TITLE 11: LABOR AND WORKERS' COMPENSATION

CHAPTER 1: LABOR GENERAL PROVISIONS

PART 1: GENERAL PROVISIONS [RESERVED]

PART 2: PUBLIC WORKS MINIMUM WAGE ACT POLICY MANUAL

11.1.2.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division, Labor and Industrial Bureau, Public Works Section

[11.1.2.1 NMAC - Rp, 11.1.2.1 NMAC, 12/30/2016]

11.1.2.2 SCOPE:

All contractors, subcontractors, employers or any person acting as a contractor who employs laborers or mechanics to perform work on a public building, public works or public road projects.

[11.1.2.2 NMAC- Rp, 11.1.2.2 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.3 STATUTORY AUTHORITY:

Section 13-4-11 through 13-4-15 and Section 13-4D-4 NMSA 1978.

[11.1.2.3 NMAC - Rp, 11.1.2.3 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.4 DURATION:

Permanent.

[11.1.2.4 NMAC - Rp, 11.1.2.4 NMAC, 12/30/2016]

11.1.2.5 EFFECTIVE DATE:

December 30, 2016, unless a later date is indicated at the end of section.

[11.1.2.5 NMAC - Rp, 11.1.2.5 NMAC, 12/30/2016]

11.1.2.6 OBJECTIVE:

The purpose of this rule is to define regulations necessary for the application of prevailing wage rates for laborers and mechanics employed on public works projects in the state including procedures for the predetermination of wages, the adoption of job classification descriptions, procedures for the enforcement of the Public Works Minimum Wage Act (PWMWA), and procedures for the disposition of appeals brought under the Public Works Minimum Wage Act. Regulations pertaining to apprentices and permanent job classifications and descriptions for public works projects are also contained in this rule.

[11.1.2.6 NMAC - Rp, 11.1.2.6 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.7 DEFINITIONS:

A. "Alteration" means any change made to any part of or any system within an existing public building, public work, or public road other than a "repair" as hereinafter defined.

B. "Base wage rate" means the straight time hours and hourly rate paid each laborer or mechanic.

C. "Contract" means any written agreement made by the state or any political subdivision of the state for or including provisions for the alteration, construction, demolition, maintenance, or repair of any public building, public work, or public road that makes use of any public funds.

D. "Craft" means a particular construction trade.

E. "Director" means the director of the division.

F. "Division" means the labor relations division of the workforce solutions department.

G. "Fringe benefit" means payments made by a contractor, subcontractor, employer or person acting as a contractor, if the payment has been authorized through a negotiated process or by a collective bargaining agreement, for: holidays; time off for sickness, injury, personal reasons or vacation; bonuses; authorized expenses incurred during the course of employment; health, life and accident or disability insurance; profit-sharing plans; contributions made on behalf of an employee to a retirement or other pension plan; zone, incentive, and subsistence pay and any other compensation paid to an employee, or for the direct benefit of an employee. Payments made to an approved apprentice program are not fringe benefits.

H. "Labor organization" means an organization of any kind, or an agency or employee representation committee or plan, in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning

grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.

I. "Locality" means one or more counties in the state of New Mexico.

J. "Prevailing wage and benefits" means the hourly wage rate and other benefits as determined by the director to be paid to, or for the benefit of, employees for work performed by the employee on public works projects, including any apprentice training contributions.

K. "Project" means any coordinated activity involving the alteration, construction, demolition, installation, maintenance, or repair of any public building, public work, or public road, and shall include all contracts related to, and employers involved in, the work to be done as a result of the coordination.

L. "Public funds" means every contract or project in excess of $60,000 that the state or any political subdivision thereof if a party to for construction, alteration, demolition, or repair, or any combination thereof.

M. "Public works" means any facility for the use, enjoyment, or benefit of the public that is altered, constructed, demolished, installed, maintained, or repaired and is funded in whole or in part with public funds or public financing, public grant, and including any form of tax bond financing.

N. "Repair" means to correct any damage or defects within, or to replace any obsolete system, part or portion, of a public building, public work or public road.

O. "Secretary" means the secretary of the department of workforce solutions.

P. "Similar nature" means contract work performed on projects as defined in 11.1.2.18 NMAC.

Q. "State" means the state of New Mexico.

R. "Wage" means the basic hourly rate of pay.

S. "Willfully" means an intentional or deliberate violation of a known duty, and shall include the failure to rectify a violation within a reasonable time after notice of the violation, or repeated violations after receiving notice of a violation.

[11.1.2.7 NMAC - Rp, 11.1.2.7 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.8 PREAMBLE:

A. Every contract or project in excess of $60,000 that the state or any political subdivision thereof is a party to for construction, alteration, demolition or repair or any

combination of these, including painting and decorating, of public buildings, public works or public roads of the state and that requires or involves the employment of mechanics, laborers or both shall contain a provision stating the minimum wages and fringe benefits to be paid to various classes of laborers and mechanics, which shall be based upon the wages and benefits that will be determined by the director to be prevailing for the corresponding classes of laborers and mechanics employed on contract work of a similar nature in the state or locality, and every contract or project shall contain a stipulation that the contractor, subcontractor, employer or a person acting as a contractor shall pay all mechanics and laborers employed on the site of the project unconditionally and not less often than once a week and without subsequent unlawful deductions or rebate on any account, at wage rates and fringe benefit rates not less than those determined by the director to be the prevailing wage rates and prevailing fringe benefit rates issued for the project.

B. Consistent with the provisions of 11.1.2.12 NMAC the director shall determine prevailing wage rates and prevailing fringe benefit rates for respective classes of laborers and mechanics employed on public works projects at the same wage rates and fringe benefit rates used in collective bargaining agreements between labor organizations and their signatory employers that govern predominantly similar classes or classifications of laborers and mechanics for the locality of the public works project and the crafts involved.

[11.1.2.8 NMAC - Rp, 11.1.2.8 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.9 RESPONSIBILITIES AND DUTIES:

A. The director shall:

(1) coordinate the administration of the Public Works Minimum Wage Act;

(2) annually determine the prevailing wage and fringe benefit rates and the rate for the employer contributions to the public works apprentice and training funds, and publish said rates;

(3) pursue enforcement of the payment of prevailing wages and fringe benefit rates;

(4) adopt standard job classifications applicable on public works projects;

(5) adopt appropriate wage rate for all apprentices on public works projects;

(6) issue electronic correspondence of the appropriate wage rate decision or decisions to the requesting agency within five business days of receipt by the director of such agency’s request;

(7) furnish the contracting agency and the contractor or employer with posters or written summaries containing the minimum wage rates of all employees for posting at each particular project site;

(8) notify the contracting agency and the contractor or employer when the contractor or employer has failed to comply with any requirement of the PWMWA and of the obligation of the contracting agency to withhold the payment of funds to the contractor or to ensure that all laborers and mechanics working on the project are paid according to the prevailing wage;

(9) request certified payrolls by letter or by issuing a subpoena at the director's discretion, if appropriate payments have not been made by an employer;

(10) notify the contracting agency and the contractor or employer of the right of the contracting agency to terminate the contract when a determination is made by the director of a willful failure of the contractor or employer to comply with the PWMWA.

B. The contracting agency, or its agent, shall:

(1) Submit a request to the director, in the manner prescribed by the division, not less than three weeks before the initial advertising date, for a wage rate decision applicable to the work to be performed. The request shall contain the following information:

(a) name, title and signature of requesting officer;

(b) department or agency requesting decision;

(c) date of request;

(d) full description and estimated cost of each of the several classifications of construction as set out in 11.1.2.10 NMAC.

(e) location (city or other description) of project site; and

(f) proposed advertising date and date by which bids are to be submitted.

(2) Electronically submit, to the director the notification of award and list of subcontractors within five business days of the execution of the contract.

(3) Electronically submit to the director any changes or additions made to the list of subcontractors within 10 business days of the change or addition.

(4) Electronically submit to the director notice of any cancellation of the project within 10 business days of the cancellation.

(5) Include wage rate decisions in advertised specifications for every contract subject to the PWMWA.

(6) Include in the advertised specifications and the contract a requirement that the contractor or any tier of the subcontractors must agree to pay the prevailing wages and benefits in order for a bidder to be considered responsible and that the contractor must, within 3 days of the award, submit to the director a signed statement of intent to pay prevailing wages and fringe benefits on a form provided by the director.

(7) Include in the advertised specifications and the contract between the agency and the contractor for all work subject to the terms of the PWMWA a provision requiring contractors and all tiers of subcontractors to maintain certified weekly payroll records that are to be updated weekly, provided to the contracting agency on a monthly basis and to the director, upon request. The prime contractor is responsible for the submission of copies of certified payroll records by all subcontractors. The director may require disclosure of any information necessary to ensure compliance by all contractors at all tiers with the requirements of the PWMWA.

(8) The contractual provision shall require that all payrolls be numbered, starting with number one for the first payroll at the beginning of the job and continuing in numerical order until the job is completed. The advertised and contractual provision need not require any particular form for contractor or subcontractor forms. The advertised and contractual provision need not require any particular form for contractor or subcontractor payrolls. The certified payrolls must contain the following information:

(a) the employee's full name need only appear on the first payroll on which the employee's name appears;

(b) the employee's classification (or classifications);

(c) the employee's hourly wage rate (or rates) ; the employee's hourly fringe benefits; subsistence and zone pay when applicable, and the employee's overtime hourly wage rate (or rates);

(d) the daily and weekly hours worked in each classification, including actual overtime hours worked (not adjusted);

(e) the itemized deductions made;

(f) the net wages paid;

(g) the identifying number of the wage rate decision issued on the project by the director:

(h) statement of compliance form;

(i) fringe benefit statement, when applicable; and

(j) annualization of fringe benefit worksheet.

(9) Include in the advertised specifications and the contract between the agency and the contractor for all work subject to the terms of the PWMWA a provision requiring contractors and all tiers of subcontractors to maintain the full social security number and current address of each employee and provide them to the director upon request for purposes of an investigation or audit of compliance with prevailing wage requirements

(10) Include in the advertisement for bidding and the contract between the agency and the contractor a provision requiring the contractors and all tiers of subcontractors to provide a signed statement with the certified payrolls demonstrating the disbursement of all fringe benefits paid to or on behalf of each employee of the contractor or subcontractor.

(11) Electronically notify the director within 10 business days if the contracting agency makes a finding or determination that the employees of the contractor or subcontractors are not being paid the prevailing wages or benefits required or if the contractor or subcontractors are otherwise failing to perform in accordance with the requirements of the PWMWA.

(12) Withhold payments to the contractor, if the contractor or any subcontractor is otherwise failing to perform in accordance with the requirement of the PWMWA, until such time as the employees have all been paid sums that are due or to the contracting agency may pay the employees of the contractor or subcontractor directly any sums that are due.

(13) Require that the contractor and all subcontractors and their tiers shall maintain legible copies of the certified weekly payrolls prepared in accordance with these regulations for a minimum of three years from the date of the final payment and for so long as is required to resolve any disputes or claims regarding the payment of wages or benefits to employees of the contractor or subcontractor that remain pending after one year and subject to all other state or federal requirements for the retention of such records by the contractor.

(14) Comply with the lawful requests of the director and cooperate with the director regarding the inspection of the project and the acquisition of all requested documentation regarding the project necessary to assure that all employees of contractors and subcontractors working on the project have been paid.

(15) Require that the contractor and each of the subcontractors submit an affidavit of wages, fringe benefits and subsistence and zone payments made prior to the final payment by the contracting agency on a project, which shall be in the following form:

I hereby certify that the above information is correct and that all workers I employ on this public works project were paid no less than the Prevailing Wage Rate(s) as determined by the Department of Workforce Solutions, Labor Relations Division for this project as identified by the State Wage Decision Number. I understand that contractors who violate Prevailing Wage Laws (i.e., incorrect job classification, improper payment of prevailing wages, or overtime, etc.), are subject to debarment procedures and shall be required to pay back any wages due to workers. (Ref. Labor Relations Division Public Works Minimum Wage Act Policy Manual (11.1.2 NMAC) & Public Works Minimum Wage Act (13-4-11 through 13-4-18, NMSA 78)). I, _____, being first duly sworn on oath under penalty of perjury, swear that the foregoing information is true and correct.

Contractor's signature. Date

Notary: Subscribed and sworn to before me at _____ this _____ day of _____, 2___

_____ _____ Notary Public
(Signature) (Date)

My commission expires: _____

C. Contractor and subcontractor shall:

(1) Pay employees, including apprentices, the prevailing wage and fringe benefits determined to be due pursuant to the prevailing wage rate determination for the project.

(2) Post the prevailing wage and fringe benefits for all employees provided by the director in a prominent, easily accessible place at the site of each particular project.

(3) Submit to the contracting agency on a monthly basis, and to the director within 10 business days of a request by the director for the purposes of an investigation or audit of compliance with prevailing wage requirements, certified payrolls and a signed statement showing the disbursement of all fringe benefits paid to or on behalf of each employee of the contractor or subcontractor. The prime contractor is responsible for the submission of copies of certified payrolls of all subcontractors.

(4) Comply with all requirements imposed by the PWMWA and these regulations.

(5) Submit to the contracting agency an affidavit of wage, fringe benefits, and subsistence and zone payments made to the employees, in the form required by the director, prior to the final payment by the contracting agency on a project.

(6) Maintain certified payrolls and documents regarding the disbursement of fringe benefits for a minimum of three years from the date of final payment to the contractor and so long as is required to resolve any disputes or claims of employees or the director regarding the payment of wages or benefits to employees of the contractor or subcontractor.

(7) Maintain a valid LEF registration at the time bids are due and for the duration of the project in accordance with Section 13-4-13.1 NMSA 1978.

[11.1.2.9 NMAC - Rp, 11.1.2.9 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.10 CLASSIFICATION OF TYPES OF CONSTRUCTION:

A. Classifications of construction work

(1) Type "A" The street, highway, utility and light engineering construction classification shall include the construction, alteration, repair and demolition of roads, streets, highways, alleys, sidewalks, curbs, gutters, guard rails, fences, parkways, parking areas, airports (other than buildings thereon), bridle paths, athletic fields; highway bridges, median channels, and grade separations involving highways; parks, golf courses, viaducts; uncovered reservoirs; canals, ditches and channels (including linings other than concrete linings); earth dams under 1,000,000 cubic yards, telephone and electrical transmission lines and site preparations, including traffic signalization and street lighting, which are part of street, highway, utility and light engineering projects; and shall include construction, alteration, repair, and demolition of utilities such as sanitary sewers, storm sewers, water lines, including appurtenances thereto such as lift stations, inlets, manholes, sewer lagoons, septic tanks and service outlets (stub-outs), providing such utility construction is outside the property line, or more than five feet from a building or heavy engineering structure, whichever is closer, provided, however, with regard to electrical utilities such construction shall include construction to the first attachment of incoming power source without regard to the property line or proximity to the building or the heavy engineering structure. Furthermore, this limitation will not apply to independent main lines and service out-lets (stub-out regardless of proximity to building or heavy engineering structure; construction and installation of pipelines (except cross-country transportation mainline pipelines), including municipal-type utility distribution pipelines, for the distribution of petroleum or natural gas, up to the first metering station or connection with the transportation mainline pipeline; provided, "First metering station or connection" means that point which divides cross-country transportation mainline transmission lines or higher pressure lateral and branch lines from lower pressure distribution systems.

(2) Type "B" The general building classification shall include the construction, alteration, repair and demolition of buildings, including office buildings, warehouses, industrial and commercial buildings, institutional and public buildings and all air-conditioning, conduit, heating and other mechanical and electrical works and site preparation for buildings or heavy engineering projects under this classifications; except

that construction, alteration, repair and demolition of buildings under the scope of this classification shall not include construction, alteration, repair and demolition of buildings under the class "C" classification of Subsection A of 11.1.2.10 NMAC, of these regulations; stadia; and shall include electrical, gas, water, sewer lines and other such utility construction which are part of projects under this classification and included within the property line or less than five feet from the building or heavy engineering structure, whichever is closer, provided, however, with regard to electrical utilities such construction shall include construction from the first attachment of incoming power source without regard to the property line or proximity to the building or the heavy engineering structure.

(3) Type "C" The residential building construction classification shall include the site preparation and construction, alteration; repair and demolition of residential buildings and shall include all structures intended for residential occupancy, be it by owners of said properties or tenants, including, but not limited to, single detached buildings, duplexes, tri-plexes, quad-plexes, residential condominium buildings, apartment buildings not to exceed four stories in height; and shall include electrical, gas, water, sewer lines and other such utility construction which are part of projects under this classification and included within the property line or less than five feet from the building, whichever is closer, provided, however, with regard to electrical utilities such construction shall include construction to the first attachment of incoming power source without regard to the property line or proximity to the building or the heavy engineering structure.

(4) Type "H" The heavy engineering construction classification shall include construction, alteration, repair and demolition of heavy engineering work such as railroad and geothermal projects, power generating plants, pump stations, natural gas compressing stations; covered reservoirs and sewage and water treatment facilities; concrete linings for canals, ditches and channels; concrete dams; earth dams of 1,000,000 cubic yards or over; radio towers, ovens, furnaces, kiln, silos, shafts and tunnels (other than highway shafts and tunnels), hydroelectric projects: and well drilling, telephone and electrical transmission lines which are part of general building and heavy engineering projects; mining appurtenances such as tipples, washeries and loading and discharging chutes, and specialized structures for testing, launching and recovering space and other rocket-type missiles; construction and installation of cross-country transportation mainline pipelines for the distribution of petroleum or natural gas, up to the first metering station or connection with the distribution pipelines; provided, "first metering station or connection" means that point which divides cross-country transportation mainline transmission lines or higher pressure lateral and branch lines from lower pressure distribution systems.

B. On contracts which involve more than one classification of construction, as defined in 11.1.2.10 NMAC the director shall issue predeterminations, including therein the appropriate wage rates for each classification of construction where none of the classifications comprises 80% of the total contract cost. Where one classification

comprises eighty percent or more of the total contract cost, the predetermined rate for that classification shall be used for the entire contract.

[11.1.2.10 NMAC - Rp, 11.1.2.10 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.11 ADOPTION OF STANDARD JOB CLASSIFICATIONS AND DESCRIPTIONS:

A. The director has adopted the standard job classifications and descriptions as set forth in 11.1.2.18 NMAC. Existing job classifications and descriptions shall remain effective until superseded on the effective date of newly adopted standard job classifications and descriptions.

B. The director may seek the assistance of contractors, contractors' associations, labor organizations, interested parties, and public officers in establishing standard job classifications and descriptions.

(1) Any person wishing to add, delete or modify a standard job classification and description shall submit a request in the manner prescribed by the division containing the proposed classification and description.

(2) Any proposal for a standard job classification and description shall contain the following clearly defined information:

(a) occupational title;

(b) a description of the physical duties to be performed by a laborer or mechanic having such a classification;

(c) evidence of existing prevailing rates of pay, including fringe benefits;

(d) evidence that the proposed classification is used in the type of contract work for which the classification is proposed; and

(e) such other justification as the director may deem advisable.

[11.1.2.11 NMAC - Rp, 11.1.2.11 NMAC, 12/30/2016]

11.1.2.12 PREDETERMINATION OF WAGE RATES:

A. Not later than May 31 of each year, labor organizations and their signatory employers shall submit to the director signed copies of their current collective bargaining agreements that will be in effect during any portion of the following calendar year. Each labor organization or signatory employer submitting a collective bargaining agreement shall include a separate list that sets forth the wage and fringe rates as well as the apprenticeship contributions for all trades covered by the collective bargaining

agreement, listed by type A, B, C, and H construction project, as identified in Section 11.1.2.10 NMAC above. In addition, interested parties may submit to the director for consideration, no later than May 31 of each year, collective bargaining agreements, interested party wage and fringe rate survey data, other written data collected during the preceding 12 month period, personal opinions and arguments supporting changes to the prevailing wage rates and prevailing fringe benefit rate determination. Submissions must be made as provided in the following subparagraphs:

(1) Collective bargaining agreements submitted to the director must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury, and which:

(a) certifies that the agreement filed is fully executed and in effect, unless it is a signed original agreement or photocopy thereof, or a printed copy of a fully executed agreement showing the names of the signatory parties or associations except in the case of a printed agreement the director may require certification; and

(b) names or otherwise identifies all New Mexico counties within the jurisdiction of the local union or unions signatory to the agreement;

(2) Interested parties wishing submit information for employees not covered by a collective bargaining agreement must provide the following information to the director: name and address of the employer or interested party, the number of hours worked by workers in each classification, the classification of each worker, the hourly rate actually paid each worker, the project type, the fringe benefit rate actually paid each worker, and, if practical, the counties in which work was performed. The information filed with the division must be accompanied by a signed statement which is certified as true and correct to the best of the knowledge and belief of the person preparing the statement, under penalty of perjury. The director shall consider any information provided during the 12 month period preceding May 31 of each year. Information from sources other than applicable collective bargaining agreements shall only be considered consistent with the provisions of the PWMWA.

B. In setting the general prevailing wage rate, the director shall give due regard to information obtained during the director's determination of the prevailing wage rates and the prevailing fringe benefit rates and may consider the written data, personal opinions, and arguments of interested parties where no applicable collective bargaining agreement is submitted.

C. If there are no collective bargaining agreements that exist in the locality on which the director can rely in setting the prevailing wages and fringe benefits, the director shall determine the prevailing wage rates and prevailing fringe benefit rates in the nearest and most similar neighboring locality and use the rates from the adjoining locality where a collective bargaining agreement exists and is in effect.

D. In order to protect the privacy of employees with respect to whom any wage information pertains, except pursuant to lawful process or to the exercise of the director's enforcement obligation under the PWMWA, neither the labor and industrial commission nor the director or any member of the director's staff, shall disclose to any person, an employee's social security number or date of birth with respect to whom wage information is received, submitted, or otherwise in the possession of the director, without having received prior written consent of the employee.

E. In order to protect the privacy of employees with respect to whom any wage information pertains, except pursuant to lawful process or to the exercise of the director's enforcement obligations under the Public Works Minimum Wage Act, neither the labor and industrial commission nor the director or any member of the director's staff, shall disclose to any person the employee's social security number or date of birth with respect to whom wage information is received, submitted, or otherwise in the possession of the director without having received the prior written consent of the employee.

[11.1.2.12 NMAC- Rp, 11.1.2.12 NMAC, 12/30/2016; A, 11/10/2020; A, 6/21/2022]

11.1.2.13 PROCEDURE FOR ADOPTION OF WAGE RATES:

A. When the director has determined the proposed prevailing wage and fringe benefit rates applicable in the state for public works projects in accordance with 11.1.2.12 NMAC, the proposed prevailing wage and fringe benefit rates shall be subject to a public hearing before the secretary or a hearing officer designated by the secretary.

B. The time, date and place of said public hearing will be established at the discretion of the secretary. Notice of the subject matter, the action proposed to be taken, the time, date and place of the public hearing, the manner in which interested persons may present their views, and the method by which copies of the proposed rates may be obtained, shall be published once at least 30 days prior to the hearing date in a newspaper of general circulation. Such notice shall also be mailed or emailed by the director to all known interested parties at least 30 days prior to the hearing date along with a copy of the proposed rates. Any objections to the proposed prevailing wage rates may be communicated to the director by an interested party either orally at such public hearing or in writing delivered to the director or the director's designee on or before the date of such public hearing.

C. The director shall consider fully all data, views, or arguments submitted in support of or in opposition to the proposed prevailing wage and fringe benefit rates before deciding to approve, modify or reject the prevailing wage and fringe benefit rates proposed by the director for public works projects.

D. The adoption of wage and fringe benefit rates by the director shall constitute an "action" which shall be appealable to the labor and industrial commission, sitting as the

appeals board, pursuant to Subsection A of Section 13-4-15 NMSA 1978, and as described in 11.1.2.17 NMAC.

(1) Consistent with the right of appeal granted to any interested person by Section 13-4-15, NMSA 1978, the director shall not adopt the issued wage rates for 15 days following their issuance, while an appeal, if any, to the labor and industrial commission, sitting as the appeals board, is pending, or before the effective date of the decision by the labor and industrial commission pursuant to Subsection D of 11.1.2.17 NMAC.

(2) The labor and industrial commission is designated, pursuant to Section 9-26-6, NMSA 1978, to hear appeals of the adoption of wage rates and shall conduct such appeals and render its decision pursuant to the procedures described in 11.1.2.17 NMAC.

E. The adopted prevailing wage rates shall not be effective until they have been filed in accordance with the State Rules Act.

[11.1.2.13 NMAC- Rp, 11.1.2.13 NMAC, 12/30/2016; A, 11/10/2020; A, 6/21/2022]

11.1.2.14 EFFECTIVE DATE OF WAGE RATES:

A. The wage and fringe benefit rates are effective as of January 1 following adoption and publication.

B. If an appeal is filed pursuant to Subsection D of 11.1.2.13 NMAC, then the director shall adopt the wage rates, as modified by the labor and industrial commission, following expiration of the stays provided by Paragraph (2) of Subsection D of 11.1.2.13 NMAC.

C. Except as provided in Subsection D of 11.1.2.14 NMAC, each discrete public works project shall be governed by one wage and fringe rate decision, which shall remain effective for the duration of the project.

D. New wage rate decisions shall be issued for all contracts on which bids have not been submitted before the date on which a new wage determination becomes effective provided that any such new decision shall not supersede any previously issued decision unless such new decision is received by the contracting agency at least 10 days prior to the date on which bids are to be submitted. Wage and fringe rate corrections or changes to decisions rendered shall not be issued without allowing the requesting agency at least 10 days' notice before the date bids are to be submitted.

E. All decisions will remain in effect until their expiration date or until modified, corrected, rescinded or superseded by the director.

F. The procurement of services pursuant to state price agreements or other methods that serve to establish long-term pre-determination of the price of services shall alter the obligations of contracting agencies and contractors to adhere to the requirements of the PWMWA and these regulations.

[11.1.2.14 NMAC - Rp, 11.1.2.14 NMAC, 12/30/2016; A, 11/10/2020; A, 6/21/2022]

11.1.2.15 PROCEDURE FOR INVESTIGATION OF VIOLATIONS:

A. The director shall investigate a complaint filed by any adversely affected party, any interested party, or an agent thereof, regarding potential violations of the PWMWA and shall give priority to complaint involving open projects before the contracting agency has made final payment on the project.

B. The director shall determine if there is a probable cause violation and convey all relevant information to the contracting agency, prime contractor and bonding companies.

C. If the director determines there is probable cause of a violation, an investigation shall be undertaken and the director shall request, or subpoena, all certified payroll records and other relevant financial records from either the subcontractor or the prime contractor. The director has a non-discretionary duty, upon probable cause to request all payroll records in question from either the prime contractor or the subcontractor. The contractor or subcontractor shall provide legible copies of the requested records within 10 business days of the receipt of the director's written request or subpoena. If the director does not receive records pursuant to the initial request or the subpoena, the director may suspend the contractor's LEF registration and order the withholding of funds from the prime contractor of the project. If an LEF registration is suspended due to non-response, the contractor shall submit a new registration and registration fee to the division upon compliance with the director's record request.

D. The director shall, within 30 days of the filing of a complaint by any employee, contracting agency, contractor, or other interested person, or any agent thereof, giving reliable allegations establishing probable cause of violations of the PWMWA commence an investigation of the allegations contained within the complaint. The director shall within 75 days after the filing of the complaint, make a determination supported by findings of fact and conclusions of law, whether there has been an underpayment of wages of fringe benefits or other violation of the PWMWA, including the amount due and owing by any contractor or subcontractor to any employee. If the complaint is of significantly complex nature, or involves multiple projects or job sites, the director may extend the time in which the determination is to be made by up to six months by providing a written notice and explanation to all parties.

E. The director shall provide the contractor, subcontractor, employer, or other persons against whom the complaint has been made an opportunity to respond to the complaint and provide exculpatory evidence prior to issuing the determination.

F. If it is determined that there has been an underpayment of wages or fringe benefits or other violation of the PWMWA, the director shall make demand for the payment of the amount due and notify the contracting agency of the amount determined to be due. In the absence of a voluntary withholding of accrued payments from the contractor, subcontractor, employer or other person until the laborers and mechanics employed on the project receive a payment for the amount of the underpayment of wages or fringe benefits or other violation of the PWMWA. If no violation is found, the investigation will be closed and notice sent to all parties.

G. The director shall certify to the contracting agency, and the employer involved, the names of persons or firms in violation of the PWMWA, specifying the amounts due to each employee. The director shall also promptly notify the contracting agency and the employer if the investigation determines that the failure of the employer to comply with the PWMWA was found to be willful.

H. Mediation may be requested by any party at any time throughout the investigation by submitting a written request to the director.

I. Any adversely affected interested party or that party's agent may appeal any determination, finding, or action of the director to the labor an industrial commission pursuant to the procedures set forth in 11.1.2.17 NMAC.

[11.1.2.15 NMAC - Rp, 11.1.2.15 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.16 PROCEDURE FOR ENFORCEMENT ACTIONS:

A. If the contractor or subcontractor has not complied with the director's request for certified payroll records or if the director determines that a violation of the PWMA has occurred and not been rectified, notice shall be given to the contracting agency and the contractor or subcontractor that payment to the non-compliant contractor or subcontractor in an amount sufficient to pay the laborers and mechanics working on the project shall be withheld by the contracting agency until compliance has been secured.

B. If the director determined that any laborer or mechanic employed on the site of the project has been, or is being, paid at a rate less than the rates required and in the absence of a voluntary resolution, the contracting agency shall, within 30 days of the director's determination, by written notice, terminate the right of the contractor, subcontractor, or employer who failed to pay appropriate wages to proceed with the work or with part of the work as to which there has been a failure to pay the required wages or fringe benefits. The contracting agency shall prosecute the work to completion by contract or otherwise. The contractor, subcontractor, or employer, or a person acting as surety thereof, shall be liable to the state for any excess costs as a result of the termination of the contractor's, subcontractor's, or employer's right to proceed with the work.

C. The director may cancel, revoke, or suspend the registration of any party required to be registered pursuant to the PWMWA for failure to comply with the registration requirements or for good cause, pursuant to Section 13-4-14.2 NMSA 1978. The director shall determine when good cause exists to cancel, revoke, or suspend the registration of any party. Frequent violations or a single substantive violation of the PWMWA could be good cause to cancel, revoke, or suspend the registration of any party.

D. The director shall include the name of any contactor or subcontractor who has willfully violated the PWMWA on a list to be distributed to all department of the state, pursuant to Section 13-4-14 NMSA 1978. The cancellation, suspension, or revocation shall remain in effect for three years, unless the contractor or subcontractor promptly corrects the action that led to the cancellation, suspension, or revocation of the registration and complies with any requirements imposed by the director as conditions of reinstatement.

E. If the director determines that there was an underpayment of wages or fringe benefits, the contractor, subcontractor, or employer shall be liable to any affected employee for $100 for each calendar day the contractor, subcontractor, or employer willfully failed to pay appropriate wages in violation of the PWMWA. In addition, if the aggregate underpayment of wages or fringe benefits is greater than $500, the contractor, subcontractor, or employer responsible for the underpayment shall be liable to any affected employee for three times the amount of the employee's unpaid wages or fringe benefits.

F. Prior to taking any enforcement action, the director shall provide notice of contemplated action to the contractor, subcontractor, or employer, setting out the basis for the proposed enforcement action.

(1) The notice of contemplated action shall be provided at least 15 days prior to any final enforcement action taken by the director.

(2) Any party who received a notice of contemplated action may provide a written response to the director for consideration prior to the final enforcement action.

(3) The director shall consider the written response provided by a party prior to taking any final enforcement action.

(4) After consideration of the response, the director may continue with the final enforcement action as proposed in the notice of contemplated action.

G. Any determination, finding, or action of the director in enforcing the PWMWA may be appealed to the labor and industrial commission by any interested party pursuant to Section 13-4-15 NMSA 1978 and 11.1.2.17 NMAC. The decision of the director shall be final 15 days after issuance unless an appeal is files pursuant to 11.1.2.17 NMAC.

Once the decision is final, the director may then proceed to the remedies available under 13-4-14 NMSA 1978.

H. Mediation by parties: Upon completion of the investigation, the director may schedule a settlement meeting between the parties. During the settlement meeting, the parties shall be notified of the preliminary conclusions of the investigation, including any potential amounts owed. If a settlement is agreed to by the parties, the investigator shall prepare the settlement agreement for signature by all parties and, upon any payments due, shall close the investigation.

I. The provisions of this section do not limit any worker's right to pursue a claim for payment of any prevailing wages that may be due nor do the provisions of this section diminish the contractor or subcontractor's duty to cooperate with the division.

J. Nothing in this section shall prevent the director, with probable cause, to immediately certify to the contracting agency pursuant to 13-4-14 NMSA 1978 and exercise the release of any assurance of payment required under 13-4-14 NMSA.

[11.1.2.16 NMAC - N, 12/31/2016; A, 11/10/2020]

11.1.2.17 PROCEDURE FOR DISPOSITION OF APPEALS:

A. Purpose and scope: The regulations contained in this part set out the procedures by which appeals may be filed, and by which the labor and industrial commission, sitting as the appeals board, hears and decides appeals pursuant to Section 13-4-15 NMSA 1978. The intent of this part is to clarify and implement the responsibilities and rights of all interested parties as set out in the Public Works Minimum Wage Act, Sections 13-4-11 through 13-4-17 NMSA 1978

B. Filing the appeal:

(1) The notice of appeal shall, consistent with Subsection A of Section 13-4-15 NMSA 1978, be filed with the director within 15 days after a determination, finding, rule, or regulation has been issued or any other action taken, and notice of the action has been given pursuant to Section 16 of 11.1.2 NMAC of these rules and regulations or otherwise.

(2) The appellant shall, within 10 days after filing the appeal, file with the labor and industrial commission, in care of the office of the director, a concise statement of all determinations, findings or actions of the director with which the appellant disagrees and from which the appeal is taken, and a brief setting forth the reasons and authorities on which the appeal is based.

(3) Within 10 days after the filing of the statement and brief, the director shall file a response setting forth the director's justification and authorities relied upon for the determination, findings, or action being appealed from which the appeal is being taken.

(4) Any interested person other than the appellant, directly affected by the determination, finding or action of the director, such as, contractors, contracting agencies, labor organizations and contractors' associations, may intervene and file a statement and brief, and may participate in the hearing conducted by the labor and industrial commission.

(5) The commission shall furnish copies of the statements, briefs, and answers filed in the appeal to the attorney general, and may request the attorney general to appoint independent counsel to represent it at the hearing.

C. Conducting the hearing:

(1) The hearing shall be conducted by the commission within 40 days after the filing of the appeal.

(2) The commission shall decide all matters brought before it by a quorum which shall consist of two members. Prior to a hearing, the commission shall designate a chairman who shall conduct the meetings and rule on the admissibility of all evidence submitted by and objections of any participant.

(3) The commission shall not be required to follow strict rules of evidence and shall have authority to admit any evidence which it concludes has probative value, but irrelevant, immaterial, or unduly repetitious evidence shall be excluded.

(4) The commission shall make its decision as to the validity or invalidity of the determination, finding, or action of the director based on substantial evidence on the whole record made before it. The appellant shall present his case first, subject to opportunity to present evidence in rebuttal.

(5) The appellant shall present evidence first, any interested party shall present its evidence next and after the director has presented evidence in support of the determination, findings or action that is the subject of the appeal, the appellant shall have the opportunity to present evidence in rebuttal of any evidence presented by the director or any interested person.

(6) Each party shall be given an opportunity by the commission to make a closing statement in support of the position of the party regarding the determination, findings, or action that is the subject of the appeal.

(7) The commission may adjourn, continue, or reschedule the hearing on the appeal as deemed necessary to afford all parties a fair and reasonable opportunity to be heard.

D. Decision by the labor and industrial commission:

(1) The commission shall, pursuant to Subsection C of Section 13-4-15 NMSA 1978, enter and file its decision, containing a concise statement of the principal reasons upon which the decision is based including findings of fact and conclusions of law within 10 days after the close of the hearing and promptly mail copies of the decision and statement to the participants of the hearing.

(2) The effective date of a decision by the commission concerning violations of the Public Works Minimum Wage Act shall be stayed for 30 days from the date of the filing of the decision to allow any party the opportunity to file an appeal to the district court pursuant to the provisions of Section 39-3-1.1 NMSA 1978.

[11.1.2.17 NMAC - Rp, 11.1.2.16 NMAC, 12/30/2016; A, 11/10/2020; A, 6/21/2022]

11.1.2.18 JOB CLASSIFICATIONS AND DESCRIPTIONS:

The job classifications and descriptions for public works projects shall be as follows:

A. Asbestos worker or heat and frost insulator: The preparation, alteration, application, erection, assembling, molding, spraying, pouring, mixing, hanging, adjusting, repairing, dismantling, reconditioning, maintenance, finishing or weatherproofing of cold or hot thermal insulations with such materials as may be specified when those materials are to be installed for thermal purpose in voids, or to create voids, or on either piping, fittings, valves, boilers, ducts, flues, tanks, vats and equipment, or on any hot or cold surfaces for the purpose of thermal control, or to be installed for sound control on mechanical devices; equipment; piping and surfaces related in an integral way to the thermal insulation of such mechanical devices, except for materials applied inside sheet metal ducts and fittings. This work also includes all labor connected with:

(1) insulation for: temperature control (excluding batt and blown-in); personnel protection or safety; prevention of condensation; fire proofing of building penetrations.

(2) distribution of, cleanup of, and removal from surfaces as described above, which surfaces will be reinsulated with (excluding demolition which is covered under the laborers classification) the materials they apply.

B. Boilermaker: Assembles prefabricated boiler parts and fittings to build steam boilers, tanks, vats and other vessels made of ten gauge or heavier metal, and installs catwalks, platforms, stairways and ladders which are erected on, and supported by storage tanks for liquid or gas when such tanks were erected by boilermakers, and installs all catwalks, platforms, stairways and ladders which are erected on and exclusively supported by a pressure vessel.

C. Bricklayer, blocklayer, stonemason: Constructs partitions, fences, walks, fireplaces, chimneys, smokestacks, etc., using brick, structural tile, concrete and other

types of structural block. This classification shall include the setting of stone, marble, slate, and artificial stone. All cutting, grouting and pointing of materials listed above shall be a part of this classification. May also build or repair brick, block, or stone retaining walls, cutting or placing of brick in mortar or other similar material.

D. Carpenter or lather: Sets batterboards, builds and sets forms for concrete, or structural stud except as provided elsewhere. Builds and erects wood and metal products for the framing of structure or building, including bearing and non-bearing walls, framework in buildings, including partitions, floor and ceiling joists, studding, and rafters. Installs wood subflooring and hardwood flooring. Builds wood stairways, cabinets, steps, etc. Installs wood or premanufactured molding, paneling, doors, windows, etc., products and components related to office interiors - partitions, draperies, shelving, panels, doors, (metal, wood, etc.); including hardware; insulation around concrete slabs. Install pin metal or steel studs and wood furring (except on roofs). Carpenters may shoot grades for surveying and attaches "sheetrock" and similar wallboard materials to walls and ceilings. Installs insulation material in walls, ceilings, and under floors of buildings where such insulation is not laid in cement or other plastic materials. Sets all woodworking equipment and operates same. Builds forms and structural element for pre-cast and pre-stressed concrete of all types and shapes on project site. Erects self-supporting scaffolding. Installs light iron and metal furring such as rods, channels and other bars or systems to which metal lath, rock lath or other materials used as a substitute for lath are to be attached. Installs metal lath, rock lath, and other materials used as a substitute for lath. Installs metal plastering accessories such as corner beads, door and window casing beads, metal picture mold, chair rails and other metal plastering accessories which are covered and serve as a ground or guard, except that metallic corner beads, when installed by using plastic material, shall be installed under the "plasterer" classification. Cuts wood materials using a stationary or portable power saw of one or more horsepower. Sharpens by use of files, all types of saws and saw blades used for the cutting of wood materials.

E. Carpenter (millwright): Performs work necessary to assemble, level, align, secure, dismantle, adjust and maintain permanent stationary pumps, motors, generators, turbines, fans, compressors or torque converters which require precision leveling and alignment of such equipment. Installs reduction gear boxes, fluid drives, and speed increasers, including the connection of same to pump or compressor coupling. May align and secure other direct drive motors and machines requiring precision alignment. Installation, repair, or removal of all pulleys, sheaves, sprockets, gears and flywheels including all belts, cables and chains. Fabricates or installs all templates, soleplates, grout pads and wedge blocks for all machinery requiring foundation or bolts. Installs all machinery, equipment and conveying devices in all classes of plants, factories, buildings, amusement parks, mills, shops stores, warehouses and construction or mining sites.

F. Carpenter (piledriver): Rigs piledriving equipment, signals pile rig and guides pile and leads to point pile is driven, aligns and plumbs pile using tape and level during driving; splices piles before, during and after driving, cuts off piles, realigns piles after

driving. In "piledriving" operations, handles wood, metal, sheetpiling, steel H-beams, concrete, or pipe, fastens them to cable of wench or piledriver, shifts timber piles with cant hook, cleans and points pile with axe or shovel. May drill pilot holes.

G. Cement mason (composition or mastic - finishing machine operator): Finishes concrete to a specified finish and grade on footings, floors, walks, steps and all concrete surfaces by using tools of the trade such as trowels, floats, screeds, etc. Sets to grade and aligns screeds one board high. Sets to grade and aligns forms for sidewalk, curbs and gutters. Fabricate, cut, bend and tie reinforcing steel and mesh to be placed within the forms for sidewalk, curbs and gutters. Patching, filling of voids and rubbing of concrete to a specified finish, which requires the use of power tools and tools of the trade. Bushammer and related finish procedure. Concrete saw operation when used on new construction to saw control joints. Vibrating screeds and rollers to achieve final level of concrete. Gunite, in cement mason operation, when it is less than one and one-half inches in thickness, the handling and control of the nozzle shall be the work of the "cement mason." All work involving the laser screed including the ride-on, laser-guided, vibratory screeding machine that establishes grades by laser which disperses concrete by auger and thoroughly vibrates and consolidates the concrete. Applies coloring material to concrete, also uses mastic to level and waterproof concrete, where tools of the trade are involved. Operates troweling and floating machines which are used in the finishing of concrete. Cementitious insulation, screed wet material to required thickness and darby joints to leave a surface suitable for roofing.

H. Electrician classifications and description - Outside:

(1) Groundman (outside): Assists "lineman" and "equipment operator" in their tasks except that the "groundman" does not climb poles or towers.

(2) Equipment operator (outside): Operates power driven equipment used in the erection and installation of materials and apparatus outlined under the "lineman" classification. Includes directional boring to install underground pipe, conduit or cable.

(3) Lineman or technician (outside):

(a) Performs all electrical construction work outside of isolated plants and the property lines of any given property, but not electric signs, and not street electrical decorations, except when messenger or guy wire is necessary for support and when fed and controlled from the street.

(b) Street lighting, traffic signalization, and related wiring when fed and controlled from the street. All line work consisting of wood, concrete or metal (or substitutes therefore), poles or towers, including wires, cables or other apparatus supported therefrom. Line work in public, private or amusement parks.

(c) All work necessary to the assembling, installation, erection, operation, maintenance, repair, control, inspection and supervision of all electrical apparatus,

devices, wires, cables, supports, insulators, conductors, ducts and raceways when part of distributing systems outside of buildings, railroads and outside and directly related railroad property and yards. Installing and maintaining the catenary and trolley work on railroad property, and bonding of rails. All underground ducts and cables when they are installed by and are part of the system of a distributing company, except in power stations during new construction, including ducts and cables to adjacent switch racks or substations. All outdoor substations and electrical connections up to and including the setting of transformers and all connecting of the secondary buses thereto, and all other related work.

(4) Cable splicer (outside): Splices or terminates power cables which are designed to be used for voltages above 2,000. Splices or terminate gas or liquid filled power cables, when part of a distribution system outside of buildings.

(5) Journeyman technician (outside): Limited to performing only street lighting, traffic signals, and wiring when fed and controlled from the street.

I. Electrician classifications and descriptions - Inside:

(1) Wireman or technician (inside): Installs wiring for automatic doors. Plans and executes the layout and installation of electrical conduit, switch panels, buss bars, outlet boxes, electrical wires and cables, lighting standards, lighting fixtures, receptacles, switches, and other electrical devices and apparatus necessary for the complete installation of wiring systems on commercial, industrial, and residential jobs, except electrical work which is incidental to the installation of elevators and escalators and is described under "elevator constructor". Analyzes proposed telephone and communication systems during the pre-installation stage to detect any basic conflicts in either equipment arrangements or plant facilities. Isolated trouble conditions in inoperable telephone communications systems. Installs a variety of equipment relating to telephone interconnect communication systems and devices including private branch exchange (PBX-PABX), key equipment and associated devices.

(2) Cable splicer (inside): Splices or terminates power cables which are designed to be used for voltages above 2,000. Splices or terminates gas or liquid filled power cables.

J. Low voltage electrician classification: Low Voltage Technician: Installs pathways (j-hooks) and wiring for low voltage cabling coax or fiber optic and terminates ends of the different types of cables levels and tests. This work includes voice, data security, access control, building automation and video surveillance. Repairs and services inter-communications systems, i.e. speakers, buzzers, microphones, signal lights or other units or components that are an integral part of such system.

K. Elevator constructor: Assembles and installs machinery and devices incidental to a complete elevator or escalator installation, including elevator cars, cables, counterweights, guide rails, hoisting machinery, etc. Installs all electrical wiring which is

incidental to the installation of automatic elevators and escalators with the exception of power feed wires to the controller, which shall be classified as a task of "electricians". Steel trusses, girders, and supports for escalators, where riveted or welded and metal frames and bucks for elevator door openings shall be installed under the "ironworker" classification.

L. Elevator constructor helper: Assist elevator constructor in the performance of all phases of their work.

M. Glazier: Installs metal window and door frames without glass, curtain wall systems, window wall systems, cable net systems, canopy systems, structural glazing systems, unitized systems, interior glazing systems, photovoltaic panels and systems, suspended glazing systems, louvers, skylights, entranceway systems including doors and hardware, revolving and automatic door systems, patio doors, store front systems including the installation of all metals, column covers, panels and panel systems, glass hand rail systems, decorative metals as part of the glazing system, and the sealing of all architectural metal and glass systems for weatherproofing and structural reasons, using vinyl, molding, rugger, lead, sealants, silicone and all types of mastics in wood, iron, aluminum, sheet metal or vinyl sash, doors, frames or any materials of the above systems as part of the glazing systems. Installs glass, including plate and window glass, mirrors, beveled plate, rough ribbed, wire, figured, colored, art and other type glass or substitute for glass when set in sash, frames, doors, skylights, etc., when set with putty, molding or other methods which are common to the glazing trade.

N. Ironworker:

(1) Journeyman Ironworker: Installs reinforcing iron and steel for concrete structures. Installs fabricated steel members such as girders, columns, beams, and bracing in structures to form the steel framework. Installs metal stairways, catwalks, ladders, and decking. Installs ornamental iron and steel. Erects structural steel radio and television towers. Sets wall bearing steel bar joists in building structures. Performs layout work for rods within project area. Fastens rods in place with wire or fasteners; bends or adjusts as required. Selects and places steel bars or spirals in concrete forms to reinforce concrete; fastens rods together with wire or patented fasteners; may cut rods with hack-saw or oxyacetylene torch. May bend rod, using rod bending machine, performs layout work and proper placing of steel in the concrete forms. May prefabricate reinforcement assembly for placement complete in forms. Works as a member of a group that raises and places fabricated or precast concrete beams or structural steel members, such as girders, plates, columns, and units them permanently to form a completed structural steel framework. Heats rivets, signals erection crane, splices cables, rigs equipment. May include dismantling and erecting large units of equipment. May suspension bridge cables. Erects, trims, and fits together by means of bolts and clamps, iron grills, grating, and special stairways. Erects ornamental enclosures and other iron work not included in structural ironwork. Fastens ironwork to walls of buildings by means of bolts, brackets or anchors. Fastens newel posts,

balauser, and other parts of stairways by fastening to supports or embedding them in sockets. Forges, welds, drills and cuts as needed.

(2) Probationary Ironworker: Probationary ironworkers shall be paid at the rate of eighty percent of the journeyman ironworker wage rate and may only work under this classification for no more than 30 days.

O. Painter (brush): Applies paint, stain, lacquer, varnish, etc., to surfaces in, on or around building structures, using appropriate brushes, rollers, sprayers or trowels. Does preparation of surfaces to receive paint, including sandblasting, small patching, sanding and spackling. Mixes and prepares paints and other materials which are to be applied by painters. Seals, sands and varnishes hardwood flooring. Paints structural steel framework of bridges; guard rails and cables of bridges; and all other surfaces requiring paint. .May erect and rig stages and platforms from which painters are to work, including swing stage scaffolding, bosun's chairs, mechanical, staging, cornice or roof hooks, scaffolding, and other devices and apparatus necessary to provide safe forking conditions for painters. Operates gasoline-powered compressor striping machine and walking type sprayers for striping parking lots, etc.

P. Paperhanger: Applies wallpaper, fabric, or other materials used in the same manner as wallpaper, to the interior of rooms. Performs work necessary to prepare surfaces to receive wallpaper or other similar material including removal of old wall paper.

Q. Drywall finisher or taper: Prepares drywall type construction to receive paint, textone, etc. by pointing, taping, bedding, texturing, skimming, wire brushing, stripping, wax, or acid application and finishing.

R. Plasterer: Applies interior and exterior plastering of cement, stucco and stone imitation or any patented materials when cast. Applies acoustical plaster or materials used as substitutes for acoustical plaster, as well as the preparatory pointing and taping of drywall surfaces to receive these finishes. Applies scratch and brown coats on walls and ceilings where tile, mosaic or terrazzo is to be applied. Molds and sets ornamental plaster and trim and runs ornamental plaster cornice and molding. Install metal corner beads when stuck by using plastic materials. Applies gunite, in plastering operations, when it is one and one-half inches in thickness, the handling and control of the nozzle should be the work of the plasterer. Spray fire proofing material on steel beams or columns. Trowel or sprayed on foam insulation on walls before stucco, etc. Patching outside concrete walls.

S. Plumbers and pipefitters: Fabricates and installs piping, and tubing systems, including installation of all necessary hangers and supports, which are to conduct water, steam, air, and other fluids or gases in and around buildings. Also installs vacuum piping systems. Installs drainage and sewage lines (laterals) from buildings to the point of attachment to mains. Installs plumbing fixtures, such as sinks, faucets, drinking fountains, commodes, etc. Installs refrigeration equipment. Performs cutting, welding

and burning which is incidental to the work of plumbing or pipefitting, except as is described under "lead burner". May do other work in connection with the installation and testing of heating and cooling apparatus and control devices.

T. Plumbers and pipefitters (lead burner): Performs cutting, burning and welding operations on lead pipes, tanks, reservoirs, etc.

U. Roofer:

(1) Roofer Journeyman: Installs, alters or repairs roof systems on new or existing roof decks to create a weatherproof and waterproof protective membrane, with or without insulation, using asphalt, pitch, tar, sealants, single ply or multiple ply materials, felt, shakes, shingles, roof tile, slate, coatings, urethane, urethane foam, metal or any other approved roofing materials, including the preparatory work necessary to bring such surfaces to a condition where roofing can be installed, sealed, or repaired. Includes cutting, shaping fabricating and installing or wood, metal or other approved materials for fascias, soffits, copings, cornices, canals, flashing, gutters, leaders, rainwater downspouts, pans, prefabricated chimneys, at or near roof lines, metal flues, prefabricated roof curbs. Installs roofing insulation, and other necessary waterproofing and damp proofing on walls and floors below ground. May perform other water-proofing operations using methods which are common to the roofing trade. Handles all roofing materials at job site and performs all roofing clean-up. Tears off old roof when roof is to be replaced.

(2) Roofer Helper: Roofer helpers shall be paid at the rate of sixty percent of the journeyman roofer wage rate. There is no restriction on the type of work that the roofer helper may perform. The ratio of helper to journeyman is one helper for every three journeymen.

V. Sheet metal worker: Fabricates and installs heating and air conditioning ducts and other ductwork. Fabricates and installs hangers, brackets, etc., used in the installation of sheet metal, and installs grills, registers, etc., which are part of duct systems. Fabricates or installs architectural sheet metal in and around buildings, including metal panel systems, canopies, awnings, exhaust louvers, and cupolas. Installs warm air furnaces except where necessary piping for gas or oil is performed under the plumbing and pipefitting classification. Performs the testing, measuring, adjusting of air and hydronic flows in a building to meet design specifications and local building codes to ensure thermal comfort, indoor air quality, and system energy efficiency are optimized, performs periodic inspections of fire, smoke and combination fire and smoke dampers and conducts differential pressure measurements across, and force testing of stairwell egress doors and performs the functional testing and general required maintenance of smoke control systems and is responsible for recognizing the proper installation, application, and usage of smoke control systems. May install other heating and cooling devices which are in connection with duct systems.

W. Soft floor layer: Cleans and prepares floors and other surfaces to which linoleum and floor tile is to be applied. Lays carpets. Applies appropriate cement to floors and surfaces and installs materials such as sheet rubber, sheet vinyl, asphalt tile, cork tile, linoleum, rubber tile, artificial turf and other resilient floor coverings. Rolls finished floors and surfaces to smooth and press down coverings which have been applied. Mixes and pours liquid seamless floor covering on floor, gyms, etc. Installs decorative or protective trim to and adjoining the above materials including the attaching of cap strips, nosing, and slats.

X. Sprinkler fitter: Fabricates, assembles, and installs all piping and auxiliary devices which are necessary for the complete installation of sprinkling systems for fire protection in buildings.

Y. Tile setter: Applies glazed, unglazed, mosaic, and other ceramic tiles which are used as a surface on floors, walls, ceilings and other surfaces and which must be set to a specified grade. Applies and floats all setting beds which these tiles are set into. Levels and plumbs these tiles to the specified grade.

Z. Tile setter helper: Handles and mixes materials to be used in floating beds, generally assists tile setter by delivering materials, cleaning and caring for tools.

AA. Power equipment operators - group I performs the following tasks or operate the following equipment:

(1) Concrete paving curing machine (Bridge type): Operates self-propelled machine and operates pump on the machine which sprays curing compound on freshly poured concrete. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(2) Fireman: Hand strokes or fires by gas or oil, a portable or semi-portable steam boiler, such as is used on steam shovels, pile drivers, cranes, dredges, hoisting equipment and asphalt plants.

(3) Oiler: A service man who lubricates mechanical equipment, gives signals to operator when applicable, changes oil, greases and filters, refuels equipment. May assist mechanic, head oiler or operator in assembling, setting up, adjusting, maintaining (including operation of steam cleaners) and repairing all types of construction equipment. May, when servicing equipment, drive a truck which carries fuels, oils and greases. May use the tools of the trade at and under the direction of a mechanic, head oiler or operator.

(4) Screedman: Manipulates handwheels or other devices to raise or lower screeds of asphalt machine. Regulated width of screed and depth of material. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(5) Scale operator such as (bin-a-batch).

(6) Tractor (under 50 drawbar h.p. without attachments): Operates a small diesel or gasoline powered rubber-tired, farm -type tractor, with no attachments, to pull by drawbar, seed drills, etc. May oil, grease, or otherwise service and make necessary adjustments.

(7) Industrial locomotive brakeman: A semi-skilled operator who hooks and unhooks various cars, throws switches, operates car dumps, signals locomotive operator, manipulates controls of loading devices (hopper conveyors, etc.) and assists locomotive operator. May oil, grease or otherwise service and make necessary adjustments.

(8) Helpers: mechanic, welder, grease truck and crane oiler.

AB. Power equipment operators - group II performs the following tasks or operate the following equipment:

(1) Tractor (under 50 drawbar h.p. with attachments): Operates a small diesel or gasoline powered rubber-tired or crawler tractor. May be used with attachments such as dozer, tampers, posthole diggers, postdrivers, etc. May be used to pull brooms, sleds, trailers, etc. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(2) Air compressor (315 c.f.m. and over): Keeps compressor fueled, oiled, clean and ready for service. Keeps oilers and air lines working properly, full of proper oil, sets and checks valves on oiler, sets and checks air pressure, cut off valve and gauges, checks and maintains air tools, keeps moisture drained from air tanks, checks governor, sets throttle to avoid compressor damage. Checks and repairs air brakes on compressor and repairs air hose.

(3) Pumps (six inch intake or over): Operates water pump which pumps water for roadway, prewetting, pumping by transmission line from water source to job area or other use. May oil, grease, prime, or otherwise service and make necessary adjustment to equipment as needed.

(4) Mixer, concrete (one cubic yard and less): Operates a small, portable concrete mixing machine to mix sand, gravel, cement and water to make concrete. Starts power unit and does or oversees loading of materials. Controls the mixing by levers to discharge concrete from drum. This small machine is sometimes charged by shoveling in the proportions of materials directly into the mixing drum and some others have a skip into which materials are shoveled before being hoisted into the mixing drum. Rinses drum with water to remove adhering concrete. May oil, grease or otherwise service and make necessary adjustments as needed.

(5) Roller (sheepsfoot or pneumatic self-propelled without dozer): Operates a diesel or gasoline driven self-propelled machine used for compaction. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(6) Service truck operator (head oiler-type B or C work): An operator of a truck equipped with high pressure grease and oil dispensing equipment. Maintains service records and performs preventative maintenance and visual inspection. Reports vehicle discrepancies to foreman or mechanic.

(7) Screening plants: Operates a screening plan to sort and segregate material. Regulates flow of material through chute to screener. May perform other related work. May oil, grease, or otherwise service and make necessary adjustments or repairs to equipment as needed.

(8) Belt type conveyors (material and concrete): Operates an endless belt-type conveyor that is a machine designed so the belt operates between a head pulley and tail pulley which are located on the opposite ends of the conveyor frame. The belt rides on carrier rollers so formed in shape and positioned that the belt forms a trough to carry the loose material. The operator starts and stops the belt as necessary, maintains the carrier rollers and belt splices, regulates belt speed for correct loading for efficient operation and belt life, maintains belt alignment to insure the belt is not loaded on one side which results in excessive belt wear. Conveyors are used efficiently in confined areas particularly in the placement of concrete with portable type conveyors. (Conveyor systems which are part of a plant shall be operated by the plant operator). May oil, grease or otherwise service and make necessary adjustments.

(9) Concrete paving joint or saw machine or grinder span type: Operates a self-propelled machine which travels on paving form or pavement and cuts grooves for expansion and contraction joints in freshly poured concrete or cured pavement. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(10) Hoist (one drum): Operates a single drum machine powered by air, electric, gasoline or diesel. Actuates valves, levers, brakes or other control devices which regulates linepull, hold or line release in accordance with signals received by sight, hearing or other signaling devices as necessary. Machines are used for various pulling and hoisting operations on construction work such as to hoist and lower material in various elevations or to hoist and lower material in construction and assembly. May oil, grease or otherwise service and make necessary adjustments.

(11) Air tugger.

(12) Elevating belt type loaders: Operates a self-propelled or tractor-drawn elevating grader, bucket, or belt loader. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(13) Lumber stacker: Operates machine designed to straddle bundles or stacks of lumber or other objects suitable to be handled by this specialized machine, hoists and moves materials to various locations. May oil, grease or otherwise service and make necessary adjustments.

(14) Winch truck: Drive a heavy duty gasoline or diesel truck equipped with a winch and gin poles or other hoisting devices. Shifts winch gears in accordance with signals from helper on ground. May service and make necessary adjustments for proper operation of equipment.

(15) Front end loader (under two cubic yards): Operates a runner tired or crawler-type tractor with an attached bucket on front end. Machine is used to load materials from stockpiles, excavation, charging batch plants, loading trucks. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(16) Fork lift: Operates a machine powered by gasoline, diesel or electric power that is equipped with a vertical hoisting and lowering device that may be canted forward and reverse of vertical center by means of control devices. Machine is equipped with fork lifting and designed to slide under loads, machine is used for lifting and transporting loads. May oil, grease or otherwise service and make necessary adjustments.

(17) Power plant (electric generator or welding machine): Operates a diesel or gasoline driven machine that generates A.C or D.C. current of 15 K.W. or more used for lighting and electrical power. Keeps cycle and synchronization control board in adjustment adhering to manufacturers specifications. Keeps governor relay in adjustment. Operates welding machine in bank, for arc-welding, uses armature dressing stone as required and resets welding heats as required. May oil grease or otherwise service and make necessary adjustment. May perform other related duties. (Electric power plants, when the principal use is to furnish electric power for camp sites, shall be excluded).

(18) Cat head winch.

(19) Oiler with CDL.

(20) Concrete curbing machine.

(21) Inside and outside material and personnel elevators.

(22) Industrial locomotive motorman: An operator of gasoline, diesel or electric powered railroad locomotive used to push, pull or switch railroad cards of various designs loaded with muck, concrete, aggregate, or other applications suitable for rail transport. May oil, grease or otherwise service and make necessary adjustments.

AC. Power equipment operators - group III performs the following tasks or operate the following equipment:

(1) Bituminous distributors.

(2) Boilers.

(3) Asphalt Retort heater: Operates a stationary or portable piece of equipment designed to apply heat to a tank, tank car, or tank truck containing asphalt. Starts fire, controls heat applied to tank by regulating burners. Starts, stops and controls flow of recirculating pumps. Maintains desired temperature in asphalt, regulates valves for discharge of asphalt from tank. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(4) Mixer, concrete (over one cubic yard): Operates a large, portable or sometimes stationary concrete mixing machines to mix sand, gravel, cement and water to make concrete. Starts power unit and oversees the loading of proper proportions of materials into the skip and then manipulates levers that control feeding of material into mixing drum. Starts drum rotating to mixmaterials; manipulates lever to discharge concrete from drum, either by tilting drum forward or by opening a discharge chute. Rinses drum with water to remove adhering concrete. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(5) Concrete paver mixer (single drum): Operates a paving machine that mixes and dumps concrete, the machine consisting primarily of a skip, concrete mixer, and a boom equipped with a traveling bucket and a power plant, all mounted upon a crawler or wheel unit. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(6) Drilling machine (cable, core or rotary): Sets up and operates a portable cable, core, diamond or rotary drill for the purpose of drilling water wells or exploratory drilling. May drill pilot holes for piling. May oil, grease, or otherwise service and make necessary adjustments.

(7) Shaft and tunnel type equipment:

(a) Refrigeration: Operates a plant designed to circulate brine or other refrigerant through piping system to freeze specified areas for purpose of drilling, trenching, boring, blasting and stabilizing formations to permit such operations. Maintains pressures, vacuum, intercooling and other related functions. May keep brine or other refrigerants at proper levels in supply tanks.

(b) Slusher operator: Operates hoist as described under one or two drum hoist to raise and lower, drag and release a bucket similar to dragline bucket without a bottom in it. To move loose material into dump chute or other purposes. Sheaves to control line direction are usually secured to roof, side or face of excavation by rock bolts. May oil, grease or otherwise service and make necessary adjustments.

(c) Jumbo form or drilling stage: Operates a specialized machine usually mounted on rails or rubber-tired wheels which has surrounding it, expandable, retractable forms. Drilling stage consists of one or more drilling stages from which drilling operations at the phase are performed for blasting. The operator positions machine for drilling, removes it for blasting, connects and disconnects air and water

lines from the source as needed. May oil, grease or otherwise service and make necessary adjustments.

(8) Trenching machine: Operates a power-driven machine that digs trenches for sewer, water, drainage, oil and gas pipelines, footings, etc. The trenching machine is mounted on crawler treads or rubber tires with the digging equipment usually consisting of an endless chain or wheel or edged buckets that excavate and deposit the material on a conveyor belt which in turn discharges the material at the side of the trench. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(9) Pumpcrete machine: Operates a concrete pumping machine that pumps fresh concrete from mixer to forms that mold fresh concrete. Sets up pump, operates power unit of pump and allows fresh concrete to flow into hopper or pump. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(10) Gunite machine: Operates a machine designed to pump dry sand and cement mixture forced under high air pressure to various areas specified for gunite treatment. May oil, grease or otherwise service and make necessary adjustments.

(11) Concrete slip-form paving machine: Operates a self-propelled machine with long forms attached which move along with the machine. Machine vibrates, screeds, spreads and finishes the surface. Operates a roto-mill machine (machine with plane to smooth). May oil, grease or other service and make necessary adjustments to equipment as needed.

(12) Mechanical bull floats.

(13) Concrete paving spreader: Operates a self-propelled machine that rides on the paving forms. Operates controls to spread fresh concrete evenly over subgrade or in concrete forms. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(14) Concrete paving finishing machine: Operates self-propelled machine which travels on subgrade or paving forms and levels fresh concrete to approximate grade and contour by pushing and pulling screeds over the surface. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(15) Subgrade or base finisher: Sets and adjusts machine to grade or string line. Operates necessary controls for grading, cutting and finishing subgrade or treated and untreated base material. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(16) Concrete paving sub grader: Operates a machine that finishes subgrade. Machine runs on concrete paving forms or subgrade and is equipped with knives or

blades to loosen material and eject same from subgrade. May oil, grease or otherwise service equipment as needed.

(17) Concrete paving form grader: Operates a machine that controls subgrade under forms used in concrete paving and is equipped with knives or blades to loosen dirt and eject same from the form line grade. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(18) Concrete paving gang vibrator: Operates a self-propelled machine which travels on paving forms and operates levers to lower multiple vibrator heads into freshly poured concrete. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(19) Concrete paving longitudinal float: Operates a self-propelled machine which travels on paving forms and moves levers to strike off the concrete to correct elevation. Machine has one or more screeds traveling longitudinally. Operates milling machine (makes ridges). May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(20) Bituminous finishing machines.

(21) Certified forklift.

(22) Asphalt distributor: Sets spray bar and operates valves and levers of distributor to control distribution of oil or bituminous liquid, also may drive truck on one-man operated distributor. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(23) Asphalt paving or laydown machine: Manipulates controls of paving machine that spreads and levels asphaltic concrete. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

AD. Power equipment operators-group IV performs the following tasks or operates the following equipment:

(1) Front end loader (two through ten cubic yards): Operates a rubber tired or crawler-type tractor with an attached bucket on front end. Machine is used to load materials from stockpiles, excavation, charging batch plants, loading trucks. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(2) Rollers steel wheeled (all types): Operates a self-propelled machine with steel flat wheels which is used to compact and smooth earth fills, flexible bases, bituminous roads surfaces. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(3) Bulldozer: Operates a tractor with a concave steel scraper blade mounted in front of the chassis to level, distribute and push earth; regulates height of blade. Uses tractor as a pusher in loading earth carrying equipment. May oil, grease or otherwise service and make minor repairs to equipment as needed.

(4) Scrapers (motor or towed): Operates a tractor or self-propelled machine to pull a steel bowl-like scoop (scraper) mounted on wheels that scrapes up earth and transports it to a designated place; manipulates necessary scraper controls. May oil, grease or otherwise service and make necessary adjustments to equipment as needed, twin bowl scraper and quad eight or nine pushers ($.35 over base rate). Three bowl scraper ($.60 over base rate).

(5) Batch or continuous mix plant (concrete, soil, cement or asphalt): Sets up and operates a large portable or stationary plant for batching concrete, soil-cement or asphaltic materials and aggregates; responsible for control of mixture and plant. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(6) Bobcat with hydraulic backhoe with buckets up to one (1) and one quarter cubic yards.

(7) Backhoes with buckets up to ¾ cubic yard-Type B or C work.

(8) Small Articulating Truck.

AE. Power equipment operators-group V performs the following tasks or operates the following equipment:

(1) Concrete paver (double drum): Operates a paving machine that mixes and dumps concrete, the machine consisting primarily of a skip, concrete mixer and a boom equipped with a traveling bucket and a power plant, all mounted upon a crawler or wheel unit. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(2) Hoist (two drums): Operates a two drum machine powered by air, electric, gasoline or diesel. Actuates valves, levers, brakes or other control devices which regulates linepull, hold or line release in accordance with signals received various pulling and hoisting operations on construction work such as: to hoist and lower material in various elevations; to hoist and lower material in construction and assembly. May oil, grease or otherwise service and make necessary adjustments.

(3) Cat cranes.

(4) Hysters.

(5) Forklifts over 20,000 lbs. lifting capacity.

(6) Auto fine grader.

AF. Power equipment operators-group VI performs the following tasks or operates the following equipment:

(1) Mucking machine (all types): Operates a machine designed especially to work in confined spaces, generally operated by air or electric power to minimize air pollution, underground. Rocker shovel types have front-mounted buckets that are loaded by being pushed into the material and lifted over the machine and dumped into an attached car, or lifted to a point that gravity dumps the material from the back of the loaded bucket onto a conveyor belt that runs over the machine to a dumping point or into attached car. This type mucking machine usually operates on tracks or are crawler mounted. The bucket is hinged to a boom which in turn is hinged to a turntable on the main frame which allows the main frame to travel in one direction while the swinging action of the bucket can reach out to the sides to remove such loose material generally called muck. These machines are especially suited for underground, emptying into conveyors or into cars. May oil, grease or otherwise service and make necessary adjustments.

(2) Tractor with hydraulic backhoe.

(3) Backhoes with buckets up to one and one quarter cubic yards- Type B or C work.

(4) Service truck operator (head oiler-type A or H work): An operator of a truck equipped with high pressure grease and oil dispensing equipment, which may have gasoline and diesel fuel tanks, who lubricates, changes oil and filters and refuels equipment. Maintains service records and performs preventative maintenance and visual inspection. Reports vehicle discrepancies to foreman or mechanic.

(5) Motor grader (rough): Operates motor grader. Blade is mounted on a carrying and turning circle under the frame of the machine. Equipment is used in leveling dirt to grade and in laying asphalt and flexible base materials. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

AG. Power equipment operators-group VII performs the following tasks or operates the following equipment:

(1) Steam engineers.

(2) Front end loader (over 10 cubic yards): Operates a rubber tired or crawler-type tractor with an attached bucket on front end. Machine is used to load materials from stockpiles, excavation, charging batch plants, loading trucks. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(3) Concrete pump (snorkel type).

(4) Mining machine.

(5) Concrete batching plant operator.

(6) Asphalt plant operator.

(7) Crushing plant operator- Operates a crusher to control flow of materials through plant. Regulates flow of rock through chute to crusher. May perform other related work. May oil, grease, or otherwise service and make necessary adjustments or repairs to equipment as needed.

(8) Hot plant operator.

(9) Roof Bolting Machine.

(10) Shuttle Car Operator.

AH. Power equipment operators-group (VIII-All shovel type equipment that does not require a State of New Mexico crane license) performs the following tasks or operates the following equipment:

(1) Side boom: Operates a diesel or gasoline powered rubber-tired or crawler-tractor on which is mounted a side boom attachment with necessary hoisting devices. Positions tractor, manipulates control levers, clutches, brakes, and other controls to raise or lower boom, raise or lower load. By tractor motivation, loads may be transported to desired location. May oil, grease or otherwise service and make necessary adjustments.

(2) Crane (crawler or mobile under ten tons): Operates crane type equipment to hoist and move materials and perform other related operations. Such equipment is used for pouring concrete, setting steel or other miscellaneous tasks for which crane type equipment is required. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(3) Backhoes with buckets over one and one quarter cubic yards- Type B or C work.

(4) Backhoes over a 3/4 yard bucket—Type A or H work.

(5) Derrick, cableway: Operates guy, stiff leg or other derrick, cableway. (Derricks are distinguished from cranes by being stationary and being supported by cables, or structural member, but may be repositioned to higher levels as construction progresses). Derricks use a hoist as described in building hoists, two drums and up, but may vary with different designs, as the source of power for line pull, hold or release through sheaves on the particular derrick or cableway for lifting and moving materials to higher, lower, or the same levels in construction. The operator controls in accordance

with signals received by sight, hearing or other signaling devices. If necessary may oil, grease or otherwise service and make necessary adjustments.

(6) Track or excavator backhoe.

(7) Pipemobile.

(8) Pile driver: Operates the basic machine, and applicable hammer controls to which pile driving attachments are attached. Pile driving attachments normally consists of leads, to service as a guide for the weight, hammer or extractor. The drop hammer is a weight hoisted by cable along the leads and released to fall by gravity onto the pile. Steam, compressed air, hydraulic, sonic and diesel hammers ride along the leads resting on top of pile or pile cap striking blows on the down stroke of the hammer, from its power source, onto the pile being driven. The extractor is a steam or air hammer that strikes its blows on the upstroke of the hammer equipped with devices for attachment onto the piling to be pulled. May drill or jet pilot holes. May oil, grease or otherwise service and make necessary adjustments.

(9) Mine hoists: Operates hoists used in mining operations and in compliance with the department of mines regulations. Hoists and lowers men and materials in shafts and inclines in accordance to authorized signals. May oil, grease or otherwise service and make necessary adjustments.

(10) Motor grader (finish).

(11) Mechanic and welder: Assembles, sets up, adjust and maintains and repairs all types of construction equipment, such as internal combustion engines, air compressors, pumps, concrete mixers, heavy earth moving equipment, rock crushers and paving equipment.

(12) Mole operator: Operates a horizontal boring machine which is the vertical rotating cutter head which deposits muck onto conveyor that passes over the machine to a dump point. The operator controls the elevation and direction and travel by hydraulic rams. The machine is a specialized piece of machinery for tunnel boring. May oil, grease or otherwise service and make necessary adjustments.

(13) Mobile pipeline inspection camera.

(14) Operator or rigger.

(15) Crane inspector.

(16) Continuous mining machine.

(17) VAC jet rodder.

(18) Equipment instructor.

(19) Heavy equipment robotics operator or mechanic.

(20) Ultra high pressure waterjet cutting tool system operator/mechanic.

(21) Vacuum blasting machine operator or mechanic.

(22) Master environmental maintenance mechanic.

AI. Power equipment operators-group IX: operate hydraulic cranes with less than 150 feet of boom and over 10 tons but less than 100 tons lifting capacity including boom trucks (NM, Class II, license required).

AJ. Power equipment operators-group X: operate hydraulic cranes and boom trucks (100 tons and over); cranes and draglines with booms and jibs over 150 feet through 199 feet; $.75 above base rate per hour additional; cranes 200 feet and over $1.00 additional; tower cranes (NM, Class I Crane License Required).

AK. Truck drivers group I:

(1) Pickup truck 3/4 ton or under: Drives a light truck for transporting small loads of construction materials, tools or equipment. May service and make necessary adjustments for proper operation of equipment.

(2) Service station attendant: Maintains service station. Washes, lubricates, fuels and otherwise services vehicles and equipment. Changes and repairs tires and tubes. Operates and maintains service station equipment.

(3) Swamper or rider helper: Assists truck driver. Shares with a driver the duties of loading and unloading a truck, shifting articles about on truck, handling cumbersome articles and may drive to relieve driver.

AL. Truck drivers-group II:

(1) Bus or taxi: Drives a bus or taxi to transport employees to and from construction project. May oil, grease, or otherwise service and make necessary adjustments to equipment as needed.

(2) Dump or batch truck: Drives a truck, under eight cubic yards, for transporting loads of construction material. May service and make necessary adjustments for proper operation of equipment.

(3) Flatbed (bobtail) two ton and under: Drives a truck for transporting loads of construction materials or equipment. May load and unload truck. May service and make necessary adjustments for proper operation of equipment.

AM. Truck drivers-group III:

(1) Dump trucks (including all highway and off highway): Drives a truck, eight cubic yards and under 16 cubic yards, for transporting loads of construction material. May service and make necessary adjustments for proper operation of equipment.

(2) Tank truck: Drives a truck or truck with trailer or semi-trailer, on which is mounted a tank, under 3,000 gallons, for transporting loads of liquid products or construction material. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(3) Flatbed (bobtail) over two tons: Drives a truck for transporting loads of construction materials or equipment. May load and unload truck. May service and make necessary adjustments for proper operation of equipment.

AN. Truck driver-group IV:

(1) Distributor (asphalt): Only drives truck equipped with tank and controls for regulating distribution of bituminous materials. Does not operate levers or valves (See Power Equipment Operators-Group III). May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(2) Heavy tire repairman.

(3) Lumber carrier: Drives truck that hauls logs and lumber with truck trailer or bobtail.

(4) Transit mix or agitator (two or three axle bobtail equipment): Drives a truck upon which is mounted a concrete mixer. Drives truck under loading hopper to receive sand, gravel and cement. Fills water tank and starts and stops mixer. Drives truck to location for unloading. Dumps concrete into chute leading to forms. Cleans mixer drum. May service and make necessary adjustments for proper operation of equipment.

(5) Scissor truck.

(6) Trailer or semi-trailer dump: Drives a truck to which is attached a trailer or semi-trailer dump used in transporting construction materials.

(7) Field equipment servicemen.

