ofSubsection A, Paragraph (3) of Subsection C and Paragraph (1) of Subsection I.

Period between academic terms. — Where school educational aides had reasonable assurance of employment for the successive academic year, and the aides were furloughed for seventeen weeks rather than the normal ten weeks due to budget cuts, the aides were entitled to unemployment benefits for the seven extra weeks of unemployment that did not fall between the ordinary terms of employment during the academic year. Ortiz v. N.M. Emp't Sec. Dep't, 105 N.M. 313, 731 P.2d 1357 (1986).

Availability. — An employee who, through no fault of the employee, is unable to provide transportation to and from work, who would not work a day shift of eight hours for five days, and who refused to work from 3:30 p.m. to 10:30 a.m. Monday through Friday and 8:00 a.m. to 2:30 a.m. on Saturday, was not available for work. Moya v. Emp't Sec. Comm'n, 80 N.M. 39, 450 P.2d 925 (1969).

Where the employee quit a job as a grocery clerk to accompany the employee's spouse, who had been laid off from the spouse's job, to a small rural community where they owned property; the rural community had only one grocery store which hired one clerk; there was another grocery store in a rural community twelve miles distant; and the employee applied regularly at both grocery stores, the employee had not removed the employee from the labor market and was not disqualified from receiving unemployment compensation benefits. Parsons v. Emp't Sec. Comm'n, 71 N.M. 405, 379 P.2d 57 (1963).

51-1-6. Periods of time not counted in determining eligibility for unemployment compensation.

Any person who has had a continuous period of sickness or injury for which he received benefits under the Workmen's Compensation Act [Chapter 52, Article 1 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 NMSA 1978] and who, in fact, has been unavailable for employment within the meaning of the Unemployment Compensation Law [Chapter 51 NMSA 1978] shall be entitled, if he was eligible before the sickness or injury occurred, to apply for and receive such unemployment compensation benefits as he would have been eligible to receive if he had been involuntarily separated from work at the time of the occurrence of the sickness or injury. The right to unemployment compensation benefits shall not be preserved under this section unless a claim for benefits is filed with respect to a week that is not later than the fourth calendar week after the termination of the continuous period of compensated sickness or injury, and unless such week is within the thirty-six month period that follows the date of the commencement of the continuous period of sickness or injury. In the event that any person has received a lump-sum award in settlement of his claim under the Workmen's Compensation Act or the New Mexico Occupational Disease Disablement Law, that person's continuous period of sickness or injury shall be deemed to have terminated, and he must file his claim for unemployment benefits within four weeks after the award or settlement.

History: 1953 Comp., § 59-9-4.1, enacted by Laws 1969, ch. 214, § 1; 1985, ch. 31, § 2.

ANNOTATIONS

Claim barred if not filed within four weeks. — Claim was barred by this section where claimant did not file for benefits within four weeks of receiving lump sum settlement, where claimant failed to meet his burden of proving that a lump sum settlement that he received was for partial disability extending into future and that the four-week provision would, thus, not bar his claim. Santiago v. N.M. Emp't Sec. Dep't, 101 N.M. 387, 683 P.2d 69 (Ct. App. 1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation § 35.

Discharge for absenteeism or tardiness as affecting right to unemployment compensation, 58 A.L.R.3d 674.

81 C.J.S. Social Security and Public Welfare § 160.

51-1-7. Disqualification for benefits.

A. An individual shall be disqualified for and shall not be eligible to receive benefits:

(1) if it is determined by the division that the individual left employment voluntarily without good cause in connection with the employment. No individual shall receive benefits until the division has contacted the former employer and determined whether the individual left the employment voluntarily; provided, however, that a person shall not be denied benefits under this paragraph:

(a) solely on the basis of pregnancy or the termination of pregnancy;

(b) because of domestic abuse evidenced by medical documentation, legal documentation or a sworn statement from the claimant; or

(c) if the person voluntarily left work to relocate because of a spouse, who is in the military service of the United States or the New Mexico national guard, receiving permanent change of station orders, activation orders or unit deployment orders;

(2) if it is determined by the division that the individual has been discharged for misconduct connected with the individual's employment; or

(3) if it is determined by the division that the individual has failed without good cause either to apply for available, suitable work when so directed or referred by the division or to accept suitable work when offered.

B. In determining whether or not any work is suitable for an individual pursuant to Paragraph (3) of Subsection A of this section, the division shall consider the degree of risk involved to the individual's health, safety and morals, the individual's physical fitness, prior training, approved training, experience, prior earnings, length of unemployment and prospects for securing local work in the individual's customary occupation and the distance of available work from the individual's residence. Notwithstanding any other provisions of the Unemployment Compensation Law, no work shall be deemed suitable and benefits shall not be denied under the Unemployment Compensation Law to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

(1) if the position offered is vacant due directly to a strike, lockout or other labor dispute;

(2) if the wages, hours or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; or

(3) if, as a condition of being employed, the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organizations.

C. An individual shall be disqualified for, and shall not be eligible to receive, benefits for any week with respect to which the division finds that the individual's unemployment is due to a labor dispute at the factory, establishment or other premises at which the individual is or was last employed; provided that this subsection shall not apply if it is shown to the satisfaction of the division that:

(1) the individual is not participating in or directly interested in the labor dispute; and

(2) the individual does not belong to a grade or class of workers of which, immediately before the commencement of the labor dispute, there were members employed at the premises at which the labor dispute occurs, any of whom are participating in or directly interested in the dispute; provided that if in any case separate branches of work that are commonly conducted in separate businesses in separate premises are conducted in separate departments of the same premises, each such department shall, for the purposes of this subsection, be deemed to be a separate factory, establishment or other premises.

D. An individual shall be disqualified for, and shall not be eligible to receive, benefits for any week with respect to which, or a part of which, the individual has received or is seeking, through any agency other than the division, unemployment benefits under an unemployment compensation law of another state or of the United States; provided that if the appropriate agency of such other state or of the United States finally determines that the individual is not entitled to such unemployment benefits, this disqualification shall not apply.

E. A disqualification pursuant to Paragraph (1) or (2) of Subsection A of this section shall continue for the duration of the individual's unemployment and until the individual has earned wages in bona fide employment other than self-employment, as provided by rule of the secretary, in an amount equivalent to five times the individual's weekly benefit otherwise payable. A disqualification pursuant to Paragraph (3) of Subsection A of this section shall include the week the failure occurred and shall continue for the duration of the individual's unemployment and until the individual has earned wages in bona fide employment other than self-employment, as provided by rule of the secretary, in an amount equivalent to five times the individual's weekly benefit amount otherwise payable; provided that no more than one such disqualification shall be imposed upon an individual for failure to apply for or accept the same position, or a similar position, with the same employer, except upon a determination by the division of disqualification pursuant to Subsection C of this section.

F. As used in this section:

(1) "domestic abuse" means that term as defined in Section 40-13-2 NMSA 1978; and

(2) "employment" means employment by the individual's last employer as defined by rules of the secretary.

History: Laws 1936 (S.S.), ch. 1, § 5; 1939, ch. 175, § 3; 1941 Comp., § 57-805; Laws 1941, ch. 205, § 3; 1943, ch. 103, § 3; 1953 Comp., § 59-9-5; Laws 1953, ch. 121, § 3; 1975, ch. 351, § 1; 1977, ch. 321, § 3; 1979, ch. 280, § 14; 1981, ch. 354, § 3; 1983, ch. 199, § 3; 1991, ch. 122, § 4; 2003, ch. 47, § 3; 2003, ch. 47, § 10; 2005, ch. 3, § 3; 2005, ch. 255, § 1; 2011, ch. 184, § 3.

ANNOTATIONS

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section and "secretary" for "department" in Subsections A, B and C; in both Subsections A and B, added the first full sentences and deleted "insured work or" following "earned wages in" in the final sentence; and deleted "insured work or such" following "earned wages in" in the first full sentence in Subsection C.

Laws 2003, ch. 47, § 3, effective March 19, 2003, rewrote the section and added Subsections E and F.

Repeals and reenactments. — Laws 2003, ch. 47, § 10 repealed Laws 1969, ch. 213, § 5 as amended by Laws 2003, ch. 47, § 3 and enacted a new section 51-1-7. Laws 2003, ch. 47, § 15 provided that the effective date of Laws 2003, ch. 47, §§ 8 through 12 is the earliest of the following: 1) June 30, 2007; or 2) the date that the unemployment compensation fund is less than three and three - fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-17 NMSA 1978.

Delayed effective date. — Laws 2003, ch. 47, § 15 provides that the effective date of Laws 2003, ch. 47, §§ 8 through 12 is the earliest of the following: 1) June 30, 2007; or 2) the date that the unemployment compensation fund is less than three and three - fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-17 NMSA 1978.

Compiler's note. — The compiler has been informed that the event described in Laws 2003, ch, 47, § 15 occurred prior to the enactment of the 2005 amendment.

Laws 2005, ch. 3, § 3, effective February 8, 2005, also amended 51-1-7 NMSA 1978, as enacted by Laws 2003, ch. 47, § 10, to insert before "provided" in Subsection A(1) "No individual shall receive benefits until the division has contacted the former employer and determined whether the individual left the employment voluntarily"; to add a new

Subsection A(1)(b) providing that no person shall be denied benefits "because of domestic abuse evidenced by medical documentation, legal documentation or a sworn statement from the claimant"; to insert in Subsection B "approved training or full-time school attendance" and add a definition of "domestic abuse" in a Subsection F(1).

The 2011 amendment, effective July 1, 2011, in Subsection B, eliminated full-time students from potential qualification for unemployment benefits.

Laws 2007, ch. 137, § 6 repealed Laws 2005, ch. 3, § 8 effective July 1, 2007. Laws 2005, ch. 3, § 8 would have repealed and reenacted this section, however it was repealed prior to taking effect.

2005 amendments. — Laws 2005, ch. 255, § 1, effective June 17, 2005, amends 51-1-7 NMSA 1978, as enacted by Laws 2003, ch. 47, § 10, and amended by Laws 2005, ch. 3, § 3, to add Subsection A(1)(c) which provides that a person shall not be denied benefits if the person voluntarily left work to relocate because of a spouse, who is in the military service, receiving permanent change of orders.

Applicability. — Laws 2011, ch. 184, § 6 provided that the amendments to the Unemployment Compensation Law made in Laws 2011, ch. 184, § 3 apply to benefit years beginning on or after July 1, 2011.

I. GENERAL CONSIDERATION

Supreme court is clearly committed to liberal interpretation of the Unemployment Compensation Act, so as to provide sustenance to those who are unemployed through no fault of their own and who are willing and ready to work if given the opportunity. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

No right of reconsideration after decision rendered. — After the commission (now division) has rendered its decision it has exercised the express power conferred by the act upon it. No right of reconsideration remains. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Deputy limited to making and submitting findings to division. — The power of decision, under former section dealing with payment of benefits in labor dispute situations, is in the commission (now division), and the deputy's function is limited to making and submitting his findings to it. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Division quasi-judicial in nature. — The express power granted the commission (now division) by the legislature is quasi-judicial in its nature and authorizes the commission (division) to decide issues submitted under the labor dispute provisions of this section. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

The term "employment", as used in Subsection A. — Because the determination of benefits rests upon a claimant's base-period employment, the term "employment", as used in Subsection A (now A(1)), logically can refer only to employment during which base-period wages were earned. Lopez v. Emp't Sec. Div., 111 N.M 104, 802 P.2d 9 (1990).

One-day absence from temporary work assignment. — Where claimant had qualified for benefits using the base-period employment with the job from which he had been laid off and remained eligible to receive benefits so long as he continued to satisfy conditions of eligibility each week, which included reporting any wages earned through temporary work assignments, claimant's one-day absence from a temporary work assignment did not provide a legal basis for disqualification from benefits under Subsection A (now A(1)). Bradley v. N.M. Dep't of Labor Emp't Sec. Div., 111 N.M. 524, 807 P.2d 222 (1991).

Standard on review by trial court. — The standard to be applied by a trial court in reviewing a decision of the division is, if the court determines that the findings are supported by substantial evidence, those findings are binding on the district court. However, should the district court determine that they are not so supported, the district court must make its own findings from the evidence presented. Donovan v. N.M. Emp't Sec. Dep't, 97 N.M. 293, 639 P.2d 580 (1982).

II. VOLUNTARY TERMINATION

"Voluntary" requirement of the Unemployment Compensation Law is clear and unambiguous, and should be accorded its ordinary meaning. LeMon v. Emp't Sec. Comm'n, 89 N.M. 549, 555 P.2d 372 (1976).

Leaving employment to attend school deemed voluntary. — Leaving one's employment to attend school is generally regarded to be a voluntary leaving without good cause related to the employment. Phelps Dodge Corp. v. N.M. Emp't Sec. Dep't, 100 N.M. 246, 669 P.2d 255 (1983).

Voluntary leaving disqualification not applicable to strikers. — The terms "leaving work" or "left his work" as used in unemployment compensation laws refer only to a severance of the employment relation and do not include a temporary interruption in the performance of services. Strikers who have temporarily interrupted their employment because of a labor dispute have not been deemed to have terminated the employment relationship and the voluntary leaving disqualification has no application to them. Albuquerque-Phoenix Express, Inc. v. Emp't Sec. Comm'n, 88 N.M. 596, 544 P.2d 1161 (1975).

Where claimant was discharged pursuant to mandatory retirement plan, it was held he did not leave his employment on a voluntary basis, and was entitled to the benefits of the unemployment compensation laws, and, furthermore, the employer

cannot be relieved of the charges on its experience rating account. Duval Corp. v. Emp't Sec. Comm'n, 83 N.M. 447, 493 P.2d 413 (1972).

Voluntary abandonment of employment not established. — Since the employee, suffering from a debilitating illness, had taken steps to remain employed by applying for transfers, workers' compensation, and disability, she did not abandon her employment as a matter of law. Fitzhugh v. N.M. Dep't of Labor, 1996-NMSC-044, 122 N.M. 173, 922 P.2d 555.

III. GOOD FAITH

Good cause is an objective measure of real, substantial and reasonable circumstances which would cause the average able and qualified worker to quit gainful employment. Molenda v. Thomsen, 108 N.M. 380, 772 P.2d 1303 (1989).

Good cause includes the concept of good faith; a genuine desire to work and be self-supporting absent fraud. Molenda v. Thomsen, 108 N.M. 380, 772 P.2d 1303 (1989).

"Good cause", proper notice requirement met. — Since the requisite causal connection between claimant's secretarial duties at work and her lower-back physical condition was established through direct uncontroverted medical testimony, and it was undisputed that claimant had asked for, and been categorically denied, any reassignment before tendering her resignation, "the good cause" demands of this section were met and her disqualification for unemployment benefits was improper. Kramer v. N.M. Emp't Sec. Div., 114 N.M. 714, 845 P.2d 808 (1992).

Failure to pay regularly as reason for quitting. — When an employer consistently fails to provide paychecks on established paydays to his or her employee, the employee has good cause to voluntarily quit employment. Randolph v. N.M. Emp't Sec. Dep't, 108 N.M. 441, 774 P.2d 435 (1989).

Religious harassment. — Employee who voluntarily terminated her employment was not subjected to unsuitable work conditions rising to the level of religious harassment, where she had previously worked for her employer, who conducted daily Bible study classes, and she was aware of the religious beliefs of her employer and how those religious beliefs affected the work environment. Randolph v. N.M. Emp't Sec. Dep't, 108 N.M. 441, 774 P.2d 435 (1989).

Reduced hours and long commute are "personal" reasons for termination. — Reduced hours and a commute to the job that the worker considers excessive are "personal" reasons, and not "good cause" for termination under Subsection A (now A(1)). Begay v. N.M. Emp't Sec. Dep't, 100 N.M. 529, 673 P.2d 506 (1983).

Circumstances leaving no alternative to leaving employment. — Good cause is established when an individual faces compelling and necessitous circumstances of such

magnitude that there is no alternative to leaving gainful employment. Molenda v. Thomsen, 108 N.M. 380, 772 P.2d 1303 (1989).

Employee's circumstances were not so compelling and necessitous that she had no alternative to quitting her job as a legal secretary, where she voluntarily quit work immediately after her employer reprimanded her in a loud voice and she did not attempt to resolve the problem with him prior to quitting, although he had been receptive to her past expressed concerns and demonstrated a willingness to correct any problems. Molenda v. Thomsen, 108 N.M. 380, 772 P.2d 1303 (1989).

IV. MISCONDUCT

Misconduct is conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. Mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not misconduct. Mitchell v. Lovington Good Samaritan Ctr., Inc., 89 N.M. 575, 555 P.2d 696 (1976); Donovan v. N.M. Emp't Sec. Dep't, 97 N.M. 293, 639 P.2d 580 (1982).

Disqualifying misconduct. — To be disqualifying, misconduct must evince a willful or wanton disregard for the employer's interests and must significantly infringe upon legitimate employer expectations. Otero v. N.M. Emp't Sec. Div., 109 N.M. 412, 785 P.2d 1031 (1990).

"Misconduct" is limited to conduct in which employees bring about their own unemployment by such callousness and deliberate or wanton misbehavior that they have given up any reasonable expectation of receiving unemployment benefits. Fitzhugh v. N.M. Dep't of Labor, 1996-NMSC-044, 122 N.M. 173, 922 P.2d 555.

Total of separate acts may be misconduct. — Although each separate incident may not be sufficient in itself to constitute misconduct, taken in totality conduct may deviate sufficiently to classify it as misconduct. Donovan v. N.M. Emp't Sec. Dep't, 97 N.M. 293, 639 P.2d 580 (1982).

Termination for single incident following prior warnings. — Termination for a series of incidents which, taken together, may constitute "misconduct" is distinguishable from termination for a single incident following one or more corrective action notices. In the latter event, the "last straw" which leads to termination must demonstrate a willful or wanton disregard for the employer's interests for unemployment benefits to be denied. Rodman v. N.M. Emp't Sec. Dep't, 107 N.M. 758, 764 P.2d 1316 (1988).

The "totality of circumstances" is relevant in contexts other than discharge after the accumulation of a series of minor incidents. The "totality of circumstances," such as provided by the employee's past conduct and previous reprimands, may also be used to evaluate whether the employee acted with willful or wanton disregard of the employer's interests on the occasion (i.e., the "last straw") that precipitated his or her termination. Rodman v. N.M. Emp't Sec. Dep't, 107 N.M. 758, 764 P.2d 1316 (1988).

Determination of misconduct not dependent on proof admissible in criminal trial. — Although the same act constituting grounds of misconduct on the job may also be a criminal act, determination of misconduct in a benefits hearing does not depend upon proof admissible in a criminal trial. Warren v. Emp't Sec. Dep't, 104 N.M. 518, 724 P.2d 227 (1986).

For unemployment compensation purposes, no distinction between "suspension" and "discharge" for misconduct. — For the purposes of unemployment compensation, there is no distinction between "discharge for misconduct" and "suspension without pay for misconduct" since the employee is performing no services and no wages are payable to him, and therefore he is unemployed under the definition of "unemployment" in Section 51-1-42 I NMSA 1978. Warren v. Emp't Sec. Dep't, 104 N.M. 518, 724 P.2d 227 (1986).

Chronic absenteeism may be "misconduct". — Persistent or chronic absenteeism, at least where the absences are without notice or excuse, and are continued in the face of warnings by the employer, constitutes willful "misconduct" within Subsection B (now A(2)). Chavez v. Emp't Sec. Comm'n, 98 N.M. 462, 649 P.2d 1375 (1982).

Discharge for absenteeism must be preceded by warnings. — Any discharge based on inadequate excuses for missing work must be preceded by an adequate warning by the employer or his authorized representative that such behavior will not be tolerated. Chavez v. Emp't Sec. Comm'n, 98 N.M. 462, 649 P.2d 1375 (1982).

Violation of rule on reporting absence not misconduct. — The employee's violation of a company policy that required her to notify her employer on a daily basis of her absence from work was not misconduct sufficient to warrant denial of unemployment benefits. Fitzhugh v. N.M. Dep't of Labor, 1996-NMSC-044, 122 N.M. 173, 922 P.2d 555.

Refusal to redye tinted hair held not misconduct. — Fast-food restaurant employee's refusal to redye her purple-tinted hair did not rise to the level of misconduct, where there was no evidence that the color of her hair significantly affected business, and the restaurant had received no customer complaints regarding the color of her hair. It's Burger Time, Inc. v. N.M. Dep't of Labor Emp't Sec. Dep't, 108 N.M. 175, 769 P.2d 88 (1989).

Substantial evidence supported denial of benefits for misconduct. — Warren v. Emp't Sec. Dep't, 104 N.M. 518, 724 P.2d 227 (1986).

Substantial evidence to support denial of benefits for misconduct. — Where employee was dismissed for presence of alcohol in a urine test, but the employer presented no evidence regarding the testing and collection procedures, and there was no corroborating evidence of intoxication, employee was not dismissed for good cause and was eligible to receive benefits. Miss. Potash, Inc. v. Lemon, 2003-NMCA-014, 133 N.M. 128, 61 P.3d 837.

Discharge for misconduct determination supported by substantial evidence. — A discharged village employee who had worked as an independent agent of the state department of motor vehicles was properly disqualified from receiving unemployment compensation benefits where evidence clearly showed that the employee had altered paperwork and collected money from customers in excess of that shown owing on altered documents sent to the department of motor vehicles. Hinojosa v. State ex rel. Emp't Sec. Dep't, 105 N.M. 212, 730 P.2d 1194 (Ct. App. 1986).

There was substantial evidence to support a finding of misconduct in failing to report for overtime work at 4:30 a.m., where, although there was testimony from the discharged employees that they were confused about the overtime issue, there was also testimony from the night-shift supervisor that his orders directing the employees to report were explicit and not confusing. Trujillo v. Emp't Sec. Dep't, 105 N.M. 467, 734 P.2d 245 (Ct. App. 1987).

Claimant's conduct in entering his employer's store at 3:26 a.m. constituted a willful and wanton violation of a reasonable and known rule prohibiting managerial employees from opening or closing the store unaccompanied by another employee, and claimant's discharge for such conduct disqualified him from receiving benefits. Sanchez v. N.M. Dep't of Labor, Emp't Sec. Div., 109 N.M. 447, 786 P.2d 674 (1990).

Unsatisfactory job performance. — In order to deny benefits in cases involving only unsatisfactory job performance, an employer must demonstrate strict compliance with its progressive discipline policies to establish willful misconduct. Chicharello v. Emp't Sec. Div., 1996-NMSC-077, 122 N.M. 635, 930 P.2d 170.

Misconduct held insufficient to deny benefits. — One incident of an office clerk's refusing to wear a smock while assisting store cashiers is not sufficient "misconduct" to deny benefits under Subsection B (now A(2)). Alonzo v. N.M. Emp't Sec. Dep't, 101 N.M. 770, 689 P.2d 286 (1984).

V. AVAILABILITY

Prospective employee who is unable to provide himself with transportation to work, even though it be through no fault of his own, is not available for work within the meaning of the statute. Moya v. Emp't Sec. Comm'n, 80 N.M. 39, 450 P.2d 925 (1969).

Refusal of insurance carrier to provide insurance. — Claimant was not disqualified from receiving benefits where the sole reason for his termination was the refusal of the

employer's insurance carrier to provide insurance, and not claimant's misrepresentations of his driving record on his application for employment. Otero v. N.M. Emp't Sec. Div., 109 N.M. 412, 785 P.2d 1031 (1990).

One who restricts willingness to accept employment not available. — The claimant has restricted his work to daytime employment, regardless of whether available work required that he report for work later in the day. One who so restricts his willingness to accept employment has failed to establish that he is "available for work" within the meaning of this section. Moya v. Emp't Sec. Comm'n, 80 N.M. 39, 450 P.2d 925 (1969).

Availability. — Where the employee quit a job as a grocery clerk to accompany the employee's spouse, who had been laid off from the spouse's job, to a small rural community where they owned property; the rural community had only one grocery store which hired one clerk; there was another grocery store in a rural community twelve miles distant; and the employee applied regularly at both grocery stores, the employee had not removed the employee from the labor market and was not disqualified from receiving unemployment compensation benefits. Parsons v. Emp't Sec. Comm'n, 71 N.M. 405, 379 P.2d 57 (1963)

VI. LABOR DISPUTES

Disqualification if labor dispute causes unemployment. — The question of whether an employee qualifies for unemployment benefits or falls within the disqualifying labor dispute provision of Subsection D (now C) requires not only a determination that a labor dispute existed but also a determination that the employee's unemployment resulted from the labor dispute. Wellborn Paint Mfg. Co. v. N.M. Emp't Sec. Dep't, 101 N.M. 534, 685 P.2d 389 (Ct. App. 1984).

Lockouts are potentially disqualifying labor disputes under Subsection D (now C), and once it is determined that a lockout occurred, the statute requires determination that the unemployment arose because of the labor dispute: this requires a causal connection between the employer's decision and a controversy relating to terms or conditions of employment. Wellborn Paint Mfg. Co. v. N.M. Emp't Sec. Dep't, 101 N.M. 534, 685 P.2d 389 (Ct. App. 1984).

Applying availability standard to persons involved in labor dispute. — Applying an absolute standard of availability for permanent new work with no limitations or restrictions of any kind, regardless of the circumstances prevailing in particular cases to persons whose unemployment results from a labor dispute and holding them unavailable because they will not immediately return to their jobs with the employer with whom they are disputing, or will not sever their employment relationship with that employer and seek permanent new work, would in all cases make such persons ineligible and render the labor dispute disqualification provisions of this section totally superfluous. Albuquerque-Phoenix Express, Inc. v. Emp't Sec. Comm'n, 88 N.M. 596, 544 P.2d 1161 (1975).

Permanently replaced workers subject to disqualification. — An employer's notice to striking employees of an intent to permanently replace them during a labor dispute is not tantamount to termination of the strikers' employment, and if the striking employees make no attempt to gain reemployment during the dispute, the disqualifying provisions of Subsection D (now C) remain in effect. Salazar v. N.M. Emp't Sec. Div., 115 N.M. 54, 846 P.2d 1063 (1993).

Claimant has no duty to cross picket line to ascertain whether work is available to him, nor does a failure to so cross under such circumstances disqualify a claimant for unemployment benefits. This would seem to be particularly true when it was known that operations had been completely shut down and all equipment secured and, under circumstances where the company, during prior labor disputes, had clearly advised the nonstriking employees of the particular work that was available to them. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Fear of violence sufficient for not crossing picket line. — While one who voluntarily refuses to cross a picket line to go to his work which is available to him participates in the labor dispute, it is equally well recognized that one who has reason to fear violence or bodily harm is not required to pass a picket line, nor is it necessary that a claimant, to be eligible for unemployment benefits, actually experience violence or bodily harm in an attempt to cross a picket line. A reasonable fear of harm or violence is sufficient. Additionally, such fear may arise from the potential for violence, as well as from the violence itself. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Fear must be reasonable. — Where employment security commission (now employment security division) found that claimants expressed fear of violence or bodily harm if they crossed picket line, but ignored the all-important requirement that such fears be reasonable, such a finding is incomplete for the purposes of supporting a legal conclusion and thus was properly ignored by the district court in making its own findings and conclusions. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 81 N.M. 532, 469 P.2d 511 (1970).

Section casts burden upon claimant to escape disqualification by showing the eligibility under Subsections D(1) and D(2) (now C(1) and C(2)). Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Claimants had burden of showing they did not participate in labor dispute which caused the work stoppage. Where work was available to claimants, their failure to establish that they did not voluntarily refuse to cross the picket line because of a reasonable fear of harm or violence disqualified them from receiving unemployment compensation benefits. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 81 N.M. 532, 469 P.2d 511 (1970).

Term "stoppage of work," as it is used in the context of the Unemployment Compensation Act, refers to the employer's business rather than the employee's work and means a cessation or substantial curtailment of the employer's business.

Albuquerque-Phoenix Express, Inc. v. Emp't Sec. Comm'n, 88 N.M. 596, 544 P.2d 1161 (1975).

Proper definition of term "directly interested in the labor dispute" must turn upon the question of what caused the work stoppage in any particular case. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

In labor dispute procedural steps reduced to minimum. — Legislature intended that in a labor dispute the procedural steps should be reduced to a minimum in order to obtain a prompt ultimate decision. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Where claimants not directly interested in grievance. — Where the strike was called by reason of a grievance dispute over the suspension of a union member, in which claimants were not "directly interested," there was an insufficient basis for disqualifying the claimants under this section. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Where claimants' unemployment was due to a labor dispute between union and employer resulting from a grievance over the suspension of a union member, such labor dispute was not one in which claimants, whose wages, hours or working conditions could have been affected by the outcome, but who did not participate in the strike, were "directly interested." Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Labor dispute disqualification not applicable where business does not suffer substantial curtailment. — There was substantial evidence to support the district court's findings that the employer's business did not suffer any substantial curtailment when the employees involved walked off their jobs, and therefore the labor dispute disqualification provisions did not apply. Albuquerque-Phoenix Express, Inc. v. Emp't Sec. Comm'n, 88 N.M. 596, 544 P.2d 1161 (1975).

Not sensible for division to demand claimants quit jobs during labor dispute. — Since the claimants who were unemployed as a result of a labor dispute were already employed by the company, expected only a temporary unemployment period and, therefore, could be available only for temporary intervening work, it would not make much sense for the commission (now division) to demand that they, in fact, quit their jobs and really join the ranks of the unemployed, or that they abandon their legal rights and economic interest in the labor dispute and return to their jobs with the employer with whom they were disputing on the premise that their dispute was without merit. Albuquerque-Phoenix Express, Inc. v. Emp't Sec. Comm'n, 88 N.M. 596, 544 P.2d 1161 (1975).

VII. SUITABLE WORK

Claimant's contention does not make evening work unsuitable. — Claimant's contention that his responsibility to his grandmother required that he remain with her in

the evenings does not make such evening work unsuitable within the meaning of the statute. Moya v. Emp't Sec. Comm'n, 80 N.M. 39, 450 P.2d 925 (1969).

"Grade or class" means organized group, or at least a cohesive group, acting in concert, where the striking member acts with the sanction of his associates, in their behalf. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

"Integral functioning" was rejected as one of basic tests of grade or class under the Unemployment Compensation Act. Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963).

Dual payments not prohibited. — There is no inconsistency between this section and Section 51-1-50 NMSA 1978, and nothing under New Mexico law prohibits dual payment of unemployment compensation, so long as such payments are not duplicative in nature. 1953-54 Op. Att'y Gen. No. 53-5635.

Person not to receive compensation under two laws. — Reading this section alone, its clear and obvious meaning would be that an individual could not, under any circumstances, receive unemployment compensation under the New Mexico law and under another such compensation law at the same time. 1953-54 Op. Att'y Gen. No. 53-5635.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 93 et seq., 140, 149, 150, 158, 162, 163, 184 to 186.

Use of vulgar or profane language as bar to claim for unemployment compensation, 92 A.L.R.3d 106.

Unemployment compensation: eligibility as affected by claimant's refusal to accept employment at compensation less than that of previous job, 94 A.L.R.3d 63.

Unemployment compensation: eligibility as affected by claimant's refusal to work at reduced compensation, 95 A.L.R.3d 449.

Unemployment compensation: eligibility as affected by mental, nervous, or psychological disorder, 1 A.L.R.4th 802.

Right to unemployment compensation as affected by claimant's receipt of holiday pay, 3 A.L.R.4th 557.

Leaving or refusing employment for religious reasons as barring unemployment compensation, 12 A.L.R.4th 611.

Leaving or refusing employment because of allergic reaction as affecting right to unemployment compensation, 12 A.L.R.4th 629.

Right to unemployment compensation as affected by employee's refusal to work in areas where smoking is permitted, 14 A.L.R.4th 1234.

Right to unemployment compensation of one who quit job because not given enough work to keep busy, 15 A.L.R.4th 256.

Employee's refusal to take lie detector test as barring unemployment compensation, 18 A.L.R.4th 307.

Employee's act or threat of physical violence as bar to unemployment compensation, 20 A.L.R.4th 637.

Eligibility for unemployment compensation as affected by voluntary resignation because of change of location of residence, 21 A.L.R.4th 317.

Right to unemployment compensation as affected by misrepresentation in original employment application, 23 A.L.R.4th 1272.

Conduct or activities of employees during off-duty hours as misconduct barring unemployment compensation benefits, 35 A.L.R.4th 691.

Eligibility for unemployment compensation benefits of employee who attempts to withdraw resignation before leaving employment, 36 A.L.R.4th 395.

Unemployment compensation: Harassment or other mistreatment by co-worker as "good cause" justifying abandonment of employment, 40 A.L.R.4th 304.

Alcoholism or intoxication as ground for discharge justifying denial of unemployment compensation, 64 A.L.R.4th 1151.

Unemployment compensation: burden of proof as to voluntariness of separation, 73 A.L.R.4th 1093.

Employee's use of drugs or narcotics, or related problems, as affecting eligibility for unemployment compensation, 78 A.L.R.4th 180.

Eligibility for unemployment compensation of employee who left employment based on belief that involuntary discharge was imminent, 79 A.L.R.4th 528.

Unemployment compensation: eligibility where claimant leaves employment under circumstances interpreted as a firing by the claimant but as a voluntary quit by the employer, 80 A.L.R.4th 7.

Private employee's loss of employment because of refusal to submit to drug test as affecting right to unemployment compensation, 86 A.L.R.4th 309.