AO. Truck driver-group V:

(1) Dumpster or dumptor: Operator of a self-propelled, four-wheeled, rubber-tired truck type machine which is used in hauling of materials. Machine is normally used off the highway, working around rock crushers or excavation. Being reverse steer,

the operator rides facing the dump-bed which is dumped by release of safety lock and sudden stop of machine, which causes off center loading of truck bed to dump. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(2) Tank truck: Drives a truck or truck with trailer or semi-trailer, on which is mounted a tank, 3,000 to 6,000 gallons, for transporting loads of liquid products or construction material. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(3) Lowboy, light equipment: Drives a truck to which is attached a trailer with a low frame or bed upon which light equipment or material is hauled. May service and make necessary adjustments for proper operation of equipment.

(4) Euclid type tank wagon under 6,000 gallons.

AP. Truck driver-group VI:

(1) Vacuum truck.

(2) Dump trucks (including all highway and off highway): Drives truck, 16 cubic yards and under 22 cubic yards, for transporting loads of construction material. May service and make necessary adjustments for proper operation of equipment.

AQ. Truck driver VII:

(1) Transit mix or agitator (semi or four axle equipment): Drives a truck upon which is mounted a concrete mixer. Drives truck under loading hopper to receive sand, gravel and cement. Fills water tank and starts and stops mixer. Drives truck to location for unloading. Dumps concrete into chute leading to forms. Cleans mixer drum. May service and make necessary adjustments for proper operation of equipment.

(2) Flaherty truck type spreader box: Drives a self-propelled vehicle, consisting primarily of a hopper mounted on pneumatic-tired wheels, used to spread crushed aggregate on bituminous roadway material. May service and make necessary adjustments for proper operation of equipment.

(3) Slurry truck driver.

(4) Bulk cement driver.

(5) Semi doubles driver.

(6) Four axle bobtail driver.

(7) Dump trucks (including all highway and off highway): Drives truck, 22 cubic yards and under 36 cubic yards, for transporting loads of construction material. May service and make necessary adjustments for proper operation of equipment.

(8) Head field equipment servicemen.

AR. Truck driver VIII:

(1) Diesel-powered transport (non-self-loading) 10 yards and over: Drives diesel powered Euclid Turnarocker, Terra Cobra, D.W.-10, D.W.-20 Le Tourneau pulls and similar diesel powered equipment when used to haul material and assigned to a "teamster".

(2) Lowboy, heavy equipment: Drives a truck to which is attached a trailer with a low frame or bed upon which light equipment or material is hauled. May service and make necessary adjustments for proper operation of equipment.

(3) Tank truck: Drives a truck or truck with trailer or semi-trailer, on which is mounted a tank 6,000 gallons and over, for transporting loads of liquid products or construction material. May oil, grease or otherwise service and make necessary adjustments to equipment as needed.

(4) Semi-trailer drivers (flatbed or van, tandems).

(5) Light equipment mechanic.

(6) Dump trucks (including all highway and off highway): Drives truck, 36 cubic yards and over, for transporting loads of construction material. May service and make necessary adjustments for proper operation of equipment.

AS. Truck driver IX:

(1) Warehouseman: Maintains warehouse for construction supplies and materials. May operate necessary equipment and machinery within warehouse area.

(2) Cardex men.

(3) Expediter.

(4) Lowboy (heavy equipment double gooseneck.

(5) Heavy equipment mechanic.

(6) Welder (body and fender man).

AT. Semi-skilled laborers Group II:

(1) Carpenter tender: Performs labor such as hand handling of materials used by carpenters. Assists in erecting and removing of forms, removes nails and clears lumber.

(2) Concrete worker or buggy operator: Pours and performs other work in relation to the lining with concrete. Operates buggy by pushing or pulling by hand between mixer or other source to site of work.

(3) Curbing machine, asphalt or cement: Operates a machine which applies asphalt or concrete along the edge of highways or parking aprons to form a small curb.

(4) Scaffold tender: Tends to the scaffold builder.

(5) Certified flagman: Supervises flag and signing personnel. Prepares revision to the traffic control plan.

(6) Bleacher seating: Unloads, moves to place of erection, assembles and installation of all stadium seating.

(7) Fence builder: Digs post holes, pours concrete for posts, sets posts, stretches fencing material.

(8) Guardrail builder: Attaches and assists in the installation of guardrails, (other than guardrails on bridges) guardrail posts, informational signs and metal fencing; including barb wire, woven wire, and chain link which is used to define right of way, medians or driving lanes or provide safety for such areas. May require the use of small hand tools such as hammer and spud wrench.

(9) Form stripper: Strips, cleans and oils all types of concrete forms.

(10) Gabian basket builders: Assembles wire baskets for rip rap.

(11) Rip rap stoneman: One who places stones into gabian baskets.

(12) Drywall, stocking and handling: Carries and handles of all materials by hand to a point adjacent to place of erection. Assists in placement of materials.

(13) Fly ash vacuum operator: Installs vacuum lines and operates nozzle of vacuum hose at power plants in the cleanup of ash.

(14) Landscaping and planter: Duties include site development, soil preparation, rototilling, fine grading, soil amending, installation of plants, seeded and sodded grasses, gravel and bark mulches. Installation of landscape sprinkler systems including landscape irrigation backflow preventers, and all components downstream including pipe, valves, low voltage control wiring, irrigation controllers, sprinkler heads, and drip components. May operate small behind and stand-on only landscape

equipment (including miniskid steers with attachments). Maintenance of landscapes including weeding, mowing, and irrigation repair. Duties do not include electrical work, fencing, concrete retaining walls or other work that is generally performed by skilled craftsmen.

(15) Manhole builder: Constructs a means of permanent access to water, electrical and sewer lines for maintenance purposes.

(16) Tool room person: manages, inspects and coordinates all tool room activities and exchanges.

(17) Rodmen: holds survey rod.

(18) Tenderers (to cement mason and plasterer): Assists in the pouring of concrete by spreading concrete, cleaning and caring of cement mason's tools, mixes mortar used in the patching of concrete. Mixes mortar for plasterers and delivers same to location where plasterers are working. Sets up scaffolding as directed by foreman where necessary, and cleans and cares for tools and equipment used in the preparation and application of plaster.

AU. Skilled laborers: Group III:

(1) Air and power tool man (not a carpenter's tool): A worker who uses a tool driven by compressed air, gas or electric power to perform such work as breaking old pavement, loosening or digging hard earth, trimming bottom and sides of trenches, breaking large rocks, driving sheeting, chipping concrete, trimming or cutting stone, calking steel plates, or compaction of earthen backfill. Install plastic and PVC linings on ponds. Rotary man operates a hand-held device to make cuts on road with a person holding a nozzle to fill cuts with oil.

(2) Asphalt raker: Distributes asphaltic road-building materials evenly over road surface by raking and brushing materials to correct thickness; may control straight edge to regulate width and depth of materials; directs "asphalt shovelers" when to add or take away material to fill low spots or to reduce high spots. Applies color to tennis courts, etc. by using a squeegee. Applies epoxy on concrete floors to seal.

(3) Asphalt heaterman: Tends a stationary or portable liquid asphalt kettle, starts fires (usually fuel oil) under the kettle, controls heat applied to the kettle by regulating dials or burners, maintains desired temperature in asphalt, and regulates valves for discharge of asphalt from kettle.

(4) Asphalt jointman: Cleans and pours asphalt joints in concrete paving with nozzle or can. Takes care of asphalt kettle heaters.

(5) Chain saw-man: Operates a power driven chain saw to clear areas of timber. Fells trees, and sometimes cuts the fallen trees into short sections to facilitate their removal.

(6) Oxy or Gasoline torch operators: Uses cutting torch only for demolition work on steel or other metal structures.

(7) Cutting torch or welding torch operator or burner person: Uses cutting torch only for demolition work on steel or other metal structures.

(8) Gunite rebound men: A laborer who shoots gunite into place.

(9) Concrete power buggy operator: Drives self-propelled buggy to transport concrete from mixer or source of supply to place of deposit. Operates levers to dump load.

(10) Sandblaster: Cleans and prepares surfaces by the use of sandblasting equipment other than preparation for painting (see painter).

(11) Potman: Cleans screens and feeds sand to hopper or pot of sandblasting machine.

(12) Wagon, air track, drill and diamond driller (outside): Sets up and operates air driven drilling mechanism that drills holes into concrete or rock. Levels machine by placing timbers under wheels. Inserts and fastens drill steel in chuck. Adjusts angle of drill tower and bolts into position. Controls drilling and speed of drill by moving levers. May make other adjustments to equipment as needed.

(13) Multi-plate setter: Assembles large diameter metal culverts by bolting together semi-circular pieces of metal to form a complete circle, and bolts each section of this circle to similar sections which are placed adjacently, repeating these processes until the required length of culvert is formed.

(14) Concrete burner: Operates a device used to burn holes, etc., through concrete. This device consists of a consumable aluminum-magnesium rod inside a small iron pipe. Oxygen is forced through the pipe under pressure, and the end of the assembly is lighted. The concrete is melted by the intense heat of the device.

(15) Mortar mixer and mason tender: Mechanically mixes mortar ingredients to proper consistency and delivers to mason on scaffold or at site of work. Keeps materials supplied to mason.

(16) Batching plant scaleman: Manually operates a stationary or portable batching scale that weighs out concrete materials. Adjusts scales for required weight of the materials. Operates controls that admit materials separately from storage hoppers to weighing bins. Observes scales or indicators that show when proper amount of

materials have been made. Discharges materials from weighing bin into truck or other carrier or mixer. He may measure materials by volume instead of weight.

(17) Concrete touch-up man: Prepares the surfaces of concrete masonry which is not to be finished (using tools other than those normally used by "cement masons') by patching holes and broken corners, and removing high spots and defective concrete.

(18) Concrete sawman - coring machine: Operates a power driven, hand guided, water-cooled saw or diamond driller which is used to cut through slabs of concrete, except as otherwise provided elsewhere.

(19) Metal form setter-road: Fits together, aligns and grades metal road forms for holding concrete in place on road and street surfaces. Dismantles, moves and cleans forms after concrete hardens.

(20) Grade setter or checker: Keeps stakes and stringline set in place out in front of trenching machine so that machine will cut ditch in correct location. Sets stakes so that pipelayers can fine-grade ditch and measure from the batter board down to correct depth of ditch.

(21) Gunite, pumpcreteman and nozzleman: Assists operator and handles the equipment and directs the placing of concrete or mortar that is moved by pressures or pneumatic equipment, such as gunite. May fine-grade and place wire mesh at times.

(22) Vibrator operator (hand type): Lowers hose-like flexible shaft of vibrator into newly poured concrete. Starts power unit and holds shaft, allowing hammerhead on shaft to vibrate, thus compacting the concrete. Air, electric or gasoline operated vibrators are used.

(23) Vibratory compactor (hand type): Operates hand guided vibratory or impact compactor. Adjusts levers, throttles and other devices necessary for operation.

(24) Hod carrier: Assists brickmasons, stonemasons and blockmasons by preparing mortar mix, either by hand or machine, delivers material to masons on scaffold, operates small material moving equipment such as power buggy, hoists, mortar mix pumps and other similar equipment. May erect and dismantle bricklayer scaffolds.

(25) Pipelayer: Unloading, handling, distribution and installation, concrete, corrugated metal pipe and corrugated and smooth wall plastic pipe, PVC and polyethylene pipe. Receives pipe lowered from top of trench; joins pipe ends; adjusts pipe to line and grade; seals joints with cement or other sealing compound. Lowers pipe.

(26) Plaster spreader operator: Mixes plaster to be used in a machine which is designed to apply plaster to surfaces by means of a hose. Handles and maintains hose, places and moves machine, and services and maintains machine.

(27) Jack hammer and chipping hammer operator: Operates jackhammer, chipping hammer, whether powered by air or electric or any other means.

(28) Tamper operator: Performs the compacting of soil using walk or stand behind equipment.

(29) Scaffold builder: Erects and dismantles all types of scaffolding, except wood scaffolding, for job site.

(30) Powderman tender: Carries powder or other explosive to blaster or powderman and assists by placing prepared explosive in hole, connecting lead wire to blasting machine, and performing other duties as directed.

(31) Water pump tender: fuels and tends to all water pumps under 6" for the purpose of moving water on the job site.

(32) Certified scissor lift or man lift operator: Person who completes competent person training certification in the operation of scissor and man lifts.

AV. Specialty laborer: Group IV:

(1) Asbestos abatement remover: A person who has proper certifications for removal of asbestos from pipes, ceiling and other parts of existing buildings, either by scraping or by using pressure by water. In addition, this definition includes a person who cleans up and disposes of asbestos after it has been removed.

(2) Toxic and hazardous waste remover: Person who has the proper certification for the removal of toxic and hazardous materials.

(3) Lead base paint remover: Person who has the proper certifications for the removal of lead base paints.

(4) Powderman and blaster: Prepares blasting material and inserts this material into predrilled holes. Performs electrical wiring necessary for detonation and assures that all charges have detonated before other workmen resume work in the area made hazardous by the charges.

(5) Pest technician (Licensed by the Bureau of Rodent Management): Technician certified for the removal and handling of rodents and pests.

(6) Radiation worker II: Person that completes proper training for work in areas containing radiation.

AW. Unskilled laborers: Group I:

(1) Chainman, stake driver, stake hopper: Carries supplies, drags chain, holds survey rod, drives stakes and assists surveyor in other related duties.

(2) Building and common laborer: A general term used on construction work covering many unskilled occupations. A laborer works with all crews doing everything from pick and shovel work to cleaning up lumber with hammer; shoveling and placing concrete; applying coats of oil to inside face of forms; stripping forms; working on rock crusher to feed trap; opening cement sacks at batch plant; working with dirt crew to move construction layout stakes; working as flagman, signalman or spotter to control traffic; serving as dumpman; spreading hot asphaltic material over roadbed with shovel; operating hand concrete buggy or wheelbarrow; helping painter to prepare surfaces for painting and cleaning paint equipment. Does not include roofing cleanup.

(3) Concrete buggy operator (hand): Operating buggy by pushing or pulling by hand between mixer or other source to site of work.

(4) Fire watch: a laborer who watches the work area for fires when craftsmen are cutting or welding.

(5) Flagman: Flagman is stationed at strategic locations to control flow of traffic by hand held flags or other hand held warning device.

(6) Window washer: Cleans and washes windows.

(7) Unloading of furniture and fixtures: Unloads furniture and fixtures from trucks and moves them to the place of installation or storage.

(8) Heat tenders: Fuels and tends to heaters use on the job sites.

AX. Underground laborers: Group I.

Tunnel workers: Outside laborer, minimum tunnel, labor, dry houseman and hand muckers, top landers, trackmen.

AY. Underground laborers: Group II.

Chuck tender, cable or base tenders, concrete laborers, dumpmen, whirley pump operators, tenders on shotcrete, gunniting and sandblasting, tenders core and diamond drills, pot tenders, concrete specialist (1) including finishing, grouting, patching, and curing, concrete specialist tender (2), applying of concrete processing materials, concrete worker, (including all chipping and finishing underground).

AZ. Underground Laborers: Group III.

Shaft Miner, tunnel miner, air tugger operators, collapsible form movers and setters, machine men and bit grinders, nippers, powdermen and blasters, reinforcing steel setters, timbermen (steel or wood tunnel support, including the placement of sheeting when required), tunnel liners, plate setters, all cutting and welding incidental to miners' work, vibrator men, internal and external, unloading, stopping and starting of moran agitator cars, diamond and core drill operators, shotcrete operator, gunnnite nozzelmen.

[11.1.2.18 NMAC - Rp, 11.1.2.17 NMAC, 12/30/2016; A, 1/1/2023; A, 5/19/2023; A, 1/1/2024]

11.1.2.19 APPRENTICES:

A. Requirements of apprentices:

(1) All apprentices shall be properly indentured.

(2) Apprentices used on public works projects shall be in training and in compliance under registered apprenticeship standards and written apprenticeship agreements, and their employment shall be in accordance with the provisions of such apprenticeship standards and apprenticeship agreements.

(3) Apprentices shall be employed only at the work of the trade to which they are indentured.

(4) Certification showing registration status of apprentices must accompany the first full payroll on which each apprentice first appears. Certification on any registered apprentice shall be made by the contractor, and verification may be obtained from the Labor Relations Division, Apprenticeship Office.

B. Method of establishing apprentice wage rates: Every apprentice shall be paid a wage rate applicable to his craft and classification in accord with the wage rates established by the approved apprenticeship program.

C. Apprenticeship contribution rates: the director shall consider the apprenticeship contribution rates set forth in the collective bargaining agreements that are received and reviewed in setting the annual wage and fringe benefit rates and shall determine the contribution requirements for employers under the provisions of the Public Works Apprentice and Training Act and Public Works Apprentice and Training Act Policy Manual. The apprenticeship contribution rate to be included in the table set forth in 11.1.2.20 NMAC shall be a fixed rate based on the contribution rates set forth in the submitted collective bargaining agreements. The amount of any apprentice contribution, which is included in the fringe rate shown in this schedule, may be deducted from the fringe benefit rate to be paid to, or on behalf of, an employee.

D. Apprentices participating in an approved apprenticeship program registered with the Apprenticeship Office who are required to attend unpaid training sessions during weeks in which they are not otherwise receiving compensation may be eligible to receive unemployment benefits for the training weeks under 51-1-1 et seq. NMSA as long as all other unemployment eligibility requirements are met.

[11.1.2.19 NMAC - Rp, 11.1.2.19 NMAC, 12/30/2016; A, 11/10/2020]

11.1.2.20 PREVAILING WAGE AND FRINGE BENEFIT AND APPRENTICESHIP CONTRIBUTION RATES:

Pursuant to 11.1.2.13 NMAC, the director of the labor relations division of the department of workforce solutions hereby publishes the proposed 2024 prevailing wage and fringe benefit rates and apprenticeship contributions that will apply to all wage rate decisions issued from January 1, 2024 through December 31, 2024.

A. TYPE A: STREET, HIGHWAY, UTILITY AND LIGHT ENGINEERING			
Trade Classification	**Base Rate**	**Fringe Rate**	**Apprenticeship**
Bricklayer/block layer/stonemason	27.03	10.99	
Bricklayer/block layer/stonemason: Curry, DeBaca, Quay and Roosevelt counties	23.10	8.98	
Bricklayer/block layer/stonemason: Dona Ana, Otero, Eddy, and Lea counties	29.56	14.10	
Carpenter/lather	29.11	12.79	
Carpenter: Los Alamos county	33.18	13.58	
Cement mason	19.34	7.41	
Drywall Finisher/Taper	26.40	8.86	
Glazier/Fabricator	21.75	7.10	
Ironworker			
Ironworker journeyman	28.49	18.71	
Probationary ironworker	22.79	18.71	
Painter – Commercial	21.00	5.75	
Paper Hanger	21.00	5.75	
Plumber/pipefitter	40.74	15.90	
Electricians – outside classifications: Zone 1			
Ground man	26.32	12.79	
Equipment operator	37.76	17.13	
Lineman	47.70	19.92	
Journeyman technician	44.42	19.10	
Cable splicer	48.87	20.22	
Electricians – outside classifications: Zone 2			

Ground man	26.32	12.79	
Equipment operator	37.76	17.13	
Lineman	47.70	19.92	
Journeyman technician	44.42	19.10	
Cable splicer	48.87	20.22	
Electricians – outside classifications: Los Alamos county			
Ground man	27.07	12.81	
Equipment Operator	38.85	17.17	
Lineman/Technician	48.95	20.24	
Journeyman technician	45.70	19.42	
Cable Splicer	53.75	21.44	
Laborers			
Group I – Unskilled	16.60	7.30	
Group II – Semi-Skilled	17.60	7.30	
Group III – Skilled	18.10	7.30	
Group IV - Specialty	18.60	7.30	
Operators			
Group I	22.42	6.79	
Group II	23.50	6.79	
Group III	23.61	6.79	
Group IV	24.09	6.79	
Group V	24.21	6.79	
Group VI	24.43	6.79	
Group VII	24.62	6.79	
Group VIII	25.33	6.79	
Group IX	33.56	6.79	
Group X	37.43	6.79	
Soft Floor Layer	21.00	9.20	
Truck drivers			
Group I – IX	19.75	9.15	
B. TYPE B: GENERAL BUILDING			
Trade Classification	Base Rate	Fringe Rate	Apprenticeship
Asbestos workers/heat & frost insulators	35.86	12.46	.60
Asbestos workers/heat & frost insulators: Los Alamos county	38.29	12.46	.60
Boilermaker/blacksmith	35.88	32.28	.60
Boilermaker/blacksmith: San Juan county	36.83	31.88	.60
Bricklayer/block layer/stonemason	27.03	10.99	.60
Bricklayer/block layer/stonemason: Curry, DeBaca, Quay, and Roosevelt counties	23.10	8.98	.60

Bricklayer/block layer/stonemason: Dona Ana, Otero, Eddy, and Lea	26.42	8.98	.60
Carpenter/lather	29.11	12.79	.60
Carpenter: Los Alamos county	33.18	13.58	.60
Millwright/pile driver	39.00	29.40	.60
Cement mason	24.31	11.16	.60
Electricians – outside classifications: Zone 1			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60
Electricians – outside classifications: Zone 2			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60
Electricians – outside classifications: Los Alamos county			
Ground man	27.07	12.81	.60
Equipment operator	38.85	17.17	.60
Lineman/technician	48.95	20.24	.60
Cable splicer	53.75	21.44	.60
Electricians – inside classifications: Zone 1			
Wireman/low voltage technician	38.30	12.60	.60
Cable splicer	42.13	12.71	.60
Electricians – inside classifications: Zone 2			
Wireman/low voltage technician	41.75	12.70	.60
Cable splicer	45.58	12.82	.60
Electricians – inside classifications: Zone 3			
Wireman/low voltage technician	44.05	12.77	.60
Cable splicer	47.88	12.89	.60
Electricians – inside classifications: Zone 4			
Wireman/low voltage technician	48.26	12.90	.60
Cable splicer	52.09	13.01	.60
Electricians – inside classifications: Dona Ana county, Hidalgo county, Luna county and Otero county			
Wireman/low voltage technician	32.72	9.65	.60

Cable splicer	32.72	9.65	.60
Electricians – inside classifications: Los Alamos county			
Wireman/low voltage technician	44.05	14.97	.60
Cable splicer	47.88	15.28	.60
Elevator constructor	49.77	39.19	.60
Elevator constructor helper	34.84	39.19	.60
Glazier/Fabricator	21.75	7.10	
Glazier: Los Alamos county	21.75	7.10	.60
Ironworker			
Ironworker journeyman	28.49	18.71	.60
Probationary ironworker	22.79	18.71	.60
Painter	21.00	5.75	.60
Painter: Los Alamos county	31.18	11.50	.60
Paper Hanger	21.00	5.75	.60
Paper Hanger: Los Alamos county	32.06	11.50	.60
Drywall Finisher/Taper – Light commercial & residential			
Ames tool operator	27.40	8.86	.60
Hand finisher/machine texture	26.40	8.86	.60
Drywall Finisher/Taper: Los Alamos county	31.18	11.50	.60
Plasterer	24.76	9.99	.60
Plumber/pipefitter	36.91	14.75	.60
Roofer			
Roofer journeyman	26.94	9.36	.60
Roofer helper	16.16	9.36	.60
Sheet metal worker			
Zone 1	37.50	19.08	.60
Zone 2 – Industrial	38.50	19.08	.60
Zone 3 – Los Alamos county	39.50	19.08	.60
Soft floor layer	21.00	9.20	.60
Soft floor layer: Los Alamos county	31.20	11.62	.60
Sprinkler fitter	35.75	24.56	.60
Tile setter	24.46	8.81	.60
Tile setter helper/finisher	16.53	8.81	.60
Laborers			
Group I – Unskilled	20.44	7.96	.60
Group II – Semi-Skilled	20.44	7.96	.60
Group III – Skilled	21.44	7.96	.60
Group IV – Specialty	23.69	7.96	.60
Operators			
Group I	24.49	8.22	.60

Group II	26.75	8.22	.60
Group III	27.24	8.22	.60
Group IV	27.70	8.22	.60
Group V	27.90	8.22	.60
Group VI	28.12	8.22	.60
Group VII	28.23	8.22	.60
Group VIII	31.43	8.22	.60
Group IX	33.94	8.22	.60
Group X	37.51	8.22	.60
Truck drivers			
Group I – VII	16.65	8.27	.60
Group VIII	16.71	8.27	.60
Group IX	18.65	8.27	.60
C. TYPE C: RESIDENTIAL			
Trade classification	**Base rate**	**Fringe rate**	**Apprenticeship**
Asbestos workers/heat & frost insulators	35.86	12.46	.60
Asbestos workers/heat & frost insulators: Los Alamos county	38.29	12.46	.60
Boilermaker/blacksmith	35.88	32.28	.60
Boilermaker/blacksmith: San Juan county	36.83	31.88	.60
Bricklayer/block layer/stonemason	27.03	10.99	.60
Bricklayer/block layer/stonemason: Curry, DeBaca, Quay, and Roosevelt counties	23.10	8.98	.60
Bricklayer/block layer/stonemason: Dona Ana, Otero, Eddy and Lea counties	26.42	8.98	.60
Carpenter/lather	29.11	12.79	.60
Carpenter: Los Alamos county	33.18	13.58	.60
Cement mason	21.27	11.09	.60
Electricians – outside classifications: Zone 1			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60
Electricians – outside classifications: Zone 2			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60

Electricians – outside classifications: Los Alamos county			
Ground man	27.07	12.81	.60
Equipment operator	38.85	17.17	.60
Lineman/technician	48.95	20.24	.60
Cable splicer	53.75	21.44	.60
Electricians – inside classifications: Zone 1			
Wireman/low voltage technician	38.30	12.60	.60
Cable splicer	42.13	12.71	.60
Electricians – inside classifications: Zone 2			
Wireman/low voltage technician	41.75	12.70	.60
Cable splicer	45.58	12.82	.60
Electricians – inside classifications: Zone 3			
Wireman/low voltage technician	44.05	12.77	.60
Cable splicer	47.88	12.89	.60
Electricians – inside classifications: Zone 4			
Wireman/low voltage technician	48.26	12.90	.60
Cable splicer	52.09	13.01	.60
Electricians – inside classifications: Dona Ana county, Hidalgo county, Luna county and Otero county			
Wireman/low voltage technician	32.72	9.65	.60
Cable splicer	32.72	9.65	.60
Electricians – inside classifications: Los Alamos county			
Wireman/low voltage technician	44.05	14.97	.60
Cable splicer	47.88	15.28	.60
Elevator constructor	49.77	39.19	.60
Elevator constructor helper	34.84	39.19	.60
Glazier/Fabricator	21.75	7.10	
Ironworker			
Ironworker journeyman	28.49	18.71	.60
Probationary ironworker	22.79	18.71	.60
Painter – Residential	19.00	5.75	.60
Drywall Finisher/Taper – Light commercial & residential			
Ames tool operator	24.03	8.86	.60
Hand finisher/machine texture	23.03	8.86	.60
Paper hanger	19.00	5.75	.60
Plasterer	21.49	8.92	.60

Plumber/pipefitter	28.04	7.60	.60
Roofer			
Roofer Journeyman	26.94	9.36	.60
Roofer Helper	16.16	9.36	.60
Sheet metal worker			
Zone 1	37.50	19.08	.60
Zone 2 – Industrial	38.50	19.08	.60
Zone 3 – Los Alamos county	39.50	19.08	.60
Soft floor layer	21.00	9.20	.60
Sprinkler fitter	35.75	24.56	.60
Tile setter	24.46	8.81	.60
Tile setter help/finisher	16.53	8.81	.60
Laborers			
Group I – Unskilled	13.44	8.16	.60
Group II – Semi-skilled	13.44	8.16	.60
Group III – Skilled	14.44	8.16	.60
Group IV – Specialty	15.44	8.16	.60
Operators			
Group I	19.50	8.82	.60
Group V	21.33	8.82	.60
Group VII	25.75	8.82	.60
Group VIII	27.95	8.82	.60
Truck drivers			
Group I – IX	20.75	6.27	.60
D. TYPE H: HEAVY ENGINEERING			
Trade Classification	**Base Rate**	**Fringe Rate**	**Apprenticeship**
Asbestos workers/heat & frost insulators	35.86	12.46	.60
Asbestos workers/heat & frost insulators: Los Alamos county	38.29	12.46	.60
Boilermaker/blacksmith	35.88	32.28	.60
Boilermaker/blacksmith: San Juan county	36.83	31.88	.60
Bricklayer/block layer/stonemason	27.03	10.99	.60
Bricklayer/block layer/stonemason: Curry, DeBaca, Quay and Roosevelt counties	23.10	8.98	.60
Bricklayer/block layer/stonemason: Dona Ana, Otero, Eddy, and Lea counties	26.42	8.98	.60
Carpenter/lather	29.11	12.79	.60
Carpenter: Los Alamos county	33.18	13.58	.60
Millwright/pile driver	39.00	29.40	.60
Cement mason	24.31	11.16	.60

Electricians - outside classifications: Zone 1			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60
Electricians - outside classifications: Zone 2			
Ground man	26.32	12.79	.60
Equipment operator	37.76	17.13	.60
Lineman/technician	47.70	19.92	.60
Cable splicer	48.87	20.22	.60
Electricians – outside classifications: Los Alamos county			
Ground man	27.07	12.81	.60
Equipment operator	38.85	17.17	.60
Lineman/technician	48.95	20.24	.60
Cable splicer	53.75	21.44	.60
Electricians – inside classifications: Zone 1			
Wireman/low voltage technician	38.30	12.60	.60
Cable splicer	42.13	12.71	.60
Electricians - inside classifications: Zone 2			
Wireman/low voltage technician	41.75	12.70	.60
Cable splicer	45.58	12.82	.60
Electricians - inside classifications: Zone 3			
Wireman/low voltage technician	44.05	12.77	.60
Cable splicer	47.88	12.89	.60
Electricians - inside classifications: Zone 4			
Wireman/low voltage technician	48.26	12.90	.60
Cable splicer	52.09	13.01	.60
Electricians – inside classifications: Dona Ana county, Hidalgo county, Luna county and Otero county			
Wireman/low voltage technician	32.72	9.65	.60
Cable splicer	32.72	9.65	.60
Electricians – inside classifications: Los Alamos county			
Wireman/low voltage technician	44.05	14.97	.60
Cable splicer	47.88	15.28	.60
Glazier/Fabricator	21.75	7.10	

Ironworker			
Ironworker journeyman	28.49	18.71	.60
Probationary ironworker	22.79	18.71	.60
Painter – Industrial	24.00	6.70	.60
Paperhanger	24.00	6.70	.60
Drywall Finisher/Taper – Industrial			
Ames tool operator	28.25	8.86	.60
Hand finisher/machine texture	27.25	8.86	.60
Plumber/pipefitter	40.74	15.90	.60
Roofer			
Roofer journeyman	26.94	9.36	.60
Roofer helper	16.16	9.36	.60
Sheet metal worker	37.50	19.08	.60
Operators			
Group I	24.51	6.79	.60
Group II	24.73	6.79	.60
Group III	24.96	6.79	.60
Group IV	25.49	6.79	.60
Group V	25.60	6.79	.60
Group VI	25.84	6.79	.60
Group VII	25.86	6.79	.60
Group VIII	28.56	6.79	.60
Group IX	34.51	6.79	.60
Group X	38.37	6.79	.60
Laborers			
Group I – Unskilled	18.95	7.30	.60
Group II – Semi-Skilled	18.89	7.30	.60
Group III – Skilled	21.21	7.30	.60
Group IV- Specialty	21.61	7.30	.60
Laborers – Underground			
Group I	21.06	7.12	.60
Group II	20.86	7.12	.60
Group III	21.58	7.12	.60
Soft Floor Layer	21.00	9.20	.60
Truck drivers			
Group I	19.75	9.15	.60
Group II	19.75	9.15	.60
Group III	19.75	9.15	.60
Group IV	19.75	9.15	.60
Group V	19.75	9.15	.60
Group VI	19.75	9.15	.60
Group VII	19.75	9.15	.60
Group VIII	19.75	9.15	.60

Group IX	25.75	9.15	.60

[11.1.2.20 NMAC - N, 02-29-2016; Rp, 1/1/2017; A, 1/1/2018, A, 1/1/2019; A, 1/1/2020; A, 1/1/2021; A, 1/1/2022; A, 1/1/2023; A, 5/19/2023; A, 1/1/2024]

11.1.2.21 SUBSISTENCE, ZONE, AND INCENTIVE PAY RATES:

All contractors are required to pay subsistence, zone, and incentive pay according to the particular trade.

A. Asbestos workers or heat and frost insulators:

(1) Zone 1 shall consist of the area lying within the city limits of a circle whose radius is 66 miles from the city hall in Albuquerque or the city hall in El Paso - $0.00 per day.

(2) Zone 2 shall consist of Los Alamos county - $40.00 per day if not furnished a company owned vehicle.

(3) Zone 3 shall consist of the area lying beyond a circle whose radius is over 66 miles from the city hall in Albuquerque or the city hall in El Paso - $85.00 per day.

B. Boilermakers/blacksmiths:

(1) Per diem is calculated from city hall of the dispatch city or the employee's home address, whichever is closer to the job location.

(2) Per diem is $55.00 per day for travel between 70 and 120 miles and $85.00 per day for travel over 120 miles.

C. Bricklayers:

(1) For Albuquerque area contractors, the starting point shall be at the intersection of I-40 and I-25 and shall continue to the job site. All other areas, the starting point shall be the employer's main office address.

(2) Between 50 and 75 miles from the starting point, $35.00 per day.

(3) 76 or more miles from the starting point, $55.00 per day.

(4) All covered refractory work over 75 miles from the intersection of I-40 and I-25, $80.00 per day.

D. Cement Masons:

(1) For employees who travel to Santa Fe from Albuquerque or vice versa, $20.00 per day.

(2) In all other work performed more than 50 miles from the employer's main office, $50.00 per day.

(3) Mutually agreed-upon lodging or transportation paid for by the employer will substitute for subsistence pay.

E. Drywall Finishers and Tapers:

(1) $40.00 per day ($5.00 per hour for eight hours work) for over 60 miles over the most typically traveled route, or other mutually agreed upon suitable lodging or transportation.

(2) If an employee has worked the full week on four10-hour days, the employee shall be paid the full week of per diem of $200.00.

(3) Special provision for Santa Fe and Albuquerque: Employees who travel between Santa Fe and Albuquerque will be paid $15.00 per day or other mutually agreed upon lodging or transportation.

F. Electricians (inside classifications):

(1) For Albuquerque only:

(a) Zone 1 is classified as being within 40 miles from the main post office.

(b) Zone 2 shall extend up to 10 miles beyond zone 1. Work performed within zone 2 shall be compensated nine percent above the journeyman rate for zone 1.

(c) Zone 3 shall extend up to 20 miles beyond zone 1. Work performed within zone 3 shall be compensated fifteen percent above the journeyman rate for zone 1.

(d) Zone 4 shall extend 20 miles or more beyond zone 1. Work performed within zone 4 shall be compensated twenty six percent above the journeyman rate for zone 1.

(2) For Los Alamos county only: work performed within the county shall be compensated fifteen percent above the zone 1 journeyman rate.

(3) For all other counties:

(a) Zone 1 is:

(i) within six miles from the main post office for Raton, Tucumcari, and Farmington.

(ii) within eight miles from the main post office for Las Vegas.

(iii) within ten miles from the main post office for Santa Fe and Gallup.

(iv) within twelve miles from the main post office for Belen, Carrizozo, Clovis, Los Lunas, Portales, Roswell, Ruidoso, Artesia, Carlsbad, Hobbs, and Lovington.

(v) within fourteen miles from the main post office for Espanola.

(b) Zone 2 shall extend up to 20 miles beyond zone 1. Work performed within zone 2 shall be compensated nine percent above the journeyman rate for zone 1.

(c) Zone 3 shall extend up to 30 miles from zone 1. Work performed within zone 3 shall be compensated fifteen percent above the journeyman rate for zone 1.

(d) Zone 4 shall extend beyond 30 miles from zone 1. Work performed within zone 4 shall be compensated twenty six percent above the journeyman rate for zone 1.

(4) Commuting time to and from a job site at the beginning and end of each workday is not compensable. However, if workers are required to report to the shop at the start of the day or return to the shop at the end of the day, then that time spent traveling is compensable. Similarly, time spent traveling from job to job is compensable. In both cases, workers shall be paid for the time spent traveling and shall be furnished transportation by the employer. Under these conditions the Zone 1 rate and any applicable overtime will be paid.

G. Electricians (outside classification – Zone 2): $50.00 per diem to be paid for work 30 miles outside of Santa Fe and 60 miles outside of Albuquerque. No per diam in Los Alamos county.

H. Glaziers:

(1) When out-of-town travel is required, the employer shall provide suitable lodging with no more than two people per room and $20.00 per night for food.

(2) Employees required to use a personal vehicle for travel to a jobsite beyond a 30 mile radius of the main post office in town where the employer's shop is located shall be compensated at the current Internal Revenue Service (IRS) rate for actual mileage incurred beyond the 30 mile radius, plus their regular rate of pay for travel time.

I. Ironworkers:

(1) Travel more than 50 miles from the interchange of Interstate 25 and Interstate 40 or from the employee's home should be paid at $9.00 per hour.

(2) If travel is within Santa Fe county, travel should be paid at $3.00 per hour.

J. Laborers:

(1) Type A:

(a) Work travel between 50 and 85 miles from the employer's primary address should be compensated at $3.50 per hour.

(b) Work travel 86 miles or greater from the employer's primary address should be compensated at $5.00 per hour.

(2) Types B and C:

(a) Work travel over 70 miles from the union halls of Albuquerque, Espanola, Farmington or Las Cruces shall be paid at $7.00 per hour in travel pay, not to exceed 10 hours per day.

(b) If an overnight stay is necessary, the employer shall pay $40.00 per day for meals, in addition to travel pay.

(3) Type H – no zone subsistence pay.

(4) If an employer provides the employee transportation and mutually agreeable, suitable lodging with no more than two people in a room in areas where overnight stays are necessary, subsistence rates do not apply.

K. Millwrights:

(1) All zone pay shall be calculated from the address of the city hall of the respective dispatch point.

(2) Zone 1: Work traveled up to 45 miles from the address of the city hall of the respective dispatch points is a free zone.

(3) Zone 2: Work traveled between 45 miles and 100 miles shall be compensated at $4.00 per hour above base wage.

(4) Zone 3: Work traveled 101 miles or more shall be compensated at $6.00 per hour above base wage.

(5) If employer fails to provide suitable lodging, employer shall pay $110.00 per diem.

(6) If an employee's principal place of residence is within 45 road miles from the project, no subsistence or travel time shall be paid.

L. Operating Engineers:

(1) Type A operators should be compensated for zone and subsistence as follows:

(a) Work travel between 50 and 85 miles from the interchange of Interstate 25 and Interstate 40 in Albuquerque, or from the Farmington City Hall in Farmington, should be compensated at $2.50 per hour.

(b) Work travel 86 miles or more from the interchange of Interstate 25 and Interstate 40 in Albuquerque or from the Farmington City Hall in Farmington, should be compensated at $4.00 per hour.

(2) Type B and C operators:

(a) Base points for operators are 30 miles and beyond:

(i) Bernalillo county courthouse in Albuquerque;

(ii) state capital building in Santa Fe;

(iii) city hall in Farmington.

(b) Zone and subsistence for Albuquerque, Santa Fe, and Farmington are as follows:

(i) work travel between 30 and 50 miles from the base point compensated at $20.00 per day;

(ii) work travel between 51 and 100 miles from the base point compensated at $50.00 per day;

(iii) work travel over 100 miles from the base point that involves an overnight stay compensated at $100.00 per day.

(c) Zone and subsistence for Los Alamos county, $100.00 per day. This takes precedence over the 50 mile radius for Santa Fe zone and subsistence.

(d) If an employer provides the employee transportation and mutually agreeable, suitable lodging in areas where overnight stays are necessary, subsistence rates do not apply.

(3) Type H operators are not eligible for zone and subsistence pay.

M. Painters:

(1) When out-of-town travel is required, the employer shall provide suitable lodging with no more than two people per room and $30.00 per day for expenses.

(2) When out-of-town travel is required and employer and employer does not provide lodging, employer shall pay $100 per day for expenses, plus their regular rate of pay.

(3) Employees required to use a personal vehicle for travel to a jobsite beyond a 60-mile radius from their residence or the employer's shop, whichever is closest to the job, shall be compensated at the current IRS rate for actual mileage incurred beyond the 60-mile radius, plus their regular rate of pay for travel time.

(4) Employer shall furnish transportation or gasoline for all work performed beyond the 30-mile radius that encompasses the free cities of Albuquerque, Santa Fe, and Belen.

N. Paper hangers:

(1) Zone 1: Base pay for an area within a 30 mile radius from the main post office in the city or town where the employee permanently resides. Albuquerque, Santa Fe, and Belen shall be considered Zone 1.

(2) Zone 2: Work travel between 30 and 75 miles from the main post office in the town where an employee permanently resides shall be compensated at $1.00 per hour above base pay.

(3) Zone 3: Work travel 75 miles or more from the main post office in the town where an employee permanently resides shall be compensated at $2.50 per hour above base pay.

(4) When the employee is required to stay overnight, the employer should provide and pay for suitable lodging.

(5) Employer will furnish transportation or gasoline for all work performed beyond the 30 mile radius that encompasses the free cities of Albuquerque, Santa Fe, or Belen.

O. Plasterers:

(1) Employees who travel from Albuquerque to Santa Fe should be compensated at $20.00 per day.

(2) Except for employees who travel from Santa Fe to Albuquerque, work travel 75 miles or more from the employer's office over the most typically traveled route should be compensated at $5.00 per hour and capped at $40.00 per day.

P. Plumbers and pipefitters:

(1) Work travel for 90 or more miles from an employee's primary residence, and involving an overnight stay, should be compensated at $80.00 per day.

(2) No zone or subsistence pay is required should the employer elect to cover the room cost.

Q. Roofers - work travel requiring an overnight stay should be compensated at $35.00 per day for food. Employer should provide and pay for a suitable hotel. When employees are assigned to jobs located 60 or more miles from the employer's place of business, transportation to and from the job site must be provided.

R. Sheet metal workers:

(1) Work travel 90 miles or more from the contractor's home base and employee's home, should be paid at $120.00 per day subsistence pay plus base and fringe, regardless of county.

(2) Los Alamos county: $2.00 per hour incentive pay plus base and fringe.

(3) Workers living 60 or more miles from a San Juan county job site shall receive $3.00 per hour subsistence pay plus base and fringe.

S. Soft floor layer:

(1) Zone 1: Base pay for an area within a 30 mile radius from the main post office in the city or town where the employee permanently resides. Albuquerque, Santa Fe, and Belen shall be considered Zone 1.

(2) Zone 2: Work travel between 30 and 75 miles from the main post office in the town where an employee permanently resides shall be compensated at $1.00 per hour above base pay.

(3) Zone 3: Work travel 75 miles or more from the main post office in the town where an employee permanently resides shall be compensated at $3.13 per hour above base pay.

(4) Employer will furnish transportation or gasoline for all work performed beyond the 30 mile radius that encompasses the free cities of Albuquerque, Santa Fe, or Belen.

(5) When the employee is directed to report to a job site and the distance to the job site requires the employee to stay out of town overnight, the employer shall provide housing arrangements.

T. Sprinkler fitters:

(1) Work travel between 60 and 80 miles from the employee's primary residence should be compensated at $23.00 per day.

(2) Work travel between 81 and 100 miles from the employee's primary residence should be compensated at $33.00 per day.

(3) Work travel of 101 miles or more from the employee's primary residence should be compensated at $125.00 per day.

(4) No zone or subsistence pay shall be paid when the employer provides daily transportation and the employee elects to travel back and forth from home.

[11.1.2.21 NMAC - N, 1/1/2019; A, 1/1/2020; A, 1/1/2021; A, 1/1/2022; A, 1/1/2024]

PART 3: PUBLIC WORKS APPRENTICESHIP AND TRAINING ACT POLICY MANUAL

11.1.3.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division, Labor and Industrial Bureau, Public Works Unit.

[11.1.3.1 NMAC - Rp, 11.1.3.1 NMAC, 04/30/2014]

11.1.3.2 SCOPE:

All contractors, subcontractors, employers or any person acting as a contractor employing laborers or mechanics on public works projects.

[11.1.3.2 NMAC - Rp, 11.1.3.2 NMAC, 04/30/2014]

11.1.3.3 STATUTORY AUTHORITY:

Section 13-4D-1 to 13-4D-8 NMSA 1978.

[11.1.3.3 NMAC - Rp, 11.1.3.3 NMAC, 04/30/2014]

11.1.3.4 DURATION:

Permanent.

[11.1.3.4 NMAC - Rp, 11.1.3.4 NMAC, 04/30/2014]

11.1.3.5 EFFECTIVE DATE:

04/30/ 2014, unless a later date is written at the end of section.

[11.1.3.5 NMAC - Rp, 11.1.3.5 NMAC, 04/30/2014]

11.1.3.6 OBJECTIVE:

The purpose of the Public Works Apprentice and Training Act is to ensure funding, through contributions made by employers, to establish an apprenticeship program that will develop skilled building trades' craftsmen in occupations recognized by the United States department of labor, office of apprenticeship or the New Mexico state apprenticeship agency. The funding will ensure adequate training during economic downturns, increase the number of New Mexicans possessing skills that will enhance their opportunities for employment and maintain the high standards of craftsmanship in our state.

[11.1.3.6 NMAC - Rp, 11.1.3.6 NMAC, 04/30/2014]

11.1.3.7 DEFINITIONS:

A. "Approved program" means building trades apprenticeship and training programs in New Mexico that are recognized by the United States department of labor, office of apprenticeship or the New Mexico state apprenticeship agency.

B. "Qualified apprentices" mean participants in approved apprenticeship and training programs that have had 90% of 144 hours of classroom instruction and not less than 1000 hours of on-the-job training for the fiscal year.

[11.1.3.7 NMAC - Rp, 11.1.3.7 NMAC, 04/30/2014]

11.1.3.8 DISBURSEMENT/CREATION OF FUNDS:

The director of the labor relations division, New Mexico department of workforce solutions, shall disburse the public works apprentice and training fund in accordance with NMSA 1978, Section 13-4D-5.

A. The director shall develop an annual budget taking into account the crafts that participated in the same fiscal year beginning July 1 and ending the following year on June 30.

B. The director shall utilize no more than 15% of the funds to be used by the public works unit to administer the Public Works Apprentice and Training Act.

C. The remainder of the funds shall be disbursed by the director to approved apprenticeship and training programs in New Mexico.

(1) Disbursement of funds. The director shall disburse the funds to approved apprenticeship and training programs in proportion to amount collected and participants within such programs.

(a) The director, in disbursing the funds, shall take into account participants who have had 90% of 144 hours of classroom instruction and not less than 1000 hours of on-the-job training for the fiscal year.

(b) The funds shall be disbursed in proportion to the number of qualified apprentices within each approved program.

(2) Method of calculation. The director shall take into account the number of participants in each approved program, the total amount collected (minus the administrative fee) divided by the total amount of approved participants for that fiscal year and disburse to each participating sponsor.

EXAMPLE: MULTIPLE PROGRAMS	
Funds collected by public works unit:	
Hours times contribution (1000 times $.50/hour)	$500.00
Minus 15% administration fee	-$75.00
Funds available	$425.00
Approved apprenticeship programs	**Qualified apprentices**
Associated builders and contractors	20
Northern New Mexico IEC	80
Ironworkers JATC	20
Plumbers and pipefitters JATC	100
Total apprentices	220
Funds available divided by participants ($425.00 divided by 220)	$1.9318/participant

Programs	**Participants**	**Amount per participant**	**Amount to be distributed**
ABC	20	$1.9318	$38.64
NNMIEC	80	$1.9318	$154.54
IEC Las Cruces	20	$1.9318	$38.64

Electricians JATC	100	$1.9318	$193.18
Total			$425.00*
*Any remaining amount reverts to the public works apprentice and training fund.			

D. A single apprentice contribution rate will be determined annually by the director. All approved apprenticeship and training programs shall submit to the director by July 30 of each year, the apprenticeship costs data for the program's most recent completed fiscal year and the total number of registered apprentices. The director will take into account all submissions in determining the apprenticeship contribution rate that will be in effect on qualifying public works projects at the beginning of each new calendar year.

[11.1.3.8 NMAC - Rp, 11.1.3.8 NMAC, 04/30/2014]

11.1.3.9 STATEMENT OF COMPLIANCE ON CERTIFIED PAYROLLS:

Statement of compliance on certified payrolls shall contain a statement identifying the program approved by the United States department of labor, office of apprenticeship or the New Mexico state apprenticeship agency or paid to the public works apprentice and training fund.

A. A monthly record of contributions shall be submitted to the public works unit of the labor relations division, New Mexico department of workforce solutions, identifying the project by state wage decision number, week ending, employee's name, number of hours, and rate in the following format by **all** contractors/subcontractors employing laborers or mechanics requiring apprenticeship contributions in the following sample form.

EXAMPLE: COMPLIANCE STATEMENT	
WAGE DECISION NO.:	(SA 93-990 A and B)
NAME OF PROJECT:	(Constr. Of Labor and Industrial Div. Offices/Street Paving)
NAME OF COMPANY:	(XYZ CONSTRUCTION CO., INC.)
ADDRESS:	(111 Oak St., Santa Fe, NM 87501)
PAYMENT FOR MONTH/YEAR: (APRIL) 20 (xx) TOTAL OF CHECK: $12.75 CHECK NO. (17895)	

EMPLOYEE	WK END	WK END	WK END	WK END	WK END	TOTAL HOURS	RATE/HOUR	TOTAL CONTRIB.
	(4/2)	(4/09)	(4/16)	(4/23)	(4/30)			

(John Doe)	2	0	3	5	5.5	15.5	$.50	$7.75
(Tom Smith)	0	0	5	0	5.0	10.0	$.50	$5.00
SIGNATURE								

B. The above information shall be submitted no later than the 15th of the following month with a copy of check paid to apprenticeship and training fund by contractors that **do** pay into an approved apprenticeship and training program in New Mexico.

C. A monthly check of contributions and the above compliance statement shall be submitted by contractors that **do not** participate in an approved apprenticeship and training program to the apprenticeship and training fund, labor relations division, New Mexico department of workforce solutions.

D. A notation shall be made in each certified payroll indicating where payment is being sent when applicable.

E. The director shall publish a list of approved apprenticeship and training programs in New Mexico to be furnished upon request.

[11.1.3.9 NMAC - Rp, 11.1.3.9 NMAC, 04/30/2014]

PART 4: WAGE AND HOUR AND EMPLOYMENT OF CHILDREN

11.1.4.1 ISSUING AGENCY:

Labor Relations Division, (LRD) New Mexico Department of Workforce Solutions (NMDWS).

[11.1.4.1 NMAC - Rp, 11.1.4.1 NMAC, 11/14/2017]

11.1.4.2 SCOPE:

Employers and employees within the state of New Mexico.

[11.1.4.2 NMAC - Rp, 11.1.4.2 NMAC, 11/14/2017]

11.1.4.3 STATUTORY AUTHORITY:

Article 1, Article 4, and Article 6 of Chapter 50 NMSA 1978, relating to the powers and duties of the labor commissioner and director of labor and industrial division, now known as the director of the labor relations division, in the enforcement of the employment laws of the state of New Mexico.

[11.1.4.3 NMAC - Rp, 11.1.4.3 NMAC, 11/14/2017]

11.1.4.4 DURATION:

Permanent.

[11.1.4.4 NMAC - Rp, 11.1.4.4 NMAC, 11/14/2017]

11.1.4.5 EFFECTIVE DATE:

November 14, 2017, unless a later date is cited at the end of a section.

[11.1.4.5 NMAC - Rp, 11.1.4.5 NMAC, 11/14/2017]

11.1.4.6 OBJECTIVE:

The objective of this Part 4 of Title 11, Chapter 1 is to establish standards and procedures for the administration of Articles 1, 4 and 6 of Chapter 50 NMSA 1978.

[11.1.4.6 NMAC - Rp, 11.1.4.6 NMAC, 11/14/2017]

11.1.4.7 DEFINITIONS:

A. "Certified teacher" means any person with a valid and current New Mexico teaching certificate issued by the New Mexico public education department or its equivalent in the United States.

B. "Child performer" means a minor person employed to act or otherwise participate in the performing arts, including but not limited to motion pictures, theatrical, radio, or television products.

C. The definitions of "employee" and "employer" that apply to these rules are set forth in Sections 50-4-1 and 50-4-21 NMSA 1978 and are incorporated herein by reference.

D. "Employ" includes suffer or permit to work.

E. "Entertainment industry" means an employer including, but not limited to, any organization or individual using the services of any minor in: motion pictures of any type, using any format including theatrical film, commercial, documentary, and television program, or similar format by any medium including photography, recording, modeling, theatrical productions, publicity, and any performances where minors perform or entertain.

F. "Forepersons, superintendents and supervisors", as used in Section 50-4-1(C)(2) of the Minimum Wage Act means an employee who meets all of the following requirements:

(1) their primary duty is to perform non-manual work related to management of the business;

(2) they are to exercise discretion;

(3) they regularly assist executives or perform specialized work or special assignments; and

(4) they perform less than twenty percent manual work;

G. "Good cause" means a substantial reason, one that affords a legal excuse, a legally sufficient ground or reason.

H. "Legal guardian" means a person appointed as a guardian by a court or Indian tribal authority.

I. "Labor commissioner" and "director of the labor and industrial division", as used in Articles 1, 4, and 6 of Chapter 50 NMSA are synonymous with the current designation used by NMDWS of "director, labor relations division".

J. "Minor" means any person under the age of 18 years.

K. "Person", as used in these rules, means an individual person.

L. "Place of employment", "work location", "movie set", "set", and "location" mean the actual work site where any person provides services in New Mexico as a performer, paid or non-paid.

M. "Resolution phase" means one or more of the procedures set forth in 11.1.4.107 to 11.1.4.109 NMAC.

N. "Safety" means the conditions of being protected from any situation that is detrimental to the child’s health and well-being.

O. "Wages" as defined in Section 50-4-1 NMSA 1978, which definition is incorporated herein by reference. Vacation pay and other forms of pay for time that is not worked are included in the definition of "wages" if such pay is compensation for labor or service rendered pursuant to the employer’s written policy.

P. "Wage claimant" or "claimant" is the individual employee on behalf of whom a wage claim is filed.

Q. "Work permit" is a permit to allow a child under the age of 16 to be able to work under certain conditions and issued by a designated school official or a representative of the LRD.

R. "Written authorization" means a document an employee signs at the time of hiring or prior to the taking of a particular deduction, giving the employer permission to deduct certain items from the employee's pay. A written authorization is needed for an employer to deduct an advance or over-payment of wages, however, the employer must pay at least minimum wages times the hours worked to the employee.

[11.1.4.7 NMAC - Rp, 11.1.4.7 NMAC, 11/14/2017]

11.1.4.8 [RESERVED]

11.1.4.9 EMPLOYMENT OF CHILDREN:

A. A work permit is ordinarily required when employing children under the age of 16.

B. Work permits shall be issued only by the school superintendents, school principals, designated issuing school officers or the director or the director's designee, upon proof of age of the student and that the work the child is engaged is not dangerous to the child or prohibited as outlined in Section 50-6-4 NMSA 1978 and in the Fair Labor Standards Act, (FLSA).

C. It is the responsibility of the employer to preserve on file the work permit in a place about the premises where the child is employed. All work permits and records are subject to inspection by representatives of the LRD.

D. The maximum number of hours allowed for children under the age of 16 is 18 hours a week during the school week and 40 hours a week in a non-school week.

E. Hazardous occupation means any occupation defined as hazardous by the United States department of labor under 29 U.S.C. 201 et seq. of the FLSA.

F. The student labor specialist will investigate any alleged violation of the Child Labor Act. The investigation may include investigating the premises of the employer, issuing a subpoena *duces tecum*, or holding an administrative hearing, to resolve the complaint.

[11.1.4.9 NMAC - Rp, 11.1.4.9 NMAC, 11/14/2017]

11.1.4.10 EMPLOYMENT OF CHILDREN IN THE ENTERTAINMENT INDUSTRY:

A. Any person who employs a person under the age of 18 as an actor or performer in the entertainment industry must obtain a pre-authorization certificate issued by the department of workforce solutions prior to the start of work. The pre-authorization certificate will include: the project name, estimated dates and length of the project, employer name, employer's New Mexico address, a minimum of three contact personnel including name, address, and contact telephone numbers. The pre-authorization certificate will include: the child performer's information: name, address,

date of birth, where the child is registered to attend school, grade level of the child, special educational needs, anticipated length of employment on this project, nature of work on this project, and list any possible exposure to potentially hazardous materials or substances. A signature will be required from the child performer when the child is 14 years of age and older. A signature will be required from the parent or legal guardian giving the child permission to be employed in the entertainment industry. A signature will be required from the employer certifying compliance with all requirements of the pre-authorization certificate.

B. It is the responsibility of the employer to obtain a child performer pre-authorization certificate before the employment begins. The employer must be able to provide a copy at the work site when requested to do so. The LRD will retain a copy.

C. The child performer pre-authorization certificate is valid for one year from the date it was issued or until the specific project for which the child is employed by the employer who makes the application for the pre-authorization ceases, whichever time period is shorter.

D. The parent or legal guardian of the child performer can contact the LRD to renew the permit 30 days prior to expiration.

E. A pre-authorization certificate for a child performer can only be issued by the LRD.

F. No pre-authorization certificate will be given or issued without a signature of a parent or legal guardian indicating their permission for their child to work on the specific project. A parent or legal guardian must be within eyesight and earshot of the child performer at all times other than the time periods in which teachers are teaching school.

G. The employer must provide a certification of compliance for the certified teacher with appropriate teaching credentials for grade levels kindergarten through 12 or to teach the level of education required for the child performer at the place of employment to the LRD prior to issuance of the pre-authorization certificate.

H. It is the responsibility of the employer to provide a New Mexico certified trainer or technician accredited in a United States department of labor occupational safety and health administered-certified safety program at the place of employment at all times when a child performer may be exposed to potentially hazardous conditions. Hazardous conditions are special effects, which potentially could be physically dangerous to the child performer.

I. The employer must provide a written background check on all certified teachers, and certified trainers and technicians on the movie set to the LRD. It is the responsibility of the employer, parent, legal guardian, teacher, trainer and technician to report any arrest or conviction record and any other information that may present a possible danger to the health, safety and well-being of the child performer.

[11.1.4.10 NMAC - Rp, 11.1.4.10 NMAC, 11/14/2017]

11.1.4.11 CERTIFICATE AND DUTIES OF CERTIFIED TEACHERS:

A. A certified teacher of New Mexico resident children, who attend public schools, must possess a valid and current teaching certificate issued by the New Mexico public education department. Certified teachers of non-resident students must possess a valid and current teaching certificate from one of the United States to teach grade levels kindergarten through 12 or teach the level of education required for the child performer at the place of employment.

B. All certified teachers, shall, in addition to teaching, and in conjunction with the parent or legal guardian, also have the responsibility of monitoring and protecting the health, safety and well-being of the child performers they have been hired to teach during the time the teacher is required to be present.

C. The certified teacher, parent, or legal guardian may refuse to allow the engagement of the child performer at the place of employment. Any party may report conditions threatening the health, safety, and well-being of the child performer to the department of workforce solutions. It is the ultimate responsibility of the parent or legal guardian to assure that the safety, health and well-being of the child are being protected. A teacher must be present during the time reserved for school, except that the child performers under 16 do not require the presence of a teacher for up to one hour for wardrobe, make-up, hairdressing, promotional publicity, personal appearances, or audio recording if these activities are not the actual site of filming or at the theatre or if school is not in session, and if the parent or legal guardian is present within earshot or eyesight of the child performer.

[11.1.4.11 NMAC - Rp, 11.1.4.11 NMAC, 11/14/2017]

11.1.4.12 LIMITATIONS OF CHILD PERFORMERS WORKING HOURS INCLUDING SCHOOL TIME:

A. All child performers' ages six to 18 years must be provided with a teacher for each group of 10 or fewer child performers when school is in session.

B. No child performers shall begin work before 5:00 a.m. or continue work after 10:00 p.m., on evenings preceding school days. Child performers shall not work later than 12:00 a.m. on days preceding non-school days. The time the child performer can be permitted at the place of employment may be extended by one-half hour for a meal period.

C. No infants 15 days old to six months of age may be employed as a child performer unless a United States licensed physician who is board-certified in pediatrics provides a written certification that the infant is at least 15 days old and, is physically capable of handling the stress of filmmaking. With the physician's approval the infant

performer may be at the place of employment a maximum of two hours, with no more than 20 minutes of work time. Work time for infants shall be limited to one period of two consecutive hours in any one day.

D. Child performers ages seven months to two years may be at the place of employment for up to four hours and may work up to two hours. The remaining time must be reserved for the child performers rest and recreation.

E. Child performers ages three years to five years may be at the place of employment for up to six hours and may work up to three hours. The remaining time must be reserved for the child performer's rest and recreation.

F. When school is in session, child performers ages six years to eight years may be at the place of employment for up to eight hours, the sum of four hours work, three hours schooling, and one hour of rest and recreation. When school is not in session, work time may be increased up to six hours, with the remaining time reserved for the child performer's rest and recreation.

G. When school is in session, child performer ages nine to 15 years may be at the place of employment for up to nine hours, the sum of five hours work, three hours schooling, and one hour rest and recreation. When school is not in session, work time may be increased up to seven hours, with the remaining time reserved for the child performer's rest and recreation.

H. When school is in session, child performers age 16 to 18 years may be at the place of employment for up to 10 hours, the sum of six hours work, three hours schooling and one hour of rest and recreation. When school is not in session, work time may be up to eight hours, with the remaining time reserved for the child performer's rest and recreation.

I. In exceptional circumstances due to unusual performance requirements, a waiver of the mandatory hours and start to finish times may be granted by the department of workforce solutions. Such waiver must be granted prior to the performances of the work that is the subject of the waiver. The department of workforce solutions will grant a waiver only under the following circumstances:

(1) written notification through a listing of specific dates and times that the child performers will be employed or present at the place of employment;

(2) written acknowledgement that the child performer's parent or legal guardian have been fully informed of the circumstances and have granted advance consent.

J. The child performer must be provided with a 12-hour rest break at the end of the workday.

K. All time spent in traveling from a studio to a location or from a location to a studio shall count as part of the working day for a minor. When a minor with a company on a location which is sufficiently distant to require an overnight stay and is required to travel daily between living quarters and the place where the company is actually working, the time spent by the minor in such traveling will not count as work time, provided the company does not spend more than 45 minutes traveling each way and furnishes the necessary transportation.

[11.1.4.12 NMAC - Rp, 11.1.4.12 NMAC, 11/14/2017]

11.1.4.13 REQUIREMENT OF TRUST ACCOUNT FOR ALL CHILD PERFORMERS:

A. Each time a child performer is employed in the state of New Mexico with a contract equal or greater than $1000, a trust account will be created for the child performer.

B. It is the responsibility of the parent or legal guardian, or trustee to set up a trust account for the child performer in the child's state of residence for the sole benefit of the child within seven business days after the child performer's employment contract is signed. The child will not have access to the trust account until the child is 18 years of age or becomes legally emancipated.

C. The parent, guardian, or trustee shall provide the employer with a trustee statement within 15 days after the start of employment. Once the employer receives the trustee statement, the employer will provide the parent, guardian, or trustee with a written acknowledgement of receipt.

D. If the employer does not receive the trustee statement within 90 days after the start of employment, the child's employer shall refer the matter to district court. The district court shall have continuing jurisdiction over the trust.

E. The employer shall deposit not less than fifteen percent of the child's gross earnings directly into the child trust account within 15 business days of the work performance. If the account is not established, the employer shall withhold fifteen percent of the gross income until a trust account is established or until court orders otherwise. Once the employer deposits fifteen percent of the gross earnings in the trust account, the employer shall have no further obligation to monitor the funds.

F. Once the funds are deposited in the trust account, only the trustee shall be obligated to monitor and account for the funds.

[11.1.4.13 NMAC - Rp, 11.1.4.13 NMAC, 11/14/2017]

11.1.4.14 SAFETY REQUIREMENTS FOR CHILD PERFORMERS:

A. No dressing room is to be occupied simultaneously by a minor and an adult performer or by minors of the opposite sex.

B. It is the responsibility of the employer to provide a safe, secure shelter for child performers under the age of 18 to rest when required to be at the place of employment during non-performances times.

C. No employer may cause, induce, entice, or permit a child performer to engage or to be used sexually exploitive material for the purpose of producing a performance. No child performer may be depicted in any media as appearing to participate in a sex act.

[11.1.4.14 NMAC - Rp, 11.1.4.14 NMAC, 11/14/2017]

11.1.4.15 PENALTIES AND DETERMINATION PROCESS:

A. The director of the labor relations division may for cause refuse to issue a pre-authorization certificate to any project that has violated the provision of this act within a two year period.

B. The director will notify the employer within 10 days from the dates requested of a non-issuance of a pre-authorization certificate.

C. Any affected party may request a reconsideration of the director's actions, in writing, within 10 days.

D. The director may schedule an administrative hearing when, in their judgment, it would facilitate resolution of the complaint. The conduct of the hearing is not governed by the Administrative Procedures Act, but rather by procedures established by the LRD. (50-1-2)

E. The director may issue a subpoena *duces tecum* to compel the production of records they believe are necessary for the resolution of the complaint.

F. The director may issue written findings whenever they have sufficient evidence upon which to base their determination.

G. Other penalties for violations may be assessed pursuant to Section 50-6-12 NMSA 1978 compilation.

[11.1.4.15 NMAC - Rp, 11.1.4.15 NMAC, 11/14/2017]

11.1.4.16 THROUGH 11.1.4.99: [RESERVED]

11.1.4.100 FILING OF A WAGE CLAIM:

The claim form is to be completed by answering the questions in the form as completely as possible, and is to be signed and dated by the employee making the wage claim. The form does not need to be notarized. A wage claim may be filed for any amount that is in dispute for any claim arising entirely or in part within the three years prior to the filing of the claim. The wage claim form will give the claimant the opportunity to choose to correspond with the LRD by email or regular mail but if the wage claimant does not make a choice, the correspondence with the wage claimant will be by regular mail. A claimant may complete the wage claim form themselves or have a LRD employee assist in completing the form based on the claimant's statements in-person or by telephone. If the LRD provides assistance in completing the form by telephone, the LRD shall mail or email the unsigned form to the claimant to be reviewed, approved, signed, and submitted to the LRD for filing. The wage claimant may provide any additional information and documentation supporting the claim, but is not required to do so. Any such documents should be copies and not originals, as the originals may be needed for any further proceedings. Upon receipt of the completed claim form, the LRD will assign a claim number and open a file. The form will be assigned to an employee of the LRD who will: (1) review the claim form to determine whether the LRD has jurisdiction over the claim; (2) determine if more information from the claimant is needed; (3) determine if the form needs to be referred for consideration as to whether a directed investigation is appropriate; and (4) interview the wage claimant, if necessary, to clarify any discrepancies, omissions, or errors in the wage claim, and obtain additional information regarding the claim. If a directed investigation is not warranted, the LRD will follow the procedures set forth in 11.1.4.104 to 11.1.4.109 NMAC. If a wage claimant is represented by an attorney at any time during the proceedings, the attorney shall give written notice to the LRD of said representation.

[11.1.4.100 NMAC - N, 11/14/2017]

11.1.4.101 JURISDICTION OF THE LRD:

The authority of the LRD is limited to the enforcement of the laws of the State of New Mexico. The LRD does not have authority to enforce the laws of any other state. The LRD may refuse to accept a wage claim if the wage claim form involves work performed entirely outside the State of New Mexico.

[11.1.4.101 NMAC - N, 11/14/2017]

11.1.4.102 DEADLINE FOR FILING A WAGE CLAIM:

A wage claimant must file a wage claim with the LRD against an employer within three years of that employer's last violation of the wage and hour laws as to the wage claimant. As long as any portion of the wage claim falls within the three-year time limit, the LRD will investigate the claim as far back as the beginning of the continued course of conduct as to the wage claimant or, in the case of a directed investigation, as far back as the course of conduct actually began as to any employee.

[11.1.4.102 NMAC - N, 11/14/2017]

11.1.4.103 INITIAL CLOSURE OF CERTAIN WAGE CLAIMS:

The LRD may close any wage claim file after the initial screening with no further investigation if the LRD determines that it does not have jurisdiction, it is impossible to identify claimant's alleged employer, or if no portion of the claim falls within a three-year time period. Upon closure, the LRD will send the claimant a letter that sets forth the material facts, statutes, or regulations on which the closure is based.

[11.1.4.103 NMAC - N, 11/14/2017]

11.1.4.104 DELIVERY OF THE WAGE CLAIM TO THE EMPLOYER:

Within 10 business days of the initial screening, the LRD shall mail the employer an initial correspondence, which shall include details from the claim form that are relevant to the wage claim, any supporting documentation received from the wage claimant, and a blank response form. The initial correspondence shall be mailed to the last known address of the employer. The notice to the employer will give the employer the opportunity to choose to receive correspondence from the LRD by email or regular mail, but if the employer does not make a choice, the correspondence will be sent by regular mail.

[11.1.4.104 NMAC - N, 11/14/2017]

11.1.4.105 RESPONSE OF THE EMPLOYER:

Within 10 business days of the receipt of the initial correspondence regarding the wage claim, the employer shall respond in writing to the wage claim and shall provide all information and documentation it has that is relevant to the wage claim, including true and accurate wage and hour records. If the employer fully admits the alleged violation, the LRD may proceed directly to the resolution phase of the investigation. If after the employer's initial response the LRD deems necessary, the LRD may interview the employer to obtain any additional information and shall issue a subpoena to compel time records, payroll records or other documents the LRD deems necessary to conduct an investigation into the merits of the wage claim, if such records were not voluntarily provided. If wage and hour records are not identified after these steps are completed, the LRD may interview the wage claimant to obtain any additional information needed and then shall proceed to the resolution phase of the investigation. If an employer is represented by an attorney at any time during the proceedings, the attorney shall give written notice to the LRD of said representation.

[11.1.4.105 NMAC - N, 11/14/2017]

11.1.4.106 DELIVERY OF THE RESPONSE TO THE WAGE CLAIMANT:

If the employer disputes the alleged violation and submits relevant documentary evidence, the LRD shall give the claimant an opportunity to respond in writing, by sending the claimant the employer's response and evidence. The wage claimant may respond within 10 business days of receipt of the communication with any additional information regarding the wage claim. The LRD may also telephone the wage claimant to obtain any additional information needed. Upon receipt of information from the claimant, or upon expiration of the 10 day period, whichever is earlier, the LRD shall proceed to the resolution phase of the investigation.

[11.1.4.106 NMAC - N, 11/14/2017]

11.1.4.107 SETTLEMENT BY PARTIES:

Upon completing the investigatory steps set forth herein, the LRD may schedule a settlement meeting between the parties. During the settlement meeting, the LRD shall inform the parties of the preliminary conclusions the LRD has reached upon initial investigation of the claim, including the potential amount owed to the wage claimant. If the claim involves a violation of Section 50-4-22 NMSA1978, the potential amount owed shall include the unpaid and underpaid wages of the wage claimant, plus an additional amount equal to twice the amount of the unpaid or underpaid wages. The LRD shall also inform the parties that any award by the LRD can only be enforced by a court entering a judgment and enforcing the judgment in the same manner as other judgments are enforced, and that the LRD will pursue such enforcement action if the claim is not resolved through settlement. The employer and the wage claimant will be given the opportunity to discuss the settlement of the wage claim and the wage claimant will have the right to decide whether to accept any settlement offered by the employer or proceed, if necessary, to a LRD hearing on the wage claim or to court to collect on the wage claim. If a settlement of the wage claim is agreed to between the employer and the wage claimant, the LRD shall prepare a document for the parties to sign reflecting the resolution.

[11.1.4.107 NMAC - N, 11/14/2017]

11.1.4.108 HEARING BY THE LRD:

If parties do not agree to a settlement, and the LRD deems necessary, the LRD may schedule a hearing. If a hearing is held, the following procedures shall apply: At the commencement of the hearing, the LRD shall once again inform the parties of the preliminary conclusions the LRD has reached upon initial investigation of the claim, including the potential amount owed to the wage claimant. If the claim involves a violation of Section 50-4-22 NMSA 1978, the potential amount owed shall include the unpaid and underpaid wages of the wage claimant, plus an additional amount equal to twice the amount of the unpaid or underpaid wages. The LRD shall also inform the parties that any award by the LRD can only be enforced by a court entering a judgment and enforcing the judgment in the same manner as other judgments are enforced, and that the LRD will pursue such enforcement action if the claim is not resolved through

settlement. At the hearing, the LRD shall place witnesses under oath and shall obtain the testimony of the witnesses who are available in person and by telephone.

[11.1.4.108 NMAC - N, 11/14/2017]

11.1.4.109 DECISION OF THE LRD:

The LRD shall issue a written determination whenever a wage claim or investigation is not resolved through settlement. The LRD has discretion to render a written decision without conducting a hearing. The decision of the LRD shall be in writing and shall set forth the material facts upon which the decision is based, the specific statutes or regulations on which the decision is based, an explanation of the reasons supporting the decision, and a calculation of the damages. When the claim involves a violation of any provision of Section 50-4-22 NMSA1978, damages shall include the amount of the claimant's unpaid minimum wages plus interest, and an additional amount equal to twice the unpaid or underpaid wages. A copy of the decision shall be sent to each party, by the method of correspondence selected by the party, as soon as it has been entered, and a copy shall be kept in the file of the LRD regarding the claim. The parties will be given an additional opportunity to resolve the claim for an amount agreed to by the parties and acceptable to the wage claimant, prior to the claim being filed with a court of competent jurisdiction.

[11.1.4.109 NMAC - N, 11/14/2017]

11.1.4.110 NO RIGHT OF ADMINISTRATIVE APPEAL:

the LRD's administrative determinations are not judgments, and the LRD does not have the power to issue judgments. The LRD may only enforce a judgment against the employer after a legally-enforceable judgment has been docketed in the appropriate court. The LRD has no administrative appeals process provided by law by which a party may appeal wage claim decisions. Wage claimants who disagree with the LRD's administrative determinations have no right of administrative appeal, but may exercise the private right of action set forth in Sections 37-1-5 and 50-4-26 NMSA1978.

[11.1.4.110 NMAC - N, 11/14/2017]

11.1.4.111 DIRECTED INVESTIGATIONS:

When the LRD has information about an alleged violation that affects multiple employees, which the director, in his sole discretion, believes involves a systemic violation of the wage and hour laws of the state of New Mexico by an employer, the director may direct the LRD to undertake a directed investigation. A directed investigation is a workplace-wide investigation into an employer's wage payment practices, which is not limited in scope to the claims of the individual reporting the alleged violation of the law. Among other investigatory methods, a directed investigation may include interviews with individuals having information and obtaining and reviewing

all employment records for the time period under investigation. It may also include enforcement action against the employer to collect wages, damages, or penalties owed, based on violations uncovered as to any employee.

[11.1.4.111 NMAC - N, 11/14/2017]

11.1.4.112 ACTION BY THE LRD IN DISTRICT COURT TO ENFORCE DECISION ON MINIMUM WAGE ACT CLAIM:

To enforce the Minimum Wage Act, Sections 50-4-19 through 50-4-30 NMSA1978, the director may institute an action in the name of the state in the district court of the county wherein the employer who has failed to comply with the act resides or has a principal office or place of business, and shall seek the assistance of the district attorney whenever, in the director's discretion, such assistance is necessary or advisable.

[11.1.4.112 NMAC - N, 11/14/2017]

11.1.4.113 ACTION BY THE LRD TO ENFORCE DECISION ON ALL OTHER WAGE CLAIMS:

To enforce any provision of Chapter 50, Article 4, if the amount of the wage claim does not exceed the jurisdictional limit for the metropolitan or magistrate court, the LRD may file an action against the employer on behalf of the wage claimant in the appropriate court. The LRD shall obtain an assignment of the wage claim as provided in Section 50-4-11 NMSA1978 prior to proceeding with any court action. The LRD will request a recording of all hearings in magistrate or metropolitan court to preserve the right to appeal to district court. The LRD will promptly forward any notice of hearing received from the magistrate or metropolitan court to the claimant in the manner selected by the wage claimant in the wage claim form. In the event the amount of a valid and enforceable wage claim exceeds the jurisdictional limit for the metropolitan or magistrate court, the LRD shall refer the matter to the district attorney for the district wherein any violation occurs by sending the district attorney the complete investigation file and cooperating with the district attorney throughout the prosecution of the action. The LRD may file a proof of claim on behalf of the wage claimant in any U.S. bankruptcy court. The LRD will not be responsible for providing an attorney to represent a wage claimant in any administrative or judicial proceeding. The wage claimant will also be advised that he or she may exercise the private right of action set forth in Sections 37-1-5 and 50-4-26 NMSA1978 and may wish to consult with an attorney regarding filing such a claim.

[11.1.4.113 NMAC - N, 11/14/2017]

11.1.4.114 SUBPOENA POWERS:

The LRD may issue a subpoena compelling any witness, including but not limited to the employer and the wage claimant, to appear for the taking of a deposition and for the

production of any documents relevant to the claim at the time of the deposition, or to appear for any hearing and for the production of any documents relevant to the claim at the time of the hearing.

[11.1.4.114 NMAC - N, 11/14/2017]

11.1.4.115 EMPLOYER RECORDS:

It is the employer's burden to maintain true and accurate time and pay records for all employees. Therefore, upon a finding by the LRD of an employment relationship, if the employer has not maintained and produced to the LRD the wage and hour records required by law, or if the LRD determines that employer records are inaccurate or incomplete, the LRD will calculate the wages due to the wage claimant based on employee records or the employee's credible recollection of the hours worked and wages paid or unpaid.

[11.1.4.115 NMAC - N, 11/14/2017]

11.1.4.116 CONFIDENTIALITY:

If there is danger of retaliation by the employer against the individual or other good cause to believe that the person providing the information about the misconduct may suffer harm for providing the information, the identity of the source of the information of misconduct by the employer shall be kept confidential by the LRD and its employees. The LRD shall not require a social security number or a taxpayer identification number of a wage claimant and shall adopt procedures to ensure that such information, if obtained, does not remain in its case files.

[11.1.4.116 NMAC - N, 11/14/2017]

11.1.4.117 CONFLICTS WITH STATE LAWS:

In the event any of the rules and regulations set forth herein conflict with any applicable state law, the state law shall control.

[11.1.4.117 NMAC - N, 11/14/2017]

11.1.4.118 CONSIDERATION OF FEDERAL FAIR LABOR STANDARDS ACT:

In making a decision, the LRD may rely upon definitions used within and decisions relating to the FLSA, 29 U.S.C. 201 *et seq.*

[11.1.4.118 NMAC - N, 11/14/2017]

11.1.4.119 EFFECT OF FILING OF PRIVATE ACTION:

The LRD may close a wage claimant's wage claim file and take no further action if the wage claimant files a separate civil action against the employer in a court of competent jurisdiction asserting the same legal claims that are the subject of a LRD investigation.

[11.1.4.119 NMAC - N, 11/14/2017]

11.1.4.120 REOPENING OF INVESTIGATION BY THE LRD:

Prior to a final decision by the LRD, and upon a showing of good cause for doing so, the LRD may reopen the investigation of any wage claim at the written request of a wage claimant. Upon reopening, the LRD may pursue any investigatory steps available to it pursuant to law and these rules and regulations.

[11.1.4.120 NMAC - N, 11/14/2017]

11.1.4.121 STANDARD OPERATING PROCEDURES:

The LRD may adopt standard operating procedures to provide additional instructions for its employees in the performance of their duties and responsibilities, which shall be made available on the LRD website upon adoption. The LRD shall also adopt a manual containing information for employees about how to apply the relevant laws to wage claims based on applicable statutes and judicial or administrative decisions. The most recent version of the manual shall be made available on the LRD website upon adoption, and changes to the manual shall be identified by date. In the event of a conflict between a provision of these rules and regulations and a provision of any standard operating procedure or manual, these rules shall control.

[11.1.4.121 NMAC - N, 11/14/2017]

11.1.4.122 LANGUAGE ACCESS:

The LRD shall translate into Spanish all standardized portions of written materials provided to the parties or made available to the public, including the claim form, form letters, standardized portions of administrative decisions, notices, brochures, and informational materials. Interpretation services will be made available by the LRD to all individuals with whom the LRD interacts in the course of carrying out its duties under the relevant statutes and rules. The claim form and the employer response form will give the parties the opportunity to indicate a language preference. The LRD shall provide a multilingual notice for members of the public to access the LRD's interpretation service, which shall include the LRD's phone number and a statement that interpretation services are available free of charge. The multilingual notice shall include the top five written languages spoken in each county in New Mexico, set forth in the language access plans of the New Mexico state courts. The notice shall appear on the LRD website and at the front desk of all LRD offices. It shall also be printed in the claimant's preferred language on all documents sent to parties who select a preferred language other than English.

[11.1.4.122 NMAC - N, 11/14/2017]

11.1.4.123 ACCESS TO DWS OFFICES:

The wage claim form shall be made available in all offices in which department of workforce solutions services are administered, and claimants shall be permitted to use landline telephones or computers in such offices to communicate with the LRD for any purpose relevant to filing a wage claim or the investigation and enforcement of the wage claim. Administrative hearings or other LRD administrative functions may also be conducted in such offices.

[11.1.4.123 NMAC - N, 11/14/2017]

PART 5: [RESERVED]

PART 6 HEALTHY WORKPLACES

11.1.6.1 ISSUING AGENCY:

Labor Relations Division (LRD) of the New Mexico Department of Workforce Solutions (NMDWS).

[11.1.6.1 NMAC – N, 7/1/2022]

11.1.6.2 SCOPE:

Employers and employees within the state of New Mexico.

[11.1.6.2 NMAC – N, 7/1/2022]

11.1.6.3 STATUTORY AUTHORITY:

Section 50-17-9 NMSA 1978 authorizes the labor relations division of the workforce solutions department to coordinate implementation and enforcement of the Healthy Workplaces act and to promulgate appropriate rules to implement that act.

[11.1.6.3 NMAC – N, 7/1/2022]

11.1.6.4 DURATION:

Permanent.

[11.1.6.4 NMAC – N, 7/1/2022]

11.1.6.5 EFFECTIVE DATE:

July 1, 2022, unless a later date is cited at the end of a section.

[11.1.6.5 NMAC – N, 7/1/2022]

11.1.6.6 OBJECTIVE:

To implement the complaint process articulated in Sections 50-17-1 NMSA 1978 through 50-17-12 NMSA 1978, including a process for investigating and resolving complaints alleging violations of the Healthy Workplaces Act.

[11.1.6.6 NMAC – N, 7/1/2022]

11.1.6.7 DEFINITIONS:

All definitions contained in Section 50-17-2 NMSA 1978 are incorporated herein by reference. Additionally, as used in these rules:

A. "Frontloading" means when an employer elects to grant employees earned sick leave the employee could accrue within the year.

B. "Calendar year" means January 1st of any year through December 31st of that same year.

C. "Complainant" means an individual who believes they have been adversely impacted by violations of the Healthy Workplaces Act or these rules or an individual who was subjected to any of the retaliatory actions prohibited by the Act and files a complaint with the division alleging such violations.

D. "Foreseeable" means an employee is aware of the need to use earned sick leave seven or more days before such use.

E. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason.

F. "Violation(s) " means any violation of the Healthy Workplaces Act or these rules, including retaliation.

[11.1.6.7 NMAC – N, 7/1/2022]

11.1.6.8 ACCRUAL AND USAGE:

A. An employer may voluntarily frontload earned sick leave to an employee; however, the employer may not recoup any used frontloaded leave through payroll deductions even if the employee signs a written agreement authorizing the employer to do so or if the employee is separated before accruing the frontloaded leave.

B. Hours worked in excess of 40 hours per seven-day work week do not accrue earned sick leave at a rate greater than one hour of earned sick leave for every 30

hours worked unless an employer chose a higher accrual rate for its employees or if required under the terms of any applicable collective bargaining agreement.

C. An employer cannot deem an employee's hours to be "cut" to a lower number due to taking earned sick leave. The employer must pay the employee all earned sick leave used according to the employee's regularly scheduled hours. If the number of hours that the employee works fluctuate from week to week, the employer shall use the average number of hours worked by the employee during the preceding two weeks when paying earned sick leave.

D. Per diem employees may use earned sick leave for hours they were scheduled to work or for hours they would have worked absent a need to use earned sick leave. For per diem employees or employees with indeterminate shift lengths (e.g., a shift whose length is defined by employer needs), an employer shall base the hours of earned sick leave used upon the hours the employer had a replacement employee for the same shift. If this method is not possible, the hours of earned sick leave shall be based on the hours worked by the employee when the employee most recently worked the same shift.

E. Earned sick leave must be paid on the same scheduled payday as regular wages.

F. Employers shall retain records documenting hours worked by employees, sick leave accrued or earned by employees and earned sick leave taken by employees. All records shall be maintained for a minimum of 48 months from the date the record was created. Employers shall produce these records for inspection upon request by the division.

G. Employers must provide employees with an accurate year-to-date written summary of earned sick leave accrued and used at least once every calendar quarter. This may be done electronically, including by email, website, mobile application or other reasonable method. If employers include this information on pay records or earnings statements provided to employees according to their normal pay schedule, employers are deemed in compliance with this provision.

H. Tipped Employees: Employees who are ordinarily paid less than the full minimum wage due to a "tip credit" must receive the full state or local minimum wage (whichever is greater) when using earned sick leave.

I. Salaried Employees: When using earned sick leave, salaried employees must receive their regular salary converted to an hourly rate based on the employee's regular work week and weekly salary amount. For example, someone who normally earns a weekly salary of $1,000 and whose normal work week consists of 40 hours, would be entitled to be paid $25 per hour for any earned sick leave used ($1,000 divided by 40). If the individual normally works 30 hours per week, then their hourly rate would be $33.33 for any earned sick leave used ($1,000 divided by 30). For a salaried employee

whose work hours fluctuate from week to week, the hourly rate would be determined by dividing their weekly salary by 40.

J. Employees paid on task, piece or commission basis must receive the greater of their hourly or salary rate or the state or local minimum wage.

K. Employers are not required to pay an employee for sick leave accrued or earned pursuant to the requirements of the Healthy Workplaces Act that was not used upon the employee's termination, resignation, retirement, or other separation from employment.

L. Employers are not required to permit more than 64 hours of unused earned sick leave to carry over year-to-year.

M. If an employer requires an employee to provide documentation when the employee's use of earned sick leave results in an absence of two or more consecutive workdays, the employee shall be allowed 14 days from the date they return to work to provide such documentation.

N. Employers may elect a different 12-month period for benefits to be used for employees covered by a collective bargaining agreement than for employees not covered by a collective bargaining agreement.

[11.1.6.8 NMAC – N, 7/1/2022]

11.1.6.9 COMPLIANCE MEASURES:

Compliance assurance measures available to the division include the following:

A. Investigations of alleged violations of the Healthy Workplaces Act upon complaints filed by individuals;

B. interviews of employers, their managers and employees and any other witness who may have relevant information;

C. requests for production of records and other information from employers;

D. administrative subpoenas for records and other information from employer, or for the taking of depositions from employers, their managers and other potential witnesses;

E. audits of employer records of the kind described in Section 50-17-9 NMSA 1978;

F. education and outreach efforts regarding the requirements of the Healthy Workplaces Act; and

G. directed Investigations: When the division has credible information about alleged violations of the Healthy Workplaces Act that affect multiple employees working for an

employer, the director may, in their sole discretion, direct a comprehensive, workplace-wide investigation into the earned-sick-leave practices of that employer. All the investigatory and compliance tools available to the division by law can be used in a directed investigation into alleged violations of the Healthy Workplaces Act. If a directed investigation results in a finding of violations of the Act, the division may, in its sole discretion, file a civil action to enforce compliance with the Act, including payment of any earned sick leave payment owed, damages and attorney's fees.

[11.1.6.9 NMAC – N, 7/1/2022]

11.1.6.10 NOTICE BY EMPLOYERS:

A. Employers shall give written or electronic notice to an employee at the commencement of employment of the employee's rights to earned sick leave; the manner in which sick leave is accrued and calculated; the terms of use of earned sick leave as guaranteed by the Healthy Workplaces Act; that retaliation against employees for using sick leave is prohibited; the employee's right to file a complaint with the division if earned sick leave accrual or use is denied or if the employee is retaliated against; and all means of enforcing the Healthy Workplaces Act. This notice must be in English, Spanish or any other language that is the first language spoken by at least ten percent of the employer's workforce, as requested by the employee.

B. Employers shall display a poster containing the information required in Section A, above, in a conspicuous and accessible place in each establishment where employees are employed. The poster should be in English, Spanish and in any language that is the first language spoken by at least ten percent of the employer's workforce.

[11.1.6.10 NMAC – N, 7/1/2022]

11.1.6.11 COMPLAINTS:

Individuals may file complaints alleging violations of the Healthy Workplaces Act or these rules, including retaliation, with the division.

A. Complaints must be submitted using a division-approved form.

B. Complainants may complete the form on their own or have an LRD employee assist in completing the form based on the complainant's statements in-person or by telephone. If the division provides assistance in completing the form by telephone, the division shall mail or email the unsigned form to the complainant to be reviewed, approved, signed, and submitted to the division for filing. The complaint form does not need to be notarized. The complainant may attach additional information or documentation supporting the complaint, but this is not a requirement.

C. Upon receipt of the completed complaint form, the division will:

(1) review the complaint to determine whether the division has jurisdiction;

(2) determine if more information from the complainant is needed; and

(3) interview the complainant, if necessary, to clarify any discrepancies, omissions, or errors in the complaint form, and obtain additional information regarding the complaint.

D. If a complainant is represented by an attorney, the attorney shall submit a written notice of the representation to the division of said representation and shall also indicate in that notice whether the division may communicate with the complainant directly without the attorney being present. If the attorney fails to indicate anything in this regard, it will be assumed the division is authorized to communicate directly with the complainant without the attorney being present.

E. The complaint form will give the complainant the opportunity to choose to correspond with the division by email or regular mail. If the complainant does not make a choice, the correspondence with the complainant will be by regular mail.

F. The division shall send complainants written notification summarizing the status of the investigation by the complainant's chosen correspondence method no less frequently than every 90 days starting from the date the complaint is received by the division.

G. The division shall provide limited English proficient (LEP) complainants, employers and witnesses with free language assistance services according to the NMDWS language access plan throughout the complaint process.

[11.1.6.11 NMAC – N, 7/1/2022]

11.1.6.12 JURISDICTION:

The division's authority is limited to the enforcement of the laws of the state of New Mexico. The division does not have authority to enforce the laws of any other state. The division may close a complaint that alleges violations of the Healthy Workplaces Act for work performed outside the state of New Mexico, including work performed entirely on tribal land.

[11.1.6.12 NMAC – N, 7/1/2022]

11.1.6.13 DEADLINE FOR FILING A COMPLAINT:

All complaints alleging violations of the Healthy Workplaces Act must be filed with the division within three years of when the last alleged violation occurred. The division will accept complaints for investigation in which any portion of the alleged violation falls within the three-year time limit.

[11.1.6.13 NMAC – N, 07/01/2022]

11.1.6.14 CONFIDENTIALITY:

The division will maintain the complainant's identity as confidential unless disclosure is necessary to facilitate investigation or resolve the complaint or is otherwise required by law. Prior to disclosing the complainant's identity and to the extent practicable, the division will notify the complainant before any such disclosure.

[11.1.6.14 NMAC – N, 7/1/2022]

11.1.6.15 DISCLOSURE OF COMPLAINTS:

The division may close any complaint alleging violations of the Healthy Workplaces Act after the initial screening with no further investigation if the division determines that it does not have jurisdiction, it is unable to identify complainant's employer after reasonable efforts have been made, or if no portion of the alleged violations falls within a three-year time period. Upon closure, the division will send the complainant a letter setting forth the reasons for closure.

[11.1.6.15 NMAC – N, 7/1/2022]

11.1.6.16 NOTICE OF COMPLAINT TO EMPLOYER:

Within 10 business days of receipt of the complaint, the division shall send the employer a copy of the complaint form, any supporting documentation received from the complainant, and a blank response form. The initial letter shall be mailed to the last known address of the employer. The notice to the employer will give the employer the opportunity to choose to receive correspondence from the division by email or regular mail, but if the employer does not make a choice, the correspondence will be sent by regular mail.

[11.1.6.16 NMAC – N, 7/1/2022]

11.1.6.17 EMPLOYER REPRESENTATION:

If an employer is represented by an attorney at any time during the investigation, the attorney shall submit a written notice to the division of representation and shall also indicate in that notice whether the division may communicate with the employer directly without the attorney being present. If the attorney fails to indicate anything in this regard, it will be assumed that the division is authorized to communicate directly with the employer without the attorney being present.

[11.1.6.17 NMAC – N, 7/1/2022]

11.1.6.18 RESPONSE BY EMPLOYER:

The employer shall respond in writing to the initial letter regarding the complaint within 10 business days of receipt. The employer shall also provide the division with true and accurate copies of the records that are required to be maintained by the Healthy Workplaces Act with respect to the complainant(s). The employer shall produce any other records related to the complaint requested by the division. The employer may provide other records of its choosing in responding to the complaint but this is not a requirement. In its discretion, the division may grant an employer a reasonable extension to respond to the initial letter if requested by the employer in writing specifically setting forth the good cause upon which the request for an extension is based.

[11.1.6.18 NMAC – N, 7/1/2022]

11.1.6.19 REQUESTS FOR ADDITIONAL INFORMATION:

In its discretion, the division may interview the employer and other witnesses to obtain additional information relevant to the investigation and may issue an administrative subpoena to compel production of records necessary to conduct the investigation if such records are not voluntarily provided by the employer.

[11.1.6.19 NMAC – N, 7/1/2022]

11.1.6.20 REPLY BY COMPLAINANT:

If the employer disputes the alleged violation(s) and submits relevant documentary evidence, the division shall allow the complainant an opportunity to submit a written reply to the employer's response along with additional documentation. The complainant has 10 business days from the date of the complainant's receipt of the employer's response to submit the reply. In its discretion, the division may interview the complainant and other witnesses to obtain additional information relevant to the investigation.

[11.1.6.20 NMAC – N, 7/1/2022]

11.1.6.21 SETTLEMENT BY PARTIES:

At any stage of the investigation, the division may schedule a settlement meeting between the parties. The division may inform the parties of its preliminary conclusions based on the evidence reviewed, including any actual or statutory damages owed to the complainant for violations of the Healthy Workplaces Act, as found by the division. If a settlement is reached, it shall be reduced to writing and signed by the complainant and the employer. After the settlement is signed by both parties, the division will close the investigation and advise the parties in writing that the case is close to include the date the three-year statute of limitations expires.

[11.1.6.21 NMAC – N, 7/1/2022]

11.1.6.22 ADMINISTRATIVE DECISION:

The division shall complete its investigation of a complaint and issue a written decision if a settlement is not reached, or if a settlement is reached but the employer fails to comply with the terms of the settlement, and a party submits a written request to the division to reopen prior to the expiration of the three year time limit outlined in NMAC 11.1.6.13. After completing its investigation the division shall issue an administrative decision on the complaint. The decision shall:

A. be issued within 180 days from the date the complaint was received;

B. be in writing and set forth findings of facts and conclusions of law, including a calculation of damages owed, if any;

C. inform the parties that if they disagree with the decision, there is no right of administrative appeal;

D. inform the parties whether the division will file a civil action to enforce its administrative decision; and

E. inform complainants of their private right of action pursuant to Subsection B of Section 50-17-10 NMSA 1978.

[11.1.6.22 NMAC – N, 7/1/2022]

11.1.6.23 CIVIL ACTIONS BY THE DIVISION:

Although the division may, in its sole discretion, bring a civil action for violations of the Healthy Workplaces Act, the division will do so only in cases that it deems appropriate based on its enforcement priorities, including but not limited to, repeat violations by a particular employer or problematic industries where systemic and/or abusive practices have been identified through investigation by the division. The division's decision on whether to bring a civil action under the Healthy Workplaces Act is final and not subject to any right of appeal or review.

[11.1.6.23 NMAC – N, 7/1/2022]

11.1.6.24 SUBPOENA POWERS:

The division may issue a subpoena compelling any witness, including but not limited to the employer and the complainant, to appear for the taking of a deposition or a recorded statement under oath, and for the production of any documents relevant to the complaint at the time that the deposition or recorded statement is taken. A recorded statement may be taken before a qualified court stenographer, but it may also be recorded digitally or on audio tape or video tape.

[11.1.6.24 NMAC – N, 7/1/2022]

11.1.6.25 EMPLOYER RECORDS:

Section 50-17-7 NMSA 1978 requires employers to keep records documenting hours worked by employees and earned sick leave taken by employees for the 48-month period immediately preceding the date the record was created. If the division finds, during the course of its investigation, the employer did not maintain and produce the required records, or that the records are inaccurate or incomplete, the division may base its calculation of damages owed on other reasonable, credible evidence, including but not limited to the complainant's estimates.

[11.1.6.25 NMAC – N, 7/1/2022]

11.1.6.26 CONFLICTS WITH STATE LAW:

In the event any of the rules and regulations set forth herein conflict with any applicable state law, the state law shall control.

[11.1.6.26 NMAC – N, 7/1/2022]

11.1.6.27 CIVIL ACTIONS:

The division may close a complainant's file and take no further action if the complainant files a separate civil action against the employer in a court of competent jurisdiction asserting the same legal claims that are the subject of the division's investigation.

[11.1.6.27 NMAC – N, 7/1/2022]

11.1.6.28 REOPENING AN INVESTIGATION:

A complainant or employer may request in writing a reopening of the investigation of a complaint upon a showing of good cause for doing so. Examples of good cause include, but are not limited to, failure of an employer to comply with the terms of the settlement, or the discovery of new, previously undisclosed evidence that would have changed the result of the previous determination. Except in the case of unfulfilled settlement terms, the division's determination of whether good cause to reopen exists is final and shall not be subject to any right of appeal or other review. All requests for reopening must be received by the division before the three-year time limit referenced in NMAC 11.1.6.13 expires. Reopening requests received after the three-year period expires will not be considered. Upon reopening, the division may pursue any investigatory steps available under the law and pursuant to these regulations and may affirm, modify, or reverse, in whole or in part, any previous decision issued.

[11.1.6.28 NMAC – N, 7/1/2022]

11.1.6.29 STANDARD OPERATING PROCEDURES:

The division may adopt standard operating procedures to provide additional instructions for its employees in the performance of their duties and responsibilities.

[11.1.6.29 NMAC – N, 7/1/2022]

PART 7-10: [RESERVED]

PART 11: YOUTH CONSERVATION CORPS COMMISSION GENERAL PROVISIONS

11.1.11.1 ISSUING AGENCY:

New Mexico Youth Conservation Corps, 408 Galisteo St., Mailing Address: P.O. Box 1948, Santa Fe, New Mexico 87504-1948, (505) 827-7467

[2/29/2000; Recompiled 11/30/01]

11.1.11.2 SCOPE:

Youth conservation corps commission.

[2/29/2000; Recompiled 11/30/01]

11.1.11.3 STATUTORY AUTHORITY:

SB 509, Laws of 1994, Chapter 145.

[2/29/2000; Recompiled 11/30/01]

11.1.11.4 DURATION:

Permanent.

[2/29/2000; Recompiled 11/30/01]

11.1.11.5 EFFECTIVE DATE:

February 29, 2000 unless a later date is cited at the end of a section.

[2/29/2000; Recompiled 11/30/01]

11.1.11.6 OBJECTIVE:

To provide rules and regulations for the youth conservation corps commission to operate under.

[2/29/2000; Recompiled 11/30/01]

11.1.11.7 DEFINITIONS:

[RESERVED]

[2/29/2000; Recompiled 11/30/01]

11.1.11.8 TELEPHONE CONFERENCING:

Pursuant to Section 10-15-1 NMSA 1978, commission members may participate in commission meetings and hearings by means of a conference telephone or other similar communications equipment when it is otherwise difficult or impossible for members to attend the meeting or hearing in person. Each member participating by conference telephone or other similar communications equipment must be identified when speaking. All participants must be able to hear each other at the same time. Members of the public attending the meeting or hearing must be able to hear commission members who speak during the meeting or hearing.

[2/29/2000; Recompiled 11/30/01]

CHAPTER 2: JOB TRAINING

PART 1: GENERAL PROVISIONS [RESERVED]

PART 2: EQUAL EMPLOYMENT OPPORTUNITY IN APPRENTICESHIP STATE PLAN AND INDUSTRIAL DIV.)

11.2.2.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division.

[11.2.2.1 NMAC - Rp, 11.2.2.1 NMAC, 11/1/2018]

11.2.2.2 SCOPE:

All apprenticeship programs registered with the New Mexico department of workforce solutions.

[11.2.2.2 NMAC - Rp, 11.2.2.2 NMAC, 11/1/2018]

11.2.2.3 STATUTORY AUTHORITY:

Sections 50-7-1 through 50-7-7 NMSA 1978.

[11.2.2.3 NMAC - Rp, 11.2.2.3 NMAC, 11/1/2018]

11.2.2.4 DURATION:

Permanent

[11.2.2.4 NMAC - Rp, 11.2.2.4 NMAC, 11/1/2018]

11.2.2.5 EFFECTIVE DATE:

November 1, 2018, unless a later date is written at the end of section.

[11.2.2.5 NMAC - Rp, 11.2.2.5 NMAC, 11/1/2018]

11.2.2.6 OBJECTIVE:

Scope and purpose. This plan sets forth policies and procedures to promote equality of opportunity in apprenticeship programs registered with the New Mexico department of workforce solutions. These policies and procedures apply to the recruitment and selection of apprentices, and to all conditions of employment and training during apprenticeship and the procedures established provide for review of apprenticeship programs, for registering apprenticeship programs, for processing complaints, and for deregistering non-complying apprenticeship programs. The purpose of this plan is to promote equality of opportunity in apprenticeship by prohibiting discrimination based on age (40 or older), disability, race, color, religion, national origin, genetic information, sexual orientation or sex in apprenticeship programs, by requiring affirmative action to provide equal opportunity in such apprenticeship programs, and by coordinating this part with other equal opportunity programs.

[11.2.2.6 NMAC - Rp, 11.2.2.6 NMAC, 11/1/2018]

11.2.2.7 DEFINITIONS:

A. "Administrator" means the administrator of the office of apprenticeship (OA), or any person specifically designated by the administrator.

B. "Apprentice" means a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn an apprenticeable occupation as provided in 11.2.3.22 NMAC under standards of apprenticeship fulfilling the requirements of 11.2.3.23 NMAC.

C. "Apprenticeship committee" means those persons designated by the sponsor to administer the program. A committee may be either joint or non-joint, as follows:

(1) A joint committee is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s).

(2) A non-joint committee, which may also be known as a unilateral or group non-joint (which may include employees) committee, has employer representatives but does not have a bona fide collective bargaining agent as a participant.

D. "Apprenticeship program" means a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, as required under 11.2.3 NMAC and 11.2.2 NMAC, including such matters as the requirement for a written apprenticeship agreement.

E. "Department" means the New Mexico department of workforce solutions.

F. "Direct threat" means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment must be based on a reasonable medical judgement that relies on the most current medical knowledge or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) the duration of the risk;

(2) the nature and severity of the potential hazard;

(3) the likelihood that the potential harm will occur; and

(4) the imminence of the potential harm.

G. "Disability" means, with respect to an individual:

(1) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(2) A record of such an impairment; or

(3) Being regarded as having such an impairment.

H. "EEO" means equal employment opportunity.

I. "Electronic media" means media that utilize electronics or electromechanical energy for the end user (audience) to access the content; and includes, but is not limited to, electronic storage media, transmission media, the Internet, extranet, lease

lines, dial-up lines, private networks, and the physical movement of removable or transportable electronic media or interactive distance learning.

J. "Employer" means any person or organization employing an apprentice whether or not such person or organization is party to an apprenticeship agreement with the apprentice.

K. "Ethnicity" for purposes of recordkeeping and affirmative action, has the same meaning as under the office of management and budget's standards for the classification of federal data on race and ethnicity, or any successor standards. Ethnicity thus refers to the following designations:

(1) Hispanic or Latino - A person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin, regardless of race.

(2) Not Hispanic or Latino.

L. "Genetic information" means:

(1) Information about:

(a) an individual's genetic tests;

(b) the genetic tests of that individual's family members;

(c) the manifestation of disease or disorder in family members of the individual (family medical history);

(d) an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or

(e) the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

(2) Genetic information does not include information about the sex or age of the individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test.

M. "Journeyworker" means a worker who has attained a level of skill, abilities and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. (Use of this term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and

knowledge of an occupation, either through formal apprenticeship or through practical or formal training).

N. "Major life activities" include, but are not limited to: Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

O. "Office of apprenticeship" (OA) means the office designated by the employment and training administration of the U.S. department of labor to administer the national registered apprenticeship system or its successor organization.

P. "Physical or mental impairment" means:

(1) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) any mental or psychological disorder, such as intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Q. "Pre-apprenticeship program" means a training model designed to assist individuals who do not currently possess the minimum requirements for selection into an apprenticeship program to meet the minimum selection criteria established in a program sponsor’s apprenticeship standards required under 11.2.3 NMAC and which maintains at least one documented partnership with a registered apprenticeship program. It involves a form of structured workplace education and training in which an employer, employer group, industry association, labor union, community-based organization, or educational institution collaborates to provide formal instruction that will introduce participants to the competencies, skills, and materials used in one or more apprenticeable occupations. It may also involve provision of supportive services such as transportation, child care, and income support to assist participants in the successful completion of the pre-apprenticeship program.

R. "Qualified applicant or apprentice" is an individual who, with or without reasonable accommodation, can perform the essential functions of the apprenticeship program for which the individual applied or is enrolled.

S. "Race" for purposes of record keeping and affirmative action, has the same meaning as under the office of management and budget's standards for the classification of federal data on race and ethnicity or any successor standards. Race thus refers to the following designations:

(1) White - A person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

(2) Black or African American - A person having origins in any of the black racial groups of Africa.

(3) Native Hawaiian or other Pacific islander - A person having origins in any of the peoples of Hawaii, Guam, Samoa, or other Pacific islands.

(4) Asian - A person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

(5) American Indian or Alaska native - A person having origins in any of the original peoples of North and South America (including Central America), and who maintains tribal affiliation or community attachment.

T. "Reasonable accommodation"

(1) The term reasonable accommodation means:

(a) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(b) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(c) modifications or adjustments that enable a sponsor's apprentice with a disability to enjoy equal benefits and privileges of apprenticeship as are enjoyed by its other similarly situated apprentices without disabilities.

(2) Reasonable accommodations may include, but are not limited to:

(a) making existing facilities used by apprentices readily accessible to and usable by individuals with disabilities; and

(b) job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the sponsor to initiate an informal, interactive process with the qualified individual in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

U. "Registration agency" means the New Mexico department of workforce solutions.

V. "Selection procedures" means any measure, combination of measures, or procedure used as a basis for any decision in apprenticeship. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

W. "Sponsor" means any person, association, committee or organization operating an apprenticeship program and in whose name the program is (or is to be) registered and approved.

X. "Undue hardship":

(1) In general, undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a sponsor, when considered in light of the factors set forth in paragraph (2) of this definition.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a sponsor, factors to be considered include:

(a) the nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, or outside funding;

(b) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(c) the overall financial resources of the sponsor, the overall size of the registered apprenticeship program with respect to the number of apprentices, and the number, type and location of its facilities;

(d) the type of operation or operations of the sponsor, including the composition, structure and functions of the workforces of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the sponsor; and

(e) the impact of the accommodation upon the operation of the facility, including the impact on the ability of other apprentices to perform their duties and the impact on the facility's ability to conduct business.

[11.2.2.7 NMAC - Rp, 11.2.2.7 NMAC, 11/1/2018]

11.2.2.8 EQUAL OPPORTUNITY STANDARDS APPLICABLE TO ALL SPONSORS:

A. Discrimination prohibited:

(1) It is unlawful for a sponsor of a registered apprenticeship program to discriminate against an apprentice or applicant for apprenticeship on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability with regard to:

(a) recruitment, outreach, and selection procedures;

(b) hiring, upgrading, periodic advancement, promotion, award of tenure, demotion, transfer, layoff, and rehiring;

(c) rotation among work processes;

(d) imposition of penalties or other disciplinary action;

(e) rates of pay or any other form of compensation and changes in compensation;

(f) conditions of work;

(g) hours of work and hours of training provided;

(h) job assignments;

(i) leaves of absence, sick leave, or any other leave; and

(j) any other benefit, term, condition, or privilege associated with apprenticeship.

(2) Discrimination standards and defenses.

(a) Race, color, religion, national origin, sex, or sexual orientation. In implementing this section, the department will look to the legal standards and defenses applied under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and Executive Order 11246, as applicable, in determining whether a sponsor has engaged in an unlawful employment practice.

(b) Disability. With respect to discrimination based on a disability, the registration agency will apply the same standards, defenses, and exceptions to the definition of disability as those set forth in title I of the Americans with Disabilities Act (ADA), 42 U.S.C. 12112 and 12113, and the implementing regulations promulgated by the equal employment opportunity commission (EEOC) at 29 CFR part 1630, which include, among other things, the standards governing reasonable accommodation, medical examinations and disability-related inquiries, qualification standards, and direct threat defense. The interpretive guidance on title I of the ADA set out as an appendix to part 1630 issued pursuant to title I may be relied upon for guidance in complying with the nondiscrimination requirements of this part with respect to the treatment of individuals with disabilities.

(c) Age. The department will apply the same standards and defenses for age discrimination as those set forth in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623, and the implementing regulations promulgated by the EEOC at 29 CFR part 1625.

(d) Genetic information. The department will apply the same standards and defenses for discrimination based on genetic information as those set forth in the Genetic Information Nondiscrimination Act (GINA), 29 U.S.C. 2000ff et seq., and the implementing regulations promulgated by the EEOC at 29 CFR part 1635.

B. General duty to engage in affirmative action: For each registered apprenticeship program, a sponsor is required to take affirmative steps to provide equal opportunity in apprenticeship. These steps include:

(1) Assignment of responsibility. The sponsor will designate an individual or individuals with appropriate authority under the program, such as an apprenticeship coordinator, to be responsible and accountable for overseeing its commitment to equal opportunity in registered apprenticeship, including the development and implementation of an affirmative action program as required by 11.2.2.9 NMAC. This individual must have the resources, support of, and access to the sponsor leadership to ensure effective implementation. This individual will be responsible for:

(a) monitoring all registered apprenticeship activity to ensure compliance with the nondiscrimination and affirmative action obligations required by this part;

(b) maintaining records required under this part; and

(c) generating and submitting reports as may be required by the department.

(2) Internal dissemination of equal opportunity policy. The sponsor must inform all applicants for apprenticeship, apprentices, and individuals connected with the administration or operation of the registered apprenticeship program of its commitment to equal opportunity and its affirmative action obligations. In addition, the sponsor must require that individuals connected with the administration or operation of the apprenticeship program take the necessary action to aid the sponsor in meeting its nondiscrimination and affirmative action obligations under this part. A sponsor, at a minimum, is required to:

(a) publish its equal opportunity pledge as set forth in Subsection C of this section, in the apprenticeship standards required under Subsection B of 11.2.3.23 NMAC and in appropriate publications, such as apprentice and employee handbooks, policy manuals, newsletters, or other documents disseminated by the sponsor or that otherwise describe the nature of the sponsorship;

(b) post its equal opportunity pledge on bulletin boards, including through electronic media, such that it is accessible to all apprentices and applicants for apprenticeship;

(c) conduct orientation and periodic information sessions for individuals connected with the administration or operation of the apprenticeship program, including all apprentices and journeyworkers who regularly work with apprentices, to inform and remind such individuals of the sponsor's equal employment opportunity policy with regard to apprenticeship, and to provide the training required by Paragraph 4 of Subsection B of this section; and

(d) maintain records necessary to demonstrate compliance with these requirements and make them available to the registration agency upon request.

(3) Universal outreach and recruitment. The sponsor will implement measures to ensure that its outreach and recruitment efforts for apprentices extend to all persons available for apprenticeship within the sponsor's relevant recruitment area without regard to race, sex, ethnicity, or disability. In furtherance of this requirement, the sponsor must:

(a) Develop and update annually a list of current recruitment sources that will generate referrals from all demographic groups within the relevant recruitment area. Examples of relevant recruitment sources include: The public workforce system's one-stop career centers and local workforce investment boards, community-based organizations, community colleges, vocational, career and technical schools, pre-apprenticeship programs, and federally-funded, youth job-training programs such as YouthBuild and Job Corps or their successors;

(b) Identify a contact person, mailing address, telephone number, and email address for each recruitment source; and

(c) Provide recruitment sources advance notice, preferably 30 days, of apprenticeship openings so that the recruitment sources can notify and refer candidates. Such notification must also include documentation of the sponsor's equal opportunity pledge specified in Subsection C of this section.

(4) Maintaining apprenticeship programs free from harassment, intimidation, and retaliation. The sponsor must develop and implement procedures to ensure that its apprentices are not harassed because of their race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability and to ensure that its apprenticeship program is free from intimidation and retaliation as prohibited by11.2.2.22 NMAC. To promote an environment in which all apprentices feel safe, welcomed, and treated fairly, the sponsor must ensure the following steps are taken:

(a) Providing anti-harassment training to all individuals connected with the administration or operation of the apprenticeship program, including all apprentices and journeyworkers who regularly work with apprentices. This training must not be a mere transmittal of information, but must include participation by trainees, such as attending a training session in person or completing an interactive training online. The training content must include, at a minimum, communication of the following:

(i) that harassing conduct will not be tolerated;

(ii) the definition of harassment and the types of conduct that constitute unlawful harassment on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability; and

(iii) the right to file a harassment complaint under 11.2.2.19 NMAC.

(b) Making all facilities and apprenticeship activities available without regard to race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability except that if the sponsor provides restrooms or changing facilities, the sponsor must provide separate or single-user restrooms and changing facilities to assure privacy between the sexes;

(c) Establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability, as well as complaints about retaliation for engaging in protected activity described in 11.2.2.22 NMAC.

(5) Compliance with federal and state equal employment opportunity laws. The sponsor must comply with all other applicable federal and state laws and regulations that require equal employment opportunity without regard to race, color, religion, national origin, sex (including pregnancy and gender identity, as applicable), sexual orientation, age (40 or older), genetic information, or disability. Failure to comply with such laws if such noncompliance is related to the equal employment opportunity of

apprentices or graduates of such an apprenticeship program under this part is grounds for deregistration or the imposition of other enforcement actions in accordance with 11.2.2.20 NMAC.

C. Equal opportunity pledge:

(1) Each sponsor of an apprenticeship program must include in its standards of apprenticeship and apprenticeship opportunity announcements the following equal opportunity pledge:

[Name of sponsor] will not discriminate against apprenticeship applicants or apprentices based on race, color, religion, national origin, sex (including pregnancy and gender identity), sexual orientation, genetic information, or because they are an individual with a disability or a person 40 years old or older. [Name of sponsor] will take affirmative action to provide equal opportunity in apprenticeship and will operate the apprenticeship program as required under Title 29 of the Code of Federal Regulations, part 30 and 11.2.2 NMAC.

(2) The nondiscrimination bases listed in this pledge may be broadened to conform to consistent state and local requirements. Sponsors may include additional protected bases but may not exclude any of the bases protected by this part.

D. Compliance:

(1) Current sponsors: A sponsor that has a registered apprenticeship program as of the effective date of this plan must comply with all obligations of this section within 180 days of the effective date of this plan.

(2) New sponsors: A sponsor registering with the department after the effective date of this plan shall comply with all obligations of this section upon registration or 180 days after the effective date of this plan, whichever is later.

[11.2.2.8 NMAC - Rp, 11.2.2.8 NMAC, 11/1/2018]

11.2.2.9 AFFIRMATIVE ACTION PLANS:

A. Definition and purpose. As used in this part:

(1) An affirmative action program is designed to ensure equal opportunity and prevent discrimination in apprenticeship programs. An affirmative action program is more than mere passive nondiscrimination. Such a program requires the sponsor to take affirmative steps to encourage and promote equal opportunity, to create an environment free from discrimination, and to address any barriers to equal opportunity in apprenticeship. An affirmative action program is more than a paperwork exercise. It includes those policies, practices, and procedures, including self-analysis, that the sponsor implements to ensure that all qualified applicants and apprentices are receiving

an equal opportunity for recruitment, selection, advancement, retention and every other term and privilege associated with apprenticeship. An affirmative action program should be a part of the way the sponsor regularly conducts its apprenticeship program.

(2) A central premise underlying affirmative action is that, absent discrimination, over time a sponsor's apprenticeship program, generally, will reflect the sex, race, ethnicity, and disability profile of the labor pools from which the sponsor recruits and selects. Consistent with this premise, affirmative action programs contain a diagnostic component which includes quantitative analysis designed to evaluate the composition of the sponsor's apprenticeship program and compare it to the composition of the relevant labor pools. If women, individuals with disabilities, or individuals from a particular minority group, for example, are not being admitted into apprenticeship at a rate to be expected given their availability in the relevant labor pool, the sponsor's affirmative action program must include specific, practical steps designed to address any barriers to equal opportunity that may be contributing to this underutilization.

(3) Effective affirmative action programs include internal auditing and reporting systems as a means of measuring the sponsor's progress toward achieving an apprenticeship program that would be expected absent discrimination.

(4) An affirmative action program also ensures equal opportunity in apprenticeship by incorporating the sponsor's commitment to equality in every aspect of the apprenticeship program. Therefore, as part of its affirmative action program, a sponsor must monitor and examine its employment practices, policies and decisions and evaluate the impact such practices, policies and decisions have on the recruitment, selection and advancement of apprentices. It must evaluate the impact of its employment and personnel policies on minorities, women, and persons with disabilities, and revise such policies accordingly where such policies or practices are found to create a barrier to equal opportunity.

(5) The commitments contained in an affirmative action program are not intended, and must not be used, to discriminate against any qualified applicant or apprentice on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability.

B. Adoption of affirmative action programs: Sponsors other than those identified in Subsection D of this section must develop and maintain an affirmative action program, setting forth that program in a written plan. The components of the written plan, as detailed in 11.2.2.10 NMAC through 11.2.2.14 NMAC, must be developed in accordance with the respective compliance dates and made available to the department any time thereafter upon request.

C. Contents of affirmative action programs: An affirmative action program must include the following components in addition to those required of all sponsors by Subsection A of 11.2.2.8 NMAC:

(1) utilization analysis for race, sex, and ethnicity, as described in 11.2.2.10 NMAC;

(2) establishment of utilization goals for race, sex, and ethnicity, as described in 11.2.2.11 NMAC;

(3) utilization goals for individuals with disabilities, as described in 11.2.2.12 NMAC;

(4) targeted outreach, recruitment, and retention, as described in 11.2.2.13 NMAC;

(5) review of personnel processes, as described in 11.2.2.14 NMAC; and

(6) invitations to self-identify, as described in 11.2.2.16 NMAC.

D. Exemptions:

(1) Programs with fewer than five apprentices. A sponsor is exempt from the requirements of Subsections (B) and (C) of this section if the sponsor's apprenticeship program has fewer than five apprentices registered, unless such program was adopted to circumvent the requirements of this section.

(2) Programs subject to approved equal employment opportunity programs. A sponsor is exempt from the requirements of Subsections (B) and (C) of this section if the sponsor both submits to the registration agency satisfactory evidence that it is in compliance with an equal employment opportunity program providing for affirmative action in apprenticeship, including the use of goals for any underrepresented group or groups of individuals, which has been approved as meeting the requirements of either title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. 2000e *et seq.*) and agrees to extend such program to include individuals with disabilities, or if the sponsor submits satisfactory evidence to the department that it is in compliance with an equal employment opportunity program providing for affirmative action in apprenticeship, including the use of goals for any underrepresented group or groups of individuals, which has been approved as meeting the requirements of both Executive Order 11246, as amended, and section 503 of the Rehabilitation Act, as amended (29 U.S.C. 793), and their implementing regulations at Title 41 of the Code of Federal Regulations, Chapter 60: Provided, that programs approved, modified or renewed subsequent to the effective date of this amendment will qualify for this exception only if the goals for any underrepresented group for the selection of apprentices provided for in such programs are likely to be equal to or greater than the goals required under this part.

E. Written affirmative action plans: Sponsors required to undertake an affirmative action program must create and update a written document memorializing and discussing the contents of the program set forth in Subsection C of this section.

(1) Compliance

(a) Apprenticeship programs existing as of the effective date of this plan. The initial written affirmative action plan for such programs must be completed within 180 days of the effective date of this plan or within two years of the date of registration, whichever is later. The written affirmative action plan for such programs must be updated every time the sponsor completes workforce analysis required by Subsection B of 11.2.2.10 NMAC and Paragraph 2 of Subsection D of 11.2.2.12 NMAC.

(b) Apprenticeship programs registered after the effective date of this plan. The initial written affirmative action plan for such programs must be completed within two years of registration. The written affirmative action plan for such programs must be updated every time the sponsor completes workforce analysis required by Subsection B of 11.2.2.10 NMAC and Paragraph 2 of Subsection D of 11.2.2.12 NMAC.

[11.2.2.9 NMAC - Rp, 11.2.2.9 NMAC, 11/1/2018]

11.2.2.10 UTILIZATION ANALYSIS FOR RACE, SEX, AND ETHNICITY:

A. Purpose: The purpose of the utilization analysis is to provide sponsors with a method for assessing whether possible barriers to apprenticeship exist for particular groups of individuals by determining whether the race, sex, and ethnicity of apprentices in a sponsor's apprenticeship program is reflective of persons available for apprenticeship by race, sex, and ethnicity in the relevant recruitment area. Where significant disparity exists between availability and representation, the sponsor will be required to establish a utilization goal pursuant to 11.2.2.11 NMAC.

B. Analysis of apprenticeship program workforce:

(1) Process. Sponsors must analyze the race, sex, and ethnic composition of their apprentice workforce. This is a two-step process. First, each sponsor must group all apprentices in its registered apprenticeship program by occupational title. Next, for each occupation represented, the sponsor must identify the race, sex, and ethnicity of its apprentices within that occupation.

(2) Schedule of analysis. Each sponsor is required to conduct an apprenticeship program workforce analysis at each compliance review, and again if and when three years have passed without a compliance review. This updated workforce analysis should be compared to the utilization goal established at the sponsor's most recent compliance review to determine if the sponsor is underutilized, according to the process in Subsection D of this section.

(3) Compliance date.

(a) Sponsors registered with the department as of the effective date of this plan: A sponsor must conduct its first workforce analysis, pursuant to this section, no

later than 180 days after the effective date of this plan or within two years of the date of registration, whichever is later.

(b) New sponsors: A sponsor registering with the department after the effective date of this plan must conduct its initial workforce analysis pursuant to this section no later than two years after the date of registration.

C. Availability analysis:

(1) The purpose of the availability analysis is to establish a benchmark against which the demographic composition of the sponsor's apprenticeship program can be compared in order to determine whether barriers to equal opportunity may exist with regard to the sponsor's apprenticeship program.

(2) Availability is an estimate of the number of qualified individuals available for apprenticeship by race, sex, and ethnicity expressed as a percentage of all qualified persons available for apprenticeship in the sponsor's relevant recruitment area.

(3) In determining availability, the following factors must be considered for each major occupation group represented in the sponsor's registered apprenticeship program standards:

(a) the percentage of individuals who are eligible for enrollment in the apprenticeship program within the sponsor's relevant recruitment area broken down by race, sex, and ethnicity; and

(b) the percentage of the sponsor's employees who are eligible for enrollment in the apprenticeship program broken down by race, sex, and ethnicity.

(4) In determining availability, the relevant recruitment area is defined as the geographical area from which the sponsor usually seeks or reasonably could seek apprentices. The sponsor must identify the relevant recruitment area in its written affirmative action plan. The sponsor may not draw its relevant recruitment area in such a way as to have the effect of excluding individuals based on race, sex, or ethnicity from consideration, and must develop a brief rationale for selection of that recruitment area.

(5) Availability will be derived from the most current and discrete statistical information available. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions.

(6) Sponsors, working with the registration agency, will conduct availability analysis at each compliance review.

D. Rate of utilization: To determine the rate of utilization, the sponsor, working with the department, must group each occupational title in its apprenticeship workforce by major occupation group and compare the racial, sex, and ethnic representation within

each major occupation group to the racial, sex, and ethnic representation available in the relevant recruitment area, as determined in Subsection C of this section. When the sponsor's utilization of women, Hispanics or Latinos, or a particular racial minority group is significantly less than would be reasonably expected given the availability of such individuals for apprenticeship, the sponsor must establish a utilization goal for the affected group in accordance with the procedures set forth in 11.2.2.11 NMAC. Sponsors are not required or expected to establish goals where no significant disparity in utilization rates has been found.

[11.2.2.10 NMAC - Rp, 11.2.2.10 NMAC, 11/1/2018]

11.2.2.11 ESTABLISHMENT OF UTILIZATION GOALS FOR RACE, SEX, AND ETHNICITY:

A. Where, pursuant to 11.2.2.10 NMAC, a sponsor is required to establish a utilization goal for a particular racial, sex, or ethnic group in a major occupation group in its apprenticeship program, the sponsor, working with the registration agency, must establish a percentage goal at least equal to the availability figure derived under Subsection C of 11.2.2.10 NMAC for that major occupation group.

B. A sponsor's determination under 11.2.2.10 NMAC that a utilization goal is required constitutes neither a finding nor an admission of discrimination.

C. Utilization goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Utilization goals are used to measure the effectiveness of the sponsor's outreach, recruitment, and retention efforts.

D. In establishing utilization goals, the following principles apply:

(1) Utilization goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered either a ceiling or a floor for the selection of particular groups as apprentices. Quotas are expressly forbidden.

(2) Utilization goals may not provide a sponsor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's status as an apprentice, on the basis of that person's race, sex, or ethnicity.

(3) Utilization goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

(4) Utilization goals may not be used to supersede eligibility requirements for apprenticeship. Affirmative action programs prescribed by the regulations of this part do not require sponsors to select a person who lacks qualifications to participate in the apprenticeship program successfully, or select a less-qualified person in preference to a more qualified one.

[11.2.2.11 NMAC - Rp, 11.2.2.11 NMAC, 11/1/2018]

11.2.2.12 UTILIZATION GOALS FOR INDIVIDUALS WITH DISABILITIES:

A. Utilization goal: The administrator of OA has established a utilization goal of seven percent for employment of qualified individuals with disabilities as apprentices for each major occupation group within which the sponsor has an apprenticeship program.

B. Purpose: The purpose of the utilization goal is to establish a benchmark against which the sponsor must measure the representation of individuals with disabilities in the sponsor's apprentice workforce by major occupation group. The goal serves as an equal opportunity objective that should be attainable by complying with all of the affirmative action requirements of this part.

C. Periodic review of goal: The administrator of OA will periodically review and update, as appropriate, the utilization goal.

D. Utilization analysis:

(1) Purpose. The utilization analysis is designed to evaluate the representation of individuals with disabilities in the sponsor's apprentice workforce grouped by major occupation group. If individuals with disabilities are represented in the sponsor's apprentice workforce in any given major occupation group at a rate less than the utilization goal, the sponsor must take specific measures outlined in subsections E and F of this section.

(2) Apprentice workforce analysis

(a) Process. Sponsors are required to analyze the representation of individuals with disabilities within their apprentice workforce by occupation. This is a two-step process. First, as required in 11.2.2.10 NMAC, each sponsor must group all apprentices in its registered apprenticeship program according to the occupational titles represented in its registered apprenticeship program. Next, for each occupation represented, the sponsor must identify the number of apprentices with disabilities.

(b) Schedule of evaluation. The sponsor must conduct its apprentice workforce analysis at each compliance review, and again if and when three years have passed without a compliance review. This updated workforce analysis, grouped according to major occupation group, should then be compared to the utilization goal established under Subsection A of this section.

(c) Compliance date.

(i) Sponsors currently registered with the department: A sponsor must conduct its first workforce analysis, pursuant to this section, no later than 180 days after

the effective date of this plan or within two years of the date of registration, whichever is later.

(ii) New sponsors: A sponsor registering with the department after the effective date of this plan must conduct its initial workforce analysis pursuant to this section no later than two years after the date of registration.

E. Identification of problem areas. When the sponsor, working with the department, determines that the percentage of individuals with disabilities in one or more major occupation groups within which a sponsor has apprentices is less than the utilization goal established in subsection A of this section, the sponsor must take steps to determine whether or where impediments to equal opportunity exist. When making this determination, the sponsor must look at the results of its assessment of personnel processes required by 11.2.2.14 NMAC and the effectiveness of its outreach and recruitment efforts required by 11.2.2.13 NMAC, if applicable.

F. Action-oriented programs. The sponsor must undertake action-oriented programs, including targeted outreach, recruitment, and retention activities identified in 11.2.2.13 NMAC, designed to correct any problem areas that the sponsor identified pursuant to its review of personnel processes and outreach and recruitment efforts.

G. Utilization goal relation to discrimination. A determination that the sponsor has not attained the utilization goal established in subsection A of this section in one or more major occupation groups does not constitute either a finding or admission of discrimination in violation of this part.

H. Utilization goal not a quota or ceiling. The utilization goal established in subsection A of this section must not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities as apprentices.

[11.2.2.12 NMAC - Rp, 11.2.2.12 NMAC, 11/1/2018]

11.2.2.13 TARGETED OUTREACH, RECRUITMENT, AND RETENTION:

A. Minimum activities required: Where a sponsor has found underutilization and established a utilization goal for a specific group or groups pursuant to 11.2.2.11 NMAC or where a sponsor has determined pursuant to Subsection F of 11.2.2.12 NMAC that there are problem areas resulting in impediments to equal employment opportunity, the sponsor must undertake targeted outreach, recruitment, and retention activities that are likely to generate an increase in applications for apprenticeship and improve retention of apprentices from the targeted group or groups or from individuals with disabilities, as appropriate. In furtherance of this requirement, the sponsor must:

(1) Set forth in its written affirmative action plan the specific targeted outreach, recruitment, and retention activities it plans to take for the upcoming program year. Such activities must include at a minimum:

(a) Dissemination of information to organizations serving the underutilized group regarding the nature of apprenticeship, requirements for selection for apprenticeship, availability of apprenticeship opportunities, and the equal opportunity pledge of the sponsor. These organizations may include: Community-based organizations, local high schools, local community colleges, local vocational, career and technical schools, and local workforce system partners including One Stop Career Centers;

(b) Advertising openings for apprenticeship opportunities by publishing advertisements in appropriate media which have wide circulation in the relevant recruitment areas;

(c) Cooperation with local school boards and vocational education systems to develop or establish relationships with pre-apprenticeship programs targeting students from the underutilized group to prepare them to meet the standards and criteria required to qualify for entry into apprenticeship programs; and

(d) Establishment of linkage agreements or partnerships enlisting the assistance and support of pre-apprenticeship programs, community-based organizations, advocacy organizations, or other appropriate organizations, in recruiting qualified individuals for apprenticeship;

(2) Evaluate and document after every selection cycle for registering apprentices the overall effectiveness of such activities;

(3) Refine its targeted outreach, recruitment, and retention activities as needed; and

(4) Maintain records of its targeted outreach, recruitment, and retention activities and records related to its evaluation of these activities.

B. Other activities. In addition to the activities set forth in Subsection A of this section, as a matter of best practice, sponsors are encouraged but not required to consider other outreach, recruitment, and retention activities that may assist sponsors in addressing any barriers to equal opportunity in apprenticeship. Such activities include but are not limited to:

(1) Enlisting the use of journeyworkers from the underutilized group or groups to assist in the implementation of the sponsor’s affirmative action program;

(2) Enlisting the use of journeyworkers from the underutilized group or groups to mentor apprentices and to assist with the sponsor’s targeted outreach and recruitment activities; and

(3) Conducting exit interviews of each apprentice who leaves the sponsor’s apprenticeship program prior to receiving a certificate of completion to understand

better why the apprentice is leaving the program and to help shape the sponsor's retention activities.

[11.2.2.13 NMAC - Rp, 11.2.2.13 NMAC, 11/1/2018]

11.2.2.14 REVIEW OF PERSONNEL PROCESSES:

A. As part of its affirmative action program, the sponsor must, for each registered apprenticeship program, engage in an annual review of its personnel processes related to the administration of the apprenticeship program to ensure that the sponsor is operating an apprenticeship program free from discrimination based on race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability. This annual review is required regardless of whether the sponsor is underutilized as described in Subsection D of 11.2.2.10 NMAC. The review must be a careful, thorough, and systematic one and include review of all aspects of the apprenticeship program at the program, industry and occupation level, including, but not limited to, the qualifications for apprenticeship, application and selection procedures, wages, outreach and recruitment activities, advancement opportunities, promotions, work assignments, job performance, rotations among all work processes of the occupation, disciplinary actions, handling of requests for reasonable accommodations, and the program's accessibility to individuals with disabilities (including to the use of information and communication technology). The sponsor must make any necessary modifications to its program to ensure that its obligations under this part are met.

(1) Compliance date for current sponsors: A sponsor that has a registered apprenticeship program as of the effective date of this regulation must comply with the obligations of subsection A of this section by 180 days after the effective date of this part or within two years of the date of registration, whichever is later.

(2) Compliance date for new sponsors: A sponsor registering with a registration agency after the effective date of this regulation shall comply with the obligations of Subsection A of this section within two years after the date of registration.

B. The sponsor must include a description of its review in its written affirmative action plan and identify in the written plan any modifications made or to be made to the program as a result of its review.

[11.2.2.14 NMAC - Rp, 11.2.2.14 NMAC, 11/1/2018]

11.2.2.15 SELECTION OF APPRENTICES:

A. A sponsor's procedures for selection of apprentices must be included in the written plan for Standards of Apprenticeship submitted to and approved by the department, as required under 11.2.3.23 NMAC.

B. Sponsors may utilize any method or combination of methods for selection of apprentices, provided that the selection method(s) used meets the following requirements:

(1) The use of the selection procedure(s) must comply with the uniform guidelines on employee selection procedures (UGESP) (41 CFR part 60-3), including the requirements to evaluate the impact of the selection procedure on race, sex, and ethnic groups (Hispanic or Latino/non-Hispanic or Latino) and to demonstrate job-relatedness and business necessity for those procedures that result in adverse impact in accordance with the requirements of UGESP.

(2) The selection procedure(s) must be uniformly and consistently applied to all applicants and apprentices within each selection procedure utilized.

(3) The selection procedure(s) must comply with Title I of the ADA and EEOC's implementing regulations at Part 1630. This procedure(s) must not screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the program sponsor, is shown to be job-related for the position in question and is consistent with business necessity.

(4) The selection procedure(s) must be facially neutral in terms of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, and disability.

[11.2.2.15 NMAC - Rp, 11.2.2.15 NMAC, 11/1/2018]

11.2.2.16 INVITATION TO SELF-IDENTIFY AS AN INDIVIDUAL WITH A DISABILITY:

A. Pre-offer:

(1) A sponsor adopting an affirmative action program pursuant to 11.2.2.9 NMAC must invite applicants for apprenticeship to inform the sponsor whether the applicant believes that he or she is an individual with a disability as defined in Subsection G of 11.2.2.7 NMAC. This invitation must be provided to each applicant when the applicant applies or is considered for apprenticeship. The invitation may be included with the application materials for apprenticeship, but must be separate from the application.

(2) The sponsor must invite an applicant to self-identify using the language and manner prescribed by OA and published on the OA website.

B. Post offer:

(1) At any time after acceptance into the apprenticeship program, but before the applicant begins his or her apprenticeship, the sponsor must invite the applicant to inform the sponsor whether the applicant believes that he or she is an individual with a disability as defined in Subsection G of 11.2.2.7 NMAC.

(2) The sponsor must invite an applicant to self-identify using the language and manner prescribed by OA and published on the OA website.

C. Apprentices:

(1) Within the timeframe specified in subsection H in this section, the sponsor must make a one-time invitation to each current apprentice to inform the sponsor whether he or she is an individual with a disability as defined in Subsection G of 11.2.2.7 NMAC. The sponsor must make this invitation using the language and manner prescribed by OA and published on the OA website.

(2) Thereafter, the sponsor must remind apprentices yearly that they may voluntarily update their disability status.

D. Voluntary self-identification for apprentices: The sponsor may not compel or coerce an individual to self-identify as an individual with a disability.

E. Confidentiality: The sponsor must keep all information on self-identification confidential, and must maintain it in a data analysis file (rather than the medical files of individual apprentices) as required under Subsection E of 11.2.2.17 NMAC. The sponsor must provide self-identification information to the department upon request. Self-identification information may be used only in accordance with this part.

F. Affirmative action obligations: Nothing in this section may relieve the sponsor of its obligation to take affirmative action with respect to those applicants and apprentices of whose disability the sponsor has knowledge.

G. Nondiscrimination obligations: Nothing in this section may relieve the sponsor from liability for discrimination in violation of this part.

H. Compliance dates:

(1) Sponsors currently registered with the department: A sponsor must begin inviting applicants and apprentices to identify as individuals with disabilities, pursuant to this section, no later than 180 days after the effective date of this plan or within two years of the date of registration, whichever is later. A sponsor must also invite each of its current apprentices to voluntarily inform the sponsor whether the apprentice believes that he or she is an individual with a disability, as defined in Subsection G of 11.2.2.7 NMAC, no later than 180 days after the effective date of this plan or within two years of the date of registration, whichever is later.

(2) New Sponsors: A sponsor registering with the department after the effective date of this plan must begin inviting applicants and apprentices to identify as individuals with disabilities, pursuant to this section, no later than two years after the date of registration. A sponsor covered by this subparagraph must also invite each of its current apprentices to voluntarily inform the sponsor whether the apprentice believes that he or she is an individual with a disability, as defined in Subsection G of 11.2.2.7 NMAC, no later than two years after the date of registration.

[11.2.2.16 NMAC - Rp, 11.2.2.16 NMAC, 11/1/2018]

11.2.2.17 RECORDKEEPING:

A. General obligation: Each sponsor must collect such data and maintain such records as the department finds necessary to determine whether the sponsor has complied or is complying with the requirements of this part. Such records must include, but are not limited to records relating to:

(1) selection for apprenticeship, including applications, tests and test results, interview notes, basis for selection or rejection, and any other records required to be maintained under UGESP;

(2) the invitation to self-identify as an individual with a disability;

(3) information relative to the operation of the apprenticeship program, including but not limited to job assignments in all components of the occupation as required under subparagraph (d) of paragraph (B) of Subsection B of 11.2.3.23 NMAC, promotion, demotion, transfer, layoff, termination, rates of pay, other forms of compensation, conditions of work, hours of work, hours of training provided, and any other personnel records relevant to EEO complaints filed with the department under 11.2.2.19 NMAC or with other enforcement agencies;

(4) compliance with the requirements of 11.2.2.8 NMAC;

(5) requests for reasonable accommodation; and

(6) any other records pertinent to a determination of compliance with these regulations, as may be required by the department.

B. Sponsor identification of record: For any record the sponsor maintains pursuant to this part, the sponsor must be able to identify the race, sex, ethnicity (Hispanic or Latino/non-Hispanic or Latino), and when known, disability status of each apprentice, and where possible, the race, sex, ethnicity, and disability status of each applicant to apprenticeship and supply this information upon request to the department.

C. Affirmative action programs: Each sponsor required under 11.2.2.9 NMAC to develop and maintain an affirmative action program must retain both the written

affirmative action plan and documentation of its component elements set forth in 11.2.2.10 NMAC, 11.2.2.11 NMAC, 11.2.2.12 NMAC, 11.2.2.13 NMAC, 11.2.2.14 NMAC, and 11.2.2.16 NMAC.

D. Maintenance of records: The records required by this part and any other information relevant to compliance with these regulations must be maintained for five years from the date of the making of the record or the personnel action involved, whichever occurs later, and must be made available upon request to the department or other authorized representative in such form as the department may determine is necessary to enable it to ascertain whether the sponsor has complied or is complying with this part. Failure to preserve complete and accurate records as required by Subsections A, B, and C of this section constitutes noncompliance with this part.

E. Confidentiality and use of medical information:

(1) Any information obtained pursuant to this part regarding the medical condition or history of an applicant or apprentice must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(a) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or apprentice and necessary accommodations;

(b) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(c) Government officials engaged in enforcing this part, the laws administered by the office of federal contract compliance programs (OFCCP), or the ADA, must be provided relevant information on request.

(2) Information obtained under this part regarding the medical condition or history of any applicant or apprentice may not be used for any purpose inconsistent with this part.

F. Access to records: Each sponsor must permit access during normal business hours to its places of business for the purpose of conducting on-site EEO compliance reviews and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material the department deems relevant to the matter under investigation and pertinent to compliance with this part. The sponsor must also provide the department access to these materials, including electronic records, off-site for purposes of conducting EEO compliance reviews and complaint investigations. Upon request, the sponsor must provide the department information about all format(s), including specific electronic formats, in which its records and other information are available. Information obtained in this manner will be used only in connection with the administration of this part or other applicable EEO laws.

[11.2.2.17 NMAC - Rp, 11.2.2.17 NMAC, 11/1/2018]

11.2.2.18 EQUAL EMPLOYMENT OPPORTUNITY COMPLIANCE REVIEWS:

A. Conduct compliance reviews: The department will regularly conduct EEO compliance reviews to determine if the sponsor maintains compliance with this part, and will also conduct EEO compliance reviews when circumstances so warrant. An EEO compliance review may consist of, but is not limited to, comprehensive analysis and evaluations of each aspect of the apprenticeship program through off-site reviews, such as desk audits of records submitted to the department, and on-site reviews conducted at the sponsor's establishment that may involve examination of records required under this part; inspection and copying of documents related to recordkeeping requirements of this part; and interviews with employees, apprentices, journeyworkers, supervisors, managers, and hiring officials.

B. Notification of compliance review findings: Within 45 business days of completing an EEO compliance review, the department must present a written notice of compliance review findings to the sponsor's contact person through registered or certified mail, with return receipt requested. If the compliance review indicates a failure to comply with this part, the department will so inform the sponsor in the notice and will set forth in the notice the following:

(1) the deficiency(ies) identified;

(2) how to remedy the deficiency(ies);

(3) the timeframe within which the deficiency(ies) must be corrected; and

(4) enforcement actions may be undertaken if compliance is not achieved within the required timeframe.

C. Compliance:

(1) When a sponsor receives a notice of Compliance Review Findings that indicates a failure to comply with this part, the sponsor must, within 30 business days of notification, either implement a compliance action plan and notify the department of that plan or submit a written rebuttal to the findings. Sponsors may also seek to extend this deadline one time by up to 30 days for good cause shown. If the department upholds the notice after receiving a written response, the sponsor must implement a compliance action plan within 30 days of receiving the notice from the department upholding its findings. The compliance action plan must include, but is not limited to, the following provisions:

(a) a specific commitment, in writing, to correct or remediate identified deficiency(ies) and area(s) of noncompliance;

(b) the precise actions to be taken for each deficiency identified;

(c) the time period within which the cited deficiency(ies) will be remedied and any corrective program changes implemented; and

(d) the name of the individual(s) responsible for correcting each deficiency identified.

(2) Upon the department's approval of the compliance action plan, the sponsor may be considered in compliance with this part provided that the compliance action plan is implemented.

D. Enforcement actions: Any sponsor that fails to implement its compliance action plan within the specified timeframes may be subject to an enforcement action under 11.2.2.20 NMAC.

[11.2.2.18 NMAC - Rp, 11.2.2.18 NMAC, 11/1/2018]

11.2.2.19 COMPLAINTS:

A. Requirements for individuals filing complaints.

(1) Who may file: Any individual who believes that he or she has been or is being discriminated against on the basis of race, color, religion, national origin, sex, sexual orientation, age (40 or older), genetic information, or disability with regard to apprenticeship, or who believes he or she has been retaliated against as described in11.2.2.22 NMAC, may, personally or through an authorized representative, file a written complaint with the department.

(2) Time period for filing a complaint: Generally, a complaint must be filed within 300 days of the alleged discrimination or specified failure to follow the equal opportunity standards. However, for good cause shown, the department may extend the filing time. The time period for filing is for the administrative convenience of the department and does not create a defense for the respondent.

(3) Contents of the complaint: Each complaint must be made in writing and must contain the following information:

(a) the complainant's name, address and telephone number, or other means for contacting the complainant;

(b) the identity of the respondent (the individual or entity that the complainant alleges is responsible for the discrimination);

(c) a short description of the events that the complainant believes were discriminatory, including but not limited to when the events took place, what occurred,

and why complainant believes the actions were discriminatory (for example, because of his or her race, color, religion, sex, sexual orientation, national origin, age (40 or older), genetic information, or disability);

(d) the complainant's signature or the signature of the complainant's authorized representative.

B. Requirements of sponsors: Sponsors must provide written notice to all applicants for apprenticeship and all apprentices of their right to file a discrimination complaint and the procedures for doing so.

(1) The notice must include the address, phone number, and other contact information for the department that will receive and investigate complaints filed under this part.

(2) The notice must be provided in the application for apprenticeship and must also be displayed in a prominent, publicly available location where all apprentices will see the notice.

C. The notice must contain the following specific wording:

(1) **"**Your Right to Equal Opportunity: It is against the law for a sponsor of an apprenticeship program registered for federal purposes to discriminate against an apprenticeship applicant or apprentice based on race, color, religion, national origin, sex, sexual orientation, age (40 years or older), genetic information, or disability."

(2) "The sponsor must ensure equal opportunity with regard to all terms, conditions, and privileges associated with apprenticeship."

(3) "If you think that you have been subjected to discrimination, you may file a complaint within 300 days from the date of the alleged discrimination or failure to follow the equal opportunity standards with New Mexico Department of Workforce Solutions, Apprenticeship Office, 401 Broadway N.E., Albuquerque, New Mexico 87102, apprenticeship.info@state.nm.us, (505) 841-8565. You may also file complaints directly with the department's Human Rights Bureau, 1596 Pacheco St., Suite 103, Santa Fe, NM 87505, 800-566-9471 or the EEOC, 1-800-669-4000 or 1-800-669-6820 (toll-free TTY number for individuals with hearing impairments)."

(4) "Each complaint filed must be made in writing and include the following information:"

(a) "Complainant's name, address, and telephone number, or other means for contacting complainant;"

(b) "The identity of the respondent (i.e. the name, address, and telephone number of the individual or entity that the complainant alleges is responsible for the discrimination;"

(c) "A short description of the events that the complainant believed were discriminatory, including but not limited to when the events took place, what occurred, and why the complainant believes the actions were discriminatory (for example, because of his or her race, color, religion, sex, sexual orientation, national origin, age (40 or over), genetic information, or disability)";

(d) "The complainant's signature or the signature of the complainant's authorized representative."

D. Requirements of the department:

(1) Conduct investigations: The investigation of a complaint filed under this part will be undertaken by the department, and will proceed as expeditiously as possible. In conducting complaint investigations, the department must:

(a) provide written notice to the complainant acknowledging receipt of the complaint;

(b) contact the complainant, if the complaint form is incomplete, to obtain full information necessary to initiate an investigation;

(c) initiate an investigation upon receiving a complete complaint;

(d) complete a thorough investigation of the allegations of the complaint and develop a complete case record that must contain, but is not limited to, the name, address, and telephone number of each person interviewed, the interview statements, copies, transcripts, or summaries (where appropriate) of pertinent documents, and a narrative report of the investigation with references to exhibits and other evidence which relate to the alleged violations; and

(e) provide written notification of the department's findings to both the respondent and the complainant.

(2) Seek compliance: Where a report of findings from a complaint investigation indicates a violation of the nondiscrimination requirements of this part, the department should attempt to resolve the matter quickly at the department level whenever appropriate. Where a complaint of discrimination cannot be resolved at the department level to the satisfaction of the complainant, the department must refer the complaint to other federal, state or local EEO agencies, as appropriate.

(3) Referrals to other EEO agencies: The department, at its discretion, may choose to refer a complaint immediately upon its receipt or any time thereafter to:

(a) the department's human rights bureau;

(b) the EEOC;

(c) the United States attorney general; or

(d) the department's OFCCP.

(4) Alternative complaint procedures: The department may adopt a complaint review procedure differing in detail from that given in this section provided it is submitted for review to and receives approval by the Administrator.

[11.2.2.19 NMAC - Rp, 11.2.2.19 NMAC, 11/1/2018]

11.2.2.20 ENFORCEMENT ACTIONS:

Where the department, as a result of a compliance review, complaint investigation, or other reason, determines that the sponsor is not operating its apprenticeship program in accordance with this part, the department must notify the sponsor in writing of the specific violation(s) identified and may:

A. offer the sponsor technical assistance to promote compliance with this part.

B. suspend the sponsor's right to register new apprentices if the sponsor fails to implement a compliance action plan to correct the specific violation(s) identified within 30 business days from the date the sponsor is so notified of the violation(s), or, if the sponsor submits a written response to the findings of noncompliance, fails to implement a compliance action plan within 30 days of receiving the department's notice upholding its initial noncompliance findings. If the sponsor has not implemented a compliance action plan within 30 business days of notification of suspension, the department may institute proceedings to deregister the program in accordance with the deregistration proceedings set forth in 11.2.3.28 NMAC or if the department does not institute such proceedings within 45 days of the start of the suspension, the suspension is lifted.

C. Take any other action authorized by law. These other actions may include, but are not limited to:

(1) referral to the EEOC;

(2) referral to the department's human rights bureau; or

(3) referral to the OFCCP.

[11.2.2.20 NMAC - Rp, 11.2.2.20 NMAC, 11/1/2018]

11.2.2.21 REINSTATEMENT OF PROGRAM REGISTRATION:

An apprenticeship program that has been deregistered pursuant to this part may be reinstated by the registration agency upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part.

[11.2.2.21 NMAC - Rp, 11.2.2.21 NMAC, 11/1/2018]

11.2.2.22 INTIMIDATION AND RETALIATION PROHIBITED:

A. A participant in an apprenticeship program may not be intimidated, threatened, coerced, retaliated against, or discriminated against because the individual has:

(1) filed a complaint alleging a violation of this part;

(2) opposed a practice prohibited by the provisions of this part or any other federal or state equal opportunity law;

(3) furnished information to, or assisted or participated in any manner, in any investigation, compliance review, proceeding, or hearing under this part or any federal or state equal opportunity law; or

(4) otherwise exercised any rights and privileges under the provisions of this part.

B. Any sponsor that permits such intimidation or retaliation in its apprenticeship program, including by participating employers, and fails to take appropriate steps to prevent such activity will be subject to enforcement action under 11.2.2.20 NMAC.

[11.2.2.22 NMAC - Rp, 11.2.2.22 NMAC, 11/1/2018]

11.2.2.23 EXEMPTIONS:

Requests for exemption from these regulations, or any part thereof, shall be made in writing to the department and must contain a statement of reasons supporting the request. Exemptions may be granted for good cause by the department. The department must receive approval to grant an exemption from the administrator prior to granting an exemption from these regulations.

[11.2.2.23 NMAC - Rp, 11.2.2.23 NMAC, 11/1/2018]

PART 3: STATE APPRENTICESHIP POLICY MANUAL

11.2.3.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, as the State Apprenticeship Agency.

[11.2.3.1 NMAC – Rp, 11.2.3.1 NMAC, 1/30/2018]

11.2.3.2 SCOPE:

All apprenticeship programs, sponsors, and apprentices registered with the New Mexico department of workforce solutions.

[11.2.3.2 NMAC – Rp, 11.2.3.2 NMAC, 1/30/2018]

11.2.3.3 STATUTORY AUTHORITY:

Section 50-7-1 to 50-7-4.1, 50-7-7 NMSA, 1978

[11.2.3.3 NMAC – Rp, 11.2.3.3 NMAC, 1/30/2018]

11.2.3.4 DURATION:

Permanent

[11.2.3.4 NMAC – Rp, 11.2.3.4 NMAC, 1/30/2018]

11.2.3.5 EFFECTIVE DATE:

January 30, 2018 unless a later date is cited at the end of a section.

[11.2.3.5 NMAC – Rp, 11.2.3.5 NMAC, 1/30/2018]

11.2.3.6 NEW MEXICO STATE APPRENTICESHIP OBJECTIVES:

A. The department of workforce solutions ("the department") is the state apprenticeship agency (SAA). By delegation, the apprenticeship director is the department’s operating head and administrator for all apprenticeship related functions and activities.

B. General: To help achieve, through cooperative effort, the training of apprentices in apprenticeable occupations to meet current and future needs for skilled journeyworkers. To help insure that this training stays abreast of technological developments and needs for national security, and to increase the job opportunities, earning ability, and security of the apprentices. In order to provide equal opportunities for all qualified applicants for apprenticeship, hereafter all apprentices shall be selected in accordance with a plan which assures equality of opportunity and which is acceptable to the state apprenticeship council and approved by the department of workforce solutions.

C. Specific:

(1) To develop and improve techniques which will more accurately measure future apprenticeship requirements on a national, industrial, and community basis.

(2) To promote more widespread use of effective techniques which will assist in the selection and employment of apprentices.