Unemployment compensation: eligibility as affected by claimant's refusal to work at particular times or on particular shifts for domestic or family reasons, 2 A.L.R.5th 475.

Unemployment compensation claimant's eligibility as affected by loss of, or failure to obtain, license, certificate or similar qualification for continued employment, 15 A.L.R.5th 653.

Right to unemployment compensation or social security benefits of teacher or other school employee, 33 A.L.R.5th 643.

Eligibility for unemployment compensation as affected by claimant's voluntary separation or refusal to work alleging that the work is illegal or immoral, 41 A.L.R.5th 123.

Unemployment compensation: leaving employment to become self-employed or to go into business for oneself as affecting right to unemployment compensation, 45 A.L.R.5th 715.

Unemployment compensation: leaving employment in pursuit of other employment as affecting right to unemployment compensation, 46 A.L.R.5th 659.

Unemployment compensation: Leaving employment in pursuit of education or to attend training as affecting right to unemployment compensation, 47 A.L.R.5th 775.

Leaving employment or unavailability for particular job or duties because of sickness or disability, as affecting right to unemployment compensation, 68 A.L.R.5th 13.

Eligibility for unemployment compensation of employee who retires voluntarily, 75 A.L.R.5th 339.

Work-related inefficiency, incompetence, or negligence as "misconduct" barring unemployment compensation, 95 A.L.R.5th 329;.

81 C.J.S. Social Security and Public Welfare §§ 160 to 208, 225 to 233, 256, 275, 286.

51-1-8. Claims for benefits.

A. Claims for benefits shall be made in accordance with such regulations as the secretary may prescribe. Each employer shall post and maintain printed notices, in places readily accessible to employees, concerning their rights to file claims for unemployment benefits upon termination of their employment. Such notices shall be supplied by the division to each employer without cost to the employer.

B. A representative designated by the secretary as a claims examiner shall promptly examine the application and each weekly claim and, on the basis of the facts found, shall determine whether the claimant is unemployed, the week with respect to which

benefits shall commence, the weekly benefit amount payable, the maximum duration of benefits, whether the claimant is eligible for benefits pursuant to Section 51-1-5 NMSA 1978 and whether the claimant shall be disqualified pursuant to Section 51-1-7 NMSA 1978. With the approval of the secretary, the claims examiner may refer, without determination, claims or any specified issues involved therein that raise complex questions of fact or law to a hearing officer for the division for a fair hearing and decision in accordance with the procedure described in Subsection D of this section. The claims examiner shall promptly notify the claimant and any other interested party of the determination and the reasons therefor. Unless the claimant or interested party, within fifteen calendar days after the date of notification or mailing of the determination, files an appeal from the determination, the determination shall be the final decision of the division; provided that the claims examiner may reconsider a nonmonetary determination if additional information not previously available is provided or obtained or whenever the claims examiner finds an error in the application of law has occurred, but no redetermination shall be made more than twenty days from the date of the initial nonmonetary determination. Notice of a nonmonetary redetermination shall be given to all interested parties and shall be subject to appeal in the same manner as the original nonmonetary determination. If an appeal is pending at the time a redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from the redetermination.

C. In the case of a claim for waiting period credit or benefits, "interested party", for purposes of determinations and adjudication proceedings and notices thereof, means:

(1) in the event of an issue concerning a separation from work for reasons other than lack of work, the claimant's most recent employer or most recent employing unit;

(2) in the event of an issue concerning a separation from work for lack of work, the employer or employing unit from whom the claimant separated for reasons other than lack of work if the claimant 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; or

(3) in all other cases involving the allowance or disallowance of a claim, the secretary, the claimant and any employing unit directly involved in the facts at issue.

D. Upon appeal by any party, a hearing officer designated by the secretary shall afford the parties reasonable opportunity for a fair hearing to be held de novo, and the hearing officer shall issue findings of fact and a decision which affirms, modifies or reverses the determination of the claims examiner or tax representative on the facts or the law, based upon the evidence introduced at such hearing, including the documents and statements in the claim or tax records of the division. All hearings shall be held in accordance with regulations of the secretary and decisions issued promptly in accordance with time lapse standards promulgated by the secretary of the United States department of labor. The parties shall be duly notified of the decision, together

with the reasons therefor, which shall be deemed to be the final decision of the department, unless within fifteen days after the date of notification or mailing of the decision further appeal is initiated pursuant to Subsection H of this section.

E. Except with the consent of the parties, no hearing officer or members of the board of review, established in Subsection F of this section, or secretary shall sit in any administrative or adjudicatory proceeding in which:

(1) either of the parties is related to the hearing officer, member of the board of review or secretary by affinity or consanguinity within the degree of first cousin;

(2) the hearing officer, member of the board of review or secretary was counsel for either party in that action; or

(3) the hearing officer, member of the board of review or secretary has an interest which would prejudice the rendering of an impartial decision.

The secretary, any member of the board of review or appeal tribunal hearing officer shall withdraw from any proceeding in which the hearing officer, member of the board of review or secretary cannot accord a fair and impartial hearing or when a reasonable person would seriously doubt whether the hearing officer, board member or secretary could be fair and impartial. Any party may request a disqualification of any appeal tribunal hearing officer or board of review member by filing an affidavit with the board of review or appeal tribunal promptly upon discovery of the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. The disqualification shall be mandatory if sufficient factual basis is set forth in the affidavit of disqualification. If a member of the board of review is disqualified or withdraws from any proceeding, the remaining members of the board of review may appoint an appeal tribunal hearing officer to sit on the board of review for the proceeding involved.

F. There is established within the department, for the purpose of providing higher level administrative appeal and review of determinations of a claims examiner or decisions issued by a hearing officer pursuant to Subsection B or D of this section, a "board of review" consisting of three members. Two members shall be appointed by the governor with the consent of the senate. The members so appointed shall hold office at the pleasure of the governor for terms of four years. One member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employers, and the other member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employees. The third member shall be an employee of the department appointed by the secretary who shall serve as chairman of the board. Either member of the board of review appointed by the governor who has missed two consecutive meetings of the board may be removed from the board by the governor. Actions of the board shall be taken by majority vote. If a vacancy on the board in a position appointed by the governor occurs between sessions

of the legislature, the position shall be filled by the governor until the next regular legislative session. The board shall meet at the call of the secretary. Members of the board appointed by the governor shall be paid per diem and mileage in accordance with the Per Diem and Mileage Act [10-8-1 NMSA 1978] for necessary travel to attend regularly scheduled meetings of the board of review for the purpose of conducting the board's appellate and review duties.

G. The board of review shall hear and review all cases appealed in accordance with Subsection H of this section. The board of review may modify, affirm or reverse the decision of the hearing officer or remand any matter to the claims examiner, tax representative or hearing officer for further proceedings. Each member appointed by the governor shall be compensated at the rate of fifteen dollars ($15.00) for each case reviewed up to a maximum compensation of twelve thousand dollars ($12,000) in any one fiscal year.

H. Any party aggrieved by a final decision of a hearing officer may file, in accordance with regulations prescribed by the secretary, an application for appeal and review of the decision with the secretary. The secretary shall review the application and shall, within fifteen days after receipt of the application, either affirm the decision of the hearing officer, reverse the decision of the hearing officer, modify the decision of the hearing officer, remand the matter to the hearing officer, tax representative or claims examiner for an additional hearing or refer the decision to the board of review for further review and decision on the merits of the appeal. If the secretary affirms, reverses or modifies the decision of the hearing officer, that decision shall be the final administrative decision of the department and any appeal therefrom shall be taken to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary remands a matter to a hearing officer, tax representative or claims examiner for an additional hearing, judicial review shall be permitted only after issuance of a final administrative decision. If the secretary refers the decision of the hearing officer to the board of review for further review, the board's decision on the merits of the appeal shall be the final administrative decision of the department, which may be appealed to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary takes no action within fifteen days of receipt of the application for appeal and review, the decision shall be promptly scheduled for review by the board of review as though it had been referred by the secretary. The secretary may request the board of review to review a decision of a hearing officer that the secretary believes to be inconsistent with the law or with applicable rules of interpretation or that is not supported by the evidence, and the board of review shall grant the request if it is filed within fifteen days of the issuance of the decision of the hearing officer. The secretary may also direct that any pending determination or adjudicatory proceeding be removed to the board of review for a final decision. If the board of review holds a hearing on any matter, the hearing shall be conducted by a quorum of the board of review in accordance with regulations prescribed by the secretary for hearing appeals. The board of review shall promptly notify the interested parties of its findings of fact and decision. A decision of the board of review on any disputed matter reviewed and decided by it shall be based upon the law and the lawful rules of interpretation issued by the secretary, and it shall

be the final administrative decision of the department, except in cases of remand. If the board of review remands a matter to a hearing officer, claims examiner or tax representative, judicial review shall be permitted only after issuance of a final administrative decision.

I. Notwithstanding any other provision of this section granting any party the right to appeal, benefits shall be paid promptly in accordance with a determination or a decision of a claims examiner, hearing officer, secretary, board of review or reviewing court, regardless of the pendency of the period to file an appeal or petition for judicial review that is provided with respect thereto in Subsection D or M of this section or the pendency of any such filing or petition until such determination or decision has been modified or reversed by a subsequent decision. The provisions of this subsection shall apply to all claims for benefits pending on the date of its enactment.

J. If a prior determination or decision allowing benefits is affirmed by a decision of the department, including the board of review or a reviewing court, the benefits shall be paid promptly regardless of any further appeal which may thereafter be available to the parties, and no injunction, supersedeas, stay or other writ or process suspending the payment of benefits shall be issued by the secretary or board of review or any court, and no action to recover benefits paid to a claimant shall be taken. If a determination or decision allowing benefits is finally modified or reversed, the appropriate contributing employer's account will be relieved of benefit charges in accordance with Subsection B of Section 51-1-11 NMSA 1978.

K. The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers and the conduct of hearings and appeals shall be in accordance with rules prescribed by the secretary for determining the rights of the parties, whether or not the rules conform to common law or statutory rules of evidence and other technical rules of procedure. A hearing officer or the board of review may refer to the secretary for interpretation any question of controlling legal significance, and the secretary shall issue a declaratory interpretation, which shall be binding upon the decision of the hearing officer and the board of review. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded but need not be transcribed unless the disputed claim is appealed to the district court.

L. Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the secretary. Such fees and all administrative expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering the Unemployment Compensation Law [51-1-1 NMSA 1978].

M. Any determination or decision of a claims examiner or hearing officer or by a representative of the tax section of the department in the absence of an appeal therefrom as provided by this section shall become final fifteen days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted the remedies as provided in

Subsection H of this section. The division and any employer or claimant who is affected by the decision shall be joined as a party in any judicial action involving the decision. All parties shall be served with an endorsed copy of the petition within thirty days from the date of filing and an endorsed copy of the order granting the petition within fifteen days from entry of the order. Service on the department shall be made on the secretary or his designated legal representative either by mail with accompanying certification of service or by personal service. The division may be represented in a judicial action by an attorney employed by the department or, when requested by the secretary, by the attorney general or any district attorney.

N. The final decision of the secretary or board of review upon any disputed matter may be reviewed both upon the law, including the lawful rules of interpretation issued by the secretary, and the facts by the district court of the county wherein the person seeking the review resides upon certiorari, unless it is determined by the district court where the petition is filed that, as a matter of equity and due process, venue should be in a different county. For the purpose of the review, the division shall return on certiorari the reports and all of the evidence heard by it on the reports and all the papers and documents in its files affecting the matters and things involved in such certiorari. The district court shall render its judgment after hearing, and either the department or any other party affected may appeal from the judgment to the court of appeals in accordance with the rules of appellate procedure. Certiorari shall not be granted unless applied for within thirty days from the date of the final decision of the secretary or board of review. Certiorari shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workers' Compensation Act [52-1-1 NMSA 1978]. It is not necessary in any proceedings before the division to enter exceptions to the rulings, and no bond shall be required in obtaining certiorari from the district court, but certiorari shall be granted as a matter of right to the party applying therefor.

History: Laws 1936 (S.S.), ch. 1, § 6; 1941 Comp., § 57-806; 1953 Comp., § 59-9-6; Laws 1953, ch. 121, § 4; 1972, ch. 5, § 1; 1973, ch. 216, § 1; 1979, ch. 280, § 15; 1981, ch. 354, § 4; 1983, ch. 199, § 4; 1987, ch. 63, § 2; 1990, ch. 18, § 3; 1991, ch. 122, § 5; 1993, ch. 209, § 3; 1994, ch. 89, § 1; 1996, ch. 33, § 1; 1998, ch. 91, § 2; 2004, ch. 93, § 1.

ANNOTATIONS

Cross references. — For procedures governing appeals to the district court, see Rule 1-077 NMRA.

For Rules of Evidence, see Rule 11-101 NMRA et seq.

The 2004 amendment, effective May 19, 2004, amended Subsection E to change "him" or "he" to "the hearing officer, member of the board of review or secretary" in three places, amended Subsection H to add after "hearing officer," "reverse the decision of

the hearing officer, modify the decision of the hearing officer," and to add after "affirms," "reverses or modifies".

The 1998 amendment, effective July 1, 1998, in the undesignated paragraph preceding Subsection F, added "or when a reasonable person would seriously doubt whether the hearing officer, board member or secretary could be fair and impartial" at the end of the first sentence; in Subsection H, inserted "tax representative" near the middle of the second sentence and "tax representative or claims examiner" near the beginning of the fourth sentence; deleted "as hereinabove provided" following "district court" near the end of Subsection N, and made minor stylistic changes throughout the section.

The 1996 amendment, effective July 1, 1996, in Subsection D, inserted "or tax" and substituted "division" for "department" at the end of the first sentence; in Subsection H, inserted "of the claims examiner" in the second sentence, substituted "shall" for "must" in the third sentence, and inserted "of fact" in the tenth sentence; and in Subsection N, substituted "court of appeals" for "supreme court of the state" and "of appellate procedure" for "governing special statutory proceedings" in the third sentence.

The 1994 amendment, effective July 1, 1994, substituted "that" for "which" in the second sentence in Subsection B, and substituted "fifteen dollars ($15.00)" for "five dollars ($5.00)" and "twelve thousand dollars ($12,000)" for "five thousand dollars ($5,000)" in Subsection G.

The 1993 amendment, effective April 5, 1993, added the proviso at the end of the fourth sentence and added the last two sentences of Subsection B; substituted "board of review" for "review board" and inserted "established in Subsection F of this section" in the introductory paragraph, and added the final unnumbered paragraph, in Subsection E; inserted "of review" following"board" in four places in Subsection H; substituted "shall be paid" for "must be paid" in the first sentence of Subsection J; and made minor stylistic changes.

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section; inserted "application and each weekly" near the beginning of the first sentence in Subsection B; inserted "or tax representative" near the middle of the first sentence in Subsection D; inserted "or secretary" in the introductory paragraph in Subsection E; in Subsection G, inserted the second sentence and substituted "five thousand dollars ($5,000)" for "six thousand dollars ($6,000)" in the third sentence; in Subsection H, inserted "administrative" near the middle of the third sentence, inserted the fourth sentence, inserted "on the merits of the appeal" near the middleof the fifth sentence, added "except in cases of remand" at the end of the next-to-last sentence and added the last sentence; inserted "secretary" near the middle of the first sentence in Subsection I; in Subsection J, inserted "secretary or" near the end of the first sentence and substituted "be relieved of benefit charges in accordance with Subsection B of Section 51-1-11 NMSA 1978" for "not be charged with benefits which the order of modification or reversal ruled should not have been paid " at the end of the second sentence; rewrote the third sentence in Subsection M, which read "All parties shall be

served with a copy of the petition and order granting the petition"; and, in Subbsection N, deleted "hearing officer as affirmed by the" preceding "secretary" in the first and next-to-last sentences and deleted "of the department" following "rulings" in final sentence.

The 1990 amendment, effective February 28, 1990, in Subsection B, substituted "specified issues" for "specified issue or" in the second sentence and deleted the former fourth sentence which read "The secretary shall, by regulation, determine who shall be an 'interested party' for purposes of determinations and adjudication proceedings and notices thereof"; added present Subsection C; designated the former fifth through seventh sentences of Subsection B as present Subsection D; designated former Subsections D to M as present Subsections E to N; inserted "remanded the matter to the hearing officer for an additional hearing" in the second sentence of present Subsection H; substituted "shall be paid" for "must be paid" near the beginning of the first sentence in present Subsection I; substituted "Workers' Compensation Act" for "Workmen's Compensation Act" in the fifth sentence in present Subsection N; and made minor stylistic changes throughout the section.

Compiler's notes. — For scope of review of the district court, see Zamora v. Village of Ruidoso Downs, 120 N.M. 778, 907 P.2d 182 (1995).

Review by the court of appeals. — A party does not have an appeal as of right from the decision of the district court on review of administrative decisions involving unemployment compensation benefits. Rule 12-505 NMRA requires a party to seek discretionary review of the district court decision in the court of appeals by means of a petition for writ of certiorari. Wakeland v. N.M. Dep’t of Workforce Solutions, 2012-NMCA-021, 274 P.3d 766, cert. denied, 2012-NMCERT-001.

Court without jurisdiction where appeal taken to division. — District court was without jurisdiction to entertain an appeal from a commission (now division) decision, where appellant merely took his appeal to the commission (division) itself, rather than the district court, within 15 days after notification of the decision. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Division quasi-judicial in nature. — The express power granted the commission (now division) by the legislature is quasi-judicial in its nature and authorizes it to decide issues submitted under the labor dispute of Section 51-1-7D NMSA 1978 (now Section 51-1-7C NMSA 1978). Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Applicability of procedural provisions. — Legislature intended that procedural provisions of the Unemployment Compensation Law should apply to decisions fixing employer's rate of contribution to the same extent as they do to employee's claim for benefits under the act. M.R. Prestridge Lumber Co. v. Emp't Sec. Comm'n, 50 N.M. 309, 176 P.2d 190 (1946).

Failure to follow statute and regulations. — Where worker was terminated by employer for fighting; worker filed a claim for unemployment benefits on May 16, 2010; employer did not respond to the department's request for separation information and the department did not conduct an investigation; although the department did not issue a notice of claim determination concerning the separation issue, it informed worker that worker was eligible for benefits and provided benefits commencing May 29, 2010 for thirteen weeks; when worker filed a second claim on June 28, 2011 for unemployment benefits for the next benefit year, the department telephoned worker and employer, and learned that worker had been fired for fighting with another employee; the department disqualified worker from receiving benefits beginning the week ending May 22, 2010 and sent worker an overpayment notice informing worker that worker was liable for repayment for fifty-eight weeks of benefits; and the department's regulations permitted the department to reconsider a claim due to new or additional information within twenty days after the date of the original determination or date of first payment, whichever occurred last, the department was precluded from reconsidering worker's claim because the reason for worker's termination could have been discovered during the initial processing of worker's claim and the department reconsidered worker's claim more than thirteen months after either the original determination of worker's eligibility or the first payment of benefits to worker. Narvaez v. N.M. Dep't of Workforce Solutions, 2013-NMCA-079, cert. denied, 2013-NMCERT-006.

Procedural steps reduced to minimum in labor dispute. — Legislature intended that in a labor dispute the procedural steps should be reduced to a minimum in order to obtain a prompt ultimate decision. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Service requirements not jurisdictional. — Strict compliance with the service requirement of Subsection M was not a precondition to jurisdiction of an appeal from a final administrative decision; thus, the district court had jurisdiction when the employee filed his petition for certiorari with the court within 30 days as required by Subsection N, even though service of the petition and the order on the Department of Labor, Employment Security Division and the employer was 16 days late. Jueng v. N.M. Dep't of Labor, 1996-NMSC-006, 121 N.M. 237, 910 P.2d 313.

Court to make own findings of fact. — In determining the scope of review of the district court, this section and Rule 1-081C(4) NMRA mean that the district court shall make its own findings of fact after a review of the evidence. They do not mean, necessarily, that the district court must ignore the findings of the department (now division). It may give them some weight and should follow the department's (division's) findings in making its own, save where the evidence clearly preponderates against him. In the last analysis, however, the responsibility of making correct findings rests with the district court and it is not to be hampered or embarrassed in the performance of this duty by the findings of the department (division). Ribera v. Emp't Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979) (decided under prior law).

Although additional evidence not contemplated. — Although Subsection M (now N) provides that "the district court shall render its judgment after hearing," the taking of additional evidence by the district court is not contemplated by this section. Abernathy v. Emp't Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).

Court examines entire record. — To decide if the district court was correct in finding substantial evidence to support the order of the board, the reviewing court must independently examine the entire record. Randolph v. N.M. Emp't Sec. Dep't, 108 N.M. 441, 774 P.2d 435 (1989).

Court to give weight to division findings. — District court in reviewing action of employment security commission (now employment security division) in fixing an employer's rate of contribution must give weight to findings made at hearing before the commission (division) and should follow such findings, except where the evidence clearly preponderates against such findings. M.R. Prestridge Lumber Co. v. Emp't Sec. Comm'n, 50 N.M. 309, 176 P.2d 190 (1946).

In reviewing an award of unemployment benefits, the district court must grant the board of review its proper authority to exclude evidence and substitute its own findings of fact for those of the hearing officer, where appropriate. Miss. Potash, Inc. v. Lemon, 2003-NMCA-014, 133 N.M. 128, 61 P.3d 837.

Division's findings to be supported by substantial evidence. — This section and Rule 1-081C(4) NMRA, require the district court to review a challenged decision of the employment security commission (now employment security division) to determine whether it is lawful. In so determining, the reviewing court must determine whether the commission's (now division's) findings of fact are supported by substantial evidence. The trial court shall adopt as its own such of the commission's (division's) findings of fact as it determines to be supported by substantial evidence and shall make such conclusions of law and decision as lawfully follow therefrom. If the district court determines that the legal evidence before the commission (division) fails to substantially support such findings or decision, then the district court shall make its own findings of fact, conclusions of law and decision based only upon the legal evidence before the commission (division). Wilson v. Emp't Sec. Comm'n, 74 N.M. 3, 389 P.2d 855 (1963); Abernathy v. Emp't Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979); Ribera v. Emp't Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979) (decided under prior law).

"Substantial evidence" defined. — "Substantial evidence" means more than merely any evidence, more than a scintilla of evidence, and contemplates such relevant legal evidence as a reasonable person might accept as sufficient to support a conclusion; evidence is substantial if reasonable men all agree, or if they may fairly differ, as to whether it establishes a fact. Ribera v. Emp't Sec. Comm'n, 92 N.M. 694, 594 P.2d 742 (1979).

No right of reconsideration after board of review decision. — After the commission (now board of review) has rendered its decision it has exercised the express power

conferred by the act upon it. No right of reconsideration remains. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

No private right of action for interference with recovery of unemployment compensation. — A terminated employee who alleged that her employer's testimony prevented her from receiving unemployment benefits had no private right of action against the employer for interference with recovery of unemployment compensation. Stock v. Grantham, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125, cert. denied, 125 N.M. 322, 961 P.2d 167.

Last employer deemed party to district court proceedings. — The last employer of a claimant by virtue of its participation in the adjudicatory hearing before the employment security commission (now employment security division) is a party to proceedings in the district court and that court may properly deny a commission (division) motion to dismiss because of failure to join the last employer. Abernathy v. Emp't Sec. Comm'n, 93 N.M. 71, 596 P.2d 514 (1979).

Statement of counsel of poor quality transcript does not support conclusion. — Statement by counsel in employment security commission (now employment security division) proceedings that transcript of hearing before the deputy was not of the quality to be placed in the record due to mechanical difficulties does not justify a conclusion that the record was incomplete or illegible or insufficient for appeal. Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967).

Division not to withhold payment where eligibility determined to preliminary hearing. — The employment security commission (now employment security division) may not withhold payment, pending the employer's appeal, of unemployment compensation benefits to those employees who have been found eligible for such benefits at the preliminary determination hearing. 1972 Op. Att'y Gen. No. 72-09.

Law reviews. — For article, "Constitutional Limitations on the Exercise of Judicial Functions by Administrative Agencies," see 7 Nat. Res. J. 599 (1967).

For comment on Kennecott Copper Corp. v. Emp't Sec. Comm'n, 78 N.M. 398, 432 P.2d 109 (1967), see 8 Nat. Res. J. 341 (1968).

For article, "Survey of New Mexico Law, 1979-80: Administrative Law," see 11 N.M.L. Rev. 1 (1981).

For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

For annual survey of New Mexico law relating to administrative law, see 12 N.M.L. Rev. 1 (1982).

For annual survey of New Mexico law relating to administrative law, see 13 N.M.L. Rev. 235 (1983).

For comment, "Comparative Fault Principles Do Not Affect Negligent Employer's Right to Full Reimbursement of Compensation Benefits Out of Worker's Partial Third-Party Recovery - Taylor v. Delgarno Transp., Inc.," see 14 N.M.L. Rev. 437 (1984).

For article, "Substantial Evidence Reconsidered: The Post-Duke City Difficulties and Some Suggestions for Their Resolution," see 18 N.M.L. Rev. 525 (1988).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 4, 5, 202 to 222.

Vested right of applicant for unemployment compensation in mode and manner of computing benefits in effect at time of his discharge or loss of employment, 20 A.L.R.2d 963.

Failure or delay with respect to filing or reporting requirements as ground for denial of unemployment compensation benefits, 97 A.L.R.2d 752.

Comment note on hearsay evidence in proceedings before state administrative agencies, 36 A.L.R.3d 12.

Unemployment compensation: eligibility as affected by claimant's refusal to work at reduced compensation, 95 A.L.R.3d 449.

Part-time or intermittent workers as covered by or as eligible for benefits under state Unemployment Compensation Act, 95 A.L.R.3d 891.

Employee's refusal to take lie detector test as barring unemployment compensation, 18 A.L.R.4th 307.

81 C.J.S. Social Security and Public Welfare §§ 147, 157, 216 to 234, 268, 279 to 288.

51-1-8. Claims for benefits. (Effective January 1, 2015.)

A. Claims for benefits shall be made in accordance with such regulations as the secretary may prescribe. Each employer shall post and maintain printed notices, in places readily accessible to employees, concerning their rights to file claims for unemployment benefits upon termination of their employment. Such notices shall be supplied by the division to each employer without cost to the employer.

B. A representative designated by the secretary as a claims examiner shall promptly examine the application and each weekly claim and, on the basis of the facts found, shall determine whether the claimant is unemployed, the week with respect to which benefits shall commence, the weekly benefit amount payable, the maximum duration of

benefits, whether the claimant is eligible for benefits pursuant to Section 51-1-5 NMSA 1978 and whether the claimant shall be disqualified pursuant to Section 51-1-7 NMSA 1978. With the approval of the secretary, the claims examiner may refer, without determination, claims or any specified issues involved therein that raise complex questions of fact or law to a hearing officer for the division for a fair hearing and decision in accordance with the procedure described in Subsection D of this section. The claims examiner shall promptly notify the claimant and any other interested party of the determination and the reasons therefor. Unless the claimant or interested party, within fifteen calendar days after the date of notification or mailing of the determination, files an appeal from the determination, the determination shall be the final decision of the division; provided that the claims examiner may reconsider a nonmonetary determination if additional information not previously available is provided or obtained or whenever the claims examiner finds an error in the application of law has occurred, but no redetermination shall be made more than twenty days from the date of the initial nonmonetary determination. Notice of a nonmonetary redetermination shall be given to all interested parties and shall be subject to appeal in the same manner as the original nonmonetary determination. If an appeal is pending at the time a redetermination is issued, the appeal, unless withdrawn, shall be treated as an appeal from the redetermination.

C. In the case of a claim for waiting period credit or benefits, "interested party", for purposes of determinations and adjudication proceedings and notices thereof, means:

(1) in the event of an issue concerning a separation from work for reasons other than lack of work, the claimant's most recent employer or most recent employing unit;

(2) in the event of an issue concerning a separation from work for lack of work, the employer or employing unit from whom the claimant separated for reasons other than lack of work if the claimant 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; or

(3) in all other cases involving the allowance or disallowance of a claim, the secretary, the claimant and any employing unit directly involved in the facts at issue.

D. Upon appeal by any party, a hearing officer designated by the secretary shall afford the parties reasonable opportunity for a fair hearing to be held de novo, and the hearing officer shall issue findings of fact and a decision that affirms, reverses or modifies the determination of the claims examiner or tax representative on the facts or the law, based upon the evidence introduced at such hearing, including the documents and statements in the claim or tax records of the division. All hearings shall be held in accordance with regulations of the secretary and decisions issued promptly in accordance with time lapse standards promulgated by the secretary of the United States department of labor. The parties shall be duly notified of the decision, together with the reasons therefor, which shall be deemed to be the final decision of the

department, unless within fifteen days after the date of notification or mailing of the decision further appeal is initiated pursuant to Subsection H of this section.

E. Except with the consent of the parties, no hearing officer or members of the board of review, established in Subsection F of this section, or secretary shall sit in any administrative or adjudicatory proceeding in which:

(1) either of the parties is related to the hearing officer, member of the board of review or secretary by affinity or consanguinity within the degree of first cousin;

(2) the hearing officer, member of the board of review or secretary was counsel for either party in that action; or

(3) the hearing officer, member of the board of review or secretary has an interest that would prejudice the rendering of an impartial decision.

The secretary, any member of the board of review or appeal tribunal hearing officer shall withdraw from any proceeding in which the hearing officer, member of the board of review or secretary cannot accord a fair and impartial hearing or when a reasonable person would seriously doubt whether the hearing officer, board member or secretary could be fair and impartial. Any party may request a disqualification of any appeal tribunal hearing officer or board of review member by filing an affidavit with the board of review or appeal tribunal promptly upon discovery of the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. The disqualification shall be mandatory if sufficient factual basis is set forth in the affidavit of disqualification. If a member of the board of review is disqualified or withdraws from any proceeding, the remaining members of the board of review may appoint an appeal tribunal hearing officer to sit on the board of review for the proceeding involved.

F. There is established within the department, for the purpose of providing higher level administrative appeal and review of determinations of a claims examiner or decisions issued by a hearing officer pursuant to Subsection B or D of this section, a "board of review" consisting of three members. Two members shall be appointed by the governor with the consent of the senate. The members so appointed shall hold office at the pleasure of the governor for terms of four years. One member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employers, and the other member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employees. The third member shall be an employee of the department appointed by the secretary who shall serve as chair of the board. Either member of the board of review appointed by the governor who has missed two consecutive meetings of the board may be removed from the board by the governor. Actions of the board shall be taken by majority vote. If a vacancy on the board in a position appointed by the governor occurs between sessions of the legislature, the position shall be filled by the governor until the next regular

legislative session. The board shall meet at the call of the secretary. Members of the board appointed by the governor shall be paid per diem and mileage in accordance with the Per Diem and Mileage Act for necessary travel to attend regularly scheduled meetings of the board of review for the purpose of conducting the board's appellate and review duties.

G. The board of review shall hear and review all cases appealed in accordance with Subsection H of this section. The board of review may affirm, reverse or modify the decision of the hearing officer or remand any matter to the claims examiner, tax representative or hearing officer for further proceedings. Each member appointed by the governor shall be compensated at the rate of fifteen dollars ($15.00) for each case reviewed up to a maximum compensation of twelve thousand dollars ($12,000) in any one fiscal year.

H. Any party aggrieved by a final decision of a hearing officer may file, in accordance with regulations prescribed by the secretary, an application for appeal and review of the decision with the secretary. The secretary shall review the application and shall, within fifteen days after receipt of the application, either affirm the decision of the hearing officer, reverse the decision of the hearing officer, modify the decision of the hearing officer, remand the matter to the hearing officer, tax representative or claims examiner for an additional hearing or refer the decision to the board of review for further review and decision on the merits of the appeal. If the secretary affirms, reverses or modifies the decision of the hearing officer, that decision shall be the final administrative decision of the department and any appeal therefrom shall be taken to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary remands a matter to a hearing officer, tax representative or claims examiner for an additional hearing, judicial review shall be permitted only after issuance of a final administrative decision. If the secretary refers the decision of the hearing officer to the board of review for further review, the board's decision on the merits of the appeal shall be the final administrative decision of the department, which may be appealed to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary takes no action within fifteen days of receipt of the application for appeal and review, the decision shall be promptly scheduled for review by the board of review as though it had been referred by the secretary. The secretary may request the board of review to review a decision of a hearing officer that the secretary believes to be inconsistent with the law or with applicable rules of interpretation or that is not supported by the evidence, and the board of review shall grant the request if it is filed within fifteen days of the issuance of the decision of the hearing officer. The secretary may also direct that any pending determination or adjudicatory proceeding be removed to the board of review for a final decision. If the board of review holds a hearing on any matter, the hearing shall be conducted by a quorum of the board of review in accordance with regulations prescribed by the secretary for hearing appeals. The board of review shall promptly notify the interested parties of its findings of fact and decision. A decision of the board of review on any disputed matter reviewed and decided by it shall be based upon the law and the lawful rules of interpretation issued by the secretary, and it shall be the final administrative decision of the department, except in cases of remand. If the

board of review remands a matter to a hearing officer, claims examiner or tax representative, judicial review shall be permitted only after issuance of a final administrative decision.