(3) To make available to potential users, information relating to prospective apprenticeship requirements, occupational outlook, counseling techniques, and procedures which will aid:

(a) educational institutions in planning curricula;

(b) management and labor in planning apprenticeship programs;

(c) parents, teachers, and counselors in advising youth;

(d) individuals in their occupational planning.

(4) To encourage communities to survey their apprenticeship needs in order to have a sound basis for providing adequate educational facilities, vocational guidance, selective placement services, and to assist in the development of sound educational and training opportunities for all individuals.

(5) To encourage those responsible for apprenticeship development in all industries to determine their future apprenticeship requirements in order to have a sound basis for action.

(6) To promote effective apprenticeship training by:

(a) studying the quantity and quality of apprenticeship training in industry;

(b) organizing and promoting research on effective apprenticeship training practices;

(c) encouraging the use of methods which have proven to be effective in apprenticeship training;

(d) developing and promoting services to assist management and labor in determining apprenticeship training needs;

(e) developing, organizing, and offering technical assistance to apprenticeship training programs.

(7) To assist other agencies to develop and provide services for apprenticeship programs which are flexible and acceptable to labor and management.

(8) To stimulate national, state, and local organizations and groups to give active support to effective apprenticeship training programs so that a greater proportion

of journeyworkers in apprenticeable occupations will have achieved their skill through apprenticeship programs.

[11.2.3.6 NMAC – Rp, 11.2.3.6 NMAC, 1/30/2018]

11.2.3.7 DEFINITIONS:

A. "Administrator" means the administrator of the office of apprenticeship (OA), or any person specifically designated by the administrator.

B. "Apprentice" means a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn an apprenticeable occupation as provided in 11.2.3.22 NMAC under standards of apprenticeship fulfilling the requirements of 11.2.3.23 NMAC.

C. "Apprenticeship agreement" means a written agreement, complying with 11.2.3.27 NMAC, between an apprentice and either the apprentice's program sponsor, or an apprenticeship committee acting as agent for the program sponsor(s), which contains the terms and conditions of the employment and training of the apprentice.

D. "Apprenticeship committee (committee)" means those persons designated by the sponsor to administer the program. A committee may be either joint or non-joint, as follows: (1) A joint committee is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s); (2) A non-joint committee, which may also be known as a unilateral or group non-joint (which may include employees) committee, has employer representatives but does not have a bona fide collective bargaining agent as a participant.

E. "Apprenticeship program" means a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, as required under 11.2.2 NMAC and 11.2.3 NMAC, including such matters as the requirement for a written apprenticeship agreement.

F. "Apprenticeship program completion approaches" means the different ways that the term of apprenticeship for completion of a program can be measured. They are defined as follows.

(1) Time based approach is measured by the skill acquisition through the individual apprentice's completion of at least 2,000 hours of on-the-job training as described in a work process schedule.

(2) Competency based approach is measured by the attainment of manual, mechanical or technical skills and knowledge, as specified by an occupational standard and demonstrated by an appropriate written and hands-on proficiency measurement.

(3) Hybrid approach is measured by the individual apprentice's skill acquisition through a combination of a specified minimum number of hours of on-the-job training and the successful demonstration of competency as described in a work process schedule.

G. "Apprenticeship standards" means a document with the requirements, as a minimum, as defined in 11.2.3.23 NMAC.

H. "Cancellation" means the termination of the registration or approval status of a program at the request of the sponsor, or termination of an apprenticeship agreement at the request of the apprentice.

I. "Certification or certificate" means documentary evidence that:

(1) the OA has approved a set of national guidelines for apprenticeship standards developed by a national committee or organization, joint or unilateral, for policy or guideline use by local affiliates;

(2) the department has established that an individual is eligible for probationary employment as an apprentice under a registered apprenticeship program;

(3) the department has registered an apprenticeship program as evidenced by a certificate of registration or other written indicia;

(4) the department has determined that an apprentice has successfully met the requirements to receive an interim credential; or

(5) the department has determined that an individual has successfully completed apprenticeship.

J. "Competency" means the attainment of manual, mechanical or technical skills and knowledge, as specified by an occupational standard and demonstrated by an appropriate written and hands-on proficiency measurement.

K. "Completion rate" means the percentage of an apprenticeship cohort who receives a certificate of apprenticeship completion within one year of the projected completion date. An apprenticeship cohort is the group of individual apprentices registered to a specific program during a one-year time frame, except that a cohort does not include the apprentices whose apprenticeship agreement has been cancelled during the probationary period.

L. "Director" means the apprenticeship director at the department of workforce solutions.

M. "Electronic media" means media that utilize electronics or electromechanical energy for the end user (audience) to access the content; and includes, but is not

limited to, electronic storage media, transmission media, the internet, extranet, lease lines, dial-up lines, private networks, and the physical movement of removable or transportable electronic media or interactive distance learning.

N. "Employer" means any person or organization employing an apprentice whether or not such person or organization is a party to an apprenticeship agreement with the apprentice.

O. "Equal employment opportunity (EEO) compliance review" means a comprehensive review conducted by the department in regards to the EEO aspects of a registered apprenticeship program in accordance with those activities defined in the 11.2.2 NMAC equal employment opportunity in apprenticeship state plan.

P. "Federal purposes" includes any federal contract, grant, agreement or arrangement dealing with apprenticeship; and any federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.

Q. "Interim credential" means a credential issued by the department, upon request of the appropriate sponsor, as certification of competency attainment by an apprentice.

R. "Journeyworker" means a worker who has attained a level of skill, abilities, and competencies recognized within an industry as having mastered the skills and competencies required for the occupation. (Use of the term may also refer to a mentor, technician, specialist or other skilled worker who has documented sufficient skills and knowledge of an occupation, either through formal apprenticeship or through practical on-the-job experience and formal training).

S. "Office of apprenticeship (OA)" means the office designated by the employment and training administration, United States department of labor, to administer the national apprenticeship system or its successor organization.

T. "Provisional registration" means the one-year initial provisional approval of newly registered programs that meet the required standards for program registration, after which program approval may be made permanent, continued as provisional, or rescinded following a review by the department and the state apprenticeship council, as provided for in the criteria described in 11.2.3.20(B)(7)(8) NMAC.

U. "Quality assurance assessment" means a comprehensive review conducted by the department regarding all aspects of an apprenticeship program's performance, including but not limited to, determining if apprentices are receiving: on-the-job learning in all phases of the apprenticeable occupation; scheduled wage increases consistent with the registered standards; related instruction through appropriate curriculum and delivery systems; and that the department is receiving notification of all new registrations, cancellations, and completions as required in this part.

V. "Registration agency" means the office of apprenticeship or a recognized state apprenticeship agency that has responsibility for registering apprenticeship programs and apprentices; providing technical assistance; conducting reviews for compliance with 29 CFR parts 29 and 30 and quality assurance assessments. The registration agency for the state of New Mexico is the department of workforce solutions.

W. "Registration of an apprenticeship agreement" means the acceptance and recording of an apprenticeship agreement by the department as evidence of the apprentice's participation in a particular registered apprenticeship program.

X. "Registration of an apprenticeship program" means the acceptance and recording of such program by the office of apprenticeship, or registration or approval by a recognized state apprenticeship agency, as meeting the basic standards and requirements of the United States department of labor, OA, for approval of such program for federal purposes. Approval is evidenced by a certificate of registration or other written indicia.

Y. "Related instruction" means an organized and systematic form of instruction designed to provide the apprentice with the knowledge of the theoretical and technical subjects related to the apprentice's occupation. Such instruction may be given in a classroom, through occupational or industrial courses, or by correspondence courses of equivalent value, electronic media, or other forms of self-study approved by the department.

Z. "Sponsor" means any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

AA. "State apprenticeship agency (SAA)" means an agency of a state government that has responsibility and accountability for apprenticeship within the state. The SAA for New Mexico is the New Mexico department of workforce solutions, herein after referred to as "the department".

BB. "State apprenticeship council (SAC)" means the entity established to assist the department.

CC. "Technical assistance" means guidance provided by department staff in the development, revision, amendment, or processing of a potential or current sponsor's standards of apprenticeship, apprenticeship agreements, or advice or consultation with a sponsor to further comply with this part or guidance from the OA to the department on how to remedy nonconformity with this part.

DD. "Transfer" means a shift of apprenticeship registration from one program to another or from one employer within a program to another employer within that same program, where there is agreement between the apprentice and the affected apprenticeship committees or program sponsors.

[11.2.3.7 NMAC – Rp, 11.2.3.7 NMAC, 1/30/2018]

11.2.3.8 DUTIES OF THE DEPARTMENT OF WORKFORCE SOLUTIONS:

A. Only the department may seek recognition by the OA as an agency which has been properly constituted under an acceptable law or executive order, and authorized by the OA to register and oversee apprenticeship programs and agreements for federal purposes.

B. The department shall:

(1) have authority to give final approval in all areas pertaining to the registration of apprenticeship programs and program standards;

(2) maintain a register and appropriate records of all apprentices and apprenticeship programs that have approval of the department;

(3) review the activities of apprenticeship programs;

(4) approve and keep record of registered apprentices and apprenticeship agreements;

(5) monitor apprenticeship programs, performance standards, and conduct quality assurance assessments and EEO compliance reviews;

(6) apply for recognition as a registration agency with the OA and maintain national requirements as determined in 29 CFR 29.13 for recognition as a registration agency; the department is subject to derecognition by the OA for failure to fulfill or operate inconformity with the requirements of CFR parts 29 and 30;

(7) serve as the registration agency for apprenticeship programs and apprentices;

(8) issue interim credentials to apprentices;

(9) issue certificates of completion to apprentices;

(10) coordinate linkages with the New Mexico workforce investment system;

(11) issue certifications;

(12) issue certificates of registration;

(13) be the highest authority within the division where complaint appeals can be sent.

[11.2.3.8 NMAC – Rp, 11.2.3.8 NMAC, 1/30/2018]

11.2.3.9 DUTIES OF THE DIRECTOR:

A. The director oversees the registration of apprenticeship programs, apprentices, and all activities associated with the department.

B. The director shall:

(1) encourage apprenticeship training through personal contact with individual employers and labor organizations;

(2) act as liaison and shall coordinate, and cooperate with other state and federal agencies;

(3) assist in the preparation of standards of apprenticeship for presentation to the SAC;

(4) protect the welfare of the apprentices;

(5) devise procedures and keep records and statistics;

(6) handle public relations pertaining to apprenticeship training for the purpose of public education;

(7) carry out the policies approved and assigned by the department;

(8) notify all apprenticeship program sponsors of new or changed policy adopted by the SAA; and

(9) coordinate the activities and objectives of the department and SAC with OA staff assigned to New Mexico.

[11.2.3.9 NMAC – Rp, 11.2.3.9 NMAC, 1/30/2018]

11.2.3.10 ORGANIZATION OF SAC:

The SAC provides advice and guidance to the department on the operation of the state’s apprenticeship system.

A. The SAC shall consist of three persons known to represent employers, three persons known to represent labor organizations, and three public representatives, appointed by the cabinet secretary of workforce solutions. Persons appointed to the council shall be familiar with apprenticeable occupations.

B. The secretary of workforce solutions and the secretary of public education, or their designees, shall be ex-officio, non-voting members of the SAC.

C. SAC members shall be appointed as provided for in Section 50-7-3 NMSA, 1978. If a SAC member misses two consecutive meetings, unless for just cause beyond the member's control, the SAC shall recommend to the department that such member be replaced by a person who represents the same interest group.

D. Officers of the SAC shall consist of a chairman and a vice-chairman. These officers will be elected annually at the third quarter regular meeting and shall assume office immediately upon election. The chairman and vice-chairman shall not be selected from the same interest group and shall not be eligible to succeed themselves. A former chairman or vice-chairman may be elected to the same office after having been out of that office for one year.

E. The director shall serve as executive secretary and as an ex-officio, non-voting member of the SAC and as an ex-officio non-voting member of any committees created pursuant to Subsection E of 11.2.3.10 NMAC.

F. Committees may be appointed by the SAC chairman to study, research, and make recommendations to the SAC on such matters as may be deemed to be appropriate by the SAC. Membership of such committees may be composed of SAC members, other interested persons, or a combination of SAC members and non-members.

[11.2.3.10 NMAC – Rp, 11.2.3.10 NMAC, 1/30/2018; A, 7/31/2023]

11.2.3.11 DUTIES OF SAC:

The SAC shall:

A. work to effectively encourage the development of, and assist in the establishment of, voluntary apprenticeship training opportunities for eligible persons;

B. review all applications for the registration of an apprenticeship program, revisions to an existing apprenticeship program, and other aspects of apprenticeship and provide a final recommendation to the department for final action on any such application; and

C. work in cooperation with the department to review the activities of all registered apprenticeship programs and all registered apprentices.

[11.2.3.11 NMAC – Rp, 11.2.3.11 NMAC, 1/30/2018]

11.2.3.12 MEETINGS OF SAC:

A. Regular meetings shall be held quarterly on the third Thursday of the second month of each quarter, unless otherwise rescheduled within each quarter by the chairman.

B. Meetings may be scheduled in any city, town, or village of the state.

C. During a regular meeting at least once each year, the SAC shall adopt an annual resolution stating its procedure for giving reasonable public notice of regular and special meetings pursuant to the requirements of the state Open Meetings Act.

D. Meetings may be requested by the chairman, or in the chairman's absence, by the vice-chairman, or on petition by any three members of the SAC. The department may also request a meeting.

E. Five members of the SAC shall constitute a quorum, provided at least one member representing employers and one member representing labor, and one public member are present.

F. Voting shall be limited to the members present at the SAC meeting. The chairman may vote on all questions and issues, or may choose to vote only in the case of a tie.

G. All meetings shall be open to all interested parties and to the public, except that meetings may be closed to the public as provided for in the state Open Meetings Act.

[11.2.3.12 NMAC – Rp, 11.2.3.12 NMAC, 1/30/2018]

11.2.3.13 PARLIAMENTARY PROCEDURE AND ORDER OF BUSINESS:

A. Roberts Rules of Order, revised, shall govern the proceedings of the SAC, unless otherwise specified in this manual.

B. The order of business for all meetings of the SAC and its committees shall be:

(1) approval of minutes for previous meeting;

(2) communications;

(3) reports of:

(a) SAC members;

(b) committees;

(c) consultants;

(d) director of apprenticeship;

(4) unfinished business;

(5) new business;

(6) persons wishing to be heard by the SAC;

(7) election of officers;

(8) adjourn.

C. The chairman shall permit public comment after presentations made during the unfinished business and new business sections of the meeting prior to any SAC vote.

[11.2.3.13 NMAC – Rp, 11.2.3.13 NMAC, 1/30/2018; A, 1/12/2021]

11.2.3.14 FORMULATION OF POLICY:

The SAC advises on general policies, principles, and standards under which the department operates. The department interprets, and enforces these policies, principles and standards. SAC advises the areas of emphasis to be placed on apprenticeship activities; represents the point of view of employers and labor and the public in respect to major state problems in apprenticeship; serves as a liaison with employers and labor, and in this capacity helps to promote apprenticeship by participation in conferences and meetings.

[11.2.3.14 NMAC – Rp, 11.2.3.214 NMAC, 1/30/2018]

11.2.3.15 U.S. DEPARTMENT OF LABOR, OFFICE OF APPRENTICESHIP:

General policy: It shall be the responsibility of the director to coordinate the activities and objectives of the department with staff of the OA assigned to New Mexico. Mutual understanding and good faith on part of the state and federal agencies is essential to the advancement of parallel interest of the state and federal governments.

[11.2.3.15 NMAC – Rp, 11.2.3.15 NMAC, 1/30/2018]

11.2.3.16 NATIONAL STANDARDS AND POLICY STATEMENTS OF APPRENTICESHIP:

General policy: It is basic department policy to cooperate in promoting the development of joint national standards of apprenticeship agreed upon by the appropriate national organizations concerned. When national standards for various reasons cannot be obtained, national policy statements by employer or employee organizations which observe the fundamentals of apprenticeship are recognized as guides by the SAA in the

promotion of apprenticeship among the members of the organizations which formulate the policy.

[11.2.3.16 NMAC – Rp, 11.2.3.16 NMAC, 1/30/2018]

11.2.3.17 APPRENTICESHIP PROGRAMS:

The terms and conditions of an apprenticeship program must be in written form so that all parties concerned may be informed of its provisions, and so it can be used in the training operations and the administration of the program. Apprenticeship programs are defined by the department based upon guidance from the United States department of labor, OA

[11.2.3.17 NMAC – Rp, 11.2.3.17 NMAC, 1/30/2018]

11.2.3.18 RELATIONSHIP TO BARGAINING AGREEMENTS:

A. General policy: Because a bargaining agreement is a legal contract between the parties who sign it, its terms and conditions with respect to the employment and training of apprentices are to be fully respected. Any changes from the terms in the bargaining agreement advocated in connection with apprenticeship must be made in conformance with the recognized procedures for amending the bargaining agreement.

B. Apprenticeship provisions in bargaining agreements: It is preferable that apprenticeship programs be developed separately from the bargaining agreement to focus greater attention to apprenticeship. Where the parties to the agreement so desire, it is recommended that a clause be inserted in the agreement authorizing the establishment of an apprenticeship program, (or recognizing a program in existence), to conform to the fundamentals or standards of the department.

C. To be eligible for registration: Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or no objection to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association must simultaneously furnish to an existing union, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The department must provide for receipt of union comments, if any, within 45 days before final action on the application for registration and approval.

[11.2.3.18 NMAC – Rp, 11.2.3.18 NMAC, 1/30/2018]

11.2.3.19 EMPLOYEE-EMPLOYER COOPERATION:

General policy: Cooperation between an employer and his skilled employees is essential for the proper training of the apprentice. The employer provides employment for the apprentices. The skilled employees impart their skills and knowledge to the apprentice.

[11.2.3.19 NMAC – Rp, 11.2.3.19 NMAC, 1/30/2018]

11.2.3.20 METHOD OF RECOGNITION:

A. General policy: Recognition is a means of publicly acknowledging apprenticeship programs that are considered to have met the fundamentals of apprenticeship. Recognition may be accorded to New Mexico apprenticeship programs by the department, by registration, when they have met the fundamentals of apprenticeship, and as detailed below. The director of apprenticeship shall notify programs of registration or denial, with the stated reason of denial within five working days of said action.

B. Eligibility and procedure for registration of an apprenticeship program:

(1) Eligibility for registration of an apprenticeship program is conditioned upon a program's conformity with the apprenticeship program standards published in this part. For a program to be determined by the department as being in conformity with these published standards, the program must apply for registration and be registered with the department. The determination that the program meets the apprenticeship program standards is effectuated only through such registration.

(2) Only an apprenticeship program or agreement that meets the following criteria is eligible for department registration:

(a) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in 11.2.3.22 NMAC and

(b) it is in conformity with the requirements of the equal employment opportunity in apprenticeship state plan, 11.2.2 NMAC.

(3) Except as provided under Paragraph (4) of this subsection, apprentices must be individually registered under a registered program. Such individual registration may be accomplished by filing copies of each individual apprenticeship agreement with the department:

(a) by filing copies of each individual apprenticeship agreement with the department or;

(b) subject to prior department approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual when apprenticed.

(4) The names of persons in probationary employment as an apprentice under an apprenticeship program registered by the department, if not individually registered under such program, must be submitted within 45 days of employment to the department for certification to establish the apprentice as eligible for such probationary employment.

(5) The department must be notified within 45 days of all individuals who have successfully completed apprenticeship programs. The department must also be notified and provided a statement of the reasons within 45 days of all apprentice actions [ie: registrations, holds, advancements, cancellations, completions, or transfers].

(6) Operating apprenticeship programs when approved by the department are accorded registration by a certificate of registration or other written indicia.

(7) Applications for new programs that the department determines meet the required standards for program registration shall be given provisional approval for a period of one year. The department must review all new programs for quality and for conformity with the requirements of this part at the end of the first year after registration and make a determination that:

(a) a program that conforms with the requirements of this part shall be made permanent or shall continue to be provisionally approved through the first full training cycle;

(b) a program that is not in operation or does not conform to the regulations during the provisional approval period shall be recommended for deregistration procedures.

(8) The department shall review all programs for quality and for conformity with the requirements of 11.2.3 NMAC at the end of the first full training cycle. A satisfactory review of a provisionally approved program shall result in conversion of provisional approval to permanent registration. Subsequent reviews shall be conducted no less frequently than every five years. Programs that are not in operation or not conforming to the regulations shall be recommended for deregistration procedures.

(9) Any sponsor proposals or applications for modification(s) or change(s) to registered programs must be submitted to the department. The registration agency must make a determination on whether to approve such submissions within 90 days from the date of receipt. If approved, the modification(s) or change(s) will be recorded and acknowledged within 90 days of approval as an amendment to such program. If not approved, the sponsor shall be notified of the reasons for the disapproval and provided the appropriate technical assistance.

(10) Under a program proposed for registration by an employer or employers' association, where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive

matters of the apprenticeship program, and such participation is exercised, written acknowledgement of the union agreement or no objection to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to an existing union, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The department shall provide for receipt of union comments, if any, within 45 days before final action on the application for registration and approval.

(11) Where the employees to be trained have no collective bargaining agreement, an apprenticeship program may be proposed for registration by an employer or group of employers, or an employers' association.

C. Reciprocity of multi-state and out-of-state programs: The department will cooperate with the United States department of labor, OA, in the recognition of multi-state or out-of-state programs registered by OA. The department shall grant reciprocal approval for federal purposes to apprentices, apprenticeship programs, and standards that are registered in other states by the OA or another SAA if such reciprocity is requested by the apprenticeship program sponsor. Program sponsors seeking reciprocal approval must meet the wage and hour provisions and apprentice ratio standards of the reciprocal state.

[11.2.3.20 NMAC – Rp, 11.2.3.20 NMAC, 1/30/2018]

11.2.3.21 REVIEW OF PROGRAMS PERFORMANCE STANDARDS:

A. General policy: In order to carry out the provisions of the New Mexico State Apprenticeship Act with regard to safeguarding the welfare of the apprentice, the program provisions under which the apprentice is to be employed should be reviewed for their consistency with current apprenticeship fundamentals and recognized apprenticeship policies and practices of industry.

B. Every registered apprenticeship program shall have at least one registered apprentice, except for the following specified periods of time, which may not exceed one year:

(1) between the date when a program is registered and the date of registration for its first apprentice(s); or

(2) between the date that a program graduates an apprentice and the date of registration for the next apprentice(s) in the program.

C. The department shall evaluate performance of registered apprenticeship programs. The tools and factors to be used shall include, but are not limited to: quality assurance assessments, equal employment opportunity (EEO) compliance reviews, and

completion rates. Any additional tools and factors used by the department in evaluating program performance must adhere to the goals and policies of the department.

D. In order to evaluate completion rates, the department shall review a program's completion rates in comparison to the national average for completion rates. Based on the review, the department shall provide technical assistance to programs with completion rates lower than the national average. Cancellation of apprenticeship agreements during the probationary period will not have an adverse impact on a sponsor's completion rate.

[11.2.3.21 NMAC – Rp, 11.2.3.21 NMAC, 1/30/2018]

11.2.3.22 CRITERIA FOR APPRENTICEABLE OCCUPATIONS:

Criteria for apprenticeable occupations: An industry specific occupation, in order to be recognized as apprenticeable by the department, must possess all the following characteristics:

A. it involves skills that are customarily learned in a practical way through a structured, systematic program of on-the-job supervised learning;

B. it is clearly identified and commonly recognized throughout an industry;

C. it involves the progressive attainment of manual, mechanical, or technical skills and knowledge which, in accordance with the industry standard for the occupation, would require the completion of a minimum of 2,000 hours of on-the job learning; and

D. it requires of the completion of related instruction to supplement the on-the-job learning.

[11.2.3.22 NMAC – Rp, 11.2.3.22 NMAC, 1/30/2018]

11.2.3.23 STANDARDS OF APPRENTICESHIP:

A. General policy: It is the objective of the department and the SAC to encourage the development and continuance of apprenticeship programs adequate to produce qualified skilled workers. Labor and employers will be encouraged to jointly develop adequate standards of apprenticeship, and it is the policy of the department and SAC to render any assistance needed by these groups in the development of such standards. Apprenticeship program sponsors shall submit their standards to the department for registration. After registration, the sponsor shall provide the director of apprenticeship with such documentation as may be requested concerning the operation of the program.

B. Development of standards: In order to promote good apprenticeship policies and procedures each apprenticeship program sponsor, who desires registration by the department, shall formulate, adopt, and submit to the department for review a set of

apprenticeship standards. The purpose of these standards is to provide rules for the operation of the apprenticeship program. An apprenticeship program, to be eligible for registration by the department shall conform to the following standards:

(1) The program shall have an organized, written plan (program standards) embodying the terms and conditions of employment, related instruction, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(2) The program standards shall contain provisions that address:

(a) the employment and training of the apprentice in a skilled occupation;

(b) the term of apprenticeship, which for an individual apprentice may be measured either through the completion of the industry standard for on-the-job learning (at least 2,000 hours) (time-based approach), the attainment of competency (competency-based approach), or a blend of the time-based and competency-based approaches (hybrid approach);

(i) the time-based approach measures skill acquisition through the individual apprentice's completion of at least 2,000 hours of on-the-job learning as described in a work process schedule;

(ii) the competency-based approach measures skill acquisition through the individual apprentice's successful demonstration of acquired skills and knowledge, as verified by the program sponsor; programs utilizing this approach shall still require apprentices to complete an on-the-job learning component of registered apprenticeship; the program standards shall address how on-the-job learning will be integrated into the program, describe competencies, and identify an appropriate means of testing and evaluation for such competencies;

(iii) the hybrid approach measures the individual apprentice's skill acquisition through a combination of specified minimum number of hours of on-the-job learning and the successful demonstration of competency as described in a work process schedule;

(c) the determination of the appropriate approach for the program standards is made by the program sponsor, subject to approval by the department of the determination as appropriate to the apprenticeable occupation for which the program standards are registered;

(d) an outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate amount of time to be spent in each major process;

(e) provisions or organized related and supplemental instruction in technical subjects related to the trade; a minimum of 144 hours for each year of apprenticeship is recommended. This instruction in technical subjects may be accomplished through media such as classroom, occupational or industry courses, electronic media, or other instruction approved by the department

(f) every apprenticeship instructor shall:

(i) meet the state department of education's requirements for a vocational-technical instructor in the state of registration, or be a subject matter expert, which is an individual, such as a journeyworker, who is recognized within an industry as having expertise in a specific occupation; and

(ii) have training in teaching techniques and adult learning styles, which may occur before or after the apprenticeship instructor has started to provide the related technical instruction;

(g) a progressively increasing schedule of wages to be paid to the apprentice consistent with the skill acquired; the entry wage shall not be less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable federal law, state law, respective regulations, or by collective bargaining agreement;

(h) periodic review and evaluation of the apprentice's performance on the job and in related instruction; and the maintenance of appropriate progress records;

(i) a numeric ratio of apprentices to journeyworkers consistent with established industry practices, proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements except where such ratios are expressly prohibited by the collective bargaining agreements; the ratio language shall be specific and clearly described as to its application to the job site, workforce, department or plant;

(j) a probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship; the probationary period cannot exceed twenty-five percent of the length of the program, or one year, whichever is shorter;

(k) adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(l) the minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years;

(m) the placement of an apprentice under a written apprenticeship agreement that meets the requirements of 11.2.3.27 NMAC; the agreement shall

directly, or by reference, incorporate the standards of the program as part of the agreement;

(n) the granting of advanced standing or credit for previously acquired experience, training or skills for all applicants equally with commensurate wages for any progression step so granted; all credit, which is to be granted, shall be reported to the office of the department in accordance with adopted procedures and guidelines;

(o) the transfer of an apprentice between apprenticeship programs and within an apprenticeship program shall be based on agreement between the apprentice and the affected apprenticeship committees or program sponsors, and shall comply with the following requirements:

(i) the transferring apprentice shall be provided a transcript of related instruction and on-the-job learning by the committee or program sponsor;

(ii) transfer shall be to the same occupation; and

(iii) a new apprenticeship agreement shall be executed when the transfer occurs between program sponsors;

(p) assurance of qualified training personnel and adequate supervision on the job;

(q) recognition for successful completion of apprenticeship evidenced by an appropriate certificate issued by the department;

(r) program standards that utilize the competency-based or hybrid approach for progression through an apprenticeship and that choose to issue interim credentials shall clearly identify the interim credentials, demonstrate how these credentials link to the components of the apprenticeable occupation, and establish the process for assessing an individual apprentice's demonstration of competency associated with the particular interim credential; further, interim credentials shall only be issued for recognized components of an apprenticeable occupation, thereby linking interim credentials specifically to the knowledge, skills, and abilities associated with those components of the apprenticeable occupation;

(s) identification of the department;

(t) provision for the registration, cancellation and deregistration of the program; and for the prompt submission of any program standard modification or amendment to the department for approval;

(u) provision for the registration of apprenticeship agreements, modifications, and amendments; notice to the SAA of persons who have successfully completed

apprenticeship programs; and notice of transfers, suspensions, and cancellations of apprenticeship agreements and a statement of the reasons therefore;

(v) authority for the cancellation of an apprenticeship agreement during the probationary period by either party without stated cause; cancellation during the probationary period will not have an adverse impact on the sponsor's completion rate;

(w)a statement that the program will be conducted, operated, and administered in conformity with applicable provisions of 11.2.2 NMAC equal opportunity in apprenticeship state plan;

(x) contact information (name, address, telephone number, and e-mail address if appropriate) for the appropriate individual with authority under the program to receive, process and make disposition of complaints;

(y) recording and maintenance of all records concerning apprenticeship as may be required by the OA or the department and other applicable law;

(z) all standards registered with the department shall contain a provision which states that the director or his or her designee shall be an ex-officio member, without vote, of any committee which functions to administer the apprenticeship program;

(aa) provision which clearly states that the director or his or her designee shall have the right to visit all job sites where apprentices may be employed, and apprentice related instruction classes, in order to determine compliance with apprenticeship standards; and

(bb) a written assurance that the sponsor is: 1) aware of the availability of Title 38 educational assistance for veterans and other eligible individuals; 2) will make a good faith effort to obtain approval for such educational assistance for each program location that recruits or employs a veteran or other eligible individual; and 3) will not deny the application of a qualified apprenticeship applicant who is a veteran or other individual qualified for Title 38 educational benefits for the purpose of avoiding making a good faith effort to obtain approval for such benefits.

[11.2.3.23 NMAC – Rp, 11.2.3.23 NMAC, 1/30/2018; A, 1/12/2021]

11.2.3.24 WORK PROCESSES:

A. General policy: An apprenticeship program should contain a sufficiently broad schedule of work processes for the acquirement of reasonable competency in the trade.

B. Development of work processes: Work process schedules should be developed by those responsible for the training of apprentices and in sufficient detail to serve as an outline of the basic elements of the trade to be learned.

[11.2.3.24 NMAC – Rp, 11.2.3.24 NMAC, 1/30/2018]

11.2.3.25 APPRENTICE WAGES:

A. General policy: Wages for apprentices should be calculated so that training, rather than production, is the principal criterion.

B. Apprentice wages under bargaining agreement: Wage rates established for the apprentice under a bargaining agreement shall be recognized.

C. Beginning apprentice rates: The beginning apprentice rates shall equal or exceed those customarily paid to other beginning apprentices in the trade in the locality.

D. Expressing wage rates: Apprentice wage rates may be expressed in terms of cents per hour but preferably in percentages of the journeyworker's rate. The journeyworker's hourly rate as of the effective date of the program shall be reported when submitting programs for review and registration. Where the journeyworker's rate is shown as a weekly or monthly wage, the standard work week hours also shall be shown.

E. Coverage under state and federal wage and hour acts: If sponsors of apprenticeship programs are uncertain as to their coverage under state and federal wage and hour acts and they propose to set up rate schedules under which the apprentice would be paid less than the minimum wages established by these acts, they should be advised to check with their attorney, or with the state or federal agency responsible for the administration of these acts.

[11.2.3.25 NMAC – Rp, 11.2.3.25 NMAC, 1/30/2018]

11.2.3.26 CERTIFICATE OF COMPLETION OF APPRENTICESHIP:

A. General policy: It is the policy to emphasize the significance of the apprentice completion certificate issued by the department.

B. Authentication of requests for completion certificates: A certificate of completion of apprenticeship will be issued to apprentices upon receipt of an electronic request from the appropriate program sponsor. The department shall have in its files some specific evidence that the program sponsor has requested a certificate for the apprentice.

[11.2.3.26 NMAC – Rp, 11.2.3.26 NMAC, 1/30/2018]

11.2.3.27 APPRENTICE AGREEMENT:

General policy: The terms and conditions of employment and training of each apprentice shall be stated in a written apprenticeship agreement. The agreement shall contain explicitly or by reference:

A. names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and the signature of a parent or guardian if the apprentice is a minor;

B. the date of birth and social security number of the apprentice;

C. contact information of the program sponsor and the department;

D. a statement of the occupation in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship;

E. a statement showing:

(1) the number of hours to be spent by the apprentice in work on the job in a time-based program; or a description of the skill sets to be attained by completion of a competency-based program, including the on-the-job learning component; or the minimum number of hours to be spent by the apprentice and a description of the skill sets to be attained by completion of hybrid program; and

(2) the number of hours to be spent in related instruction in technical subjects related to the occupation, which is recommended not be less than 144 hours per year;

F. a statement setting forth a schedule of the work processes in the occupation or industry division in which the apprentice is to be trained and the approximate time to be spent at each process;

G. a statement setting forth a schedule of the graduated scale of wages to be paid to the apprentice and whether or not the required related instruction is compensated;

H. statements providing:

(1) for a specific period of probation during which the apprenticeship agreement may be cancelled by either party to the agreement upon written notice to the department, without adverse impact on the sponsor;

(2) that, after the probationary period, the agreement may be:

(a) cancelled at the request of the apprentice, or

(b) suspended or cancelled by the sponsor, for good cause, with due notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the department of the final action taken;

I. a reference incorporating as part of the agreement the standards of the apprenticeship program as they exist on the date of the agreement and as they exist on the date of the agreement and as they may be amended during the period of the agreement;

J. a statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex;

K. contact information (name, address, phone, and email if appropriate) of the appropriate authority designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established procedure or applicable collective bargaining provisions.

[11.2.3.27 NMAC – Rp, 11.2.3.27 NMAC, 1/30/2018]

11.2.3.28 PROGRAM COMPLIANCE AND DEREGISTRATION PROCEEDINGS:

A. Operation according to approved standards: After a program sponsor has registered the program's standards with the department, the program shall operate in accordance with these standards. Should an operating procedure be desired that is not in accordance with the existing approved standards, the program sponsor is required to submit a proposal pursuant to the procedures set forth in Section B of 11.2.3.23 NMAC.

B. Programs not in compliance with department policies: Should a program sponsor not comply with these policies and procedures, the SAA shall take appropriate action. Deregistration of the program shall be used after reasonable efforts to gain compliance have failed.

C. Deregistration of an apprenticeship program: Deregistration of a program may be effected upon the voluntary action of the sponsor by submitting a request for cancellation of the registration in accordance with Paragraph (1) of this subsection or upon reasonable cause, by the department instituting formal deregistration proceedings in accordance with Paragraph (2) of this subsection.

(1) Deregistration at the request of the sponsor: The department may cancel the registration of an apprenticeship program by written acknowledgment of such request stating the following:

(a) the registration is cancelled at the sponsor's request and effective date thereof;

(b) that, within 15 days of the date of the acknowledgment, the sponsor shall notify all apprentices of such cancellation and the effective date; that such cancellation

automatically deprives the apprentice of individual registration; that the deregistration of the program removes the apprentice from coverage for federal purposes which require the secretary of labor's approval of an apprenticeship program, and that all apprentices are referred to the department for information about potential transfer to other registered apprenticeship programs.

(2) Deregistration by the department upon reasonable cause:

(a) Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, or administered in accordance with the program's registered standards or with the requirements of this part, including but not limited to: failure to provide on-the-job learning; failure to provide related instruction; failure to pay the apprentice a progressively increasing schedule of wages consistent with the apprentices skills acquired; or persistent and significant failure to perform successfully. Deregistration proceedings for violation of equal opportunity requirements must be processed in accordance with the provisions under 11.2.2 NMAC equal employment opportunity in apprenticeship state plan.

(b) For purposes of this section, persistent and significant failure to perform successfully occurs when a program sponsor consistently fails to register at least one apprentice, shows a pattern of poor quality assessment results over a period of several years, demonstrates an ongoing pattern of very low completion rates over a period of several years, or shows no indication of improvement in the areas identified by the SAA during a review process as requiring corrective action.

(c) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the department must notify the program sponsor in writing.

(d) The notice sent to the program sponsor's contact person must:

(i) be sent by registered or certified mail, with return receipt requested;

(ii) state the shortcoming(s) and the remedy required; and

(iii) state that a determination of reasonable cause for deregistration will be made unless corrective action is effected within 30 days.

(e) Upon request by the sponsor for good cause, the 30-day term may be extended for another 30 days; during the period for corrective action, the department must assist the sponsor in every reasonable way to achieve conformity.

(f) If the required correction is not effected within the allotted time, the department must send a notice to the sponsor, by registered or certified mail, return requested, stating the following:

(i) the notice is sent under this paragraph;

(ii) certain deficiencies were called to the sponsor's attention (enumerating them and the remedial measures requested, with the dates of such occasions and letters), and the sponsor has failed or refused to take corrective action; and

(iii) based upon the stated deficiencies and failure to remedy them, a determination has been made that there is reasonable cause to deregister the program and the program may be deregistered unless, within 15 days of the receipt of this notice, the sponsor requests a hearing with the department;

(g) If the sponsor does not request a hearing, the department will deregister the program.

(h) If the sponsor requests a hearing, the department will transmit to the administrator a report containing all pertinent facts and circumstances concerning the noncomformity, including the findings and recommendations for deregistration, and copies of all relevant documents and records. Statements concerning interviews, meetings, and conferences will include the time, date, place and persons present, and the administrator will refer the matter to the office of administrative law judges. An administrative law judge will convene a hearing in accordance with Subsection D of this section.

(i) Every order of deregistration must contain a provision that the sponsor must, within 15 days of the effective date of the order, notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice of individual registration; that the deregistration removes the apprentice from coverage for federal purposes which require the secretary of labor's approval of an apprenticeship program; and that all apprentices are referred to the department for information about potential transfer to other registered apprenticeship programs.

D. Hearings for deregistration:

(1) Within 10 days of receipt of a request for a hearing, the administrator of the OA shall contact the department's office of administrative law judges to request the designation of the administrative law judge to preside over the hearing. The administrative law judge shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor. Such notice will include:

(a) a reasonable time and place of hearing;

(b) a statement of the provisions of 11.2.3.28 NMAC pursuant to which the hearing is to be held; and

(c) a concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(2) The procedures contained in 29 CFR 18 will apply to the disposition of the request for hearing except that:

(a) the administrative law judge will receive, and make part of the record, documentary evidence offered by any party and accepted at the hearing; copies thereof will be made available by the party submitting the documentary evidence to any party to the hearing upon request;

(b) technical rules of evidence will not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination will be applied, where reasonably necessary, by the administrative law judge conducting the hearing; the administrative law judge may exclude irrelevant, immaterial, or unduly repetitious evidence.

(3) The administrative law judge should issue a written decision within 90 days of the close of the hearing record. The administrative law judge's decision constitutes final agency action unless, within 15 days from receipt of the decision, a party dissatisfied with the decision files a petition for review with the administrative review board, specifically identifying the procedure, fact, law or policy to which exception is taken. Any exception not specifically urged is deemed to have been waived. A copy of the petition for review shall be sent to the opposing party at the same time. Thereafter, the decision of the administrative law judge remains final agency action unless the administrative review board, within 30 days of the filing of the petition for review, notifies the parties that it has accepted the case for review. The administrative review board may set a briefing schedule or decide the matter on the record. The administrative review board shall decide any case it accepts for review within 180 days of the close of the record. If not so decided, the administrative law judge's decision constitutes final agency action.

E. Reinstatement of program registration: Any apprenticeship program deregistered under Subsection C of 11.2.3.26 NMAC may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence shall be presented to the SAC for recommendation to the department for reinstatement.

F. Limitations: Nothing in this part or in any apprenticeship agreement shall operate to invalidate:

(1) any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(2) any special provision for veterans, minority persons, or women in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, executive order, or authorized regulation.

[11.2.3.28 NMAC – Rp, 11.2.3.28 NMAC, 1/30/2018]

11.2.3.29 ENERGY TRANSITION ACT COMPLIANCE:

A. The construction of New Mexico facilities that generate electricity for New Mexico retail customers, and that are not located on the customer side of an electricity meter, shall be subject to the requirements of Subsection B of Section 62-13-16 NMSA 1978 if the facilities are built as a result of competitive solicitations.

B. Subject to availability of qualified applicants, the construction of facilities that generate electricity for New Mexico retail customers shall employ apprentices from an apprenticeship program registered with the department during the construction phase of a project at a minimum level as outlined in Subsection B of 62-13-16 NMSA 1978 for all persons employed for the project.

(1) A "project" for the purposes of this Section means any construction of a facility that generates electricity or transmits electricity for New Mexico retail customers.

(2) The number of apprentices required applies to each occupation or trade performing services during the project.

(3) For projects commencing after January 1, 2020 but before January 1, 2024, apprentices should comprise 10 percent of all persons employed for the project.

(4) For projects commencing after January 1, 2024 but before January 1, 2026, apprentices should comprise 17.5 percent of all persons employed for the project.

(5) For projects commencing after January 1, 2026, apprentices should comprise 25 percent of all persons employed for the project.

C. The department shall be responsible for monitoring the project for the appropriate level of apprentices on the project and ensuring compliance.

(1) Upon receiving a notice to proceed from the Public Regulation Commission (PRC) for construction of such a project, the general contractor shall submit a compliance plan including a list of subcontractors of any tier that will meet the required number of apprentices to the department.

(2) Every 90 days from the date of the initial plan, the general contractor shall submit an updated compliance plan.

(3) Contractors shall provide documentation demonstrating compliance within 10 days of a request for records from the department.

(4) Failure of a contractor to comply with the requirement for utilizing the required apprenticeship percentage will result in a referral to the PRC advising the Commission that the project is not in compliance with the provisions of the Energy Transition Act.

D. The department will continue to encourage diversity among apprenticeship program participants, participation by the underrepresented in the industry associated with that apprenticeship program and participation from disadvantaged communities.

[11.2.3.29 NMAC – N, 1/1/2020; A, 7/31/2023; A, 6/25/2024]

11.2.3.30 UNEMPLOYMENT ELIGIBILITY:

A. Apprentices participating in an approved apprenticeship program registered with the apprenticeship office through the department of workforce solutions who are required to attend unpaid training sessions during weeks in which they are not otherwise receiving compensation may be eligible to receive unemployment benefits for the training weeks under 51-1-1 *et seq*. NMSA as long as all other unemployment eligibility requirements are met.

B. During the week in which an apprentice is eligible for unemployment benefits though this provision, the work search requirements will be waived since the apprentice will have a predetermined return to work date established though their apprentice program.

[11.2.3.30 NMAC – N, 1/12/2021]

PART 4: WORKFORCE INNOVATION AND OPPORTUNITY ACT LOCAL GOVERNANCE

11.2.4.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS).

[11.2.4.1 NMAC - N, 7/1/2018]

11.2.4.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients and workforce system partners.

[11.2.4.2 NMAC - N, 7/1/2018]

11.2.4.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. Chapter 32, Subchapter I, and NMSA 1978, Section 50-14-1 *et seq.*

[11.2.4.3 NMAC - N, 7/1/2018]

11.2.4.4 DURATION:

Permanent.

[11.2.4.4 NMAC - N, 7/1/2018]

11.2.4.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.4.5 NMAC - N, 7/1/2018]

11.2.4.6 OBJECTIVE:

This policy outlines the local guidance structure in New Mexico as required by WIOA, to administer the implementation of workforce development activities in the local areas. This policy also provides guidance on the appointment of local boards and outlines the roles, responsibilities, and authority of the CEOs and the local boards in regard to the local workforce system.

[11.2.4.6 NMAC - N, 7/1/2018]

11.2.4.7 DEFINITIONS:

A. Chief elected official (CEO) is the chief elected executive officer of a unit of general local government in a local area. CEOs shall consist of one county commissioner from each county located in the area. In a case in which a local area includes more than one unit of general local government, the points of contact shall only be the recognized CEOs for each county located in that area.

B. Chief Lead Elected Official (CLEO) is the individual selected by the participating chief elected officials who may act on behalf of the other chief elected officials in a given local workforce development area (local area).

C. Local administrative entity means the entity designated by the local board for the administration of WIOA in the local area.

D. Local area means a workforce development area assigned to a region by the governor for the administration of workforce development activities; and the area within which local boards oversee their functions.

E. Local board grant agreement means the grant agreement between the recipient of WIOA funding (DWS), and the sub-recipient of WIOA funding (local board), to fund and direct the administration of WIOA in the local area.

F. Local workforce development board (state local board) means the state workforce development board established by the governor under WIOA section 107.

G. One-stop delivery system means a one-stop delivery system, as described in WIOA section 121.

H. One-stop operator means a public, private, or nonprofit entity, or a consortium of entities designated or certified under WIOA section 121.

I. One-stop partner means an entity described in WIOA section 121 that is participating in the operation of a one-stop delivery system.

J. State workforce development board (state board) means the state workforce development board established by the governor under WIOA section 101.

K. Technical assistance guidance means technical advisories issued by state or federal government authorities to aid in the implementation of WIOA.

L. Unit of general local government means any general purpose political subdivision of a state that has the power to levy taxes and spend funds, as well as general corporate and police powers.

M. Workforce connection center means a physical one-stop center within the one-stop delivery system, as described in WIOA section 121, and partner of the American job center network.

N. Workforce solutions department means the state administrative agency designated by the governor for the administration of WIOA in New Mexico, commonly referred to as the department of workforce solutions (DWS). DWS is also the agency designated by the governor as the pass-through entity for WIOA funding.

[11.2.4.7 NMAC - N, 7/1/2018; A, 6/22/2021]

11.2.4.8 BACKGROUND:

The purpose of WIOA Title I includes:

A. Increasing access to, and opportunities for, individuals to receive the employment, education, training, and support services necessary to succeed in the labor market, with a particular focus on those individuals with disabilities or other barriers to employment including out of school youth with the goal of improving their outcomes;

B. Enhancing the strategic role for states and elected officials, and local boards in the public workforce system by increasing flexibility to tailor services to meet employer and worker needs at state, regional and local levels;

C. Streamlining service delivery across multiple programs by requiring co-location, coordination, and integration of activities and information to make the system understandable and accessible for individuals, including individuals with disabilities and those with other barriers to employment, and businesses;

D. Supporting the alignment of the workforce investment, education, and economic development systems in support of a comprehensive, accessible, and high-quality workforce development system at the federal, state, and local levels;

E. Improving the quality and labor market relevance of workforce investment, education, and economic development efforts by promoting the use of industry and sector partnerships, career pathways, and regional service delivery strategies in order to both provide America's workers with the skills and credentials that will enable them to secure and advance in employment with family-sustaining wages, and to provide America's employers with the skilled workers the employers need to succeed in a global economy;

F. Promoting accountability using core indicators of performance measured across all WIOA authorized programs, sanctions, and high quality evaluations to improve the structure and delivery of services through the workforce development system to address and improve the employment and skill needs or workers, job seekers, and employers;

G. Increasing the prosperity and economic growth of workers, employers, communities, regions, and states; and

H. Providing workforce development activities through statewide and local workforce development systems to increase employment, retention, and earnings of participants and to increase industry-recognized postsecondary credential attainment to improve the quality of the workforce, reduce welfare dependency, increase economic self-sufficiency, meet skill requirements of employers, and enhance productivity and competitiveness of the nation.

[11.2.4.8 NMAC - N, 7/1/2018]

11.2.4.9 SHARED LIABILITY AGREEMENT:

Per WIOA section 107, if a local area includes more than one unit of general local government, the CEOs of such units must execute a written agreement that specifies the respective roles and liability of the individual CEOs. If the CEOs are unable to reach agreement after reasonable effort, the governor may appoint the members of the local board from individuals nominated or recommended.

A. Required inclusions. CEOs must enter into an agreement with each other that, at a minimum, includes the following sections:

(1) Liability of funds. The agreement must acknowledge financial liability per WIOA section 107, and outline the process for determining each CEO's share of responsibility as laid out in the CEO agreement. This determination could be based on allocation, population, expenditures, and other criteria determined by the CEOs.

(2) Grant recipient and signatory. The agreement must acknowledge the CEOs are the grant recipient for all local WIOA funds or have designated grant recipient authority to the local board. If the CEOs will serve as the grant recipient, they must outline the process they will use to sign contracts and enter into agreements related to WIOA. This may be accomplished by designating signatory authority to a Chief Lead Elected Official (CLEO).

(3) Fiscal agent designation. To assist in the administration of the grant funds, the CEOs may designate an entity to serve as a local fiscal agent and describe the process for designating a local fiscal agent within the guidelines required by state and local procurement laws and policies.

(4) Local board budget approval. The agreement must describe the process for reviewing and approving the local board annual budget.

(5) Participating CEOs. The agreement must contain the name, representation, contact information, and signature of each participating CEO in the local area.

(6) Election of a new CEO. Within 90 days of when a new CEO is elected within the local area, either participating as a signatory on the agreement or as a participating CEO, the local board must ensure the individual submits to the local board a written statement acknowledging that he or she:

(a) has read, understands, and will comply with the current CEO agreement; and

(b) reserves the option to request negotiations to amend the CEO agreement at any time during the official's tenure as a CEO.

(c) Amendment or change to the CEO agreement. The agreement must outline the process that will be used for amendments or changes to the CEO

agreement. All amendments or changes must be maintained at the local administrative entity office and available for monitoring by DWS.

B. Recommended inclusions. To improve the coordination and functionality of the local workforce system, CEOs should also address the following items in their agreement:

(1) Designation of a CLEO. CEOs are liable for all WIOA funds in the local area and are required by WIOA to approve or provide guidance on a number of local board activities. DWS encourages CEOs to select a CLEO who will act on behalf of the other CEOs. If a CLEO is appointed, the following information must be sent to the local administrative entity and kept on file for review by DWS:

(a) appointment process and term of CLEO;

(b) designation of the CLEO to serve as the signatory for the CEOs;

(c) outline of decisions that may be made by the lead on behalf of the CEOs; and

(d) inclusion of the name, title, and contact information of the appointed CLEO.

(2) Local board member representation. The agreement should outline how CEOs will ensure local board representation is fair and equitable across the local area.

(3) Communication. The agreement should describe how the CEOs will communicate with each other regarding local board activities, determining how many times a year the CEOs will meet, and how often a joint meeting with the local board will be held. CEOs should meet at least once a year just as CEOs and once a year with the local board.

[11.2.4.9 NMAC - N, 7/1/2018; A, 6/22/2021]

11.2.4.10 CEO AND LOCAL BOARD PARNERSHIP AGREEMENT:

A. To ensure the criteria established by the state are acknowledged by both the CEOs and the members of the local board, a partnership agreement is required. The partnership agreement must establish roles and responsibilities of the CEOs and the local board along with a description of the partnership and specific responsibilities. The local board and CEOs must enter into a partnership agreement that at a minimum, addresses the following sections:

(1) describes the respective roles and responsibilities of the respective parties;

(2) acknowledged the authority of the CEOs to appoint the members of the local board in accordance with the criteria established under WIOA section 107, and in accordance with the required criteria in state technical assistance guidance;

(3) describes how the local plan will be developed in partnership between the CEOs and the local board;

(4) describes how the local board will develop the local area budget and the process for obtaining the CEO's approval, per WIOA section 107;

(5) establishes the guidelines that will be followed by the local board for selection of a one-stop operator, including the process for getting CEO agreement on the selection;

(6) describes the process for approving local workforce policy;

(7) describes the process for demonstrating the CEO agreement on the memoranda of understanding between workforce system partners and the board;

(8) describes the process for demonstrating agreement between the CEOs and the local board on the methods for funding the infrastructure costs of workforce connection centers in the local area;

(9) describes the process for demonstrating agreement between the CEOs and the local board on local performance indicators; and

(10) describes the process for demonstrating CEO agreement on the appropriate use of funds and oversight of adult, dislocated worker, and youth workforce development activities, and the entire one-stop delivery system in the local area; and the appropriate use, management, and investment of funds to maximize performance outcomes under WIOA section 116.

B. The partnership agreement must be signed by the current CEOs that have been identified as participating in the CEO agreement and by the local board chair at the time of signing.

C. Any amendment or change to the partnership agreement, notice of an election of a new CEO, or notice of an election of a new local board chair must be maintained at the local administrative entity office and available for monitoring by DWS. If a new CEO or local board chair is elected within the local area, the newly elected individual must submit to the local board a written statement acknowledging the following:

(1) the individual has read, understands, and will comply with the current partnership agreement; and

(2) the individual reserves the option to request negotiations to amend the partnership agreement at any time during the individual's tenure.

D. The partnership agreement should establish requirements for informing the CEOs on a regular basis regarding activities, performance outcomes, and budgets with at least one joint meeting held annually between the CEOs and the local board.

[11.2.4.10 NMAC - N, 7/1/2018]

11.2.4.11 LOCAL BOARD MEMBERSHIP:

The local board is appointed by the CEOs in each local area every two years. All members must be individuals with optimum policy-making authority within the entities they represent. An individual may be appointed as a representative of more than one entity if the individual meets all the criteria for representation; however, individuals representing more than one category must have the optimum policy-making authority within each of the entities they are representing. All required local board members must have voting privileges. The CEO may convey voting privileges to non-required members. The local board must elect a chairperson from among the business representatives on the local board.

A. Representatives of business. The majority (fifty-one percent) of the members of the local board must be representatives of business in the local area. At a minimum, two members must represent small business as defined by the US small business administration. Business representatives serving on local boards may also serve on the state board. Each business representative must meet the following criteria:

(1) be an owner, chief executive officer, chief operating officer, or other individual with optimum policymaking or hiring authority;

(2) provide employment opportunities in in-demand industry sectors or occupations, as those terms are defined in WIOA section 3, and provide high-quality, work-relevant training and development opportunities to its workforce or to the workforce of others; and

(3) are appointed from among individuals nominated by local business organizations and business trade associations.

B. Representatives of the workforce. Not less than twenty percent of the members of the local board must be workforce representatives. These representatives:

(1) must include two or more representatives of labor organizations, where such organizations exist in a local area. Where labor organizations do not exist, representatives must be selected from other employee representatives; and

(2) must include one or more representatives of a joint labor-management or union affiliated, registered apprenticeship program within the area who must be a training director or a member of a labor organization. If no union affiliated registered apprenticeship programs exist in the area, a representative of a registered apprenticeship program with no union affiliation must be appointed, if one exists.

(3) In addition to the above representatives, the board may also include the following to contribute to the twenty percent requirement:

(a) one or more representatives of community-based organizations that have demonstrated experience and expertise in addressing the employment training or education needs of individuals with barriers to employment including organizations that serve veterans or provide or support competitive integrated employment for individuals with disabilities; and

(b) one or more representatives of organizations with demonstrated experience and expertise in addressing the employment, training, or education needs of eligible youth, including representatives of organizations that serve out-of-school youth.

C. Representatives of education and training. The balance of local board membership must include:

(1) at least one eligible provider administering adult education and literacy activities under WIOA Title II;

(2) at least one representative from an institution of higher education providing workforce investment activities, including community colleges; and

(3) may include representatives of local educational agencies, and of community-based organizations with demonstrated experience and expertise in addressing the education or training needs of individuals with barriers to employment.

D. Representatives of governmental and economic and community development entities. Each local board must include at least one appropriate representative from:

(1) economic and community development entities;

(2) the state employment service office under the Wagner-Peyser Act (29 USC 49 et seq.) serving the local area;

(3) the programs carried out under title I of the Rehabilitation Act of 1973, other than section 112 or part C of that title, serving the local area; and

(4) may include representatives from:

(a) agencies or entities administering programs serving the local area relating to transportation, housing, and public assistance;

(b) philanthropic organizations serving the local area; and

(c) other appropriate individuals deemed appropriate by the CEO.

[11.2.4.11 NMAC - N, 7/1/2018]

11.2.4.12 LOCAL BOARD ROLES AND RESPONSIBLITIES:

The local board must perform the following functions per WIOA section 107 and must describe the implementation of these functions in the agreement with its CEOs, including:

A. develop and submit a four-year local plan for the local area, in partnership with the CEO per WIOA section 108;

B. conduct workforce research and regional labor market analysis to include:

(1) analyses and regular updates of economic conditions, needed knowledge and skills, workforce and workforce development, including:

(a) education and training activities;

(b) strengths and weaknesses; and

(c) the capacity to provide services to address the identified education and skill needs of the workforce and the employment needs of employers.

(2) assistance to DWS in developing the statewide workforce and labor market information system under the Wagner-Peyser Act for the region; and

(3) other research, data collection, and analysis related to the workforce needs of the regional economy after receiving input from a wide array of stakeholders, as necessary.

C. convene local workforce development system stakeholders to assist in the development of the local plan and in identifying non-federal expertise and resources to leverage support for workforce development activities. Such stakeholders may assist the local board and standing committees in carrying out the convening, brokering, and leveraging functions at the direction of the local board;

D. lead efforts to engage with a diverse range of employers and other entities in the region to:

(1) promote business representation on the local board;

(2) develop effective linkages, including the use of intermediaries, with employers in the region to support employer utilization of the local workforce development system and to support local workforce activities;

(3) ensure workforce investment activities meet the needs of employers and support economic growth in the region by enhancing communication, coordination, and collaboration among employers, economic development entities and service providers; and

(4) develop and implement proven or promising strategies for meeting the employment and skill needs of workers and employers, such as the establishment of industry and sector partnerships, that provide the skilled workforce needed by employers in the region and that expand employment and career advancement opportunities for workforce development system participants in in-demand industry sectors or occupations.

E. with representatives of secondary and postsecondary education programs, lead efforts to develop and implement career pathways within the local area by aligning the employment, training, education, and supportive services that are needed by adults and youth, particularly individuals with barriers to employment;

F. lead efforts in the local area to identify and promote proven and promising strategies and initiatives for meeting the needs of employers, workers and job seekers, and identify and disseminate information on proven and promising practices carried out in other local areas for meeting such needs;

G. develop strategies for using technology to maximize the accessibility and effectiveness of the local workforce development system for employers, workers, and job seekers by:

(1) facilitating connections among the intake and case management information systems of the one-stop partner programs to support a comprehensive workforce development system in the local area;

(2) facilitating access to services provided through the one-stop delivery system involved, including access in remote areas;

(3) identifying strategies for better meeting the needs of individuals with barriers to employment, including strategies that augment traditional service delivery, and increase access to services and programs of the one-stop delivery system, such as improving access in remote areas;

(4) leveraging resources and capacity within the local workforce development system, including resources and capacity for services for individuals with barriers to employment.

H. in partnership with the CEOs for the local area:

(1) conduct oversight of youth workforce investment activities authorized under WIOA section 129, adult and dislocated worker employment and training activities under WIOA section 134, and the entire one-stop delivery system in the local area;

(2) ensure the appropriate use and management of the funds provided under WIOA Title I for the youth, adult, and dislocated worker activities and one-stop delivery system in the local area; and

(3) ensure the appropriate use, management, and investment of funds to maximize performance outcomes under WIOA section 116.

I. negotiate and reach agreement on local performance indicators with the CEO and DWS;

J. negotiate with CEOs and required partners on the methods for funding the infrastructure costs of one-stop centers in the local area or must notify DWS if they fail to reach agreement at the local level and will use a state infrastructure funding mechanism;

K. select the following providers in the local area, and where appropriate terminate such providers:

(1) providers of youth workforce investment activities through competitive grants or contracts based on the recommendations of the youth standing committee (if such a committee is established); however, if the local board determined there is an insufficient number of eligible training providers in the local area, the local board may award contracts on a sole-source basis as per WIOA section 123;

(2) providers of training services consistent with the criteria and information requirements established per WIOA section 122;

(3) providers of career services through the award of contracts, if the one-stop operator does not provide such services; and

(4) one-stop operators.

L. work with the state to ensure there are sufficient numbers and types of providers of career services and training services serving the local area and providing the services in a manner that maximizes consumer choice, as well as providing

opportunities that lead to competitive integrated employment for individuals with disabilities per WIOA section 107;

M. coordinate activities with education and training providers in the local area, including:

(1) reviewing applications to provide adult education and literacy activities under WIOA Title II, for the local area to determine whether such applications are consistent with the local plan;

(2) making recommendations to the eligible agency to promote alignment with such plan; and

(3) replicating and implementing cooperative agreements to enhance the provision of services to individuals with disabilities and other individuals, such as cross training of staff, technical assistance, use and sharing of information, cooperative efforts with employers, and other efforts at cooperation, collaboration, and coordination;

N. develop a budget for the activities of the local board, with the approval of CEOs and consistent with the local plan and the duties of the local board;

O. assess on an annual basis, the physical and programmatic accessibility of all one-stop centers in the local area per WIOA section 188, if applicable, and applicable provisions of the Americans with Disabilities Act of 1990 (42 USC 12101 et seq.);

P. certify one-stop centers;

Q. produce an annual report that must be submitted to the state administrative entity, per guidelines established by the state administrative entity;

R. promote workforce connection center programs and activities; and

S. conduct business in an open manner by making available to the public information about the activities of the local board.

[11.2.4.12 NMAC - N, 7/1/2018]

11.2.4.13 BYLAWS:

The local board must establish bylaws that include, at a minimum, the following sections:

A. Establishment. Acknowledge that the local board is established in accordance with WIOA section 107;

B. Name. Identify the name of the local board.

C. Purpose. Acknowledge the establishment of the local board consistent with WIOA sections 107;

D. Duties and responsibilities. Acknowledge the duties and responsibilities as outlined in WIOA and in the partnership agreement between the CEOs and the local board.

E. Membership. Include a description of membership as outlined in WIOA section 107 and in the CEO agreement, as required by this rule.

F. Local board chair election. Describe the process used to elect a local board chair, including term details.

G. Election of officers. Outline officer positions, the process used to elect officers, officer terms, removal of officers, and specific officer roles and responsibilities.

H. Meetings.

(1) Information on how often local board and committee meetings will be held.

(2) Acknowledgement of open meeting requirements and compliance.

(3) Description of the process of announcing regular and special meetings.

(4) Acknowledgement that a quorum shall consist of at least a simple majority of the currently appointed membership.

(5) Clarification as to whether phone and web-based meetings will be permitted.

I. Delegation of local board duties. Acknowledge that local board members will not be permitted to delegate any local board duties to proxies or alternates.

J. Committees. Include a list of standing committees including the descriptions for each and composition, and description of the process for having ad hoc committees.

K. Conflict of interest. Acknowledge that local board members shall adhere to the following in regard to conflict of interest:

(1) A local board member may not vote on any matter that would provide direct financial benefit to the member or the member’s immediate family, or on matters of the provision of services by the member or the entity the member represents.

(2) A local board member shall avoid even the appearance of a conflict of interest. Prior to taking office, local board members shall provide to the local board chair a written declaration of all substantial business interests or relationships they, or their

immediate families, have with all businesses or organizations that have received, currently receive, or are likely to receive contracts or funding from the local board. Such declarations shall be updated annually or within 30 days to reflect any changes in such business interests or relationships. The local board shall appoint an individual to timely review the disclosure information and advise the local board chair and appropriate members of potential conflicts.

(3) Prior to a discussion, vote, or decision on any matter before a local board, if a member, or a person in the immediate family of such member, has a substantial interest in or relationship to a business entity, organization, or property that would be affected by any official local board action, the member shall disclose the nature and extent of the interest or relationship and shall abstain from discussion and voting on or in any other way participating in the decision on the matter. All abstentions shall be recorded in the minutes of the local board meeting and be maintained as part of the official record.

(4) It is the responsibility of the local board members to monitor potential conflict of interest and bring it to the local board's attention in the event a member does not make a self-declaration.

(5) In order to avoid a conflict of interest, a local board shall ensure that the local board's workforce service providers shall not employ or otherwise compensate a current or former local board member or local board employee who was employed or compensated by the local board or its administrative entity, fiscal agent, or grant recipient anytime during the previous 12 months.

(6) Local board members or their organizations may receive services as a customer of a local workforce service provider or workforce system partner. To avoid conflict of interest, a local board shall ensure that the local board, its members, or its administrative staff do not directly control the daily activities of its workforce service providers, workforce system partners or contractors.

L. Compensation and reimbursement of expenses. A description of the policy on compensating local board members and reimbursing expenses shall be included.

M. Amendment. Include a description of the process for amending the bylaws.

N. Compliance with law.

(1) Acknowledgement stating, in execution of its business, the local board shall comply with all applicable New Mexico statutes and regulations including, but not limited to, the state Procurement Code, the state Open Meetings Act, NMSA 1978 Compilation, and the state Mileage and Per Diem Act.

(2) Acknowledgement stating, in execution of its business, the local board shall comply with WIOA and related regulations as well as state policies and directives.

[11.2.4.13 NMAC - N, 7/1/2018]

11.2.4.14 LOCAL BOARD CERTIFICATION:

A. Initial certification. DWS must certify the composition of each local board in the state.

B. Subsequent certification. Upon completion of initial certification, DWS must recertify local boards every two years.

C. Certification criteria.

(1) Initial certification criteria. Initial certification shall be based on criteria established under WIOA section 107, including compliance with membership, appointment process, chairmanship, and standing committee requirements.

(2) Subsequent certification criteria. Subsequent certification shall be based on the initial certification criteria, as well as the extent to which the local board has ensured that workforce investment activities carried out in the local area have enabled the local area to meet the corresponding performance accountability measures and achieved sustained fiscal integrity, as defined in WIOA section 106, and as outlined in the local board grant agreement.

(a) If a local board meets all membership requirements, but fails to meet performance measures and outcomes, certification will be granted for only a one-year review period, instead of a two-year period.

(b) At the end of the one-year review period, the recertification process will be repeated with an updated review of performance and membership composition. If this review shows the local board is meeting all performance measures and outcomes, a two-year certification will be granted.

(c) During the two-year certification period, if more than ten percent of the local board membership is removed for cause, a recertification shall occur to ensure membership compliance and board stability.

D. Decertification.

(1) Conditions for decertification. A local board is subject to decertification under the following conditions:

(a) failure to meet all local board certification requirements;

(b) failure to carry out required functions of the local board;

(c) fraud; or

(d) abuse.

(2) Performance and decertification. If a local board has already been placed on a one-year review period due to lack of meeting performance measures and outcomes, and fails to meet performance measures and outcomes for a second year, the local board may be decertified.

(3) Notice and comment. A written notice and opportunity for comment will be provided prior to decertification.

(4) Reorganization plan. Per WIOA section 107, if a local board is decertified, DWS, acting on behalf of the governor, may require a new local board be appointed and certified for the local area pursuant to a reorganization plan developed by DWS, in consultation with the CEOs in the local area and in accordance with the certification criteria referred to in this policy.

[11.2.4.14 NMAC - N, 7/1/2018]

11.2.4.15 PLANNING REGIONS:

A. Background

(1) WIOA envisions a workforce development system that is customer-focused on both the job seeker and business, and is able to anticipate and respond to the needs of regional economies. Strong collaboration among government, local employers and industry, training providers and educational institutions, service and advocacy organizations, philanthropy and other local organizations is often needed to support and deliver effective workforce services. It requires Chief Elected Officials (CEOs) and local workforce development boards (LWDB) to design and govern the system regionally, to align workforce policies and services with regional economies, and to support service delivery strategies tailored to these needs. To support this regional approach, WIOA requires States to identify planning regions. Per section 106 (a)(2) of WIOA, the State shall identify:

(a) which regions are comprised of one local workforce development area (local area) that is aligned with the region;

(b) which regions are comprised of two or more local areas that are collectively aligned with the planning region; and

(c) which, of the planning regions, are interstate areas contained within two or more states, and consist of labor market areas, economic development areas, or other appropriate contiguous sub-areas of those States.

(2) As part of the identification of planning regions, New Mexico also uses the following criteria:

(a) a single labor market;

(b) a common economic development area;

(c) possessing of the Federal and non-Federal resources to administer workforce development activities;

(d) commuting patterns, which shows movement of workers from their residence to their workplace;

(e) population centers;

(f) similar economic bases, including percentage of employment in a particular industry;

(g) labor force conditions, including labor force data and unemployment data; and

(h) industrial composition, including industry employment patterns (jobs by industry and share of total employment by industry).

(3) Planning regions are areas identified by the State and the purpose of a planning regions is to promote alignment of workforce development activities and resources with larger regional economic development areas and available resources to provide coordinated and efficient services to both individuals and employers. The development of comprehensive regional partnerships facilitates this alignment and provides support for the execution and implementation of sector strategies and career pathways. Identification of planning regions is important, because regional economic development areas are established in order to ensure that training and employment services:

(a) support economic growth and related employment opportunities;

(b) meet the needs of individuals, including those with barriers to employment;

(c) meet the skill competency and unique cultural requirements of the region; and

(d) meet the specific needs of regional employers and the skills they require.

B. State Requirements

(1) The State is required to identify regions in consultation with local CEOs and LWDBs. In New Mexico, consultation will entail one or more of the following activities:

(a) collaboration with the State Workforce Development Board;

(b) collaboration with the New Mexico department of economic development;

(c) e-mail notification of proposed planning regions to the CEOs and LWDB directors with the opportunity to provide comment at least 30 days prior to any final action;

(d) public notice of proposed planning regions to allow affected businesses, institutions of higher education, labor organizations, other primary stakeholders and the general public the opportunity to provide public comment at least 30 days prior to any final action;

(e) dialogue with one or more of the following associations which provide support and guidance to the CEOs and LWDBs:

(i) New Mexico Municipal League; and

(ii) New Mexico Association of Counties;

(f) in-person meetings or teleconferences with individual CEOs and LWDBs;

(g) presentations at training events or at CEO or LWDB meetings; and

(h) through legal public comment processes for workforce policies.

(2) CEOs and affected LWDBs shall be provided opportunity for consultation throughout the designation process. Consultation shall include

(a) collaboration with the State;

(b) notice of proposed planning regions and opportunity to provide comment at least 30 days prior to final action;

(c) dialogue with one or more of the following associations which provide support and guidance to the CEOs and LWDBs;

(d) in-person meetings or teleconferences with the State; and

(e) through legal public comment processes for workforce policies.

(3) In addition to WIOA law and the State's criteria for identification of planning regions, the following guidelines have been used to identify and designate planning regions for New Mexico:

(a) a single local area may be split across two planning regions;

(b) local areas must be contiguous in order to be a planning region;

(c) a local area may share part of one planning region (interstate planning); and

(d) alignment with statewide economic development regions.

(4) Planning regions shall be identified using the state criteria and the associated WIOA guidelines. Announcements of planning regions shall be included in correspondence and guidance documents issued by NMDWS and communicated to the local areas when regional and local planning is conducted.

(5) NMDWS may identify interstate planning regions if necessary. Announcements regarding interstate planning regions shall be communicated to the local areas when regional and local planning is conducted. If interstate planning regions have not been identified by NMDWS, New Mexico may still plan with other states for the purposes of that state's regional or local planning requirements.

(6) The identified regions are required to be included in local area planning. Local Workforce Development Boards are required to coordinate and include regional plans into their local plan every four years; additionally, LWDBs will be required to address and include activities with planning regions who share common labor markets. Regional and local planning activities will include but are not limited to the following:

(a) the preparation of a regional plan;

(b) the establishment of regional service strategies, including use of cooperative service agreements;

(c) the development and implementation of sector strategies for in-demand industry sectors or occupations for the planning region;

(d) the collection and analysis of regional labor market data;

(e) the coordination of administrative cost arrangements, including the pooling of funds for administrative costs, as appropriate;

(f) the coordination of transportation and other supportive services as appropriate;

(g) the coordination of services with regional economic development service, partners and providers;

(h) development of strategies to serve common employers;

(i) coordination of rapid response and layoff aversion activities; and

(j) identification, development and coordination of training programs and providers to support job seekers and employers.

(7) The state workforce development board will review or modify the identification of single local areas and planning regions when local area designation is reviewed or modified, including local area subsequent designation, ongoing review of local area subsequent designation, and local area re-designation.

(8) NMDWS will assist the planning regions and local areas in obtaining the necessary labor market data, operational data elements, and any other data that will support the process of regional and local planning. NMDWS will also provide ongoing support to meet the purpose of the regional and local planning.

(9) Each planning region, including the individual local workforce development board, in partnership with CEO's, shall prepare, submit and obtain approval of a local plan that includes a description of the policies, procedures, and local activities that are carried out in the regional area that contains all the requirements outlined in 679.560 of Title 20 the Federal Regulations.

C. Public comment

(1) Public notice shall be issued for any contemplated actions concerning changes to proposed planning regions or workforce policies;

(2) notice shall be provided by email notification to the CEOs and LWDB directors and published in a newspaper of general circulation in the local affected area at least 30 days prior to any final action

(3) notice to interested parties shall include the method by which comments will be accepted and any applicable deadlines.

D. Technical Assistance

(1) Ongoing support, guidance, training and technical assistance on development of local and regional planning is available to all local areas.

(2) Requests for technical assistance may be sent to NMDWS to the attention of the WIOA Department at 401 Broadway NE, PO Box 1928, Albuquerque, NM 87103.

[11.2.4.15 NMAC - N, 7/28/2020; A, 6/22/2021]

PART 5: WORKFORCE INNOVATION AND OPPORTUNITY ACT ONE-STOP DELIVERY SYSTEM AND PARTNERSHIPS

11.2.5.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS)

[11.2.5.1 NMAC - N, 7/1/2018]

11.2.5.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients and workforce system partners.

[11.2.5.2 NMAC - N, 7/1/2018]

11.2.5.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. Chapter 32, Subchapter I, and 1978 NMSA Section 50-14-1 *et seq.*

[11.2.5.3 NMAC - N, 7/1/2018]

11.2.5.4 DURATION:

Permanent.

[11.2.5.4 NMAC - N, 7/1/2018]

11.2.5.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.5.5 NMAC - N, 7/1/2018]

11.2.5.6 OBJECTIVE:

To provide guidance to local boards and one-stop partners and operators regarding required and appropriate partnering strategies within the one-stop delivery system.

[11.2.5.6 NMAC - N, 7/1/2018]

11.2.5.7 DEFINITIONS:

A. Infrastructure funding agreement (IFA) is an agreement on shared infrastructure costs negotiated among local boards, one-stop partners, and chief elected officials. IFAs are a mandatory component of the local memorandum of understanding, described in WIOA Sections 121(c), 20 CFR 678.500 and 678.755, 34 CFR 361.500

and 361.755, and 34 CFR 463.500 and 463.755. The IFA contains the infrastructure costs budget, which is an integral component of the overall one-stop operating budget.

B. Workforce connection online system is a common management information system DWS makes available to support business outreach and job seeker services. The system is utilized for all data collection, performance monitoring, and reporting of all workforce development activities.

[11.2.5.7 NMAC - N, 7/1/2018]

11.2.5.8 DESCRIPTION OF THE ONE-STOP SYSTEM:

The one-stop delivery system brings together required partner agencies and organizations to collaboratively implement a seamless, customer-focused approach to delivering workforce development, education, and other related workforce development programs. Together these partners determine strategies to best meet this mission, such as through co-location, shared case management, coordinated and integrated communications and information, training and educational activities, business services, and other means.

A. Each local area is required to establish at least one comprehensive center that includes access to all of the required partners.

B. Non-comprehensive sites, or affiliate sites, where one or more of the required programs are available, are permissible, as long as clear opportunities exist for connecting partners, customers, and businesses to ensure coordination across programs.

C. Under WIOA Title I, stand-alone sites offering only Wagner-Peyser employment services-funded services, are prohibited.

[11.2.5.8 NMAC - N, 7/1/2018]

11.2.5.9 ONE-STOP PARTNERS AND PARTNER RESPONSIBILITIES:

WIOA establishes goals for the integration of workforce development programs. These goals are intended to maximize the value and benefits to customers of services available to them under federally-funded workforce development programs. Planning and coordinating services among all federally-funded workforce development partners is necessary in order to achieve the level of integrated services delivery required by WIOA. This means that all federally-funded workforce development programs must work in partnership to optimize the quality of services provided. Successful integration is directly related to coordinated and joint use of resources.

A. These required partners are entities responsible for administering the following workforce development programs and activities in the local area:

(1) Title I Programs (Adult, dislocated worker, youth, Job Corps, YouthBuild, Native American and migrant and seasonal farmworker programs);

(2) Wagner-Peyser Act employment service program authorized under the Wagner-Peyser Act (29 USC 49, et seq), as amended;

(3) Vocational Rehabilitation program authorized under Title I of the Rehabilitation Act of 1973 (29 USC 720, et seq), as amended by WIOA Title IV;

(4) Adult Education and Family Literacy Act programs under Title II of WIOA.

(5) Senior community service employment program (SCSEP) authorized under Title V of the Older Americans Act of 1965 (42 USC 3056, et seq);

(6) Career and technical education programs at the postsecondary level, authorized under Carl D. Perkins Career and Technical Education Act of 2006(20 USC 2301, et seq.);

(7) Trade Adjustment Assistance authorized under Chapter 2 of Title II of the Trade Act of 1974 (19 USC 2271, et seq);

(8) Jobs for veterans state grants programs authorized under Chapter 41 of Title 38, USC;

(9) Employment and training activities carried out under the Community Services Block Grant (42 USC 9901, et seq);

(10) Employment and training activities carried out by the department of housing and urban development;

(11) Programs authorized under state unemployment compensation laws under 1978 NMSA 51-1-1, et seq (in accordance with applicable federal law);

(12) Reentry employment opportunities (REO) (formerly known as ex-offender programs) authorized under Section 212 of the Second Chance Act of 2007 (42 USC 17532); and

(13) Temporary assistance to needy families (TANF) authorized under the Social Security Act, unless exempted by the governor.

(14) Other entities that carry out a workforce development program, including federal, state or local programs, and programs in the private sector, may serve as additional partners in the one-stop delivery system if the local board and chief elected officials approve the entity's participation, in accordance with 20 CFR 678.410.

B. Each required partner must provide its workforce development programs or activities through the one-stop delivery system.

C. Each local board is mandated to establish a memorandum of understanding (MOU) with each of the required one-stop partners in that local area that describes their programmatic and fiscal contributions for infrastructure, and additional costs necessary to support the one-stop delivery system.

D. WIOA and related regulations outline the requirements for federally-funded workforce development partners to contribute to infrastructure funding of the one-stop system in each local area. Partner programs and additional partners that carry out a program in the local area are required to share infrastructure costs and certain additional costs. When two or more grant recipients or contractors of a required partner program carry out a program in a local area, these entities are considered one-stop partners, and they must reach out to the local board to assist in carrying out the roles and responsibilities of the workforce connection centers, including negotiating their share of the infrastructure costs.

E. When one or more required partners is the recipient of multiple federal grant awards, each grant or contract recipient carrying out the workforce development program in that local area must contribute towards the infrastructure costs. Contributions must be based on the proportionate use and relative benefit received by those partners from the workforce connection centers. As required one-stop partners, Native American programs are strongly encouraged to contribute to infrastructure costs, but they are not required to contribute. Any agreement or contribution or non-contribution to infrastructure costs by Native American programs must be documented in the MOU carried out by the US department of housing and urban development;

[11.2.5.9 NMAC - N, 7/1/2018]

11.2.5.10 MEMORANDUM OF UNDERSTANDING (MOU):

The MOU is the functional tool, as well as the visionary plan for how the local boards and one-stop partners will work together to create and execute a unified service delivery system that meets the needs of their shared customers. The following additional requirements for MOUs apply:

A. Local boards may develop a single "umbrella" MOU that addresses overarching issues for the local board, chief elected officials, and required one-stop partners as they relate to the local one-stop delivery system. Alternatively, they may choose to enter into a separate MOU with each individual partner, or group of partners;

B. Each required one-stop partner entering into the MOU development and negotiation process designates a specific individual with authority to commit financially and programmatically on behalf of the required partner. This individual may be staff

from a state agency's central, regional, or local office or a local representative providing services for a state-level entity through a contract, grant, or similar agreement.

C. MOUs must identify and detail how each required partner will contribute its proportionate share of infrastructure costs for the one-stop system.

D. The local board must report failure to execute any MOU with a required one-stop partner to DWS. If DWS cannot assist the local board to resolve the impasse, the failure to resolve the impasse will be reported to the US Secretary of Labor and the head of any other agency with responsibility for oversight of the required partner's program.

[11.2.5.10 NMAC - N, 7/1/2018]

11.2.5.11 ONE-STOP OPERATING COSTS:

WIOA requires all one-stop partners to contribute to infrastructure funding, which includes both facility and shared costs needed to maintain operation of the one-stop delivery system.

A. Contributions by required one-stop partners to the facility funding costs of a comprehensive workforce connection must be monetary.

B. Contributions by both required and other partners for shared costs may be in cash, or in a fairly evaluated in-kind contribution. However, said contributions must demonstrate the contribution impacts and benefits all partners and the overall one-stop delivery system.

C. Each local board is required to establish an MOU with each partner in that local area that includes how infrastructure funding will be allocated and contributed.

D. DWS is responsible for providing ongoing technical assistance and written guidance describing the required workforce system partners, example tables, and funding structures to aid in the overall planning and development of the infrastructure funding agreements (IFAs). DWS is also responsible for advocacy and communication with state partner organizations and agencies as needed to support local board negotiations.

E. If consensus cannot be reached when developing the IFA, local boards are required to notify DWS at least 60 days prior to the deadline set by DWS. DWS will then assume responsibility for reviewing negotiated costs and processes used to determine the IFA, providing further guidance to local boards and the partners. The funding mechanism imposed by DWS is a last resort effort. The local board and the required partners are required to continue to negotiate in good faith to avoid a funding mechanism imposed by DWS.

[11.2.5.11 NMAC - N, 7/1/2018]

11.2.5.12 ONE-STOP OPERATORS:

A. At a minimum, the one-stop operator (operator) must coordinate the service delivery of required one-stop partners. The operator works with all the required workforce development partners to coordinate effective strategies and systems necessary to build and sustain a cohesive, seamless one-stop delivery system that engages all the partners in planning, goal setting, and implementing activities. The operator is primarily responsible for organizing and facilitating partner discussions surrounding the MOU, IFA, and shared work responsibilities needed to implement and sustain a customer-centered approach focused on improving employment outcomes for job seekers and business outreach to employers. Additionally, the operator must oversee implementation and compliance of these activities to ensure effective programmatic and physical access at each of the workforce connection centers to ensure they are in compliance with WIOA regulations, and state and local policies related to nondiscrimination and equal opportunity.

B. The following requirements apply to the local board and operator:

(1) WIOA requires each local board to issue a competitive process for the selection of the operator for the local area on a regular basis.

(2) A sole source selection option is allowed, but only after an attempt to competitively procure does not result in a responsive or reasonable offer. A local board may also be selected as an operator through sole source procurement, but only with an agreement of the chief elected officials in the local area and DWS. In instances where the local board is selected as the operator, sufficient conflict of interest policies and procedures must be established by the local board and these policies and procedures must be approved by DWS.

(3) An operator may be a single public, private, or nonprofit entity, or a consortium of entities. If a consortium of entities is used, it must include a minimum of three of the required one-stop partners.

(4) Elementary schools and secondary schools are not eligible as operators, except that a non-traditional public secondary school such as a night school, adult school, or an area career and technical education school may be selected.

[11.2.5.12 NMAC - N, 7/1/2018]

11.2.5.13 ONE-STOP CERTIFICATION:

Local boards must certify their workforce connection centers at least once every three years.

A. The state workforce development board, in consultation with chief elected officials and the local board must establish objective criteria and procedures for the local board to use when certifying the workforce connection centers.

B. Local boards must develop and include in their local plan, a certification policy and procedure that contains the criteria for assessing each workforce connection center and the one-stop delivery system.

C. Local board certification policies must be consistent with the criteria for assessing each local workforce connection center and one-stop delivery system. This must include an evaluation of the workforce connection centers and one-stop delivery system for effectiveness, physical and programmatic accessibility, and continuous quality improvement, as well as any additional criteria as determined by the local board.

D. Local boards must submit their certification policies to DWS for review and approval. These certification policies will be incorporated into the compliance review and audit procedures conducted by state monitors.

E. In cases where a local board is selected to act as the operator, DWS must review the assessment and make the certification determination for those workforce connection centers and the one-stop delivery system.

F. If local board certification is not completed within the timeframes set by DWS, the workforce connection centers and the one-stop system become ineligible to receive infrastructure funding from partners or the state funds for those areas that rely on state infrastructure funding.

[11.2.5.13 NMAC - N, 7/1/2018]

11.2.5.14 COMMON IDENTIFIER:

In accordance with WIOA and 20 CFR, 678.900, the US Department of Labor's Employment and Training Administration, Education's Office of Career, Technical and Adult Education, Office of Special Education and Rehabilitative Services' Administration, and Health and Human Services Administration for Children and Families established the "American Job Center" network as a unifying name and brand that identifies online and in-person workforce development services as part of a single network of publicly funded services. The one-stop delivery system must use either that common identifier as its name, or use a tag line phrase, "a proud partner of the American Job Center network". As such, DWS has adopted the tag line phrase, "a proud partner of the American Job Center network". All New Mexico workforce connection centers are required to:

A. adopt the new logo and branding practices with timeframes and procedures established in accordance with state technical assistance guidance;

B. replace existing logos and incorporate the tagline phrase;

C. adhere to the logo and branding practices for all printed materials that are copied and distributed for specific events and meeting, and all related publications and handouts which include references to the workforce connection centers in New Mexico;

D. adhere to state technical assistance guidance regarding the common identifier.

[11.2.5.14 NMAC - N, 7/1/2018]

11.2.5.15 DWS RESPONSIBILITIES:

DWS, under the direction of the governor and the state workforce development board, is designated as the state administrative entity responsible for the implementation and oversight of WIOA in New Mexico. DWS's responsibilities include, but are not limited to:

A. developing statewide policies and written guidance letters;

B. ensuring each local board develops and maintains a single umbrella or individual partner memorandum of understanding;

C. ensuring each local board develops an infrastructure funding agreement with the WIOA required partners that is monitored, reviewed, and updated at least quarterly;

D. reviewing and approving local board workforce development plans;

E. preparing New Mexico's WIOA state plan and submitting it to the US department of labor (USDOL), as directed

F. preparing an annual report in coordination with the state workforce development board on workforce system activity and performance;

G. negotiating statewide performance measures with the USDOL, and subsequently negotiating local area performance measures with local boards;

H. providing oversight and administration for the eligible training provider certification system;

I. preparing and initiating grant agreements with each local board;

J. monitoring and evaluating the one-stop delivery system to ensure compliance with state and federal policies and directives;

K. providing or contracting for technical assistance and training to ensure performance measures and outcomes are met;

L. ensuring the one-stop delivery system includes all required partners, and that continuous quality improvement activities are developed and implemented;

M. requiring corrective action or imposing sanctions on a local board or other WIOA sub-recipient for significant inability or failure to perform as required;

N. evaluating the effectiveness of the one-stop delivery system, including qualitative and quantitative program analysis of program goals, performance success indicators, outcomes, cost-efficiencies, seamless service delivery, partner contribution and collaboration, and customer satisfaction; and

O. compiling and submitting data and reports on program outcomes and performance of the one-stop delivery systems as required by the USDOL, which may also include compilation of data and reports related to common performance measures and outcomes related to WIOA core partners.

[11.2.5.15 NMAC - N, 7/1/2018]

11.2.5.16 COMMON INFORMATON AND MANAGEMENT SYSTEM:

Local boards and their sub-recipients are required to use the workforce connection online system, which tracks participants and individual services and is used to track and monitor performance outcomes. Partners co-located in the comprehensive and affiliate centers, or partners engaged in shared case management and referral, may enter into data sharing agreements with DWS to support access to this system, and its related data, in accordance with the provisions of a data sharing agreement.

[11.2.5.16 NMAC - N, 7/1/2018]

PART 6: WORKFORCE INVESTMENT ACT MEMORANDUM OF UNDERSTANDING [REPEALED]

(This part was repealed on July 1, 2018)

PART 7: WORKFORCE INVESTMENT ACT SERVICE INTEGRATION [REPEALED]

(This part was repealed on July 1, 2018)

PART 8: WORKFORCE INNOVATION AND OPPORTUNITY ACT (WIOA) TITLE I ADULT, DISLOCATED WORKER AND YOUTH PROGRAM SERVICE DELIVERY

11.2.8.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS)

[11.2.8.1 NMAC - N, 7/1/2018]

11.2.8.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients and workforce system partners.

[11.2.8.2 NMAC - N, 7/1/2018]

11.2.8.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. Chapter 32, Subchapter I; and NMSA 1978 50-14-1 *et seq.*

[11.2.8.3 NMAC - N, 7/1/2018]

11.2.8.4 DURATION:

Permanent.

[11.2.8.4 NMAC - N, 7/1/2018]

11.2.8.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.8.2 NMAC - N, 7/1/2018]

11.2.8.6 OBJECTIVE:

To provide guidance to local boards and other WIOA sub-recipients regarding the appropriate selection of service providers, participant eligibility, provision of career and training services for eligible adults, dislocated workers, and youth, appropriate use of training accounts, provisions of work-based training, incumbent worker training, supportive services, priority of service, co-enrollment and performance.

[11.2.8.6 NMAC - N, 7/1/2018]

11.2.8.7 DEFINITIONS:

A. Eligible training provider. Training services must be provided by an eligible training provider in accordance with WIOA Section 122(d). Training is available through

a state eligible training provider and program list comprised of entities determined eligible to receive funds through WIOA Title I, Subtitle B, according to DWS's established eligibility criteria and procedure. The purpose of this list is to ensure the accountability, quality and labor-market relevance of programs, and to ensure informed customer choice for individuals eligible for training.

B. Out of school youth according to Section 20 CFR 681.210, must be aged 16-24, not attending any school, and meet one or more additional conditions, which could include: school dropout; within age of compulsory attendance but has not attended for at least the most recent complete school year calendar quarter; holds a secondary school diploma or recognized equivalent and is low-income and is basic skills deficient or an English language learner; subject to the juvenile or adult justice system; homeless, runaway, in foster care or aged out of the foster care system, eligible for assistance under Section 477, Social Security Act, or in out-of-home placement; pregnant or parenting; an individual with a disability; low income person who requires additional assistance to enter or complete an educational program or to secure and hold employment.

C. In-school youth according to Section CFR 681.220, must be aged 14-21, attending school low income, and meet one or more additional conditions, which could include: basic skills deficient; English language learner; an offender; homeless, runaway, in foster care, or aged out of the foster care system; pregnant or parenting; an individual with a disability; person who requires additional assistance to enter or to complete an educational program or to secure and hold employment.

D. Training contract. Individual training accounts (ITAs) are the primary method to be used for procuring training services under WIOA. However, in certain circumstances, a training contract may be used to provide services, instead of an ITA. These circumstances are referred to as the "training exceptions" or "contract exceptions", as governed by WIOA Section 134(c)(3)(G)(ii) and consistent with Sections 20 CFR 680.320, 680.340, and 680.530. Additionally, the local board must have fulfilled the consumer choice requirements of Section 20 CFR 680.340.

E. Work-based training. Allowed types of work-based training include registered apprenticeships, on-the-job training (OJT), and customized training. Sections 20 CFR 680.700 through 680.840 govern work-based training.

F. Incumbent worker training is designed to meet the needs of an employer or group of employers to retrain a skilled workforce or avert layoffs, as governed by Sections 20 CFR 680.780 through 680.820.

G. Supportive service are designed to provide a participant with the resources necessary to enable their participation in career and training services, and are governed by Section 20 CFR 680.900 through 680.970. Supportive services can include services such as transportation assistance, child care and dependent care assistance, housing assistance, and needs-related payments. Needs-related payments are only available to

individuals enrolled in training services and must be consistent with Sections 20 CFR 680.930, 680.940, 680.950, 680.960, and 680.970.

H. Basis career services include universally accessible services, such as eligibility determinations, initial skill assessments, labor exchange services, provisions of information on programs and services, and program referrals, that must be made available in at least one comprehensive workforce connection center per local area to all individuals seeking employment and training services. These services may be provided by both the adult and dislocated worker programs, as well as by the Wagoner-Peyser employment services.

I. Individual career services include services, such as specialized assessments, developing an individual employment plan, counseling, work experiences, which must be provided to participants after workforce connections center staff determine that such services are required to retain or obtain employment, consistent with any applicable statutory priorities.

J. Training services are described in WIOA, Section 134(c)(3). Training services are governed by Sections 20 CFR 680.200 through 680.230 and 20 CFR 680.300 through 680.350. Workforce connection center staff may determine training services are appropriate, regardless of whether the individual has received basic or individualized career services first, and there is no sequence of service requirement. Training services, when determined appropriate, must be provided either through a training contract, such as an ITA.

K. Follow-up services must be provided for adults and dislocated worker participants who are placed in unsubsidized employment, for up to 12 months after the first day of employment and local areas must establish policies that define what are considered to be appropriate follow-up services, as well as policies for identifying when to provide follow-up services to participants.

L. Basic skills deficient means an individual:

(1) who is a youth, that the individual has an English reading, writing, or computing skills at or below the eighth grade level on a generally accepted standardized test; or

(2) who is a youth or adult, and the individual is unable to compute or solve problems, or read, write, or speak English, at a level necessary to function on the job, in the individual's family, or in society.

[11.2.8.7 NMAC - N, 7/1/2018]

11.2.8.8 SELECTION OF SERVICE PROVIDERS:

Local boards must select the following providers in the local area, and where appropriate, terminate such providers in accordance with Section 2 CFR 200:

A. Providers of youth services. Providers of youth workforce investment activities through competitive grants or contracts based on the recommendations of the youth standing committee (if such committee is established), in accordance with WIOA Section 107(d)(10)(E), and local area grant agreements. The local board may implement a WIOA pay-for-performance contract strategy for youth program elements described in 20 CFR 681.460, for which the local board may reserve and use not more than ten percent of the total funds allocated to the local area under WIOA Section 128(b).

B. Providers of adult and dislocated worker services. Providers of WIOA Title I adult and dislocated worker career services through the award of contracts in accordance with local board grant agreements.

[11.2.8.8 NMAC - N, 7/1/2018]

11.2.8.9 ELIGIBILE TRAINING PROVIDERS:

DWS, in partnership with local boards, identifies eligible training providers and programs that are qualified to receive WIOA Title I-B funds to train adults, dislocated workers and out-of-school youth ages 16-24, including those with disabilities. DWS administers and provides access to the eligible training provider list in accordance with WIOA Sections 116, 122, and 134, and Sections 20 CFR 677.230, 679.370-380, 680.400-530, and 683.630. This state-approved list identifies appropriate providers and programs for eligible WIOA participants in the local areas who are seeking training, as well as cost and program performance information for each of the providers' programs, to allow participants to make informed consumer choices. DWS administers the application procedure for training providers and programs to maintain their eligibility.

[11.2.8.9 NMAC - N, 7/1/2018]

11.2.8.10 WIOA PARTICIPANT ELIGIBILITY:

Local boards are required to establish and formally approve a local policy for making eligibility determinations for the three WIOA finding streams under Title I - adult, dislocated worker, and youth. Local board policy must also include guidance on the use of self-attestation as a last resort when other documentation cannot be found or accessed.

A. Adult and dislocated worker eligibility. Eligibility criteria vary according to each type of career or training service, in accordance with Sections 20 CFR 680.120, 680.130, and 680.210.

(1) To be eligible to receive career services as an adult in the adult and dislocated worker programs, an individual must be 18 years of age or older, and meet the criteria of Section 680.120.

(2) To be eligible for any dislocated worker program, an eligible adult must meet the criteria of section 20 CFR 680.130.

(3) Eligibility criteria for training services are found at Sections 20 CFR 680.210 and 680.220.

B. Youth eligibility. Section 20 CFR 681, Part B governs eligibility criteria for youth activities under WIOA Title I. In order to be a participant in the WIOA youth program an eligibility determination must be made including the provision of an objective assessment, development of an individual service strategy, and participation in any of the 14 WIOA youth program elements discussed in section 11.2.8.13 of this rule.

(1) Both in-school and out-of-school youth are eligible for youth services, in accordance with definitions in Sections 20 CFR 681.210-220.

(2) Applicable state law governs the definition for "attending" or "not attending" school for the purposes of determining in-school youth and out-of-school youth eligibility for WIOA-funded service. These definitions are based on the department of public education’s rules in 6.10.4 NMAC and described in the WIOA state plan.

(3) Applicable state law for secondary and postsecondary institutions defines "school", however, for the purposes of WIOA, some additional eligibility restrictions apply, in accordance with Section 20 CFR 681.230.

(4) Sections 20 CFR 681.250-270 address how certain eligibility criteria are to be applied including low-income and disability determinations.

(5) Local boards must establish a policy in their local plans to govern how "basic skills deficient" criteria are to be applied in making eligibility determinations, in accordance with Section 20 CFR 681.290 and the WIOA state plan.

(6) For in-school and out-of-school youth, local boards may establish definitions and eligibility documentation requirements for the "requires additional assistance to enter or complete an educational program, or to secure and hold employment" criterion of Sections 20 CFR 681.210(c)(9) and 681.220(d)(8). Local boards who wish to apply this criterion must establish a policy in their local plans that aligns with state policy as stated in the WIOA state plan and that local policy must establish definitions and eligibility documentation requirements for the "requires additional assistance to complete an educational program to secure and hold employment".

(7) Per WIOA Section 129(3)(B), local areas are not allowed to assist more than five percent of in-school youth who are eligible under "individual who requires additional assistance" to complete an educational program or to secure of hold employment.

(8) Per WIOA Section 129(3)(A)(ii), local areas are not allowed to assist more than five percent of in-school youth who are not low-income.

[11.2.8.10 NMAC - N, 7/1/2018]

11.2.8.11 ADULT AND DISLOCATED WORKER SERVICES:

WIOA Title I formula funds allocated to local areas for adults and dislocated workers must be used to provide career and training services through the one-stop delivery system, in accordance with Section 20 CFR 680.

A. Career services. Career services consist of three categories, including basic career services, individualized career services, and follow-up services. Local boards determine the mix of these services but both types must be available for eligible adults and dislocated workers. Requirements on who may provide career services for adults and dislocated workers and how those services are to be provided are located in Section 20 CFR 680.160.

(1) Basic career services. At a minimum, all of the basis career services described in WIOA Sections 134(c)(2)(A)(i)-(ix) and 20 CFR 678.430(a) must be provided in each local area through the one-stop delivery system.

(2) Individualized career services. Individualized career services described in WIOA Section 134(c)(2)(A)(xii) and Section 20 CFR 678.430(b) must be made available, if determined appropriate in order for an individual to obtain or retain employment.

(3) Follow-up services. Follow-up services, as described in WIOA Sections 134(c)(2)(A)(xiii) and 20 CFR 678.430(c) must be made available, as determined appropriate by the local board for a minimum of 12 months following the first day of employment, to participants who are placed in unsubsidized employment.

B. Training services. The types of training services that may be provided to eligible adults and dislocated workers are provided in WIOA Section 134(c)(3)(D), and include but are not limited to, work-based training and incumbent worker training. Local boards must adhere to criteria for funding training in Section 20 CFR 680.230.

C. Additional services. WIOA Title I funds may also be used to provide additional services, as described in WIOA Section 134(d), including:

(1) job seeker services, including but not limited to, customer support for individuals with barriers to employment, such as individuals with disabilities and veterans, as well as supportive services;

(2) employer services, including but not limited to, customized employment-related services to employers on a fee-for-service basis; and

(3) coordination activities, including but not limited to, employment and training activities in coordination with child support enforcement activities, activities to facilitate remote access to services provided through the workforce connection centers, and economic development activities within the local area.

[11.2.8.11 NMAC - N, 7/1/2018]

11.2.8.12 PRIORITY AND SPECIAL POPULATIONS:

According to WIOA Section 134(c)(3)(E), local boards must establish a policy with criteria by which the workforce connection center will apply the priority of service in assisting individuals. Requirements governing priority of service, including the order in which priority is given, are locate in Sections 20 CFR 680.600-660, local board grant agreements and the WIOA state plan.

A. Priority for individualized career services and training services funded with WIOA Title I adult funds must be given to recipients of public assistance, other low-income individuals, and individuals who are basic skills deficient in the local area.

B. Veterans, as defined under WIOA Section (3)(63) and 38 USC 101, and eligible spouses receive priority of service in all US department of labor-funded training programs, in accordance with Sections 20 CFR 680.650-660.

[11.2.8.12 NMAC - N, 7/1/2018]

11.2.8.13 YOUTH SERVICES:

A. Youth program design. Section 20 CFR 681.420 describes the design framework services of local youth programs that must be met, including but not limited to, objective assessments, individual service strategies, case management, local plan content requirements, linkages to appropriate entities, and referral requirements. Program design requirements are also agreed to in the local board grant agreements. Local youth programs must provide services to a participant for the amount of time necessary to ensure successful preparation to enter postsecondary education or unsubsidized employment. Programs must link participation to the individual service strategy and not the timing of youth service provider contracts or program years.

B. Youth elements. Local programs must make each of the 14 youth services available to youth participants as described in Section CFR 681.460, which include:

(1) tutoring, study skills training, instruction and evidence-based dropout prevention and recovery strategies that lead to completion of the requirements for a secondary school diploma or its recognized equivalent or for a recognized postsecondary credential;

(2) alternative secondary school services, or dropout recovery services;

(3) paid and unpaid work experiences that have as a component academic and occupational educational;

(4) occupational skills training;

(5) education offered concurrently with and in the same context as workforce preparation activities and training for specific occupational cluster;

(6) leadership developmental opportunities;

(7) supportive services;

(8) adult mentoring;

(9) follow-up services;

(10) comprehensive guidance and counseling;

(11) financial literacy education;

(12) entrepreneurial skills training;

(13) services that provide labor market and employment information about in demand industry sectors or occupations available in the local area; and

(14) activities that help youth prepare for and transition to postsecondary education and training.

C. Out-of-school youth expenditures. Criteria for expending youth funds to provide services to out-of-school youth in Section 20 CFR 681.410 must also be met. At least seventy-five percent of the total amount of youth formula funds allocated to the local workforce area must be used to provide activities to out-of-school youth, in accordance with the eligibility section of this rule, 11.2.8.10 NMAC, as agreed to in the local board grant agreements, and described in the state plan.

D. Work experience expenditures. Criteria for expending youth funds to provide work experiences to youth, in accordance with Section 20 CFR 681.590 must also be met. Local youth programs must expend not less than twenty percent of the funds allocated to them to provide in-school and out-of-school youth with paid and unpaid

work experiences that fall under the categories listed in Section CFR 681.460(a)(3), and further defined in Section 20 CFR 681.600, such as summer employment opportunities, pre-apprenticeship programs, internships and on-the-job training.

E. Follow-up services for youth. Follow-up services are critical services provided following a youth's exit from the program to help ensure the youth is successful in employment or postsecondary education and training. Follow-up services must be provided to all participants for a minimum of 12 months unless the participant declines to receive follow-up services or the participant cannot be located or contacted. Follow-up services may include regular contact with a youth participant's employer, including assistance in addressing work-related problems that arise. Section 20 CFR 681.580 addresses the types of follow-up services for youth.

[11.2.8.13 NMAC - N, 7/1/2018]

11.2.8.14 INDIVIDUAL TRAINING ACCOUNTS (ITAs):

Training services for eligible individuals are typically provided by training providers who receive payment for their services through an ITA. The criteria for establishing an ITA, including how these services are provided, limitations on the duration and amounts of ITAs, under what circumstances mechanisms other than ITAs may be used to provide training, coordination of ITAs with grant assistance, the appropriate use of ITAs and supportive services related to registered apprenticeships, and requirements around consumer choice and in-demand occupations, are located in Section 20 CFR 680.300-330, and further discussed in federal and state technical assistance guidance. Additionally, WIOA ITAs are allowable for out-of-school youth, ages 16-24 using WIOA youth funds when appropriate, to enhance individual participant choice in their education and training plans and provide flexibility to service providers. Local boards must establish a policy on the use of ITAs based on the criteria in state technical assistance guidance.

[11.2.8.14 NMAC - N, 7/1/2018]

11.2.8.15 SUPPORTIVE SERVICES:

Local boards, in consultation with the one-stop partners and other community service providers, must develop policies on supportive services, payments, and other compensation that ensures resource and service coordination in the local area for participating youth, adults, and dislocated workers. The supportive service policies, at a minimum, must address the following in accordance with 20 CFR 680, subpart G:

A. coordination with partners and other entities to ensure non-duplication of resources and services;

B. define the types of WIOA-funded supportive services that may be made available to eligible participants;

C. establish or provide the workforce connection centers with the authority to establish limits on the amount and duration of funding to be made available for participants, including any procedures for granting exceptions to these limits;

D. provision of needs-related payments, which may only be provided to participants enrolled in training, requires verification of any unemployment insurance claim and benefits status, and must adhere to the requirements of Section 20 CFR 680.930-970, and federal and state technical assistance guidance; and

E. procedures for referral to supportive services, including how they will be funded and what documentation will be required to indicate no other resources are available. The need for supportive services must be documented in the individual employment plan or individual service strategy prior to the provision of WIOA-funded supportive services.

F. Awards of incentives to youth, in accordance with Sections 20 CFR 681.640 and 20 CFR part 200, for recognition and achievement directly tied to training activities and work experiences, as well as to the goals of the specific program.

[11.2.8.15 NMAC - N, 7/1/2018]

11.2.8.16 CO-ENROLLMENT AND COORDINATED SERVICE DELIVERY:

WIOA provides a significant opportunity for coordination across all of the core programs, and any coordination or co-enrollment activities must adhere to the service delivery provisions of federal regulations, Sections 20 CFR 651, 652, 653, 358, and 680.

A. Coordination between adult dislocated worker and youth programs. Individuals aged 18-24 may be eligible for both the WIOA youth and adult programs and can be co-enrolled in the two programs.

B. Coordination with Wagner-Peyser employment services. Universal access to basic career services must be achieved through close integration of Wagoner-Peyser, WIOA programs, and other partners in the New Mexico workforce connection centers. Basic career services offered by the WIOA programs must be made available by the Wagoner-Peyser program in coordination with other workforce connection center partners.

C. Coordination with adult education. Individuals who meet the respective program eligibility requirements for WIOA youth Title I and Title II may participate in Title I and Title II concurrently. WIOA Sections 134(c)(2) authorizes career services to be provided with Title I adult and dislocated worker funds.

D. Coordination with vocational rehabilitation. Individuals with disabilities are identified as individuals with barriers to employment under WIOA, and should be able to access all workforce connection center services. Funds allocated to a local area for

adult and dislocated worker activities may be used to improve coordination between employment and training programs carried out in the local area for individuals with disabilities through the workforce connection centers.

E. Coordination with trade adjustment assistance (TAA). TAA eligible workers can be co-enrolled with the WIOA dislocated worker or adult programs to allow for the timely provision of individualized services through the workforce connection center network. The Trade Act, as amended, contains provisions allowing the costs of a training program approved under the Trade Adjustment Act to be paid by TAA funds or from other sources, but does not allow duplication of payment in training costs. Those authorities and restrictions are governed by Section 20 CFR 617.25(b).

[11.2.8.16 NMAC - N, 7/1/2018]

11.2.8.17 PERFORMANCE:

In order to achieve the vision of WIOA, align service delivery across the core WIOA programs, and ensure a comprehensive approach across all partners, the US departments of labor and education have developed common measures and reporting elements. DWS is required to measure the success and overall effectiveness of the WIOA Title I adult, dislocated worker and youth programs.

A. Performance indicators: Each local area under WIOA Title I is subject to the same primary performance indicators of performance for the core programs under 20 CFR 677.155(a)(1) and (c). In addition to these indicators, DWS may apply additional indicators of performance to local areas.

B. Performance levels. Performance levels are established through a negotiation process between DWS and local areas, in accordance with Section 20 CFR 210, as agreed to in local board grant agreements. In establishing performance expectations, local boards must, through the local planning process, consider the overall goals of the programs and how the WIOA-funded activities will lead to outcomes that contribute to these goals.

C. Performance monitoring. Through the grant agreements, local areas are directed to work with their service providers to monitor performance and report outcomes to DWS, in accordance with Section 20 CFR 677, Subpart C, as well as per their grant agreements. The local board grant agreements serve as a basis for monitoring the attainment of the performance outcomes of each local board. Refer to 11.2.19 NMAC, oversight and monitoring, for further information on monitoring requirements.

[11.2.8.17 NMAC - N, 7/1/2018]

PART 9: WORKFORCE INVESTMENT ACT ADULT AND DISLOCATED WORKER SERVICES [REPEALED]

(This part was repealed on July 1, 2018)

PART 10: WORKFORCE INVESTMENT ACT PARTICIPATION AND CO-ENROLLMENT [REPEALED]

(This part was repealed effective 7/1/2018)

PART 11: WORKFORCE INVESTMENT ACT INDIVIDUAL TRAINING ACCOUNTS [REPEALED]

(This part was repealed effective 7/1/2018)

PART 12: WORKFORCE INVESTMENT ACT ON-THE-JOB-TRAINING [REPEALED]

(This part was repealed effective 7/1/2018)

PART 13: WORKFORCE INVESTMENT ACT CUSTOMIZED TRAINING [REPEALED]

(This part was repealed effective 7/1/2018)

PART 14: WORKFORCE INVESTMENT ACT YOUTH ACTIVITIES [REPEALED]

(This part was repealed effective 7/1/2018)

PART 15: WORKFORCE INVESTMENT ACT YOUTH COUNCILS [REPEALED]

(This part was repealed effective 7-1-2018)

PART 16: WORKFORCE INVESTMENT ACT SUPPORTIVE SERVICES [REPEALED]

(This part was repealed effective 7-1-2018)

PART 17: WORKFORCE INVESTMENT ACT PRIORITY OF SERVICE [REPEALED]

[This part was repealed effective August 14, 2018]

PART 18: WORKFORCE INVESTMENT ACT ELIGIBLE TRAINING PROVIDER LIST [REPEALED]

[This part was repealed effective August 14, 2018]

PART 19: WORKFORCE INNOVATION AND OPPORTUNITY ACT OVERSIGHT AND MONITORING

11.2.19.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS)

[11.2.19.1 NMAC - N, 7/1/2018]

11.2.19.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients and workforce system partners.

[11.2.19.2 NMAC - N, 7/1/2018]

11.2.19.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. Chapter 32, Subchapter I; and NMSA 1978, Section 50-14-1 *et seq.*

[11.2.19.3 NMAC - N, 7/1/2018]

11.2.19.4 DURATION:

Permanent.

[11.2.19.4 NMAC - N, 7/1/2018]

11.2.19.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.19.5 NMAC - N, 7/1/2018]

11.2.19.6 OBJECTIVE:

To provide comprehensive guidelines for local boards, sub-recipients, and contract service providers, on the monitoring and procedures to be used by DWS to oversee the appropriate administration of WIOA formula funds in New Mexico, including roles and responsibilities of affected entities.

[11.2.19.6 NMAC - N, 7/1/2018]

11.2.19.7 STATE MONITORING AUTHORITY, PURPOSE, AND COMPLIANCE:

A. Purpose. The purpose of monitoring activities is to identify strengths and weaknesses in the program operations and minimize risk for local boards. Monitoring also serves as a way to provide technical assistance and resources to the local boards as they are held accountable for the appropriate and effective expenditure of funds, as well as the scope of activities associated with the implementation of WIOA.

B. Oversight roles and responsibilities. Recipients and sub-recipients of federal financial assistance awarded under Title I of WIOA and the Wagner-Peyser Act must conduct regular oversight and monitoring of its WIOA and Wagner-Peyser Act programs and those of its sub-recipients and contractors as required under Title I of WIOA and the Wagner-Peyser Act, as well as under Section 2 CFR 200, including 2 CFR 200.327, 200.328, 200.330, 200.331, and 2 CFR 2900, in order to:

(1) determine that expenditures have been made within the proper cost categories and within the cost limitations specified in WIOA and related federal regulations;

(2) determine whether there is compliance with WIOA provisions, related federal regulation, and other applicable laws and regulations;

(3) assure compliance with Section 2 CFR 200; and

(4) determine compliance with the nondiscrimination, disability, and equal opportunity requirements of Section 188 of WIOA, including the Assistive Technology Act of 1998 (USC 3003).

C. **State monitoring authority.** DWS is required to monitor the fiscal and program activities of sub-recipients, which include the local boards, as well as their contractors, i.e. service providers and one-stop operators to ensure the integrity and compliance with WIOA, and related federal regulations.

D. Compliance requirements. Sub-recipients and contract service providers shall comply with all required program and fiscal monitoring activities including site visits, document review, requests for information, and any other information necessary in order to determine sub-recipient and contract service provider compliance or performance. Failure to comply with this requirement will result in corrective action and possible sanctions pursuant to 11.2.20 NMAC.

E. Access to records and personnel.

(1) Access to records. DWS, or its authorized representative, has the right of timely access to any hard copy or electronic document or communication, or any other

record of sub-recipients or contract service providers that are pertinent to the receipt and use of any funds administered by DWS. DWS, or its authorized representative, is also permitted to make any necessary copies, transcripts, etc. in accordance with its monitoring activities.

(2) Access to personnel. The right of access also includes timely access to sub-recipient and contract service provider personnel for the purpose of interview and discussion related to such documents.

(3) Record retention. In accordance with Section 29 CFR 97.42, the right of access is not limited to any required retention period but will last as long as the records are retained. Electronic or hard copy documents obtained during a monitoring review will be secured appropriately. All monitoring records shall be retained for a period of three years or, in cases of any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the three year period, the records shall be retained until completion of the action and resolution of all issues which arise.

[11.2.19.7 NMAC - N, 7/1/2018]

11.2.19.8 LOCAL BOARD SELF-MONITORING:

Sub-recipients are also required to monitor their own grant-supported activities to include the development of local-level monitoring plans, tools, and processes.

A. Written procedures. Sub-recipients under WIOA Title I, must have written monitoring and resolution procedures in place that are consistent with Section 2 CFR part 200 to be used in monitoring both program and fiscal operations. In addition, sub-recipients and contract service providers shall develop their own local-level monitoring plan that includes:

(1) the schedule or timetable for monitoring WIOA funded activities; and

(2) identification of the type of review planned, such as on-site review, comparative financial

analysis, desk review, staff analysis, or other type of appropriate review.

B. Monitoring Controls. To ensure comprehensive and effective monitoring, sub-recipients and contract service providers must adhere to the following:

(1) require periodic reports from their contract service providers outlining monitoring reviews, noncompliance issues, and the status of corrective actions;

(2) ensure that a briefing regarding monitoring activities and findings is provided to the local board or appropriate local board subcommittee at regularly scheduled meetings and that this briefing is documented; and

(3) perform an annual evaluation of the monitoring function to determine its effectiveness.

C. Reporting and resolution requirements. Sub-recipients and contract service providers shall ensure monitoring reports identify instances of noncompliance with applicable federal, state, and local laws, regulations, contract provisions or grant agreements, policies, and official directives, and provide recommendations for corrective action and program quality enhancements. Sub-recipients and contract service providers shall ensure that timelines are established for the completion of corrective action based on the severity of the deficiency, and shall work with the contract service providers to ensure implementation of corrective action. Timelines shall support prompt correction of any instances of noncompliance. Sub-recipients and contract service providers shall ensure that a copy of all monitoring reports are made available to all local board members.

[11.2.19.8 NMAC - N, 7/1/2018]

11.2.19.9 MONITORING REVIEW ELEMENTS:

A. Self and risk assessments. The monitoring process begins with an assessment of the overall health of the WIOA program to assist DWS in determining each local board's level of risk and serves as guidance for setting monitoring focus and priorities.

B. Monitoring reviews. The types of reviews that can be conducted include annual onsite monitoring reviews and quarterly desk reviews, both fiscal and programmatic with timeframes set by DWS.

(1) Annual onsite monitoring reviews. State monitors may conduct two kinds of onsite monitoring reviews of each local board annually at the mid program-year mark, which includes an annual fiscal review and an annual programmatic review. The purpose of these reviews is to identify the strengths and weaknesses of local board implementation of WIOA.

(2) Desk Reviews. State monitors may conduct two kinds of desk reviews of local boards, which includes a quarterly fiscal review and a quarterly programmatic review. The reviews are designed to identify any issues with the local board's fiscal or administrative controls, programmatic operations, and are intended to ensure that these issues are addressed timely.

C. Monitoring reports. When preparing for and performing monitoring reviews, monitors will use a set of monitoring tools to guide their review work activities. Upon completion of monitoring activities, the monitor will begin work on, and issue, a detailed

monitoring report which will be sent electronically to the appropriate local elected official(s) and administrator(s) within 30 days of the completion of the evaluation period. The report will identify issues, policies, or practices that are noncompliant with program standards or other WIOA-related regulations. These observations are risk areas (i.e. areas of concern or findings) that if not corrected, could lead to an area of noncompliance in future monitoring reviews. Findings will include citations for laws, rules, or policies that are out of compliance, and the corresponding corrective actions and recommendations that are required. The report will also include any local board strengths identified by the monitor worth noting, as well as any best practices or technical assistance information the monitor determines may be beneficial to the local board.

D. State monitoring outcomes. Findings can result in the development of a detailed corrective action plan, the provision of technical assistance, or other means by which the deficiencies identified during the evaluation and monitoring period shall be addressed. The requirements for corrective action can be found pursuant to Section 20 CFR 683 and 11.2.20 NMAC. Likewise, exceptional performance, as determined by DWS, can lead to incentives as noted in 11.2.20 NMAC.

E. Review follow-ups. State monitors will conduct follow-ups to verify the completion of required or recommended corrective action activities within the timeframes communicated through the state monitoring manual. This will ensure that any lingering monitoring findings throughout the program year have been resolved, or that a robust corrective action plan is in place for the resolution of those items as appropriate. Follow-up reviews revealing failed compliance will be documented in a formal report to DWS for determination of appropriate sanctions.

[11.2.19.9 NMAC - N, 7/1/2018]

11.2.19.10 TECHNICAL ASSISTANCE:

Technical assistance is an ongoing activity vital to addressing performance and encouraging an environment of continuous improvement. DWS will proactively assist local boards by issuing policy guidance, sharing of best practices, and will work to resolve operational issues as they arise. DWS will also provide guidance and assistance to highlight areas that are working well. Monitors will also be offering technical assistance as a part of the annual onsite monitoring review process, as needed.

[11.2.19.10 NMAC - N, 7/1/2018]

11.2.19.11 INCENTIVES:

Clean monitoring reports (i.e. no findings), exceptional performance outcomes (i.e. more than one hundred percent of the local negotiated performance level), or demonstrated tangible positive outcomes of innovative service strategies, as determined by DWS, can

result in the local board's receipt of an incentive award. Incentives will emphasize accountability, high performance, seamlessness and continuous improvement, supporting New Mexico in achieving its workforce development goals. DWS will annually determine the total amount of funds to be awarded from funds available. State technical guidance will be used to address the process for the administration of incentive awards in accordance with WIOA and federal regulations.

[11.2.19.11 NMAC - N, 7/1/2018]

PART 20: WORKFORCE INNOVATION AND OPPORTUNITY ACT CORRECTIVE ACTIONS, PENALTIES AND SANCTIONS

11.2.20.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS).

[11.2.20.1 NMAC - N, 7/1/2018]

11.2.20.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients, and workforce system partners.

[11.2.20.2 NMAC - N, 7/1/2018]

11.2.20.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA), 29 U.S.C. Chapter 32, Subchapter I; and 50-14-1 *et seq.* 1978 NMSA.

[11.2.20.3 NMAC - N, 7/1/2018]

11.2.20.4 DURATION:

Permanent.

[11.2.20.4 NMAC - N, 7/1/2018]

11.2.20.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.20.5 NMAC - N, 7/1/2018]

11.2.20.6 OBJECTIVE:

To provide comprehensive guidelines for local boards, sub-recipients, and contract service providers on corrective actions, technical assistance, incentives, sanctions, and appeal policies and procedures to be used by DWS in overseeing and monitoring the administration of WIOA formula funds in New Mexico, including roles and responsibilities of affected entities.

[11.2.20.6 NMAC - N, 7/1/2018]

11.2.20.7 CORRECTIVE ACTION AND PENALTIES:

A. General. Failure to ensure compliance with one or more contracted performance measures, grant agreement provisions, federal or state law, federal regulations, or federal or state technical assistance guidance, is considered a sanctionable act or acts. DWS may assess corrective action or penalties based on the totality of the circumstances surrounding the occurrence of a sanctionable act or acts, including the severity, nature, duration, and extent, including previous occurrences of sanctionable acts. In determining corrective action or penalties, DWS may consider efforts by the local board or sub-recipient to prevent the occurrence of the sanctionable act, such as efforts to obtain technical assistance or training, as well as resolved monitoring findings.

B. Types of corrective action and penalties. To assist the local board or sub-recipient in correcting any deficiencies, DWS may assess, for each occurrence of a sanctionable act, one or more of the following corrective action activities or penalties:

(1) participation in technical and quality assurance activities, including mandatory participation in training;

(2) on-site visits by DWS, or its designee, to monitor and assist with daily operations of a local board, local board's contractor, or sub-recipient;

(3) corrective action plan developed by DWS and implemented by the local board to address the identified weaknesses, including strict timelines for completion;

(4) submission of additional or more detailed financial or performance documentation or reports;

(5) designation as a high-risk local board or sub-recipient requiring additional monitoring visits;

(6) requirement for the local administrative entity, or the sub-recipient to report on activities and progress at state board meetings until performance is satisfactory;

(7) DWS meetings with the local area's chief elected official(s), local board chair, local board members, local board's executive director, or the sub-recipient to check in on progress on corrective action;

(8) DWS oversight or management of local board operations, such as the appointment of a steward.

(9) DWS approval of specified actions (i.e. prohibition against entering into specific contracts or engaging in certain activities without explicit prior approval from DWS);

(10) prohibiting the use of designated service providers or one-stop operators;

(11) payment restrictions, such as payment by reimbursement only with required supporting documentation;

(12) delay, suspension, or denial of contract payments;

(13) requirement of a local board or its sub-recipient(s) to reimburse DWS any costs it deems disallowed in accordance with federal or state law, or regulations;

(14) issuance of a notice of intent to cease immediately reimbursement of local program costs;

(15) designation of local board as ineligible for additional discretionary funding, incentives, or other funds;

(16) contract cancellation or termination;

(17) issuance of notice to revoke approval of all or part of the local plan affected;

(18) imposition of a local area reorganization plan;

(19) other actions deemed appropriate by DWS to secure compliance.

C. Penalties for nonattainment of performance goals:

(1) First-year nonperformance. If a local board fails to meet one or more local negotiated performance levels in a single program year based on annual performance outcomes, the local board shall develop a performance improvement plan within 45 days of the final performance outcome reported in the New Mexico WIOA annual report. DWS may also require the local board to modify its local plan or take other action designed to improve the local board's performance.

(2) Second-year nonperformance. If a local board failed to meet one or more local negotiated performance levels for the same performance measure(s) for a second consecutive program year, DWS will review the performance deficiencies and may make a recommendation to the governor to impose a reorganization plan for the local area. DWS's recommendation to the governor for reorganization of a local area may include the imposition of one or more of the following penalties:

(a) requiring modification of the local board's local plan;

(b) issuing a notice of intent to revoke all or part of the affected local plan;

(c) restructuring the local board, including decertification of the current local board and a plan for appointment and certification of a new local board;

(d) selection of an alternate entity to administer the WIOA for the local area; or

(e) merging of the local area into one or more other local areas.

D. Corrective action plans. If a corrective action plan is required, the local board must submit the plan in writing to DWS within 45 days of receipt of the final monitoring report. The corrective action plan must identify actions the board will take to correct the finding and a timeline for completion of the corrective action. The local board may be required to provide a monthly progress report each month that a corrective action plan is pending. In the event a finding is repeated in subsequent monitoring reviews, monitors will inform DWS who will make the determination of appropriate sanctions.

E. Performance Improvement Plans. If a performance improvement plan is required, the local board must submit the plan in writing to DWS within 45 days of the final performance outcome reported in the New Mexico WIOA annual report, and the plan shall be fully implemented by the end of the current program year (June 30). The performance improvement plan for addressing the failure to meet performance shall include, at a minimum, the following:

(1) list of the performance measures for which the local board failed to achieve at least 80 percent of the negotiated performance level;

(2) detailed analysis and explanation of why the local board failed to achieve at least 80 percent of the negotiated performance level;

(3) description of the corrective action to be taken, and the timeline for such actions, to address performance deficiencies in subsequent program years;

(4) identification of the technical assistance needed to support successful performance, including the source and type of assistance; and

(5) local board monitoring plan of its sub-recipients with timelines for evaluating effectiveness of the corrective action plan.

F. Intent to sanction. DWS may, but is not required to, issue a notice of intent to sanction to the local board prior to DWS placing a local board in sanction status. This formal notification is intended to communicate expectations, such as corrective action or performance improvement plans, for resolution of local board findings, to prevent escalation into sanction status.

[11.2.20.7 NMAC - N, 7/1/2018]

11.2.20.8 SANCTIONS:

A. Sanction Status. The purpose of imposing sanctions is to ensure accountability of local boards and other sub-recipients in meeting the needs of employers and job seekers, ensure performance in reaching outcome measures, ensure adequate return on New Mexico investments, and support New Mexico in achieving its goals. There are three levels of sanction status that may be assigned by DWS to a local board, or other sub-recipient, for failure to ensure compliance with one or more contracted performance measures, grant agreement provisions, federal or state laws, and related regulations.

(1) Level one sanction status: A level one sanction status is assigned for significant inability or failure to perform as determined by DWS. A level one sanction status may be associated with the assessment of one or more corrective actions or penalties as referenced in the corrective actions and penalties section of this rule. Sanctionable acts that occur during or after the program, grant, fiscal, contract, or calendar year, include but are not limited to the following:

(a) failure to submit timely and accurate required financial or performance reports;

(b) failure to take corrective action to resolve findings identified during monitoring, investigative or program reviews, including failing to comply with a performance improvement plan;

(c) failure to resolve all independent audit findings or questioned costs within required time frames;

(d) failure to submit the annual audit required by WIOA federal regulations;

(e) breach of administrative and service contract requirements;

(f) failure to retain required service delivery and financial records; and

(g) failure to meet one or more local negotiated performance levels in a single program year based on annual performance outcomes.

(2) Level two sanction status: A level two sanction status is a higher sanction status than level one and is assigned for severe inability or failure to perform as determined by DWS. A level two sanction may be associated with the assessment of more severe penalties than those assessed to a local board or sub-recipient in level one sanction status. Sanctionable acts that occur during or after the program, grant, fiscal, contract, or calendar year include, but are not limited to the following:

(a) failure to resolve or implement corrective action on a level one sanction within 180 days of notice.

(b) committing the same violation a second time within an 18 month period.

(c) failure to meet negotiated performance levels for the same performance measure(s) for two consecutive program years.

(3) Level three sanction status: This is the highest sanction status assigned for extreme inability or failure to perform as determined by DWS. A level three sanction may be associated with the assessment of the most severe penalties being assessed against the local board or sub-recipient. Sanctionable acts that occur during the program, grant, fiscal, contract, or calendar year include, but are not limited to the following:

(a) failure to resolve or implement corrective action on a level one sanction within 360 days of notice.

(b) failure to resolve or implement corrective action on a level two sanction within 180 days of notice.

(c) committing the same violation three or more times within a 36 month period.

B. Sanction Determination. If the local board remains in noncompliance after the prescribed timeline for completion of the corrective action, or performance improvement plan has passed, DWS on behalf of the governor, must determine whether it is appropriate to place a local board or sub-recipient in sanction status. DWS must officially notify the non-compliant local board or sub-recipient by sending the appropriate local administrative entity a sanction determination letterA via certified mail and return receipt requested at least 10 working ways in advance of the effective date of the sanction. The sanction determination letter must include the following:

(1) the sanctionable act upon which the sanction was based;

(2) the sanction status level in which the local board of sub-recipient is placed and the conditions upon which the local board or sub-recipient may be removed from sanction status;

(3) the penalty and the effective date of the penalty;

(4) the corrective action required, including the timeline for completing the corrective action; and

(5) the technical assistance requested from DWS or other entity to assist in completing the corrective action.

[11.2.20.8 NMAC - N, 7/1/2018]

11.2.20.9 APPEALS:

A. Final determination appeals. All final determinations issued by DWS may be appealed pursuant to the process provided in Subpart F of Section 20 CFR 683. A local board or sub-recipient may appeal a sanction determination by filing a written request with the DWS cabinet secretary for appeal of a sanction determination within 10 working days following the receipt of the sanction determination by the local board administrative entity. The DWS cabinet secretary has 30 days to issue a decision to uphold, revoke, or revise the original final determination. If the DWS cabinet secretary takes no action within the 30 day time period, the original final determination becomes the final administrative decision on the appeal.

B. Other appeals. A local area which has been found in substantial violation of WIOA Title I, and has received notice from DWS, on behalf of the governor, that either all or part of the local plan will be revoked or that a reorganization will occur, may appeal such sanctions to the secretary of the United States department of labor under WIOA Section 184(b) and that appeal must be filed no later than 30 days after receipt of written notification of the revoked plan or imposed reorganization, pursuant to Section 20 CFR 683.650.

[11.2.20.9 NMAC - N, 7/1/2018]

PART 21: WORKFORCE INNOVATION AND OPPORTUNITY ACT GRIEVANCE AND COMPLAINT RESOLUTION PROCEDURES

11.2.21.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS).

[11.2.21.1 NMAC - N, 7/1/2018]

11.2.21.2 SCOPE:

State workforce development board (state board), department of workforce solutions (DWS), chief elected officials (CEOs), local workforce development boards (local

boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients, and workforce system partners.

[11.2.21.2 NMAC - N, 7/1/2018]

11.2.21.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act (WIOA) 29 USC Subchapter I of Chapter 32, and 50-14-1 et seq., 1978 NMSA.

[11.2.21.3 NMAC - N, 7/1/2018]

11.2.21.4 DURATION:

Permanent.

[11.2.21.4 NMAC - N, 7/1/2018]

11.2.21.5 EFFECTIVE DATE:

July 1, 2018, unless a later date is cited at the end of a section.

[11.2.21.5 NMAC - N, 7/1/2018]

11.2.21.6 OBJECTIVE:

To establish procedures for processing grievances and complaints as required by WIOA. These procedures apply to all levels of the New Mexico workforce system and covers equal opportunity (EO) requirements, discrimination EO grievances, state and local WIOA complaints, and criminal fraud and abuse.

[11.2.21.6 NMAC - N, 7/1/2018]

11.2.21.7 DEFINITIONS:

29 C.F.R. Section 37.4 contains the definitions of the terms used in the implementation of nondiscrimination and equal opportunity requirements of WIOA. For convenience, some of the definitions found in that section are listed below. If a conflict exists between terminology, as defined in this policy and 29 C.F.R. Section 38.4, the definition in 29 C.F.R. Part 38.4 is controlling.

A. Applicant. An individual who is interested in being considered for any WIOA Title I-financially assisted aid, benefit, service, or training by a recipient, and who has signified that interest by submitting personal information in response to a request by a recipient.

B. Participant. An individual who has been determined to be eligible to participate in and who is receiving aid, benefit, service, or training under a program or activity financially assisted in whole or in part under Title I of WIOA. "Participant" includes, but is not limited to, individuals receiving any service(s) or benefit(s) under state unemployment insurance programs.

C. Recipient. An entity to which financial assistance under WIOA Title I is extended, directly from DWS, or through the governor or another recipient (including any successor, assignee, or transferee of a recipient). The term excludes any ultimate beneficiary of the WIOA Title I-financially assisted program or activity. In instances in which a governor operates a program or activity, either directly or through a state agency, using discretionary funds apportioned to the governor under WIOA Title I (rather than disbursing the funds to another recipient), the governor is also a recipient. In addition, for the purposes of this part, one-stop partners, as defined in Section 121(b) of WIOA, are treated as "recipients", and are subject to the nondiscrimination and equal opportunity requirements of this part, to the extent that they participate in the one-stop delivery system. Recipients are listed in 29 CFR 38.44(zz).

D. Retaliation. Retaliation means discharging, intimidating, threatening, coercing, or discriminating against any individual because the individual has:

(1) filed a complaint alleging a violation of Section 188 of WIOA or 29 CFR Part 38;

(2) opposed a practice prohibited by nondiscrimination and equal opportunity provisions of WIOA or 29 CFR Part 38;

(3) furnished information to, or assisted or participated in any manner, in an investigation, review, hearing, or any other activity related to the following:

(a) Administration of the nondiscrimination and equal opportunity provisions of WIOA, 29 CFR Part 38, or 11.2.21.1 NMAC et seq.;

(b) Exercise of authority under those provisions;

(c) Exercise of privilege secured by those provisions; or

(d) Otherwise exercised any rights and privileges under the nondiscrimination and equal opportunity provisions of WIOA or 29 CFR Part 38.

[11.2.21.7 NMAC - N, 7/1/2018]

11.2.21.8 BACKGROUND:

Section 188 of WIOA prohibits discrimination on the basis of race, color, religion, sex, national origin, age, disability, or political affiliation or belief or, for any beneficiaries,

applicants, and participants only, on the basis of citizenship status as a lawfully admitted immigrant authorized to work in the United States or for participation in a WIOA Title I financially assisted program or activity. The federal regulations (29 C.F.R. Part 38) clarify the application of the nondiscrimination and equal opportunity provisions of WIOA and provide uniform procedures for implementing them. Examples of discriminatory acts specifically prohibited, other than those based on a disability, are set forth in 29 C.F.R. Sections 37.6. The regulatory requirements associated with employment practices and communications with individuals with disabilities are set forth in 29 C.F.R. Sections 38.12 through 38.17.

[11.2.21.8 NMAC - N, 7/1/2018]

11.2.21.9 EQUAL OPPORTUNITY REQUIREMENTS:

References include the following: Workforce Innovation and Opportunity Act (WIOA), 29 CFR, Part 38, 20 CFR Section 667.275, 20 CFR Section 667.600(g)(1)(2) and Training and Employment Information Notice (TEIN) No. 16-99.

A. Recipient requirements. Recipients of WIOA Title I federal financial assistance have basic requirements which are summarized as follows.

(1) designate an equal employment opportunity officer;

(2) communicate equal employment opportunity policy and train staff to carry it out;

(3) review all contracts, plans, and agreements for equal opportunity;

(4) make efforts to provide equitable services among substantial segments of the eligible population;

(5) ensure program and site access to individuals with disabilities;

(6) collect and maintain data to examine discrimination;

(7) monitor recipients for compliance;

(8) receive and process discrimination complaints; and

(9) obtain corrective action or apply sanctions for violating nondiscrimination requirements.

B. Annual self-appraisal. All WIOA recipients shall perform an annual self-appraisal to ensure and document compliance with the above listed requirements. This will include completion by each local board and service providers of the five accessibility

checklists, set forth in USDOL training and information notice no. 16-99, available on the web at: www.doleta.gov/directives.

[11.2.21.9 NMAC - N, 7/1/2018]

11.2.21.10 DISCRIMINATION AND EQUAL OPPORTUNITY GRIEVANCE:

A. Equal opportunity complaints.

(1) WIOA prohibits discrimination on the basis of race, color, religion, sex (including pregnancy, childbirth, and related medical conditions, transgender status, and gender identity), national origin (including limited English proficiency), age, disability, political affiliation or belief, and for beneficiaries, applicants, and participants only, on the basis of either citizenship status or participation in any program or activity that received financial assistance under WIOA Title or 29 CFR Part 38. Sexual harassment is a prohibited form of sex discrimination.

(2) Any person who believes that he or she, or any specific class of individuals, has been or is being subjected to discrimination or retaliation prohibited by WIOA or its implementing regulations may file a written complaint, either individually or through an authorized representative.

(3) The discrimination complaint processing procedures shall be completed and a written notice of final action issued within 90 calendar days from the date the complaint was filed.

(4) To the extent possible and permitted by law, the confidentiality of information obtained as a result of the processing or investigation of a complaint will be maintained and will only be provided to those persons who have a legitimate need to know in order to achieve a timely resolution of the complaint. Even if an individual who makes an initial report of suspected discrimination or harassment ultimately decides to not file a formal complaint, it may still be necessary for the state or local administrative entity, service provider, one-stop operator, the state-level EO officer or the local area EO officer to investigate the matter in order to protect other applicants or participants from discrimination and harassment.

(5) Reprisal or retaliation against any individual for making a complaint of unlawful discrimination or for using, cooperating, or participating in the complaint process, including serving as a witness, is prohibited. Any person or persons engaging in retaliation are subject to disciplinary action, up to and including termination from employment.

(6) Both the complainant and respondent have the right to be represented by an attorney or other individual of their choice at their own expense throughout the complaint process.

B. Time and place for filing complaint.

(1) Discrimination complaints shall be filed with a state or local administrative entity, service provider, one-stop operator, the state-level EO officer, a local area EO officer, or with the Director of the Civil Rights Center (CRC), USDOL, 200 Constitution Ave NW, Room N-4123, Washington, DC 20210.

(2) Discrimination complaints shall be filed within 180 days of the alleged discrimination. However, a complainant may petition the director of the civil rights center for an extension of the filing time.

(3) The date of filing of any discrimination complaint shall be:

(a) if the complaint is sent by mail, the postmark date on the envelope in which the complaint is mailed;

(b) if the complaint is sent via commercial courier service, the date on which the courier service records that it received the complaint;

(c) if the complaint if sent by fax, the transmittal date recorded on the complaint;

(d) if the complaint is sent by electronic mail, the date that it is date stamped on the e-mail; or

(e) in the absence of any of the above, the date on which the complaint is received by the state or local administrative entity, service provider, one-stop operator, state-level EO officer, or local area EO officer.

C. Complaint requirements: Each complaint must be in writing and contain the following information:

(1) The complainant's name, mailing address, telephone number (if any), and e-mail address (if available);

(2) The identity of the respondent, i.e. the individual or entity that the complainant alleges is responsible for the discrimination;

(3) A description of the complainant's allegations. This description must include enough detail to allow the recipient or the CRC director, as applicable, to determine whether:

(a) the CRC or the recipient, as applicable, has jurisdiction over the complaint;

(b) the complaint was filed in time; and

(c) the complaint has apparent merit; in other words, whether the complainant's allegations, if true, would indicate a violation of the nondiscrimination and equal opportunity provisions of Title I of WIOA or 29 CFR Part 38.

(4) The signature of the complainant or complainant's representative.

D. Initial complaint processing procedures.

(1) Logging of complaints. All complaints shall be logged.

(a) For complaints filed with a service provider, one-stop operator or local area EO officer, it shall be the local area EO officer's responsibility to log the complaint.

(b) For complaints filed DWS, or the state-level EO officer, it shall be the state-level EO officer's responsibility to log the complaint;

(c) All equal opportunity complaint logs shall include the following information: the name and address of the complainant; the basis of the complaint; a description of the complaint; the disposition and date of disposition of the complaint; and any other pertinent information.

(d) Each local EO officer shall transmit copies of its equal opportunity logs for their corresponding local workforce development area to the state-level EO officer on a monthly basis and shall do so no later than 10 calendar days after the last day of the month the log covers.

(e) The state-level EO officer will compile and maintain copies of all complaint logs submitted in order to carry out the recordkeeping and monitoring activities required under WIOA and 29 CFR Part 38.

(2) Determining jurisdiction. Jurisdiction must be determined within five business days of the date the complaint is received. In order for a recipient to have jurisdiction to process a discrimination complaint, each of the following elements must be met:

(**a)** the respondent against whom the complaint was field must be a WIOA recipient;

(**b**) the complaint must allege a basis for discrimination that is prohibited by WIOA, including unlawful retaliation; and

(**c)** the complaint was filed within 180 calendar days of the alleged discrimination.

(3) Who determines jurisdiction.

(a) if the complaint is filed with the local administrative entity, service provider, one-stop operator, or local area EO officer, then the local area EO officer is responsible for determining jurisdiction.

(b) if the complaint is filed with DWS or the state-level EO officer, then the state-level EO officer is responsible for determining jurisdiction.

(**4) Notice of lack of jurisdiction.** If a determination is made that there is no jurisdiction to process the complaint, the EO officer (state-level or local area) making the determination shall send a written notice of lack of jurisdiction to the complaint that includes the reason for the determination and notice that the complainant has the right to file a complaint directly with the civil rights center within 30 calendar days from receipt of the notice of lack of jurisdiction. The written notice of lack of jurisdiction must be sent within five business days of the date that the complaint is received.

(**5) Joint jurisdiction.** Where the complaint alleges discrimination by a WIOA recipient, or service provider on a basis that is prohibited by both WIOA and by a civil rights law independently enforced by that WIOA recipient or service provider, the complaint shall be referred to that WIOA recipient or service provider for processing under their procedures. For example, WIOA prohibits discrimination on the basis of national origin. If a discrimination complaint on the basis of national origin is made against a WIOA recipient or service provider and they are also prohibited from discriminating on the basis of national origin, then the complaint will be referred to them for processing according to their own procedures. The state-level or local area EO officer making the determination that joint jurisdiction exists is responsible for making written referral of the complaint to the WIOA recipient or service provider and sending written notice of the referral to the complainant within five business days of the date that the complaint is received.

(**6) Sole jurisdiction.** Where the complaint alleges discrimination by a WIOA recipient or service provider on a basis that is prohibited by WIOA and is not covered by a civil rights law independently enforced by that WIOA recipient or service provider (e.g., political affiliation or belief, citizenship or participation in WIOA Title I), the complaint shall be processed by that WIOA recipient or service provider under these procedures. When it is determined that WIOA has sole jurisdiction over the discrimination complaint, the complaint will be referred to the state-level EO officer within five business days of the date that the complaint is received.

(**7)** Within 10 business days of the date that the complaint was filed, the state-level EO officer shall conduct an initial review of the complaint and issue an initial notice in writing to the complainant containing the following information:

(a) an acknowledgement that the recipient has received the complaint;

(b) notice that the complaint process shall be completed and a written notice of final action issued within 90 calendar days from the date the complaint was filed;

(c) notice that the complainant has the right to be represented in the complaint process;

(d) a copy of the "equal opportunity is the law" statement;

(e) notice that the complainant has the right to request and receive, at no cost, auxiliary aids and services, language assistance services, and that this notice will be translated into non-English languages upon the complainant's request;

(f) a list of issues raised in the complaint;

(g) for each issue raised in the complaint, a statement whether the recipient will accept the issue for investigation or reject the issue, and the reasons for the rejection;

(h) a statement that the complainant has the right to elect resolution of their complaint through alternative dispute resolution (ADR), at the complainant's sole option;

(i) a statement that, if the complainant does not desire to use ADR, he or she must notify the state-level officer of that fact within 10 business days of the issuance of the state-level EO officer's initial letter acknowledging receipt of the complaint; and

(j) a statement that retaliation against any individual for filing a complaint or cooperating with an investigation is unlawful and prohibited.

(8) Alternative Dispute Resolution (ADR). The complainant may, but is not required to, attempt to resolve their complaint through ADR.

(a) the choice whether to use ADR rests with the complainant;

(b) the complainant must notify the state-level EO officer of his or her election to use ADR within 10 business days of the issuance of the state-level EO officer's initial letter acknowledging receipt of the complaint;

(c) if the complainant requests to use ADR for resolving the complaint, the state-level EO officer will request a mediator and monitor the processing of the complaint. The mediator will schedule mediation by written notice, mailed to all interested parties at least seven calendar days prior to the first mediation session. The notice will include the date, time, and place of the mediation. The mediation process shall be concluded within 45 calendar days from the date the complaint was filed. The complaint is considered resolved when all parties to the complaint enter into a written agreement resolving the issues raised in the complaint. The written agreement shall give notice that if the terms of the agreement are breached, the non-breaching party may file a complaint with the director of the CRC within 30 calendar days of the date the non-breaching party learns of the breach.

(d) if the parties do not reach an agreement, the state-level EO officer will proceed to investigate the circumstances underlying the complaint under these procedures.

(9) Fact-finding and investigation.

(a) Unless the complainant has notified the state-level EO officer that the complainant desires to attempt a resolution of their complaint through ADR, the state-level EO officer shall investigate the circumstances underlying the complaint. The investigation may include, but is not limited to, interviewing the complainant, the respondent, and any witnesses included in the complaint or who become known through the investigation process; reviewing documents and other evidence; and conducting site visits.

(b) The state-level EO officer has the power to make written request of any entity to which financial assistance under WIOA Title I is extended to produce records or documents that are potentially relevant to the investigation of the complaint.

(c) The entity to which financial assistance under WIOA Title I is extended shall produce such records or documents requested by the state-level EO officer within 10 days of the request. Failure by the entity to comply with the state-level EO officer's request for records could negatively impact its eligibility for financial assistance under WIOA Title I in future grant cycles.

(d) If at any stage in the investigation the state-level EO officer investigating the complaint has a reasonable belief that immediate action is necessary to protect any involved parties from harm, the appropriate members of management shall be notified and actions deemed appropriate will be taken.

(e) Within 90 days of the date that the complaint was filed, the state-level EO officer shall complete his or her investigation and issue a notice of final action.

(f) If at any time during the processing of a complaint it becomes apparent the state-level EO officer has a conflict of interest with respect to the complaint which would make it improper for him or her to conduct or participate in the investigation, the cabinet secretary of DWS, as the governor's designee with respect to enforcement of nondiscrimination and equal opportunity provisions of WIOA, shall appoint an alternate qualified individual to process, investigate and make a determination on the complaint.

(10) Notice of final action. The notice of final action shall contain the following information:

(a) For each issue raised in the complaint, a statement of either: the decision on the issue and an explanation of the reasons underlying the decision based on the findings of the investigation or; if the parties elected to use ADR to resolve the complaint, a description of the way the parties resolved the issue; and

(b) Notice that the complainant has a right to file a complaint with the director of the CRC within 30 days of the date in which the notice of final action is received if the complainant is dissatisfied with the notice of final action.

(c) The notice of final action shall be sent to: the complainant; DWS; and in the case of a complaint involving a recipient, service provider, one-stop operator or other entity under the jurisdiction of a local workforce development board, the local workforce development board, which shall treat all information related to the complaint or contained in the notice of final action with utmost confidentiality.

[11.2.21.10 NMAC - N, 7/1/2018]

11.2.21.11 LOCAL AND STATE WIOA COMPLAINTS:

A. Program complaints against local WIOA programs and policies.

(1) Who may file. Applicants, participants, service providers, recipients and other interested parties may file a complaint alleging a non-criminal violation of local WIOA programs, agreements or the local workforce development board's policies and activities.

(2) Time and place for filing. Local program complaints shall be filed with the local administrative entity or one-stop operator within one year from the date of the event or condition that is alleged to be a violation of WIOA.

(3) Initial review.

(a) Written complaints will be taken by the local administrative entity or one-stop operator from the complainant or the complainant's designated representative. All complaints will be logged.

(b) If the complaint alleges a violation of any statute, regulation, policy, or program that is not governed by WIOA, the complaint will be referred to the appropriate organization for resolution. Notice of the referral will be sent to the complainant.

(c) A complaint file will be established that contains: all application and enrollment forms, if appropriate; the complete statement and form; chronological log of events; relevant correspondence; and a record of the resolution attempted.

(4) Informal resolution. An attempt should be made to informally resolve the complaint to the satisfaction of all parties. This informal resolution process shall be completed within 10 calendar days from the date the complaint was filed. If all parties are satisfied, the complaint is considered resolved. The terms and conditions of the resolutions shall be documented in the complaint file.

(5) Formal resolution. When no informal resolution is possible, the local administrative entity or one-stop operator will forward the complaint and a copy of the file to the NMDWS WIOA administrator to review the complaint file, conduct a further investigation, if necessary, and issue a determination within 20 calendar days from the date the complaint was filed.

(6) Appeal.

(a) Any party dissatisfied with the formal resolution determination, or any party who has not received a determination or a formal resolution within 20 calendar days from the date the complaint was filed, may file an appeal. An appeal shall be filed with the department of workforce solutions within 90 calendar days from the date the complaint was originally filed.

(b) The NMDWS WIOA administrator will review the record and issue a decision on appeal within 30 calendar days from the date the appeal was received by the state administrative entity.

(c) Any party dissatisfied with the decision on appeal of the NMDWS WIOA administrator may request a hearing within 10 calendar days from the date of the decision. NMDWS will schedule the hearing and forward the complaint to the NMDWS hearing officer. The NMDWS WIOA administrator will monitor the processing of the complaint.

(7) Hearing. The NMDWS hearing officer will schedule a formal hearing by written notice mailed to all interested parties at least seven calendar days prior to the hearing. The notice will include the date, time, and place of the hearing. The hearing shall be conducted within 45 calendar days from the date the complaint was filed. Parties may present witnesses and documentary evidence and question others who may present evidence and witnesses. Parties may be represented by an attorney or another designated representative, and may request that records and documents be produced. All testimony will be taken under oath or affirmation. The hearing will be recorded. The hearing officer's recommended resolution will include a summary of factual evidence given during the hearing and the conclusions upon which the recommendation is based.

(8) Final decision. The NMDWS WIOA administrator will review the recommendation of the hearing officer and will issue a final decision within 60 calendar days from the date the complaint was filed.

B. Program complaints against state WIOA programs and policies.

(1) Who may file. Applicants, participants, service providers, recipients and other interested parties may file a complaint alleging a non-criminal violation of statewide WIOA policies, activities, or agreements.

(2) Time and place for filing. Statewide program complaints shall be filed with the NMDWS WIOA administrator within one year from the date of the event or condition that is alleged to be a violation of WIOA.

(3) Initial review.

(a) Written complaints will be taken from the complainant or the complainant's designed representative. All complaints will be logged.

(b) When the complaint alleges a violation of local WIOA programs, policies, or agreements, the complaint will be referred to the local administrative entity for processing under the complaint procedures for program complaints against local WIOA programs. If the complaint alleges a violation of any statute, regulation, policy or program that is not part of WIOA, the complaint will be referred to the appropriate organization. Notice of the referral will be sent to the complainant.

(4) Informal resolution. An attempt should be made to informally resolve the complaint to the satisfaction of all parties. This informal resolution process shall be completed within 10 calendar days from the date the complaint was filed. If all parties are satisfied, the complaint is considered resolved and the terms of the conditions of the resolution shall be documented in the complaint file.

(5) Formal resolution.

(a) When no informal resolution is possible, the NMDWS WIOA administrator will forward the complaint together with a copy of the complaint file to the NMDWS hearing officer who will review the complaint file, conduct a further investigation if necessary, and issue a determination within 20 calendar days from the date the complaint was filed. If further review of the determination is not requested, the complaint is considered resolved and the resolutions should be documented in the complaint file.

(b) Any party dissatisfied with the determination may request a hearing within 10 calendar days of the date of determination. NMDWS will schedule the hearing and forward the program complaint to the NMDWS hearing officer for resolution. The NMDWS WIOA administrator will monitor the processing of the complaint.

(6) Hearing. The NMDWS hearing officer will schedule a formal hearing by written notice, mailed to all interested parties at least seven calendar days prior to the hearing. The notice will include the date, time, and place of the hearing. The hearing shall be conducted within 45 calendar days from the date the complaint was filed. Parties may present witnesses and documentary evidence, and question others who may present evidence and witnesses. Parties may be represented by an attorney or another designated representative, and may request that records and documents be produced. All testimony will be taken under oath or affirmation. The hearing will be recorded. The hearing officer's recommended resolution will include a summary of

factual evidence given during the hearing and the conclusions upon which the recommendation is based.

(7) Final decision. The NMDWS WIOA administrator will review the recommendation of the hearing officer and will issue a final decision within 60 calendar days from the date the complaint was filed.

[11.2.21.11 NMAC - N, 3/12/2019]

PART 22: WORKFORCE INVESTMENT ACT (WIA) PROGRAMS OF DEMONSTRATED EFFECTIVENESS [REPEALED]

[This part was repealed on August 15, 2012]

PART 23: WORKFORCE INVESTMENT ACT (WIA) PRIORITY OF SERVICE [REPEALED]

[This part was repealed on August 15, 2012]

PART 24: WORKFORCE INVESTMENT ACT (WIA) AUDITS, DISALLOWED COST RESOLUTION, SANCTIONS FOR DELINQUENT AUDITS [RESERVED]

PART 25: WORKFORCE INVESTMENT ACT (WIA) ELIGIBLE TRAINING PROGRAMS AND PROVIDERS [RESERVED]

PART 26: WIA PROGRAM COMPLAINT RESOLUTION PROCEDURES AND PROCEDURES FOR REPORTING CRIMINAL FRAUD AND ABUSE [REPEALED]

[This part was repealed on August 15, 2012]

PART 27: WIA EQUAL OPPORTUNITY REQUIREMENTS AND DISCRIMINATION COMPLAINT RESOLUTION PROCEDURES [REPEALED]

[This part was repealed on August 15, 2012]

PART 28: WORKFORCE INVESTMENT ACT (WIA) PROCUREMENT AND CONTRACTING ACTIVITIES GUIDELINES [REPEALED]

[This part was repealed on August 15, 2012]

PART 29: [RESERVED]

PART 30: WIA POLICY REGARDING DISABILITY NONDISCRIMINATION [REPEALED]

[This part was repealed on August 15, 2012]

PART 31: APPRENTICESHIP ASSISTANCE

11.2.31.1 ISSUING AGENCY:

Department of Workforce Solutions.