I. Notwithstanding any other provision of this section granting any party the right to appeal, benefits shall be paid promptly in accordance with a determination or a decision of a claims examiner, hearing officer, secretary, board of review or reviewing court, regardless of the pendency of the period to file an appeal or petition for judicial review that is provided with respect thereto in Subsection D or M of this section or the pendency of any such filing or petition until such determination or decision has been modified or reversed by a subsequent decision. The provisions of this subsection shall apply to all claims for benefits pending on the date of its enactment.

J. If a determination or decision allowing benefits is finally modified or reversed, the appropriate contributing employer will be relieved of benefit charges in accordance with Subsection A of Section 51-1-11 NMSA 1978.

K. The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers and the conduct of hearings and appeals shall be in accordance with rules prescribed by the secretary for determining the rights of the parties, whether or not the rules conform to common law or statutory rules of evidence and other technical rules of procedure. A hearing officer or the board of review may refer to the secretary for interpretation any question of controlling legal significance, and the secretary shall issue a declaratory interpretation, which shall be binding upon the decision of the hearing officer and the board of review. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded but need not be transcribed unless the disputed claim is appealed to the district court.

L. Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the secretary. Such fees and all administrative expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering the Unemployment Compensation Law.

M. Any determination or decision of a claims examiner or hearing officer or by a representative of the tax section of the department in the absence of an appeal therefrom as provided by this section shall become final fifteen days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted the remedies as provided in Subsection H of this section. The division and any employer or claimant who is affected by the decision shall be joined as a party in any judicial action involving the decision. All parties shall be served with an endorsed copy of the petition within thirty days from the date of filing and an endorsed copy of the order granting the petition within fifteen days from entry of the order. Service on the department shall be made on the secretary or the secretary's designated legal representative either by mail with accompanying certification of service or by personal service. The division may be represented in a

judicial action by an attorney employed by the department or, when requested by the secretary, by the attorney general or any district attorney.

N. The final decision of the secretary or board of review upon any disputed matter may be reviewed both upon the law, including the lawful rules of interpretation issued by the secretary, and the facts by the district court of the county wherein the person seeking the review resides upon certiorari, unless it is determined by the district court where the petition is filed that, as a matter of equity and due process, venue should be in a different county. For the purpose of the review, the division shall return on certiorari the reports and all of the evidence heard by it on the reports and all the papers and documents in its files affecting the matters and things involved in such certiorari. The district court shall render its judgment after hearing, and either the department or any other party affected may appeal from the judgment to the court of appeals in accordance with the rules of appellate procedure. Certiorari shall not be granted unless applied for within thirty days from the date of the final decision of the secretary or board of review. Certiorari shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workers' Compensation Act. It is not necessary in any proceedings before the division to enter exceptions to the rulings, and no bond shall be required in obtaining certiorari from the district court, but certiorari shall be granted as a matter of right to the party applying therefor.

History: Laws 1936 (S.S.), ch. 1, § 6; 1941 Comp., § 57-806; 1953 Comp., § 59-9-6; Laws 1953, ch. 121, § 4; 1972, ch. 5, § 1; 1973, ch. 216, § 1; 1979, ch. 280, § 15; 1981, ch. 354, § 4; 1983, ch. 199, § 4; 1987, ch. 63, § 2; 1990, ch. 18, § 3; 1991, ch. 122, § 5; 1993, ch. 209, § 3; 1994, ch. 89, § 1; 1996, ch. 33, § 1; 1998, ch. 91, § 2; 2004, ch. 93, § 1; 2013, ch. 132, § 1; 2013, ch. 133, § 1.

ANNOTATIONS

2013 Multiple Amendments. *— Laws 2013, ch. 132, § 1, effective July 1, 2013, and Laws 2013, ch. 133, § 1, effective January 1, 2015, enacted different amendments to this section that can be reconciled. Pursuant to 12-1-8 NMSA 1978, Laws 2013, ch. 133, § 1, which was last signed by the governor, is set out above and incorporates both amendments. The amendments enacted by Laws 2013, ch.132 , § 1 and Laws 2013, ch. 133, § 1 are described below. Laws 2013, ch. 132 , §1 eliminated the right to receive benefits before all appeals have been exhausted and Laws 2013, ch. 133, § 1 relieved employers of benefit charges if a determination allowing benefits is finally modified or reversed. To view the session laws in their entirety, see* the 2013 session laws on *NMONESOURCE.COM*.

Laws 2013, ch. 133 , §1, *effective January 1, 2015, made grammatical changes; relieved employers of benefit charges if a determinations allowing benefits is finally modified or reversed; and in Subsection J, in the second sentence, after "appropriate contributing", deleted "employer's account" and added "employer".*

Laws 2013, ch. 132 , §1, *effective July 1, 2013, made grammatical changes; eliminated the right to receive benefits before all appeals have been exhausted; and in Subsection J, deleted the former first sentence, which read "If a prior determination or decision allowing benefits is affirmed by a decision of the department, including the board of review or a reviewing court, the benefits shall be paid promptly regardless of any further appeal which may thereafter be available to the parties, and no injunction, supersedeas, stay or other writ or process suspending the payment of benefits shall be issued by the secretary or board of review or any court, and no action to recover benefits paid to a claimant shall be taken.".*

51-1-8.1. Voluntary withholding of federal income tax.

A. Every individual filing a new claim for unemployment compensation shall, at the time of filing such claim, be advised in writing that:

(1) unemployment compensation is subject to federal, state and local income tax;

(2) requirements exist pertaining to estimated tax payments;

(3) the individual may elect to have federal income tax deducted and withheld from the individual's unemployment compensation payments at the amount specified in the Internal Revenue Code of 1986; and

(4) the individual is permitted to change a previously elected withholding status one time during each benefit year.

B. Amounts deducted and withheld from unemployment compensation shall remain in the fund until transferred to the federal internal revenue service.

C. The division shall follow all procedures specified by the United States department of labor and the federal internal revenue service pertaining to the deducting and withholding of income tax.

D. Amounts shall be deducted and withheld under this section only after amounts are deducted and withheld for any overpayments of unemployment compensation, child support obligations or any other amounts required to be deducted and withheld under the Unemployment Compensation Law [51-1-1 NMSA 1978].

E. The provisions of this section apply to unemployment compensation payments made after December 31, 1996.

History: Laws 1996, ch. 33, § 2.

ANNOTATIONS

Internal Revenue Code. — The Internal Revenue Code is codified as Title 26 of the United States Code.

51-1-9. Contributions; computation; payment.

A. Contributions shall accrue and become payable by each employer for each calendar year in which he is subject to the payments of contributions under the Unemployment Compensation Law [Chapter 51 NMSA 1978], with respect to wages for employment as provided in Subsection T of Section 51-1-42 NMSA 1978. Such contributions shall become due and be paid by each employer to the department for the fund in accordance with such regulations and at such times as the secretary may prescribe and shall not be deducted, in whole or in part, from the wages of individuals in his employ.

B. In the payment of any contributions, a fractional part of a cent shall be disregarded unless it amounts to one-half cent ($.005) or more, in which case it shall be increased to one cent ($.01).

History: 1953 Comp., § 59-9-7, enacted by Laws 1961, ch. 139, § 1; 1971, ch. 209, § 2; 1977, ch. 320, § 1; 1979, ch. 280, § 16; 1980, ch. 50, § 2; 1981, ch. 354, § 5.

ANNOTATIONS

Repeals and reenactments. — Laws 1961, ch. 139, § 1, repealed former 59-9-7, 1953 Comp., relating to contribution, and enacted a new 59-9-7, 1953 Comp.

Applicability of procedural provisions. — Legislature intended that procedural provisions of the Unemployment Compensation Law should apply to decisions fixing employer's rate of contribution to the same extent as they did to employee's claim for benefits under the act. M.R. Prestridge Lumber Co. v. Emp't Sec. Comm'n, 50 N.M. 309, 176 P.2d 190 (1946).

Liberal construction called for. — This section is remedial legislation that calls for a liberal construction to the end that humanitarian purposes may be given effect. Emp't Sec. Comm'n v. C.R. Davis Contracting Co., 81 N.M. 23, 462 P.2d 608 (1969).

Court to give weight to department findings. — District court in reviewing action of employment security commission (now employment security department) in fixing an employer's rate of contribution had to give weight to findings made at hearing before the commission (now department) and follow such findings, except where the evidence clearly preponderated against such findings. M.R. Prestridge Lumber Co. v. Emp't Sec. Comm'n, 50 N.M. 309, 176 P.2d 190 (1946).

Contribution due and owing state. — Regardless of their derivation from federal legislation, the unemployment compensation contributions are considered to be due and owing the state of New Mexico. 1969 Op. Att'y Gen. No. 69-141.

Indian and non-Indian employers are subject to taxation under the Unemployment Compensation Law with respect to wages paid for services performed by their employees on pueblo and reservation land. 1972 Op. Att'y Gen. No. 72-23.

Law reviews. — For comment, "Coal Taxation in the Western States: The Need for a Regional Tax Policy," see 16 Nat. Res. J. 415 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 35, 36, 85, 86, 187 to 195.

Successor's treatment under provisions of act subjecting to its provisions an employer purchasing or succeeding to the business of another employer, 4 A.L.R.2d 721.

Right of successor in business to experience or rating of predecessor for purpose of fixing rate of contributions, 22 A.L.R.2d 673.

81 C.J.S. Social Security and Public Welfare §§ 139 to 153, 155, 170, 172, 192 to 210, 212, 214, 218, 281, 293.

51-1-10. Rate of contribution.

For any contributions assessed against an employer under the provisions of the Unemployment Compensation Law of New Mexico [51-1-1 NMSA 1978] prior to January 1, 1977, the base wage upon which contributions must be paid and the rate of contributions assessable shall be the base wage and rates in effect by law as of the date such contributions became due and payable to the department.

History: 1953 Comp., § 59-9-7.1, enacted by Laws 1977, ch. 320, § 2; 1979, ch. 280, § 17.

ANNOTATIONS

Repeals and reenactments. — Laws 1977, ch. 320, § 2, repealed former 59-9-7.1, 1953 comp., relating to rate of contribution, and enacted a new 59-9-7.1, 1953 Comp.

Law reviews. — For comment, "Undocumented Aliens: Education, Employment and Welfare in the United States and in New Mexico," see 9 N.M.L. Rev. 99 (1978-79).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 152, 195 to 198.

51-1-11. Future rates based on benefit experience.

A. The division shall maintain a separate account for each contributing employer and shall credit the contributing employer's account with all contributions paid by that employer under the Unemployment Compensation Law. Nothing in the Unemployment

Compensation Law shall be construed to grant an employer or individuals in the employer's service prior claims or rights to the amounts paid by the employer into the fund.

B. Benefits paid to an individual shall be charged against the accounts of the individual's base-period employers on a pro rata basis according to the proportion of the individual's total base-period wages received from each employer, except that no benefits paid to a claimant as extended benefits under the provisions of Section 51-1-48 NMSA 1978 shall be charged to the account of any base-period employer who is not on a reimbursable basis and who is not a governmental entity and, except as the secretary shall by rule prescribe otherwise, in the case of benefits paid to an individual who:

(1) left the employ of a base-period employer who is not on a reimbursable basis voluntarily without good cause in connection with the individual's employment;

(2) was discharged from the employment of a base-period employer who is not on a reimbursable basis for misconduct connected with the individual's employment;

(3) is employed part time by a base-period employer who is not on a reimbursable basis and who continues to furnish the individual the same part-time work while the individual is separated from full-time work for a nondisqualifying reason; or

(4) received benefits based upon wages earned from a base-period employer who is not on a reimbursable basis while attending approved training under the provisions of Subsection E of Section 51-1-5 NMSA 1978.

C. The division shall not charge a contributing or reimbursing base-period employer's account with any portion of benefit amounts that the division can bill to or recover from the federal government as either regular or extended benefits.

D. The division shall not charge a contributing base-period employer's account with any portion of benefits paid to an individual for dependent allowance or because the individual to whom benefits are paid:

(1) separated from employment due to domestic abuse, as "domestic abuse" is defined in Section 40-13-2 NMSA 1978; or

(2) voluntarily left work to relocate because of a spouse, who is in the military service of the United States or the New Mexico national guard, receiving permanent change of station orders, activation orders or unit deployment orders.

E. All contributions to the fund shall be pooled and available to pay benefits to any individual entitled thereto, irrespective of the source of the contributions.

F. For each calendar year, if, as of the computation date for that year, an employer's account has been chargeable with benefits throughout the preceding thirty-

six months, the secretary shall classify the employer in accordance with its actual experience of benefits charged against its accounts. For such an employer, the contribution rate shall be determined pursuant to Subsection I of this section on the basis of the employer's record and the condition of the fund as of the computation date for the calendar year. If, as of the computation date for a calendar year, an employer's account has not been chargeable with benefits throughout the preceding thirty-six months, the contribution rate for that employer for the calendar year shall be two percent, except that:

(1) an individual, type of organization or employing unit that acquires all or part of the trade or business of another employing unit, pursuant to Paragraphs (2) and (3) of Subsection E of Section 51-1-42 NMSA 1978, that has a rate of contribution less than two percent shall be entitled to the transfer of the reduced rate to the extent permitted under Subsection H of this section;

(2) an employer that, at the time of establishing an account, is in business in another state or states and that is not currently doing business in New Mexico may elect, pursuant to Paragraph (3) of this subsection, to receive a beginning contribution rate of two percent or a contribution rate based on the current contribution rate schedule in Paragraph (4) of Subsection I of this section, whichever is lower, if:

(a) the employer has been in operation in the other state or states for at least three years immediately preceding the date of becoming a liable employer in New Mexico, throughout which an individual in the employer's employ could have received benefits if eligible; and

(b) the employer provides the authenticated account history as defined by rule of the secretary from information accumulated from operations in the other state or all the other states to compute a current New Mexico rate; and

(3) the election authorized in Paragraph (2) of this subsection shall be made in writing within thirty days after receiving notice of New Mexico liability and, if not made timely, a two percent rate will be assigned; if the election is made timely, the employer's account will receive the lesser of the computed rate determined by the condition of the account for the computation date immediately preceding the New Mexico liable date, or two percent; rates for subsequent years will be determined by the condition of the account for the computation date.

G. An employer may make voluntary payments in addition to the contributions required under the Unemployment Compensation Law, which shall be credited to the employer's account in accordance with department rule. The voluntary payments shall be included in the employer's account as of the employer's most recent computation date if they are made on or before the following March 1. Voluntary payments when accepted from an employer shall not be refunded in whole or in part.

H. In the case of a transfer of an employing enterprise, notwithstanding any other provision of law, the experience history of the transferred enterprise shall be transferred from the predecessor employer to the successor under the following conditions and in accordance with the applicable rules of the secretary:

(1) as used in this subsection:

(a) "employing enterprise" means a business activity engaged in by a contributing employing unit in which one or more persons have been employed within the current or the three preceding calendar quarters. An "employing enterprise" includes the employer's work force;

(b) "predecessor" means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise;

(c) "successor" means any person that acquires an employing enterprise and continues to operate such business entity;

(d) "experience history" means the experience rating record and reserve account, including the actual contributions, benefit charges and payroll experience of the employing enterprise;

(e) "common ownership" means that two or more businesses are substantially owned, managed or controlled by the same person or persons;

(f) "knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved; and

(g) "violates or attempts to violate" includes an intent to evade, a misrepresentation or a willful nondisclosure;

(2) except as otherwise provided in this subsection, for the purpose of this subsection, two or more employers who are parties to or the subject of any transaction involving the transfer of an employing enterprise shall be deemed to be a single employer and the experience history of the employing enterprise shall be transferred to the successor employer if the successor employer has acquired by the transaction all of the business enterprises of the predecessor; provided that:

(a) all contributions, interest and penalties due from the predecessor employer have been paid;

(b) notice of the transfer has been given in accordance with the rules of the secretary during the calendar year of the transaction transferring the employing enterprise or the date of the actual transfer of control and operation of the employing enterprise;

(c) the successor shall notify the division of the acquisition on or before the due date of the successor's first wage and contribution report. If the successor employer fails to notify the division of the acquisition within this time limit, the division, when it receives actual notice, shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition, and the successor shall pay a penalty of fifty dollars ($50.00); and

(d) where the transaction involves only a merger, consolidation or other form of reorganization without a substantial change in the ownership and controlling interest of the business entity, as determined by the secretary, the limitations on transfers stated in Subparagraphs (a), (b) and (c) of this paragraph shall not apply. A party to a merger, consolidation or other form of reorganization described in this subparagraph shall not be relieved of liability for any contributions, interest or penalties due and owing from the employing enterprise at the time of the merger, consolidation or other form of reorganization;

(3) the applicable experience history may be transferred to the successor in the case of a partial transfer of an employing enterprise if the successor has acquired one or more of the several employing enterprises of a predecessor but not all of the employing enterprises of the predecessor and each employing enterprise so acquired was operated by the predecessor as a separate store, factory, shop or other separate employing enterprise and the predecessor, throughout the entire period of the contribution with liability applicable to each enterprise transferred, has maintained and preserved payroll records that, together with records of contribution liability and benefit chargeability, can be separated by the parties from the enterprises retained by the predecessor to the satisfaction of the secretary or the secretary's delegate. A partial experience history transfer will be made only if the successor:

(a) notifies the division of the acquisition, in writing, not later than the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition;

(b) files an application provided by the division that contains the endorsement of the predecessor within thirty days from the delivery or mailing of such application by the division to the successor's last known address; and

(c) files with the application, in a manner described by the department, a schedule of the name and social security number of and the wages paid to and the contributions paid for each employee for the three and one-half year period preceding the computation date as defined in Subparagraph (d) of Paragraph (3) of Subsection I of this section through the date of transfer or such lesser period as the enterprises transferred may have been in operation. The application and schedule shall be supported by the predecessor's permanent employment records, which shall be available for audit by the division. The application and schedule shall be reviewed by the division and, upon approval, the percentage of the predecessor's experience history attributable to the enterprises transferred shall be transferred to the successor. The

percentage shall be obtained by dividing the taxable payrolls of the transferred enterprises for such three and one-half year period preceding the date of computation or such lesser period as the enterprises transferred may have been in operation by the predecessor's entire payroll;

(4) if, at the time of a transfer of an employing enterprise in whole or in part, both the predecessor and the successor are under common ownership, then the experience history attributable to the transferred business shall also be transferred to and combined with the experience history attributable to the successor employer. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer;

(5) whenever a person, who is not currently an employer, acquires the trade or business of an employing enterprise, the experience history of the acquired business shall not be transferred to the successor if the secretary or the secretary's designee finds that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, the successor shall be assigned the applicable new employer rate pursuant to this section. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contribution, the secretary or the secretary's designee shall consider:

(a) the cost of acquiring the business;

(b) whether the person continued the business enterprise of the acquired business;

(c) how long such business enterprise was continued; and

(d) whether a substantial number of new employees were hired for performance of duties unrelated to those that the business activity conducted prior to acquisition;

(6) if, following a transfer of experience history pursuant to this subsection, the department determines that a substantial purpose of the transfer of the employing enterprise was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to the combined account;

(7) the secretary shall adopt such rules as are necessary to interpret and carry out the provisions of this subsection, including rules that:

(a) describe how experience history is to be transferred; and

(b) establish procedures to identify the type of transfer or acquisition of an employing enterprise; and

(8) a person who knowingly violates or attempts to violate a rule adopted pursuant to Paragraph (7) of this subsection, who transfers or acquires, or attempts to transfer or acquire, an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions or who knowingly advises another person to violate a rule adopted pursuant to Paragraph (7) of this subsection or to transfer or acquire an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions is guilty of a misdemeanor and shall be punished by a fine of not less than one thousand five hundred dollars ($1,500) or more than three thousand dollars ($3,000) or, if an individual, by imprisonment for a definite term not to exceed ninety days or both. In addition, such a person shall be subject to the following civil penalty imposed by the secretary:

(a) if the person is an employer, the person shall be assigned the highest contribution rate established by the provisions of this section for the calendar year in which the violation occurs and the three subsequent calendar years; provided that, if the difference between the increased penalty rate and the rate otherwise applicable would be less than two percent of the employer's payroll, the contribution rate shall be increased by two percent of the employer's payroll for the calendar year in which the violation occurs and the three subsequent calendar years; or

(b) if the person is not an employer, the secretary may impose a civil penalty not to exceed three thousand dollars ($3,000).

I. For each calendar year, if, as of the computation date for that year, an employer's account has been chargeable with benefits throughout the preceding thirty-six months, the contribution rate for that employer shall be determined as follows:

(1) the total assets in the fund and the total of the last annual payrolls of all employers subject to contributions as of the computation date for each year shall be determined. These annual totals are here called "the fund" and "total payrolls". For each year, the "reserve" of each employer shall be fixed by the excess of the employer's total contributions over total benefit charges computed as a percentage of the employer's average payroll reported for contributions. The determination of each employer's annual rate, computed as of the computation date for each calendar year, shall be made by matching the employer's reserve as shown in the reserve column with the corresponding rate in the rate column of the applicable rate schedule of the table provided in Paragraph (4) of this subsection;

(2) for each calendar year after 2014, except as otherwise provided, each employer's rate shall be the corresponding rate in:

(a) Contribution Schedule 0 of the table provided in Paragraph (4) of this subsection if the fund equals at least two and three-tenths percent of the total payrolls;

(b) Contribution Schedule 1 of the table provided in Paragraph (4) of this subsection if the fund equals less than two and three-tenths percent but not less than one and seven-tenths percent of the total payrolls;

(c) Contribution Schedule 2 of the table provided in Paragraph (4) of this subsection if the fund equals less than one and seven-tenths percent but not less than one and three-tenths percent of the total payrolls;

(d) Contribution Schedule 3 of the table provided in Paragraph (4) of this subsection if the fund equals less than one and three-tenths percent but not less than one percent of the total payrolls;

(e) Contribution Schedule 4 of the table provided in Paragraph (4) of this subsection if the fund equals less than one percent but not less than seven-tenths percent of the total payrolls;

(f) Contribution Schedule 5 of the table provided in Paragraph (4) of this subsection if the fund equals less than seven-tenths percent but not less than three-tenths percent of the total payrolls; or

(g) Contribution Schedule 6 of the table provided in Paragraph (4) of this subsection if the fund equals less than three-tenths percent of the total payrolls;

(3) as used in this section:

(a) "annual payroll" means the total amount of remuneration from an employer for employment during a twelve-month period ending on a computation date, and "average payroll" means the average of the last three annual payrolls;

(b) "base-period wages" means the wages of an individual for insured work during the individual's base period on the basis of which the individual's benefit rights were determined;

(c) "base-period employers" means the employers of an individual during the individual's base period; and

(d) "computation date" for each calendar year means the close of business on June 30 of the preceding calendar year;

(4) table of employer reserves and contribution rate schedules:

Employer Reserve	Contribution Schedule 0	Contribution Schedule 1	Contribution Schedule 2	Contribution Schedule 3
10.0% and over	0.03%	0.05%	0.1%	0.6%
9.0%-9.9%	0.06%	0.1%	0.2%	0.9%

8.0%-8.9%	0.09%	0.2%	0.4%	1.2%
7.0%-7.9%	0.10%	0.4%	0.6%	1.5%
6.0%-6.9%	0.30%	0.6%	0.8%	1.8%
5.0%-5.9%	0.50%	0.8%	1.1%	2.1%
4.0%-4.9%	0.80%	1.1%	1.4%	2.4%
3.0%-3.9%	1.20%	1.4%	1.7%	2.7%
2.0%-2.9%	1.50%	1.7%	2.0%	3.0%
1.0%-1.9%	1.80%	2.0%	2.4%	3.3%
0.9%-0.0%	2.40%	2.4%	3.3%	3.6%
(-0.1%)-(-0.5%)	3.30%	3.3%	3.6%	3.9%
(-0.5%)-(-1.0%)	4.20%	4.2%	4.2%	4.2%
(-1.0%)-(-2.0%)	5.00%	5.0%	5.0%	5.0%
Under (-2.0%)	5.40%	5.4%	5.4%	5.4%

Employer Reserve	Contribution Schedule 4	Contribution Schedule 5	Contribution Schedule 6
10.0% and over	0.9%	1.2%	2.7%
9.0%-9.9%	1.2%	1.5%	2.7%
8.0%-8.9%	1.5%	1.8%	2.7%
7.0%-7.9%	1.8%	2.1%	2.7%
6.0%-6.9%	2.1%	2.4%	2.7%
5.0%-5.9%	2.4%	2.7%	3.0%
4.0%-4.9%	2.7%	3.0%	3.3%
3.0%-3.9%	3.0%	3.3%	3.6%
2.0%-2.9%	3.3%	3.6%	3.9%
1.0%-1.9%	3.6%	3.9%	4.2%
0.9%-0.0%	3.9%	4.2%	4.5%
(-0.1%)-(-0.5%)	4.2%	4.5%	4.8%
(-0.5%)-(-1.0%)	4.5%	4.8%	5.1%
(-1.0%)-(-2.0%)	5.0%	5.1%	5.3%
Under (-2.0%)	5.4%	5.4%	5.4%;

(5) from January 1, 2011 through December 31, 2012, each employer making contributions pursuant to this subsection shall make a contribution at the rate specified in Contribution Schedule 1; and

(6) from January 1, 2013 through December 31, 2014, each employer making contributions pursuant to this subsection shall make a contribution at the rate specified in Contribution Schedule 2.

J. The division shall promptly notify each employer of the employer's rate of contributions as determined for any calendar year pursuant to this section. Such notification shall include the amount determined as the employer's average payroll, the total of all of the employer's contributions paid on the employer's behalf and credited to the employer's account for all past years and total benefits charged to the employer's account for all such years. Such determination shall become conclusive and binding upon the employer unless, within thirty days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such notice, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing, in any proceeding involving the employer's rate of contributions or contribution liability, to contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

K. The division shall provide each contributing employer, within ninety days of the end of each calendar quarter, a written determination of benefits chargeable to the employer's account. Such determination shall become conclusive and binding upon the employer for all purposes unless, within thirty days after the mailing of the determination to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such determination, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing in any proceeding involving the employer's contribution liability to contest the chargeability to the employer's account of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known

address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

L. The contributions, together with interest and penalties thereon imposed by the Unemployment Compensation Law, shall not be assessed nor shall action to collect the same be commenced more than four years after a report showing the amount of the contributions was due. In the case of a false or fraudulent contribution report with intent to evade contributions or a willful failure to file a report of all contributions due, the contributions, together with interest and penalties thereon, may be assessed or an action to collect such contributions may be begun at any time. Before the expiration of such period of limitation, the employer and the secretary may agree in writing to an extension thereof and the period so agreed on may be extended by subsequent agreements in writing. In any case where the assessment has been made and action to collect has been commenced within four years of the due date of any contribution, interest or penalty, including the filing of a warrant of lien by the secretary pursuant to Section 51-1-36 NMSA 1978, such action shall not be subject to any period of limitation.

M. The secretary shall correct any error in the determination of an employer's rate of contribution during the calendar year to which the erroneous rate applies, notwithstanding that notification of the employer's rate of contribution may have been issued and contributions paid pursuant to the notification. Upon issuance by the division of a corrected rate of contribution, the employer shall have the same rights to review and redetermination as provided in Subsection J of this section.

N. Any interest required to be paid on advances to this state's unemployment compensation fund under Title 12 of the Social Security Act shall be paid in a timely manner as required under Section 1202 of Title 12 of the Social Security Act and shall not be paid, directly or indirectly, by the state from amounts in the state's unemployment compensation fund.

History: 1978 Comp., § 51-1-11, enacted by Laws 2003, ch. 47, § 11; 2005, ch. 3, § 4; 2005, ch. 3, § 9; 2007, ch. 137, § 2; 2010, ch. 55, § 2; 2011, ch. 184, § 4; 2012, ch. 35, § 1; 2013, ch. 133, § 2.

ANNOTATIONS

Cross references. — For Section 1202 and Title XII of the Social Security Act, *see* 42 U.S.C. § 1322 and 42 U.S.C. §§ 1321 to 1324, respectively.

The 2013 amendment, effective January 1, 2014, extended the application of Contribution Schedule 2 through 2014; in Subparagraph (c) of Paragraph (3) of Subsection H, in the first sentence, after "with the application", deleted "a Form ES-903A or its equivalent with" and added "in a manner described by the department", in the second sentence, after "The application and", deleted "Form ES-903A" and added "schedule", and in the third sentence, after "The application and", deleted "Form ES-903A" and added "schedule"; and in Subsection I, in Paragraph (2), after "calendar year

after", deleted "2013" and added "2014" and in Paragraph (6), after "December 31", deleted "2013" and added "2014".

The 2011 amendment, effective July 1, 2011, in Subsection B, required that benefits paid to full-time students be charged against the accounts of students' base-period employers; in Subsection D, required that benefits paid to individuals enrolled in training or attending school on a full-time basis be charged to the individual's contributing pay-period employer's account; and in Subsection I, for calendar years after 2012, required employers to pay the rates specified in the contribution schedules and required employers to pay the rate specified in Contribution Schedule 3 for the period from January 1, 2012 through December 31, 2012.

Compiler's notes. — On December 14, 2011, the supreme court ruled that the governor's partial veto of Subsection I(6) of Section 4 in Laws 2011, ch. 184 was "unconstitutional because after the governor vetoed the language regarding the increase to the 2012 contribution schedule from schedule 1 to schedule 3, what remained was an unworkable piece of legislation" and issued a writ of mandamus ordering the reinstatement of Laws 2011, ch. 184 as passed by the legislature.

Applicability. — Laws 2011, ch. 184, § 6 provided that the amendments to Subsections B and D of Section 51-1-11 NMSA 1978 in Laws 2011, ch. 184, § 4 apply to benefit years beginning on or after July 1, 2011.

The 2010 amendment, effective July 1, 2010, in Subsection I(2), after "calendar year after", changed "2010" to "2011"; in Subsections I(2)(a)(b)(c)(d)(e)(f)(g), at the beginning of each sentence, added "Contribution"; deleted Subsection I(5), which provided employer contribution rates for the period from July 1, 2007 through December 31, 2010; and added Paragraphs (5) and (6) of Subsection I.

The 2007 amendment, effective July 1, 2007, added Paragraph (3) of Subsection D, deleted the standard rate of contribution of five and four-tenths percent, provided for the classification of an employer and the determination of an employer's contribution rate if the employer's account has been chargeable with benefits during the preceding thirty-six months, prescribed contribution rates for calendar years after 2010, and prescribed contribution rates from July 1, 2007 through December 31, 2010.

Compiler's notes. — Laws 2007, ch. 137, § 6, repealed Laws 2005, ch. 3, § 9, effective July 1, 2007, prior to Laws 2005, ch. 3, § 9 taking effect.

2005 amendments. — Laws 2005, ch. 3, § 4, effective February 8, 2005, also amended 51-1-11 NMSA 1978, as enacted by Laws 2003, ch. 47, § 11, to add to Subsection B(4), "or school on a full-time basis"; add a new Subsection D; add new Paragraphs (4) and (5) of relettered Paragraph D (former Paragraph D); add a new subparagraph (f) of Subsection H(2) (former Subsection G), increase the employer's rate in Paragraph (2) of Subsection I (former Subsection H), and insert a new

"Contribution Schedule 0" in the "Table of employer reserves and contribution rate schedules" in Paragraph (4) of Subsection H (former Subsection G).

Laws 2005, ch. 3, § 9 would have repealed and reenacted this section, as amended by Laws 2005, ch. 3, § 4, effective the earliest of (1) January 1, 2008; or (2) the January following certification to the governor by the secretary of labor 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 Section 51-1-11 NMSA 1978, however Laws 2005, ch. 3, § 9 was repealed prior to taking effect.

Laws 2005, ch. 255, § 2, effective June 17, 2005, amends that version of 51-1-11 NMSA 1978 that was enacted by Laws 2003, ch. 47, § 11, as amended by Laws 2005, ch. 3, § 4, to provide in Subsection H that in case of a transfer, notwithstanding any other provision of law, the experience history shall be transferred; provides in Subsection H(1)(a) that an employing enterprise includes the employer's workforce; adds the definition of "common ownership" in Subsection H(e); adds the definition of "knowingly" in Subsection H(f); adds the definition of "violates or attempts to violate" in Subsection H(g); provides in Subsection H(2) that except as otherwise provided in this subsection, for the purpose of this subsection, two or more employers involved in the transfer or an employing enterprise shall be a single employer; changes "within four years" to "during the calendar year" in Subsection H(2)(b); deletes the former qualification in Subsection H(2)(c) that in the case of a transfer of an employing enterprise, the successor shall notify the division; adds Subsection H(4) to provide that if the predecessor and successor employing enterprise are under common ownership, then the experience history shall be transferred and combined with the experience history at the successor enterprise and the rates of both employers shall be recalculated; adds Subsection H(5) to provide that if a person acquires an employing enterprise to obtain a lower of contributions, the experience history of the acquired business shall not be transferred to the successor business and the successor shall be assigned the applicable new employer rate and to provide the criteria for determining whether a business was acquired to obtain a lower rate; adds Subsection H(6) to provide that if the department determines that a purpose of the transfer of experience history is to obtain a reduced liability for contributions, then the experience rating accounts of the employers shall be combined and a single rate assigned; adds Subsection H(7) to provide that the secretary shall adopt rules that include a description of how experience history is transferred and that establish procedures to identify the type of transfer or acquisition of an employing enterprise; and adds Subsection H(8) to provide criminal and civil penalties for violations of or inducing others to violate the secretary's rules or for transferring, acquiring or attempting to transfer or acquire an employing enterprise to obtain a reduced liability for contributions.