[11.2.31.1 NMAC - Rp, 11.2.31.1 NMAC, 3/31/2016]

11.2.31.2 SCOPE:

All New Mexico registered apprenticeship programs that develop skilled craftsmen in occupations recognized by the department of workforce solutions.

[11.2.31.2 NMAC - Rp, 11.2.31.2 NMAC, 3/31/2016]

11.2.31.3 STATUTORY AUTHORITY:

22-2-1, 22-2-2, 21-19A-6 NMSA 1978.

[11.2.31.3 NMAC - Rp, 11.2.31.3 NMAC, 3/31/2016]

11.2.31.4 DURATION:

Permanent.

[11.2.31.4 NMAC - Rp, 11.2.31.4 NMAC, 3/31/2016]

11.2.31.5 EFFECTIVE DATE:

March 31, 2016, unless a later date is cited at the end of a section.

[11.2.31.5 NMAC - Rp, 11.2.31.5 NMAC, 3/31/2016]

11.2.31.6 OBJECTIVE:

To set forth requirements and processes by which an apprenticeship program shall receive assistance through the department of workforce solutions relating to 21-19A-2 et seq NMSA 1978.

[11.2.31.6 NMAC - Rp, 11.2.31.6 NMAC, 3/31/2016]

11.2.31.7 DEFINITIONS:

A. "**Advisory committee**" means the apprenticeship and training advisory committee to the division.

B. "**Applicant**" means an entity desiring to file for Apprenticeship Assistance Act funding.

C. "**Apprentice**" means a person at least 16 years old who is approved by the department of workforce solutions and is covered by a written apprenticeship agreement with a registered apprenticeship program in any trade or occupation.

D. "**Apprenticeable trades or occupations**" mean those trades or occupations officially recognized by the department of workforce solutions.

E. "**Apprenticeship**" means a formal educational method for training a person in a skilled trade or occupation that combines supervised employment with related instruction.

F. "**Apprenticeship agreement**" means a written agreement between an apprentice and a registered apprenticeship program, which agreement contains the terms and conditions of the employment and training of the apprentice identified in 21-19A-5.C NMSA 1978.

G. "**Apprenticeship committee**" means the sponsoring committee of each apprenticeable craft or occupation that is responsible for that particular apprenticeship program.

H. "**Apprenticeship standards**" means those standards that are registered and approved by the department of workforce solutions or the United States department of labor, office of apprenticeship.

I. "**Chair**" means the director for apprenticeship of the department of workforce solutions who shall chair the apprenticeship training and advisory committee (ATAC) meetings.

J. "**Department**" means the department of workforce solutions.

K. "**Director**" means the director for apprenticeship of the department of workforce solutions.

L. "**Division**" means the labor relations division of the department of workforce solutions.

M. "**Journeyworker**" means an individual who has documented sufficient skills and knowledge of a trade, craft or occupation, either through formal apprenticeship or

through practical on-the-job experience, and formal training. This individual is recognized by the state or his/her employer, as being fully qualified to perform the work of the trade, craft or occupation.

N. "Procedures manual" means the manual maintained by the department of workforce solutions that contains the administrative procedures, forms formulas, reports and other requirements necessary for approval and distribution of funds provided by the Apprenticeship Assistance Act.

O. "Office of apprenticeship" means the office designated by the employment and training administration, United States department of labor to administer the national apprenticeship system or its successor organization.

P. "**Registered apprenticeship program**" means a program registered by the department of workforce solutions or the office of apprenticeship.

Q. "**Related instruction**" means the organized, off-the-job instruction in theoretical or technical subjects required for the completion of an apprenticeship for a particular apprenticeable trade or occupation.

R. "**Reserved funds**" mean funds not obligated on March 1 of the current fiscal year.

S. "Secretary" means the secretary of the department of workforce solutions.

T. "Supplementary instruction" means new or upgraded skill training for those already employed as journeyworkers.

[11.2.31.7 NMAC - Rp, 11.2.31.7 NMAC, 3/31/2016]

11.2.31.8 APPRENTICESHIP AND TRAINING ADVISORY COMMITTE:

The apprenticeship and training advisory committee shall provide input to the director for apprenticeship of the department of workforce solutions regarding:

A. The administration of funds provided by the Apprenticeship Assistance Act to assist apprenticeship programs.

B. Recommend request for legislative appropriation of state funds for apprenticeship training.

C. Modifications to the application process and procedures manual.

D. Funding formulas for distributing available funds that shall be uniformly applied to all registered apprenticeship programs based on data contained in the apprenticeship-related instruction cost study required by Section 21-19A-10 NMSA 1978.

E. Development of a program and fiscal year calendar.

[11.2.31.8 NMAC - N, 3/31/2016]

11.2.31.9 THE DEPARTMENT OF WORKFORCE SOLUTIONS:

The department of workforce solutions shall have sole control over the disbursement of funds appropriated under the Apprenticeship Assistance Act and shall:

A. Receive input from the apprenticeship and training advisory committee regarding the administration of funds provided by the Apprenticeship Assistance Act to assist apprenticeship programs.

B. Annually develop and publish a procedures manual that shall include;

(1) a current calendar with the dates for apprenticeship meetings, quarterly reports, regulatory deadlines and any other significant items;

(2) an application form for requesting Apprenticeship Assistance Act funds;

(3) the date for the public meeting to be held no later than February 28th for approving the procedures and application process;

(4) the date for the public meeting to be held no later than March 30th to conduct the mandatory technical assistance workshop for prospective applicants; and

(5) the date for the public meeting to be held no later than May 30th to approve applicants for receipt of Apprenticeship Assistance Act funds.

C. Develop uniform formulas for the distribution of available funds to registered apprenticeship programs.

D. Evaluate allocated funds throughout the fiscal year for possible redistribution to all participating programs as provided in the Apprenticeship Assistance Act.

E. Review reimbursement claims for accuracy and to ensure that all funded programs have sufficient records to allow for audits in accordance with the Apprenticeship Assistance Act.

F. Finalize grant agreements with all funded programs.

[11.2.31.9 NMAC - N, 3/31/2016]

11.2.31.10 APPLICATION:

The department of workforce solutions shall develop an application that shall:

A. Comply with criteria for apprenticeship programs as outlined in the Apprenticeship Assistance Act.

B. Require any program applicant to have a minimum of a one year's registration with the department of workforce solutions office of apprenticeship and at least one apprentice at the time the application is submitted.

C. Provide that requested funding shall be calculated based on the number of total related instruction contact hours multiplied by the approved hourly rate, not to exceed two hundred twenty hours per participant per year.

D. Require any program applicant to maintain a certificate of registration from the New Mexico taxation and revenue department and be licensed to do business in New Mexico.

E. Provide that requested funding shall be calculated using only those apprentices registered and in training at the time of application; the number of approved apprentices being applied for must be equal to or less than the total number of apprentices registered and in training at the time of application.

F. Provide that all programs have a structured component for related instruction with a minimum of four hours of direct in person contact with an instructor per month.

G. Require a representative from any program applicant to appear in person at the mandatory technical assistance workshop for prospective applicants and at the mandatory application approval meeting.

H. Contain sections requesting information for funding request, a funding survey and an acknowledgment of the department of workforce solutions' policies and procedures.

I. Provide that no funds shall be distributed to an apprenticeship program until the program has timely filed all reports required by the Apprenticeship Assistance Act and the department of workforce solutions.

J. Require any program applicant to respond to request for additional information that the department of workforce solutions regards as necessary to clarify issues identified in the application or expenditure of Apprenticeship Assistance Act funds.

[11.2.31.10 NMAC - N, 3/31/2016]

11.2.31.11 PROCESS FOR APPLICATION AND EXPENDETURE OF FUNDS:

A. To increase transparency and expedite the transmission of necessary information the department of workforce solutions will publish and maintain on the department of workforce solutions' website the current calendar, application form for

Apprenticeship Assistance Act funds and a procedures manual that contains all the required forms developed by the department of workforce solutions.

B. Program applicants to be eligible for consideration for Apprenticeship Assistance Act funds in the fiscal year shall submit their applications to the director by the deadline specified in the department of workforce solutions' procedures manual.

C. A representative from the program applicant must appear in person at the mandatory technical assistance workshop for prospective applicants and at the mandatory application approval meeting to be eligible for consideration for funding in the fiscal year.

D. If the director of apprenticeship for the department of workforce solutions denies an application or approves the application with conditions, the director shall:

(1) state the reasons for the denial or imposition of conditions in writing within three (3) days of the meeting at which the application was denied or conditions imposed;

(2) a program applicant whose application was denied or approved with conditions that are unacceptable to the program applicant may appeal the decision to the secretary within three (3) days of the receipt of the notice of the denial or imposition of conditions;

(3) within three (3) days of receipt of the notice of appeal, the secretary shall meet with the program applicant and review the director of apprenticeship's decision that denied the application or approved it with conditions;

(4) the secretary may affirm the decision of the director of apprenticeship or reverse the decision with or without the imposition of conditions; and

(5) the secretary's decision shall be final and binding on the program applicant.

E. All approved program applicants shall comply with the following requirements by the dates specified in the department of workforce solutions' procedures manual:

(1) complete and sign a grant agreement;

(2) submit quarterly claims for reimbursement;

(3) submit a mid-year survey; and

(4) comply with all other requirements of the procedures manual.

F. Participation in any apprenticeship assistance act meeting of the department of workforce solutions by means of a conference telephone or other communications equipment when it is otherwise difficult or impossible for the participant to attend the meeting in person shall be allowed, provided that each person participating by conference telephone or other communications equipment can be identified when speaking, all participants are able to hear each other and members of the public attending the meeting are able to hear any person speaking; except that a representative from any program applicant shall appear in person at the mandatory technical assistance workshop for prospective applicants and at the mandatory application approval meeting.

[11.2.31.11 NMAC - N, 3/31/2016]

PART 32: WORKFORCE INNOVATION AND OPPORTUNITY ACT LOCAL AREA DESIGNATION PROCEDURE

11.2.32.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions (DWS).

[11.2.32.1 NMAC - N, 10/29/2019]

11.2.32.2 SCOPE:

State workforce development board (state board), New Mexico department of workforce solutions, chief elected officials (CEOs), local workforce development boards (local boards), local workforce system administrative entities (local administrative entities), workforce system sub-recipients, and workforce system partners.

[11.2.32.2 NMAC - N, 10/29/2019]

11.2.32.3 STATUTORY AUTHORITY:

Title I of the Workforce Innovation and Opportunity Act, 29 USC Subchapter I of Chapter 32 (WIOA), and Section 50-14-1 et seq., 1978 NMSA.

[11.2.32.3 NMAC - N, 10/29/2019]

11.2.32.4 DURATION:

Permanent.

[11.2.32.4 NMAC - N, 10/29/2019]

11.2.32.5 EFFECTIVE DATE:

October 29, 2019, unless a later date is cited at the end of a section.

[11.2.32.5 NMAC - N, 10/29/2019]

11.2.32.6 OBJECTIVE:

To establish the process by which the governor shall designate local workforce development areas within the state that are eligible to receive funding under Title 1 of WIOA, after consultation with local boards and chief elected officials and after consideration of comments received through the public comment process.

[11.2.32.6 NMAC - N, 10/29/2019]

11.2.32.7 DEFINITIONS:

[RESERVED]

11.2.32.8 BACKGROUND:

A. Title 1 of the Workforce Innovation and Opportunity Act (WIOA) requires DWS to issue a policy to provide guidance regarding the process for designation of workforce development areas in New Mexico, along with the process for appealing designation decisions. WIOA mandates that the State Workforce Development Board must assist the governor in designation of workforce development areas, as required in WIOA Section 106, and requires an established appeals process.

B. The governor shall designate local workforce development areas within the state through consultation with the state board, after consultation with chief elected officials, and after consideration of comments received through the public comment process as described in WIOA, Section 102(b)(2)(E)(iii)(II). Considerations shall include:

(1) the extent to which the areas are consistent with the labor market areas in the state;

(2) the extent to which the areas are consistent with regional economic development areas in the state; and

(3) the extent to which the areas have available federal and non-federal resources necessary to effectively administer activities under subtitle B and other applicable provisions of this act, including whether the areas have the appropriate education and training providers, such as institutions of higher education and area career and technical education schools.

[11.2.21.8 NMAC - N, 10/29/2019]

11.2.32.9 LOCAL AREA DESIGNATION PROCEDURE:

A. At any time, CEOs from local areas, the state board, any unit of general local government, or the governor may propose or request a local area designation. A request is initiated by filing a written request to DWS, the state administrative entity (SAE) authorized by the governor to implement Title I of WIOA.

B. Requests for local workforce development area designations must be sent in writing to the department of workforce solutions at 401 Broadway NE, Albuquerque, NM 87102, to the attention of the cabinet secretary.

C. Requests must be received by the governor through DWS no later than October 1 of the year previous to the program year the designation would be in effect. A program year (PY) is from July 1 through June 30. (i.e.: PY 2018 is July 1, 2018 through June 30, 2019)

D. The full request for the designation as a local workforce development area must:

(1) Address the following questions:

(a) Is the proposed designation consistent with labor market areas in the state; and

(b) Is the proposed designation consistent with regional economic development areas in the state; and

(c) Are there available federal and non-federal resources, including appropriate education and training institutions, to effectively administer activities pursuant the youth, adult and dislocated worker programs under Title I of WIOA.

(2) Submit a service delivery plan that includes a description of resources available to the area to provide services and the ability to coordinate multiple resources;

(3) demonstrate local support for the designation by chief elected officials, including, but not limited to, county commissioners, mayors, city council, or other applicable boards;

(4) demonstrate local capacity to manage funds per federal and state guidelines, and the capacity to provide oversight of the programs;

(5) provide evidence that the proposed entity, in the two program years for which data is available prior to the request, met or exceeded the adjusted levels of performance, successfully met the state and federal fiscal requirement, and was not subject to the sanctions process per DWS and USDOL guidelines; and

(6) address how the proposed new area designation will impact other local workforce areas or regions. It should be understood by any county, city, or combination of such seeking the designation, that the new area will secure formula allocated funds

for each WIOA funding stream (i.e.: adult, dislocated worker, and youth) based on the formula factors identified by USDOL.

E. If the requirements are met, the governor, through DWS, will forward the request to the state board for consideration. The state board must provide public notice pursuant to the New Mexico Open Meetings Act. The SWDB shall provide notice of the time, place and agenda for any meeting where designation will be discussed. The notice must be specific enough to permit citizens to recognize matters of interest.

F. If the state board determines that there is compelling evidence for designation, the state board will recommend the designation of the local area to the governor. The governor may approve the request and recognize the resulting configuration of the local area(s).

[11.2.32.9 NMAC - N, 10/29/2019]

11.2.32.10 APPEAL PROCEDURES:

Any changes to existing local area designation by the state board may be appealed to the governor through DWS.

A. Appeals must be sent in writing to the department of workforce solutions, 401 Broadway NE, Albuquerque, NM 87102, to the cabinet secretary's attention.

B. The appeal must be filed within 14 calendar days after notification of the decision.

C. The appeal must contain a specific statement of the grounds upon which the appeal is sought.

D. The state board will have 60 days from the date the appeal is received to hold a public hearing to allow for comments and objections concerning the request

E. The state board will review the record, including public comments, and will submit a recommendation to the governor within 25 business days of the hearing. The final decision rests with the governor.

F. If the decision of the appeal changes the designation, the changes will become effective on July 1st of the following year.

G. If a decision on appeal is not rendered in a timely manner, or if the appeal does not result in designation, the entity may request review by the US Secretary of Labor, under the procedures set forth in 20 CFR 667.640(a).

[11.2.32.10 NMAC - N, 10/29/2019]

PART 33-96: [RESERVED]

PART 97: WELFARE-TO-WORK PROGRAM POLICIES [REPEALED]

[This part was repealed on December 30, 2011.]

PART 98-170: [RESERVED]

PART 171: THE YOUTH CONSERVATION CORPS (YCC) PROGRAM

11.2.171.1 ISSUING AGENCY:

The New Mexico Youth Conservation Corps Commission.

[11.2.171.1 NMAC – Rp, 11.2.171.1 NMAC, 12/17/2019]

11.2.171.2 SCOPE:

General Public.

[11.2.171.2 NMAC – Rp, 11.2.171.2 NMAC, 12/17/2019]

11.2.171.3 STATUTORY AUTHORITY:

Section 9-5B-l et-seq. NMSA 1978.

[11.2.171.3 NMAC – Rp, 11.2.171.3 NMAC, 12/17/2019]

11.2.171.4 DURATION:

Permanent.

[11.2.171.4 NMAC – Rp, 11.2.171.4 NMAC, 12/17/2019]

11.2.171.5 EFFECTIVE DATE:

December 17, 2019, unless a later date is cited at the end of a section.

[11.2.171.5 NMAC – Rp, 11.2.171.5 NMAC, 12/17/2019]

11.2.171.6 OBJECTIVE:

The objective of this rule is to establish procedures and standards for the administration of the Youth Conservation Corps (YCC) program.

[11.2.171.6 NMAC – Rp, 11.2.171.6 NMAC, 12/17/2019; A, 9/15/2020]

11.2.171.7 DEFINITIONS:

A. "In-kind contribution" means a non-monetary donation of goods or services provided by the project sponsor for the purpose of carrying out a program.

B. "Native American" means a person having origins in any of the original peoples of North and South America (including Central America) and who maintain tribal affiliation or community attachment.

C. "Residential program" means a program where corps members and their supervisors are housed on-site in a residential facility.

D. "Rural" means an area not within a metropolitan statistical area as defined by the United States office of management and budget.

E. "Summer program" means a program taking place between May and September.

F. "Seasonal program" means a program that takes place any time of year and is six months or less in duration.

G. "Under-resourced" means lacking sufficient resources, including, but not limited to funds, opportunity, work force, knowledge base, support systems, physical aids, communication devices, and other physical assets that limit access to job training and outdoor recreation.

H. "Urban" means an area within a metropolitan statistical area as defined by the United States office of management and budget.

[11.2.171.7 NMAC – Rp, 11.2.171.7 NMAC, 12/17/2019; A, 9/15/2020]

11.2.171.8 PROPOSALS:

At least annually, the commission will request proposals for YCC projects. The commission’s announcement will include where to obtain proposal information and the date by which proposals must be submitted.

[11.2.171.8 NMAC – Rp, 11.2.171.15 NMAC, 12/17/2019; A, 9/15/2020]

11.2.171.9 YCC PROJECT ELIGIBILITY:

A. Project sponsors: The YCC Commission will accept applications from:

(1) A federally recognized sovereign tribal government within the state.

(2) A state agency.

(3) A local government agency or unit.

(4) A federal agency operating within the state.

(5) A non-profit organization with a 501(c) internal revenue service designation operating within the state.

(6) Any organization or agency with a 501(c) fiscal sponsor.

B. Projects must be consistent with the purposes of the NMYCC program and may include, but need not be limited to, projects that:

(1) protect, conserve, rehabilitate or increase resiliency of terrestrial and aquatic species, forests, refuges, rangelands and waters of the state;

(2) improve use and access to public parks, greenways, historic sites, libraries, museums, zoos, recreational areas and associated facilities;

(3) reinforce the "keep New Mexico true" campaign;

(4) provide emergency assistance, disaster relief or recovery; or

(5) improve disaster preparedness; increase energy efficiency.

(6) beautify, improve and restore urban areas;

(7) renovate community facilities, including those for the elderly or indigent.

[11.2.171.9 NMAC – Rp, 11.2.171.12 and 11.2.171.13 NMAC, 12/17/2019; A, 9/15/2020]

11.2.171.10 PROHIBITED ACTIVITIES:

The following activities are prohibited in the conduct of any NMYCC project:

A. the displacement or substitution of an existing employee by a corps member or the replacement of a seasonal employee normally hired by the project sponsor;

B. the participation by corps members in the removal or cleaning up of any toxic or hazardous waste or toxic or hazardous waste site; and

C. the assignment of corps members to general work activities such as, but not limited to, routine lawn mowing, routine litter control, janitorial duties and clerical tasks.

D. funding permanent capital improvements on privately owned property.

[11.2.171.10 NMAC – N, 9/15/2020]

11.2.171.11 YCC PROJECT REQUIREMENTS:

A. Project sponsors shall ensure that all project sites and practices conform to appropriate state and federal health and safety standards and requirements.

B. Project sponsors shall classify their programs as a summer, seasonal, or residential project; and also specify whether their project primarily engages Native American, rural, urban or other under-resourced populations.

C. Wages, unemployment insurance and workers' comp for corps members, corps leaders, and corps trainers shall account for a minimum of seventy percent of the total funds requested.

D. Projects shall hire a minimum of four corps members and one corps crew leader or corps crew trainer.

E. Project sponsors must provide an education and training program to corps members for the duration of the project. The number of hours of training provided for each corps member shall be no less than ten percent of the total hours budgeted per corps member for the entirety of the project.

F. Project sponsors shall match a minimum of twenty percent of total funds requested with in-kind or cash contributions.

G. Project sponsors shall provide proof they have obtained permission from all land owners or managers where the project shall take place.

H. Project sponsors shall have worker's compensation and unemployment insurance in place for the duration of the project.

I. Program applicants shall provide proof of adequate insurance coverage for any liability arising out of program activities for the duration of the program.

[11.2.171.11 NMAC – Rn & A, 11.171.2.10 NMAC, 9/15/2020]

11.2.171.12 YCC PROJECT LOCATIONS:

Projects may be undertaken on:

A. public or federally recognized tribal lands, waters or structures located within the state that ;

(1) are under the jurisdiction, owned or administered by the project sponsor; or

(2) are accessible to the project sponsor in accordance with a written agreement between the project sponsor and the agency or entity that owns, administers or has jurisdiction over the public or federally recognized tribal lands, waters or structures; and

(3) provided that the land or facilities are open to the public on a reasonable basis and there is a public value or benefit as a result of the project.

B. privately owned lands, waters or structures located within the state that

(1) are owned or administered by a nonprofit organization; or

(2) are accessible to the project sponsor in accordance with a written agreement between the project sponsor and the nonprofit organization; and

(3) provided that these the land or facilities are open to the public on a reasonable basis and there is a public value or benefit as a result of the project; and

(4) provided no funding for capital improvements is requested for the project.

[11.2.171.12 NMAC – N, 9/15/2020]

11.2.171.13 YCC CORPS MEMBERS:

A. Project sponsors shall, at their own expense, comply with all applicable laws, regulations, rules ordinances, and requirements of local, state, and federal authorities, including but not limited to those pertaining to equal opportunity employment, workers compensation benefits, and fair labor standards.

B. Recruitment, selection, supervision, development and dismissal of corps members will be the responsibility of the project sponsors.

C. Sponsors shall verify corps members meet the following eligibility requirements at the time of enrollment and keep records of such:

(1) are unemployed at the time of hire;

(2) are New Mexico residents consistent with 18.19.5 NMAC;

(3) are in-school or out-of-school youth at the time of hire;

(4) are between the ages of 14 and 25 years of age at the time of hire;

(5) have a work permit if under the age of 16; and

(6) are not the children or siblings of the project sponsor's hiring officer or project supervisor.

D. Sponsors shall enforce all labor laws and shall be familiar with child labor laws as they apply to employees under the age of 18.

E. Classification:

(1) Corps members shall be individuals who meet the eligibility requirements and are at least 14 years of age at the beginning of the project.

(2) Corps crew leaders or corps crew trainers shall be individuals who meet the eligibility requirements, and serve in a leadership, trainer or mentor position.

F. Compensation:

(1) All corps members shall be compensated, at a minimum, as provided by law following the state or municipality established minimum wage.

(2) Project sponsors may request wage increases of no more than ten percent of starting wage for corps members based on promotion, performance or additional responsibilities; and if there are sufficient funds in the budget to complete the project as planned.

(3) The YCC will support the project sponsor's existing policy for holiday pay and sick pay.

(4) Project sponsors may not budget overtime pay into the cost proposal, and under no circumstances will the commission reimburse project sponsors for overtime.

(5) The YCC will not reimburse the project sponsor for hazard pay.

G. Project sponsors shall follow their established personnel policies for dismissal of corps members. Sponsors are encouraged to provide opportunities for improvement prior to dismissal.

H. The length of a corps member’s employment shall be determined by the duration of the work project in which the corps member is participating.

[11.2.171.13 NMAC – Rn & A 11.2.171.11 NMAC, 9/15/2020]

11.2.171.14 YCC EDUCATIONAL TUITION VOUCHERS AND ADDITIONAL CASH COMPENSATION:

A. On completion of employment with the YCC, a corps member who has 12 full months (48 weeks) of employment as a corps member during a period not to exceed 48

months, and who has received satisfactory evaluations throughout their employment, may apply for a $500.00 additional cash compensation or a $1500.00 educational tuition voucher.

B. A corps member who receives satisfactory employment evaluations and has completed a minimum of 32 weeks employment but less than 12 months (48 weeks) in a four-year period due to circumstances beyond the corps member's control, may receive a partial cash compensation or a partial educational tuition voucher.

(1) Circumstances beyond a corps member's control may include but are not limited to illness, death in the family. a return to school, or family relocation.

(2) Circumstances beyond the corps member's control do not include the unavailability of projects or that the project sponsor did not select them for employment.

C. The YCC staff shall certify that the corps member was employed for the duration of the project.

(1) The educational voucher is good for reimbursement of expenses at a New Mexico institution of higher education, including accredited universities, colleges, community colleges, vocational schools and on-line education associated with an accredited New Mexico institution of higher education.

(2) The educational tuition voucher is valid for two years and will be reimbursed upon presentation of receipts and proof of payment.

(a) Examples of reimbursable expenses include educational expenses such as tuition, textbooks, and classroom and lab supplies.

(b) Examples of non-reimbursable expenses include personal expenses, transportation, computers, residential rent, and food.

[11.2.171.14 NMAC – Rn & A 11.2.171.12 NMAC, 9/15/2020]

11.2.171.15 EVALUATION OF PROPOSALS:

A. The commission shall adopt a competitive evaluation process to guide the allocation of funds.

B. The commission shall review and evaluate all proposals to determine the proposal's conformance with the goals of the programs as described in the act and 11.2.171 NMAC, Sections 9, 10, and 11.

C. The commission shall take appropriate measures to ensure the evaluation process is not influenced by donors to the youth conservation corps. This may include,

but is not limited to, appointing an external review committee; and concealing the identity of applicants during the review process.

D. The commission will distribute funds equitably among qualified projects that variously engage Native American, rural, urban or other under-resourced populations.

[11.2.171.15 NMAC – Rp, 11.2.171.16 NMAC, 12/17/2019; A, 9/15/2020]

11.2.171.16 AWARD AGREEMENTS:

Successful applicants shall enter into a formal agreement with the commission for the expenditure of awarded funds.

[11.2.171.16 NMAC – Rp, 11.2.171.17 NMAC, 12/17/2019]

11.2.171.17 FUNDS:

A. The commission may establish limitations on the availability and use of program funds. Any limitations shall be defined in the current application package

B. The commission may limit the amount of funding available for any element(s) of a program.

C. If money is not awarded in a given fiscal year due to the lack of applications meeting minimum requirements, the commission may reassign the funds to a non-funded or under-funded program that meets all the minimum requirements or may carry them over into the total program allocation for the next fiscal year.

[11.2.171.17 NMAC – Rp, 11.2.171.9 NMAC, 12/17/2019]

CHAPTER 3: EMPLOYMENT SECURITY

PART 1-99: [RESERVED]

PART 100: GENERAL PROVISIONS

11.3.100.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, P.O. Box 1928, Albuquerque, NM 87103.

[7-15-98; 11.3.100.1 NMAC - Rn & A, 11 NMAC 3.100.1, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.100.2 SCOPE:

General Public

[7-15-98; 11.3.100.2 NMAC - Rn, 11 NMAC 3.100.2, 01-01-2003]

11.3.100.3 STATUTORY AUTHORITY:

NMSA 1978 Sections 51-1-1 to 51-1-59.

[7-15-98; 11.3.100.3 NMAC - Rn & A, 11 NMAC 3.100.3, 01-01-2003]

11.3.100.4 DURATION:

Permanent

[7-15-98; 11.3.100.4 NMAC - Rn, 11 NMAC 3.100.4, 01-01-2003]

11.3.100.5 EFFECTIVE DATE:

July 15, 1998, unless a later date is cited at the end of a section.

[7-15-98; 11.3.100.5 NMAC - Rn & A, 11 NMAC 3.100.5, 01-01-2003]

11.3.100.6 OBJECTIVE:

To explain the general New Mexico department of workforce solutions rules and regulations addressing the Unemployment Compensation Law.

[7-15-98; 11.3.100.6 NMAC - Rn & A, 11 NMAC 3.100.6, 01-01-2003; A, 11-15-2012]

11.3.100.7 DEFINITIONS:

In addition to the definitions found in the individual parts and sections, the following definitions apply in Parts 100 through 500 of Title 11, Chapter 3:

A. "Claim" means a request for benefits pursuant to the Unemployment Compensation Law.

B. "Contribution" means the state unemployment insurance tax imposed on employers pursuant to the Unemployment Compensation Law.

C. "Department" means the New Mexico department of workforce solutions.

D. "Division" means the unemployment insurance division of the New Mexico department of workforce solutions, formerly the employment security division, formerly known as the employment security commission and formerly known as the employment security department.

E. "Electronic" means relating to technology having electrical, digital, magnetic, wireless, telephonic, optical, electromagnetic or similar capabilities.

F. "Electronic form" means body of information collected by electronic means, computer program or other automated means similar to the body of information collected by a paper document.

G. "E-mail" or "electronic mail" means communications similar to paper letters and memos transmitted electronically for the purpose of communication.

H. "Electronic signature" means electronic symbols or process attached to or logically associated with a record, adopted and executed by an individual with the intent to sign the record or electronic form.

I. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason.

J. "IVR" means the interactive voice response system used by the department to administer the Unemployment Compensation Law.

K. "Password" means a series of letters and numbers intended by the sender and receiver to provide additional security to electronic transmissions. Typically, the password is adopted by the sender and conveyed to the receiver prior to a series of communications. The password is used to verify the identity of the sender of the communications. The password, along with the sender's "username" can constitute a signature for all legal purposes.

L. "Personal identification number" or "PIN" means a series of letters and numbers intended by the sender and receiver to provide additional security to electronic transmissions. The terms "password" and "PIN" are used interchangeably in the department's rules, regulations and policies.

M. "Rule" and "regulation" are synonymous and refer to provisions of the New Mexico Administrative Code.

N. "Secretary" means the cabinet secretary of the New Mexico department of workforce solutions or that person's official designee as provided in the department's internal policies and procedures.

O. "Signature" means any means of signature including, but not limited to, manual, facsimile, electronic, digital or other means permitted by law.

P. "Tax section" means the tax administration section of the unemployment insurance division of the New Mexico department of workforce solutions.

Q. "The director of the employment security division" means that person or that person's official designee as provided in the department's internal policies and procedures.

R. "Transmit" means any method of communication customary in the business community, including but not limited to U.S. postal service, private courier services, personal delivery and electronic communications such as telephone, facsimile, electronic mail and internet. Unless specifically required by law or department rule, transmissions and communications do not require hard or paper documents. Unless specifically required by law or department rule, the date and time of the receipt of the transmittal by the appropriate department official is the received or filed date.

S. "Unemployment Compensation Law" means NMSA 1978, Section 51-1-1 et seq. as amended from time to time.

T. "Username" means the term as commonly used in electronic communication which is an abbreviation of the name of the sender of electronic communications. Typically, the username, which is less secure, is used in conjunction with a password or PIN to provide secure communications between a sender and receiver while allowing the receiver assurances and verification of the identity of the sender.

U. "Wages" means all compensation for employment except as provided in these rules or in state and federal statutes applicable to unemployment compensation.

(1) Borrowed monies, including monies borrowed from a 401(K) or other pension account, even if such borrowed money may create a taxable event, shall not be deemed compensation or wages such as to disqualify the individual from unemployment benefits.

(2) 26 U.S. C. Section 3306(b)(13) of the Internal Revenue Code excludes from the definition of wages "any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127 or 129." Under 26 U.S.C. Section 127 of the Internal Revenue Code, employer-paid education expenses are excludable from the gross income of and wages of an employee if provided under an educational assistance plan. This exclusion applies to both graduate and undergraduate courses and is effective with respect to courses beginning after December 31, 2001.

[11.3.100.7 NMAC - N, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.100.8 THROUGH 11.3.100.100: [RESERVED]

11.3.100.101 FILING DATE:

Any report, response or other document required to be filed by the Unemployment Compensation Law or these rules, and any appeal, notice or other pleading required to be filed with the department shall be deemed filed on the date it is received by the department or, if mailed, as of the date of the postmark on the envelope. If it is postmarked at or prior to the deadline, it will be deemed filed timely if received by the department within a reasonable period of time. Unless otherwise specified by law or rules any report, response document or appeal that is mailed but has no postmark date shall be considered timely if, on the basis of customary mail practice and the actual date of delivery, it may be presumed to have been mailed within the specified time period. If the final day for a report, response document or appeal falls on a date when the department offices are closed, receipt on the first business day thereafter shall be considered timely.

[7-15-98; 11.3.100.101 NMAC - Rn, 11 NMAC 3.100.101, 01-01-2003; Repealed, 11-15-2012; 11.3.100.101 NMAC - Rn & A, 11.3.100.104 NMAC, 11-15-2012]

11.3.100.102 VALUATION OF IN KIND COMPENSATION:

A. If a claimant receives any wages in a medium other than cash, the reasonable cash value of any compensation other than cash shall be deemed for all purposes of the Unemployment Compensation Law to be either:

(1) the amount agreed upon between the employing unit and the claimant if the terms of the agreement are reported to the department and the department agrees that such agreed amount or value is reasonable; or

(2) the cash value as shown to the satisfaction of the department.

B. If the department determines that the amount agreed to is unreasonable, or if the employing unit and the individual fail to agree upon an amount, or if the employing unit fails to report the terms of an agreement to the department and fails to show the cash value of such non-cash compensation prior to the due date of contributions or payment in lieu of contributions with respect to such wages, the department shall fix an amount or value after considering all available information or evidence. The amount fixed by the department shall be deemed for all purposes of the Unemployment Compensation Law to be the cash value of the claimant’s wages received in any medium other than cash.

[7-15-98; 11.3.100.102 NMAC - Rn, 11 NMAC 3.100.102, 01-01-2003; Repealed, 11-15-2012; 11.3.100.102 NMAC - Rn & A, 11.3.100.105 NMAC, 11-15-2012; A, 10/29/2019]

11.3.100.103 AFFIRMATIONS UNDER PENALTY OF PERJURY:

A. All information and statements required of an individual by the department in furtherance of the department’s duties are deemed material.

B. All submissions to the department of information and statements are deemed made as an affirmation or oath under penalty of perjury pursuant to NMSA 1978, Sections 14-13-2 and 30-25-1.

C. All signatures or affirmations requests on department forms whether paper, electronic or voice submission shall carry the warning in substantially the following format: "I solemnly, sincerely and truly declare and affirm that the statements made herein and the information supplied by me are true and correct, with no material omissions, and I do so under the pains and penalties of perjury."

[7-15-98; 11.3.100.103 NMAC - Rn & A, 11 NMAC 3.100.103, 01-01-2003; Repealed, 11-15-2012; 11.3.100.103 NMAC - Rn & A, 11.3.100.106 NMAC, 11-15-2012]

11.3.100.104 DE MINIMIS AMOUNTS:

A. Money owed by the department to individuals or entities which amounts are equal to or less than the combined total amount of $5.00 in any quarter shall be retained on the department's books as a credit to that individual, entity or account, but no check or payment shall be issued absence a specific request by the party to whom the credit is due.

B. Money owed by individuals or entities to the department which amounts are equal to or less than the combined total amount of $20.00 will not be billed or invoiced or liens issued, but the amounts due shall be retained on the department's books as a debit owing by that individual, entity or account.

[7-15-98; 11.3.100.104 NMAC - Rn & A, 11 NMAC 3.100.104, 01-01-2003; 11.3.100.104 NMAC - Rn & A, 11.3.100.107 NMAC, 11-15-2012]

11.3.100.105 VERIFICATION OF INFORMATION:

A. The department requires employers, employing units and claimants to provide their federal tax identification numbers or social security numbers as a means of verifying identity and eligibility for benefits under the Unemployment Compensation Law. The department may verify all information submitted by employers, employing units and claimants with that in the possession of other state and federal agencies.

B. An employer or employing unit's failure or refusal to provide the required numbers will result in enforcement action.

C. A claimant's failure or refusal to provide the required numbers will result in a denial of benefits.

D. The provision of a false identification number or a false social number by any employers, employing units or claimants may result in criminal liability.

[7-15-98; 11.3.100.105 NMAC - Rn & A, 11 NMAC 3.100.105, 01-01-2003; 11.3.100.105 NMAC - Rn & A, 11.3.100.108 NMAC, 11-15-2012]

11.3.100.106 AVAILABILITY AND CONFIDENTIALITY OF DEPARTMENT RECORDS:

A. The Public Records Act permits the inspection of public records of this state "except as otherwise provided by law," Paragraph (8) of Subsection A of Section 14-2-1 NMSA 1978. Section 51-1-32 NMSA 1978 requires that "information obtained from employers, employing units or claimants pursuant to the administration of the Unemployment Compensation Law and determinations as to the benefit rights of any claimant are confidential and shall not be open to inspection in any manner revealing the claimant's employer's or employing unit's identity except that such information may be made available to those designated persons and agencies, and for the purposes specified in regulations issued by the secretary."

B. The department's files and records, including but not limited to investigation reports, statements, memoranda, correspondence or other data, regardless of the media on which stored, pertaining to matters under consideration or scheduled for hearing, other departmental proceeding or judicial appeal shall be available for inspection and copying, at any reasonable time by the employing unit or individual who is a party to any proceeding before the department.

C. The contents of the department's files and records shall not be released to any person except the employers, employing units or claimants to whom the file or record pertains or the employers', employing units' or claimants 'authorized representative, and then, only upon a signed, written release, court order, grand jury subpoena or search warrant. Except in instances of court orders, grand jury subpoenas and search warrants, if more than one party is named in the file or record sought, both parties must sign a consent to the release of the file or record if it is sought for any purpose other than a proceeding before the department.

D. With the consent and approval of the secretary and upon advice of the department's general counsel, the contents of the department's files and records may be released to law enforcement agencies for the purpose of criminal investigations and child support proceedings.

E. From time to time, the department may enter into agreements to exchange information with other government agencies and with non-government providers of public assistance, which agreements may provide for the exchange of information otherwise confidential under NMSA 1978, Section 51-1-32. The conveyance of this information is for the purpose of obtaining information necessary for the department to provide services to its customers or so that other agencies can provide public assistance benefits to the individuals about whom the information pertains. In such instances, every reasonable effort shall be made to maintain the confidentiality of the information exchanged.

F. Unless otherwise provided by statute or a written agreement provided in Subsection E of 11.3.100.106 NMAC, the department shall charge the indicated fees for copies of department files and records:

(1) CD or DVD disc, $5.00 per disc;

(2) printed paper copies, $1.00 of first page of file or request; 50 cents per page thereafter up to 100 copies; 25 cents all copies thereafter within the same file or request;

(3) staff research time, $20.00 per hour for all time in excess of one hour spent in locating or reviewing a file prior to copying;

(4) employment or income verification, whether or not copies are requested, $6.00; and

(5) any other request shall be charged at a reasonable rate for the equipment, staff and other resources used to provide the copies.

[11.3.100.106 NMAC - N, 01-01-2003; 11.3.100.106 NMAC - Rn & A, 11.3.100.109 NMAC, 11-15-2012; A, 10/26/2019]

11.3.100.107 WEBSITE:

A. For the convenience of the department, its employees, its customers and the general public, the department operates and maintains one or more websites to provide a portal to services offered by the department. The website contains original material pages and material developed by the department as well as commercially prepared software systems acquired to provide access to services that support the Workforce Innovation Opportunities Act and the department's mission. The department website also features links to the websites of other providers who also offer services that are related or complementary to the services offered by the department.

B. Binding agreement: Use of the department's website constitutes acceptance as a contract of the published terms and conditions as provided in this rule and as published on the website from time to time.

C. General disclaimer: The department shall attempt to ensure that the information on the website is accurate by continuously updating the information. The department does not warrant or guarantee that the information is free from error. The website is a work in progress, under constant development in order to better serve the website users. The department accepts no liability for any loss or damage, direct, indirect, consequential or otherwise, incurred in the reliance on the material, information or programs provided on the website.

D. Public information: Information on the website is public information pursuant to the Public Records Act, NMSA 1978, Section 14-2-1 through 14-2-12.

E. Property of the department: All the material, information or programs on the department website are the property of the department unless otherwise specified. The material, information or programs on the department website:

(1) are provided as a public service for informational and educational purposes only.

(2) are not intended as legal advice of any kind.

(3) may be used only for the purpose of gaining general information or for nonprofit purposes.

(4) is for public use and may be duplicated and disseminated for non-commercial purposes so long as not subject to another's copyright; any such duplication or dissemination must be accompanied by a citation acknowledging the department as the source of the information and the department's copyright and trademark notices;

(5) may not be used for commercial purposes of any kind without the written permission of a division director or higher officer of the department except that employment listings may be used by individual website users for obtaining employment.

F. Copyright notice: All copyrightable text, graphics, design, selection and arrangement of information is protected by copyright (2011, New Mexico department of workforce solutions).

G. Third party links: The department website provides links to third party websites and vice versa as a courtesy and convenience to the department's website users. The department is not responsible for the content or condition of third party websites. The department has no responsibility or liability to users for the content or accuracy of websites linked from this page or websites that provide a link to this page. The department does not endorse the views, products or services of third party websites. The department has no responsibility for the privacy practices or internal content of linked sites. The provision of a link provides no assurance that the linked site has a privacy policy similar to the department's privacy policy.

H. Privacy: The department is committed to maintaining the privacy of the personal information of those persons who access and use the department's website. The department is committed to maintaining the security of its computer system.

(1) Monitoring: The department's computer system including the website is monitored to ensure proper operation, to verify the functioning of applicable security features and for similar purposes.

(2) Personally identifiable information: For the purpose of the website, "personally identifiable information" means information collected on-line that could serve to identify an individual, including, but not limited to:

(a) first and last name;

(b) physical address;

(c) e-mail address;

(d) telephone number;

(e) social security number;

(f) tax identification number;

(g) credit card information;

(h) bank account information;

(i) any combination of information that could be used to determine identity.

(3) Except where specified, website users need not provide personally identifiable information to visit the department website or download information from the website.

(4) Any personally identifiable information provided to the department will be used solely by the department, its agents, contractor and employees in accordance with NMSA 1978, Section 14-8-21, unless the information is designated as a public record under the Public Records Act.

(5) Unless the user chooses to provide the information for a specific purpose, personally identifiable information is not collected and maintained by the department.

(6) Personally identifiable information may be required to qualify or determine eligibility for certain government services.

(7) The department shall take reasonable precaution to protect the confidentiality of personally identifiable information from loss, misuse, alteration or disclosure to unauthorized persons.

(8) Unless otherwise prohibited by state or federal law or applicable rules and regulations, an individual may access and correct personally identifiable information whether or not the access was created by accident, unauthorized access or a change in circumstances.

(9) E-mail or other forms of information requests sent to the department website may be saved and used to respond to the request, to forward the request to the appropriate agency, communicate updates of information or to provide the department's webmaster with valuable customer feedback to assist in improving the website.

(10) Despite all precautions, the department does not guarantee or warrant users of the website against hardware failure, unauthorized intrusion or other technical problems that might affect privacy and confidentiality.

(11) To maintain the website user's privacy, the department requires the use of a password before accessing any personal or account information. The department shall provide methods for the assignment of user names and passwords in a manner customary in the industry from time to time.

I. Trespass: The department shall use all legally available means to prevent, monitor and investigate any attempt to deface, delete, modify or misappropriate the department's website, server, database, information system or other department technology asset.

J. Finality: No information provided to the department through this electronic medium is final until the department transmits a confirmation to the website user.

K. Publication of an amendment to website policy: A copy of this rule shall be published on the website. From time to time, the department may heighten, but shall not decrease the privacy policy without amendment of this rule.

[11.3.100.107 NMAC - N, 01-01-2003; 11.3.100.107 NMAC - Rn & A, 11.3.100.110 NMAC, 11-15-2012; A, 10/29/2019]

11.3.100.108 DIGITIZED SIGNATURES:

[RESERVED]

[11.3.100.108 NMAC - N, 01-01-2003; 11.3.100.108 NMAC - Rn & A, 11.3.100.111 NMAC, 11-15-2012]

11.3.100.109 ELECTRONIC TRANSACTIONS:

A. Official communications with the department shall contain all material customarily found on paper forms.

B. Electronic forms and records used by the department shall clearly indicate the purpose of the form, instructions for completion and submission electronically, information on receiving assistance by telephone or e-mail, require the submission of a valid e-mail address, telephone number or United States postal service address at

which the sender can be contacted regarding the information submitted and the purpose underlying the submission of the information.

C. A person choosing to communicate with the department electronically bears the responsibility of ensuring that the information submitted and the methods by which the person can be contacted are accurate. The recipient must notify the department in the event of an address change.

D. If electronic correspondence is elected, the recipient will not receive correspondence by US mail. It is the recipient's obligation to exercise due diligence in checking the email of record and to frequently log into the on-line account to obtain any correspondence.

E. The use of a person's name, identifying information, username and password or PIN in electronic and other communications with the department is deemed a signature for all legal purposes.

F. Persons using a means of electronic communication shall be advised that the submission of the information using the identifier is deemed a binding signature.

G. Use of electronic notification constitutes reasonable and proper notice for all purposes, laws, rules and regulations.

H. Employers shall submit all quarterly wage reports to the department electronically using their on-line accounts, unless the department has granted an express, written exception.

I. Third party administrators shall remit all quarterly wage contributions, payments, and fact finding responses electronically.

[11.3.100.109 NMAC - N, 01-01-2003; 11.3.100.109 NMAC - Rn & A, 11.3.100.112 NMAC, 11-15-2012; A, 10/29/2019]

11.3.100.110 [RESERVED]

[11.3.100.110 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.100.111 [RESERVED]

[11.3.100.111 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.100.112 [RESERVED]

[11.3.100.112 NMAC - N, 01-01-2003; A, 11-15-2012]

PART 101-199: [RESERVED]

PART 200: PROCEDURES AND REQUIREMENTS REGARDING PROMULGATION OF RULES AND REGULATIONS

11.3.200.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Employment Security Division, P.O. Box 1928, Albuquerque, NM 87103.

[7-15-98; 11.3.200.1 NMAC - Rn & A, 11 NMAC 3.200.1, 01-01-2003; A, 11-15-2012]

11.3.200.2 SCOPE:

General public.

[7-15-98; 11.3.200.2 NMAC - Rn, 11 NMAC 3.200.2]

11.3.200.3 STATUTORY AUTHORITY:

NMSA 1978 Sections 51-1-1 to 51-1-59.

[7-15-98; 11.3.200.3 NMAC - Rn & A, 11 NMAC 3.200.3, 01-01-2003]

11.3.200.4 DURATION:

Permanent.

[7-15-98; 11.3.200.4 NMAC - Rn, 11 NMAC 3.200.4, 01-01-2003]

11.3.200.5 EFFECTIVE DATE:

July 15, 1998, unless a later date is cited at the end of a section.

[7-15-98; 11.3.200.5 NMAC - Rn &A, 11 NMAC 3.200.5, 01-01-2003]

11.3.200.6 OBJECTIVE:

To explain the procedures and requirements governing promulgation, adoption, amendment and appeal of rules and regulations for the New Mexico department of workforce solutions employment security division.

[7-15-98; 11.3.200.6 NMAC - Rn & A, 11 NMAC 3.200.6, 01-01-2003; A, 11-15-2012]

11.3.200.7 DEFINITIONS:

[RESERVED]

11.3.200.8-11.3.200.200: [RESERVED]

11.3.200.201 NOTICE REGARDING PROMULGATION OF RULES:

A. Prior to the adoption, amendment or repeal of any rule or regulation, the secretary shall:

(1) publish one notice of its proposed action at least thirty days prior thereto in the New Mexico register and on the department's website;

(2) notify any person or group filing a written request, the request to be renewed yearly, for notice of any proposed action that may affect that person or group, notification being by mail to the last known address of the person or group at least thirty days prior to the proposed action.

B. The notice in contemplated by 11.3.200.201 NMAC shall give the time and place of the proposed action, describe the subject matter of the proposed action and state the manner in which interested persons may present their views and the method by which copies of the proposed rule or regulation, proposed amendment or repeal of an existing rule or regulation may be obtained.

[7-15-98; 11.3.200.201 NMAC - Rn & A, 11 NMAC 3.200.201, 01-01-2003]

11.3.200.202 SUBMISSION BY INTERESTED PERSONS:

Prior to the adoption, amendment or repeal of any rule or regulation, the secretary shall conduct a public hearing and afford all interested persons a reasonable opportunity to submit data, views and arguments orally or in writing concerning the proposed action; however, if the secretary finds that oral presentation is unnecessary or impracticable, the secretary may require submission to be made in writing.

[7-15-98; 11.3.200.202 NMAC - Rn & A, 11 NMAC 3.200.202, 01-01-2003; A, 11-15-2012]

11.3.200.203 CONSIDERATION AND ADOPTION BY SECRETARY:

The secretary shall consider fully all written and oral submissions respecting the proposed regulatory action. All persons attending the public hearing or making oral or written submissions to be considered in connection with the proposed action shall be given a copy of the final rule or regulation upon filing.

[7-15-98; 11.3.200.203 NMAC - Rn & A, 11 NMAC 3.200.203, 01-01-2003]

11.3.200.204 EMERGENCY REGULATIONS:

If the secretary finds that immediate adoption, amendment or suspension of a rule or regulation is necessary for preservation of the public peace, safety or general welfare, the secretary may dispense with the requirements of notice and hearing and adopt, amend or suspend a regulation as an emergency. The secretary's findings and a brief statement of the reasons for its findings shall be incorporated in the emergency rule or regulation, amendment or suspension. If an emergency rule or regulation, amendment or suspension shall remain in effect for longer than sixty days, notice as required in 11.3.200.201 NMAC shall be given within seven days after the emergency action.

[7-15-98; 11.3.200.204 NMAC - Rn & A, 11 NMAC 3.200.204, 01-01-2003]

11.3.200.205 FILING AND EFFECTIVE DATE:

The secretary shall file each rule or regulation, amendment or repeal thereof in accordance with the State Rules Act, and each rule or regulation, amendment or repeal shall be effective after it is filed with the state records center and published in the New Mexico register. The secretary shall publish in the New Mexico register, in full or in part, all adopted rule or regulation, amendments or repeals.

[7-15-98; 11.3.200.205 NMAC - Rn & A, 11 NMAC 3.200.205, 01-01-2003; A, 11-15-2012]

11.3.200.206 PETITIONS FOR ADOPTION, AMENDMENT OR REPEAL OF RULES AND REGULATIONS:

A. Any interested person may petition the secretary requesting the promulgation, amendment or repeal of any rule.

(1) When any person is requesting the promulgation of a rule, the individual shall submit a petition which sets forth in full the proposed rule and includes all of the reasons for the promulgation of the requested rule.

(2) When any person requests the amendment or repeal of a rule or portion of a rule presently in effect, the individual shall submit a petition which sets forth in full the proposed amendment or repeal and includes all of the reasons for the proposed amendment or repeal.

B. All petitions shall be considered by the secretary who may, in the secretary’s discretion, order a hearing for the further consideration and discussion of the requested promulgation, amendment, repeal or modification of any rule.

C. Within sixty days after submission of a petition, the secretary shall either deny the petition in writing, stating the reasons for the denial, or initiate rule making proceedings in accordance with Sections 11.3.200.201, 202 and 203 NMAC.

[7-15-98; 11.3.200.206 NMAC - Rn & A, 11 NMAC 3.200.206, 01-01-2003; A, 11-15-2012]

11.3.200.207 DECLARATORY RULINGS:

A. Any person whose interests, rights or privileges will be significantly affected by any provision of the Unemployment Compensation Law or any rule or regulation promulgated thereunder may petition the secretary for a declaratory ruling as to the applicability of to the law, rule or regulation.

B. Any person requesting a declaratory ruling shall submit a petition which sets forth the issues for which a declaratory ruling is requested.

C. The secretary shall consider the petition and within sixty days after submission of a petition notify the petitioner that no declaratory ruling is to be issued; or set a reasonable time and place for a public hearing upon the matter and give reasonable notification to the petitioner and the public of the time and place for such hearing and of the issue involved.

D. If a hearing is conducted, the secretary shall, within sixty days after the hearing, issue a declaratory ruling or notify the petitioner and the public that no declaratory ruling is to be issued.

[7-15-98; 11.3.200.207 NMAC - Rn & A, 11 NMAC 3.200.207, 01-01-2003; A, 11-15-2012]

PART 201-299: [RESERVED]

PART 300: CLAIMS ADMINISTRATION

11.3.300.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, P.O. Box 1928 Albuquerque, NM 87103.

[11.3.300.1 NMAC - Rp, 11.3.300.1 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.2 SCOPE:

General public.

[11.3.300.2 NMAC - Rp, 11.3.300.2 NMAC, 11/1/2018]

11.3.300.3 STATUTORY AUTHORITY:

Sections 51-1-1 to 51-1-59, NMSA 1978.

[11.3.300.3 NMAC - Rp, 11.3.300.3 NMAC, 11/1/2018]

11.3.300.4 DURATION:

Permanent.

[11.3.300.4 NMAC - Rp, 11.3.300.4 NMAC, 11/1/2018]

11.3.300.5 EFFECTIVE DATE:

November 1, 2018, unless a different date is cited at the end of a section.

[11.3.300.5 NMAC - Rp, 11.3.300.5 NMAC, 11/1/2018]

11.3.300.6 OBJECTIVE:

The purpose of this rule is to provide clarification of the Unemployment Compensation Law. This rule assists claimants and employers in better understanding how specific sections of the law are administered by the department. The rule also assists claimants and employers to better comply and better understand the department's procedures.

[11.3.300.6 NMAC - Rp, 11.3.300.6 NMAC, 11/1/2018]

11.3.300.7 DEFINITIONS:

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

B. "Agent state" means any state in which an individual files a claim for benefits from another state or states.

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

D. "Base period and benefit year" means the base period and benefit year applicable under the unemployment compensation law of the paying state.

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

F. "Benefits" means the benefits payable to a claimant with respect to their unemployment, under the unemployment compensation law of any state.

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

H. "Combined-wage claimant" means a claimant who uses wages from more than one state to establish monetary eligibility for benefits and who has filed a claim under this arrangement.

I. "Educational or training institution or program" means any primary school, secondary school or institution of higher education, public or private, which offers instruction, either for a fee or without charge, and which requires attendance and participation, either in person or online, to receive the instruction.

J. "Emergency unemployment compensation" (EUC) occurs when regular unemployment benefits are exhausted and extended for additional weeks. Unemployment extensions are created by passing new legislation at the federal level, often referred to as an "unemployment extension bill". This new legislation is introduced and passed during high or above average unemployment rates.

K. "Employment" means all services which are covered under the unemployment compensation law of a state, whether expressed in terms of weeks of work or otherwise.

L. "Full-time employment" means the normal full-time hours customarily scheduled and prevailing in the establishment in which an individual is employed, but in no event less than 32 hours per week.

M. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party’s physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by failure to keep the department directly and promptly informed of the claimant’s, employer’s or employing unit’s correct address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

N. "Initial claim" means a new claim application submitted by the claimant to establish a benefit year and to obtain a determination of weekly and maximum benefit amounts.

O. "Instruction" means all teaching or opportunity for learning whether of a vocational or academic nature.

P. "Interstate benefit payment plan" means the plan approved by the interstate conference of employment security agencies as approved by the United States secretary of labor under which benefits shall be payable to unemployed individuals absent from the state or states in which benefit credits have been accumulated.

Q. "Interstate claimant" means an individual who claims benefits under the unemployment compensation law of one or more liable states through the facilities of an agent state. The term "interstate claimant" shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the department finds that this exclusion would create undue hardship on such claimants in specified areas.

R. "Last employer" means the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or in the event that the claimant separated from the most recent employer for lack of work, the employer or employing unit before that from which the claimant separated for any reason other than lack of work, provided the claimant has not subsequently 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.

S. "Liable state" means any state against which a claimant files, through another state, a claim for benefits.

T. "Paying state" means the state against which the claimant is filing that actually issues the benefit payment.

U. "Real estate salesperson" means an individual who is licensed by the New Mexico real estate commission.

V. "Regular base period" means the first four of the last five completed quarters as provided in Subsection A of Section 51-1-42 NMSA 1978.

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

X. "State" means the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

Y. "Student" means any individual enrolled in an educational or training institution or program.

Z. "Trade adjustment assistance" (TAA) is a federal program that provides a variety of reemployment services including training and job-searching assistance and benefits to displaced workers who have lost their jobs or suffered a reduction of hours and wages as a result of increased imports or shifts in production outside the United States.

AA. "Trade readjustment allowances" (TRA) are income support payments to individuals who have exhausted unemployment benefits and whose jobs were affected by foreign imports as determined by a certification of group coverage issued by the Department of Labor.

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

CC. "Wages" means all compensation for services, including commissions and bonuses and the cash value of all compensation in any medium other than cash.

DD. "Week of unemployment" means any week of unemployment as defined in the law of the liable state from which benefits with respect to such week are claimed.

[11.3.300.7 NMAC - Rp, 11.3.300.7 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.8-300 [RESERVED]

11.3.300.301 FILING INITIAL, ADDITIONAL AND REOPENED CLAIMS:

A. Upon filing an initial claim, an additional claim, or a reopened claim, the claimant shall be subject to a waiting week period before the commencement of benefits begins.

B. Unless otherwise prescribed, any claimant wishing to claim benefits shall register for work, file an initial, additional, transitional or reopened claim for benefits and provide the name and address of their last employer.

C. The date of filing of any initial, additional or reopened claim shall be the Sunday of the week in which filed. Upon a showing of good cause, any initial claim or additional claim may be back-dated to the Sunday of the week immediately following the week in which the claimant was separated, and any reopened claim may be back-dated up to a maximum of 21 days from the preceding Sunday of the date of the request for back-

dating. "Good cause," as used in 11.3.300.301 NMAC, exists when it is established that factors or circumstances beyond the reasonable control of the claimant caused the delay in filing. All requests for back-dating or post-dating shall include a fact-finding response.

D. Unless otherwise prescribed, all claims shall be made online or by phone, giving all information required thereby. A claimant shall also separately register for work within 14 calendar days of the date the claim is filed. If a claimant is already registered with the department from a prior claim, the registration must be reactivated within 14 days of the date the claim is filed. If a claimant's registration is not current with the department, their benefits shall be temporarily withheld until they comply unless good cause for the failure to register is shown.

[11.3.300.301 NMAC - Rp, 11.3.300.301 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.302 FILING CONTINUED CLAIMS:

In order to establish and maintain eligibility for benefits a claimant cannot be subject to an administrative penalty pursuant to Subsection C of 11.3.300.314 NMAC, shall continue to report weekly as directed, and file continued claims for benefits online, by phone, or as otherwise prescribed by the department providing the information setting forth that:

A. the claimant is continuing their claim for benefits;

B. the claimant is unemployed or partially unemployed;

C. the claimant has registered for reemployment services;

D. since the claimant last registered for reemployment services, the claimant has not performed services or earned wages, except as indicated;

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

F. the claimant shall provide to the department their most current mailing or email address. It is the claimant's responsibility to maintain a current address with the department.

[11.3.300.302 NMAC - Rp, 11.3.300.302 NMAC, 11/1/2018]

11.3.300.303 TIMELY RESPONSE TO REQUEST FOR INFORMATION:

A. Any response to a request for information from the department must be received by the department within 10 calendar days from the date transmitted. Responses to requests for additional information must be received within two business days from the date of transmission.

B. The 10 calendar day period shall begin to run on the first day after the date the request was transmitted to the claimant or to the employer. If the tenth calendar day falls on a date when the department offices are closed, receipt on the first business day thereafter shall be timely. If a response is not received timely, the department will make a determination based on the information available at that time.

C. Employers and third party administrators must respond to request for additional information electronically.

[11.3.300.303 NMAC - Rp, 11.3.300.303 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.304 LATE FILING OF CONTINUED CLAIMS:

A. If the department finds good cause for a claimant's failure to timely file a continued claim, the claimant may file a late continued claim provided the certification is filed within 14 days of the last date of the week requiring certification.

B. A certification not processed due to a department request for additional information from the claimant shall be considered timely if the requested information is received by the department no later than 10 calendar days after the request for additional information is transmitted to the claimant.

[11.3.300.304 NMAC - Rp, 11.3.300.304 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.305 ALTERNATE BASE PERIOD:

A. Application of alternate base period: If a claimant is determined ineligible because the claimant does not have sufficient wages during the base period to qualify for benefits and is not eligible for a regular claim in any other state or a combination of states and the claimant's work history reflects that the claimant may qualify using the alternate base period, the department will utilize the "alternate base period" to determine if the claimant is eligible for benefits. If the department applies the "alternate base period" and the wages for the most recent quarter have not yet been reported by the employer or processed by the department, the claimant will be required to provide proof of wages consisting of payroll checks ("check stubs)", W-2s or an appropriate affidavit. If the employer's reported wages are available for the most recent quarter, proof is not required from the claimant. On its own initiative and within its own discretion, if and when the department receives new or additional information regarding wages, it may initiate a reconsideration of the regular base period.

B. Effect of election: Wages that fall within the regular base period or the alternate base period established pursuant to 11.3.300.305 NMAC are not available for reuse in qualifying for a subsequent benefit year.

C. Procedure:

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

(2) Upon processing of the most recent quarter's wages, a "notice of initial determination of benefits" will be issued utilizing the wage information provided by the claimant for the alternate base period.

(3) If the claimant fails to provide documentary evidence of wages within the timeframe required, the original "notice of initial determination of benefits" will become final.

(4) Employers will be notified of the wages used for the alternate base period on the notice to employer of claim determination, which may include wages based upon proof provided by the claimant. The employer will have 10 calendar days from date of transmission of determination to provide the actual wages or to object to the wages being used on the claim, and may also protest charges based upon the reason for separation pursuant to Subsections A and C of 11.3.500.8 NMAC.

[11.3.300.305 NMAC - Rp, 11.3.300.305 NMAC, 11/1/2018]

11.3.300.306 [RESERVED]

[11.3.300.306 NMAC - Repealed, 11.3.300.306 NMAC, 11/1/2018]

11.3.300.307 [RESERVED]

[11.3.300.307 NMAC - Repealed, 11.3.300.307 NMAC, 11/1/2018]

11.3.300.308 CLAIM DETERMINATION:

A. Notice to employer of filing of claim: Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to the claimant's last known employer, at the address of the employer as registered with the department, if so registered, and, if not registered, to the address provided by the claimant, a dated notice of the filing of the claim and a fact-finding questionnaire. The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to the department within 10 calendar days from the date the notice of claim is sent. Unless excused by the department, the response must be an electronic transmittal.

B. Request for additional information: Prior to issuance of a determination the department may request additional information from the employer, the claimant or witnesses relative to the separation of the claimant from employment. The employer shall provide the department full and complete information to the request for additional information within two business days from the transmission. Unless excused by the department, the response must be an electronic transmittal.

C. Initial determination: A determination on any claim for unemployment benefits shall be transmitted only after the department has evaluated the claim.

(1) If an employer's response is not received within 10 calendar days after the transmission of the notice of a claim and a non-monetary issue is not raised in the application for benefits, a determination shall be made upon the information on the application.

(2) The 10 day period shall begin to run on the day after the notice of claim was transmitted to the employer as indicated on the application. If the tenth calendar day falls on the weekend or on a holiday, the reply shall be timely if received by the department on the following business day.

(3) After the 10 day period has passed, the department shall immediately transmit to the parties the determination including the reason, and shall advise the parties of the right to appeal that determination pursuant to these rules.

(4) If the claimant is subsequently disqualified from the receipt of benefits resulting in an overpayment, the employer will remain liable for any benefit charges incurred to the date of disqualification if the employer or an agent of the employer demonstrates an established pattern of failing to respond timely or adequately to the notice of claim within the 10-day period.

(a) A pattern is defined as failure to respond timely or adequately to five claims, or more at the secretary's discretion, within a calendar year.

(b) An inadequate response is defined as the employer's failure to provide relevant information or documentation that was reasonably available at the time a response was requested by the department.

(5) An employer may appeal a determination within 15 days of the assessment of the penalty that the employer or agent of the employer failed to respond timely or adequately to the notice of claim. Upon a finding on appeal that the employer or an agent of the employer had good cause for failure to transmit a timely or adequate response, the employer will be relieved of such charges. Overturned determinations will not be factored into the analysis of whether a pattern exists.

D. Redetermination: A redetermination may be issued only if all the following criteria are met:

(1) The department perceives the need for reconsideration as a result of a protest by an interested party due to new or additional information received. Examples of the type of errors which may prompt a redetermination are misapplication or misinterpretation of the law, mathematical miscalculation, an additional fact not available to the department at the time of the determination excluding those facts the employer and claimant had the opportunity to provide prior to the initial determination,

transmitting a notice to the wrong employer or address, an employer's timely response statement disputing a claim for benefits, or other administrative error.

(2) All evidence and records are re-examined.

(3) A written redetermination notice is issued to the claimant and any other interested party, and is documented in the department records.

(4) A redetermination can be issued no later than 20 calendar days from the original determination date or 20 days from the date of the first payment derived from the original determination, whichever event occurs latest.

(5) The department may issue a redetermination provided that the employer's statement was received within the statutory time limits and within less than 20 calendar days from the date of the first payment.

(6) If the claimant began collecting benefits and as a result of redetermination will be denied benefits, the claimant shall be advised.

E. Stopping payment due to administrative error: Once an initial determination is made and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard pursuant to 11.3.500.9 NMAC. When payments are made as a result of administrative error by the department and are clearly not authorized by law, rule, regulation, or any determination made pursuant to Subsection C of 11.3.300.308 NMAC, such payment shall not be deemed to have been made pursuant to a determination of eligibility.

F. Employer's notice of a labor dispute: When there is a strike, lock-out or other labor dispute, the employer shall file with the department after the commencement of such activity, and upon the demand of the department, a report of the existence and nature of the labor dispute, and the number of persons affected; and shall promptly provide the names, social security numbers and work classifications of all individuals unemployed due to the labor dispute, and whether and in what manner each individual is participating in the dispute or has a direct interest in the outcome.

G. Termination of continued claims: Payment of continued benefits to any person who has been determined eligible to receive benefits on an initial claim in accordance with 11.3.300.308 NMAC shall not thereafter be terminated without notice and an opportunity to respond.

[11.3.300.308 NMAC - Rp, 11.3.300.308 NMAC, 11/1/2018 A, 10/29/2019; A, 1/12/2021]

11.3.300.309 BENEFITS FOR PARTIAL UNEMPLOYMENT:

A. Partially unemployed claimants: Claimants are partially unemployed in any week in which their usual full-time employment is reduced to less than the normal full-time hours customarily scheduled and prevailing in the establishment in which they are employed, and their wages fall below their weekly benefit amount, due to the employer having less than full-time work for them. For partially unemployed claimants whose wages are paid on a weekly basis, a week of partial unemployment shall consist of their pay period week, a calendar week or some other period designated by the department.

B. Notice of reduced employment: On the next payday after any week for which an employee's work has been reduced by the employer to less than 32 hours, their employer shall notify them that they may file a claim by contacting the department for a week of partial unemployment. If the employer fails to notify the employees of their rights under the law regarding reduced employment, the employees may file for benefits at any time. Once the employees have received notice from the employer, they may be denied benefits if they have earned five times the weekly benefit amount after notification.

C. Employer records in connection with partial unemployment: In addition to the requirements set forth in 11.3.400.401 NMAC, all employers shall keep their payroll records in such form that it would be possible from an inspection thereof to determine which employees may be eligible for partial benefits to include:

(1) wages earned by weeks as described in Subsection A of 11.3.300.309 NMAC;

(2) whether any week was in fact a week of less than full-time work; and

(3) time lost, if any, by workers due to their unavailability for work.

[11.3.300.309 NMAC - Rp, 11.3.300.309 NMAC, 11/1/2018]

11.3.300.310 INTERSTATE CLAIMS:

A. Registration for work:

(1) Each interstate claimant shall be registered for work, through any public employment office in the agent state when and as required by the law, regulations, rules, policies and procedures of the agent state. The registration shall be accepted as meeting the registration requirements of the liable state.

(2) Each agent state shall report to the liable state whether each interstate claimant meets the registration requirements of the agent state.

B. Benefit rights of interstate claimants:

(1) If a claimant files a claim against any state, and it is determined by such state that the claimant has available benefit credits in such state, then claims shall be filed only against such state as long as benefit credits are available in that state. Thereafter, the claimant may file claims against any other state in which the claimant has available benefit credits.

(2) For purposes of this rule, benefit credits shall be deemed to be unavailable whenever benefits have been exhausted, terminated, or postponed for an indefinite period or for the entire period in which benefits would otherwise be payable, or whenever benefits are affected by the application of a seasonal restriction.

C. Continued claims for benefits:

(1) Any claim for benefits or for waiting-period credit shall be filed by an interstate claimant in accordance with uniform procedures developed pursuant to the interstate benefit payment plan. The claim shall be filed in accordance with the type of week in use in the agent state. Any adjustments required to fit the type of week used by the liable state shall be made by the liable state on the basis of consecutive claims filed.

(2) The claim shall be filed in accordance with the agent state's rules or regulations for intrastate claims.

(a) With respect to claims for weeks of unemployment in which claimants are not working for their regular employers, the liable state shall, under circumstances which it considers good cause, accept a continued claim filed up to one week or one reporting period late. If a claimant files more than two weeks late, an initial interstate claim must be used to begin a claim series, and no continued claim for a past period shall be accepted.

(b) With respect to weeks of unemployment during which claimants are attached to their regular employers, the liable state shall accept any claim which is filed within the time limit applicable to such claims under the law of the agent state.

D. Determinations of claims:

(1) The agent state shall, in connection with each claim filed by an interstate claimant, ascertain and report to the liable state such facts relating to the claimant's availability for work and eligibility for benefits as are readily determinable in and by the agent state.

(2) The agent state's responsibility and authority in connection with the determination of interstate claims shall be limited to investigation and reporting of relevant facts. The agent state shall not refuse to take an interstate claim.

E. Appellate procedures:

(1) The agent state shall afford all reasonable cooperation in the taking of evidence and the holding of hearings in connection with appealed interstate benefit claims.

(2) With respect to the time limits imposed by the law of a liable state other than New Mexico, upon the filing of an appeal in connection with a disputed benefit claim, whether or not the appeal is timely shall be determined by the liable state by reference to that state's law, regulations, rules, policies and procedures. In interstate appeals in which New Mexico is the liable state, whether or not the appeal is timely shall be determined by reference to relevant provisions of the New Mexico Unemployment Compensation Act and 11.3.500.8 NMAC.

F. Extension of interstate benefit payments to include claims taken in and for Canada: This rule shall apply to claims taken in and for Canada.

[11.3.300.310 NMAC - Rp, 11.3.300.310 NMAC, 11/1/2018]

11.3.300.311 COMBINED-WAGE CLAIMS:

All combined-wage claims shall be subject to the provisions of the interstate arrangement for combining employment and wages, the interstate benefit payment plan, the regulations and guidelines prescribed by the United States secretary of labor, and the applicable provisions of the Unemployment Compensation Law and department regulations which apply to claims for and payment of regular unemployment compensation.

A. Filing of claims:

(1) An unemployed claimant who has covered employment and wages in more than one state has the right to combine such wages and employment in the base period of one state if the combination will provide benefits for which the claimant could not otherwise qualify or will increase the benefits for which the claimant qualifies in a single state. The claimant must file a combined-wage claim if the claimant is eligible to do so rather than claim extended benefits. If the claimant wishes, the claimant has the right to reject a combined-wage and file against a state in which the claimant is separately eligible or to cancel the combined-wage claim and file no claim.

(2) Restrictions on combined-wage claims:

(a) any unemployed claimant who has covered employment in New Mexico and in another state may file a combined-wage claim unless:

(i) the claimant has established a valid claim under any other state;

(ii) the benefit year has not ended; and

(iii) there are still unused benefit rights; a claimant will not be considered to have unused benefit rights on a prior claim if all benefits have been exhausted or benefits have been denied by a seasonal restriction or benefits have been postponed for an indefinite period or for the remainder of the benefit year;

(b) if a claimant files a combined-wage claim, all wages and employment in all states in which the claimant worked during the base period of the paying state must be included except employment and wages which are not transferable under the provisions of Subsection C of 11.3.300.311 NMAC.

B. Responsibilities of new mexico when transferring wages:

(1) Wages earned in New Mexico in covered employment during the base period of the combined wage claim filed by a claimant will be promptly transferred to the paying state.

(2) Wages earned in New Mexico will not be transferred if the employment and wages have been:

(a) transferred to another paying state and have not been returned unused, or which have been previously used by New Mexico as the basis for a monetary determination which establishes a benefit year, or

(b) cancelled or are otherwise unavailable to the claimant as a result of a monetary determination by New Mexico prior to its receipt of the request for transfer, if such determination has become final or is the subject of a pending appeal; if the appeal is finally decided in favor of the combined-wage claimant, any employment and wages deemed eligible for use as wages in establishing monetary eligibility will be transferred to the paying state.

C. Non-monetary eligibility determination: When a combined-wage claim is filed, the law and eligibility requirements of the paying state apply even if an issue has been previously adjudicated by a transferring state.

D. Conditions for withdrawal of a combined wage claim: A combined-wage claimant may withdraw the combined-wage claim any time before the monetary determination of the paying state becomes final, provided that the combined-wage claimant:

(1) repays in full any benefits paid to the claimant; or

(2) authorizes the state against which the claimant will claim benefits to withhold and forward to the former paying state a full repayment of benefits.

E. Recovery of prior overpayments: If there is an overpayment outstanding in the transferring state, including New Mexico, and such transferring state so requests, the overpayment shall be deducted from any benefits the paying state would otherwise pay

to the combined-wage claimant on the combined-wage claim except to the extent prohibited by the law of the paying state. The paying state shall transmit the amount deducted to the transferring state or credit the transferring state's required reimbursement under the arrangement. This paragraph shall apply to overpayments only if the transferring state certifies to the paying state that the determination of overpayment was made within three years before the combined-wage claim was filed and that repayment is legally required and enforceable against the combined-wage claimant under the law of the transferring state.

F. Notification and appeals:

(1) A combined-wage claimant will receive a monetary determination notice from the paying state once the wage information from all states is received. The claimant has the right to appeal any aspect of the monetary determination. The appeal may be against either the paying state or the transferring state depending upon which agency issued the determination which the combined-wage claimant considers adverse to the claimant's interest. If the transferring state refused to transfer wages because the wage credits were cancelled under a disqualification or because the work was not covered, the combined-wage claimant will be sent an appealable determination by the transferring state.

(2) Except as provided in this rule, when the claimant files a combined-wage claim in the paying state, any protest or appeal shall be in accordance with the law of such state.

(a) Where the combined-wage claimant files a combined-wage claim in a state other than the paying state or under the circumstances described in this rule, any protest or appeal shall be in accordance with the interstate benefit payment plan.

(b) To the extent that any protest or appeal involves a dispute as to the coverage of the employing unit or services in the transferring state or otherwise involves the amount of wages subject to transfer, the protest or appeal shall be decided by the transferring state in accordance with its law.

[11.3.300.311 NMAC - Rp, 11.3.300.311 NMAC, 11/1/2018]

11.3.300.312 EXTENDED BENEFIT CLAIMS AND PAYMENT:

A. Application of other rules: The pertinent provisions of the law and rules that apply to regular claimants apply also to claimants for extended claims insofar as such rules pertaining to regular claimants are not inconsistent with the provisions of this rule.

B. Filing claims: Unless otherwise prescribed, a claimant who has received all of the regular benefits that were available to the claimant under the Unemployment Compensation Law or any other state law and is an "exhaustee" as defined in Subsection H of Section 51-1-48 NMSA 1978, may apply for extended benefits by filing

an extended benefits claim via internet or by contacting the department. The claim shall become effective as of the Sunday of the week in which filed, provided that the claim may be back-dated to the Sunday of the week immediately following the week which exhausted benefit eligibility if the failure to file is determined to be with good cause.

C. Claim determination and notice: Upon receipt of a claim for extended benefits the department will issue a determination on the eligibility for extended benefits and transmit a notice thereof to the claimant. The determination may be appealed in the manner prescribed for regular benefit determination appeals.