The 2003 amendment, effective March 19, 2003, rewrote the section.

Delayed effective date. — Laws 2003, ch. 47, § 15 provided that the effective date of Laws 2003, ch. 47, §§ 8 through 12 was the earliest of the following: 1) June 30, 2007; or 2) the date that the unemployment compensation fund is less than three and three-

fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-17 NMSA 1978. Laws 2003, ch. 47, § 11, would repeal this section and reenact the section as set out above.

Compiler's note. — The compiler has been informed that the event described in Laws 2003, ch, 47, § 15 occurred prior to the enactment of the 2005 amendment.

The 2000 amendment, effective July 1, 2000, deleted former Subsection B(3), relating to benefits paid in connection with a work-release program, and redesignated former Subsections B(4) and B(5) as present Subsections B(3) and B(4); substituted "three and four-tenths" for "four" in Subsection H(2)(a); substituted "less than three and four-tenths percent and not less than two and seven-tenths" for "between four percent and three percent" in Subsection H(2)(b); substituted "less than two and seven-tenths percent and not less than" for "between three percent and two" in Subsection H(2)(c); substituted "less than" for "between" and inserted "not less than" in Subsections H(2)(d) and H(2)(e); and reduced employer compensation rate schedule 1 for all employers with an employer reserve of 0% or greater and schedule 2 for all employers with a 1.0% or greater reserve in Subsection H(4).

The 1998 amendment, effective July 1, 1998, inserted "through the date of transfer" following "of this section" in Subparagraph G(3)(c), added Subsection N and made minor stylistic changes throughout the section.

The 1993 amendment, effective April 5, 1993, substituted "this paragraph" for "Paragraph (2) of Subsection C of this section" in the first sentence of Subsection G(2)(d); inserted "throughout the entire period of his contribution with liability applicable to each enterprise transferred" near the middle of the first sentence of Subsection G(3); and, in Subsection G(3)(c), substituted the language "for the three and one-half year" for "from the inception of the enterprise transferred or for the three and one-half year period preceding the date of computation as defined in Subparagraph D of Paragraph (3) of Subsection H of section 51-1-11 NMSA 1978, whichever is less" at the end of the first sentence, in the second sentence substituted "percentage" for "actual share" and deleted "for the period set forth on Form ES-903A" following "enterprises transferred", and added the last sentence.

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section; added Paragraphs (3) to (5) in Subsection B; in Subsection G, added Subparagraph (d) in Paragraph(1), substituted "fifty dollars ($50.00)" for "thirty dollars ($30.00)" at the end of Subparagraph (c) in Paragraph (2), deleted "the business or" preceding "the employing enterprises of the predecessor" and "throughout the entire period of his contribution liability applicable to each enterprise transferred" preceding "has maintained" in the first sentence in Paragraph (3) and rewrote Subparagraph (c) of Paragraph (3), which read "the successor files with the application a Form ES-903A or its equivalent with a schedule of the name and social security number of, and the wages paid to each employee and the contributions paid with respect to each calendar quarter from the inception of the enterprises being transferred prepared from, and supported by,

the predecessor's permanent employment records which must be available for audit by the department"; substituted "Paragraph (4)" for "Paragraph 5" where the reference appears throughout Subsection H; substituted "further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978" for "a petition for judicial review is filed in the district court of the county in which he resides" at the end of Subsection I; substituted "determination" for "notice" in the first sentence and added the succeeding sentences in Subsection J; and made related and other minor stylistic changes.

Partial veto rendered the act unworkable and incomplete. — Where the legislature amended Subsection I of Section 51-1-11 NMSA 1978 to change the effective date of a formula-based contribution schedule to calendar years after 2012 and to set a fixed contribution schedule for the year 2012 at Schedule 3; the governor vetoed the provision that fixed the 2012 contribution schedule at Schedule 3; and the partial veto resulted in the elimination of a contribution schedule for 2012, which effectively exempted established employers from making mandatory contributions to the unemployment compensation fund for calendar year 2012, the partial veto was unconstitutional because what remained after the partial veto was an unworkable piece of legislation and the court ordered that the legislation be reinstated as passed by the legislature. State of N.M. ex rel. Stewart v. Martinez, 2011-NMSC-045, 270 P.3d 96.

Law reviews. — For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 104 to 109.

81 C.J.S. Social Security and Public Welfare § 294.

51-1-11. Employer contribution rates; benefits chargeable; unemployment compensation fund adequate reserve; reserve factor; excess claims premium; definitions. (Effective January 1, 2015.)

A. Benefits paid to an individual shall be charged to the individual's base-period employers on a pro rata basis according to the proportion of the individual's total base-period wages received from each employer, except that no benefits paid to a claimant as extended benefits under the provisions of Section 51-1-48 NMSA 1978 shall be charged to any base-period employer who is not on a reimbursable basis and who is not a governmental entity and, except as the secretary shall by rule prescribe otherwise, in the case of benefits paid to an individual who:

(1) left the employ of a base-period employer who is not on a reimbursable basis voluntarily without good cause in connection with the individual's employment;

(2) was discharged from the employment of a base-period employer who is not on a reimbursable basis for misconduct connected with the individual's employment;

(3) is employed part time by a base-period employer who is not on a reimbursable basis and who continues to furnish the individual the same part-time work while the individual is separated from full-time work for a nondisqualifying reason; or

(4) received benefits based upon wages earned from a base-period employer who is not on a reimbursable basis while attending approved training under the provisions of Subsection E of Section 51-1-5 NMSA 1978.

B. The division shall not charge a contributing or reimbursing base-period employer with any portion of benefit amounts that the division can bill to or recover from the federal government as either regular or extended benefits.

C. The division shall not charge a contributing base-period employer with any portion of benefits paid to an individual for dependent allowance or because the individual to whom benefits are paid:

(1) separated from employment due to domestic abuse, as "domestic abuse" is defined in Section 40-13-2 NMSA 1978; or

(2) voluntarily left work to relocate because of a spouse, who is in the military service of the United States or the New Mexico national guard, receiving permanent change of station orders, activation orders or unit deployment orders.

D. All contributions to the fund shall be pooled and available to pay benefits to any individual entitled thereto, irrespective of the source of the contributions.

E. In the case of a transfer of an employing enterprise, notwithstanding any other provision of law, the experience history of the transferred enterprise shall be transferred from the predecessor employer to the successor under the following conditions and in accordance with the applicable rules of the secretary:

(1) except as otherwise provided in this subsection, for the purpose of this subsection, two or more employers who are parties to or the subject of any transaction involving the transfer of an employing enterprise shall be deemed to be a single employer and the experience history of the employing enterprise shall be transferred to the successor employer if the successor employer has acquired by the transaction all of the business enterprises of the predecessor; provided that:

(a) all contributions, interest and penalties due from the predecessor employer have been paid;

(b) notice of the transfer has been given in accordance with the rules of the secretary during the calendar year of the transaction transferring the employing enterprise or the date of the actual transfer of control and operation of the employing enterprise;

(c) the successor shall notify the division of the acquisition on or before the due date of the successor's first wage and contribution report. If the successor employer fails to notify the division of the acquisition within this time limit, the division, when it receives actual notice, shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition, and the successor shall pay a penalty of fifty dollars ($50.00); and

(d) where the transaction involves only a merger, consolidation or other form of reorganization without a substantial change in the ownership and controlling interest of the business entity, as determined by the secretary, the limitations on transfers stated in Subparagraphs (a), (b) and (c) of this paragraph shall not apply. A party to a merger, consolidation or other form of reorganization described in this subparagraph shall not be relieved of liability for any contributions, interest or penalties due and owing from the employing enterprise at the time of the merger, consolidation or other form of reorganization;

(2) the applicable experience history may be transferred to the successor in the case of a partial transfer of an employing enterprise if the successor has acquired one or more of the several employing enterprises of a predecessor but not all of the employing enterprises of the predecessor and each employing enterprise so acquired was operated by the predecessor as a separate store, factory, shop or other separate employing enterprise and the predecessor, throughout the entire period of the contribution with liability applicable to each enterprise transferred, has maintained and preserved payroll records that, together with records of contribution liability and benefit chargeability, can be separated by the parties from the enterprises retained by the predecessor to the satisfaction of the secretary or the secretary's delegate. A partial experience history transfer will be made only if the successor:

(a) notifies the division of the acquisition, in writing, not later than the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition;

(b) files an application provided by the division that contains the endorsement of the predecessor within thirty days from the delivery or mailing of such application by the division to the successor's last known address; and

(c) files with the application a form with a schedule of the name and social security number of and the wages paid to and the contributions paid for each employee for the three and one-half year period preceding the computation date through the date of transfer or such lesser period as the enterprises transferred may have been in operation. The application and form shall be supported by the predecessor's permanent employment records, which shall be available for audit by the division. The application and form shall be reviewed by the division and, upon approval, the percentage of the predecessor's experience history attributable to the enterprises transferred shall be transferred to the successor. The percentage shall be obtained by dividing the taxable payrolls of the transferred enterprises for such three and one-half year period preceding

the date of computation or such lesser period as the enterprises transferred may have been in operation by the predecessor's entire payroll;

(3) if, at the time of a transfer of an employing enterprise in whole or in part, both the predecessor and the successor are under common ownership, then the experience history attributable to the transferred business shall also be transferred to and combined with the experience history attributable to the successor employer. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer;

(4) whenever a person, who is not currently an employer, acquires the trade or business of an employing enterprise, the experience history of the acquired business shall not be transferred to the successor if the secretary or the secretary's designee finds that the successor acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions. Instead, the successor shall be assigned the applicable new employer rate pursuant to this section. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contribution, the secretary or the secretary's designee shall consider:

(a) the cost of acquiring the business;

(b) whether the person continued the business enterprise of the acquired business;

(c) how long such business enterprise was continued; and

(d) whether a substantial number of new employees were hired for performance of duties unrelated to those that the business activity conducted prior to acquisition;

(5) if, following a transfer of experience history pursuant to this subsection, the department determines that a substantial purpose of the transfer of the employing enterprise was to obtain a reduced liability for contributions, then the experience rating accounts of the employers involved shall be combined into a single account and a single rate assigned to the combined account;

(6) the secretary shall adopt such rules as are necessary to interpret and carry out the provisions of this subsection, including rules that:

(a) describe how experience history is to be transferred; and

(b) establish procedures to identify the type of transfer or acquisition of an employing enterprise; and

(7) a person who knowingly violates or attempts to violate a rule adopted pursuant to Paragraph (6) of this subsection, who transfers or acquires, or attempts to

transfer or acquire, an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions or who knowingly advises another person to violate a rule adopted pursuant to Paragraph (6) of this subsection or to transfer or acquire an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions is guilty of a misdemeanor and shall be punished by a fine of not less than one thousand five hundred dollars ($1,500) or more than three thousand dollars ($3,000) or, if an individual, by imprisonment for a definite term not to exceed ninety days or both. In addition, such a person shall be subject to the following civil penalty imposed by the secretary:

(a) if the person is an employer, the person shall be assigned the highest contribution rate established by the provisions of this section for the calendar year in which the violation occurs and the three subsequent calendar years; provided that, if the difference between the increased penalty rate and the rate otherwise applicable would be less than two percent of the employer's payroll, the contribution rate shall be increased by two percent of the employer's payroll for the calendar year in which the violation occurs and the three subsequent calendar years; or

(b) if the person is not an employer, the secretary may impose a civil penalty not to exceed three thousand dollars ($3,000).

F. For each calendar year, if, as of the computation date for that year, an employer has been a contributing employer throughout the preceding twenty-four months, the contribution rate for that employer shall be determined by multiplying the employer's benefit ratio by the reserve factor as determined pursuant to Subsection H of this section; provided that an employer's contribution rate shall not be less than thirty-three hundredths percent or more than five and four-tenths percent. An employer's benefit ratio is determined by dividing the employer's benefit charges during the immediately preceding fiscal years, up to a maximum of three fiscal years, by the total of the annual payrolls of the same time period, calculated to four decimal places, disregarding any remaining fraction.

G. For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer for less than twenty-four months, the contribution rate for that employer shall be the average of the contribution rates for all contributing employers in the employer's industry, as determined by administrative rule, but shall not be less than one percent or more than five and four-tenths percent; provided that an individual, type of organization or employing unit that acquires all or part of the trade or business of another employing unit, pursuant to Paragraphs (2) and (3) of Subsection E of Section 51-1-42 NMSA 1978, that has a rate of contribution less than average of the contribution rates for all contributing employers in the employer's industry, shall be entitled to the transfer of the contribution rate of the other employing unit to the extent permitted under Subsection E of this section.

H. The division shall ensure that the fund sustains an adequate reserve. An adequate reserve shall be determined to mean that the funds in the fund available for

benefits equal the total amount of funds needed to pay between eighteen and twenty-four months of benefits at the average of the five highest years of benefits paid in the last twenty-five years. For the purpose of sustaining an adequate reserve, the division shall determine a reserve factor to be used when calculating an employer's contribution rate pursuant to Subsection F of this section by rule promulgated by the secretary. The rules shall set forth a formula that will set the reserve factor in proportion to the difference between the amount of funds available for benefits in the fund, as of the computation date, and the adequate reserve, within the following guidelines:

(1) 1.0000 if, as of the computation date, there is an adequate reserve;

(2) between 0.5000 and 0.9999 if, as of the computation date, there is greater than an adequate reserve; and

(3) between 1.0001 and 4.0000 if, as of the computation date, there is less than an adequate reserve.

I. If an employer's contribution rate pursuant to Subsection F of this section is calculated to be greater than five and four-tenths percent, notwithstanding the limitation pursuant to Subsection F of this section, the employer shall be charged an excess claims premium in addition to the contribution rate applicable to the employer; provided that an employer's excess claims premium shall not exceed one percent of the employer's annual payroll. The excess claims premium shall be determined by multiplying the employer's excess claims rate by the employer's annual payroll. An employer's excess claims rate shall be determined by multiplying the difference of the employer's contribution rate, notwithstanding the limitation pursuant to Subsection F of this section, less five and four-tenths percent by ten percent.

J. The division shall promptly notify each employer of the employer's rate of contributions and excess claims premium as determined for any calendar year pursuant to this section. Such notification shall include the amount determined as the employer's annual payroll, the total of all of the employer's contributions paid on the employer's behalf for all past years and total benefits charged to the employer for all such years. Such determination shall become conclusive and binding upon the employer unless, within thirty days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such notice, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing, in any proceeding involving the employer's rate of contributions or contribution liability, to contest the chargeability to the employer of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the

Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

K. The division shall provide each contributing employer, within ninety days of the end of each calendar quarter, a written determination of benefits chargeable to the employer. Such determination shall become conclusive and binding upon the employer for all purposes unless, within thirty days after the mailing of the determination to the employer's last known address or in the absence of mailing, within thirty days after the delivery of such determination, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be granted an opportunity for a fair hearing in accordance with rules prescribed by the secretary, but an employer shall not have standing in any proceeding involving the employer's contribution liability to contest the chargeability to the employer of any benefits paid in accordance with a determination, redetermination or decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to such determination, redetermination or decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined. The employer shall be promptly notified of the decision on the employer's application for redetermination, which shall become final unless, within fifteen days after the mailing of notice thereof to the employer's last known address or in the absence of mailing, within fifteen days after the delivery of such notice, further appeal is initiated pursuant to Subsection D of Section 51-1-8 NMSA 1978.

L. The contributions and excess claims premiums, together with interest and penalties thereon imposed by the Unemployment Compensation Law, shall not be assessed nor shall action to collect the same be commenced more than four years after a report showing the amount of the contributions was due. In the case of a false or fraudulent contribution report with intent to evade contributions or a willful failure to file a report of all contributions due, the contributions and excess claims premiums, together with interest and penalties thereon, may be assessed or an action to collect such contributions may be begun at any time. Before the expiration of such period of limitation, the employer and the secretary may agree in writing to an extension thereof and the period so agreed on may be extended by subsequent agreements in writing. In any case where the assessment has been made and action to collect has been commenced within four years of the due date of any contribution, excess claims premium, interest or penalty, including the filing of a warrant of lien by the secretary pursuant to Section 51-1-36 NMSA 1978, such action shall not be subject to any period of limitation.

M. The secretary shall correct any error in the determination of an employer's rate of contribution during the calendar year to which the erroneous rate applies, notwithstanding that notification of the employer's rate of contribution may have been issued and contributions paid pursuant to the notification. Upon issuance by the division of a corrected rate of contribution, the employer shall have the same rights to review and redetermination as provided in Subsection J of this section.

N. Any interest required to be paid on advances to this state's unemployment compensation fund under Title 12 of the Social Security Act shall be paid in a timely manner as required under Section 1202 of Title 12 of the Social Security Act and shall not be paid, directly or indirectly, by the state from amounts in the state's unemployment compensation fund.

O. As used in this section:

(1) "annual payroll" means the total taxable amount of remuneration from an employer for employment during a twelve-month period ending on a computation date;

(2) "base-period employers" means the employers of an individual during the individual's base period;

(3) "base-period wages" means the wages of an individual for insured work during the individual's base period on the basis of which the individual's benefit rights were determined;

(4) "common ownership" means that two or more businesses are substantially owned, managed or controlled by the same person or persons;

(5) "computation date" for each calendar year means the close of business on June 30 of the preceding calendar year;

(6) "employing enterprise" means a business activity engaged in by a contributing employing unit in which one or more persons have been employed within the current or the three preceding calendar quarters. An "employing enterprise" includes the employer's work force;

(7) "experience history" means the benefit charges and payroll experience of the employing enterprise;

(8) "knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved;

(9) "predecessor" means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise;

(10) "successor" means any person that acquires an employing enterprise and continues to operate such business entity; and

(11) "violates or attempts to violate" includes an intent to evade, a misrepresentation or a willful nondisclosure.

History: Laws 2013, ch. 133, § 3.

ANNOTATIONS

Repeals and reenactments. *— Laws 2013, ch.133, § 3 repeals 51-1-11 NMSA 1978, as enacted by Laws 2003, ch. 47, § 11 and amended by Laws 2013, ch. 133, § 2, and enacts a new section, effective January 1, 2015.*

51-1-12. Penalty; late payment of contributions.

The rate of contribution of an employer shall in no case be raised as a penalty for, or as a result of, the late filing of any notice, report or payment of contributions required under Section 51-1-9 NMSA 1978 or any regulations promulgated thereunder. Effective as to all wages for employment paid on and after July 1, 1965, quarterly wage and contribution reports and contribution payments, if not filed on or before the due date as prescribed by the secretary, shall be subject to the following penalties:

A. if the required report for any calendar quarter is not filed within ten days after due date, a penalty of fifty dollars ($50.00) is to be paid by the employer;

B. if the contributions due on such report are not paid in full within ten days after due date, an additional penalty of five percent but not less than twenty-five dollars ($25.00) is to be paid by the employer on any such contributions remaining unpaid;

C. if any payment required to be made by the Unemployment Compensation Law [51-1-1 NMSA 1978] is attempted to be made by check which is not paid upon presentment, a penalty of twenty-five dollars ($25.00) shall be paid by the employer; and

D. in no case shall any penalty as herein provided or as imposed by this section prior to June 30, 1965 be assessed for any quarter prior to the six completed calendar quarters immediately preceding the quarter in which the employer shall be determined subject to the Unemployment Compensation Law; and in no case shall a penalty for late reporting or late payment of contribution be imposed if, in the opinion of the secretary, an employer's late reporting, late payment of contribution, or both, was occasioned by circumstances beyond the control of the employer, who in good faith exercised reasonable diligence in an effort to comply with the reporting and contribution payment provisions of the Unemployment Compensation Law.

History: 1953 Comp., § 59-9-7.3, enacted by Laws 1965, ch. 192, § 1; 1979, ch. 280, § 19; 1981, ch. 354, § 7; 1991, ch. 122, § 7.

ANNOTATIONS

The 1991 amendment, effective April 3, 1991, substituted "fifty dollars ($50.00)" for "five dollars ($5.00)" in Subsection A; substituted "twenty-five dollars ($25.00)" for "five dollars ($5.00)" in Subsection B; inserted present Subsection C; redesignated former Subsection C as present Subsection D; and made a related stylistic change.

Repeals and reenactments. — Laws 1965, ch. 192, § 1, repealed former 59-9-7.3, 1953 Comp., relating to penalty and late payment of contribution, and enacted a new 59-9-7.3, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare § 205.

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

Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this section. For the purpose of this section, a "nonprofit organization" is an organization, or group of organizations, described in Paragraph (8) of Subsection F of Section 51-1-42 NMSA 1978.

A. Any nonprofit organization which, pursuant to Paragraph (8) of Subsection F of Section 51-1-42 NMSA 1978, is subject to the Unemployment Compensation Law [51-1-1 NMSA 1978], shall pay contributions under the provisions of Section 51-1-9 NMSA 1978, unless it elects, in accordance with this subsection, to pay to the division for the fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment that begin during the effective period of such election.

(1) Any nonprofit organization that becomes subject to the Unemployment Compensation Law after January 1, 1972 may elect to become liable for payments in lieu of contributions for a period of not less than two taxable years by filing a written notice of its election with the division not later than thirty days immediately following the date subjectivity is determined.

(2) Any nonprofit organization which makes an election in accordance with Paragraph (1) of this subsection will continue to be liable for payments in lieu of contributions until it files with the division a written notice terminating its election not later than thirty days prior to the beginning of the taxable year for which such termination shall first be effective.

(3) Any nonprofit organization that has been paying contributions under the Unemployment Compensation Law may change to a reimbursable basis by filing with the division written notice of its election not later than thirty days prior to the beginning of the taxable year for which its election shall first be effective. Such election shall not be terminated by the organization for the following two taxable years.

(4) The division, in accordance with such regulations as the secretary may prescribe, shall notify each nonprofit organization of any determination which it may make of the organization's status as an employer and of the effective date of any election which the organization makes and of any termination of such election. Such determination shall be subject to reconsideration, appeal and review in accordance with regulations of the secretary governing appeals by employers of their liability under Section 51-1-9 NMSA 1978.

B. Payments in lieu of contributions shall be made in accordance with the provisions of this subsection.

(1) At the end of each calendar quarter, or at the end of any other period as determined by the secretary, the division shall bill each nonprofit organization, or group of such organizations, which has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during such quarter or other prescribed period that is attributable to service in the employ of such organization.

(2) Effective with the calendar quarter beginning January 1, 1987, and each succeeding calendar quarter, each employer that is liable for payments in lieu of contributions, including governmental entities, shall pay to the division an amount equal to twenty-five percent of the total benefit charges made to each such employer during the four calendar quarters ending the preceding June 30. Such payments shall be made on or before the tenth day of the first month of each calendar quarter.

(3) In the event that any employer liable for making payments in lieu of contributions incurred no benefit charges during the four calendar quarters ending the preceding June 30, the employer shall pay to the division, each calendar quarter, an amount equal to one-eighth of one percent of the employer's annual taxable wages paid for such period for employment as defined in Subsection F of Section 51-1-42 and in Section 51-1-44 NMSA 1978 as estimated by the secretary. Such payments shall be paid on or before the tenth day of the first month of the calendar quarter.

(4) For each calendar quarter, the secretary shall determine the amount paid by each employer subject to payment in lieu of contributions and the amount of benefits charged to such employer's account. Each employer who has made payments in an amount less than the amount of benefits charged to the employer's account shall pay the balance of the amount charged within twenty-five days of the notification by the division. If the quarterly payment made by an employer pursuant to Paragraph (2) of this

subsection exceeds the amount of benefits charged to such employer's account, the excess payment shall be refunded on a quarterly basis.

(5) Payments made by any nonprofit organization under the provisions of this subsection shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

C. Collection of past due payments of amounts in lieu of contributions shall be as provided in this subsection.

(1) Past due payments of amounts in lieu of contributions are subject to the same penalties that are applied to past due contributions under Section 51-1-12 NMSA 1978.

(2) The provisions of Section 51-1-36 NMSA 1978 shall apply to all contributions or payments of amounts in lieu of contributions for which a nonprofit organization becomes liable pursuant to an election made under Subsection A of this section.

(3) Any nonprofit organization that elects to become liable for payments in lieu of contributions shall be required, within thirty days after the effective date of its election, to execute and file with the secretary a surety bond or such other surety undertaking or security, which may consist of a cash security deposit in a form approved by the secretary. With the consent of the secretary, a cash security deposit may be made in three annual installments. This paragraph shall not apply to:

(a) group accounts established pursuant to Subsection E of this section or any member of such a group account; and

(b) governmental entities as defined in Subsection B of Section 51-1-44 NMSA 1978; except that all instrumentalities of governmental entities shall be included as part of the controlling governmental entity or entities for purposes of determining liability for the payment of unemployment compensation contributions.

(4) The amount of the surety bond or other surety undertaking or security required by Paragraph (4) of this subsection shall be equal to 2.7 percent of contribution times the organization's taxable wages paid for employment as defined in Subsection F of Section 51-1-42 and Section 51-1-44 NMSA 1978, for the four calendar quarters immediately preceding the effective date of the election. If the nonprofit organization did not pay wages in each of the preceding four calendar quarters, the amount of surety bond required shall be determined by the secretary based upon an estimate of taxable wages to be paid during the succeeding four calendar quarters. Thereafter, the amount of the surety bond shall be adjusted on the basis of the organization's actual taxable payroll.

(5) If any nonprofit organization that is not required to execute and file a surety bond or other security is delinquent in making payments in lieu of contributions as required under Subsection B of this section, or if any nonprofit organization that is required to execute and maintain a surety bond or other security fails to do so or is delinquent in making payments as required under Subsection B of this section, the secretary may terminate the organization's election to make payments in lieu of contributions effective as of the beginning of the next taxable year and the termination shall be effective until the organization executes and files with the department a surety bond or other security as required.

(6) Any bond or other surety undertaking or security required under this subsection shall be in force for a period of not less than two taxable years and shall be renewed with the approval of the secretary at such times as the secretary may prescribe.

D. Each employer who is liable for payments in lieu of contributions shall pay to the division for the fund the amount of regular benefits plus the amount of one-half of extended benefits paid that are attributable to service in the employ of that employer in accordance with the provisions of Subsection B of Section 51-1-11 NMSA 1978, except that any employer that is liable for payments in lieu of contributions shall not be relieved of charges for benefits paid to an individual who was separated from the employ of that employer for any reason.

E. Two or more employers who have become liable for payments in lieu of contributions, in accordance with the provisions of Subsection A of this section, Subsection B of Section 51-1-14 NMSA 1978 and Section 51-1-16 NMSA 1978, may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each application shall identify and authorize a group representative to act as the group's agent for the purpose of this subsection. Upon its approval of the application, the division shall establish a group account for the employers effective as of the beginning of the calendar quarter in which it receives the application and shall notify the group's representative of the effective date of the account. The account shall remain in effect for not less than two years and thereafter until terminated at the discretion of the secretary or upon application by the group. Each group account shall be liable for the prepayment of payments in lieu of contributions as provided in Paragraphs (2), (3) and (4) of Subsection B of this section. Each member of the group account shall be liable to the division for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in the quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment for such member during the quarter bear to the total wages paid during the quarter for service performed in the employ of all members of the group. The secretary shall prescribe regulations as he deems necessary with respect to applications for establishment, maintenance and termination of group accounts that are authorized by this subsection, for addition of new members to, and withdrawal of active members from, the accounts and for the determination of the

amounts that are payable under this subsection by members of the group and the time and manner of payments.

F. Each group account may apportion liability for amounts due to the group representative as the group shall determine.

History: 1953 Comp., § 59-9-7.4, enacted by Laws 1971, ch. 209, § 4; 1973, ch. 216, § 3; 1975, ch. 351, § 3; 1977, ch. 321, § 4; 1979, ch. 280, § 20; 1981, ch. 354, § 8; 1987, ch. 63, § 3; 1991, ch. 122, § 8.

ANNOTATIONS

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section; deleted "unemployment" preceding "fund" in the first sentence in Subsection A; in Paragraph (3) of Subsection B, substituted "one-eighth" for "one-fourth" preceding "of one percent" in the first sentence and deleted the former second sentence, which read "If such employer has had employment subject to benefit charges for a period of three years ending on the preceding June 30, but has incurred no benefit charges during the same three-year period, such employer shall pay to the department, each calendar quarter, an amount equal to one-eighth of one percent of the employer's annual taxable wages as estimated by the secretary"; in Paragraph (4) of Subsection B, substituted "quarter" for "year" near the beginning of the first sentence and rewrote the final sentence, which read "If the total payments made by an employer exceed the amount of benefits charged to such employer's account, the excess payments shall be credited as partial payment against future payments due or, if requested by the employer, shall be refunded"; and made minor stylistic changes.

Exemption from payment of contributions by charitable corporations was to be liberally construed; exemption was determined by use of property and not by declared objects and purposes of its owner; in ascertaining whether lodge was exempt, fact that half of its income was consumed in operating expenses was of no consequence; finding that lodge was organized and operated exclusively for charitable purposes was supported by evidence that the half of its income not needed for operating expenses was spent for charities and that its bar, reading room and bowling alley were conducive to attendance and helped produce funds which were expended for charity. Santa Fe Lodge No. 460 v. Emp't Sec. Comm'n, 49 N.M. 149, 159 P.2d 312 (1945).

Determination of member's liability to group account. — The formula contained in Subsection E did not apply where the membership of a group member was terminated but the group itself had not sought termination of its account with the department; instead, Subsection B was applied to determine the amount of the group member's liability to the group account. N.M. Hosp. Ass'n v. A.T. & S.F. Mem'l Hosps., 105 N.M. 508, 734 P.2d 748 (1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation § 40.

81 C.J.S. Social Security and Public Welfare §§ 182, 205.

51-1-13. Financing benefits paid to employees of nonprofit organizations. (Effective January 1, 2015.)

Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this section. For the purpose of this section, a "nonprofit organization" is an organization or group of organizations described in Paragraph (8) of Subsection F of Section 51-1-42 NMSA 1978.

A. Any nonprofit organization that, pursuant to Paragraph (8) of Subsection F of Section 51-1-42 NMSA 1978, is subject to the Unemployment Compensation Law shall pay contributions in accordance with the provisions of Section 51-1-9 NMSA 1978, unless it elects, in accordance with this subsection, to pay to the division for the fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment that begin during the effective period of such election.

(1) Any nonprofit organization that becomes subject to the Unemployment Compensation Law after January 1, 1972 may elect to become liable for payments in lieu of contributions for a period of not less than two taxable years by filing a written notice of its election with the division not later than thirty days immediately following the date subjectivity is determined.

(2) Any nonprofit organization that makes an election in accordance with Paragraph (1) of this subsection will continue to be liable for payments in lieu of contributions until it files with the division a written notice terminating its election not later than thirty days prior to the beginning of the taxable year for which such termination shall first be effective.

(3) Any nonprofit organization that has been paying contributions under the Unemployment Compensation Law may change to a reimbursable basis by filing with the division written notice of its election not later than thirty days prior to the beginning of the taxable year for which its election shall first be effective. Such election shall not be terminated by the organization for the following two taxable years.

(4) The division, in accordance with such regulations as the secretary may prescribe, shall notify each nonprofit organization of any determination that it may make of the organization's status as an employer and of the effective date of any election that the organization makes and of any termination of such election. Such determination shall be subject to reconsideration, appeal and review in accordance with regulations of the secretary governing appeals by employers of their liability under Section 51-1-9 NMSA 1978.

B. Payments in lieu of contributions shall be made in accordance with the provisions of this subsection.

(1) At the end of each calendar quarter or at the end of any other period as determined by the secretary, the division shall bill each nonprofit organization or group of such organizations that has elected to make payments in lieu of contributions for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during such quarter or other prescribed period that is attributable to service in the employ of such organization.

(2) Effective with the calendar quarter beginning January 1, 1987 and each succeeding calendar quarter, each employer that is liable for payments in lieu of contributions, including governmental entities, shall pay to the division an amount equal to twenty-five percent of the total benefit charges made to each such employer during the four calendar quarters ending the preceding June 30. Such payments shall be made on or before the tenth day of the first month of each calendar quarter.

(3) In the event that any employer liable for making payments in lieu of contributions incurred no benefit charges during the four calendar quarters ending the preceding June 30, the employer shall pay to the division, each calendar quarter, an amount equal to one-eighth of one percent of the employer's annual taxable wages paid for such period for employment as defined in Subsection F of Section 51-1-42 NMSA 1978 and Section 51-1-44 NMSA 1978 as estimated by the secretary. Such payments shall be paid on or before the tenth day of the first month of the calendar quarter.

(4) For each calendar quarter, the secretary shall determine the amount paid by each employer subject to payment in lieu of contributions and the amount of benefits charged to such employer. Each employer who has made payments in an amount less than the amount of benefits charged to the employer shall pay the balance of the amount charged within twenty-five days of the notification by the division. If the quarterly payment made by an employer pursuant to Paragraph (2) of this subsection exceeds the amount of benefits charged to such employer, the excess payment shall be refunded on a quarterly basis.

(5) Payments made by any nonprofit organization under the provisions of this subsection shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the organization.