D. Continued claims: Any claimant, in order to claim weekly-extended benefits, shall file the continued claim as directed by the department.

E. Relief from certain eligibility requirements: A claimant who claims extended benefits will not be required to:

(1) be unemployed for a waiting-period of one week; or

(2) perform services in employment as designated in Section 51-1-5(B) NMSA 1978, before extended benefits are paid.

F. Requirement for additional initial claims: A claimant whose benefit year expires within an extended benefit period must file an initial claim for regular benefits at the end of that current benefit year and, if a new benefit year is not established, at the beginning of each calendar quarter during the period to determine if the claimant has sufficient wage credits in covered employment to establish a new regular claim.

[11.3.300.312 NMAC - Rp, 11.3.300.312 NMAC, 11/1/2018]

11.3.300.313 "WEEK" DEFINED:

A. Week of unemployment: Weeks of unemployment and claims shall be on a calendar week basis, except as prescribed in the case of partial unemployment, or as the department may direct otherwise in any case where it appears some other "week" may better secure the full payment of benefits when due.

B. Conditions for establishment: The calendar week within which the claimant becomes unemployed and in which the claimant earns less than the claimant’s weekly benefit amount shall be credited as a week of unemployment.

C. "Week" in more than one benefit year: A week of unemployment shall be deemed to be within that benefit year which includes the greater part of such week.

D. Week of disqualification: With respect to acts and periods of disqualification under Section 51-1-7 NMSA 1978, which occur or commence before the start of any week of unemployment as defined in 11.3.300.313 NMAC and Subsection A of

11.3.300.309 NMAC, "week" means the calendar week in which the disqualifying act or event occurs.

[11.3.300.313 NMAC - Rp, 11.3.300.313 NMAC, 11/1/2018]

11.3.300.314 FRAUDULENT CLAIMS:

A. Claimant Fraud:

(1) Subsection F of Section 51-1-38 NMSA of the Unemployment Compensation Law provides: "Notwithstanding any other provision of the Unemployment Compensation Law, including the provisions of Subsection J of Section 51-1-8 NMSA 1978, if any individual claiming benefits or waiting period credits shall, in connection with such claim, make any false statement or representation, in writing or otherwise, knowing it to be false or shall knowingly fail 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." The terms used in, Section 51-1-38 NMSA 1978 mean:

(a) "False" means a statement contrary to fact.

(b) "Knowingly" means the person making the statement, at the time it was made, knew the statement to be false or should have known it to be false because the person had no reasonable basis for believing it to be true.

(c) "Knowingly fails to disclose any material fact" means the claimant deliberately withholds information which the claimant knows should be disclosed to the department.

(d) "Material fact" means the fact affects the eventual outcome of a transaction. A fact which, if known, would result in a determination adverse to the claimant is a material fact. A fact is not material if the failure to disclose it or the intentional misstatement of it would not cause injury. A fact which, if known, would not cause a denial or reduction of benefits or disqualification from receipt of benefits is not a material fact.

(e) "With intent to obtain benefits" means the claimant intended the statement to assist the claimant to obtain benefits. In the absence of facts to indicate otherwise, when concealment of a material fact by willful misstatement or nondisclosure occurs in connection with a claim for benefits, it is assumed that the claimant's intent was to obtain or increase the amount of a benefit payment. When facts are established which

indicate a different intent, the conclusions as to the claimant's intent shall be based on consideration of all the facts and not merely an assumption.

(2) Claimants who inadvertently make a mistake or omission on the basis of information previously given them by the department, cannot reasonably be expected to understand their responsibility and shall not be subject to the provisions of Subsection D of Section 51-1-38 NMSA 1978.

(3) The department shall impose an administrative penalty pursuant to Subsection A of Section 51-1-38 NMSA 1978 for each week that a claimant knowingly makes a false statement or representation or knowingly fails to disclose a material fact to obtain or increase the amount of a benefit payment. Administrative penalties shall be imposed as follows:

(a) for each week of unreported or underreported earnings, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of 52 weeks, from the date of the determination;

(b) for each false statement on separation, eligibility, refusal of work and other issues, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of 52 weeks, from the date of the determination; and

(c) In any case where a claimant fraudulently obtained or increased benefits in two or more separate offenses, the claimant shall forfeit all benefit rights for 52 weeks from the date of the determination.

(4) The department shall demand immediate repayment of any overpayment established pursuant to Subsection D of Section 51-1-38 NMSA 1978. A warrant of levy and lien shall be filed in all cases where the overpayment is not repaid immediately. Recovery of the overpayment may be by any means permitted by law. Recovery of fraudulent overpayments may include court awarded costs. The court costs awarded by the court shall be added to the overpayment and shall be collected in the same manner as the underlying overpayment.

(5) Restitution of an amount overpaid to a claimant due to fraudulent misrepresentation or failure to disclose a material fact shall not preclude the department from requesting criminal proceedings against such claimant.

(6) The department shall impose a civil penalty pursuant to Subsection B of Section 51-1-38 NMSA 1978 upon every claimant who knowingly makes a false statement or representation or knowingly fails to disclose a material fact to obtain or increase the amount of a benefit payment. The total amount of the penalty shall be twenty-five percent of the amount of benefits overpaid as a result of the claimant’s false statement or representation or knowing failure to disclose a material fact. The department shall apply the penalty as follows:

(a) an amount equal to the first fifteen percent of the amount of benefits overpaid as a result of the claimant's false statement or representation or knowing failure to disclose a material fact shall be deposited in the "unemployment compensation fund" set forth in Section 51-1-19 NMSA 1978.

(b) an amount equal to the remaining ten percent of the amount of benefits overpaid as a result of the claimant's false statement or representation or knowing failure to disclose a material fact shall be deposited in the Employment Security Department Fund.

(7) Any payments received from a claimant for repayment for any overpayment and civil penalty shall be applied first to the principal amount of the overpayment and any payment in excess of the principal amount of the overpayment shall be applied to pay the civil penalty.

B. Employer Fraud:

(1) Subsection D of Section 51-1-38 NMSA 1978 provides: "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 claimant eligible for benefits under the Unemployment Compensation Law shall be required to pay a civil penalty in an amount not to exceed $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."

(2) When imposing a civil penalty upon employers found to have made a false statement or representation knowing it to be false or to have knowingly failed to disclose a material fact to prevent or reduce the payment of benefits to any claimant eligible for benefits under the Unemployment Compensation Law, the department shall adhere to the following guidelines:

(a) an initial violation shall subject the employer to a maximum penalty of $500.00;

(b) a second violation within a period of three years of the previous violation shall subject the employer to a penalty that is no less than $500.00 and no more than $1,000.00;

(c) a third violation within a period of three years of the most recent violation shall subject the employer to a penalty that is no less than $1,000.00 and no more than $2,000.00;

(d) a fourth or subsequent violation within a period of three years of the most recent violation shall subject the employer to a penalty that is no less than $2,000.00 and no more than $10,000.00.

(3) The department shall demand immediate repayment of any civil penalty established pursuant to Subsection D of Section 51-1-38 NMSA 1978. A warrant of levy and lien shall be filed in all cases where the civil penalty is not repaid immediately. Recovery of the civil penalty may be by any means permitted by law. Recovery of the civil penalty may include court awarded costs. The court costs awarded by the court shall be added to the civil penalty.

(4) Payment of the civil penalty due to fraudulent misrepresentation or failure to disclose a material fact by any employing unit or officer or agent of an employing unit shall not preclude the department from requesting criminal proceedings against such employing unit or officer or agent of an employing unit.

[11.3.300.314 NMAC - Rp, 11.3.300.314 NMAC, 11/1/2018; A, 6/21/2022]

11.3.300.315 RETIREMENT INCOME:

A. Each eligible claimant who, pursuant to a pension or retirement plan financed in whole or in part by a base-period employer of the claimant shall have the weekly benefit amount reduced, but not below zero, by the prorated amount of the pension, retirement pay, annuity or other similar periodic or lump-sum payment that exceeds the percentage contributed to the plan by the eligible claimant. The maximum benefit amount payable shall also be reduced to an amount not more than 26 times the reduced weekly benefit amount. For purposes of this section periodic retirement income is not deemed "received", if , under the time period allowed by the Internal Revenue Code, 26 U.S.C. Section 3405 and related provisions, that amount is placed in a non-taxable qualifying retirement account.

B. A claimant's, monthly pension or retirement payment shall be multiplied by 12, then divided by 52 to determine the amount of pension or retirement income attributed to a week beginning with the last week worked prior to separation from employment.

C. A lump-sum pension or retirement payment shall be considered a periodic payment and the amount divided by 52 and allocated on a weekly basis beginning with the last week worked prior to separation from employment.

[11.3.300.315 NMAC - Rp, 11.3.300.315 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.316 DETERMINATION OF ELIGIBILITY OF FULL-TIME STUDENTS:

A. Except for students in approved training in accordance with Subsection E of Section 51-1-5 NMSA 1978 and 11.3.100.103 NMAC, the availability of benefits for full-

time students shall be determined in accordance with the provisions of Subsection E of Section 51-1-5 NMSA 1978 and 11.3.300.316 NMAC.

B. The general requirement: Any claimants enrolled in an educational or training institution or program in a course of study who are able to work and are available for work and are actively seeking permanent full-time work or part-time work in accordance with Subsection I of Section 51-1-42 NMSA 1978, will not be denied from receiving benefits or waiting period credit.

C. Any claimants enrolled in an educational or training institution or program who can demonstrate by credible evidence that they are unequivocally attached to the labor force and available for full-time or part time permanent work for which they are presently qualified without regard to the hours spent in attending classes or doing homework will not be subject to denial if all of the following requirements are met:

(1) While working full-time or part-time and attending school, they became unemployed for reasons not attributable to the schooling and the hours of school attendance have not changed substantially since becoming unemployed, or they began attending school after becoming unemployed and no rearrangement of their school hours would be required to accommodate their normal and customary working hours.

(2) For school terms commencing after the filing of the unemployment claim, the claimants are required to submit to the department a completed student questionnaire, a schedule of classes and, if required by the department, an authorization of release of school records prior to the commencement of each school term. For school terms commencing prior to the filing of the unemployment claim, a student questionnaire and schedule of classes may be verified by the department prior to issuance of a determination that the claimants are available for full-time or part-time permanent work for the school term covered on the student questionnaire notwithstanding their status as full- students.

(3) Full time school is defined as 12 or more credit hours during a regular school term; six or more credit hours for summer term or graduate school or as defined by the school or training institution.

D. A determination of eligibility made in accordance with Subsection C of 11.3.300.316 NMAC shall apply only to the semester or period covered on the student questionnaire.

E. A claimant who receives a determination pursuant to Subsection C of 11.3.300.316 NMAC shall promptly transmit to the department any changes to class schedule during the school term. If the claimant adds or changes any classes, the claimant’s eligibility shall be subject to redetermination pursuant to Subsection C of 11.3.300.316 NMAC and Subsection A of 11.3.300.308 NMAC.

[11.3.300.316 NMAC - Rp, 11.3.300.316 NMAC, 11/1/2018]

11.3.300.317 POST EMPLOYMENT PAYMENTS:

A. The following payments made to a claimant are considered wages that must be reported by the claimant at the time they are earned and which are deductible from any benefits otherwise payable to the claimant for the week or weeks covered by such payments:

(1) Wages in lieu of notice, meaning wages paid by an employer to an employee upon separation in lieu of providing a definite period of notice per a written employer contract, a clearly defined, uniformly applied, written employer policy in place prior to the date of separation, or a statutory requirement;

(2) Bonuses, including commissions, incentive pay, ratification lump sum payments (such as union layoff bonuses), retention or "stay" bonuses, and transfer or relocation bonuses;

(3) Supplemental unemployment payments whose premiums are paid by the employer;

(4) Vacation or leave pay, bereavement pay, continuation pay, or PTO payouts with a letter of intent to return to work within four weeks of separation; or

(5) Back pay.

B. A claimant who receives payments listed in Subsection A of this part cannot establish a waiting period credit or receive benefits for the week or weeks covered by such payments, if such payments equal or exceed the claimant’s weekly benefit amount.

C. When a claimant leaves work voluntarily without good cause connected with work, is discharged for misconduct connected with work, or fails without good cause to apply for or accept an offer of suitable work and receives a payment listed in Subsection A of this part for services actually performed in any week for which benefits are claimed, these payments cannot be used to meet the requirement of wages earned during employment equal to or exceeding five times the weekly benefit amount of the claim to restore eligibility following a disqualification from benefits or filing a new claim under the provisions of Subsection A of Sections 51-1-7, Subsection B of Section 51-1-7 or Subsection C of Section 51-1-7 NMSA 1978.

D. The following payments are not considered wages and will not be deducted from any benefits otherwise payable to a claimant:

(1) Severance

(2) Supplemental unemployment payments whose premiums are paid by the claimant

(3) Vacation or leave pay bereavement pay, continuation pay, or PTO payouts without a letter of intent to return to work

(4) Residuals

[11.3.300.317 NMAC - Rp, 11.3.300.317 NMAC, 11/1/2018]

11.3.300.318 BENEFITS DUE DECEASED PERSONS:

A. If prior to the claimant's death, a claimant had filed a weekly certification, for benefits which were unpaid at the time of the claimant's death, the benefits shall be paid to the deceased claimant's court-appointed executor, administrator or personal representative. If the deceased claimant's next of kin demonstrates, to the secretary's satisfaction, that the court appointment of a fiduciary is impractical or legally unnecessary, then the benefits shall be paid to the next of kin. The order of priority for such payment shall be:

(1) one-half to the surviving spouse, if residing with the deceased claimant at the time of death, and one-half to the natural parent or physical custodian of any minor children or any dependent disabled adult children of the deceased claimant (if more than one, per capita by children and not per stirpes);

(2) if no minor children and no dependent disabled adult children of the deceased claimant, all to the surviving spouse; if no surviving spouse, all equally

(3) to the surviving adult children; if no surviving adult children, all equally

(4) to the surviving parents; if no surviving parents, all equally

(5) to the surviving siblings; if no surviving siblings, all

(6) to the deceased claimant's heirs at law as provided in the New Mexico Probate Code, Sections 45-2-101 through 45-2-114 NMSA 1978.

B. Whenever there is more than one legal heir in any of the above classes, payment may be made to any one of such group as agent for the others upon submission of proper evidence of authority and identification.

C. Application for payment of benefits must be made in writing and on the prescribed form within six months of the death of the decedent and must be accompanied by a certified copy of the death certificate. The application form shall set forth that the individual died intestate, that no executor, administrator or personal representative has been appointed to administer the deceased claimant's estate, and the relationship of the person to the deceased. Any outstanding payments representing benefits claimed must accompany the application for payment for re-issuance.

D. Unless, within the time prescribed herein a claim is made for benefits due a deceased claimant by one of the parties herein authorized to make such claim, any payments issued directly to the deceased claimant shall be canceled, and any additional benefit payments due to the deceased claimant for weeks of unemployment prior to the claimant's death shall be canceled, and all sums represented by benefits payable to the deceased claimant prior to the claimant's death shall remain a part of the unemployment compensation fund.

[11.3.300.318 NMAC - Rp, 11.3.300.318 NMAC, 11/1/2018]

11.3.300.319 STANDARDS FOR WAGES ELIGIBLE TO PURGE BENEFIT DISQUALIFICATION; BONA FIDE EMPLOYMENT:

In determining whether a claimant has earned wages to requalify for benefits after imposition of a disqualification under the provisions of Section 51-1-7 NMSA 1978, the following shall apply:

A. Wages required to requalify will include both covered and non-covered wages, but will not include earnings from self-employment or earnings excluded under the provisions of 11.3.300.317.NMAC.

B. The wages must have been earned for work performed subsequent to the effective date of the disqualification.

C. The proof required to establish wages for requalification may consist of check stubs or other payment records, employer statement or W-2 form if the W-2 establishes that the wages were paid after the effective date of the disqualification. When employers' quarterly wage reports available to the department show the contended wage items, the department may accept the report as proof of wages. If necessary for a determination under Subsection B of 11.3.300.319 NMAC, the period during which the wages were earned shall be established by other proof.

D. Except for wages of which the department has knowledge through employers' quarterly wage reports, the burden of establishing requalifying wages shall rest on the claimant. The department may, as it deems appropriate, assist the claimant in the verification of wages which the claimant states that the claimant has earned but of which the claimant has no proof or insufficient proof, by contacting the employers.

E. The wages must have been earned in "bona fide" employment. The basic test to determine whether employment is "bona fide" to purge a disqualification is whether the total facts lead a reasonable person to conclude that the claimant was in good faith genuinely attached to the labor market. A claimant is not engaged in bona fide employment when the service is performed for the purpose of purging a disqualification. No fixed rule can govern when employment is "bona fide," but the following factors shall be considered by the department:

(1) whether a valid, arms-length employer-employee relationship exists; this excludes self-employment and incidental cash payments for services reportedly performed for relatives and friends;

(2) whether the work is of the type of which the claimant would accept referral on a full-time basis or for repeated temporary durations;

(3) whether the work bears any relation to the claimant's main occupational skills;

(4) whether the work is of the type that employers generally offer in the job market;

(5) whether the work is related to the particular employer's normal activity and customarily offered to the working public by this employer;

(6) whether the employer is registered for employment purposes with appropriate taxing and licensing authorities;

(7) the nature of the work, concerning hours to be worked, where the work is performed, and rate of pay;

(8) whether the employer can produce payroll records to substantiate the amount of payment and appropriate tax withholding information;

(9) whether the wages for the employment were equivalent to the claimant's wages in the claimant’s usual occupation or last preceding employment; and

(10) the manner in which the work was obtained, and the nature and extent of the claimant's search for work.

[11.3.300.319 NMAC - Rp, 11.3.300.319 NMAC, 11/1/2018]

11.3.300.320 WORK SEARCH REQUIREMENT:

A. WORK SEARCHES: To qualify for continued benefits, a claimant must:

(1) be a member of a union with a hiring hall or a referral hall and meet the union requirements for job referral or placement;

(a) the claimant must be a member in good standing at the time of certification;

(b) the hiring hall or referral hall must be actively seeking to place its members in employment; or

(2) actively seek work by contacting a minimum number of different employers each week during the week for which benefits are claimed, as directed by department representatives. It is not mandatory that the work searches occur on different days of the week;

(a) a claimant may contact the same employer more than one time during a given week, which may count for multiple searches if the claimant applies for multiple jobs with the same employer so long as the applications are distinct and separate positions;

(b) a claimant may list jobs applied for through the New Mexico department of workforce solutions workforce connection centers, the New Mexico state personnel office (SPO), America's job bank, Workforce Innovation and Opportunity Act (WIOA) partners and similar programs as approved from time to time by the department as valid work search contacts for each week of claim certification;

(3) Other unions may apply for work search waivers by submitting a request in writing to the secretary, who may upon discretion make an exception to the work search requirements.

B. in order to qualify for continued benefits, interstate, if New Mexico is the liable state, claimants must seek work within the week for which benefits are being claimed and actively seek work by contacting a minimum of two different employers each week, or if a union member, actively seek work by contacting the union as required by the union in order to be eligible for job referral or placement.

C. claimants must keep a record of the name, address and telephone number or electronic mail address of each employer contacted in the event of an audit and must retain a copy of any email confirmation received as a result of applying for a job on-line;

(1) This information must be provided to department representatives upon request;

(2) the claimant must provide the requested information no later than 10 calendar days from the date of the department's request;

(3) the claimant must provide sufficient information for the department to verify the claimant's work search efforts. If the claimant is able to provide specific job numbers or requisition numbers for the job applied for, this information will be considered sufficient to verify the contact;

(4) failure to provide the required information without good cause may result in a denial of benefits for the week in question;

(5) if the information provided is insufficient to verify a valid work search occurred, benefits for the week in question will be denied;

(6) if a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits. Such benefits would constitute an overpayment which would be recouped pursuant to Section 51-1-38 NMSA 1978;

(7) any denial imposed for failure to provide the required information may be appealed pursuant to 11.3.500.9 NMAC;

D. A claimant whose work search is deemed inadequate or invalid shall be denied benefits for the week in question. A rebuttable presumption that the claimant failed to meet the active work-search requirements for that week will be raised in all cases where a claimant's work search is deemed inadequate or invalid. In order to overturn the denial of benefits the claimant shall provide proof that the claimant did meet the active work-search requirements for that week. If a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits. Such benefits would constitute an overpayment which would be recouped pursuant to Section 51-1-38 NMSA 1978. Any denial imposed on the basis of an inadequate or invalid work search may be appealed pursuant to 11.3.300.500.9 NMAC.

E. The department may waive the work search requirements for claimants who the department determines are on temporary lay-off status from their regular full-time employment upon receipt of an assurance from the employer that the lay-off shall not exceed four weeks or upon receipt of an express offer in writing of substantially full-time work which will begin within a period not exceeding four weeks. Such waivers shall apply only to the four-week period covered on the determination. A claimant who receives a determination granting a waiver for the four-week period shall promptly transmit any change to the claimant's recall date or start date to the department. The claimant's eligibility shall then be subject to redetermination pursuant to Subsection A of 11.3.300.308 NMAC.

F. In cases where the department determines a claimant is in a temporary lay-off status due to a government furlough or shutdown, the department may waive the work search requirements during the period of the temporary lay-off for all affected claimants.

G. In the event of a public health emergency declaration issued by the governor, work searches shall, to the extent permissible by federal law, be waived for all claimants at the discretion of the secretary until the end of the public health crisis.

[11.3.300.320 NMAC - Rp, 11.3.300.320 NMAC, 11/1/2018; A/E, 1/9/2019 A, 10/29/2019; A, 7/28/2020; A, 9/14/2021]

11.3.300.321 REEMPLOYMENT SERVICES:

A claimant shall be eligible to receive benefits with respect to any week only if the claimant participates in reemployment services such as job search assistance services, if the claimant has been determined to be likely to exhaust regular benefits, and needs

reemployment services pursuant to a profiling system established by the department, unless the department determines that:

A. this claimant has completed such services; or

B. there is justifiable cause for the claimant's failure to participate in such services;

C. if the claimant does not participate in reemployment services as required by the department, benefits shall be denied for the week of non-participation.

[11.3.300.321 NMAC - Rp, 11.3.300.321 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.322 CLAIM CANCELLATIONS:

A. A claim may be canceled by the claimant at any time after an initial or amended monetary determination even though final, provided that no disqualifying determination has been issued nor any benefits paid on the claim. Requests for cancellation must be made by the claimant or their authorized representative in the manner prescribed by the department and signed electronically or in writing by the claimant or the authorized representative of the claimant.

B. A request to change the date of a claim is deemed a request to cancel a claim and file a new claim.

(1) Only if the claimant does not qualify for benefits using the base period consisting of the first four of the last five completed quarters will the base period be changed.

(2) In situations where claimants might be benefited by a delayed filing, the department will advise the claimant that the claim determination will not show any wages for the first quarter and that this is not an error. If using the new base period will cause an increase in the weekly benefit amount, the department will make an effort to advise the claimant of this option to file a claim at a future date.

C. Claimants who are eligible to file a combined wage claim may cancel such claim when New Mexico is the paying state if benefits have been paid on the combined wage claim. Cancellation will be authorized only if the claimant agrees in the manner prescribed by the department to reimburse all benefits paid by cash or by authorizing any other state to deduct the amount due from any benefit payments to which the claimant is eligible. Requests for cancellation must be made in the manner prescribed by the department signed electronically or in writing by the claimant or the authorized representative of the claimant.

[11.3.300.322 NMAC - Rp, 11.3.300.322 NMAC, 11/1/2018]

11.3.300.323 VOLUNTARY WITHHOLDING OF FEDERAL INCOME TAX:

A. The department shall provide each claimant filing a new claim for benefits with the following information in documented form:

(1) benefits are subject to federal, state and local income tax;

(2) requirements exist under federal law pertaining to estimated tax payments;

(3) a claimant may elect to have federal income tax deducted and withheld from the claimant's benefit payments at the amount specified in the federal Internal Revenue Code, 26 U.S.C. Section 3402(p)(2); and

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

B. Amounts deducted and withheld from benefits shall remain in the unemployment compensation fund until transferred to the internal revenue service as a payment of income tax.

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

D. Amounts shall be deducted and withheld for the purpose of federal income tax payments only after amounts are deducted and withheld for any overpayments of benefits, child support obligations and food stamp over-issuances required to be deducted and withheld under the Unemployment Compensation Law.

[11.3.300.323 NMAC - Rp, 11.3.300.323 NMAC, 11/1/2018]

11.3.300.324 COLLECTIONS:

A. Deferred collections: From time to time, the department may, at its discretion determine that it is not economically efficient to actively pursue collection of certain overpayments due to the claimant's situation or the department's resources. The department may cease or forbear active collection activities for either a finite period or an indefinite period depending on the circumstances. However, overpayment debts will remain on the department's books as an obligation owed by the claimant to the department. The department's discretion in this matter is final.

B. Money collected by the department with respect to an overpayment or civil penalty will be applied in the following order unless specifically directed otherwise:

(1) costs incurred by the department to pursue collection of the overpayment or civil penalty;

(2) the principal amount of the overpayment;

(3) the portion of the civil penalty equal to fifteen percent of the overpayment amount which will be deposited in the Unemployment Compensation Fund set forth in Section 51-1-19 NMSA 1978; and

(4) the portion of the civil penalty equal to ten percent of the overpayment of the amount which will be deposited in the employment security department fund created pursuant to Section 51-1-34 NMSA 1978.

[11.3.300.324 NMAC - Rp, 11.3.300.324 NMAC, 11/1/2018]

11.3.300.325 OVERPAYMENTS AND WAIVER OF OVERPAYMENTS PURSUANT TO THE TRADE ACTS OR ANY ENACTED FEDERAL EXTENSION PROGRAM:

A. The department shall use the process set forth herein to evaluate disputes of overpayments paid under the Trade Acts, the Trade Adjustment Assistance (TAA), Trade Readjustment Assistance (TRA), Federal Extended Benefits, or any enacted federal extension program under the following circumstances:

(1) When a decision of the department results in an overpayment, an appealable determination will be sent to the claimant. The claimant may file an appeal no later than 15 days from the date of the determination in accordance with 11.3.500 NMAC.

(2) At the department's discretion, a request for review of an overpayment may be administratively initiated to determine if a waiver of overpayment will be approved. A waiver will be approved if the department determines that:

(a) the application was made timely;

(b) payment was made without the fault of the claimant; and

(c) requiring repayment would be contrary to equity and good conscience.

(3) The department's affirmative finding of any one of the following factors of fault precludes a waiver:

(a) that the claimant knowingly made a material misrepresentation, which misrepresentation resulted in the overpayment; or

(b) that the claimant knowingly failed to disclose a material fact, which failure to disclose resulted in the overpayment; or

(c) that the claimant knew or should have known that he was not eligible for the payment; or

(d) that the department has previously issued a determination of fraud in regards to the overpayment.

(4) The department shall consider the following factors in determining whether, in equity and good conscience, the department should require repayment:

(a) whether the overpayment was the result of a decision on appeal;

(b) whether the claimant was given notice that repayment would be required in the event of reversal on appeal;

(c) whether the recovery of the overpayment would cause an extraordinary and lasting financial hardship to the claimant, resulting in the claimant's inability to obtain minimal necessities of food, medicine and shelter for at least 30 days and period of financial hardship lasting at least three months, and

(d) whether, if recoupment from other benefits is proposed, the length of time of extraordinary and lasting financial hardship shall be the longest potential period of benefit eligibility as seen at the time of the request for waiver of determination.

(5) In determining whether fraud has occurred, the department shall consider the following factors:

(a) whether the claimant knowingly made, or caused another to make, a false statement or representation of a material fact resulting in the overpayment;

(b) whether the claimant knowingly failed, or caused another to fail, to disclose a material fact resulting in the overpayment.

B. If a determination of fraud is made, the claimant shall be ineligible for any further TAA, TRA or any other enacted federal extension program benefits and shall be ineligible for waiver of any overpayment.

C. A finding that the overpayment was not the result of a decision on appeal or that the recovery would not cause extraordinary and lasting financial hardship shall preclude a waiver.

D. If a claimant fails, without good cause, to complete training, a job search or a relocation, any payment to such claimant that is not properly and necessarily expended in attempting to complete the activity shall constitute an overpayment. Such overpayments shall be recovered or waived according to the standards of fault, equity and good conscience contained in 11.3.300.325 NMAC.

E. In any event, no repayment shall be required or deduction made until a notice and an opportunity for fair hearing have been provided to the claimant in accordance

with 11.3.500 NMAC, a determination has been issued by the department, and the determination has become final.

[11.3.300.325 NMAC - Rp, 11.3.300.325 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.326 DOMESTIC ABUSE:

A. A claimant is eligible for waiting period credit or benefits if the claimant voluntarily leaves work due to circumstances directly resulting from domestic abuse.

(1) "Domestic abuse" means abuse as defined in Section 40-13-2 NMSA 1978, and includes but is not limited to any incident by a household member against another household member resulting in: physical harm; severe emotional distress; bodily injury or assault; a threat causing imminent fear of bodily injury by any household member; criminal trespass; criminal damage to property; repeatedly driving by a residence or work place; telephone harassment; stalking; harassment, or harm or threatened harm to children.

(2) "Household member" means a spouse, former spouse, family member, including relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, intimate partner or a person with whom the claimant has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member.

B. Documentation: The claimant shall provide documentation satisfactory to the department for the determination of whether the claimant has experienced domestic abuse for purposes of benefit eligibility. The documentation shall be of a competent nature, reasonably susceptible to verification and bearing indicia of credibility. The documentation shall include a sworn statement by the claimant regarding the domestic abuse. The documentation may include information from individuals or organizations from whom the claimant has sought assistance for the domestic abuse, including but not limited to police or court records, documentation from a shelter worker, attorney at law, a member of the clergy, physician or other medical or mental health practitioner. If upon review of the claimant's documentation, the department determines that further verification is warranted, the department may require additional supporting documentation.

C. Determination: To be eligible for benefits as a result of domestic violence, the department must determine that the claimant is monetarily eligible. The existence of domestic violence shall be established by a preponderance of the evidence.

(1) Factors to be considered in determining if claimant voluntarily leaves work as a result of domestic violence include but are not limited to whether: claimant reasonably fears domestic abuse at or en route to or from claimant's place of employment; claimant reasonably is required to relocate to another geographic area to avoid future domestic abuse; claimant reasonably believes that leaving employment is

necessary for the future safety of the claimant or the claimant's family due to the domestic abuse; the abuse itself interfered with claimant's ability to work, travel or prepare for work; claimant reasonably left the labor market to escape such abuse; the abuse occurred at claimant's place of employment; the abuser's relatives or friends or the abuser were co-workers of claimant or otherwise present at the worksite; claimant informed the employer and gave the employer the opportunity to ameliorate the domestic abuse within a reasonable period of time, but the employer would not or could not do so; claimant has filed a civil or criminal proceeding against an alleged abuser; however nothing in this provision shall be construed as requiring the filing of a civil or criminal proceeding as a prerequisite to establishing the existence of domestic violence.

(2) Claimant must indicate at the time of filing the claim that the reason for leaving employment was as a result of qualifying domestic abuse.

(3) Claimant must provide evidence tending to prove the existence of qualifying domestic abuse within 10 days of the filing of the claim.

(4) Claimant will be eligible to receive benefits retroactively to the date of filing if adequate documentation is received within 10 days of the filing of the claim, if otherwise eligible for benefits.

(5) If no documentation is received within 10 days of the filing of the claim, an initial determination will be issued denying the claim on the basis of domestic abuse.

(6) If claimant subsequently submits documentation tending to demonstrate the existence of domestic abuse, a determination will be made on the basis of the subsequent documentation submitted. Claimant will not be eligible to receive benefits retroactively to the date of filing but will be eligible to receive benefits retroactively to the date of submission of the subsequent documentation supporting domestic abuse.

(7) Only an alleged victim of domestic abuse may obtain benefits under this provision; an alleged perpetrator may not.

D. If domestic abuse is proven, a determination will be issued identifying domestic abuse as the reason for the separation and a contributing employer's account will not be charged any portion of benefits paid.

[11.3.300.326 NMAC - Rp, 11.3.300.326 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.327 DEPENDENTS' ALLOWANCE:

A. A claimant is eligible to receive benefits in the amount of $25 for each unemancipated child, up to a maximum of two children, and not to exceed fifty percent of the claimant's weekly benefit amount.

B. The claimant shall declare the dependents' allowance on the date that the claimant files an initial claim for the benefit year.

C. Within 14 days of an application for the dependents' allowance, the claimant must supply verification that, for each child for whom the allowance is claimed, the child is the claimant's child, under the age of 18, unemancipated and the child is:

(1) in fact dependent on and wholly or mainly supported by the claimant; or

(2) in the legal custody of the claimant pending adjudication of a petition for adoption filed in a court of competent jurisdiction; or

(3) the subject of a decree or order from a court of competent jurisdiction requiring the claimant to contribute to the dependent's support; and no other claimant is receiving dependents' allowance benefits for that child under the Unemployment Compensation Law.

D. Definitions: "Child" means a person:

(1) who is related to the claimant within the third degree of consanguinity; or

(2) who is a stepchild of the claimant by virtue of the claimant's marriage to the child's biological or legal parent and that biological or legal parent has sole or primary legal and physical custody of the child and the child physically resides with the claimant; or

(3) who is in the claimant's legal or physical custody pursuant to a decree or order from a court of competent jurisdiction including but not limited to orders of custody, guardianship, conservatorship, trusteeship or foster care;

(4) "wholly or mainly supporting" means that the claimant who is applying for the dependents' allowance is in fact furnishing contemporaneously more than fifty percent of the actual cost of support for the dependent.

E. The claimant has the burden of establishing to the satisfaction of the department that the claimant is actually furnishing more than one-half of the cost of support of the child.

F. No fixed dollar amount shall be used to make the determination regarding support.

(1) The department considers "cost of support" to include but is not limited to a reasonable proration of the expenses of shelter (including but not limited to household grocery, toiletries, household cleaning products, rent or mortgage payments, customary utilities such as water, sewer, gas, electricity and basic telephone), school expenses of the child (including but not limited to tuition, books, clothing and supplies for special

school or educational activities), medical and dental expenses including actual payments and payments of insurance premiums; payment of expenses related to any special needs of the child.

(2) The department may also use any child support worksheets utilized by a court of competent jurisdiction in determining the amount of child support due from each parent.

G. Verification:

(1) Claimant shall not be eligible to claim a dependents' allowance for any person unless the dependent has been issued a social security number or other federal identification sufficient for purposes of verification.

(2) A claimant who is otherwise eligible for benefits and who has not yet submitted the required dependents' allowance verification shall not be paid the dependents' allowance unless and until verification satisfactory to the department is presented.

(3) Upon receipt of verification within 14 days of the application the dependents' allowance shall be paid retroactively to the date of the application.

(4) If the claimant submits verification after 14 days, the claimant will not be eligible to receive benefits retroactively to the date of the application but will be eligible to receive benefits retroactively to the date of submission of verification satisfactory to the department.

H. Changes in eligibility:

(1) During the life of the claim, should claimant become eligible for a dependents' allowance, claimant may request from the department that the dependents' allowance be granted. Claimant will be required to provide proof that the dependent for which the benefit is being sought was not a dependent at the time of the filing of the initial claim. The department will issue a written determination whether claimant is granted or denied the dependents' allowance.

(2) During the life of the claim, should claimant no longer be eligible to claim a dependents' benefit for one or more of the dependents for whom claimant is receiving the dependents' allowance, claimant is required to report to the department within five days any such change in circumstances. A claimant who fails to report such change in circumstances may be assessed an overpayment.

(3) Should the circumstances of who provides support for the dependent change during the life of the claim, the claimant shall inform the department within five days of the change of circumstances.

I. Multiple claims: Only one claimant may receive a dependents' allowance for any specific dependent. In the event two claimants each request to receive the dependents' allowance for the same child, upon notification of the dispute, the department shall continue making payments to the claimant who the department initially determined was eligible to receive benefits for the dependent. A later claimant may demonstrate a superior claim to the dependents' allowance for a child by producing documentation showing that the later claimant has a paramount right to claim the dependents' allowance, including but not limited to:

(1) a custody decree or order from a court of competent jurisdiction finding that the dependent child is or should be in the primary physical custody of the later claimant or that the later claimant is obligated to provide more than fifty percent of the dependent child's support and that the later claimant is in fact the primary physical custodian of the dependent child or is in fact providing more than fifty percent of the dependent child's support;

(2) a custody decree or order from a court of competent jurisdiction or similar document including, but not limited to IRS form 8332, finding that the later claimant is eligible to claim the child as a dependent for official purposes.

J. Once a claimant has been determined to be eligible for the dependents' allowance that determination will remain in effect for the life of the claim, subject to the provisions of Subsection H of 11.3.300.327 NMAC.

K. Payment of regular benefits will not be delayed due to any delay in processing the application for dependents’ allowance.

L. A contributing employer's account will not be charged any portion of benefits paid for the dependents' allowance.

[11.3.300.328 NMAC - Rp, 11.3.300.328 NMAC, 11/1/2018]

11.3.300.328 APPRENTICES:

A. Apprentices participating in an approved apprenticeship program registered with the Apprenticeship Office through the department of workforce solutions who are required to attend unpaid training sessions during weeks in which they are not otherwise receiving compensation may be eligible to receive unemployment benefits for the training weeks under 51-1-1 *et seq.* NMSA as long as all other unemployment eligibility requirements are met.

B. During the week in which an apprentice is eligible for unemployment benefits though this provision, the work search requirements will be waived since the apprentice will have a predetermined return to work date established though their apprentice program.

[11.3.300.328 NMAC - N, 1/12/2021]

PART 301-399: [RESERVED]

PART 400: TAX ADMINISTRATION

11.3.400.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Workforce Transition Services Division.

[11.3.400.1 NMAC - Rp, 11.3.400.1 NMAC, 11/30/2016]

[Address: Post Office Box 1928, Albuquerque, N.M. 87103]

11.3.400.2 SCOPE:

General public.

[11.3.400.2 NMAC - Rp, 11.3.400.2 NMAC, 11/30/2016]

11.3.400.3 STATUTORY AUTHORITY:

Sections 51-1-1 to 51-1-59 NMSA 1978.

[11.3.400.3 NMAC - Rp, 11.3.400.3 NMAC, 11/30/2016]

11.3.400.4 DURATION:

Permanent.

[11.3.400.4 NMAC - Rp, 11.3.400.4 NMAC, 11/30/2016]

11.3.400.5 EFFECTIVE DATE:

November 30, 2016, unless a later date is cited at the end of a section.

[11.3.400.5 NMAC - Rp, 11.3.400.5 NMAC, 11/30/2016]

11.3.400.6 OBJECTIVE:

The purpose of these rules is to provide clarification of the Unemployment Compensation Law. These rules assist employers and claimants to better understand how specific sections of the law are being administered by the department. The rules also assist employers achieve compliance by facilitating understanding of the

department's procedure so that employers can meet the requirements of unemployment compensation law.

[11.3.400.6 NMAC - Rp, 11.3.400.6 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.7 DEFINITIONS:

A. "Account" means the employer account, identified by an account number, established and maintained by each employer, or employer member of a group account, for the purpose of determining liability for contributions or payments in lieu of contributions and includes a record of all unemployment insurance activity including benefit charge allocations, contributions and wages from which benefits to eligible claimants can be determined.

B. "Agency" means any officer, board, commission, or other authority charged with the administration of the unemployment compensation law of a participating jurisdiction.

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

D. "Annual payroll" means the total taxable amount of payment from an employer for employment during a 12-month period ending on a computation date.

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

F. "Base-period employers" means the employer of an individual during the individual’s base period.

G. "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.

H. "Benefit charges" means the dollar amounts allocated or accrued to an employer’s account for unemployment benefits paid to individuals.

I. "Benefit payments used to calculate the average benefit cost rate" means all unemployment compensation benefits and state extended benefits paid from the trust fund to claimants with wages from non-reimbursable covered employment.

J. "Benefit ratio" means the result determined by dividing an employer’s benefit charges by the employer’s taxable payroll.

K. "Common ownership" means that two or more businesses are substantially owned, managed or controlled by the same person or persons.

L. "Computation date" means for each calendar year the close of business on June 30 of the preceding calendar year.

M. "Contributions" means the tax 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.

N. "Contribution rate" means the rate applicable to the tax payments the employer is required to pay into the fund.

O. "Employer's reserve" means the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, up to a maximum of three fiscal years.

P. "Employing enterprise" means a business activity engaged in by an employing unit in which one or more persons have been employed within the current or the three preceding calendar quarters.

Q. "Employment" means services performed by an individual including corporate officers for wages or other payment for an employer that has the right, whether utilized or not, to control or direct the individual in the performance of the services at the employer's place of business which includes all locations where services are performed for the employer under the individual's contract of service and the individual is not customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of services.

R. "Excess claims premium" means the charge in addition to the contribution rate applicable to the employer if an employer's contribution rate is calculated to be greater than five and four-tenths percent, provided that an employer's excess claims premium shall not exceed one percent of the employer's annual payroll.

S. "Experience history factor" means the determination based on the employer's reserve which is the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, to a maximum of three fiscal years.

T. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made

by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the claimant's, failure to keep the department directly and promptly informed of the claimant's correct email or postal mailing address or the employer's or employing unit's failure to keep the department directly and promptly informed of the employer's or employing unit's correct email address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

U. "Group account" means the account, identified by an account number, established for two or more employers whose application to become liable for payments in lieu of contributions and for sharing the cost of benefits paid by them, has been approved by the department in accordance with Subsection E of Section 51-1-13 NMSA 1978.

V. "Group member" means any employer who has become associated with another or others to form a group account.

W. "Interested agency" means the agency of an interested jurisdiction.

X. "Interested jurisdiction" means any participating jurisdiction to which an election submitted under this rule is sent for its approval.

Y. "Jurisdiction" means any state of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands or, with respect to the federal government, the coverage of any federal unemployment compensation law.

Z. "Knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved.

AA. "Participating jurisdiction" means a jurisdiction whose administrative agency has subscribed to the interstate reciprocal coverage arrangement and whose adherence thereto has not terminated.

BB. "Payment in lieu of contributions" means nonprofit employers or governmental agencies that elect to pay 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 or governmental agency, to individuals of weeks of unemployment that begin during the effective period of such election.

CC. "Predecessor" means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise.

DD. "Reserve factor" means the annual factor determined by the department that is necessary to ensure that the unemployment trust fund sustains an adequate reserve.

EE. "Services customarily performed by an individual in more than one jurisdiction" means services performed in more than one jurisdiction during a reasonable period, if the nature of the services gives reasonable assurance that they will continue to be performed in more than one jurisdiction or if such services are required or expected to be performed in more than one jurisdiction under the election.

FF."Successor" means any person or entity that acquires an employing enterprise and continues to operate such business entity.

GG. "Taxable year" means the calendar year beginning the first day of January and ending the last day of December.

HH. "Total wages for the purpose of computing the reserve ratio and the benefit cost rate" means all wages paid to covered employees for payroll periods ending in a calendar year as reported on the quarterly census of employment and wages.

II. "Trust fund balance" means the trust fund balance on deposit with the U.S. treasury in the state's account as of June 30 that includes only funds that will be used for payments of benefits to claimants.

JJ."Violates or attempts to violate" means intent to evade, a misrepresentation or a willful nondisclosure.

KK. "Wages" means all remuneration for services, including commissions, bonuses or unpaid loans to employees and the cash value of all remuneration in any medium other than cash.

[11.3.400.7 NMAC - Rp, 11.3.400.7 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.8-11.3.400.400: [RESERVED]

11.3.400.401 EMPLOYER TAX ACCOUNT AUDITS:

A. Records of employing units:

(1) Each employing unit shall keep true and accurate employment and payroll records which shall include, with reference to the employing unit the name and correct address of such employing unit, and the name and correct address of each branch or division or establishment operated, owned or maintained by such employing unit at different locations in New Mexico, all disbursements for services rendered to the

employing unit; and with reference to each and every individual performing services for it, the following information:

(a) the individual's name, address and social security number;

(b) the dates on which the individual performed services for such employing unit, including beginning and ending dates, and the state or states in which such services were performed;

(c) the total amount of wages paid to the individual for each separate payroll period, date of payment of said wages, and amounts paid to the individual for each separate payroll period other than "wages", as defined in the Unemployment Compensation Law;

(d) whether, during any payroll period, the individual worked less than full time, and, if so, the hours and dates worked;

(e) the reasons for separation of the individual.

(2) In addition to the records required by Subsection A of 11.3.400.401 NMAC, each employing unit shall keep and provide to the department upon request, the following:

(a) records to establish and demonstrate the ownership and any changes of ownership of the employing unit and the address at which such records are available for inspection or audit by representatives of the department. The records shall show the addresses of the owners of the employing unit or, in the event the employing unit is a corporation or unincorporated organization, such records shall show the addresses of directors, officers, registered agents and any person on whom subpoenas or legal process may be served in New Mexico. In the event the employing unit is a group account, the records shall show the address of the group representative; and

(b) records to verify any and all workers providing services to the employer are properly classified as employees or independent contractors such as the employer’s general ledger or check register.

(3) If any payments other than money wages is paid to or received by an individual with respect to services performed by his employer, the records shall show the total amount of cash wages and the cash value of any other payments.

(4) All records shall be kept and maintained as to establish clearly the correctness of all reports which the employing unit is required to file with the department and shall be readily accessible to authorized representatives of the department within the geographical boundaries of New Mexico; and in the event such records are not maintained or are not available in New Mexico, the employing unit shall pay to the

department the expenses and costs incurred when a representative of the department is required to go outside the state of New Mexico to inspect or audit such records.

(5) If an employing unit elects to maintain its payroll records on magnetic media, it shall be the obligation of such employing unit to reproduce such records on a media, readable by the human eye for the purpose of an audit.

(6) The records prescribed by this rule shall be preserved for a period of at least four years in addition to the current calendar year.

B. Employers must provide accurate work records at any reasonable time and as often as necessary for effective administration of the Unemployment Compensation Law.

(1) The department shall complete random audits of employer records to ensure compliance. Such audits will be conducted electronically whereby employers shall return any requested documentation electronically through the employer's online account.

(2) Employers shall return the required documentation within 20 days from the date of the audit notification letter. Failure to return all documents timely could result in the department seeking compliance through a subpoena and enforcement in district court.

(3) If the audit results in reclassification of employees due to employer misclassification, the employer has the right to appeal the determination following procedures in 11.3.500 NMAC. Penalties and interest assessed as a result of the determination shall not be abated. Any removal of penalties and interest must be addressed during the appeal process.

C. The department determines whether an individual is considered an independent contractor using the "ABC test" as defined in Subparagraphs (a) through (c) of Paragraph (5) of Subsection F of Section 51-1-42 NMSA 1978.

[11.3.400.401 NMAC - Rp, 11.3.400.401 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.402 IDENTIFICATION OF EMPLOYEES:

Each employer shall report an employee's social security account number in making any report required by the department with respect to such employee. If the employee has no such number, the employer shall request the employee show the employer a receipt issued by the social security administration acknowledging that the employee has filed an application for an account number. The receipt shall be retained by the employee and a copy of the receipt shall be retained by the employer. In making any report required by the department with respect to such an employee, the employer shall

report the date of issue of the receipt, its termination date, the address of the issuing office, and the name and address of the employee exactly as shown in the receipt.

[11.3.400.402 NMAC - Rp, 11.3.400.402 NMAC, 11/30/2016]

11.3.400.403 POSTING OF NOTICES:

Each employer, including each person or entity which has elected, with the approval of the department, to become an employer, shall post and maintain printed notices to individuals in its employ informing them that they are covered under the provisions of the Unemployment Compensation Law of New Mexico. Such notices shall also include information as to the employees' rights to benefits and instructions as to the procedure for registering for work and filing claims for benefits. No such notice may be posted or maintained by any person or entity to whom an unemployment insurance account has not been assigned by the department or who has ceased to be an employer. Such notices shall be furnished by the department in such numbers as the department may determine to be necessary and shall be posted and maintained in conspicuous places near the location where the workers' services are performed. The department may furnish other notices, including those containing either information as to employees' rights to benefits or instructions as to the procedure for registering for work and for filing claims for benefits. These notices shall be posted or made available by each employer so that an employee entitled to benefits is informed of his rights to benefits and the means of attaining them.

[11.3.400.403 NMAC - Rp, 11.3.400.403 NMAC, 11/30/2016]

11.3.400.404 WAGE AND CONTRIBUTION REPORTS BY EMPLOYING UNITS:

A. QUARTERLY EMPLOYMENT & WAGE DETAIL REPORT:

(1) An employer’s wage and contribution report must be filed electronically on the department’s web page on or before the last day of the month immediately following the end of the calendar quarter. If the due date falls on a Saturday, Sunday or legal holiday, the report is due on the next department business day. A wage and contribution report must be filed even though no wages were paid or no contribution or tax is due for the quarter unless the employer's liability has been terminated or suspended pursuant to Section 51-1-18 NMSA 1978. Each wage and contribution report must include only wages, as the term is defined in Subsection T of Section 51-1-42 NMSA 1978, paid during the quarter being reported. Corrections of errors made on previously submitted reports must be electronically submitted as an adjustment through the employer’s on-line account.

(2) In the event of a federal or state declaration of emergency, the department may extend the deadline for submission of the quarterly wage report and corresponding contributions due for up to one month after the deadlines stated in this Subsection.

B. SIGNATURE REQUIREMENTS ON WAGE AND CONTRIBUTION REPORTS: Wage and contribution reports must have an appropriate electronic signature by the owner, partner, corporate officer or a designated representative of the employer. If the employer appoints a designated representative or third party agent who is not an employee, the employer must electronically specify what duties have been assigned to the designated representative or third party agent to perform on the employer's behalf.

C. WAGE DETAIL REPORTING REQUIREMENTS: All employers must file their quarterly wage and contribution report electronically, using one of the acceptable formats prescribed by the department. Reports that contain extraneous information, are incomplete or otherwise submitted or prepared improperly will be rejected and become subject to the following penalties:

(1) if the required report for any calendar quarter is not filed within 10 days after due date, a penalty of $50 is to be paid by the employer;

(2) if the contributions due on such report are not paid in full within 10 days after due date, an additional penalty of five percent but not less than $25 is to be paid by the employer on any such contributions remaining unpaid;

(3) if any payment required to be made by the Unemployment Compensation Law (51-1-9 NMSA 1978) is attempted to be made by check which is not paid upon presentment, a penalty of $25 shall be paid by the employer; and

(4) in no case shall any penalty as herein provided or as imposed by this section 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.

D. ESTIMATED WAGE AND CONTRIBUTION REPORTS: If an employer fails or refuses to make reports in a manner as prescribed in Subsection C of 11.3.401.404 NMAC showing what the employer claims for the amount of wages which it believes to be due, the department's representative shall estimate the amount according to the process described in Subsection E of 11.3.401.404 NMAC. After the estimated wages are calculated, the department shall provide a notice to the employer advising it that the department is estimating the amount of contribution due, provide the estimated amount of contribution due and advise the employer that unless an appeal is initiated within 15 days pursuant to Subsection B of 11.3.500.8 NMAC, the estimated amount shown in the notice shall be the amount of the contribution due for the period stated in the notice. The notice shall also inform the employer that the department may record a lien against the employer's assets. After service of the notice to the employer the department shall

cause the warrant of levy and lien to be recorded in same manner as any other warrant issued by the department. If thereafter, the department should receive from the employer reports for the estimated quarters containing different wage amounts, the estimation of the contribution due shall not be altered, and the employer shall remain liable for the amount assessed.

E. ESTIMATION PROCESS: The estimated contribution shall be one and one-half times higher than the highest wages reported in any quarter in the most recent eight quarters in which wage reports were filed. If no wage and contribution report has been filed since the employer was determined liable or if the employer has never submitted a report to determine liability to the department, no estimations shall be done.

F. ADMINISTRATIVE ERROR: At any time, the department may correct any error the department determines has been made even if notifications have been given, estimations made or contributions paid pursuant to the notifications. By way of example and not by limitation, such internal errors may be the result of an estimation that has been made after notice was sent to an incorrect address, sent to a deceased or incapacitated natural employer, estimations otherwise imposed without proper notice to the employer, estimations imposed due to misinformation in a wage claim which precipitated the establishment of an incorrect account, or other incidents of human or computer error or excusable neglect within the department. Estimations may be removed only pursuant to the written authorization of the department.

[11.3.400.404 NMAC - Rp, 11.3.400.404 NMAC, 11/30/2016; A, 10/29/2019; A/E, 4/24/2020]

11.3.400.405 QUARTERLY PAYMENT OF CONTRIBUTIONS:

The contributions imposed on any individual or employing unit subject to the Unemployment Compensation Law of New Mexico other than an employer who has elected to become liable for payments in lieu of contributions shall be due and payable for each calendar quarter with respect to wages for employment paid in such quarter without assessment, notice or demand.

[11.3.400.405 NMAC - Rp, 11.3.400.405 NMAC, 11/30/2016]

11.3.400.406 DUE DATE FOR PAYMENT OF CONTRIBUTIONS; NOTICE OF DELINQUENCY; INTEREST AND PENALTIES:

A. All contributions shall become due on and shall be paid on or before the last day of the month immediately following the close of the calendar quarter for which they are payable, and any employer failing to pay any contribution when due shall be delinquent. The department shall serve a notice of delinquency to the employer at the employer's address of record. The failure of the department to locate and serve a notice of delinquency, or the failure of the employer to receive any notice of delinquency, shall not affect the employer's liability for any contribution, interest or penalty. Interest and

penalties shall be assessed from and after the due date in accordance with the Unemployment Compensation Law of New Mexico.

B. Whenever the department finds that the collection of contributions from any particular employer may be jeopardized by delaying the collection thereof until the date otherwise prescribed, the department may advance the due date of such employer's contributions to such date, succeeding the period with respect to which they have accrued, as the department deems advisable, or may in the department's discretion, upon such finding prescribe payment of contributions from such employer monthly rather than quarterly. Monthly contributions shall become due on and shall be paid on or before the 15th day of the month next following the close of the month for which they are payable. Contributions not paid on or before the due date shall become delinquent and interest and penalties shall be assessed from and after the due date.

C. The department may, at its discretion, furnish an employer written permission to pay delinquent contributions in installments. Any arrangement for payment in installments must make provision for the payment of interest on the past due delinquent contribution balances from the due date through the ending date on which such installment is paid. In the event that such employer fails to pay an installment in full when it becomes due, the entire unpaid balance of contributions, interest and penalty will become due. No written permission for the payment of contributions shall preclude collection action pursuant to Section 51-1-36 NMSA 1978 against such employer.

[11.3.400.406 NMAC - Rp, 11.3.400.406 NMAC, 11/30/2016]

11.3.400.407 FIRST PAYMENT OF CONTRIBUTIONS FOR NEW EMPLOYERS AND EMPLOYERS ELECTING COVERAGE:

A. The first contribution payment of any employing unit which becomes an employer within any calendar quarter of any calendar year shall become due and payable on or before the last day of the month immediately following the quarter for which such contributions have accrued, and shall include contributions which have accrued during the whole of such calendar year.

B. Notwithstanding the provisions of Subsection A of 11.3.400.407 NMAC, the first contribution payment of any employing unit which elects to become an employer shall, upon the written or electronic approval of the department, become due and payable on or before the last day of the month immediately following the close of the calendar quarter in which the department's approval is given. Such first payment shall include contributions with respect to all wages for services covered by such election paid on or after the effective date and up to and including the last day of such calendar quarter. Interest and penalties shall be assessed from and after the due date.

[11.3.400.407 NMAC - Rp, 11.3.400.407 NMAC, 11/30/2016]

11.3.400.408 PAYMENT OF CONTRIBUTIONS FOR UNCOMPLETED CALENDAR QUARTERS:

Contributions shall be payable for any expired part of an uncompleted calendar quarter with respect to wages for employment in such period in any case where an employer, by reason of the removal from the state, discontinuance, sale, or other transfer of the employer's business has ceased to employ individuals in employment. Such contributions shall become due and payable not later than 30 days after the removal, discontinuance, sale or other transfer of the employer's business; provided that where an application for transfer of the employer's account is filed within said 30-day period, it must be accompanied by all quarterly reports and payments as required by 11.3.400.415 NMAC and 11.3.400.416 NMAC. Interest shall be assessed from and after said due date. Penalties shall be assessed in accordance with law.

[11.3.400.408 NMAC - Rp, 11.3.400.408 NMAC, 11/30/2016]

11.3.400.409 REPORT TO DETERMINE LIABILITY:

A. REGISTRATION: Each employing unit or employing enterprise engaged in doing business in the state of New Mexico, whether by succession to a business already being operated, by starting a new business, by change in partnership, or otherwise, shall register the business on line. Registration for the business may be filed when the employer has hired its first employee, and:

(1) The employer has paid an individual wages of $450 dollars or more in any calendar quarter in either the current or preceding calendar year or if there was one or more persons (part-time workers included) in employment in each of twenty different calendar weeks during either the current or the preceding calendar year irrespective of whether the same individual was in employment in each day.

(2) In agricultural labor, the employer has paid wages of $20,000 dollars or more to individuals during any calendar quarter in either the current or the preceding calendar year or employed 10 or more individuals in agricultural labor (part-time workers included) in each of 20 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.

(3) The employer has paid an individual in domestic service in a private home, local college club or local chapter of a college fraternity or sorority wages of $1,000 dollars in any calendar quarter in the current or preceding calendar year.

B. REPORT OF CHANGE IN STATUS:

(1) Every subject employer who shall sell, convey or otherwise dispose of its business, or all or any substantial part of the assets thereof, or who shall cease business for any reason, whether voluntarily or by being in bankruptcy shall, within five

days, immediately report such fact, electronically, to the department, stating the name and address of the person, firm or corporation to whom such business, or all or any substantial part of the assets thereof, shall have been sold, conveyed or otherwise transferred.

(2) In cases of bankruptcy, receivership or similar situations, such employer shall report the name and address of the trustee, receiver or other official placed in charge of the business.

(3) Upon the death of any employer, the report shall be made by the employer's personal representative upon the representative's appointment by the court. In the event no personal representative is appointed, the report shall be made by the heir or other person who succeeds to the interest of the employer.

(4) In the event of a dissolution of a partnership or joint venture, such report shall be made by the former partners or joint venturers.

(5) For purposes of Paragraph (1) of Subsection B of 11.3.400.409 NMAC, "substantial" part of a business, shall be any identifiable part which, if considered alone, would constitute an employing unit as defined in Subsection D of Section 51-1-42 NMSA 1978.

[11.3.400.409 NMAC - Rp, 11.3.400.409 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.410 EXTENSION OF DUE DATE FOR FILING QUARTERLY REPORTS OR PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:

Upon written application to the department establishing to the department's satisfaction that good cause exists therefore, an extension not to exceed 30 days may be granted with respect to the date when the employer's quarterly wage and contribution report or payment of contributions or payments in lieu of contributions shall become due and be paid. Such application must be filed prior to the regular due date.

[11.3.400.410 NMAC - Rp, 11.3.400.410 NMAC, 11/30/2016]

11.3.400.411 INTEREST ON UNPAID CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:

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 made.

[11.3.400.411 NMAC - Rp, 11.3.400.411 NMAC, 11/30/2016]

11.3.400.412 IMPOSITION OF PENALTIES FOR LATE REPORTS AND LATE PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:

Penalties shall be imposed and payable in accordance with Subsection C of 11.3.400.404 NMAC for failure to file any quarterly wage and contribution report or failure to pay contributions or payment in lieu of contributions when due.

[11.3.400.412 NMAC - Rp, 11.3.400.412 NMAC, 11/30/2016]

11.3.400.413 PROCEDURE FOR RELIEF FROM PENALTIES:

A. An employer aggrieved by the imposition of penalties for late reports or late payment of contributions or payments in lieu of contributions may, submit a written request to the department for relief from the imposition of penalties specifically identifying the relief requested and stating the reason for the request. Relief may be granted upon the showing of good cause.

B. The department shall review the employer's request and make a recommendation to the secretary to grant or deny relief from penalties to taxpayers.

[11.3.400.413 NMAC - Rp, 11.3.400.413 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.414 GROUNDS FOR RELIEF FROM PENALTIES:

For the purposes of a determination or decision as to relief from the assessment or payment of any penalty for late reporting or late payment of contribution may not 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.

[11.3.400.414 NMAC - Rp, 11.3.400.414 NMAC, 11/30/2016]

11.3.400.415 CONTRIBUTION RATING OF EMPLOYERS:

Contribution rates for employers are calculated in accordance with Section 51-1-11 NMSA 1978.

A. ELIGIBILITY OF EMPLOYER'S ACCOUNT FOR COMPUTED RATE BASED ON 24 MONTHS EXPERIENCE. For purposes of the interpretation and application of Subsection F of Section 51-1-11 NMSA 1978, no employer's experience rating account shall be deemed to have been chargeable with benefits throughout the preceding 24 consecutive calendar month period ending on a computation date as defined in Subsection J of 11.3.400.7 NMAC, unless as of such computation date, the department finds that the employer paid wages in employment during any part of the first calendar quarter of the 24 month period ending on such computation date and that the payment of such wages was not interrupted for eight or more consecutive calendar quarters, or by termination of coverage under Section 51-1-18 NMSA 1978; provided, all quarterly

wage and contribution reports received by the department by July 31 following the computation date will be considered in computing the rate for the succeeding calendar year.

B. CONTRIBUTING EMPLOYERS FOR 24 MONTHS. For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer throughout the preceding 24 months, the contribution rate for that employer shall be determined by multiplying the employer's benefit ratio by the reserve factor then multiplying that product by the employer's experience history factor. 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. The reserve factor is the annual numerical factor determined by the department that is necessary to ensure that the unemployment trust fund sustains an adequate reserve. The employer's experience history factor shall be based on the employer's reserve. The employer's reserve shall be calculated as the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, up to a maximum of three fiscal years, calculated to four decimal places, disregarding any remaining fraction, as set forth in the following table and provided that an employer's contribution rate shall not be less than thirty-three hundredths percent or more than five and four-tenths percent.

If an employer's reserve is:	The employer's experience history factor is:
6.0% and over	0.4000
5.0% - 5.9%	0.5000
4.0% - 4.9%	0.6000
3.0% - 3.9%	0.7000
2.0% - 2.9%	0.8000
1.0% - 1.9%	0.9000
0.0% - 0.9%	0.9500
Under 0.0%	1.0000

C. CONTRIBUTING EMPLOYERS FOR LESS THAN 24 MONTHS. For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer for less than 24 months, the contribution rate for that employer

shall be the average of the contribution rates for all contributing employers in the employer's industry based on its North American industry classification system (NAICS) sector, 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 a employing enterprise that has a rate of contribution less than the 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 pursuant to Subsection D of 11.3.400.417 NMAC.

D. EXCESS CLAIMS PREMIUM. If an employer's contribution rate pursuant to Subsection B of 11.3.400.415 NMAC is calculated to be greater than five and four-tenths percent, notwithstanding the limitation in Subsection B of 11.3.400.415 NMAC, 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 in Subsection B of 11.3.400.415 NMAC, less five and four-tenths percent by ten percent.

E. NOTIFICATION OF ANNUAL RATE CONTRIBUTIONS. The department shall promptly notify each employer of the employer's rate of contributions and excess claims premium as determined for any calendar year on or before January 31st of the year the rate is effective. 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 the past years, total benefits charged to the employer for all such years and the employer's experience history factor. For an employer that has been a contributing employer for less than 24 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 set forth in Subsection C of 11.3.400.415 NMAC. Such determination shall become conclusive and binding upon the employer unless, within 30 days after the service of notice thereof to the address of record, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be promptly notified of the decision on the employer's application for review and redetermination, which shall become final unless, within 15 days after the service of notice thereof to the employer's address of record, further appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC. The employer shall not have standing, in any appeal 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 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 the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.

F. NOTIFICATION OF QUARTERLY CHARGES. The department shall provide each contributing employer a written determination of benefits chargeable to the employer within 90 days of the end of each calendar quarter. Such determination shall become conclusive and binding upon the employer unless, within 30 days after the service of the determination to the employer's address of record, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be promptly notified of the decision on the employer's application for review and redetermination, which shall become final unless, within 15 days after the service of notice thereof to the employer's address of record, further appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC. The employer shall not have standing, in any appeal involving the employer's quarterly rate of contributions or contribution liability, to contest the chargeability to the employer of any benefits paid in accordance with a 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 the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.

G. CORRECTION OF ERRORS. 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 E of 11.3.400.415 NMAC.

[11.3.400.415 NMAC - Rp, 11.3.400.415 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.416 BUSINESS TRANSFERS DEFINED; EFFECTIVE DATE:

It is deemed that two or more employing units are parties to or the subject of a business transfer transaction whenever one such unit acquires an employing enterprise from another such unit, either by merger, consolidation or other form of reorganization; by a contractual or other form of voluntary sale or transfer; or by a transfer by order of court. There is a transfer and an acquisition in this sense, not only where there is an outright sale between separate individuals or concerns, but also where individuals form partnerships or corporations; partnerships form into corporations; new partnerships are formed by the addition or withdrawal of members; a corporation officer or partner acquires the enterprise from the corporation or the partnership; or in any manner that a change is made in the identity or organization of the employing unit. The effective date of such an acquisition and transfer is the date the department determines that the change in ownership or possession and operation is actually consummated as evidenced by a bill of sale, deed to real estate and buildings, a transfer by any other form of written transfer agreement or legally valid instrument, transfer by court order, or by physical or constructive possession.

[11.3.400.416 NMAC - Rp, 11.3.400.416 NMAC, 11/30/2016]

11.3.400.417 PURCHASE OR SALE, EXPERIENCE HISTORY TRANSFERS:

A. TOTAL EXPERIENCE HISTORY TRANSFERS:

(1) ACQUISITION OF ALL EMPLOYING ENTERPRISES: A total experience history transfer is available to a successor enterprise only in the situation where the successor has acquired all of the predecessor's business enterprise and, where the predecessor, immediately after the business transfer as defined in 11.3.400.416 NMAC, ceases operating the same enterprise except for liquidation purposes.

(a) In the sale of a business enterprise, the phrase "all assets" includes the transfer of a favorable experience history.

(b) In the sale of a business enterprise, the phrase assumption of "all liabilities" includes an unfavorable experience history and any unpaid contributions, interest and penalties.

(2) NOTIFICATION BY SUCCESSOR: A successor who has acquired all of the predecessor's employing enterprises shall notify the department of such acquisition by completing an electronic notification for a total experience history transfer through the employer's on-line account 60 days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise or enterprises. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a total history transfer shall be given as prescribed by the electronic notification through the employer's on-line account or as requested by the department. Upon completion of the notification, the department shall furnish a statement of account to the predecessor and the successor, if the predecessor is delinquent in either submitting wage and contribution reports or the payment of contributions.

(a) All contributions, interest and penalties due from the predecessor employer must be paid. If any amount remains due to the department at the time of the transfer, the successor employer assumes the liability for the outstanding balance as part of the history transfer.

(b) If the successor employer fails to complete an electronic notification to the department before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition, when the department receives actual notice of the transfer, the department 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 $50 dollars.

(c) An electronic notification for a history transfer must be completed on line during the calendar year of the transaction transferring the employing enterprises. Upon

a showing of good cause, the department may extend the due date for the completion of the endorsed notification and quarterly wage and contribution reports for an additional 30 days provided that the request for an extension of time is filed in writing on or before the regular due date.

(3) LIQUIDATION WAGES: Any wages reported by the predecessor and contributions paid by the predecessor for the cessation of the predecessor's business after the acquisition date of the business by the successor shall be credited to the successor's account for experience rating purposes.

(4) WRITTEN DETERMINATION TO SUCCESSOR AND PREDECESSOR: The department shall issue a written determination to the successor and predecessor approving or disapproving the total history transfer. All such determinations shall be subject to the provisions of 11.3.500.8 NMAC governing appeals of contribution or tax determinations. Failure to timely appeal a denial of the transfer of a favorable experience transfer without good cause as defined in11.3.400.7 NMAC will deprive the successor business of the opportunity for the transfer of the favorable experience history transfer.

(5) PREDECESSOR RESUMES OR CONTINUES IN BUSINESS: If the predecessor owner operates a new or different business enterprise upon or after the business transfer, the predecessor shall retain its account number and a rate in accordance with the provisions of Section 51-1-11 NMSA 1978.

B. PARTIAL EXPERIENCE HISTORY TRANSFERS:

(1) NOTIFICATION BY SUCCESSOR AND SUBMISSION OF JOINT NOTIFICATION FORM: 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 designee.

(2) The successor shall notify the department of such acquisition by completing an electronic notification for a partial experience history transfer through the employer's on-line account 60 days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise. The notification shall be endorsed by the predecessor. The notification shall provide a schedule of the name and social security number of and the wages paid to and the contributions paid for all employees 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 notification shall be supported by the predecessor's permanent employment records, which shall be available for audit by the department. The notification shall be reviewed by the department 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. Upon a showing of good cause as defined in 11.3.400.7 NMAC, the department may extend the due date for the filing of the endorsed notification and quarterly wage and contribution reports for an additional 30 days provided that the request for an extension of time is filed in writing on or before the regular due date. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a partial history transfer shall be given as prescribed by the notification or as requested by the department.

(3) WRITTEN DETERMINATION TO SUCCESSOR: The department shall issue a written determination to the successor approving or disapproving the partial history transfer. All determinations disapproving the partial history transfer shall be subject to the provisions of 11.3.500.8 NMAC governing appeals of contribution or tax determinations. Failure to timely appeal a denial of the partial history transfer without good cause as defined in 11.3.400.7 NMAC will deprive the successor business of the opportunity for the transfer of the partial history experience.

C. COMMON OWNERSHIP EXPERIENCE HISTORY TRANSFER:

(1) If 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, and both the predecessor and the successor are under common ownership, a party to a merger, consolidation or other form of reorganization 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 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.

D. DETERMINATION OF CONTRIBUTION RATES AFTER TOTAL OR PARTIAL EXPERIENCE HISTORY TRANSFER:

(1) If, on the effective date of the transfer, the successor employer has a contribution rating for the calendar year there will be no change in rate determined for the successor's account as a result of the transfer.

(2) If, on the effective date of the transfer, the successor employer does not have a contribution rating for the calendar year, the rate shall be computed from the successor's prior history combined with the acquired total or partial history of the predecessor.

(3) If, on the effective date of the transfer, the successor employer has not been a contributing employer throughout the preceding 24 months, the contribution rate for the successor employer shall be:

(a) the rate of the predecessor or combined predecessors in the case of a total experience transfer; and

(b) a rate based on experience of the separate schedule of employment and related benefits charged will apply in the case of a partial experience transfer.

(4) If, on the effective date of the transfer, the successor employer has not been a contributing employer throughout the preceding 24 months, and the successor employer acquires all or part of a employing enterprise that has a rate of contribution less than the 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 predecessor employing enterprise.

(5) A new rate based on experience of the remaining schedule of employment and related benefits charged will apply to the predecessor account from the effective date of the transfer in the case of a partial experience transfer.

E. CHARGING OF BENEFITS AFTER TRANSFER: Benefits paid subsequent to the effective date of a partial, total or common ownership experience history transfer shall be charged to the successor's account if the base period wages were transferred to the successor.

[11.3.400.417 NMAC - Rp, 11.3.400.417 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.418 TIME FOR CORRECTION OF ERRONEOUS RATE DETERMINATIONS:

A. Where an employer's rate of contribution for any calendar year has been incorrectly determined, the error or omission shall be corrected and the rate adjusted accordingly by the department on its own initiative with notification to the employer at its address of record, within the following periods:

(1) on or before June 30 of the calendar year in which the erroneous rate determination was issued if the error was in the determination of benefits chargeable to the employer's experience rating account;

(2) at any time within the calendar year in which the erroneous rate determination was issued if the error or omission was due to the employer's misrepresentation or nondisclosure of a material fact;

(3) at any time during the calendar year in which the erroneous rate determination was issued and any time within the next calendar year if the error or omission was due wholly or in part to a rate computation.

B. Upon issuance of a corrected rate of contribution, the employer shall have the right to a review and redetermination as provided in Subsection L of Section 51-1-11 NMSA 1978.

[11.3.400.418 NMAC - Rp, 11.3.400.418 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.419 CHARGING OF BENEFITS:

Whenever a claimant files a new claim for benefits and is found by the department to have sufficient base period wages to entitle the claimant to benefits if otherwise eligible, the department shall issue a "notice to employer of claim determination" on a form prescribed by the department, to each base period employer unless that employer was also the claimant's last employer and has been sent notice pursuant to 11.3.300.308 NMAC. The notice to each employer will give the name and social security account number of the claimant, the claim date and the amount of wages paid by that employer in each quarter of the base period.

A. NOTICE TO LAST EMPLOYER OF CLAIM DETERMINATION -- RESPONSE REQUIRED: Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to the claimant’s last known employer, at the employer’s address of record, if the employer is registered, and to the address provided by the claimant if the employer is not registered with the department, a dated notice of the filing of the claim and a fact-finding questionnaire.

(1) The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to the department electronically through the employer’s on-line account within 10 calendar days from the date of the transmittal of the notice of claim.

(2) If the employer fails to respond by the deadline, or if the submitted response is untimely or inadequate, and the determination is later reversed at the appeal level, the employer may be liable for any benefit charges incurred to the date of disqualification if the employer or the employer’s agent has demonstrated an established pattern of failing to respond timely or adequately.

(a) A pattern is defined as failure to respond timely or adequately to five claims, or more at the secretary’s discretion, within a calendar year.

(b) An inadequate response is defined as the employer's failure to provide relevant information or documentation that was reasonably available at the time a response was requested by the department.

B. NOTICE TO BASE PERIOD EMPLOYERS OF POTENTIAL LIABILITY–RESPONSE REQUIRED: Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to all employers who employed the claimant during the established base period at the addresses of record, a dated notice of the filing of the claim that the employer may have liability for and a fact finding questionnaire.

(1) The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response through the employer's online account within 10 days from the date of the transmittal of the notice of claim.

(2) If the employer fails to respond by the deadline, the department shall issue a determination based on the information on hand.

(3) If the employer appeals the determination issued by the department, the employer must first establish good cause for failing to timely respond to the department's inquiry before the appeal may be heard on the merits of the employer's liability.

C. PRIOR DETERMINATION OF ELIGIBILITY FINAL: If a prior, final determination has been made by the department that the claimant did not voluntarily leave claimant's employment with the employer for a cause not attributable to the employer, or that the claimant was not discharged for misconduct connected with claimant's work, or that the employer is no longer an interested party to proceedings on the claim because of failure to respond within the time allowed on the "notice to employer of claim for benefits" issued at the time of the claimant's separation, that determination will remain final and binding for purposes of making a determination in response to the "notice to employer of claim determination" on the chargeability of the employer's account for benefits payable to the claimant.

D. MULTIPLE PERIODS OF EMPLOYMENT WITH SAME EMPLOYER: If the individual had more than one period of employment and termination of employment with the same base period employer during and after the current and past five quarters, the employer must include in the report:

(1) the date on which each period of employment terminated;

(2) full particulars as to the circumstances of the termination including the reason given by the individual for leaving the employment or the nature of the individual's actions for which he was discharged, or the reason the claimant was laid off, as the case may be.

E. CONCURRENT EMPLOYMENT WITH TWO OR MORE EMPLOYERS: Where an individual works concurrently for two or more employers and becomes unemployed from one or more, but one or more of the concurrent employers continues to furnish that individual substantially the same amount of work, benefits shall not be charged to that employer or those employers who continue to furnish the claimant substantially the same amount of employment during such period of unemployment as long as the individual is receiving benefits based on base period earnings, in whole or in part, from the former concurrent employers. Those employers who continue to furnish the claimant work must respond to the "notice to employer of claim determination" within 10 days from the date shown on the notice setting forth the number of hours per week the claimant worked during the current and two preceding quarters.

F. CHARGING UNDER COMBINED WAGES: Benefits paid to a claimant based on wage credits from one or more states combined with New Mexico shall not be charged to an employer's account when no benefits have been paid upon the sole basis of wage credits in New Mexico.

G. NOTICE OF DEPARTMENT'S DETERMINATION: Upon receipt of the employer's response to the "notice to employer of claim determination" within 10 days, the department shall make a determination with respect to relief from the charging of benefits, and shall promptly notify the employer if it is determined that the employer's account will be charged for benefits paid. The determination shall become final unless the employer files an application for appeal, in accordance with 11.3.500.8 NMAC, setting forth the reasons therefore, within 15 days from the date shown on the determination.

H. LIMITATION ON APPEALS: Notwithstanding the provisions of Subsection F of 11.3.400.419 NMAC, the employer shall not have standing, in any appeal to contest the chargeability to the employer of any benefits paid in accordance with a 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 the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.