C. Collection of past due payments of amounts in lieu of contributions shall be as provided in this subsection.

(1) Past due payments of amounts in lieu of contributions are subject to the same penalties that are applied to past due contributions pursuant to Section 51-1-12 NMSA 1978.

(2) The provisions of Section 51-1-36 NMSA 1978 shall apply to all contributions or payments of amounts in lieu of contributions for which a nonprofit organization becomes liable pursuant to an election made pursuant to Subsection A of this section.

(3) Any nonprofit organization that elects to become liable for payments in lieu of contributions shall be required, within thirty days after the effective date of its election, to execute and file with the secretary a surety bond or such other surety undertaking or security, which may consist of a cash security deposit, in a form approved by the secretary. With the consent of the secretary, a cash security deposit may be made in three annual installments. This paragraph shall not apply to:

(a) group accounts established pursuant to Subsection E of this section or any member of such a group account; or

(b) governmental entities as defined in Subsection B of Section 51-1-44 NMSA 1978; except that all instrumentalities of governmental entities shall be included as part of the controlling governmental entity or entities for purposes of determining liability for the payment of unemployment compensation contributions.

(4) The amount of the surety bond or other surety undertaking or security required by Paragraph (3) of this subsection shall be equal to 2.7 percent of contribution times the organization's taxable wages paid for employment, as defined in Subsection F of Section 51-1-42 NMSA 1978 and Section 51-1-44 NMSA 1978, for the four calendar quarters immediately preceding the effective date of the election. If the nonprofit organization did not pay wages in each of the preceding four calendar quarters, the amount of surety bond required shall be determined by the secretary based upon an estimate of taxable wages to be paid during the succeeding four calendar quarters. Thereafter, the amount of the surety bond shall be adjusted on the basis of the organization's actual taxable payroll.

(5) If any nonprofit organization that is not required to execute and file a surety bond or other security is delinquent in making payments in lieu of contributions as required pursuant to Subsection B of this section or if any nonprofit organization that is required to execute and maintain a surety bond or other security fails to do so or is delinquent in making payments as required pursuant to Subsection B of this section, the secretary may terminate the organization's election to make payments in lieu of contributions effective as of the beginning of the next taxable year and the termination shall be effective until the organization executes and files with the department a surety bond or other security as required.

(6) Any bond or other surety undertaking or security required under this subsection shall be in force for a period of not less than two taxable years and shall be renewed with the approval of the secretary at such times as the secretary may prescribe.

D. Each employer who is liable for payments in lieu of contributions shall pay to the division for the fund the amount of regular benefits plus the amount of one-half of extended benefits paid that are attributable to service in the employ of that employer in accordance with the provisions of Subsection A of Section 51-1-11 NMSA 1978, except that any employer that is liable for payments in lieu of contributions shall not be relieved of charges for benefits paid to an individual who was separated from the employ of that employer for any reason.

E. Two or more employers who have become liable for payments in lieu of contributions, in accordance with the provisions of Subsection A of this section, Subsection B of Section 51-1-14 NMSA 1978 and Section 51-1-16 NMSA 1978, may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of such employers. Each application shall identify and authorize a group representative to act as the group's agent for the purpose of this subsection. Upon its approval of the application, the division shall establish a group account for the employers effective as of the beginning of the calendar quarter in which it receives the application and shall notify the group's representative of the effective date of the account. The account shall remain in effect for not less than two years and thereafter until terminated at the discretion of the secretary or upon application by the group. Each group account shall be liable for the prepayment of payments in lieu of contributions as provided in Paragraphs (2), (3) and (4) of Subsection B of this section. Each member of the group account shall be liable to the division for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in the quarter that are attributable to service performed in the employ of all members of the group, as the total wages paid for service in employment for such member during the quarter bear to the total wages paid during the quarter for service performed in the employ of all members of the group. The secretary shall prescribe regulations as the secretary deems necessary with respect to applications for establishment, maintenance and termination of group accounts that are authorized by this subsection, for addition of new members to and withdrawal of active members from the accounts and for the determination of the amounts that are payable under this subsection by members of the group and the time and manner of payments.

F. Each group account may apportion liability for amounts due to the group representative as the group shall determine.

History: 1953 Comp., § 59-9-7.4, enacted by Laws 1971, ch. 209, § 4; 1973, ch. 216, § 3; 1975, ch. 351, § 3; 1977, ch. 321, § 4; 1979, ch. 280, § 20; 1981, ch. 354, § 8; 1987, ch. 63, § 3; 1991, ch. 122, § 8; 2013, ch. 133, § 4.

ANNOTATIONS

The 2013 amendment, *effective January 1, 2015, provided for reconciling the contributions and benefits charged to employers; in Paragraph (4) of Subsection B, in the first sentence, after "benefits charged to such", deleted "employer's account" and*

added "employer", in the second sentence, after "benefits charged to the", deleted "employer's account" and added "employer", and in the third sentence, after "benefits charged to such", deleted "employer's account" and added "employer".

51-1-14. Financing benefits and extended benefits paid to employees of governmental entities.

A. State agencies shall make payments in lieu of contributions in accordance with the provisions of Sections 51-1-15 and 51-1-45 NMSA 1978.

B. Local public bodies shall finance benefits paid to an individual based on services performed in their employ by:

(1) participating in the local public body compensation reserve fund;

(2) paying contributions to the department; or

(3) making an election to become liable for payments in lieu of contributions in accordance with the provisions of Subsection B or E of Section 51-1-13 NMSA 1978.

History: 1953 Comp., § 59-9-7.5, enacted by Laws 1977, ch. 227, § 1; 1979, ch. 280, § 21.

ANNOTATIONS

Cross references. — As to applicability of act, see 51-1-47 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 183, 212.

51-1-15. Risk management division; payments in lieu of contributions.

A. Benefits paid to employees of governmental entities covered by the provisions of state government unemployment compensation reserve fund or the local public body unemployment compensation reserve fund shall be financed as follows:

(1) for each state agency, the risk management division of the general services department shall pay from the state government unemployment compensation reserve fund to the department for the unemployment fund an amount equal to the amount of regular benefits and extended benefits paid that is attributable to service in the employ of such state agency to individuals for weeks of unemployment; and

(2) for each local public body covered by the local public body unemployment compensation reserve fund, the risk management division of the general services

department shall pay from the local public body unemployment compensation reserve fund to the department for the unemployment fund an amount equal to the amount of regular benefits and extended benefits paid that is attributable to service in the employ of such local public body to individuals for weeks of unemployment.

B. Payments in lieu of contributions shall be made at the end of each calendar quarter. Payment of any bill rendered shall be made by the risk management division not later than thirty days after such bill was mailed or otherwise delivered by the department to the risk management division and to the employer governmental entity unless there has been an application for review and redetermination of the amount due.

C. Payments made by the risk management division under the provisions of this section shall not be deductible, in whole or in part, from the remuneration of individuals in the employ of the governmental entity.

D. Past due payments of amounts in lieu of contributions are subject to the same penalties that are applied to past due contributions under Section 51-1-12 NMSA 1978. The provisions of Section 51-1-36 NMSA 1978 shall apply to all contributions or payments of amounts in lieu of contributions for which the risk management division becomes liable.

E. On the effective date of this act, the secretary shall establish the following group accounts:

(1) "the state account," for funds received from the state government unemployment compensation reserve fund; and

(2) "the local public body account," for funds received from the local public body unemployment compensation reserve fund.

F. Notice of claims for governmental entities participating in the state government unemployment compensation reserve fund or the local public body unemployment compensation reserve fund shall be given to the risk management division. Upon written request, the department shall provide to any governmental entity participating in the state government unemployment compensation reserve fund or the local public body unemployment compensation reserve fund a copy of the notice of claim to the last employer.

History: 1953 Comp., § 59-9-7.6, enacted by Laws 1977, ch. 227, § 2; 1978, ch. 131, § 1; 1979, ch. 280, § 22; 1983, ch. 301, § 78.

ANNOTATIONS

Cross references. — As to state government unemployment compensation reserve fund, see 51-1-45 NMSA 1978.

As to local public body unemployment compensation reserve fund, see 51-1-46 NMSA 1978.

As to applicability of provisions to government entities, see 51-1-47 NMSA 1978.

51-1-16. Financing benefits to employees of local public bodies not participating in the local public body unemployment compensation reserve fund.

A. Any local public body may elect to make payments in lieu of contributions by paying to the department in accordance with the provisions of the Unemployment Compensation Law [51-1-1 NMSA 1978] for the unemployment fund an amount equal to the amount of regular benefits and extended benefits paid that is attributable to service in the employ of such local public body to individuals for weeks of unemployment.

B. Any local public body electing to make payments in lieu of contributions shall be:

(1) subject to the provisions of Subsections B and E of Section 51-1-13 NMSA 1978 governing the payment of contributions and formation of group accounts by nonprofit organizations; and

(2) required to make an election to become liable for payments in lieu of contributions for a period of not less than two taxable years by filing a written notice of its election with the department.

C. Payments made by any local public body under the provisions of this section shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the local public body.

D. The secretary shall have the authority, in accordance with established principles of law, to determine what constitutes a separate local public body for the purposes of this section.

E. Local public bodies electing to make payments in lieu of contributions through a group account, pursuant to Subsection E of Section 51-1-13 NMSA 1978, may authorize the group agent to invest money deposited in the group account. Money deposited in the group account and any income from such account shall be held in trust and deposited in a segregated account. Money in the account may be invested only in legal investments for the state permanent fund. Money in the account shall be used for the purpose of the account, including but not limited to paying the cost of benefits, penalties and interest and the cost of administering the account.

History: 1953 Comp., § 59-9-7.7, enacted by Laws 1977, ch. 227, § 3; 1978, ch. 131, § 2; 1979, ch. 280, § 23.

ANNOTATIONS

Cross references. — As to applicability of provisions to government entities, see 51-1-47 NMSA 1978.

51-1-17. Budgets; governmental entities.

A. The department of finance and administration shall not approve the budget of any governmental entity which has failed to budget sufficient revenues to pay unemployment compensation benefits as required by the Unemployment Compensation Law [51-1-1 NMSA 1978].

B. The risk management division of the general services department annually on or before April 15 shall prescribe schedules of minimum rates per employee to be budgeted by governmental entities for the succeeding fiscal year. Rate schedules prescribed by the risk management division shall take into account the prior experience of the governmental entity, the amount of reserves the governmental entity has on deposit with the department of finance and administration or in a separate account earmarked for the payment of unemployment compensation claims and, if the governmental entity participates in the state government unemployment compensation reserve fund or the local public body unemployment compensation reserve fund, the balance in the fund.

History: 1953 Comp., § 59-9-7.8, enacted by Laws 1977, ch. 227, § 4; 1978, ch. 131, § 3; 1983, ch. 301, § 79.

ANNOTATIONS

Cross references. — As to applicability of provisions to government entities, see 51-1-47 NMSA 1978.

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

A. Except as otherwise provided in Subsection C of this section, any employing unit that is or becomes an employer subject to the Unemployment Compensation Law [51-1-1 NMSA 1978] within any calendar year shall be subject to the Unemployment Compensation Law during the whole of such calendar year.

B. Except as otherwise provided in Subsection C of this section, an employing unit shall cease to be an employer subject to the Unemployment Compensation Law only as of January 1 of any calendar year if it files with the department, between January 1 and March 15 of the year in which the employing unit desires termination of coverage, a written application for termination of coverage and the secretary finds:

(1) that there was no calendar quarter within the preceding calendar year within which such employing unit paid wages for employment amounting to four hundred fifty dollars ($450) or more or as otherwise provided in Paragraphs (6) and (7) of Subsection F of Section 51-1-42 NMSA 1978; and

(2) that there were no twenty different weeks within the preceding calendar year, whether or not such weeks were consecutive, within which such employing unit employed an individual in employment subject to the Unemployment Compensation Law. For the purpose of this subsection, the two or more employing units mentioned in Paragraphs (2) and (3) of Subsection E of Section 51-1-42 NMSA 1978 shall be treated as a single employing unit. For like cause or when the total experience history of a predecessor employing unit is transferred pursuant to Section 51-1-11 NMSA 1978 or when, in the opinion of the secretary, it is unlikely that an employing unit will have individuals in employment at any time in the future, termination of coverage may be granted on the secretary's own initiative; provided that due notice is given to the employing unit at its last address of record with the department. The provisions of this subsection shall not apply to any governmental unit.

C. An employing unit, not otherwise subject to the Unemployment Compensation Law, that files with the department its written election to become an employer subject hereto for not less than two calendar years shall, with the written approval of such election by the secretary, become an employer subject hereto to the same extent as all other employers, as of the date stated in such approval, and shall cease to be subject hereto as of January 1 of any calendar year subsequent to such two calendar years only if, between the dates of January 1 and March 15 of the year in which the employing unit desires termination of coverage, it has filed with the department a written notice to that effect or the secretary, on his own initiative, has given notice of termination of such coverage.

D. Any employing unit for which services that do not constitute employment, as defined in the Unemployment Compensation Law, are performed may file with the department a written election that all such services performed by individuals in its employ in one or more distinct establishments or places of business shall be deemed to constitute employment for all the purposes of the Unemployment Compensation Law for not less than two calendar years. Upon the written approval of such election by the secretary, such services shall be deemed to constitute employment subject to the Unemployment Compensation Law after the date stated in such approval. Such services shall cease to be deemed employment subject hereto as of January 1 of any calendar year subsequent to such two calendar years only if, between January 1 and March 15 of the year in which the employing unit desires termination of coverage, it has filed with the department a written notice to that effect, or the secretary, on his own initiative, has given notice of termination of such coverage.

E. The secretary may terminate the election of an employer or employing unit made pursuant to Subsection C or D of this section at any time the secretary determines that the employer or employing unit is not abiding by all the requirements of the Unemployment Compensation Law and the regulations issued pursuant thereto, or if the employer or employing unit that has made an election for coverage becomes delinquent in the payment of its contributions or payment in lieu of contributions, interest or penalties.

F. The secretary, on his own initiative or upon written notification from an employer, may suspend such employer's obligation for filing a quarterly wage and contribution report as provided in the Unemployment Compensation Law or any regulation issued pursuant thereto in any case where the employer has ceased to and does not in the immediate future expect to have individuals in employment; provided that this subsection shall not apply or be a bar to the collection of contributions, interest and penalties if, in fact, it is determined that the employer had an individual in employment subject to the Unemployment Compensation Law during the period covered by the suspension.

History: Laws 1936 (S.S.), ch. 1, § 8; 1937, ch. 129, § 4; 1939, ch. 175, § 4; 1941 Comp., § 57-808; Laws 1941, ch. 205, § 5; 1943, ch. 105, § 1; 1953 Comp., § 59-9-8; Laws 1971, ch. 209, § 5; 1973, ch. 216, § 4; 1977, ch. 321, § 5; 1978, ch. 165, § 3; 1979, ch. 280, § 24; 1985, ch. 31, § 3; 1998, ch. 91, § 4.

ANNOTATIONS

Cross references. — As to the definition of "department," see 51-1-2 NMSA 1978.

The 1998 amendment, effective July 1, 1998, added Subsection E and redesignated former Subsection E as Subsection F; in Subsection F, deleted "nor shall it" following "shall not apply", and made minor stylistic changes throughout the section.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 108 to 114.

51-1-19. Unemployment compensation fund.

A. There is hereby established as a special fund, separate and apart from all public money, or funds of this state, an "unemployment compensation fund", which shall be administered by the department exclusively for the purposes of this section. The fund shall consist of:

(1) all contributions collected and payments in lieu of contributions collected or due pursuant to the Unemployment Compensation Law;

(2) interest earned upon any money in the fund;

(3) any property or securities acquired through the use of money belonging to the fund;

(4) all earnings of such property or securities;

(5) all money received from the federal unemployment account in the unemployment trust fund in accordance with Title 12 of the Social Security Act, as amended;

(6) all money credited to this state's account in the unemployment trust fund pursuant to Section 903 of the Social Security Act, as amended;

(7) all money received or due from the federal government as reimbursements pursuant to Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and

(8) all money received for the fund from any other source. All money in the fund shall be mingled and undivided.

B. The state treasurer shall be the treasurer and custodian of the fund and shall administer the fund in accordance with the directions of the department and shall issue checks upon it in accordance with such regulations as the secretary may prescribe. The state treasurer shall maintain, within the fund, three separate accounts:

(1) a clearing account;

(2) an unemployment trust fund account; and

(3) a benefit account.

C. All money payable to the fund upon receipt thereof by the department shall be forwarded to the treasurer, who shall immediately deposit it in the clearing account. Refunds payable pursuant to Sections 51-1-36 and 51-1-42 NMSA 1978 shall be paid from the clearing account or the benefit account upon checks issued by the treasurer under the direction of the department. After clearance thereof, all money in the clearing account, except as herein otherwise provided, shall be immediately deposited with the secretary of the treasury of the United States to the credit of the account of this state in the unemployment trust fund, established and maintained pursuant to Section 904 of the act of congress known as the Social Security Act, as amended (42 U.S.C. Section 1104), any provisions of law in this state relating to the deposits, administration, release or disbursements of money in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all money requisitioned from this state's account in the unemployment trust fund. Except as herein otherwise provided, money in the clearing and benefit accounts may be deposited by the treasurer, under the direction of the secretary, in any bank or public depository in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund. Money in the clearing and benefit accounts shall not be commingled with other state funds but shall be maintained in separate accounts on the books of the depository.

D. All of the money not deposited in the treasury of the United States shall be subject to the general laws applicable to the deposit of public money in the state; and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of this state.

E. The state treasurer shall be liable on the state treasurer's official bond for the faithful performance of duties in connection with the unemployment compensation fund provided for under this section. The liability on the official bond of the state treasurer shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to the liability of any separate bond existent on the effective date of this provision or that may be given in the future. All sums recovered for losses sustained by the fund shall be deposited therein.

F. All money in the clearing account established under this section is hereby appropriated for the purpose of making refunds pursuant to Sections 51-1-36 and 51-1-42 NMSA 1978, and all money in the clearing account not needed for the purpose of making the refunds shall be immediately paid to the secretary of the treasury of the United States to the credit of the account of this state in the unemployment trust fund, and the money in the unemployment trust fund is hereby appropriated for the purposes of this section.

G. Money shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and for the payment of refunds pursuant to Sections 51-1-36 and 51-1-42 NMSA 1978 in accordance with regulations prescribed by the secretary, except that money credited to this state's account pursuant to Section 903 of the Social Security Act, as amended, shall be used exclusively as provided in Subsection H of this section. The secretary shall, from time to time, requisition from the unemployment trust fund such amounts not exceeding the amounts standing to this state's account therein, as the secretary deems necessary for the payment of such benefits and refunds for a reasonable future period. Upon receipt thereof, the treasurer shall deposit such money in the benefit account and shall issue checks for the payment of benefits solely from such benefit account. Expenditures of such money in the benefit account and refunds from the benefit account or the clearing account shall not be subject to any provisions of law requiring specific appropriations or other formal release by state officers of money in their custody. All money shall be withdrawn from the fund only upon a warrant issued by the department or its duly authorized agent upon the treasurer, and the treasurer upon receipt of such warrants shall issue a check against the fund in accordance with the warrant of the secretary. Any balance of money requisitioned from the unemployment trust fund that remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for, the payment of benefits and refunds during succeeding periods, or in the discretion of the secretary, shall be redeposited with the secretary of the treasury of the United States, to the credit of this state's account in the unemployment trust fund, as provided in Subsection C of this section. All money in the benefit account provided for hereinabove is hereby appropriated for the payment of benefits and refunds as provided herein.

H. Money credited to the account of this state in the unemployment trust fund by the secretary of the treasury of the United States pursuant to Section 903 of the Social Security Act may be requisitioned from this state's account or used only for:

(1) the payment of benefits pursuant to Subsection G of this section; and

(2) the payment of expenses incurred for the administration of the Unemployment Compensation Law and the federal Wagner-Peyser Act; provided that any money requisitioned and used for the payment of expenses incurred for the administration of the Unemployment Compensation Law and the federal Wagner-Peyser Act must be authorized by the enactment of a specific appropriation by the legislature that:

(a) specifies the purpose for which such money is appropriated and the amounts appropriated therefor;

(b) limits the period within which such money may be obligated to a period ending not more than two years after the date of the enactment of the appropriation law, except for amounts distributed to the state of New Mexico on March 13, 2002 pursuant to Section 209 of the federal Temporary Extended Unemployment Compensation Act of 2002;

(c) limits the amount that may be obligated to an amount that does not exceed the amount by which the aggregate of the amounts credited to the account of this state pursuant to Section 903 of the Social Security Act exceeds the aggregate of the amounts used by the state pursuant to this subsection and charged against the amounts transferred to the account of this state; and

(d) notwithstanding the provisions of Paragraph (1) of this subsection, money credited with respect to federal fiscal years 1999, 2000 and 2001 shall be used only for the administration of the Unemployment Compensation Law.

I. Amounts credited to this state's account in the unemployment trust fund under Section 903 of the Social Security Act that are obligated for administration shall be charged against transferred amounts at the exact time the obligation is entered into. The appropriation, obligation and expenditure or other disposition of money appropriated under Subsection H of this section shall be accounted for in accordance with standards established by the United States secretary of labor.

J. Money appropriated under Subsection H of this section for payment of expenses of administration shall be requisitioned as needed for payment of the obligations incurred under such appropriations and, upon requisition, shall be deposited in the unemployment compensation administration fund but, until expended, shall remain a part of the unemployment compensation fund for use only in accordance with the conditions specified in Subsection H of this section, notwithstanding any provision of Section 51-1-34 NMSA 1978. Any money so deposited that will not be expended shall be returned promptly to the account of the state in the unemployment trust fund.

K. The provisions of Subsections A through J of this section to the extent that they relate to the unemployment trust fund, shall be operative only so long as such

unemployment trust fund continues to exist and so long as the secretary of the treasury of the United States continues to maintain for this state a separate book account of all funds deposited therein by the state for benefit purposes, together with this state's proportionate share of the earnings of such unemployment trust fund from which no other state is permitted to make withdrawals. If and when such unemployment trust fund ceases to exist, or such separate book account is no longer maintained, all money, properties or securities therein belonging to the unemployment compensation fund of this state shall be transferred to the treasurer of the unemployment compensation fund, who shall hold, invest, transfer, sell, deposit and release such money, properties or securities in a manner approved by the secretary, in accordance with the provisions of this section; provided that such money shall be invested in the following readily marketable classes of securities; bonds or other interest-bearing obligations of the United States and of the state; and provided further that such investment shall at all times be so made that all the assets of the fund shall always be readily convertible into cash when needed for the payment of benefits. The treasurer shall dispose of securities or other properties belonging to the unemployment compensation fund only under the direction of the secretary.

History: Laws 1936 (S.S.), ch. 1, § 9; 1939, ch. 175, § 5; 1941 Comp., § 57-809; Laws 1941, ch. 205, § 6; 1947, ch. 209, § 4; 1953 Comp., § 59-9-9; Laws 1959, ch. 342, § 1; 1965, ch. 190, § 1; 1973, ch. 216, § 5; 1979, ch. 280, § 25; 1983, ch. 199, § 6; 1998, ch. 91, § 5; 2003, ch. 47, § 5; 2007, ch. 137, § 3; 2010, ch. 55, § 3.

ANNOTATIONS

Cross references. — As to unemployment compensation administration fund, see 51-1-34 NMSA 1978.

As to state investment council, see 6-8-1 NMSA 1978.

As to public depositaries, see 6-10-15 NMSA 1978 et seq.

As to state treasurer's bond, see 6-10-38 and 8-6-1 NMSA 1978.

Federal acts. — Title XII of the Social Security Act is compiled in 42 U.S.C. §§ 1321 to 1324. Sections 903 and 904 of the Social Security Act are compiled in 42 U.S.C. §§ 1103 and 1104. Section 204 of the Federal-State Extended (Unemployment) Compensation Act of 1970 is placed in a note under 26 U.S.C. § 3304. The Wagner-Peyser Act is codified as 29 U.S.C.S. § 49-49k.

The 2010 amendment, effective July 1, 2010, effective July 1, 2010, in Subsection A(1), deleted "except for contributions deposited into the state unemployment trust 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".

The 2007 amendment, effective July 1, 2007, provides that the unemployment compensation fund does not consist of contributions deposited into the state unemployment trust fund.

The 2003 amendment, effective March 19, 2003, inserted "Unemployment" following "Federal-State Extended" near the end of Subsection A(7); deleted "over" following "immediately paid" near the middle of Subsection F; inserted "and the federal Wagner-Peyser Act" following "Unemployment Compensation Law" twice in Subsection H(2); added "except for amounts distributed to the state of New Mexico on March 13, 2002 pursuant to Section 209 of the federal Temporary Extended Unemployment Compensation Act of 2002" at the end of Subsection H(2)(b); substituted "Paragraph" for "Subparagraph" near the beginning of Subsection H(2)(d); in Subsection K substituted "through" for "B, C, D, E, F, G, H, I and" following "Subsections A" and inserted "of this section" following "J" near the beginning.

Compiler's notes. — Laws 2003, ch. 47, § 13, appropriated two million five hundred ninety-two thousand four hundred one dollars ($2,592,401) from the Red Act distribution fund, consisting of funds made available to the state of New Mexico on March 13, 2002 pursuant to Section 209 of the federal Temporary Extended Unemployment Compensation Act of 2002, to the unemployment compensation administration fund for expenditure in fiscal years 2004 through 2007 to implement the provisions of this act. Any unexpended or unencumbered balance remaining at the end of fiscal year 2007 shall revert to the Reed Act distribution fund.

The 1998 amendment, effective July 1, 1998, designated Subsections C to F; redesignated former Subsections C and D as Subsections G and H; in Subsection G substituted "Subsection H" for "Subsection D" near the end of the first sentence, deleted "thereupon" following "warrants shall" in the fifth sentence, and substituted "Subsection C" for "Subsection B" in the sixth sentence; in Paragraph H(1), substituted "Subsection G" for Subsection C", rewrote Subparagraph H(2)(c) and added Subparagraph H(2)(d); designated Subsections I and J and rewrote the Subsections; redesignated former Subsection E as Subsection K and inserted "E, F, G, H, I and J" at the beginning and deleted "of America" following "United States"; and made minor stylistic changes throughout the section.

Three-year statute of limitations inapplicable to this section. — The contributions required to be paid under the provisions of this section are not "revenues" within the meaning of Section 30-1-8G NMSA 1978, which provides for a three-year statute of limitations for any crime in violation of a revenue law. Robinson v. Short, 93 N.M. 610, 603 P.2d 720 (1979) (decided under prior law).

Separate and apart from other public moneys. — Although this section states that unemployment compensation money is a "special fund separate and apart from all public moneys or funds of this state," these words, if they mean anything over and above what was already provided by other language of the act, mean that the fund shall be separate and apart from all other public moneys or funds of the state, since their

character as public moneys is not lost by calling them something else. 1939-40 Op. Att'y Gen. 39-3365.

Funds covered by public moneys provision. — All funds mentioned in this section, while in the custody of the state treasurer as ex-officio treasurer of the unemployment compensation commission (now employment security department), are covered by the Public Moneys Act (now Section 6-10-1 NMSA 1978 et seq.). 1939-40 Op. Att'y Gen. 39-3365.

Law reviews. — For comment, "Undocumented Aliens: Education, Employment and Welfare in the United States and in New Mexico," see 9 N.M.L. Rev. 99 (1978-79).

For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 3, 7.

Presumption or inference that accidental death of employee engaged in occupation of manufactoring or processing arose out of and in course of employment, 47 A.L.R.5th 801.

81 C.J.S. Social Security and Public Welfare §§ 152, 192, 238 to 241.

51-1-19.1. Repealed.

ANNOTATIONS

Repeals. — Laws 2010, ch. 55, § 6 repealed 51-1-19.1 NMSA 1978, as enacted by Laws 2007, ch. 137, § 4, relating to the state unemployment trust fund, effective July 1, 2010. For provisions of former section, *see* the 2009 NMSA 1978 on *NMONESOURCE.COM*.

51-1-20. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 280, § 54, repeals 51-1-20 NMSA 1978, relating to manpower development and training programs, effective July 1, 1979.

51-1-21. Seal; report.

The department shall adopt an official seal which shall be judicially noticed. Not later than December 1 of each year it shall submit to the governor a report covering the administration and operation of the Unemployment Compensation Law [51-1-1 NMSA 1978] for the preceding fiscal year ending June 30 and make recommendations for

amendments to that act as it deems proper. The report shall include a balance sheet of the money in the fund in which there shall be provided, if possible a reserve against liability in future years, to pay benefits in excess of the then current contributions, which reserves shall be set up by the secretary in accordance with accepted actuarial principles on the basis of statistics of employment, business activity and other relevant factors for the longest possible period.

History: 1953 Comp., § 59-9-11, enacted by Laws 1959, ch. 321, § 1; 1969, ch. 215, § 1; 1979, ch. 280, § 26.

ANNOTATIONS

Repeals and reenactments. — Laws 1959, ch. 321, § 1, repeals 59-9-11, 1953 Comp., relating to employment security commission, and enacted a new 59-9-11, 1953 Comp.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 213, 214, 268 to 270.

51-1-22. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 280, § 54, repeals 51-1-22 NMSA 1978, relating to regulations and general and special rules of the employment security commission, effective July 1, 1979.

51-1-23. Publication.

The department shall cause to be printed for distribution to the public the text of the Unemployment Compensation Law [51-1-1 NMSA 1978], regulations and general rules, annual reports to the governor and any other material deemed proper, and furnish such to any person upon application.

History: 1953 Comp., § 59-9-11.2, enacted by Laws 1959, ch. 321, § 3; 1979, ch. 280, § 27.

51-1-24. Repealed.

ANNOTATIONS

Repeals. — Laws 1979, ch. 280, § 54, repeals 51-1-24 NMSA 1978, relating to personnel within the employment security commission, effective July 1, 1979.

51-1-25. Advisory councils.

The secretary shall appoint a state advisory council composed in each case of men and women and including an equal number of employer and employee representatives who are representative because of their vocation, employment or affiliations, and such members representing the general public as the secretary designates. The council shall aid the department in formulating policies and discussing problems relating to the administration of the Unemployment Compensation Law [51-1-1 NMSA 1978] and in assuring impartiality and freedom for political influence in the solution of such problems. The secretary may also appoint industry or other special councils to perform appropriate services. Council members shall serve without compensation other than for wage loss sustained for attendance at formal meetings of the council or duly constituted committees. Members shall be reimbursed for any travel expense incurred in the same manner as employees of the department.

History: 1953 Comp., § 59-9-11.4, enacted by Laws 1959, ch. 321, § 5; 1979, ch. 280, § 28.

51-1-26. Employment stabilization.

With the advice and aid of advisory councils, the secretary shall:

A. take appropriate steps to reduce and prevent unemployment;

B. encourage and assist in the adoption of practical methods of vocational training, retraining and vocation guidance;

C. investigate, recommend, advise and assist in the establishment and operation by municipalities, counties, school districts and the state of reserves for public works to be used in times of business depression and unemployment;

D. promote the reemployment of unemployed workers throughout the state in every feasible way; and

E. carry on and publish the results of investigations and research studies.

History: 1953 Comp., § 59-9-11.5, enacted by Laws 1959, ch. 321, § 6; 1979, ch. 280, § 29.

51-1-27. Records and papers.

Each employing unit shall keep accurate work records for periods of time and containing information prescribed by regulation. The records shall be open to inspection and subject to being copied by the secretary at any reasonable time and as often as necessary. The secretary may require from any employing unit any sworn or unsworn reports with respect to persons employed by it which are deemed necessary for effective administration of the Unemployment Compensation Law [51-1-1 NMSA 1978].

History: 1953 Comp., § 59-9-11.6, enacted by Laws 1959, ch. 321, § 7; 1979, ch. 280, § 30.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare § 285.

51-1-28. Oaths and witnesses.

In discharging duties imposed by the Unemployment Compensation Law [51-1-1 NMSA 1978], [the] board of review or the secretary or his authorized representative has power to administer oaths and affirmations, take depositions, certify to official acts and issue subpoenas to compel attendance of witnesses and production of books, papers, correspondence, memoranda and other records deemed necessary as evidence in connection with a disputed claim or the administration of the Unemployment Compensation Law. Service of subpoenas may be made personally upon the party therein or, at the option of the secretary, by registered mail with return receipt request, addressed to the person to be served at his last know address. When service is made by registered mail the subpoena shall be posted not less than ten days prior to the return day. The registry return receipt of a person served by registered mail, accompanied by a certificate or affidavit of the person mailing the subpoena, constitutes proof of service.

History: 1953 Comp., § 59-9-11.7, enacted by Laws 1959, ch. 321, § 8; 1979, ch. 280, § 31.

ANNOTATIONS

Law reviews. — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L. Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 279, 286.

51-1-29. Enforcement of subpoenas; penalty.

In case of contumacy or refusal to obey a subpoena, the district court within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which the person guilty of contumacy or refusal to obey is found, resides or transacts business, upon application by the secretary or his authorized representative, has jurisdiction to issue an order requiring the person to appear before the secretary or his authorized representative to produce evidence if ordered or to give testimony touching the matter under investigation or in question. Failure to obey such order of the court may be punished by the court as contempt. Any person who without just cause fails or refuses to attend and testify, to answer any lawful inquiry or to produce books, papers,

correspondence, memoranda and other records, if it is in his power to do so, in obedience to a subpoena of the secretary shall be punished by a fine of not less than two hundred dollars ($200) or by imprisonment for not longer than sixty days, or both. Each day such violation continues is a separate offense.

History: 1953 Comp., § 59-9-11.8, enacted by Laws 1959, ch. 321, § 9; 1979, ch. 280, § 32.

ANNOTATIONS

Law reviews. — For note, "On Building Better Laws for New Mexico's Environment," see 4 N.M.L Rev. 105 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare § 270.

51-1-30. Protection against self-incrimination.

No person is excused from attending and testifying or from producing books, papers, correspondence, memoranda and other records before the secretary or his authorized representative in any cause or proceeding on the ground that testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to any penalty of forfeiture. No individual may be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he is compelled, after claiming his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such person is not exempt from prosecution and punishment for perjury committed in so testifying.

History: 1953 Comp., § 59-9-11.9, enacted by Laws 1959, ch. 321, § 10; 1979, ch. 280, § 33.

ANNOTATIONS

Cross references. — As to privilege against self-incrimination, see N.M. Const., art. II, § 15.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 87, 88.

81 C.J.S. Social Security and Public Welfare §§ 222, 270.

51-1-31. State-federal cooperation.

In the administration of the Unemployment Compensation Law [51-1-1 NMSA 1978] the secretary shall cooperate to the fullest extent possible under the act with the United States secretary of labor in his duties under the Social Security Act, 42 U.S.C. Section

301 et seq., as amended. The secretary shall make reports in the form and containing such information as the secretary of labor may from time to time require, and shall comply with such provisions as the secretary of labor may from time to time find necessary to assure the correctness and verification of such reports. The department shall comply with regulations prescribed by the secretary of labor governing expenditures of such sums as may be allotted and paid to this state under Title 3 of the Social Security Act, 42 U.S.C. Sections 501 through 503, for the purpose of assisting in the administration of the Unemployment Compensation Law.

Upon request, the secretary shall furnish to any agency of the United States charged with administration of public works or assistance through public employment, the name, address, ordinary occupation and employment status of each recipient of benefits, and such recipient's rights to further benefits under the Unemployment Compensation Law.

History: 1953 Comp., § 59-9-11.10, enacted by Laws 1959, ch. 321, § 11; 1979, ch. 280, § 34.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare § 209.

51-1-32. Disclosure of information; penalty.

A. Information obtained from any employing unit or individual pursuant to the administration of the Unemployment Compensation Law [51-1-1 NMSA 1978] and determinations as to benefit rights of any individual are confidential and shall not be disclosed or be open to public inspection in any manner revealing the individual's or employing unit's identity, except that such information may be made available to those designated persons and agencies, and for purposes specified in regulations issued by the secretary.

B. Information will be provided from the records of the department only pursuant to an agreement which specifies in addition to other requirements established by the secretary:

(1) the express purpose for which the information will be used;

(2) assurances that the requesting party will protect the confidentiality of the information against unauthorized use or disclosure;

(3) assurances that the requesting agency will reciprocate on a continuing basis in providing information requested by the department in the administration of employment and unemployment compensation programs; and

(4) the obligation of the requesting party or agency to pay to the department the reasonable cost, as determined by the secretary, of providing the information.

C. Any employee or member of the department or board of review who, in violation of the provisions of this section, makes any disclosure of information obtained from any employing unit or individual in the administration of the Unemployment Compensation Law or any person who has obtained any list of applicants for work or of claimants or recipients of benefits under the Unemployment Compensation Law who uses or permits the use of such list for any political purpose shall be fined not less than twenty dollars ($20.00) or more than two hundred dollars ($200) or imprisoned for not more than ninety days or both.

History: 1953 Comp., § 59-9-11.11, enacted by Laws 1959, ch. 321, § 12; 1961, ch. 201, § 1; 1979, ch. 280, § 35; 1981, ch. 354, § 9; 1985, ch. 31, § 4.

51-1-33. Employment service.

A. State employment service. The New Mexico state employment service, created by Chapter 15, Special Session Laws of 1934 [50-8-1, 50-8-2 NMSA 1978], together with its existing personnel and all of its records, files and property, including office equipment and the unexpired balance of any appropriation, is hereby transferred to the department, and any money available for such offices is hereby transferred and made available to the department for the purpose of maintaining the New Mexico state employment service.

The department in the conduct of such service shall establish and maintain free public employment offices in such manner in such places as may be necessary for the proper administration of this act and for purposes of performing such duties as are within the purview of the act of congress entitled "An Act to provide for the establishment of a national employment system and for cooperation with the States in the promotion of such system and for other purposes," approved June 6, 1933 (48 Stat. 113, U.S.C.A. Title 29, Section 49 (c)), as amended. It shall be the duty of the department to cooperate with any official or agency of the United States having powers or duties under the provisions of the said act of congress, as amended, and to do and perform all things necessary to secure to this state the benefits of the said act of congress, as amended, in the promotion and maintenance of a system of public employment offices. The provisions of the said act of congress, as amended, are hereby accepted by this state, in accordance with Section 4 of said act, and this state will observe and comply with the requirements thereof. The department is hereby designated and constituted the agency of this state for the purposes of said act. The department may cooperate with or enter into agreements with the railroad retirement board with respect to the establishment, maintenance, and use of free employment service facilities.

B. Financing. All money received by this state under the said act of congress as amended, shall be paid into the unemployment compensation administration fund. For

the purpose of establishing and maintaining free public employment offices, the department is authorized to enter into agreements with the railroad retirement board, or any other agency of the United States charged with the administration of an unemployment compensation law, with any political subdivision of this state, or with any private, nonprofit organization, and as a part of any such agreement the department may accept money, services or quarters as contribution to the unemployment compensation administration fund. Money hereby made available to the department [is] to be expended as provided by this section and by said act of congress.

History: Laws 1936 (S.S.), ch. 1, § 12; 1939, ch. 175, § 6; 1941 Comp., § 57-812; Laws 1941, ch. 205, § 8; 1953 Comp., § 59-9-12; Laws 1979, ch. 280, § 36.

ANNOTATIONS

Federal acts. — The act of congress referred to in the second paragraph of Subsection A appears as 29 U.S.C. §§ 49 to 49k. Section 4 of said act, also referred to in the second paragraph, appears as 29 U.S.C. § 49c.

Bracketed material. — The bracketed material was added by the compiler and is not part of the law.

Meaning of "this act". — The term "this act," referred to in the first sentence of the second paragraph of Subsection A, refers to Laws 1936 (S.S.), ch. 1, which is presently compiled as 51-1-1, 51-1-3, 51-1-7, 51-1-8, 51-1-18, 51-1-19, 51-1-33, 51-1-34, 51-1-36 to 51-1-38, 51-1-40 to 51-1-42, 51-1-50, 51-1-52 and 51-1-53 NMSA 1978. Laws 1982, ch. 41, § 1, amended 51-1-1 NMSA 1978, substituting a reference to "Chapter 51 NMSA 1978" for "this act."

Future amendments to federal act not incorporated. — This section cannot be interpreted so as to incorporate by reference future amendments made in the federal act. 1945-1946 Op. Att'y Gen. 46-4898.

Funds covered by public moneys provision. — All funds mentioned in this section, while in the custody of the state treasurer as ex-officio treasurer of the unemployment compensation commission (now employment security department), are covered by the Public Moneys Act (now Section 6-10-1 NMSA 1978 et seq.). 1939-40 Op. Att'y Gen. 39-3365.

51-1-34. Administration funds.

A. There is created a special fund to be held in the custody of the state treasurer and known as the "unemployment compensation administration fund".

(1) All money paid into the fund is available to the secretary. All money in the fund shall be expended solely for the purposes and in the amount found necessary by the secretary of labor of the United States for the administration of the Unemployment

Compensation Law. Except as provided in Subsection B of this section, the fund shall consist of money appropriated by the state, and all money received from the federal government or any of its agencies, including the department of labor of the United States, the railroad retirement board or from any other source for such purpose. Money received from the railroad retirement board as compensation for services or facilities supplied to the board shall be paid into the fund. All money in the fund shall be deposited, administered and disbursed in accordance with the Unemployment Compensation Law and regulations, except that money in the fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of the depository. Any balance in the fund shall not lapse at any time but shall be continuously available for expenditure consistent with the Unemployment Compensation Law. Such money is subject to the general laws applicable to the deposit of public money in New Mexico, and collateral pledged shall be maintained in a separate custody account.

(2) If Section 303(a)(5) of Title 3 of the Social Security Act and Section 3304(a)(4) of the Internal Revenue Code are amended to permit a state agency to use, in financing administrative expenditures incurred in carrying out its employment security functions, some part of the money collected, or to be collected, under the Unemployment Compensation Law, in partial or complete substitution for grants under Title 3, then the Unemployment Compensation Law shall be modified by proclamation and by general rules in the manner and to the extent and within the limits necessary to permit such use under the Unemployment Compensation Law, and the modification is effective on the same date as the use is permissible under federal amendments.

B. There is created a special fund to be held in the custody of the state treasurer and known as the "employment security department fund".

(1) The fund is separate from the unemployment compensation administration fund.

(2) All money paid into the employment security department fund may be expended only pursuant to an appropriation by the legislature or specific provision of law. The department shall submit its annual budget for expenditures from the fund in accordance with the rules and regulations established by the department of finance and administration governing the submission of budgets by state agencies. All balances in the fund at the end of the fiscal year that have not been appropriated for expenditure shall remain in the fund and be invested by the state treasurer until appropriated by the legislature. The money in the fund, except for refunds of interest and penalties erroneously collected, and except for fiscal-year balances, shall be expended solely for the purposes and in the amount found necessary for the payment of the costs of administration not chargeable against federal grants or other funds received for the unemployment compensation administration fund. Nothing in this section shall prevent the unencumbered money of the fund from being used as a revolving fund to cover necessary and proper expenditures for which federal funds have been duly requested but not yet received, subject to the charging of such expenditures against such funds

when received. Money shall not be expended or made available for expenditure in any manner that would permit its substitution for, or cause a corresponding reduction in, federal funds that would be available, in the absence of such money, to finance expenditures for the administration of the Unemployment Compensation Law. Except as provided in Paragraph (2) of Subsection B and Subsection D of Section 51-1-38 NMSA 1978, the fund shall consist of all interest collected on delinquent contributions and all penalties provided by the Unemployment Compensation Law and all other money received for the fund from any other source. All money in the fund shall be deposited, administered and disbursed in accordance with this section, except that money in the fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of the depository and is subject to the general laws applicable to the deposit of public money in New Mexico, and collateral pledged shall be maintained in a separate custody account.

C. The state treasurer is liable on the state treasurer's official bond for the faithful performance of duties in connection with the funds created by Subsections A and B of this section, in addition to the liability upon all other bonds.

History: Laws 1936 (S.S.), ch. 1, § 13; 1937, ch. 129, § 5; 1939, ch. 175, § 7; 1941 Comp., § 57-813; Laws 1941, ch. 205, § 9; 1943, ch. 106, § 1; 1947, ch. 209, § 6; 1953 Comp., § 59-9-13; Laws 1970, ch. 87, § 1; 1971, ch. 45, § 1; 1973, ch. 216, § 6; 1979, ch. 280, § 37; 2013, ch. 132, § 2.

ANNOTATIONS

Cross references. — For the unemployment compensation fund, *see* 51-1-19 NMSA 1978.

For state treasurer's bond, *see* 6-10-38 and 8-6-1 NMSA 1978.

For Section 303(a)(5) of Title III of the Social Security Act, *see* 42 U.S.C. § 503 (a)(5).

For Section 3304(a)(4) of the Internal Revenue Code, *see* 26 U.S.C. § 3304(a)(4).

The 2013 amendment, effective July 1, 2013, provided for distribution of penalties to the employment security department fund; and in Paragraph (2) of Subsection B, in the seventh sentence, added "Except as provided in Paragraph (2) of Subsection B and Subsection D of Section 51-1-38 NMSA 1978".

Funds covered by public moneys provision. — All funds mentioned in this section, while in the custody of the state treasurer as ex-officio treasurer of the unemployment compensation commission (now employment security department), are covered by the Public Moneys Act (now Section 6-10-1 NMSA 1978 et seq.). 1939-40 Op. Att'y Gen. 39-3365.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation § 45.

81 C.J.S. Social Security and Public Welfare § 288.

51-1-35. Reimbursement of fund.

If any money received after June 30, 1941, from the department of labor of the United States of America under Title 3 of the Social Security Act, or any unencumbered balances in the unemployment compensation administration fund as of that date, or any money granted after that date to this state pursuant to the provisions of the Wagner-Peyser Act, or any money made available by this state or its political subdivisions and matched by money granted to this state pursuant to the provisions of the Wagner-Peyser Act, is found by the secretary of labor of the United States of America, because of any action or contingency, to have been lost or been expended for purposes other than, or in amounts in excess of, those found necessary by the secretary of labor of the United States of America for the proper administration of the Unemployment Compensation Law [51-1-1 NMSA 1978], it is the policy of this state that such money shall be replaced by money appropriated for such purpose from the general fund to the unemployment compensation administration fund for expenditure as provided in Section 51-1-34 NMSA 1978. Upon receipt of notice of such a finding by the secretary of labor of the United States of America, the secretary shall promptly report the amount required for such replacement to the governor and the governor shall at the earliest opportunity, submit to the legislature a request for the appropriation of such amount. This section shall not be construed to relieve this state of its obligation with respect to funds received prior to July 1, 1941, pursuant to the provisions of Title 3 of the Social Security Act.

History: 1941 Comp., § 57-814, enacted by Laws 1941, ch. 203, § 1; 1953 Comp., § 59-9-14; Laws 1973, ch. 216, § 7; 1979, ch. 280, § 38.

ANNOTATIONS

Social Security Act. — Title III of the federal Social Security Act appears as 42 U.S.C. § 501 et seq.

Wagner-Peyser Act. — The federal Wagner-Peyser Act appears as 29 U.S.C. §§ 49 to 49k.

51-1-36. Collection of contributions.

A. Contributions unpaid on the date on which they are due and payable shall bear interest at the rate of one percent per month from and after such date until payment is received by the division. Interest collected pursuant to this subsection shall be paid into the employment security department fund.

B. If, after due notice, any employer defaults in any payment of contributions or interest thereon, the amount due shall be collected by civil action in the name of the division, and the employer adjudged in default shall pay the costs of such action. Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference on the calendar of the court, to the same extent as civil actions and appeals of civil actions brought to collect unpaid or underpaid wages, interest and any other amounts due under Section 50-4-26 NMSA 1978, over all other civil actions except petitions for judicial review under this act and worker's compensation cases arising under Chapter 52, Article 1 NMSA 1978 or in the discretion of the secretary, if any contribution or any portion thereof or any interest or penalty imposed by the Unemployment Compensation Law is not paid within thirty days after the same becomes due, the secretary shall, after due notice and opportunity to be heard in accordance with regulations, issue a warrant under its official seal, directed to the sheriff of any county of the state commanding the sheriff to levy upon and sell the real and personal property of the person owning the same, found within that county, of the payment of the amount due and an added amount of ten percent of the contribution in addition to any other penalties imposed and costs of executing the warrant, and to return such warrant to the secretary and pay to the secretary the money collected by virtue thereof, by the time to be specified, not more than thirty days from the date of the warrant. In the event the division does not know the amount of contribution due, and the employer from whom the same is due refuses or fails to make reports showing what the employer or the division claims for the amount of contributions that the division believes to be due, and the division files the warrant for the estimated amount, mailing notice to the employer stating that the division is estimating the amount of contribution due and giving the estimated amount in the notice, the warrant and estimated amount shown shall have the same effect as any other warrant issued under this subsection. If the employer does not make a showing to the satisfaction of the secretary that the estimated amount is incorrect within thirty days after the warrant is filed with the county clerk, then the estimated amount shown in the warrant shall be and become the amount of the contribution due for the period stated in the warrant. The sheriff to whom any warrant, issued under this section, is directed shall, within five days after receipt of the same, file with the county clerk of the sheriff's county a copy thereof, for which the clerk shall make no charge, and thereupon the county clerk shall record the same upon the clerk's records and the day when such copy is filed. Thereupon the amount of the warrant so filed and entered shall become a lien upon all property, real and personal, of the person against whom it is issued, including choses in action, except negotiable instruments not past due; provided, however, that such lien shall be inferior to all other valid liens, encumbrances, mortgages, judgments and assessments that are filed or placed of record prior to the filing of such warrant. The sheriff or a representative of the division thereupon shall levy upon any property of the taxpayer, including negotiable instruments, and the property so levied on shall be sold in all respects with the like effect, and in the same manner as is prescribed by law with respect to executions against property upon judgments of a court of record, and the remedies of garnishment shall apply. Whenever any property or right to property upon which levy has been made is not sufficient to satisfy the claim for which levy is made, the sheriff or a representative

of the division may thereafter, and as often as may be necessary, proceed to levy in like manner upon any other property or rights to property subject to levy of the person against whom the claim exists, until the amount due from the person is fully paid. The sheriff shall be entitled to the general fees for services in executing the warrant as now allowed by law for like services, to be collected in the same manner as now provided by law for like services. All costs of executing warrants including mileage of the sheriff serving and executing the same and all other costs in connection with the levy, including advertising or publication costs upon the sale of any property levied upon, shall be collected by the department from the employer from whom contribution is due.

C. In the event of any distribution of an employer's assets pursuant to an order of any court under the laws of this state, including any receivership, assignment for benefit of creditors, adjudicated insolvency, composition or similar proceeding, contributions then or thereafter due shall be paid in full prior to all other claims except taxes and claims for remuneration of not more than two hundred fifty dollars ($250) to each claimant, earned within six months of the commencement of the proceeding. In the event of an employer's adjudication in bankruptcy, judicially confirmed extension proposal, or composition, under the Federal Bankruptcy Code 11 U.S.C. Sec. 10l et seq., contributions then or thereafter due shall be entitled to such priority as is provided in the Federal Bankruptcy Code U.S.C. Title 11, Sec. 507.

D. If, not later than four years after the date on which any contributions or interest thereon are paid, an employing unit that has paid such contributions or interest makes application for an adjustment in connection with subsequent contribution payments or for a refund because such adjustment cannot be made, and the secretary determines that such contributions or interest or any portion was erroneously collected, the secretary shall allow the employing unit to make an adjustment, without interest, in connection with subsequent contribution payments by the employing unit, or if such adjustment cannot be made, the secretary shall refund the amount, without interest, from the fund to which the amount was deposited. For like cause and within the same period, adjustment or refund may be so made on the secretary's own initiative.

E. Any person, group of individuals, partnership or employing unit that acquires the organization, trade or business or substantially all the assets thereof from an employer shall notify the division in writing by registered mail not later than five days prior to the acquisition. Unless such notice is given, such acquisition shall be void as against the division, if, at the time of the acquisition, any contributions are due and unpaid by the previous employer, and the secretary shall have the right to proceed against such employer either in personam or in rem and the assets so acquired shall be subject to attachment for such debt.

History: Laws 1936 (S.S.), ch. 1, § 14; 1939, ch. 175, § 8; 1941 Comp., § 57-815; Laws 1941, ch. 205, § 10; 1947, ch. 209, § 7; 1953 Comp., § 59-9-15; Laws 1953, ch. 121, § 7; 1953, ch. 123, § 1; 1978, ch. 165, § 4; 1979, ch. 280, § 39; 1990, ch. 18, § 4; 1991, ch. 122, § 9; 2013, ch. 182, § 2.

ANNOTATIONS

Cross references. — As to fees of sheriffs for serving process, etc., see 4-41-16 to 4-41-18 NMSA 1978.

As to garnishment, see 35-12-1 NMSA 1978 et seq.

As to execution and foreclosure, see 39-4-1 NMSA 1978 et seq.

As to attachment, see 42-9-1 NMSA 1978 et seq.

The 2013 amendment, effective June 14, 2013, provided that civil actions to collect unemployment contributions shall have a preference to the same extent as civil actions and appeals brought to collect unpaid or underpaid wages; in Subsection B, in the second sentence, after "preference on the calendar of the court", added "to the same extent as civil actions and appeals to collect unpaid or underpaid wages, interest and any other amounts due under Section 50-4-26 NMSA 1978" and after "cases arising under", deleted "Sections 51-1-1 through 52-2-13" and added "Chapter 52, Article 1".

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section; deleted "plus accrued interest" following "payment" in the first sentence in Subsection A; inserted the eighth sentence, which begins "Whenever any property", near the end of Subsection B; substituted "11 U.S.C. Sec. 101" for "11 U.S.C., Sec. 10" in the second sentence in Subsection C; and made minor stylistic changes.

The 1990 amendment, effective February 28, 1990, in Subsection B, substituted "worker's compensation" for "workmen's compensation" in the second sentence, inserted "or a representative of the department" in the next to last sentence, and substituted "sheriff" for "officer" in the last two sentences; in Subsection C, rewrote the provision at the end following "composition" which read "under Federal Bankruptcy Act of 1898, as amended (11 U.S.C., Sec. 1 et seq.), contributions then or thereafter due shall been titled to such priority as is provided in Section 64(A) of that act (U.S.C. Title 11, Sec.104(A)), as amended"; and made minor stylistic changes throughout Subsections B, C and D.

Warrants of employment security commission (now employment security division) are no instruments made to the commission (division) a grantee or vendee. They are instruments made by it as claimant of a lien. Laws 1961, ch. 77 (see Section 14-9-7 NMSA 1978) does not apply to warrants of the employment security commission (division). 1961-62 Op. Att'y Gen. No. 61-51.

Interest for fractional part of month. — The interest to be collected by the commission (now division) should include any fractional parts of the month at approximately *1*/30 of 1% for each day where part of a month is included. 1943-44 Op. Att'y Gen. No. 43-4409.

Fees for collection of taxes under this section are paid to the treasurer for the county, and the expenses may be retained by or repaid to the sheriff. 1937-38 Op. Att'y Gen. 37-1786.

Property acquired at special master's sale rather than from the employer himself cannot be followed by the commission (now division) in the hands of the purchaser or his successor in interest as the right of lien by attachment is lost under those circumstances. 1943-44 Op. Att'y Gen. No. 43-4391.

Levy on liquor stock. — In view of this section the employment security commission (now employment security division) may levy upon liquor stock of an employer in default on contributions payable under the Unemployment Compensation Law, but any stock sold in pursuance thereof can only be sold to another licensed New Mexico liquor dealer because of former 60-9-5 NMSA 1978 (see now 60-6B-9 NMSA 1978). 1947-48 Op. Att'y Gen. No. 47-5076.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 C.J.S. Social Security and Public Welfare §§ 147 to 153.

51-1-37. Protection of rights and benefits.

A. Except as provided by Section 51-1-37.1 NMSA 1978, any agreement by an individual to waive, release or commute his rights to benefits or any other rights under the Unemployment Compensation Law [51-1-1 NMSA 1978] shall be void. No agreement by any individual in the employ of any person or concern to pay all or any portion of an employer's contributions or payments in lieu of contributions, required under the Unemployment Compensation Law from such employer, shall be valid. No employer shall directly or indirectly make or require or accept any deduction from the remuneration of individuals in his employ to finance the employer's contributions or payments in lieu of contributions required from him or require or accept any waiver of any right hereunder by an individual in his employ. Any employer or officer or agent of an employer who violates any provisions of this subsection shall, for each offense, be fined not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) or be imprisoned for not more than six months, or both.

B. No individual claiming benefits shall be charged fees of any kind in any proceeding under the Unemployment Compensation Law by the department or its representatives or by any court or any officer thereof. Any individual claiming benefits and any employer in any proceeding before the secretary, his authorized representative or the board of review may be represented by counsel or any other duly authorized agent, but no such counsel or agent shall either charge or receive for such services more than an amount approved by the secretary. Any person who violates any provision of this subsection shall, for each such offense, be fined not less than fifty dollars ($50.00) nor more than five hundred dollars ($500) or imprisoned for not more than six months, or both.

C. Except as provided in Subsection D of this section, any assignment, pledge or encumbrance of any right to benefits which are or may become due or payable under the Unemployment Compensation Law shall be void, and such rights to benefits shall be exempt from levy, execution, attachment, garnishment or any other remedy provided for the collection of debt. Benefits received by any individual, so long as they are not mingled with other funds of the recipient, shall be exempt from a remedy for the collection of debts except debts incurred for necessaries furnished to an individual or his spouse or dependents during the time when he was unemployed. Any waiver of any exemption provided for in this subsection is void.

D. The following actions for collection of the indicated obligations may be taken:

(1) deduction and witholding [withholding] of amounts of unpaid child support pursuant to Section 51-1-37.1 NMSA 1978;

(2) levy by the federal internal revenue service pursuant to Section 6331(h)(2)(C) of the Internal Revenue Code provided that arrangements have been made by the internal revenue service for reimbursement of the division for administrative costs incurred by the division that are attributable to the repayment of uncollected federal internal revenue taxes. Levy of federal income taxes will be made in accordance with such regulations as the secretary may prescribe; and

(3) deduction and withholding of amounts for food stamp overissuances pursuant to Section 51-1-37.2 NMSA 1978.

History: Laws 1936 (S.S.), ch. 1, § 15; 1941 Comp., § 57-818; 1953 Comp., § 59-9-18; Laws 1973, ch. 216, § 8; 1979, ch. 280, § 40; 1981, ch. 348, § 1; 1982, ch. 41, § 3; 1998, ch. 91, § 6.

ANNOTATIONS

Bracketed material. — The bracketed material in Subsection D was not enacted by the legislature and is not part of the law.

Cross references. — As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

As to form for claim of exemptions on executions, see Rule 4-803 NMRA.

As to form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

As to form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

As to form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

As to form for claim of exemption from garnishment, see Rule 4-809 NMRA.

Internal Revenue Code. — Section 6331(h) of the Internal Revenue Code of 1986, referred to in Paragraph D(2) of this section, appears as 26 U.S.C. § 170.

The 1998 amendment, effective July 1, 1998, in Subsection C, substituted "in Subsection D of this section" for "by Section 51-1-37.1 NMSA 1978" at the beginning, added Subsection D, and made minor stylistic changes throughout the section.

Law reviews. — For article, "Attachment in New Mexico - Part I," see 1 Nat. Res. J. 303 (1961).

For article, "Attachment in New Mexico - Part II," see 2 Nat. Res. J. 75 (1962).

51-1-37.1. Child support obligations.

A. The division shall notify the human services department of the name of any individual who files a new claim for unemployment compensation and who is determined to be eligible for benefits.

B. The division shall deduct and withhold from any unemployment compensation otherwise payable to an individual who owes child support obligations:

(1) the amount specified by the individual to be deducted and withheld, if an amount is not specified under Paragraph (2) or (3) of this subsection;

(2) the amount specified in an agreement between the individual and the child support enforcement bureau of the human services department, pursuant to Section 454(20)(B)(i) of the Social Security Act, a copy of which has been provided to the division by the child support enforcement bureau; or

(3) any amount otherwise required to be so deducted and withheld from such unemployment compensation pursuant to a writ of garnishment or other legal process for enforcement of judgments issued by any court or administrative agency of competent jurisdiction in any state, territory or possession of the United States or any foreign country with which the United States has an agreement to honor such process directed to the human services department for the purpose of enforcing an individual's obligation to provide child support.

C. Any amount withheld from the unemployment compensation benefits due a claimant shall be considered as payment of unemployment compensation benefits to the claimant and paid by the individual in satisfaction of his child support obligations.

D. The amount of child support obligations withheld by the division pursuant to this section shall be paid to the human services department.

E. As used in this section, "unemployment compensation benefits" means benefits payable under the Unemployment Compensation Law [51-1-1 NMSA 1978] and amounts payable by or through the division pursuant to an agreement under any federal law providing for compensation, assistance or allowance with respect to unemployment.

F. As used in this section, "child support obligations" includes only obligations that are being enforced pursuant to a plan described in Section 454 of the Social Security Act that has been approved by the United States secretary of health and human services under Part D of Title 4 of the Social Security Act.

G. The human services department shall reimburse the division for the administrative costs incurred by it that are attributable to the child support obligations being enforced by the human services department. If the human services department and the division fail to agree on the amount of such administrative costs, the state budget division of the department of finance and administration shall prescribe the amount of administrative costs to be reimbursed.

History: 1978 Comp., § 51-1-37.1, enacted by Laws 1982, ch. 41, § 4; 1983, ch. 199, § 7; 1998, ch. 91, § 7.

ANNOTATIONS

Cross references. — As to establishment of bureaus within divisions of the human services department, see 9-8-10 NMSA 1978.

As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

As to form for claim of exemptions on executions, see Rule 4-803 NMRA.

As to form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

As to form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

As to form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

As to form for claim of exemption from garnishment, see Rule 4-809 NMRA.

Social Security Act. — Section 454 of the federal Social Security Act referred to in Subsections B(2) and F, appears as 42 U.S.C. § 654.

Part D of Title IV of the Social Security Act, referred to in Subsection F, appears as 42 U.S.C. § 651 et seq.

The 1998 amendment, effective July 1, 1998, rewrote Subsection A; substituted "division" for "employment security department" throughout the section; in Paragraph B(3), inserted "or administrative agency" following "any court" and "human services" preceding "department"; in Subsection C, inserted "unemployment compensation" near the beginning; in Subsection E, inserted "As used in this section," at the beginning, substituted "benefits" for "compensation" and "amounts" for "any compensation"; inserted "As used in this section," at the beginning of subsection F; in Subsection G, substituted "it that" for "the employment security department which"; and made minor stylistic changes throughout the section.

51-1-37.2. Food stamp overissuances.

A. The division shall notify the human services department of the name and social security number of any individual who files a new claim for unemployment compensation and who is determined to be eligible for benefits. This information provided by the division shall be used by the human services department to determine whether any eligible individual owes an uncollected overissuance of food stamp coupons, as defined in Section 13(c)(1) of the federal Food Stamp Act of 1977.

B. The division shall deduct and withhold from any unemployment compensation benefits payable to an individual who owes an uncollected overissuance:

(1) the amount specified by the individual to the division to be deducted and withheld under this subsection;

(2) the amount, if any, determined pursuant to an agreement submitted to the human services department pursuant to Section 13(c)(3)(A) of the federal Food Stamp Act of 1977; or

(3) any amount otherwise required to be deducted and withheld from unemployment compensation pursuant to Section 13(c)(3)(B) of the federal Food Stamp Act of 1977.

C. Any amount deducted and withheld pursuant to this section shall be paid by the division to the human services department.

D. Any amount deducted and withheld pursuant to Subsection B of this section shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by such individual to the human services department as repayment of the individual's uncollected overissuance.

E. As used in this section, "unemployment compensation benefits" means any benefits payable pursuant to the Unemployment Compensation Law [51-1-1 NMSA

1978] and amounts payable pursuant to an agreement pursuant to any federal law providing for compensation, assistance or allowances with respect to unemployment.

F. This section applies only if arrangements have been made for reimbursement by the human services department for the administrative costs incurred by the division pursuant to this section that are attributable to the repayment of uncollected overissuances to the human services department.

History: 1978 Comp., § 51-1-37.2, enacted by Laws 1998, ch. 91, § 8.

ANNOTATIONS

Food Stamp Act. — The federal Food Stamp Act, referred to in this section, is codified as 7 U.S.C. § 2011 et seq.

51-1-38. Penalties; liability for benefit overpayment.

A. Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under the Unemployment Compensation Law either for that person or for any other person, shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each such false statement or misrepresentation or failure to disclose a material fact shall constitute a separate offense. In any case where, after notice and an opportunity to be heard, any person is found by the secretary to have so obtained or increased the amount of any benefit for the person, the person shall, in addition to other penalties provided herein, forfeit all benefit rights under the Unemployment Compensation Law for a period of not more than one year from and after such determination.

B. In addition to the penalty pursuant to Subsection A of this section, whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit or other payment under the Unemployment Compensation Law, either for that person or for any other person, shall be required to pay a civil penalty of twenty-five percent of the amount of overpaid benefits, collected in the manner provided in Subsection B of Section 51-1-36 NMSA 1978. The penalty shall be distributed as follows:

(1) fifteen percent of the amount of overpaid benefits shall be distributed to the fund; and

(2) ten percent of the amount of overpaid benefits shall be distributed to the employment security department fund created pursuant to Subsection B of Section 51-1-34 NMSA 1978.

C. Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under the Unemployment Compensation Law or who willfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each such false statement or representation or failure to disclose a material fact and each day of such failure or refusal may constitute a separate offense.

D. In addition to the penalty pursuant to Subsection C of this section, any employing unit or officer or agent of an employing unit that makes a false statement or representation knowing it to be false or that knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled to benefits under the Unemployment Compensation Law shall be required to pay a civil penalty in an amount not to exceed ten thousand dollars ($10,000), as determined by rule established by the department. The penalty shall be collected in a manner provided in Subsection B of Section 51-1-36 NMSA 1978 and distributed to the fund.

E. Any person who willfully violates any provision of the Unemployment Compensation Law or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of the Unemployment Compensation Law and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not more than one hundred dollars ($100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

F. Notwithstanding any other provision of the Unemployment Compensation Law, if any individual claiming benefits or waiting period credits, in connection with such claim, makes any false statement or representation, in writing or otherwise, knowing it to be false or knowingly fails to disclose any material fact in order to obtain or increase the amount of a benefit payment, such claim shall not constitute a valid claim for benefits in any amount or for waiting period credits but shall be void and of no effect for all purposes. The entire amount of the benefits obtained by means of such claim shall be, in addition to any other penalties provided herein, subject to recoupment by deduction from the claimant's future benefits or they may be recovered as provided for the collection of past due contributions in Subsection B of Section 51-1-36 NMSA 1978.

G. Any person who, by reason of the nondisclosure or misrepresentation by the person or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under the Unemployment Compensation Law, while any conditions for the receipt of benefits

imposed by the Unemployment Compensation Law were not fulfilled in the person's case and any person who receives any sum as benefits while the person knows or should know that the person is not entitled to such benefits because the person has received a notice of denial or disqualification or has received a monetary eligibility notice showing erroneous base period employers and wages, shall, in the discretion of the secretary and notwithstanding any action brought pursuant to Subsection A of this section, either be liable to have such sum deducted from any future benefits payable to the person under the Unemployment Compensation Law or be liable to repay to the department for the unemployment compensation fund a sum equal to the amount so received by the person, and such sum shall be collectible in the manner provided in Subsection B of Section 51-1-36 NMSA 1978 for the collection of past-due contributions.

H. Any person who has received benefits as a result of a determination or decision of the department or any court that the person was eligible and not disqualified for such benefits and such determination or decision is subsequently modified or reversed by a final decision as provided in Section 51-1-8 NMSA 1978, or who has received benefits as a result of administrative error or for any other reason while conditions for the receipt of benefits imposed by the Unemployment Compensation Law were not fulfilled in the person's case or while the person was disqualified from receiving benefits, irrespective of whether such overpayment of benefits was due to any fault of the person claiming benefits, shall, as determined by the secretary or the secretary's authorized delegate, either be liable to have such sum deducted from any future benefits payable to the person under the Unemployment Compensation Law at a rate to be determined by the secretary but not less than fifty percent of the weekly benefit amount payable to the person, or be liable to repay to the department, for the unemployment compensation fund or for credit to the appropriate reimbursable account, a sum equal to the amount of benefits received by the person for which the person was not eligible or for which the person was disqualified or that was otherwise overpaid to the person; provided, that for the purposes of this subsection, no determination or decision establishing an overpayment of benefits shall be issued by the department against any person for failure to meet the eligibility conditions of Paragraph (3) of Subsection A of Section 51-1-5 NMSA 1978 more than one year after payment of benefits has been made, unless such condition of eligibility has been appealed or otherwise contested within such year.

I. Any amount of benefits for which a person is determined to be overpaid pursuant to this section may be collected in the manner provided in Subsection B of Section 51-1-36 NMSA 1978 for the collection of past-due contributions, notwithstanding that the person from whom the overpayment is to be collected has been assessed a penalty pursuant to Subsections A through E of this section.

J. A person shall be liable to repay the amount of benefits received for any period for which the person also received an award or settlement of back pay resulting from an action or grievance concerning a discharge unless the amount of the back pay award or settlement was reduced by the amount of benefits received during the period. The individual shall furnish the division with a signed copy of the award or settlement

agreement that sets forth the person's name, the name of the employer, the period of time covered by the award or settlement and the amount by which the award or settlement was so reduced.

History: Laws 1936 (S.S.), ch. 1, § 16; 1941 Comp., § 57-819; 1953 Comp., § 59-9-19; Laws 1953, ch. 121, § 8; 1961, ch. 162, § 1; 1979, ch. 280, § 41; 1980, ch. 50, § 3; 1985, ch. 31, § 5; 1987, ch. 63, § 4; 1993, ch. 209, § 5; 2013, ch. 132, § 3.

ANNOTATIONS

Cross references. — As to unemployment compensation fund, see 51-1-19 NMSA 1978.

The 2013 amendment, effective July 1, 2013, authorized the workforce solutions department to recover benefits after a decision allowing benefits has been modified or reversed; provided a civil penalty for fraudulently obtaining or increasing benefits or preventing or reducing the payment of benefits; added Subsection B; in Subsection C, after "each day of such failure or refusal", deleted "shall" and added "may"; added Subsection D; in Subsection F, in the first sentence, after "Unemployment Compensation Law", deleted "including the provisions of Subsection J of Section 51-1-8 NMSA 1978"; in Paragraph H, at the beginning of the sentence, deleted "Except as provided in Subsection J of Section 51-1-8 NMSA 1978"; and in Subsection I, after "Subsections A", deleted "B and C" and added "through E".

The 1993 amendment, effective April 5, 1993, substituted "Subsection J" for "Subsection I" in the first sentences of Subsections D and F, and added Subsection H.

Recovery of overpayments of unemployment compensation benefits is mandatory and equitable estoppel is not a defense in an action to recover the overpayments. Millar v. N.M. Dep't of Workforce Solutions, 2013-NMCA-055, 304 P.3d 427, cert. denied, 2013-NMCERT-004.

Recovery of overpayments is mandatory. — Where the employee began receiving unemployment compensation benefits on December 19, 2009; the employer appealed the award of benefits on January 21, 2010; the employee did not learn of the appeal until the department of workforce solutions sent a notice of hearing on June 4, 2010; at the hearing on June 16, 2010, the department determined that the employee was disqualified from benefits due to misconduct at work; the department's appeals tribunal upheld the decision on January 7, 2011; and the department sent the employee an overpayment notice demanding the refund of the unemployment compensation payments the employee received from December 19, 2009 through the end of April 2010, the employee was liable to repay the payments because the department had no discretion to forego recovery of overpayments and the doctrine of equitable estoppel was not a valid defense. Millar v. N.M. Dep't of Workforce Solutions, 2013-NMCA-055, 304 P.3d 427, cert. denied, 2013-NMCERT-004.

No state statute of limitation ran against a claim by the New Mexico department of labor alleging that a debtor wrongfully collected unemployment compensation benefits while employed by failing to disclose her employment. N.M. Dep't of Labor v. Valdez, 136 Bankr. 874 (Bankr. D.N.M. 1992).

Falsely obtaining unemployment benefits deemed petty misdemeanor. — When Section 30-1-6C NMSA 1978 is read together with this section, it is clear that the crime of falsely obtaining unemployment benefits is a petty misdemeanor, for which the statute of limitations is two years (now one year) under Section 30-1-8F NMSA 1978 (now 30-1-8D NMSA 1978) . Robinson v. Short, 93 N.M. 610, 603 P.2d 720 (1979).

Where claimant misrepresents amount that he earned, the commission (now department) should deduct the total amount of the benefits received from any future payments made or should otherwise recover the same. 1943-44 Op. Att'y Gen. No. 44-4577.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 196, 197, 209, 223, 224.

Reductions to back pay awards under Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 135 A.L.R. Fed. 1

81 C.J.S. Social Security and Public Welfare §§ 251, 252, 272, 278, 297, 298.

51-1-39. [Saving clause.]

This act [51-1-38, 51-1-39 NMSA 1978] does not apply to offenses committed prior to the effective date of this act. Such offenses are subject to punishment as provided by the Unemployment Compensation Law [51-1-1 NMSA 1978] in force at the time the offense was committed.

History: 1953 Comp., § 59-9-19.1, enacted by Laws 1961, ch. 162, § 2.

51-1-40. Actions for enforcement.

A. In any civil action to enforce the provisions of this act, the division may be represented by the attorney general or some attorney designated by him to act, by any district attorney or by an attorney designated and employed by the department.

B. All criminal actions for violation of any provision of this act or any rules or regulations issued pursuant thereto shall be prosecuted by the district attorney of the district in which the offense was committed. The attorney general is authorized to assist in the conduct of any such prosecution if deemed necessary by him or by the district attorney, and the division is authorized to employ special counsel to assist in the prosecution, with the advice and consent of the district attorney and approved by the

court. An authorized representative of the secretary may institute any such prosecution by the filing of a complaint or information in accordance with the laws of this state.

C. In addition to suits by civil action for the collection of contributions as authorized by Section 51-1-36 NMSA 1978, the division may, in its own name, sue and may be sued by an employing unit or other proper party, in the manner provided by law for civil actions in the courts of this state including actions for declaratory judgments, where such action is necessary for the proper determination and enforcement of any right under this act; provided, that this shall not affect any administrative remedy or authority for judicial review contained in said act.

D. When contributions or payments in lieu of contributions imposed by the Unemployment Compensation Law [51-1-1 NMSA 1978] have not been paid by an employer subject to that law, the division may institute an action in accordance with the provisions of Section 7-1-53 NMSA 1978 to ensure or compel payment of delinquent contributions or payments in lieu of contributions.

History: Laws 1936 (S.S.), ch. 1, § 17; 1941 Comp., § 57-820; Laws 1951, ch. 76, § 3; 1953 Comp., § 59-9-20; Laws 1979, ch. 280, § 42; 1991, ch. 122, § 10.

ANNOTATIONS

Cross references. — As to declaratory judgments, see 44-6-1 NMSA 1978 et seq.

Meaning of "this act". — See 51-1-33 NMSA 1978 and notes thereto.

The 1991 amendment, effective April 3, 1991, substituted "division" for "department" throughout the section and added Subsection D.

51-1-41. Nonliability of state.

Benefits shall be deemed to be due and payable under the Unemployment Compensation Law [51-1-1 NMSA 1978] only to the extent provided in that act and to the extent that money is available therefor to the credit of the unemployment compensation fund, and neither the state nor the department shall be liable for any amount in excess of such sums.

History: 1936 (S.S.), ch. 1, § 18; 1941 Comp., § 57-821; 1953 Comp., § 59-9-21; Laws 1979, ch. 280, § 43.

ANNOTATIONS

Interest not recoverable from employer where not recoverable from department. — Where the commission (now department) itself took a timely appeal, thus staying execution and delaying the payment of claims, and the commission (now department) is not liable for interest, it would be illogical to hold that appellants could recover from the

employer when they could not do so from the commission (department). Bateman v. Kennecott Copper Corp., 80 N.M. 778, 461 P.2d 911 (1969).

51-1-42. Definitions.

As used in the Unemployment Compensation Law:

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 that 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. 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, that are 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; 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 for full tax credit against the tax imposed by the Federal Unemployment Tax Act, 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;

(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;

(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; 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 is required to be covered under the Unemployment Compensation Law;

(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;

(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 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 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;

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 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;

(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;

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 workforce solutions 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;

(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;

(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 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; 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.

History: 1978 Comp., § 51-1-42, enacted by Laws 2003, ch. 47, § 12; 2005, ch. 3, § 5; 2005, ch. 3, § 10; 2007, ch. 137, § 5; 2010, ch. 55, § 4.

ANNOTATIONS

The 2010 amendment, effective July 1, 2010, in Subsection H, after "Unemployment Compensation Law shall be paid", deleted "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"; and in Subsection S, deleted "labor" and added "workforce solutions".

Temporary provisions. — Laws 2010, ch. 144, § 5 provided that on the effective date of this act [July 1, 2010], the balance of the state unemployment trust fund, including any accrued earnings credited to the fund, is transferred to the unemployment compensation fund. On or after the effective date of this act, the workforce solutions department shall deposit all contributions received under Section 51-1-11 NMSA 1978 in the unemployment compensation fund notwithstanding the requirement of that section, as it existed prior to the effective date of this act, to deposit money in the state unemployment trust fund.

Laws 2007, ch. 137, § 6 repeals Laws 2005, ch. 3, § 10 effective July 1, 2007, prior to Laws 2005, ch. 3, § 10 taking effect.

Laws 2007, ch. 137, § 5, effective July 1, 2007, provides that the definition of "fund" may include the state unemployment trust fund and contributions paid to that fund.

Laws 2005, Ch. 3, § 5, effective February 8, 2005, amends Laws 2003, Chapter 47, Section 12 to insert in Subsection A “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; insert in Subsection I “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.”

Laws 2005, Chapter 3, § 12 provides that Laws 2005, Chapter 3, Sections 1 through 5 apply to benefit calculations and eligibility determinations made on or after January 1, 2005.

Laws 2005, ch. 3, § 10 repeals Laws 2003, ch. 4,7 § 12 as amended by Laws 2003, ch. 3, § 5, enacts new section 51-1-41. The effective date is the earliest of the following: A. January 1, 2008; or, B. the January 1 following certification to the governor by the secretary of labor 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 Section 51-1-11 NMSA 1978. However, prior to taking effect, Laws 2005, ch. 3, § 10 was repealed by Laws 2007, ch. 137, § 6.

The 2003 amendment, effective January 1, 2004, inserted "except that 'base period' means for benefit years effective on or after January 1, 2004 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:" and added Subsections A(1) and A(2); in Subsection D, substituted "An individual" for "All individuals" at the beginning of the second and third sentences and; inserted "federal" preceding "Immigration and Nationality" near the end of Subsection F(6)(b); inserted "of 1986" following "Internal Revenue Code" near the end of Subsection F(12)(d); in Subsection I, added "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" at the end; substituted "B" for "A" following "Subsection" near the middle of Subsection R; in Subsection T(2), substituted "the" for "its" and inserted "of an employing unit" near the middle; and substituted "rule" for "regulation" throughout the section.

Laws 2003, ch. 47, § 12 repeals Laws 1936 (S.S.), ch. 1, § 19, as amended by Laws 2003, ch. 47, § 5 and reenacts the section set forth below. Laws 2003, ch. 47, § 15 provides that the effective date of Laws 2003, ch. 47, §§ 8 through 12 is the earliest of the following: 1) June 30, 2007; or 2) the date that the unemployment compensation fund is less than three and three-fourths percent of total payrolls pursuant to the computation provided in Paragraph (1) of Subsection I of 51-1-17 NMSA 1978.

Compiler's note. — The compiler has been informed that the event described in Laws 2003, ch, 47, § 15 occurred prior to the enactment of the 2005 amendment.

Identification of covered employer. — Where plaintiffs were recruited on a day-haul basis by "crew leaders" to perform agricultural labor for farm operators, it was not unreasonable for the New Mexico department of labor to identify the crew leaders as the covered employer of plaintiffs for purposes of reporting wages and paying taxes. Macias v. N.M. Dep't of Labor, 21 F.3d 366 (10th Cir. 1994).

51-1-42. Definitions. (Effective January 1, 2015.)

As used in the Unemployment Compensation Law:

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, that 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. 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, that are 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; provided that where such an acquisition takes place, the secretary may postpone activating the individual or type of organization pursuant to 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 for full tax credit against the tax imposed by the Federal Unemployment Tax Act, 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;

(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;

(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; 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 is required to be covered under the Unemployment Compensation Law;

(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;

(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 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 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;

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 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;

(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;

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 workforce solutions 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;

(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;

(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 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; 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.

History: 1978 Comp., § 51-1-42, enacted by Laws 2003, ch. 47, § 12; 2005, ch. 3, § 5; 2005, ch. 3, § 10; 2007, ch. 137, § 5; 2010, ch. 55, § 4; 2013, ch. 133, § 5.

ANNOTATIONS

Cross references. *— For the Federal Unemployment Tax Act, see* 26 U.S.C. §§ 3301 to 3308.

For the federal Immigration and Nationality Act, see 8 U.S.C. §§ 1101 to 1503.

The 2013 amendment, *effective January 1, 2015, changed the definition of "employer"; and in Paragraph (2) of Subsection E, after "postpone activating the", deleted "separate account" and added "individual or type of organization" and after "pursuant to", deleted "Subsection A of".*

51-1-43. Unemployment compensation; governmental entities.

Subject to the provisions of Section 51-1-47 NMSA 1978, services performed by individuals in the employ of governmental entities, state hospitals and state institutions of higher education shall be subject to the provisions of the Unemployment Compensation Law [51-1-1 NMSA 1978].

History: 1953 Comp., § 59-9-22.2, enacted by Laws 1977, ch. 227, § 5; 1978, ch. 131, § 4; 1980, ch. 50, § 5; 1981, ch. 354, § 11.

ANNOTATIONS

Cross references. — As to meaning and applicability of act to government entities, see 51-1-47 NMSA 1978.

Employer liable to employees for unemployment compensation. — In an employer-employee relationship, the employer maintains the right to determine how the work is to be done and is liable to its employees for unemployment compensation. 1980 Op. Att'y Gen. No. 80-08.

Artists-in-schools participants ineligible for benefits. — Artists participating in the artists-in-the-schools program are not employees of the New Mexico arts division and, therefore, are ineligible for unemployment compensation benefits through the division. 1980 Op. Att'y Gen. No. 80-08.

51-1-44. Additional definitions.

For purposes of the Unemployment Compensation Law [51-1-1 NMSA 1978]:

A. "employment" means service performed by an individual in the employ of a governmental entity unless such service is performed by an individual in the exercise of his duties:

(1) as an elected official;

(2) as a member of a legislative body or a member of the judiciary of a governmental entity of this state;

(3) as a member of the national guard or air national guard;

(4) as an employee serving on a temporary basis in case of fire, snow, earthquake, flood or similar emergency; or

(5) in a position which, under or pursuant to state law, is designated as:

(a) a major nontenured policy-making or advisory position; or

(b) a policy-making or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week;

B. "governmental entity" means the state or any political subdivision thereof, or any instrumentality of any one or more of the foregoing which is wholly owned by one or more states or political subdivisions;

C. "local public body" means all political subdivisions of the state or any of their agencies, instrumentalities and institutions or any county hospitals, or outpatient clinics thereof, leased to, or operated under an agreement with, a state educational institution

named in Article 12, Section 11 of the constitution of New Mexico. The term "local public body" shall not be construed to mean school districts; and

D. "state" or "state agency" means the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all school districts of this state.

History: 1953 Comp., § 59-9-22.3, enacted by Laws 1977, ch. 227, § 6; 1978, ch. 168, § 4.

ANNOTATIONS

Cross references. — As to applicability of act to government entities, see 51-1-47 NMSA 1978.

Artists-in-schools participants ineligible for benefits. — Artists participating in the artists-in-the-schools program are not employees of the New Mexico arts division and, therefore, are ineligible for unemployment compensation benefits through the division. 1980 Op. Att'y Gen. No. 80-08.

51-1-45. State government unemployment compensation reserve fund created; purposes; assessments.

A. There is created a "state government unemployment compensation reserve fund". The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the director of the risk management division of the general services department with the prior approval of the state board of finance. Money in the fund is appropriated to carry out the purposes of the fund.

B. The director of the risk management division of the general services department shall assess each state agency at the end of each calendar quarter in accordance with the rate schedule prescribed by the risk management division plus an additional amount to pay reasonable costs of administration of the fund. Assessments shall be deposited in the state government unemployment compensation reserve fund to carry out the purposes of Laws 1977, Chapter 227, as amended. The director of the risk management division shall approve the method of computing the amounts that are payable under this subsection by each state agency and the time and manner of payments.

C. Money deposited in the state government unemployment compensation reserve fund may be used by the director of the risk management division of the general services department to:

(1) pay the department for benefits paid to employees of state agencies;

(2) pay costs or expenses incurred in protesting benefits paid by the department;

(3) pay other costs incurred in carrying out the provisions of this section; and

(4) establish and maintain a reserve fund for paying reimbursements of benefits paid to employees of state agencies.

History: 1953 Comp., § 59-9-22.4, enacted by Laws 1977, ch. 227, § 7; 1978, ch. 131, § 5; 1979, ch. 280, § 45; 1996 (1st S.S.), ch. 3, § 6; 2000, ch. 27, § 5.

ANNOTATIONS

Cross references. — As to applicability of act to government entities, see 51-1-47 NMSA 1978.

The 2000 amendment, effective March 6, 2000, added Subsection C(4) and deleted Subsection D, concerning excess cash balances in the state government unemployment compensation reserve fund.

The 1996 amendment, effective March 21, 1996, inserted "of the general services department" throughout the section; in Subsection C, deleted former Paragraph (4) which provided for the establishment and maintenance of a reserve fund for paying reimbursement of benefits to employees of state agencies, and made a minor stylistic change; and added Subsection D.

Law reviews. — For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

51-1-46. Local public body unemployment compensation reserve fund created; purposes; assessments.

A. There is created the "local public body unemployment compensation reserve fund." The fund and any income from the fund shall be held in trust, deposited in a segregated account and invested by the general services department with the prior approval of the state board of finance. Money in the fund is hereby appropriated to carry out the purposes of the fund.

B. Any local public body of this state may participate in the local public body unemployment compensation reserve fund by:

(1) giving notice to the director of the risk management division at least ninety days prior to the date participation is to begin; and

(2) agreeing to pay at the end of each calendar quarter an amount determined pursuant to the rate schedule prescribed by the risk management division

plus such additional amount as may be necessary to pay reasonable costs of administration.

C. The director of the risk management division shall terminate the participation of any local public body in the local public body unemployment compensation reserve fund if the local public body fails to:

(1) pay any assessment made by the risk management division within thirty days after the date of assessment; or

(2) comply with regulations of the risk management division.

D. Money deposited in the local public body unemployment compensation reserve fund may be used by the director of the risk management division to:

(1) reimburse the department for benefits paid to public employees covered under the local public body unemployment compensation reserve fund during the previous calendar quarter;

(2) pay any costs or expenses incurred in protesting benefits paid by the department;

(3) pay any costs and expenses incurred in carrying out the provisions of this section; and

(4) establish and maintain a reserve fund for paying reimbursements of benefits paid to employees of local public bodies.

History: 1953 Comp., § 59-9-22.5, enacted by Laws 1977, ch. 227, § 8; 1978, ch. 131, § 6; 1979, ch. 280, § 46; 1983, ch. 301, § 80.

ANNOTATIONS

Cross references. — As to applicability of act to government entities, see 51-1-47 NMSA 1978.

51-1-47. Application of the act [Applicability of act to governmental entities].

The provisions of Laws 1977, Chapter 227, as amended [51-1-14 to 51-1-17, 51-1-43 to 51-1-47 NMSA 1978], shall apply to all governmental entities of New Mexico to the extent such entities are constitutionally required by federal law to pay unemployment benefits to public employees as a condition of obtaining approval of the state unemployment compensation plan. If the federal Unemployment Compensation Amendments of 1976 (Public Law 94-566) is adjudged unconstitutional or invalid in its application or stayed during the pendency of legal proceedings, the coverage of public

employees of this state under the Unemployment Compensation Law [this chapter] is automatically stayed. Upon entry of a final judgment declaring the Federal Unemployment Compensation Law to be unconstitutional, the provisions of Laws 1977, Chapter 227, as amended, are repealed.

History: 1978 Comp., § 51-1-47, enacted by Laws 1977, ch. 227, § 11; 1978, ch. 131, § 7.

ANNOTATIONS

Compiler's notes. — This section was not compiled in the 1953 Compilation.

Unemployment Compensation Amendments. — The federal Unemployment Compensation Amendments of 1976, referred to in the second sentence, appear as various sections throughout 5, 26 and 42 U.S.C.

Federal Unemployment Compensation Law. — The reference to the Federal Unemployment Compensation Law in the last sentence apparently means the Federal Unemployment Tax Act, which appears as 26 U.S.C. §§ 3301 to 3308.

51-1-48. Definitions; extended benefits.

A. As used in this section, unless the context clearly requires otherwise, "extended benefit period" means a period that:

(1) begins with the third week after a week for which there is a state "on indicator";

(2) ends with either of the following weeks, whichever occurs later:

(a) the third week after the first week for which there is a state "off indicator"; or

(b) the thirteenth consecutive week of such period; and

(3) does not begin by reason of a state "on indicator" before the fourteenth week following the end of a prior extended benefit period that was in effect with respect to this state.

B. There is a state "on indicator" for this state for a week if the rate of insured unemployment not seasonally adjusted under this section for the period consisting of that week and the immediately preceding twelve weeks:

(1) equaled or exceeded one hundred twenty percent of the average of the rates for the corresponding thirteen-week period ending in each of the preceding two calendar years; and

(2) equaled or exceeded five percent; or

(3) equaled or exceeded six percent, regardless of the rate of insured unemployment in the two previous years; provided that the operation of this paragraph shall not activate the state "on indicator" any time after four weeks prior to the last week for which one hundred percent federal sharing funding is available under Section 2005(a) of Public Law No. 111-5, without regard to the extension of federal sharing for certain claims as provided under Section 2005(c) of that law; or

(4) with respect to benefits for weeks of unemployment beginning after July 1, 2003 and ending four weeks prior to the last week for which one hundred percent federal sharing funding is available under Section 2005(a) of Public Law No. 111-5, without regard to the extension of federal sharing for certain claims as provided under Section 2005(c) of that law:

(a) the average rate of total unemployment, seasonally adjusted, as determined by the United States secretary of labor, for the period consisting of the most recent three months for which data for all states are published before the close of such week equals or exceeds six and one-half percent; and

(b) the average rate of total unemployment in this state, seasonally adjusted, as determined by the United States secretary of labor, for the three-month period referred to in Subparagraph (a) of this paragraph, equals or exceeds one hundred ten percent of such average: 1) for either or both of the corresponding three-month periods ending in the two preceding calendar years; or 2) for weeks of unemployment beginning after December 17, 2010 and ending before December 31, 2011, for any or all of the corresponding three-month periods ending in the three preceding calendar years.

C. There is a state "off indicator" for this state for a week only if, for the period consisting of that week and the immediately preceding twelve weeks, none of the options specified in Subsection B of this section result in a state "on indicator".

D. Except as provided in Subsection E of this section, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year shall be the least of the following amounts:

(1) fifty percent of the total amount of regular benefits that were payable to the individual pursuant to this section in the individual's applicable benefit year;

(2) thirteen times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year; or

(3) thirty-nine times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year, reduced by the total amount of regular benefits that were

paid, or deemed paid, to the individual pursuant to this section with respect to the benefit year; provided that the amount determined pursuant to this paragraph shall be reduced by the total amount of additional benefits paid, or deemed paid, to the individual under the provisions of this section for weeks of unemployment in the individual's benefit year that began prior to the effective date of the extended benefit period that is current in the week for which the individual first claims extended benefits; and provided further, if the benefit year of the individual ends within an extended benefit period, the remaining balance of the extended benefits that the individual would, but for this paragraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced, but not below zero, by the product of the number of weeks for which the individual received any amounts as readjustment allowances within that benefit year multiplied by the individual weekly benefit amount for extended benefits.

E. Effective with respect to weeks beginning in a high-unemployment period, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year shall be the least of the following amounts:

(1) eighty percent of the total amount of regular benefits that were payable to the individual pursuant to this section in the individual's applicable benefit year;

(2) twenty times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year; or

(3) forty-six times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year reduced by the total amount of regular benefits that were paid, or deemed paid, to the individual pursuant to this section with respect to the benefit year; provided that the amount determined pursuant to this paragraph shall be reduced by the total amount of additional benefits paid, or deemed paid, to the individual under the provisions of this section for weeks of unemployment in the individual's benefit year that began prior to the effective date of the extended benefit period that is current in the week for which the individual first claims extended benefits; and provided further, if the benefit year of an individual ends within an extended benefit period, the remaining balance of the extended benefits that the individual would, but for this paragraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced, but not below zero, by the product of the number of weeks for which the individual received any amounts as readjustment allowances within that benefit year multiplied by the individual weekly benefit amount for extended benefits.

F. For purposes of Subsection E of this section, "high-unemployment period" means a period during which an extended benefit period would be in effect if Paragraph (4) of Subsection B of this section were applied by substituting "eight percent" for "six and one-half percent".

G. A benefit paid to an individual pursuant to this section shall be charged pursuant to Subsection B of Section 51-1-11 NMSA 1978.

H. As used in this section:

(1) "rate of insured unemployment" means the percentage derived by dividing:

(a) the average weekly number of individuals filing claims for regular benefits in this state for weeks of unemployment with respect to the most recent thirteen-consecutive-week period, as determined by the secretary on the basis of the secretary's reports to the United States secretary of labor; by

(b) the average monthly employment covered under the Unemployment Compensation Law for the first four of the most recent six completed calendar quarters ending before the end of such thirteen-week period;

(2) "regular benefits" means benefits payable to an individual under the Unemployment Compensation Law or under any other state law, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C., Chapter 85, other than extended benefits;

(3) "extended benefits" means benefits, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C., Chapter 85, payable to an individual under the provisions of this section for weeks of unemployment in the individual's eligibility period;

(4) "eligibility period" of an individual means the period consisting of the weeks in the individual's benefit year that begin in an extended benefit period and, if the individual's benefit year ends within such extended benefit period, any weeks thereafter that begin in such period;

(5) "exhaustee" means an individual who, with respect to any week of unemployment in the individual's eligibility period:

(a) has received, prior to such week, all of the regular benefits that were available to the individual under the Unemployment Compensation Law or any other state law, including dependent's allowance and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C., Chapter 85, in the individual's current benefit year that includes such week; provided that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to the individual, although, as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in the individual's benefit year, the individual may subsequently be determined to be entitled to added regular benefits; or

(b) if the individual's benefit year has expired prior to such week, has no, or insufficient, wages on the basis of which the individual could establish a new benefit year that would include such week; and

(c) has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Trade Act of 1974, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States secretary of labor; and has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada, but if the individual is seeking such benefits and the appropriate agency finally determines that the individual is not entitled to benefits under such law, the individual is considered an exhaustee; and

(6) "state law" means the unemployment insurance law of any state, approved by the United States secretary of labor under Section 3304 of the Internal Revenue Code of 1986.

History: 1953 Comp., § 59-9-23, enacted by Laws 1971, ch. 209, § 7; 1973, ch. 216, § 10; 1975, ch. 228, § 1; 1977, ch. 321, § 7; 1978, ch. 165, § 5; 1979, ch. 280, § 47; 1981, ch. 354, § 12; 1982, ch. 41, § 5; 2003, ch. 47, § 7; 2011, ch. 184, § 5.

ANNOTATIONS

Cross references. — For the Railroad Unemployment Insurance Act, *see* 45 U.S.C. § 351 et seq.

For the Trade Expansion Act of 1962, *see* 19 U.S.C. § 1801 et seq.

For the Trade Act of 1974, *see* 19 U.S.C. § 2101 et seq.

For the Automotive Products Trade Act of 1965, *see* 19 U.S.C. § 2001 et seq.

For Section 3304 of the Internal Revenue Code of 1986, *see* 26 U.S.C. § 3304.

Repeals and reenactments. — Laws 1971, ch. 209, § 7, repealed former 59-9-23, 1953 Comp., relating to meaning of this act, and enacted a new 59-9-23, 1953 Comp.

The 2011 amendment, effective July 1, 2011, provided that extended benefits will be paid only if one hundred percent federal sharing funding is available, and for the period December 17, 2010 to December 31, 2011, only if unemployment in New Mexico equals or exceeds one hundred ten percent of the national average rate of unemployment.

The 2003 amendment, effective March 19, 2003, in the first paragraph added the subsection designation "A." preceding "As used" at the beginning and deleted "A." following "otherwise" near the middle; substituted "does not" for "provided that no extended benefit period may" at the beginning of present Subsection A(3); rewrote

Subsections B and C; and added present Subsections D, E, F and G and redesignated the remaining provisions.

Act unambiguous and in harmony with federal law. — The Unemployment Compensation Law is not ambiguous with regard to the definition of "regular" and "extended" benefits and is not in conflict with federal statutes and regulations. N.M. Hosp. Ass'n v. Emp't Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).

"Extended" and "regular" benefits defined. — "Extended benefits" are benefits payable under the provisions of this section, and benefits payable under other sections of the Unemployment Compensation Law are "regular benefits." N.M. Hosp. Ass'n v. Emp't Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).

"Regular" benefits are those benefits provided under 51-1-4 NMSA 1978 for 26 weeks, and "extended" benefits are those benefits payable under this section during an extended benefit period to those claimants who have exhausted all their rights to regular benefits. N.M. Hosp. Ass'n v. Emp't Sec. Comm'n, 92 N.M. 725, 594 P.2d 1181 (1979).

Law reviews. — For article, "Unemployment Compensation in New Mexico," see 11 N.M.L. Rev. 327 (1981).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Unemployment compensation: eligibility as affected by claimant's refusal to accept employment at compensation less than that of previous job, 94 A.L.R.3d 63.

51-1-48. Definitions; extended benefits. (Effective January 1, 2015.)

A. As used in this section, unless the context clearly requires otherwise, "extended benefit period" means a period that:

(1) begins with the third week after a week for which there is a state "on indicator";

(2) ends with either of the following weeks, whichever occurs later:

(a) the third week after the first week for which there is a state "off indicator"; or

(b) the thirteenth consecutive week of such period; and

(3) does not begin by reason of a state "on indicator" before the fourteenth week following the end of a prior extended benefit period that was in effect with respect to this state.

B. There is a state "on indicator" for this state for a week if the rate of insured unemployment not seasonally adjusted under this section for the period consisting of that week and the immediately preceding twelve weeks:

(1) equaled or exceeded one hundred twenty percent of the average of the rates for the corresponding thirteen-week period ending in each of the preceding two calendar years; and

(2) equaled or exceeded five percent; or

(3) equaled or exceeded six percent, regardless of the rate of insured unemployment in the two previous years; provided that the operation of this paragraph shall not activate the state "on indicator" any time after four weeks prior to the last week for which one hundred percent federal sharing funding is available under Section 2005(a) of Public Law No. 111-5, without regard to the extension of federal sharing for certain claims as provided under Section 2005(c) of that law; or

(4) with respect to benefits for weeks of unemployment beginning after July 1, 2003 and ending four weeks prior to the last week for which one hundred percent federal sharing funding is available under Section 2005(a) of Public Law No. 111-5, without regard to the extension of federal sharing for certain claims as provided under Section 2005(c) of that law:

(a) the average rate of total unemployment, seasonally adjusted, as determined by the United States secretary of labor, for the period consisting of the most recent three months for which data for all states are published before the close of such week equals or exceeds six and one-half percent; and

(b) the average rate of total unemployment in this state, seasonally adjusted, as determined by the United States secretary of labor, for the three-month period referred to in Subparagraph (a) of this paragraph, equals or exceeds one hundred ten percent of such average: 1) for either or both of the corresponding three-month periods ending in the two preceding calendar years; or 2) for weeks of unemployment beginning after December 17, 2010 and ending before December 31, 2011, for any or all of the corresponding three-month periods ending in the three preceding calendar years.

C. There is a state "off indicator" for this state for a week only if, for the period consisting of that week and the immediately preceding twelve weeks, none of the options specified in Subsection B of this section result in a state "on indicator".

D. Except as provided in Subsection E of this section, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year shall be the least of the following amounts:

(1) fifty percent of the total amount of regular benefits that were payable to the individual pursuant to this section in the individual's applicable benefit year;

(2) thirteen times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year; or

(3) thirty-nine times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year, reduced by the total amount of regular benefits that were paid, or deemed paid, to the individual pursuant to this section with respect to the benefit year; provided that the amount determined pursuant to this paragraph shall be reduced by the total amount of additional benefits paid, or deemed paid, to the individual under the provisions of this section for weeks of unemployment in the individual's benefit year that began prior to the effective date of the extended benefit period that is current in the week for which the individual first claims extended benefits; and provided further, if the benefit year of the individual ends within an extended benefit period, the remaining balance of the extended benefits that the individual would, but for this paragraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced, but not below zero, by the product of the number of weeks for which the individual received any amounts as readjustment allowances within that benefit year multiplied by the individual weekly benefit amount for extended benefits.

E. Effective with respect to weeks beginning in a high-unemployment period, the total extended benefit amount payable to an eligible individual with respect to the applicable benefit year shall be the least of the following amounts:

(1) eighty percent of the total amount of regular benefits that were payable to the individual pursuant to this section in the individual's applicable benefit year;

(2) twenty times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year; or

(3) forty-six times the individual's average weekly benefit amount that was payable to the individual pursuant to this section for a week of total unemployment in the applicable benefit year reduced by the total amount of regular benefits that were paid, or deemed paid, to the individual pursuant to this section with respect to the benefit year; provided that the amount determined pursuant to this paragraph shall be reduced by the total amount of additional benefits paid, or deemed paid, to the individual under the provisions of this section for weeks of unemployment in the individual's benefit year that began prior to the effective date of the extended benefit period that is current in the week for which the individual first claims extended benefits; and provided further, if the benefit year of an individual ends within an extended benefit period, the remaining balance of the extended benefits that the individual would, but for this paragraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced, but not below zero, by the product of the number of weeks for which the individual

received any amounts as readjustment allowances within that benefit year multiplied by the individual weekly benefit amount for extended benefits.

F. For purposes of Subsection E of this section, "high-unemployment period" means a period during which an extended benefit period would be in effect if Paragraph (4) of Subsection B of this section were applied by substituting "eight percent" for "six and one-half percent".

G. A benefit paid to an individual pursuant to this section shall be charged pursuant to Subsection A of Section 51-1-11 NMSA 1978.

H. As used in this section:

(1) "rate of insured unemployment" means the percentage derived by dividing:

(a) the average weekly number of individuals filing claims for regular benefits in this state for weeks of unemployment with respect to the most recent thirteen-consecutive-week period, as determined by the secretary on the basis of the secretary's reports to the United States secretary of labor; by

(b) the average monthly employment covered under the Unemployment Compensation Law for the first four of the most recent six completed calendar quarters ending before the end of such thirteen-week period;

(2) "regular benefits" means benefits payable to an individual under the Unemployment Compensation Law or under any other state law, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C., Chapter 85, other than extended benefits;

(3) "extended benefits" means benefits, including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C., Chapter 85, payable to an individual under the provisions of this section for weeks of unemployment in the individual's eligibility period;

(4) "eligibility period" of an individual means the period consisting of the weeks in the individual's benefit year that begin in an extended benefit period and, if the individual's benefit year ends within such extended benefit period, any weeks thereafter that begin in such period;

(5) "exhaustee" means an individual who, with respect to any week of unemployment in the individual's eligibility period:

(a) has received, prior to such week, all of the regular benefits that were available to the individual under the Unemployment Compensation Law or any other state law, including dependent's allowance and benefits payable to federal civilian

employees and ex-servicemen under 5 U.S.C., Chapter 85, in the individual's current benefit year that includes such week; provided that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to the individual, although, as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in the individual's benefit year, the individual may subsequently be determined to be entitled to added regular benefits; or

(b) if the individual's benefit year has expired prior to such week, has no, or insufficient, wages on the basis of which the individual could establish a new benefit year that would include such week; and

(c) has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Trade Act of 1974, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States secretary of labor; and has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada, but if the individual is seeking such benefits and the appropriate agency finally determines that the individual is not entitled to benefits under such law, the individual is considered an exhaustee; and

(6) "state law" means the unemployment insurance law of any state, approved by the United States secretary of labor under Section 3304 of the Internal Revenue Code of 1986.

History: 1953 Comp., § 59-9-23, enacted by Laws 1971, ch. 209, § 7; 1973, ch. 216, § 10; 1975, ch. 228, § 1; 1977, ch. 321, § 7; 1978, ch. 165, § 5; 1979, ch. 280, § 47; 1981, ch. 354, § 12; 1982, ch. 41, § 5; 2003, ch. 47, § 7; 2011, ch. 184, § 5; 2013, ch. 133, § 6.

ANNOTATIONS

The 2013 amendment, *effective January 1, 2015, in Subsection G, changed "Subsection B of Section 51-1-11 NMSA 1978" to "Subsection A of Section 51-1-11 NMSA 1978".*

51-1-48.1. Extended benefits; eligibility.

A. During an extended benefit period in this state, an individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the secretary finds that with respect to such week:

(1) he is an "exhaustee" as defined in Section 51-1-48 NMSA 1978;

(2) he has been paid wages for insured work during his base period equal to at least one and one-half times the wages paid in that quarter of his base period in

which his wages were highest or as otherwise provided by the Federal-State Extended Unemployment Compensation Act of 1970, as amended; and

(3) he has satisfied those provisions of the Unemployment Compensation Law [51-1-1 NMSA 1978] which apply to claims for, and the payment of, regular benefits and which are consistent with the provisions of this section and the Federal-State Extended Unemployment Compensation Act of 1970, as amended.

B. An individual shall be ineligible for payment of extended benefits for any week of unemployment in the individual's extended eligibility period if the secretary finds that during such period the individual failed to accept any offer of suitable work or failed to apply for any suitable work to which the individual was referred by the department or the individual failed to actively engage in seeking work.

(1) For purposes only of this subsection, "suitable work" means any work which is within an individual's capabilities, provided that the gross average weekly remuneration payable for the work must:

(a) exceed the individual's weekly extended benefit amount as determined in Subsection A of Section 51-1-48.2 NMSA 1978 plus the amount of any supplemental unemployment benefits (as defined in Section 501 (c)(17)(D) of the Internal Revenue Code of 1954) payable to the individual;

(b) equal or exceed the higher of: 1) the minimum wage required by Section 6(a)(1) of the Fair Labor Standard Act of 1938, as amended, without regard to any exemption; or 2) the minimum wage provisions of Section 50-4-22 NMSA 1978, as amended; and

(c) the offer of work is a bona fide offer made to the individual in writing or is currently listed with the employment service of the division.

(2) For purposes of this subsection, an individual shall be treated as actively engaged in seeking work during a week of unemployment if the individual furnishes tangible evidence each week, as provided by regulation of the secretary, that he has made a systematic and sustained effort to obtain work which meets the criteria in Paragraph (1) of this subsection.

C. If any individual is ineligible for extended benefits for any week because of his failure to accept any offer of suitable work or to apply for any suitable work when referred by the department or to actively seek new work as provided in this section, the individual shall be ineligible to receive extended benefits for any week during the period beginning with the week following the week in which such failure occurs and until the individual has been employed during at least four weeks and has earned a total remuneration of at least four times his weekly extended benefit amount established during his benefit year.

D. If an individual furnishes evidence satisfactory to the division that such individual's prospects for obtaining work in his customary occupation or trade within a reasonably short period are good, the determination of suitable work with respect to such individual shall be made in accordance with the state law provisions applicable to claimants for regular benefits.

E. The employment service of the division shall refer applicants for extended benefits to suitable work meeting the criteria of Paragraph (1) of Subsection B of this section.

F. An individual shall not be eligible for extended benefits for any week for which such benefits would be payable pursuant to an interstate claim filed under the interstate benefit payment plan if no extended benefit period is in effect for the week in the state in which the interstate claim is filed. The provisions of this subsection shall not apply to the first two weeks for which extended benefits are payable to the individual on an interstate claim from the extended benefit account established for the individual with respect to the benefit year.

History: 1978 Comp., § 51-1-48.1, enacted by Laws 1981, ch. 354, § 13; 1982, ch. 41, § 6; 1993, ch. 209, § 7.

ANNOTATIONS

Federal acts. — The Federal-State Extended Unemployment Compensation Act of 1970, referred to in Subsections A(2) and A(3), appears as 26 U.S.C. § 3304, et seq.

Section 501(c)(17)(D) of the Internal Revenue Code of 1954, referred to in Subsection B(1)(a), appears as 26 U.S.C. § 501(c)(17)(D).

Section (6)(a)(1) of the Fair Labor Standard Act of 1938, referred to in Subsection B(1)(b)(1), appears as 29 U.S.C. § 206(a)(1).

The 1993 amendment, effective April 5, 1993, substituted "division" for "employment security department" throughout the section; added the language beginning "or as otherwise provided" at the end of Subsection A(2); added the language beginning "and the Federal-State" at the end of Subsection A(3); and made minor stylistic changes.

51-1-48.2. Extended benefits; payments.

A. The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year pursuant to Section 51-1-4 NMSA 1978, provided that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970 are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, the weekly extended benefit amount

payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the next lower dollar amount.

B. The total extended benefit amount payable to any eligible individual with respect to this applicable benefit year shall be the least of the following amounts:

(1) fifty percent of the total amount of regular benefits which were payable to him under the Unemployment Compensation Law [51-1-1 NMSA 1978] in his applicable benefit year;

(2) thirteen times his weekly benefit amount which was payable to him under the Unemployment Compensation Law for a week of total unemployment in the applicable benefit year;

(3) thirty-nine times his weekly benefit amount which was payable to him under the Unemployment Compensation Law for a week of total unemployment in the applicable benefit year, reduced by the total amount of regular benefits which were paid (or deemed paid) to him under the Unemployment Compensation Law with respect to the benefit year; or

(4) in conjunction with Paragraphs (1), (2) and (3) of this subsection, an amount equal to the aggregate of the reductions in the weekly benefit amount payable under Subsection A of this section when such weekly benefit amounts are reduced pursuant to an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

C. Notwithstanding any other provisions of this chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this section, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts of trade readjustment allowances within that benefit year multiplied by the individual's weekly benefit amount for extended benefits.

D. Whenever an extended benefit period is to become effective in this state as a result of a state "on" indicator, or an extended benefit period is to be terminated in this state as a result of state "off" indicators, the department shall make an appropriate public announcement. Computations required by the provisions of Subsection D of Section 51-1-48 NMSA 1978 shall be made by the department in accordance with regulations prescribed by the United States secretary of labor.

History: 1978 Comp., § 51-1-48.2, enacted by Laws 1981, ch. 354, § 14; 1982, ch. 41, § 7; 1987, ch. 63, § 5.

ANNOTATIONS

Federal-State Extended Unemployment Compensation Act. — Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, referred to in the first sentence in Subsection A, appears as a note following 26 U.S.C. § 3304.

Balanced Budget and Emergency Deficit Control Act. — Section 252 of the federal Balanced Budget and Emergency Deficit Control Act of 1985, referred to in the first sentence in Subsection A and in Subsection B(4), appears as 2 U.S.C. § 902.

51-1-49. Repealed.

ANNOTATIONS

Repeals. — Laws 1991, ch. 122, § 13 repeals 51-1-49 NMSA 1978, as enacted by Laws 1936 (S.S.), ch. 1, § 20, relating to part-time workers, effective April 3, 1991. For provisions of former section, see 1987 Replacement Pamphlet.

51-1-50. Reciprocal arrangements.

A. The secretary is hereby authorized to enter into reciprocal arrangements with appropriate and duly authorized agencies of other states or of the federal government, or both, whereby services performed by an individual for a single employing unit for which services are customarily performed by such individual in more than one state shall be deemed to be services performed entirely within any one of the states (1) in which any part of such individual's service is performed; or (2) in which such individual has his residence; or (3) in which the employing unit maintains a place of business; provided there is in effect, as to such services, an election, by an employing unit with the acquiescence of such individual, approved by the agency charged with the administration of such state's unemployment compensation law, pursuant to which services performed by such individual for such employing unit are deemed to be performed entirely within such state.

B. The department shall participate in any arrangement for the payment of compensation on the basis of combining an individual's wages and employment covered under the Unemployment Compensation Law [51-1-1 NMSA 1978] with his wages and employment covered under the unemployment compensation laws of other states which are approved by the United States secretary of labor in consultation with the state unemployment compensation agencies as are reasonably calculated to assure the prompt and full payment of compensation in such situations and which included provisions for:

(1) applying the base period of a single state law to a claim involving the combining of an individual's wages and employment covered under two or more state unemployment compensation laws; and

(2) avoiding the duplicate use of wages and employment by reason of such combining; and

(3) for purposes of this subsection no such arrangement shall be entered into unless it contains provisions for reimbursements to the fund for such of the benefits paid under the Unemployment Compensation Law upon the basis of such wages or services, and provisions for reimbursements from the fund for such of the compensation paid under such other law upon the basis of wages for insured work, as the secretary finds will be fair and reasonable as to all affected interests.

C. Contributions and payments in lieu of contributions due under the Unemployment Compensation Law with respect to wages for insured work shall for the purposes of Section 51-1-36 NMSA 1978 be deemed to have been paid to the fund as of the date payment was made as contributions or payments in lieu of contributions therefor under another state or federal unemployment compensation law, but no such arrangement shall be entered into unless it contains provisions for such reimbursement to the fund of such contributions or payments in lieu of contributions as the secretary finds will be fair and reasonable as to all affected interests.

D. Reimbursements paid from the fund pursuant to Subsection B of this section shall be deemed to be benefits for the purposes of the Unemployment Compensation Law. The department is authorized to make to other state or federal agencies and to receive from such other state or federal agencies, reimbursements from or to the fund, in accordance with arrangements entered into pursuant to Subsection B of this section.

E. The administration of the Unemployment Compensation Law and of other state and federal unemployment compensation and public employment service laws will be promoted by cooperation between this state and such other states and the appropriate federal agencies in exchanging services, and making available facilities and information. The secretary is therefore authorized to make such investigations, secure and transmit such information, make available such services and facilities and exercise such of the other powers provided herein with respect to the administration of the Unemployment Compensation Law as he deems necessary or appropriate to facilitate the administration of any such unemployment compensation or public employment service law, and in like manner to accept and utilize information, services and facilities made available to this state by the agency charged with the administration of any such other unemployment compensation or public employment service law.

F. To the extent permissible under the laws and constitution of the United States, the secretary is authorized to enter into or cooperate in arrangements whereby facilities and services provided under the Unemployment Compensation Law and facilities and services provided under the unemployment compensation law of any foreign government, may be utilized for the taking of claims and the payment of benefits under the Unemployment Compensation Law of this state or under a similar law of such government.

History: Laws 1936 (S.S.), ch. 1, § 21; 1941 Comp., § 57-824; Laws 1941, ch. 205, § 12; 1943, ch. 108, § 1; 1953 Comp., § 59-9-25; Laws 1971, ch. 209, § 8; 1973, ch. 216, § 11; 1979, ch. 280, § 49.

ANNOTATIONS

Dual payments not prohibited. — There is no inconsistency between Section 51-1-8 NMSA 1978 and this section and nothing under New Mexico law prohibits dual payment of unemployment compensation, so long as such payments are not duplicate in nature. 1953-54 Op. Att'y Gen. No. 53-5635.

51-1-51. Record availability; cooperation.

The secretary may make the state's records relating to the administration of the Unemployment Compensation Law [51-1-1 NMSA 1978] available to the railroad retirement board and may furnish the railroad retirement board, at the expense of such board, such copies thereof as the railroad retirement board deems necessary for its purposes. The secretary may afford reasonable cooperation with every agency of the United States charged with the administration of any unemployment insurance law.

History: Laws 1939, ch. 175, § 10; 1941 Comp., § 57-825; 1953 Comp., § 59-9-26; Laws 1979, ch. 280, § 50.

51-1-52. Effectiveness if federal act inoperative.

If the tax imposed by Title IX of the federal Social Security Act or any amendments thereto, or any other federal tax against which contributions under the Unemployment Compensation Law [51-1-1 NMSA 1978] may be credited shall be amended or repealed by congress or held unconstitutional by the supreme court of the United States, with the result that no portion of the contributions required under that act may be credited against such federal tax, then that act by virtue of that fact, shall be suspended until the legislature shall meet and take action relative thereto, and any unobligated funds in the unemployment compensation fund, and returned by the United States treasurer because such federal Social Security Act is inoperative, shall be held in custody by the state treasurer under supervision of the secretary until the legislature shall provide for the disposition thereof.

History: Laws 1936 (S.S.), ch. 1, § 22; 1941 Comp., § 57-826; 1953 Comp., § 59-9-27; Laws 1979, ch. 280, § 51.

ANNOTATIONS

Cross references. — As to rules governing garnishment and writs of execution in the district, magistrate, and metropolitan courts, see Rules 1-065.1, 2-801, and 3-801 NMRA, respectively.

As to form for claim of exemptions on executions, see Rule 4-803 NMRA.

As to form for order on claim of exemption and order to pay in execution proceedings, see Rule 4-804 NMRA.

As to form for application for writ of garnishment and affidavit, see Rule 4-805 NMRA.

As to form for notice of right to claim exemptions from execution, see Rule 4-808A NMRA.

As to form for claim of exemption from garnishment, see Rule 4-809 NMRA.

Social Security Act. — Title IX of the federal Social Security Act, referred to in this section, appears as 42 U.S.C. § 1101 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation § 3.

51-1-52.1. Leasing employer; temporary services employer.

A. As used in this section:

(1) "leasing employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs the following functions:

(a) retains the right to hire and terminate workers; and

(b) pays the worker from its own account; and

(2) "temporary services employer" means an employing unit that contracts with clients or customers to supply workers to perform services for the client or customer and performs all of the following functions:

(a) negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality and price of the services;

(b) determines assignments of workers, even though workers retain the right to refuse specific assignments;

(c) retains the authority to reassign or refuse to reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer;

(d) assigns the worker to perform services for a client or customer;

(e) sets the rate of pay for the worker, whether or not through negotiation; and

(f) pays the worker directly.

B. Notwithstanding any other provision of the Unemployment Compensation Law [51-1-1 NMSA 1978], if an individual or entity contracts to supply an employee to perform services for a client or customer and is a leasing employer or a temporary services employer, the individual or entity is the employer of the employee who performs the services. If an individual or entity contracts to supply an employee to perform services for a client or customer and is not a leasing employer or temporary services employer, the client or customer is the employer of the employee who performs the services. An individual or entity that contracts to supply an employee to perform services for a customer or client and pays wages to the employee for the services, but is not a leasing employer or a temporary services employer, pays the wages as the agent of the employer.

C. Notwithstanding any other provision of the Unemployment Compensation Law, in circumstances which are in essence the loan of an employee from one employer to another employer wherein direction and control of the manner and means of performing the services transfers to the employer to whom the employee is loaned, the loaning employer shall continue to be the employer of the employee if the loaning employer continues to pay remuneration to the employee, whether or not reimbursed by the other employer. If the employer to whom the employee is loaned pays remuneration to the employee for the services performed, that employer shall be considered the employer for the purpose of any remuneration paid to the employee, regardless of whether the loaning employer also pays remuneration to the employee.

D. A temporary services employer shall provide an employee, at the time of hiring, with written notice that the employee is required to contact the temporary services employer for reassignment upon the completion of an assignment and that failure to do so may result in denial of unemployment benefits.

E. If an employee of a temporary services employer has received the written notice pursuant to Subsection D of this section and fails without good cause to contact the temporary services employer upon completion of an assignment, the employee shall be deemed to have voluntarily left employment without good cause in connection with his employment for purposes of Section 51-1-7 NMSA 1978.

History: 1978 Comp., § 51-1-52.1, enacted by Laws 1987, ch. 350, § 1; 1999, ch. 154, § 1.

ANNOTATIONS

The 1999 amendment, effective June 18, 1999, added Subsections D and E.

51-1-53. Saving clauses.

The legislature reserves the right to amend or repeal all or any part of this act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges or immunities conferred by this act or by acts done pursuant thereto shall exist subject to the power of the legislature to amend or repeal this act at any time.

History: 1936 (S.S.), ch. 1, § 23; 1941 Comp., § 57-827; 1953 Comp., § 59-9-28.

ANNOTATIONS

Meaning of "this act". — See 51-1-33 NMSA 1978 and notes thereto.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 76 Am. Jur. 2d Unemployment Compensation §§ 4, 5, 47.

81 C.J.S. Social Security and Public Welfare §§ 151, 163.

51-1-54. Repealed.

ANNOTATIONS

Repeals. — Laws 1981, ch. 354, § 15, repeals 51-1-54 NMSA 1978, relating to the inclusion of wages paid for previously uncovered services in wages for insured work with respect to weeks of unemployment beginning on or after January 1, 1978, effective April 9, 1981.

51-1-55. Res judicata and collateral estoppel prohibition.

Any findings of fact or law, judgment, conclusions or final order made by an unemployment insurance claims examiner, hearing officer, the board of review or any person with the authority to make findings of fact or law in any action or proceeding under the Unemployment Compensation Law [51-1-1 NMSA 1978], shall not be conclusive or binding in any separate proceeding between an individual and his present or prior employer brought before an arbitrator, hearing officer, court or judge of this state or the United States regardless of whether the prior action was between the same or related parties or involved the same facts.

History: 1978 Comp., § 51-1-55, enacted by Laws 1990, ch. 18, § 5.

51-1-56. Death reports.

By the fifteenth day of each month, the state registrar shall send to the employment security division a report, certified as correct over his signature or the signature of his authorized representative, containing the name, date of birth, date of death, address, sex and social security number, where available, of each person who died in the state within the preceding calendar month. The employment security division unemployment

insurance bureau chief shall have custody of these reports. Such reports shall be confidential and shall not be considered as public records under the provisions of Sections 14-2-1 through 14-2-3 NMSA 1978. Such reports shall be used by the employment security division for administrative purposes only, and except for authorized personnel of the labor department, shall not be divulged to any person for any reason.

History: 1978 Comp., § 51-1-56, enacted by Laws 1991, ch. 122, § 11.

ANNOTATIONS

Compiler's notes. — Section 14-2-3 NMSA 1978 was repealed in 1993.

51-1-57. Amnesty.

A. The secretary shall establish a tax amnesty program for all employers owing any contributions or payments in lieu of contributions. Notice of the tax amnesty program shall be provided to each known delinquent employer. Such notice shall specify the amount of known delinquency and the taxable period for which amnesty may be sought.

B. The amnesty program shall be conducted from the period July 1, 1991 through September 30, 1991.

C. The amnesty program shall provide that upon written application by any employer and payment by such employer of all contributions or payments in lieu of contributions for any taxable period ending prior to July 1, 1990, the collection of interest and penalties shall be waived. Amnesty shall be granted only to those employers applying for amnesty during the period July 1, 1991 through September 30, 1991 who pay all contributions or payments in lieu of contributions due and file all delinquent quarterly wage and contribution reports. Failure to pay all contributions or payments in lieu of contributions due at the time of application and failure to file all delinquent quarterly wage and contribution reports at the time of application shall invalidate any amnesty granted. Amnesty shall be granted only for the periods specified in this section and only if all amnesty provisions are satisfied by the employer.

History: 1978 Comp., § 51-1-57, enacted by Laws 1991, ch. 122, § 12.

51-1-58. Conformity with federal laws.

If any provisions of this chapter are determined to be in nonconformity with federal statutes, as determined by the United States secretary of labor or his designee, the secretary, with the approval of the governor, is authorized to administer the state law to conform with any mandatory conformity provisions of the federal statutes until such time as the legislature meets in its next regular session and has an opportunity to amend the state law.

History: 1978 Comp., § 51-1-58, enacted by Laws 1993, ch. 209, § 8.

51-1-59. Coverage of Indian tribes.

A. The legislature finds that:

(1) the state of New Mexico recognizes and respects the Indian tribes and pueblos as governments that possess the inherent right of self-government;

(2) under the Federal Unemployment Tax Act, federal law now expressly exempts Indian tribes and requires that state law provide that an Indian tribe may elect to make contributions for employment or make reimbursable payments in lieu of contributions; and

(3) in order to comply with the change in federal law, state law must be amended to provide for the treatment of Indian tribes under the state unemployment insurance system.

B. Benefits based on service in employment of an Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service in employment for other employers pursuant to the Unemployment Compensation Law [51-1-1 NMSA 1978].

C. An Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe may make contributions in the same manner and under the same conditions as other employers or may elect to reimburse the fund with payments equal to the amounts of benefits attributable to service in the employ of the tribe, unit, subdivision, subsidiary or enterprise.

D. If an Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe elects to make payments in lieu of contributions, the following provisions shall apply:

(1) as used in this section, "electing entity" means a tribe, tribal unit or a subdivision, subsidiary or business enterprise, wholly owned by a tribe, that elects to make payments in lieu of contributions. The tribe as a whole may be an electing entity or an individual tribal unit, subdivision, subsidiary or enterprise, or a combination of these may be electing entities;

(2) an electing entity may elect to make payments in lieu of contributions by filing a written notice of its election with the division not later than thirty days prior to the beginning of the taxable year for which its election shall first be effective; except that, if an election is made prior to July 1, 2001, at the option of the electing entity the election shall be deemed to be effective December 21, 2000 or January 1, 2001; and

(3) once an election is made, payments in lieu of contributions will be used by the electing entity for the following two taxable years.

E. The following provisions apply to payments in lieu of contributions made by an electing entity:

(1) at the end of each calendar quarter, the division shall bill each electing entity for an amount calculated pursuant to this subsection; except that, in calculating the initial payments due for an electing entity that has made an election prior to July 1, 2001, the secretary shall bill the electing entity for the period elapsed since December 21, 2000;

(2) each calendar quarter, each electing entity making payments in lieu of contributions shall pay to the division an amount equal to twenty-five percent of the total benefit charges made to the electing entity during the four calendar quarters ending the preceding June 30. The due date for the payments shall be the tenth day of the first month of each calendar quarter;

(3) in the event that an electing entity making payments in lieu of contributions incurred no benefit charges during the four calendar quarters ending the preceding June 30, the electing entity shall pay to the division, each calendar quarter, an amount equal to one-eighth of one percent of the electing entity's annual taxable wages paid for such period for employment as estimated by the secretary. The due date for the payments shall be the tenth day of the first month of the calendar quarter;

(4) for each calendar quarter, the secretary shall determine the amount paid by each electing entity subject to payment in lieu of contributions and the amount of benefits charged to the electing entity's account; provided that an electing entity shall not be relieved of charges for benefits paid to an individual who was separated from the employ of that electing entity for any reason. Each electing entity who has made payments in an amount less than the amount of benefits charged to the electing entity's account shall pay the balance of the amount charged within twenty-five days of the notification by the division. If the quarterly payment made by an electing entity pursuant to Paragraph (2) or (3) of this subsection exceeds the amount of benefits charged to the electing entity's account, the excess payment shall be refunded on a quarterly basis;

(5) payments made by an electing entity pursuant to the provisions of this subsection shall not be deducted or deductible, in whole or in part, from the remuneration of individuals in the employ of the electing entity;

(6) two or more electing entities may file a joint application for the establishment of a group account for the purpose of sharing the cost of benefits paid that are attributable to service in the employ of the entities. The application shall identify and authorize a group representative to act as the group's agent for the purpose of this paragraph. Upon its approval of the application, the division shall establish a group account for the electing entities effective as of the beginning of the calendar quarter in

which it receives the application and shall notify the group's representative of the effective date of the account. The account shall remain in effect for not less than two years and thereafter until terminated at the discretion of the secretary or upon application by the group. Each group account shall be liable for the prepayment of payments in lieu of contributions as provided in Paragraphs (2), (3) and (4) of this subsection. Each member of the group account shall be liable to the division for payments in lieu of contributions with respect to each calendar quarter in the amount that bears the same ratio to the total benefits paid in the quarter that are attributable to service performed in the employ of all members of the group as the total wages paid for service in employment for such member during the quarter bear to the total wages paid during the quarter for service performed in the employ of all members of the group. The secretary shall prescribe rules as he deems necessary with respect to applications for establishment, maintenance and termination of group accounts that are authorized by this paragraph, for addition of new members to, and withdrawal of active members from, the accounts and for the determination of the amounts that are payable under this subsection by members of the group and the time and manner of payments. Each group account may apportion liability for amounts due to the group representative as the group shall determine; and

(7) past-due payments in lieu of contributions are subject to the same penalties that are applied to past-due contributions under Section 51-1-12 NMSA 1978.

F. Contributions or payments in lieu of contributions unpaid on the date on which they are due and payable shall bear interest at the rate of one percent per month from and after such date until payment is received by the division. Interest collected pursuant to this subsection shall be paid into the employment security department fund.

G. Any person, group of individuals, partnership or employing unit that acquires the organization, trade or business or substantially all the assets thereof from an Indian tribe or tribal entity shall notify the division in writing by registered mail not later than five days prior to the acquisition. Unless such notice is given, such acquisition shall be void as against the division, if, at the time of the acquisition, any contributions or payments in lieu of contributions are due and unpaid by the tribe or tribal entity, and the assets so acquired shall, if otherwise allowed by law, be subject to attachment for the debt.

H. If an Indian tribe or a tribal entity fails to make a contribution or payment in lieu of contribution pursuant to the Unemployment Compensation Law [Chapter 51 NMSA 1978], the division shall mail a notice of nonpayment or delinquency to the noncomplying tribe or tribal entity at its last known address as shown in division records. If the payment is not made within ninety days of the date the notice is mailed, the account of the noncomplying tribe or tribal entity shall be terminated. Notice of the termination shall be mailed to the tribe or tribal entity at its last known address shown in division records. The notice shall be accompanied by a written description of protest rights pursuant to Section 51-1-8 NMSA 1978. Termination of an account pursuant to this subsection terminates the tribe or tribal entity's participation as a contributing employer.

I. The secretary may reinstate the account of an Indian tribe or tribal entity that loses coverage pursuant to Subsection H of this section if the tribe or the tribal entity pays all contributions, payments in lieu of contributions, interest, penalties, surcharges and fees that are due and owing.

J. If an Indian tribe or tribal entity fails to make contributions or payments in lieu of contributions pursuant to this section, including any assessed interest and penalties, within ninety days of a notice of nonpayment or delinquency, the secretary shall immediately notify the United States internal revenue service and the United States department of labor.

K. Notices of payment and reporting delinquency to an Indian tribe or a tribal entity shall include an explanation that failure to make full payment within the prescribed time will cause the tribe or the tribal entity to:

(1) be liable for taxes pursuant to the Federal Unemployment Tax Act;

(2) lose the option to make payments in lieu of contributions; and

(3) lose its status as an employer under the Unemployment Compensation Law [Chapter 51 NMSA 1978] and will cause services performed for the tribe or tribal entity to not be treated as "employment" under that law.

L. Extended benefits paid that are attributable to service in the employ of an Indian tribe or tribal entity and not reimbursed by the federal government shall be the responsibility of the Indian tribe or tribal entity.

M. Nothing in this section shall be deemed to be a waiver of tribal sovereignty or sovereign immunity, either directly or indirectly. Compliance by an Indian tribe or tribal entity with the provisions of this section shall not be deemed to directly or indirectly waive tribal sovereignty or sovereign immunity.

History: 1978 Comp., § 51-1-59, enacted by Laws 2001, ch. 249, § 3.

ANNOTATIONS

Federal Unemployment Tax Act — The Federal Unemployment Tax Act, referred to in Subsections A(2) and K(1), appears as 26 U.S.C. § 3301 et seq.

Effective dates. — Laws 2001, ch. 249 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective June 15, 2001, 90 days after adjournment of the legislature.

Temporary provisions. — The labor department shall waive any unpaid contributions, including interest and penalties, from an Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe due between January 1, 2000

and December 21, 2000 if, before January 31, 2004, the tribe, tribal unit or subdivision, subsidiary or business enterprise pays to the unemployment compensation fund an amount equal to the total benefits actually paid from the fund between January 1, 2000 and December 21, 2000 to the employees of that tribe, tribal unit or subdivision, subsidiary or business enterprise.