[11.3.400.419 NMAC - Rp, 11.3.400.419 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.420 EMPLOYER ELECTIONS TO COVER MULTI-STATE WORKERS:

A. This rule shall govern the department in its administrative cooperation with other states subscribing to the interstate reciprocal coverage arrangement, hereinafter referred to as "the arrangement".

B. Submission and approval of coverage elections under the arrangement.

(1) Any employing unit may file an election, on a form provided by the division, to cover under the law of a single participating jurisdiction all of the services performed for the employer by any individual who customarily works for the employer in more than one participating jurisdiction.

(2) Such an election may be filed, with respect to an individual, with any participating jurisdiction in which:

(a) any part of the individual's services is performed;

(b) the individual resides; or

(c) the employing unit maintains a place of business to which the individual's services bear a reasonable relation.

(3) The agency of the elected jurisdiction shall initially approve or disapprove the election.

(4) If such agency approves the election, it shall forward a copy thereof to the agency of each other participating jurisdiction specified thereon, under whose unemployment compensation law the individual or individuals in question might, in the absence of such election, be covered. Each such interested agency shall approve or disapprove the election, as promptly as practicable; and shall notify the agency of the elected jurisdiction accordingly.

(5) In case its law so requires, any such interested agency may, before taking such action, require from the electing employing unit satisfactory evidence that the affected employees have been notified of, and have acquiesced in, the election.

(6) If the agency of the elected jurisdiction, or the agency of any interested jurisdiction, disapproves the election, the disapproving agency shall notify the elected jurisdiction and the electing employing unit of its action and of its reason therefore.

(7) Such an election shall take effect as to the elected jurisdiction only if approved by its agency and by one or more interested agencies.

(8) An election thus approved shall take effect, as to any interested agency, only if it is approved by such agency.

(9) In case any such election is approved only in part, or is disapproved by some of such agencies, the electing employing unit may withdraw its election within 10 days after being notified of such action.

C. Effective period of elections.

(1) Commencement.

(a) An election duly approved under this rule shall become effective at the beginning of the calendar quarter in which the election was submitted, unless the election, as approved, specified the beginning of a different calendar quarter.

(b) If the electing unit requests an earlier effective date than the beginning of the calendar quarter in which the election is submitted, such earlier date may be approved solely as to those interested jurisdictions in which the employer had no liability to pay contributions for the earlier period in question.

(2) Termination.

(a) The application of an election to any individual under this rule shall terminate, if the agency of the elected jurisdiction finds that the nature of the services customarily performed by the individual for the electing unit has changed, so that they are no longer customarily performed in more than one participating jurisdiction. Such termination shall be effective as of the close of the calendar quarter in which notice of such finding is sent to all parties affected.

(b) Except as provided in Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, each approved election shall remain in effect through the close of the calendar year in which it is submitted, and thereafter until the close of the calendar quarter in which the electing unit gives written notice of its termination to all affected agencies.

(c) Whenever an election hereunder ceases to apply to any individual, under Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, the electing unit shall notify the affected individual accordingly.

D. Reports and notices by the electing unit.

(1) The electing unit shall promptly notify each individual affected by its approved election, on a form approved by the elected jurisdiction, and shall furnish the elected agency a copy of such notice.

(2) Whenever an individual covered by an election hereunder is separated from the individual’s employment, the electing unit shall again notify the individual, forthwith, as to the jurisdiction under whose unemployment compensation law the individual’s services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, the electing unit shall notify the individual as to the procedure for filing interstate benefit claims.

(3) The electing unit shall immediately report to the elected jurisdiction any change which occurs in the conditions of employment pertinent to its election, such as cases where an individual's services for the employer cease to be customarily performed in more than one participating jurisdiction or where a change in the work

assigned to an individual requires the individual to perform services in a new participating jurisdiction.

E. Approval of reciprocal coverage elections. The authority to approve or disapprove reciprocal coverage elections in accordance with this rule shall be exercised by the secretary or the secretary's designee.

[11.3.400.420 NMAC - Rp, 11.3.400.420 NMAC, 11/30/2016]

11.3.400.421 EMPLOYERS ELECTING COST BASIS FINANCING AND GROUP ACCOUNTS:

A. CHARGING OF BENEFITS: Any benefits or any portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer who has elected to become liable for payments in lieu of contributions, shall be reimbursed by the employer in accordance with Subsection B of Section 51-1-13 NMSA 1978, and any benefits or portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer while the employer was subject to contributions pursuant to Subsection A of Section 51-1-18 NMSA 1978, shall be charged to the experience rating account of the employer as provided in Section 51-1-11 NMSA 1978.

B. DUE DATES OF WAGE AND CONTRIBUTION REPORTS AND PAYMENTS IN LIEU OF CONTRIBUTIONS: Each employer who has elected to become liable for payments in lieu of contributions shall submit a wage and contribution report electronically to the department each calendar quarter with respect to wages paid in such quarter. Said wage and contribution report shall be submitted on or before the end of the month following the close of the calendar quarter to which the wage and contribution report applies. The wages so reported shall not be used for computation of rates as provided for employers subject to contributions.

C. SUBMISSION OF WAGE AND CONTRIBUTION REPORTS FOR GROUP ACCOUNTS: The quarterly wage and contribution report required of each group member of a group account shall be transmitted electronically by the group representative. The payments in lieu of contributions required of each group member shall be transmitted by the group representative, together with all amounts owing by all the group members, within 30 days after transmission by the department of a statement showing the payments in lieu of contributions owing. Each report and any payments required of each employer or group member not transmitted within the time specified will be delinquent and penalties and interest as provided by the Unemployment Compensation Law shall be assessed from and after the delinquent date.

D. EXTENSION OF TIME TO SUBMIT REPORTS: Upon written application, transmitted prior to the due date, by an employer, group member, or group account representative establishing to the satisfaction of the department that good cause exists, excluding any dilatory act, negligence or lack of funds on the part of the employer, an

extension, not to exceed 30 days, may be granted by the department with respect to the due date of the wage and contribution report or payment.

E. TERMINATION OF RIGHT TO MAKE PAYMENTS IN LIEU OF CONTRIBUTIONS: If, after due notice, any employer who has elected to become liable for payments in lieu of contributions remains delinquent for payments or interest or penalty, the department shall transmit a determination to said employer of pending termination of the organization's election to make payments in lieu of contributions for the next calendar year. If payment is not forthcoming within 30 days from the date of said notice, the department shall transmit a final determination to such employer that election has been terminated for the next calendar year.

F. REQUIREMENTS FOR SURETY BOND: At the discretion of the department, termination of an organization's election to make payments in lieu of contributions shall continue effective for any succeeding calendar year unless the employer provides a surety bond or other surety acceptable to the department and underwritten by a corporate surety authorized to transact business in New Mexico; or an agreement of cash collateral assignment, executed with a state or national bank or federally insured savings association authorized to do business in New Mexico, as trustee, in a form prescribed by the department. Interest, if any, accumulating on the cash collateral assignment shall accrue to the employer. Said surety or cash bond shall be in the amount of not more than two and seven tenths percent of the taxable wages paid for employment subject to the Unemployment Compensation Law by the employer in the four quarter period immediately preceding the date of notice of termination was issued and shall be released by the department only when no further delinquency for payment in lieu of contributions of the employer exists.

G. ESTABLISHING ACCOUNTS, PROVIDING FOR ADDITIONS AND WITHDRAWALS OF GROUP MEMBERS: The department, upon receipt of properly completed form prescribed by the department bearing the endorsement of each group member, accompanied by any forms enumerated therein or otherwise requested in writing, shall establish a group account and notify the group representative of the effective date as provided in Subsection E of Section 51-1-13 NMSA 1978. The group account shall remain in effect for a period of not less than two calendar years, ending on December 31, and thereafter, until terminated at the discretion of the department, or by approval by the department, of an application from the group received on or before December 1, immediately preceding the calendar year in which termination is desired. Upon establishment and after termination of the group account, each group member, group account and group account representative shall be fully liable for:

(1) any payment in lieu of contributions, penalties or interest required under Subsection E of Section 51-1-13 NMSA 1978, for the period during which any benefits or portion thereof are payable on the basis of wage credits earned during the period the claimant's base period employer was a group member; and

(2) the performance of the group representative.

H. ADDITIONS OF GROUP MEMBERS: Any nonprofit organization liable for payments in lieu of contributions which becomes subject to the Unemployment Compensation Law on or after January 1, 1972, may, with the approval of the department, be added to an existing group account if the department receives an application not later than 30 days prior to the beginning of the calendar year for which the application is to be effective.

I. ACQUISITION OF GROUP MEMBERS: Any nonprofit organization liable for payments in lieu of contributions which acquired the organization, trade or business, or substantially all the assets thereof, of a group member who because of the transaction no longer employs workers in employment will be a group member of the group account to which the predecessor belonged provided the department receives an application as called for in Subsection H of 11.3.400.421 NMAC not later than 30 days after the date of the transaction.

J. WITHDRAWAL OF GROUP MEMBERS: A member may withdraw or be removed from a group account only at the end of a calendar year provided written application for withdrawal or removal is received by the department not later than 30 days prior to the first day of the following calendar year. Such withdrawal or removal of a member from a group account shall not be effective until approved by the department. No group member may withdraw or be removed from a group account unless it has been a member of such group account for at least two calendar years as of the effective date of the withdrawal or removal; except that a member may withdraw or be removed from a group at any time if the group member:

(1) has permanently ceased to employ workers in employment; or

(2) has ceased to be an employer exempt under Section 3306 (c) (8) of the federal Unemployment Tax Act; or

(3) has, in accordance with Paragraph (2) of Subsection A of Section 51-1-13 NMSA 1978, terminated its election to be liable for payments in lieu of contributions; or

(4) has for a period of two successive quarters been delinquent in its payment of assessments under the group plan for benefits chargeable to its account.

[11.3.400.421 NMAC - Rp, 11.3.400.421 NMAC, 11/30/2016]

11.3.400.422 INDIAN TRIBES:

A. ELECTION OF TREATMENT:

(1) An Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe ("electing entity") shall make its election to be a contributing employer or reimbursable employer on or before December 1, for previously registered Indian tribes, and 30 days after subjectivity is determined for newly

subject Indian tribes, except for the year 2001, Indian tribes may make the election any time between July 1, 2001, and December 1, 2001. If the electing entity fails to make an affirmative election in writing in the manner provided in 11.3.400.422 NMAC, the electing entity shall be deemed to have elected status as a contributing employer.

(2) If the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe is currently registered with the department and desires to change its manner of treatment, the electing entity may change its election on or before the due date of the wage and contribution report for the fourth quarter of 2001, which report is due January 31, 2002. Such change in election shall be in writing in the manner provided in 11.3.400.422 NMAC.

B. MASTER CONTRIBUTORY ACCOUNTS:

(1) Effective July 1, 2001, master contributory accounts for the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe previously established with the department are discontinued. If the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe elects to be a reimbursable employer, it may apply for group account treatment as provided in 11.3.400.421 NMAC.

(2) Upon the termination of a master account, all members of the master account will be assigned the then existing tax rate for the master account. Each member of the former master account will enjoy the former master account's tax rate for the remainder of the calendar year 2001. Thereafter, each former member of the former master account will be assigned an individual tax rate based on its individual experience history commencing July 1, 2001.

C. ASSIGNMENT OF ACCOUNT NUMBERS:

(1) Upon registration with the department, an Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe not previously registered will be assigned an employer account number.

(2) An Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe previously registered as part of a master account may be assigned a new account number.

[11.3.400.422 NMAC - Rp, 11.3.400.422 NMAC, 11/30/2016]

11.3.400.423 PARTNERSHIPS:

A separate employer account number and experience rating shall be assigned to each partnership of a group of two or more partnerships composed of identical partners with identical interests, if all of the following conditions are met:

A. each separate partnership joins in a request that individual reporting is appropriate;

B. a separate written partnership agreement exists for each partnership;

C. the accounting records for each partnership are separately maintained; and

D. there is no commingling of the employment of the two or more partnerships.

[11.3.400.423 NMAC - Rp, 11.3.400.423 NMAC, 11/30/2016]

11.3.400.424 CHARGING OF BENEFITS PAID DUE TO FEDERAL DISASTER:

Each contributing employer's account shall not be subject to potential pro rata benefit charges during the period wherein a claimant's eligibility for unemployment benefits is directly attributable to unavailability of work due to a federally certified disaster which results in the suspension or termination of operations by such employer. Any nonprofit organization or governmental unit electing to make payments in lieu of contributions shall not be relieved of charges for benefits paid to an individual whose eligibility for unemployment benefits is directly attributable to unavailability of work due to a federally certified disaster.

[11.3.400.424 NMAC - Rp, 11.3.400.424 NMAC, 11/30/2016]

11.3.400.425 NOTICE OF TAX DETERMINATIONS FINAL AND APPEALS:

A. Finality of decision: The department shall give written notice to any employer, employing unit or claimant of every determination made by the department which could alter or affect the employer’s or employing unit’s tax liability or the claimant’s monetary eligibility under the law. Such determination shall be deemed to be the final decision of the department, unless an appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC.

B. Stay pending appeal: Legal action, including the issuance of 10 day notices and warrants of lien and levy, shall not be taken on accounts that have an appeal pending within the department.

[11.3.400.425 NMAC - Rp, 11.3.400.425 NMAC, 11/30/2016]

11.3.400.426 APPLICATION OF UNDERPAYMENTS:

In the event an employing unit fails to submit payment in an amount sufficient to satisfy the total amount of outstanding debt for any current or past-due contributions, interest or penalty, the amount of the underpayment shall be applied in the following order: first, to any contributions and excess claims premiums due, second, to any interest due and third, to any penalties due, from the oldest debt to the newest.

[11.3.400.426 NMAC - Rp, 11.3.400.426 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.427 ADEQUATE RESERVE DETERMINATION:

The department shall ensure that the fund sustains an adequate reserve.

A. 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 18 and 24 months of benefits at the average of the five highest years of benefits paid in the last 25 years.

B. For the purpose of sustaining an adequate reserve, the department shall determine a reserve factor to be used when calculating an employer's contribution rate based upon 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.

C. The New Mexico adequate reserve multiple (NMARM) is a measure of fund adequacy used in determining the reserve factor. The NMARM is equal to the reserve ratio divided by the average benefit cost rate. The reserve ratio is the trust fund balance, as of June 30, divided by calendar year total wages. The average benefit cost rate is the average of the state's five highest benefit cost rates, during the preceding 25 years. The benefit cost rate is calendar year benefit payments divided by the sum of total wages for the same period.

D. The formula for setting the reserve factor shall be determined as follows:

(1) If NMARM ≤ 0.5 then reserve factor = 4.

(2) If 0.5 < NMARM < 1.5 then reserve factor = 11/2 - 3×NMAR.

(3) If 1.5 ≤ NMARM ≤ 2 then reserve factor = 1.

(4) If 2 < NMARM < 3.150 then reserve factor = 43/23 - 10/23×NMARM.

(5) If NMARM ≥ 3.150 then reserve factor = 0.5.

[11.3.400.427 NMAC - Rp, 11.3.400.427 NMAC, 11/30/2016]

11.3.400.428 EMPLOYER RESPONSES:

The employer is required to respond timely and accurately to all inquiries from the department. If the department does not receive timely or adequate responses, the department will, at its discretion, take action based on the information at hand based which may result in assessed penalties or employer liabilities. Absent a showing of good cause, the department will not reverse determinations as a result of the employer's failure to appropriately respond.

[11.3.400.428 NMAC – N, 10/29/2019]

PART 401-499: [RESERVED]

PART 500: ADJUDICATORY HEARINGS, FILING OF APPEALS AND NOTICE

11.3.500.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, P.O. Box 1928, Albuquerque, NM 87103.

[11.3.500.1 NMAC - Rp, 11 NMAC 3.500.1, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.500.2 SCOPE:

General public.

[11.3.500.2 NMAC - Rp, 11 NMAC 3.500.2, 01-01-2003]

11.3.500.3 STATUTORY AUTHORITY:

NMSA 1978 Sections 51-1-1 to 51-1-59.

[11.3.500.3 NMAC - Rp NMAC 3.500.3, 01-01-2003]

11.3.500.4 DURATION:

Permanent.

[11.3.500.4 NMAC - Rp, 11 NMAC 3.500.4, 01-01-2003]

11.3.500.5 EFFECTIVE DATE:

January 1, 2003, unless a later date is cited at the end of a section.

[11.3.500.5 NMAC - Rp, 11 NMAC 3.500.5, 01-01-2003]

11.3.500.6 OBJECTIVE:

To provide procedures governing unemployment appeals and hearings.

[11.3.500.6 NMAC - Rp, 11 NMAC 3.500.6, 01-01-2003]

11.3.500.7 DEFINITIONS:

A. "Adjudicatory body" means the appeal tribunal, the board of review or other commissions or body within the department holding an adjudicatory hearing.

B. "Adjudicatory hearing" means a judicial or quasi-judicial hearing upon either the law or the evidence or both which allows the parties to present evidence, objections to evidence, documents and witnesses as well as cross-examine opposing parties' witnesses and evidence.

C. "Administrative law judge or ALJ" mans the individual who conducts appeal tribunal hearings and makes decisions on issues arising from determinations issued by the department. This term is synonymous with the term "hearing officer" as set forth in Section 51-1-8 NMSA 1978.

D. "Authorized representative" means an individual who, by virtue of his position within the department, is designated by the secretary to perform certain specific tasks on behalf of the department.

E. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the party's failure to keep the department directly and promptly informed by written, signed statement of the claimant's, employer's or employing unit's correct mailing address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

F. "Practice manual" means a resource maintained by the department consisting of department procedures and guidelines based on federal and state statutes and

regulations, Department of Labor directives and guidance, and decisions of the Board of Review or district court judges.

[11.3.500.7 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.8 PRESENTATION OF APPEALS OF INITIAL DETERMINATIONS:

A. Any interested party aggrieved by a determination of the department may file an appeal to the appeal tribunal within 15 days from the date of transmission of the determination. Any written communication clearly demonstrating a desire to appeal a determination of the department will be regarded as an appeal. Appeals shall be transmitted to the department by U.S. mail, by fax or by electronic filing using the online system. All appeals should be transmitted to the department in a format indicating the interested party's desire to appeal. For any issues of timeliness with regard to faxed appeals, the time and date affixed on the department's receiving device will be presumptively the date and time of submission. For any issues of timeliness with regard to appeals submitted via U.S. mail, the postmark date on the appeal envelope will presumptively be the date and time of submission. For any issues of timeliness with regard to appeals filed electronically through the department's claims processing website, the date and time that the department's online system "electronically stamps" the appeal will be presumptively the date and time of submission.

B. All interested parties will be given notice of any hearing or review before the appeal tribunal as provided for in 11.3.500.9 and 11.3.500.12 NMAC.

C. Unless otherwise provided by statute or a specific rule of the department, the time for the appeal of any determination from one level to another within the department is 15 calendar days from the date of the transmission of the decision or determination, with the first day commencing on the calendar date after the date of transmission.

D. The time for filing any appeal within the department may be extended only upon a showing of good cause.

[11.3.500.8 NMAC - N, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.500.9 ADJUDICATORY PROCEEDINGS GENERALLY:

A. Right to representation: In any adjudicatory hearing before the department:

(1) Any party may self-represent or be represented by an attorney at law or by any other person qualified to represent the party in the matters under consideration. The secretary may bar attorneys and authorized representatives from appearing on behalf of others in proceedings before the department if the attorney or authorized representative's previous' conduct has established to the department's satisfaction that the attorney or authorized representative is unlikely to provide competent representation in future proceedings.

(2) A partnership may be represented by any of its employees, members or duly authorized representative. A corporation or association may be represented by an officer, employee or any duly authorized representative. Any governmental entity may be represented by an officer, employee, or any other authorized person.

(3) The presiding officer or the secretary may, for lack of qualifications or other sufficient cause, bar any person from representing any party, in such circumstances, the reasons for such bar shall be set out in the record of proceedings.

B. The unauthorized practice of law: Any party may be represented by an attorney at law licensed to practice in the courts of this state. A representative or agent other than licensed attorneys may represent any party only to the extent that such participation does not constitute unauthorized practice of law under the statute and rules of the courts of the state of New Mexico.

C. Copies: Consistent with the provisions of Section 51-1-32 NMSA 1978 and 11.3.100.106 NMAC, while any proceeding before the department is ongoing a party to such proceeding may request and receive from the department, without charge, one set of copies of the department files and records, including but not limited to investigation reports, statements, memoranda, correspondence, tape recordings or transcripts of hearings or other data pertaining to matters under consideration, scheduled for hearing, or other proceeding before the department. Thereafter, copies shall be charged at the department's usual rate for copying.

D. Notice of hearing: Upon the scheduling of an adjudicatory hearing before the appeal tribunal on any appeal, a notice of the hearing shall be transmitted to all interested parties at least 10 calendar days prior to the date of the adjudicatory hearing and shall include:

(1) a statement notifying the parties of their responsibilities and the requirements to participate in the hearing;

(2) a statement of the time, place and nature of the hearing;

(3) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(4) a short and plain statement of the foreseeable issues to afford each party reasonable opportunity to prepare; if any issue cannot be stated in advance of the hearing, it shall be stated as soon as practicable; in all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after statement or amendment to afford all parties reasonable opportunity to prepare or the parties may waive notice of such issue on the record.

(5) Any party to an appeal before the appeal tribunal may elect, using the self-service feature of the claims processing website, to have all notices of hearing for that

appeal delivered electronically rather than by paper notice through the mail. Such electronic notification shall be deemed legally sufficient notice for all purposes and the party electing that electronic notification will be deemed to have acknowledged their responsibility to exercise due diligence in checking the website for notifications. For parties electing electronic notification, such notification shall continue until the party has taken all necessary steps change their notification preference using the self-service feature of the website. Until the party's notification preference has been changed, that party's obligation to exercise due diligence in checking the website for notifications will remain in effect.

(6) If an adjudicatory hearing has been scheduled and a notice of hearing has already been issued to an interested party before that interested party's attorney or authorized representative has filed its entry of appearance in the matter, notice shall be deemed to be sufficient.

E. Subpoenas: Authorized representatives of the department may issue subpoenas requiring upon reasonable notice, the attendance and testimony of witnesses or the production of evidence, including books, records, correspondence, documents, papers or other objects necessary and relevant to any proceedings before the department. An authorized representative in any proceeding may authorize the taking of depositions of witnesses in the same manner and to the same extent as permitted in the district court.

(1) "Subpoena" means an official directive or order by an administrative law judge or quasi-judicial official directing the recipient to appear and testify as a witness. The subpoena may require witnesses to bring documents with them when they come to testify. Failure of a party to respond to a subpoena could result in the department filing a motion for compliance in the district court of the jurisdiction where the party is located.

(2) The department's authority to issue subpoenas is found at Subsection L of Section 51-1-8 NMSA 1978 and Section 51-1-28 NMSA 1978. Department subpoenas can be served personally at least 5 days prior to the hearing date or by certified mail posted at least 10 days prior to the hearing date.

(3) Issuance and challenges to subpoenas: The adjudicatory body or other authorized representative of the department may issue subpoenas to compel attendance of witnesses and production of records in connection with proceedings before the adjudicatory body or department. Sections 51-1-28 & 29 NMSA 1978.

(a) Who may request: Any party to an adjudicatory proceeding may make written application to the applicable adjudicatory body for the issuance of a subpoena.

(b) Contents of requests for subpoena: The party seeking the subpoena must reasonably identify and specify the evidence or documents sought and show the relevance of such evidence or documents to the issue under consideration. The proposed subpoena shall show upon its face the name and address of the party at whose request the subpoena was issued.

(c) Decision regarding issuance of subpoena: The adjudicatory body, at its discretion, may issue the subpoena upon the written application or may schedule a hearing or conference on the application to hear argument and objections from interested parties for the purpose of determining whether the subpoena should issue. If such a hearing is held, the adjudicatory body may make a ruling on the record during the hearing, or may, in its discretion, issue a written decision, informing the parties of the decision and of their right to further appeal.

(d) Challenge to issued subpoena or a request to quash: Any witness summoned may petition the department to quash or modify a subpoena served on the witness. The department shall give prompt notice of such petition to all interested parties. After the investigation or hearing, whichever the department considers appropriate, it may grant the petition in whole or part, or it may deny the petition upon a finding that the testimony or the evidence required to be produced does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested, or for any other reason that justice requires.

(e) Appeal of disputes: The stated reason for the request for the subpoena and the stated reason for the opposition as well as the administrative law judge's decision in regard to the subpoena shall be part of the record on appeal.

(f) Order of protection: If the department denies the petition to quash the subpoena, the aggrieved party may petition the district court of either the county where he resides, or, in the case of a corporation, the county where it has its principal office, or the county where the hearing or proceeding will be held, for an order of protection.

(g) Sanctions to compel compliance with subpoenas: In case of failure to comply with any subpoena issued and served under the department's statutory authority or for the refusal of any person to testify to any matter regarding which he may be interrogated lawfully in a proceeding before an adjudicatory body of the department, the department may apply to the district court either in the county of the person's residence or in the county where the hearing or proceeding is being held, for an order to compel compliance with the subpoena or the furnishing of information or the giving of testimony. The prevailing party is entitled to costs of the enforcement proceeding.

(h) Sanctions against parties for witnesses' failure to comply with subpoenas: When a subpoenaed witness fails to attend or testify, if a party exercises substantial control or influence over the witness, such as an employee, relative of a party employer or a relative of a party claimant, the adjudicatory body can deem that, if the witness had appeared and testified, the testimony would have been unfavorable to the party controlling or influencing the witness.

(i) If a party or a subpoenaed witness fails or refuses to produce records or documentary evidence pursuant to an order or subpoena of the adjudicatory body, the

adjudicatory body can deem that, if the records or documentary evidence had been produced, the evidence would have been unfavorable to the party failing or refusing to produce the records or documentary evidence or to the party controlling or influencing the witness who failed or refused to produce the records or documentary evidence.

F. Disqualification of board of review members and appeal tribunal administrative law judges: An appeal tribunal administrative law judge or board of review member shall withdraw from any proceeding in which the appeal tribunal administrative law judge or board of review member cannot accord a fair and impartial hearing or consideration and from any proceeding in which the appeal tribunal administrative law judge or board of review member has an interest. Any party may request a disqualification of an appeal tribunal administrative law judge or board of review member on the grounds of the person's inability to be fair and impartial, by filing an affidavit or written statement or making a statement on the record with the appeal tribunal or board of review promptly upon the 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 board of review member is disqualified pursuant to this regulation, the remaining board of review members may appoint an appeal tribunal administrative law judge or other qualified department representative to sit on the board of review for the proceeding involved. The grant or denial of a requested disqualification can be considered in an appeal on the merits.

G. Attorneys at law and authorized representatives: Prior to or at the commencement of any adjudicatory hearing, all attorneys at law or other authorized representatives shall file a written entry of appearance which shall be made a part of the record and a copy shall be furnished by the attorney or representative to the opposing party. The entry of appearance shall be signed by the attorney at law or authorized representative, whose mailing address, telephone number and other contact addresses shall be provided. An attorney or representative who has provided notice of representation will be deemed to continue such representation until a written notification of the withdrawal of such representation is provided to all parties, the administrative law judge or the board of review. Even if an attorney or authorized representative has entered his appearance on behalf of a party, the party may appear on his own behalf without the attorney or authorized representative.

H. Ex parte communications: No party or representative of a party or any other person shall communicate off the record about the merits of the case with the cabinet secretary, any administrative law judge or board of review member who participates in making the decision for any adjudicatory hearing, unless the communication is written and a copy of the communication is transmitted to all interested parties to the proceeding. The cabinet secretary, any administrative law judge, board of review member or their representatives shall not communicate off the record about the merits of an adjudicatory hearing with any party or representative of a party or any other person, unless a copy of the communication is sent to all interested parties in the proceeding.

I. Requirements for hearing evidence or reviewing record: The cabinet secretary, board of review member or appeal tribunal administrative law judge shall not participate in any decision for any adjudicatory hearing unless the cabinet secretary, board of review member or appeal tribunal administrative law judge has heard the evidence or reviewed the record.

[11.3.500.9 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.10 HEARING PROCEDURE BEFORE THE APPEAL TRIBUNAL:

A. Conduct of adjudicatory hearings:

(1) Adjudicatory hearings before the appeal tribunal shall be conducted in such a manner that all parties are afforded basic rights of due process and that all pertinent facts necessary to the determination of the rights of the parties are obtained. All hearings and proceedings will be conducted informally in such a manner as to ascertain the substantial rights of the parties and will not be governed by common law or statutory rules as to the admissibility of evidence or by technical rules of procedure, but the procedures shall afford the parties equally and impartially the right to:

(a) call and examine witnesses and to cross examine the opposing party's witnesses;

(b) introduce exhibits and offer rebuttal evidence;

(c) object to questions and to the introduction of improper or irrelevant testimony or evidence; and

(d) submit written expositions of the case, within the discretion of the administrative law judge.

(2) The appeal tribunal, on its own initiative:

(a) may examine parties and witnesses;

(b) require additional evidence as it finds necessary to the determination of the issues before it;

(c) may exclude testimony and evidence which it finds to be incompetent, irrelevant or otherwise improper by standards of common reasonableness; and

(d) if it deems appropriate, the appeal tribunal may permit opening and closing statements.

B. Opportunity for fair hearing: In conducting adjudicatory hearings, the appeal tribunal shall afford all parties an opportunity for a full and fair hearing including an

opportunity to respond and present evidence and argument on all issues involved; provided that the term "adjudicatory hearing "as used in this rule does not apply to fact-finding interviews conducted by the department representative for purposes of making an initial determination of eligibility for benefits or liability for contributions, payments in lieu of contributions, interest or penalties under the Unemployment Compensation Law.

C. Continuance, adjournment and reopening of adjudicatory hearings:

(1) An adjudicatory hearing before an appeal tribunal administrative law judge, for good cause shown, may be continued or adjourned upon the request of a party or upon the appeal tribunal's own motion, at any time before the hearing is concluded. A claimant's right to a prompt determination of claimant's eligibility and payment of benefits shall not be impaired by undue delay of proceedings.

(2) If any party fails to appear at a scheduled adjudicatory hearing, the appeal tribunal may, in its best judgment, either adjourn the hearing until a later date or proceed to render its decision on the record and the evidence then before it. Any decision shall be subject to reopening before the appeal tribunal upon a showing of good cause for the party’s failure to appear as long as the request to reopen is received no later than 15 days from the date of the decision that.

(3) A reopening of any adjudicatory hearing shall be granted upon showing of good cause, including good cause for not appearing at the scheduled hearing, or may be ordered on the appeal tribunal's, the board of review's or the secretary’s own motion for good cause. A request for reopening shall be made as soon as reasonably possible but in no event later than 15 days after the decision of the appeal tribunal was mailed.

(4) A request for a continuance, adjournment or reopening shall be made to the appeal tribunal administrative law judge as identified on the notice of hearing. If the administrative law judge finds good cause for failing to appear, the merits of the appeal shall be set for hearing. Notice of the date, time and place of a reopened, postponed or adjourned hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard. The administrative law judge shall issue a decision approving or denying a request for a continuance adjournment or reopening.

(5) A request for reopening made later than 15 days after the decision of the appeal tribunal was issued shall be heard by the secretary or the board of review on the reason for the untimely request for the reopening. If the secretary or the board of review finds good cause for the late request, the merits of the appeal shall be set for hearing before the appeal tribunal. Notice of the date, time and place of a reopened hearing shall be given to the parties or their representatives and shall include a statement of the issues to be heard.

D. Authority over conduct of adjudicatory hearings. The appeal tribunal shall have and shall exercise full authority over the conduct and behavior of parties and witnesses

appearing before it to insure a fair, orderly adjudicatory hearing and an expeditious conclusion of the proceedings.

E. Mode of hearings:

(1) The appeal tribunal may conduct the adjudicatory hearing by telephone or in person at the discretion of the appeal tribunal. The mode of conducting the hearing will be as indicated in the notice setting the hearing.

(2) Notice of telephone hearing: If the hearing is to be by telephone, the notice shall so inform the parties and will include instructions for informing the administrative law judge of the necessary telephone numbers. If the hearing is a telephonic hearing, no party or representative will be permitted to attend in person. If the hearing is an in-person hearing, at the discretion of the administrative law judge, a party, witness or representative will be permitted to appear telephonically.

F. Exhibits:

(1) Exchange of exhibits prior to hearings:

(a) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the other party. The copies shall be transmitted by the offering party in a manner to insure their receipt by the other party at least 48 hours prior to the date and time of the scheduled hearing.

(b) A party seeking to introduce exhibits shall provide copies of all proposed exhibits to the administrative law judge at least 48 hours prior to any hearing. In no event shall the administrative law judge be provided copies of exhibits not previously transmitted by the offering party to the opposing party.

(c) Documents not submitted in accordance with this subsection shall be denied admission and denied consideration by the department:

(i) unless it is apparent that the particular document was previously seen by the party whose interest is affected, that party acknowledges having seen the document and has no objection to its admission; or

(ii) the administrative law judge, in the judge's discretion, determines that fundamental fairness and the proper administration of the Unemployment Compensation Law requires the admission of the document.

(d) In any case where the administrative law judge determines that documentary evidence will be admitted over the objection of a party that the party has not had an opportunity to review and consider the evidence, a reasonable continuance shall be granted by the administrative law judge to give the objecting party an opportunity to review the evidence.

(2) Marking exhibits: All exhibits tendered to the administrative law judge shall be separately marked for identification. The employer's exhibits shall be denoted E-1, E-2, E-3 and so forth; the claimant's exhibits shall be denoted C-1, C-2, C-3 and so forth. A file, such as a personnel file, containing voluminous documents need not be separately marked, but the pages shall be individually numbered by the offering party prior to admission. Failure to sequentially number the pages of a voluminous exhibit will be grounds to deny the admission of the exhibit.

(3) Exhibits admitted and considered by the administrative law judge shall be individually identified on the record.

(4) Exhibits denied admission: The reason for the denial of admission of tendered exhibits shall be clearly stated on the record. Typical, but not exclusive, reasons for the denial of admission of an exhibit is lack of relevancy, immateriality, redundancy and voluminous unnumbered pages or documents. Exhibits offered and denied admission shall be retained in the record, but shall not form the basis for the decision of the administrative law judge. The written decision shall reiterate the statement of exhibits denied admission and the basis for the denial.

G. Record of hearings:

(1) Proper record: The appeal tribunal shall ensure that all of the testimony, objections and motions or other matters in connection therewith are fully and accurately recorded, in such a manner that a complete and accurate transcript can be rendered therefrom as needed.

(2) The record in an adjudicatory hearing shall include:

(a) all documents in the department's files, pleadings, motions and previous rulings;

(b) documentary evidence received or considered;

(c) a statement of matters officially noticed;

(d) questions, tenders of evidence, offers of proof, objections and rulings thereon in the form of a tape recording or transcript;

(e) findings and conclusions; and

(f) any decision, opinion or report by the cabinet secretary, board of review members or appeal tribunal administrative law judge conducting the hearing.

(3) The department deems that the recording of a proceeding made by the department is the official recording of the record.

(a) Inaudible recording: If the tape or digital recording or a significant portion of it is demonstrated as inaudible or otherwise unusable, if the parties do not stipulate as to the matters which would have appeared on the recording if usable, the appeal tribunal may order a rehearing de novo of all matters or of only the matters which were on the unusable portions of recording.

(b) Official transcript: The department or either party, at the party's expense, may prepare a typed transcript of any such tape recording for the use of the parties. Any typed transcript prepared by the department or under its supervision may be designated by the appeal tribunal as the official transcript. Typed transcripts prepared by a party shall not be deemed official transcripts unless such transcript was transcribed with the department's consent and prepared either in-person or from a department tape or digital recording by an individual approved by the department. A copy of the typed transcript of an appeal hearing may be made available without charge to parties of an appeal pending before the district court.

(c) Availability of recordings: Upon written application, for good cause shown, a duplicate copy of the recording of all testimony, objections and motions or other matters will be supplied to any party to the proceeding. Unless the applicant is entitled to the a copy of the recording without charge or otherwise shows good cause as to why the party should not be charged as provided in 11.3.100.106 NMAC, the applicant may be required to pay for a copy of the recording.

H. Factual information to be considered: All evidence, including any records, investigation reports and documents in the possession of the adjudicatory body which the department desires to avail itself as evidence in making a decision, shall be made a part of the record in the proceedings, and no other factual information or evidence shall be considered, except as provided in this section. Documentary evidence may be received in evidence in the form of copies or excerpts or by specific citation to page numbers in published documents.

I. Briefs or memoranda of law, requested findings of fact and conclusions of law: At any time during an adjudicatory hearing and prior to a decision, the parties may be afforded a reasonable opportunity to submit briefs or memoranda of law, proposed findings of fact and conclusions of law, together with supporting reasons including citations to the record and copies of case law, for the consideration of the adjudicatory body.

J. Official notice: Official notice may be taken of all facts of which judicial notice may be taken and of other facts within the specialized knowledge of the board of review or appeal tribunal administrative law judge, but whenever any such member or officer takes official notice of a fact, the noticed fact and its source shall be stated at the earliest practicable time, before or during the adjudicatory hearing, but before the final decision, and any party shall, on timely request, be afforded an opportunity to show the contrary.

K. Specialized knowledge of department: The experience, technical competence and specialized knowledge of the department and its staff may be utilized in the evaluation of the evidence by the adjudicatory bodies of the department.

L. Decision of the appeal tribunal:

(1) Decision in writing: Following the conclusion of an adjudicatory hearing on an appeal, the appeal tribunal shall promptly announce its decision on the case. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by the administrative law judge who heard the appeal.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

(3) The residuum rule shall apply in the issuance of all decisions. This rule requires that the decision of the department's appeal tribunal be supported by "substantial evidence", that is evidence which would be admissible in a court of law. A decision of the appeal tribunal cannot be made on the basis of controverted hearsay evidence alone; there must be a residuum of legal evidence which would be admissible in a court of law.

(4) Where an appeal was not filed within the statutory appeal period, the appeal tribunal shall, after review of the record conduct an evidentiary hearing with notice to all interested parties to determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that grants a request for reopening or finds good cause for failure to timely appeal from an initial determination cannot be appealed. Any decision that denies a request for reopening shall include the appeal tribunal's findings and conclusions for the denial. Either party if aggrieved may file an appeal on the merits of any written decision issued by the administrative law judge to higher authority.

(5) Publication of decision: Copies of any decision issued by the appeal tribunal shall be promptly transmitted to all interested parties to the appeal.

M. Remand by appeal tribunal: The appeal tribunal may, in its discretion, remand any issue developed from evidence presented at the hearing or apparent from the existing record to the department with an order directing that a determination be made with regard to that issue or that additional procedures be taken to perfect a determination already issued or to make other disposition in the matter.

[11.3.500.10 NMAC - N, 01-01-2003; A, 11-15-2012; A, 07-31-2013; A, 10/29/2019]

11.3.500.11 REMOVAL ACTIONS:

At the order of the secretary, any proceeding before the department or the appeal tribunal may be removed to the board of review. Such removed actions shall be

presented, heard and decided by the board of review in the manner prescribed for appeal tribunal hearings.

[11.3.500.11 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.12 PRESENTATION OF FURTHER APPEALS:

A. An interested party aggrieved by a decision of the appeal tribunal is entitled to appeal to higher authority. A written communication clearly demonstrating a desire to appeal a determination to higher authority shall be filed with the department. The information submitted with the appeal shall include a clear statement of the relevant facts and a clear statement of the party's basis for appeal.

B. Secretary decision: The secretary shall review the application and shall, within 15 days after receipt of the application for appeal, either affirm the decision of the administrative law judge, remand the matter to the appeal tribunal for an additional hearing or new decision, remand to the department for further investigation and determination, or refer the decision to the board of review for further review and decision on the merits of the appeal. Issues of timeliness shall be decided by the secretary, who may refer the decision to the board of review.

(1) Decision in writing: Following the conclusion of a review on an appeal, the cabinet secretary shall issue a decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by cabinet secretary.

(2) Findings of fact shall be based exclusively on the record and matters officially noted.

(3) Publication of decision: Copies of any decision issued by the secretary shall be promptly transmitted to all interested parties to the appeal.

C. If the secretary takes no action within 15 days of receipt of the application for appeal and review, the decision will be promptly scheduled for review by the board of review as though it had been referred by the secretary.

D. All appeals from a decision of the appeal tribunal filed more than 15 days from the date of the appeal tribunal’s decision shall be referred to the secretary, who may refer the decision to the board of review. In addition to the information required by Subsection A of 11.3.500.12 NMAC, all late appeals shall contain a concise statement setting forth the reasons for the late appeal. The secretary, or the board of review if the case has been referred to the board, may extend the time for filing any appeal from a decision of the appeal tribunal only upon showing of good cause.

E. Notice of review before the board of review shall be mailed to all interested parties informing them that, unless a hearing is granted pursuant to the Subsection A of 11.3.500.13 NMAC, no additional evidence shall be taken and all parties will have the

opportunity to submit written statements, briefs or memorandum of law explaining why the decision of the appeal tribunal should be affirmed or reversed.

F. Applications for leave to participate or intervene in an appeal: An interested party, if aggrieved by a decision of the appeal tribunal, but not a party to the proceeding before the appeal tribunal, may apply for leave to participate or intervene in an appeal before the board of review. The party applying for leave to participate or intervene in an appeal before the board of review shall file with the board of review an application for leave to join an appeal setting forth his interest in the matter appealed. The board of review shall have the discretionary power to approve or reject any such application.

[11.3.500.12 NMAC - N, 01-01-2003, A, 02-14-2011; A, 11-15-2012; A, 10/29/2019]

11.3.500.13 THE BOARD OF REVIEW:

A. The board of review's authority: In every case referred to the board of review by the secretary from an appeal tribunal decision the board of review may, in its discretion, hear and decide the case upon the record; it may entertain written arguments, or, after notice to all parties and in accordance with 11.3.500.9 NMAC it may conduct a hearing and take additional evidence before it.

B. Review of the record as an appellate or reviewing body: As a general practice and unless the board of review gives specific notice to the contrary, the board sits in its capacity as an appellate or reviewing body. As such, it reviews the record; it does not receive new evidence.

C. Remand by board of review to the appeal tribunal or the department: With an order directing that a determination or decision be made with regard to that issue, or that additional procedures be taken to perfect a determination or decision already issued, or to make other disposition in the matter, as the board of review, in its discretion, may deem necessary, the board of review may remand any claim or an issue involved in a claim; any issue developed from evidence presented at the hearing or apparent from the existing record:

(1) To the appeal tribunal for the taking of additional evidence or a hearing de novo. Hearings conducted by the appeal tribunal pursuant to a remand by the board of review shall be conducted after notice to all parties and in accordance with 11.3.500 NMAC. Unless directed otherwise by the board of review, the appeal tribunal shall issue a decision based upon the entire record before it, including the record of all the prior hearings. Parties to any additional hearing shall have the right to review the appeal tribunal recording made at any prior evidentiary hearing.

(2) To the department for fact-finding and issuance of an initial determination or redetermination.

D. Appeals by the secretary: Within 15 days from the date of issuance of any decision by the appeal tribunal, the secretary, on the secretary's motion, may request the board of review to reconsider a decision of an appeal tribunal administrative law judge, which the secretary believes to be inconsistent with law or the applicable rules of interpretation or which is not supported by the evidence. In such situations the board of review may, in its discretion, take additional evidence, review the matter on the record or remand the matter to the appeal tribunal for an additional evidentiary hearing.

E. Where an appeal was not filed within the statutory appeal period, the cabinet secretary shall, after review of the record and appeal, determine whether the appellant has good cause for failure to timely appeal from an initial determination. Any decision that denies a request to extend the time frame for the appeal shall include findings and conclusions for the denial of the reopening.

F. Decision by the board of review:

(1) Decision in writing: The board of review may take the appeal under advisement, may order a transcript of proceedings for review may afford the parties an opportunity to file memorandum briefs and proposed findings of fact and conclusions of law; or the board may issue a decision. The decision shall be in writing, shall include findings of fact and conclusions of law, and shall be signed by the members of the board who heard or reviewed the appeal. If a decision of the board of review is not unanimous, the decision of the majority shall control. The minority may file a dissent from such decision.

(2) Findings of fact shall be based exclusively on the record, the evidence presented at the tribunal hearing and matters officially noted.

(3) Publication of decision: Copies of any decision issued by the board of review shall be promptly transmitted to all interested parties to the appeal.

[11.3.500.13 NMAC - N, 01-01-2003; A, 11-15-2012; A, 10/29/2019]

11.3.500.14 INSPECTION OF DECISIONS:

Copies of all decisions of the cabinet secretary, board of review and appeal tribunal shall be kept on file in accordance with the state records center retention requirements at the department's office in Albuquerque, New Mexico. A compilation of decisions of the appeal tribunal and board of review designated significant by the secretary or the general counsel, but with the parties' names and identifying information redacted and removed shall be open for inspection. The redacted decisions shall be filed chronologically but, from time to time, may be indexed by topic and offered as a precedent manual.

[11.3.500.14 NMAC - N, 01-01-2003; A, 11-15-2012]

11.3.500.15 ADMINISTRATIVE ERROR:

Clerical mistakes in decisions or parts of the record and errors arising from oversight or omission may be corrected by the department at any time on its own initiative or on the request of any party. During the pendency of an appeal to the judicial system, such mistakes may be corrected before the official record is transmitted to the district court, and, thereafter, while the appeal is pending, may be corrected with leave of the appellate court.

[11.3.500.15 NMAC - N, 01-01-2003]

11.3.500.501-11.3.500.512: [RESERVED]

[11.3.500.501-512 NMAC - Repealed, 01-01-2003]

CHAPTER 4: WORKERS' COMPENSATION

PART 1: GENERAL PROVISIONS

11.4.1.1 ISSUING AGENCY:

Workers' Compensation Administration (WCA).

[11.4.1.1 NMAC - Rp, 11 NMAC 4.1.1, 10/1/2014]

11.4.1.2 SCOPE:

These rules govern all parties involved in claims arising under the Workers' Compensation Act.

[11.4.1.2 NMAC - Rp, 11 NMAC 4.1.2, 10/1/2014]

11.4.1.3 STATUTORY AUTHORITY:

The director is authorized by Section 52-5-4 NMSA 1978 (Repl. Pamp. 1991), to adopt reasonable rules and regulations to implement the legislative purposes of the Workers' Compensation Act. The Workers' Compensation Act specifically directs the adoption of definitions for the phrases "bad faith" and "unfair claims processing" in Section 52-1-28.1 NMSA 1978 (Repl. Pamp. 1991). The rules on record confidentiality are adopted pursuant to Section 52-1-21 NMSA 1978 (Repl. Pamp. 1991).

[11.4.1.3 NMAC - Rp, 11 NMAC 4.1.3, 10/1/2014]

11.4.1.4 DURATION:

Permanent.

[11.4.1.4 NMAC - Rp, 11 NMAC 4.1.4, 10/1/2014]

11.4.1.5 EFFECTIVE DATE:

October 1, 2014, unless a later date is cited at the end of a section.

[11.4.1.5 NMAC - Rp, 11 NMAC 4.1.5, 10/1/2014]

11.4.1.6 OBJECTIVE:

This part defines words and phrases frequently used in the rules adopted by the director and also establishes rules for review of agency records.

[11.4.1.6 NMAC - Rp, 11 NMAC 4.1.6, 10/1/2014]

11.4.1.7 DEFINITIONS:

The definitions adopted below shall apply to all WCA rules unless expressly indicated otherwise in a specific part of these rules.

A. "Act" means collectively: the Workers' Compensation Act, the Workers' Compensation Administration Act, and the Occupational Disease Disablement Law, Sections 52-4-1 to 52-4-5 NMSA 1978. This definition includes prior law applicable to the particular facts of the claim.

B. "Administration" means the workers' compensation administration (WCA).

C. "Bad faith" means conduct in the handling of a claim by any person that amounts to fraud, malice, oppression or willful, wanton or reckless disregard of the rights of any party.

D. "Cause" means any and all proceedings before the WCA pertaining to the same disease or accidental injury and assigned the same file number by the clerk of the administrative court.

E. "Claim" means any allegation of entitlement to benefits or relief under the act, which has been communicated to the employer by the giving of notice as required by the act.

F. "Clerk" (also referred to as clerk of the administrative court or clerk of the WCA) means any individual assigned by the director to oversee the filing of claims and records with the WCA.

G. "Complaint" means a written request for workers' compensation benefits or any relief under the Act, filed on a mandatory form with the clerk of the WCA by a worker, employer, insurance carrier or the uninsured employers' fund.

H. "Director" means the director of the WCA.

I. "Employer" means, collectively, unless otherwise stated: an employer subject to the act; a self-insured entity, group or pool; a workers' compensation insurance carrier or its representative; or any authorized agent of an employer or insurance carrier, including any individual owner, chief executive officer or proprietor of any entity employing workers.

J. "Health care provider" (also referred to in the rules as "HCP") means any person, entity or facility authorized to furnish health care to an injured worker pursuant to Section 52-4-1 NMSA 1978, including any provider designated pursuant to Sections 52-1-49 or -51 NMSA 1978 and may include a provider licensed in another state if approved by the director, as required by the act.

K. "IME", or independent medical examination, means a medical examination of a worker, by a provider other than a previously designated health care provider, upon whom the parties have agreed or the judge has appointed according to the act.

L. "Judge" means a workers' compensation judge appointed by the director pursuant to Section 52-5-2 NMSA 1978.

M. "Mediation conference" means a mandatory conference at which all parties named in the complaint shall appear and present their positions to the mediator.

N. "Mediator" means a director's designee, who will evaluate and attempt to resolve a complaint by holding a mediation conference and issuing a recommendation for resolution of the complaint.

O. "Medical records" means:

(1) all records, reports, letters, and bills produced or prepared by a HCP relating to the care and treatment rendered the worker;

(2) all other documents generally kept by the HCP in the normal course of business relating to the worker, including, but not limited to, clinical, nurses' and intake notes, notes evidencing the patient's history of injury, subjective and objective complaints, diagnosis, prognosis and/or restrictions, reports of diagnostic testing, hospital records, logs and bills, physical therapy records and bills for services rendered.

P. "Party" may include any of the following:

(1) an employer against whom a claim has been asserted by an injured or disabled worker;

(2) an injured or disabled worker asserting a claim against an employer;

(3) the uninsured employers' fund, if a claim has been asserted against it;

(4) a health care provider named in a billing dispute or seeking qualification as an out-of-state provider; or

(5) any other person or entity named in an administrative enforcement proceeding.

Q. "Pending cause" means any cause in which a party has filed a document with the clerk of the WCA within the previous six months, and which has not yet been administratively closed by the clerk.

R. "Person" means any individual, association, organization, reciprocal or Lloyd's plan insurer, partnership, firm, syndicate, trust, corporation and every legal entity as defined in Section 59A-1-10 NMSA 1978.

S. "Pleading" means any document filed and endorsed by the clerk.

T. "Rules of civil procedure" means the Rules of Civil Procedure for the district courts, as adopted by the supreme court of New Mexico.

U. "Rules of evidence" means the Rules of Evidence as adopted by the supreme court of New Mexico.

V. "Rules of the WCA" means rules enacted by the WCA and cited as 11.4 NMAC.

(1) These rules are organized by title, chapter, part, section, paragraph and subparagraph.

(2) For ease of use, these rules may be referred to in writing and speech by part, section, paragraph and subparagraph.

W. "Unfair claims processing" means any practice, whether intentional or not, which unreasonably delays or prolongs the payment of benefits at a rate not consistent with the act. "Unfair claims processing" is a less severe violation than "bad faith" and includes, but is not limited to, any and all of the following practices with respect to claims, by an employer, insurer, third party administrator, worker or other person:

(1) knowingly misrepresenting pertinent facts relating to workers' compensation benefits or failing to disclose facts material to a workers' compensation claim;

(2) failing to acknowledge and act promptly upon communications with respect to claims;

(3) failing to adopt and implement reasonable standards for the prompt investigation and processing of claims;

(4) failing to affirm or deny coverage of claims within a reasonable time after a request for payment of benefits has been submitted to an employer;

(5) not attempting in good faith to develop prompt, fair and equitable settlements of claims in which liability has become clear;

(6) compelling litigation to recover amounts due by offering substantially less than the amounts ultimately recovered in actions brought by similarly situated workers;

(7) initiating litigation when benefits are currently being paid at the maximum rate of entitlement under the act;

(8) soliciting, accepting or obtaining a complete release of liability in exchange for an acceleration of benefits, or discounting an acceleration of benefits, where such an acceleration is not made pursuant to a lump sum payment approved by a judge; and

(9) failing to timely pay authorized and undisputed medical bills.

X. "Wage records" means all records evidencing all wages, commissions, overtime pay, gratuities, meals, board, rent, housing or lodging received from any employer during all time periods relevant to the act.

Y. "Worker" means an injured or disabled employee.

[11.4.1.7 NMAC - Rp, 11 NMAC 4.1.7, 10/1/2014; A, 1/1/2023]

11.4.1.8 CONFIDENTIALITY:

A. All records of the WCA are confidential except:

(1) as provided in Section 52-5-21 NMSA 1978;

(2) records required to be released by order of a court of competent jurisdiction;

(3) the identity of the insurance carrier for a particular employer, the fact that the employer is certified as a self-insurer or the fact that the administration has no record of compliance with the insurance requirement of the Act;

(4) any matter required to be made available to another state agency pursuant to statutes, joint powers agreements or memoranda of understanding; or

(5) as otherwise provided by law.

B. Procedure for requesting access to WCA records (both public and confidential records):

(1) Inspection of records will be allowed only during normal business hours.

(2) A written request to inspect must be submitted to the records custodian. The written request to inspect shall indicate sufficient information to distinctively identify and retrieve the records to be inspected.

(3) The WCA shall charge a reasonable fee for copies of records, the amount of which shall be posted at the clerk's office and on the WCA website.

C. Right to inspect confidential WCA records:

(1) Once a disablement or accident occurs, any person who is a party to a claim arising from the disablement or accident shall have the right to inspect all files relating to the accident or disablement, and all files relating to any prior accident, injury or disablement of the worker.

(2) The named party, representative or the attorney in a claim shall be required to provide acceptable proof of identity prior to being allowed to inspect confidential WCA records. Acceptable proof of identity shall be a driver's license or other identification bearing a photograph, name and address of the person requesting inspection. An attorney or other representative requesting confidential records on behalf of a party must show proof of the principal-agent relationship through a filed entry of appearance, a signed release or waiver, a signed power of attorney, written correspondence on law firm letterhead or through other reliable means.

(3) The records custodian shall review the written request and determine if the person requesting the inspection has a right to inspect confidential WCA records.

(4) The clerk shall allow only authorized employees of the WCA, or parties to a claim, including their attorneys or other representatives, access to confidential WCA records.

[11.4.1.8 NMAC - Rp, 11 NMAC 4.1.8, 10/1/2014; A, 1/1/2023]

PART 2: DATA REPORTING AND SAFETY REQUIREMENTS

11.4.2.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11.4.2.1 NMAC - Rp, 11.4.2.1 NMAC, 9/30/16]

11.4.2.2 SCOPE:

These provisions govern all employers subject to the act.

[11.4.2.2 NMAC - Rp, 11.4.2.2 NMAC, 9/30/16]

11.4.2.3 STATUTORY AUTHORITY:

The director is authorized by Section 52-5-4, NMSA 1978, to promulgate regulations to implement the act. The regulations implementing the safety program requirements are adopted pursuant to Section 52-1-6.2, NMSA 1978. The rules on gathering and reporting of statistical data are adopted pursuant to Section 52-5-3, NMSA 1978.

[11.4.2.3 NMAC - Rp, 11.4.2.3 NMAC, 9/30/16]

11.4.2.4 DURATION:

Permanent.

[11.4.2.4 NMAC - Rp, 11.4.2.4 NMAC, 9/30/16]

11.4.2.5 EFFECTIVE DATE:

September 30, 2016, unless a later date is cited at the end of a section.

[11.4.2.5 NMAC - Rp, 11.4.2.5 NMAC, 9/30/16]

11.4.2.6 OBJECTIVE:

The objective of 11.4.2 NMAC is to establish reporting and safety requirements for employers. This rule creates a standardized method for reporting data on work accidents, notifying workers about legal requirements for making a claim, and complying with mandatory safety provisions of the act.

[11.4.2.6 NMAC - Rp, 11.4.2.6 NMAC, 9/30/16]

11.4.2.7 DEFINITIONS:

A. "American standard code for information interchange (ASCII)" means a code that follows the proposed standard for defining codes for information exchange between equipment produced by different manufacturers.

B. "Claims administrator" means the insurance carrier, third party administrator, self-insured association, self-insured employer, or any claims coordinator, if any, designated by the employer or another claims payer to provide claims processing services on workers' compensation claims. These services include receiving and sending workers' compensation claims information to the WCA, employer, insurance carrier, and injured worker.

C. "EDI" means electronic data interchange.

D. "Loss run" means a computer generated report, listing or file that provides uniquely identifying and financial data of each individual claim for a group of claims occurring during a particular period for an insured or employer.

E. "Industry" means a business, or all businesses, as the context requires, that have identical two digit NAICS codes as determined by the WCA.

F. "NAICS code" means a designator of the principal business of an employer assigned by the WCA pursuant to the current version of the North American industry classification system, a publication of the executive office of the president, office of management and budget, United States.

G. "Experience modifier" is a calculation that compares the losses of an individual risk (employer) to average losses for all other risks in that industry classification and state. The experience modifier is used to adjust the insurance premiums of an individual risk according to the risk's loss experience.

H. "FROI" means first report of injury data (IAIABC 148 format). FROI also refers to WCA form E-1 and WCA form E-1.2.

I. "SROI" means subsequent report of injury data required to complete the notice of benefit payment (IAIABC A49 format). SROI also refers to WCA form E-6.

J. "TA" means transmission accepted.

K. "TE" means transmission accepted with errors.

L. "TR" means transmission rejected.

[11.4.2.3 NMAC - Rp, 11.4.2.3 NMAC, 9/30/16]

11.4.2.8 DATA COLLECTION:

A. General provisions:

(1) Paper copies of FROI and SROI will not be accepted by the WCA as of January 1, 2017. Beginning January 1, 2017, FROI and SROI data shall only be submitted through EDI or the WCA website.

(2) It is the claims administrator's or an uninsured employer's responsibility to timely submit all data required under the data collection rules.

(3) Time frames for submission of reports are not waived when the WCA acknowledges and returns an erroneous submission that needs correction.

(4) It is the responsibility of the claims administrator to report to the WCA required financial, legal and medical claims activity for the insured including reporting of the first dollar of indemnity benefits paid by, or on behalf of, an employer who has a deductible policy.

(5) It is the responsibility of the claims administrator to provide a loss run to the WCA upon request for reconciliation of a noted discrepancy.

(6) Claims administrators that file any required report at the time of the mediation conference, either with the mediator or at the clerk of the courts office, have not met their filing obligation with the WCA and must electronically file all required FROI and SROI data. The date of actual filing is the date of acceptance by the WCA, which will be used to determine compliance with filing requirements.

(7) Electronic filing

(a) A claims administrator shall file electronically with the WCA.

(b) EDI trading partner profile must be on record with the WCA before electronic filings can be accepted. A sample EDI trading partner profile is available on the WCA website.

(c) The transmission format is the international association of industrial accident boards and commissions (IAIABC) 148 and A49 record scheme. Transmission header and trailer records are also required under this format. The transmission record formats are also available on the WCA website.

(d) Electronic transmissions must be in the ASCII format. The file may be transmitted by electronic transmission via the internet.

(e) Electronic mailboxes must be registered with the management information systems (MIS) bureau of the WCA.

(f) Receipts for all TA, TE, and TR transmissions will be returned electronically.

(g) TR codes must be corrected within 30 days.

B. FROI:

(1) FROI data must be submitted, within 10 days of notification, for all injuries or occupational diseases that result in more than seven cumulative days of lost time.

(2) FROI data must be timely submitted even if the claim is disputed.

(3) The claims administrator must furnish a copy of the FROI data to the worker and the employer at the time of electronic submission to the WCA. If the employer is uninsured, the employer must furnish a copy of the FROI data to the worker.

(4) When an employer has notice of an accident and receives a complaint, FROI data must be submitted immediately after receiving an initial pleading involving an injury or illness that is not otherwise already supported by FROI data.

C. SROI must be submitted:

(1) within 10 days of the date of initial payment of the indemnity portion of any claim;

(2) within 50 days of the filing of an order of the WCA, or of the date upon which a recommended resolution became a compensation order for payment made to or on behalf of an injured worker, unless an order staying enforcement of a compensation order is filed with the clerk; and

(3) within 30 days of the date of the closing payment of the indemnity portion of the claim; and

(4) within 30 days of any change in benefits; and

(5) within 90 days of the date of the initial payment of a medical-only claim with cumulative payments over $300, provided, however, that a E-6 closing report shall be submitted with respect to all claims for which expenses have been previously reported;

(6) for medical-only claims with cumulative payments over $300, the initial and closing E-6 may be submitted on one form.

D. Annual expenditure report: Claims administrators shall file an annual expenditure report with the economic research and policy bureau of the WCA. The annual expenditure report must:

(1) be submitted electronically using the WCA website;

(2) identify the carrier(s), groups, pools or self-insured employer(s), by the name and the federal employers identification number (FEIN);

(3) be submitted for all expenditures reported in a calendar year (January 1-December 31); and

(4) be received by the WCA no later than February 15th of the year following the reporting period.

E. Failure to file. Any failure to timely file a statistical report as required by 11.4.2 NMAC shall be considered a violation of these rules and may be penalized pursuant to Section 52-1-61 NMSA 1978.

F. Waiver: Any provision of 11.4.2.8 NMAC may be waived, either permanently or temporarily, by written order of the director upon good cause shown.

[11.4.2.8 NMAC - Rp, 11.4.2.8 NMAC, 9/30/16]

11.4.2.9 SAFETY:

A. Annual inspections:

(1) All employers, as identified in Section 52-1-6.2 NMSA 1978, are required to have an annual safety inspection. All other employers are encouraged to do so.

(2) Any employer who purchases or renews a policy of workers' compensation insurance with a premium liability of $15,000 or more shall, within 60 days of the policy issuance or renewal, submit proof of an annual safety inspection to the WCA. Self-insured employers shall submit proof of an annual safety inspection to the WCA within 60 days of completing an inspection.

(3) Standards for annual inspections: The minimum standards for the annual safety inspection are contained in the WCA publication, annual safety inspections. This publication may be obtained from the WCA's website.

(4) Who may conduct the inspection:

(a) A safety consultant from the WCA.

(b) A senior manager or dedicated safety professional employed by the business. The WCA may be contacted to provide training on how to conduct a proper safety inspection.

(c) A third party safety organization or safety professional.

(d) A safety professional from the insurance company.

(5) Employers shall submit an affidavit listing the address of all facilities that were included in the inspection to the WCA safety program on a form approved by the director. Though the responsibility for reporting is with the employer, the insurance carrier may report completed inspections, provided the insurance carrier or a safety organization or safety professional retained by the carrier conducted the inspection.

(6) Failure to comply with the annual safety inspection requirement may subject an employer to penalties under Section 52-1-6.2 NMSA 1978.

B. Risk reduction program:

(1) The extra-hazardous employer program is hereinafter referred to as the risk reduction program ("RRP").

(2) An employer may be classified for the RRP if its experience modifier (e-mod) is higher than the state average for that industry or if a safety audit reveals a need for assistance based on the employer's accident frequency or severity of injury caused by the accident(s).

(3) The WCA shall notify the employer and its insurance carrier if that the employer meets the criteria, under the above guidelines, to be enrolled in the RRP and is selected for enrollment in the RRP.

(a) Notice shall be given to the employer, and the insurer or self-insurance entity, if any, by personal service upon any person of suitable age and discretion at the business location or by certified mail addressed to the owner, proprietor, managing partner, president, majority stockholder, chief operational officer or manager of the business.

(b) Employers who have received a notice of classification shall have five days to file a written request for reconsideration with the director. The director may hold hearings upon a request for reconsideration and make a determination as appropriate. Appeal of a ruling by the director shall be by writ of certiorari to the district court, pursuant to S.C.R.A. Rule 1-075.

(4) Within 30 days of service of a notice of classification or within 30 days of the director's decision if a request for reconsideration is filed, an employer who is classified and enrolled in the RRP shall obtain a safety consultation. The consultation must be performed by a WCA safety consultant, the employer's insurer or a professional independent safety consultant approved by the director. A WCA safety consultant may assist employers in interpreting the requirement for a safety consultation and in conducting the consultation.

(5) The safety consultant performing the safety consultation shall submit within 10 days a written report to WCA and the employer detailing any identified hazardous conditions or practices identified through the safety consultation. The written report must be in a form acceptable to the director.

(6) Within 30 days of the submission of the written report concerning the safety consultation, the employer participating in the RRP shall submit a specific accident prevention plan to resolve the hazards and practices identified in the written report.

(7) The WCA may investigate accidents occurring at the work site(s) of an employer for whom a plan has been formulated under Paragraph (6) of Subsection B of

this section and the WCA may otherwise monitor the implementation of the accident prevention plan as it finds necessary.

(8) Six months after the formulation of an accident prevention plan prescribed by Paragraph (6) of Subsection B of this section, the WCA shall conduct a follow-up inspection of the employer's premises. The WCA may require the participation of the safety consultant who performed the initial consultation and formulated the safety plan.

(a) If the WCA determines that the employer has complied with the terms of the accident prevention plan or has implemented other acceptable corrective measures, the WCA shall so certify.

(b) If, at the time of the inspection required under Paragraph (8) of Subsection B of this section, the employer continues to exceed the injury frequencies that may reasonably be expected in that employer's business or industry, the WCA shall continue to monitor the safety conditions at the work site(s) and may formulate additional safety plans reasonably calculated to abate hazards. The employer shall comply with the plans and may be subject to additional penalties for failure to implement the plan or plans.

(9) For good cause shown, the director may extend any time limit required by this part for up to 30 additional days.

(a) All applications for extension shall be submitted in writing and shall state with specificity the reasons for requested additional time.

(b) The director may hold hearings to determine the appropriateness of extensions of time for submission of specific accident prevention plans.

(c) The director's determination on a request for an extension is final.

(d) In the case of an RRP employer whose employees are assigned to furnish services to other employers, the responsibility for the development and submission of an accident prevention plan as required by these rules shall be with the employer who controls and provides direct on-site supervision of the workers who are exposed to the hazards and practices identified in the written report of the safety consultant.

(10) Any employer who fails to develop, submit, cause to be submitted, implement or comply with a specific accident prevention plan as provided for in these rules shall be subject to imposition of a penalty of up to $5,000. Each incident of failure to formulate, submit, cause to be submitted, implement or comply with a specific accident prevention plan persisting for a period of 15 days shall constitute a separate violation and subject the employer to additional penalties. The enforcement procedures established in 11.4.5 NMAC shall be utilized in all proceedings under this subsection.

(11) An employer shall no longer be designated to participate in the RRP when the provisions of Paragraphs (4) through (8) of Subsection B of 11.4.2.9 NMAC, inclusive, have been satisfied.

C. The employer, its insurer and all agents of the employer or insurer have the duty of compliance with reasonable requests for information from workers' compensation administration personnel. WCA personnel shall collect data regarding all work-place fatalities in New Mexico.

[11.4.2.9 NMAC - Rp, 11.4.2.9 NMAC, 9/30/16]

11.4.2.10 ACCIDENT NOTICE POSTERS AND ACCIDENT NOTICES:

A. Every employer shall post and keep posted in conspicuous places on its business premises, in areas where notices to employees and applications for employment are customarily posted, an accident notice poster stating the requirement that workers notify employers of accidents. The accident notice poster is available at the WCA at no charge to the employer on a form approved by the director.

B. Every employer must keep attached to the accident notice poster an adequate supply of notice of accident forms approved by the director.

C. Any employer may submit to the director a proposal for approval of a notice of accident form or accident notice poster. No form shall be approved except in writing, signed by the director.

[11.4.2.10 NMAC - Rp, 11.4.2.10 NMAC, 9/30/16]

PART 3: PAYMENT OF CLAIMS AND CONDUCT OF PARTIES

11.4.3.1 ISSUING AGENCY:

Workers’ Compensation Administration.

[6/1/96; 11.4.3.1 NMAC - Rn, 11 NMAC 4.3.1, 11/30/04]

11.4.3.2 SCOPE:

This part governs all employers and workers subject to the act.

[6/1/96; 11.4.3.2 NMAC - Rn, 11 NMAC 4.3.2, 11/30/04]

11.4.3.3 STATUTORY AUTHORITY:

Section 52-5-4 NMSA 1978 (Repl. Pamp. 1991), as amended, authorizes the director of the WCA to adopt reasonable rules and regulations for effecting the purposes of the act.

Sections 52-5-20 to 52-5-22 NMSA 1978 (Repl. Pamp. 1991), as amended, contain certain payment deadlines and requirements for reporting by insurer. Section 52-1-28.1 NMSA 1978 (Repl. Pamp. 1991), specifically directs the WCA to create regulations on unfair claims processing practices and bad faith. Section 52-1-12.1 NMSA 1978 (2016) directs the director to promulgate rules governing post-accident drug and alcohol testing.

[6/1/96; 11.4.3.3 NMAC - Rn, 11 NMAC 4.3.3, 11/30/04; A, 6/16/16]

11.4.3.4 DURATION:

Permanent.

[6/1/96; 11.4.3.4 NMAC - Rn, 11 NMAC 4.3.4, 11/30/04]

11.4.3.5 EFFECTIVE DATE:

June 1, 1996 unless a later date is cited at the end of a section.

[6/1/96; 11.4.3.5 NMAC - Rn & A, 11 NMAC 4.3.5, 11/30/04]

11.4.3.6 OBJECTIVE:

This rule is intended to regulate the manner of payment of workers' compensation claims, to provide for post-accident drug and alcohol testing, and to clarify the parties' mutual obligations of prompt payment, cooperation and information reporting.

[6/1/96; 11.4.3.6 NMAC - Rn, 11 NMAC 4.3.6, 11/30/04; A, 6/16/16]

11.4.3.7 DEFINITIONS:

See 11.4.1.7 NMAC.

[6/1/96; 11.4.3.7 NMAC - Rn, 11 NMAC 4.3.7, 11/30/04]

11.4.3.8 PAYMENT OF CLAIMS:

A. If an accidental injury or occupational disease occurs to a worker during the course of employment and results in lost time to the worker of more than seven cumulative days, the employer shall file an E1.2 report with the WCA, and shall concurrently provide a copy to the worker.

B. The employer shall pay the worker the first installment of compensation benefits on a compensable claim no later than 14 days of the date of filing of the E1.2 report with the WCA.

C. If a claim is denied, the employer shall, upon the request of the worker, provide a written statement of the basis for the denial.

D. Compromise payments by the employer shall not be construed as an admission of liability by any person or party.

[5/2/87, 5/26/87, 5/29/91, 6/1/96; 11.4.3.8 NMAC - Rn, 11 NMAC 4.3.8, 11/30/04; A, 6/16/16]

11.4.3.9 LATE PAYMENT OF CLAIMS:

A. The WCA shall determine the timeliness of initial payments to workers.

B. Upon request of the WCA, an employer shall provide documentation to verify the timeliness of initial payments.

C. If an employer is identified by the WCA as having made initial payments on an untimely basis, the WCA may require the employer to implement a plan to prevent future late payments, and may require the employer to furnish proof of compliance with the plan.

[1/24/91, 6/1/96; 11.4.3.9 NMAC - Rn, 11 NMAC 4.3.9, 11/30/04; A, 6/16/16]

11.4.3.10 INSURERS' REPORTING DUTY TO EMPLOYER:

A. Upon written request of an employer, the insurer, self-insurer, or third-party administrator carrying the employer's workers' compensation insurance shall provide a list of workers' compensation claims made against that employer, which shall contain the information specified in Section 52-5-20 NMSA 1978 (Repl. Pamp. 1991).

B. Upon written request of an employer, the insurer carrying the employer's workers' compensation insurance shall provide the employer with notice of any proposed settlement of any claim against that employer.

[5/29/91, 6/1/96; 11.4.3.10 NMAC - Rn, 11 NMAC 4.3.10, 11/30/04]

11.4.3.11 MILEAGE BENEFITS:

A. Employer shall pay worker's mileage, transportation, meal and commercial lodging expenses for travel to HCPs pursuant to this rule. Payment shall be made only to the injured worker and within 30 days of the employer's receipt of an original itemized receipt that complies with the requirements of this rule:

(1) for travel to HCPs of 15 miles or more, one way, from the worker's residence or place of employment, depending upon the point of origin of travel, mileage

shall be reimbursed at the mileage reimbursement rate set by the New Mexico Department of Finance and Administration regulations in effect on the date of travel;

(2) actual reimbursement for the cost of a ticket on a common carrier, if applicable;

(3) actual reimbursement up to $15.00 for any one meal with up to three meals total and $30.00 total reimbursed for a 24 hour period; and,

(4) actual reimbursement up $85.00 for the cost of overnight commercial lodging in the event of required travel of at least 150 miles one way from worker's residence or place of employment, depending upon the point of origin of travel.

B. The employer in its sole discretion may make payments under this section in advance. If worker accepts an advance payment and fails to appear for the scheduled HCP or IME appointment for which an advance has been issued, the employer/insurer may deduct the amount of the advance from the present indemnity benefits.

[5/26/87...6/1/96; 11.4.3.11 NMAC - A/E, 11/15/04; 11.4.3.11 NMAC - Rn, 11 NMAC 4.3.11, 11/30/04; A/E, 2/19/10; A, 12/31/12; A, 6/30/16]

11.4.3.12 POST-ACCIDENT DRUG AND ALCOHOL TESTING:

A. GENERAL PROVISIONS

(1) This section establishes regulations for post-accident drug and alcohol testing pursuant to Section 52-1-12.1 NMSA 1978.

(2) These rules are not intended to supersede other laws and are only intended to establish post-accident testing protocols and cut off levels as required by Section 52-1-12.1 NMSA 1978. Nothing in these rules shall prohibit an employer from conducting any drug or alcohol testing of employees which is otherwise permitted by law.

(3) If the worker requires emergency medical attention, medical treatment shall not be delayed to collect a drug or alcohol sample, provided that sample collection may occur in conjunction with the provision of medical treatment.

(4) A party may call a health care provider, toxicologist or similar forensic specialist as an expert witness to assist the workers' compensation judge in determining the degree to which intoxication or influence contributed to the worker's injury or death.

B. DEFINITIONS

(1) "Actual knowledge" means direct observation, by a supervisor or manager of the employer, of the consumption or use of drugs, alcohol or combination thereof, or

of the clear physical symptoms or manifestations of intoxication or influence of the worker, or worker's admission to consumption or use of drugs or alcohol made to a supervisor or manager.

(2) "Alcohol" means the intoxicating agent in beverage alcohol, ethyl alcohol, or other low molecular weight alcohols, including methyl and isopropyl alcohol.

(3) "Confirmatory test" or "confirmatory drug test" means a second analytical procedure performed on the original sample used to identify and quantify the presence of a specific drug or drug metabolite.

(4) "Constructive knowledge" means that a supervisor or manager of the employer, by exercise of reasonable diligence, should have had actual knowledge that the injured worker was impaired on the date of the workplace accident.

(5) "Drug" means any chemical agent that affects living processes and has the potential to impair those processes, including, but not limited to, substances listed under the New Mexico Controlled Substances Act. "Drug or controlled substance" does not include medications prescribed to a worker by the worker's licensed health care provider and taken in accordance with directions of the prescribing health care provider or dispensing pharmacy, unless such medication is combined with alcohol or a non-prescribed drug or controlled substance to cause intoxication or influence.

(6) "Initial test" or "initial drug test" means a screening test used to differentiate a negative specimen from one that requires further testing for drugs or drug metabolites.

(7) "Implement" or "implemented" means that the employer has put into effect and enforces a written policy on drug and alcohol use in the workplace.

(8) "Intoxication" or "influence" means a temporary state or condition of impaired physical, mental or cognitive function by means of alcohol, a drug, a controlled substance, or a combination of two or more substances at the time of injury or death.

(9) "Refusal to submit" means a worker who, by words or actions, refuses to submit to a drug or alcohol test, fails to appear for a test, fails to complete a test, fails to cooperate with collection of a sample, or otherwise intentionally conceals him or herself or makes him or herself unavailable to test.

(10) "Testing facility" as referenced in Section 52-1-12.1(F) means a testing facility selected by the employer to test a sample.

C. MINIMUM REQUIREMENTS FOR EMPLOYERS' DRUG AND ALCOHOL POLICIES

(1) To comply with the provisions of Section 52-1-12.1(H), the employer's written drug and alcohol policy shall:

(a) declare a drug and alcohol free workplace;

(b) advise workers of the types of testing they may be required to submit to and the circumstances under which workers may be tested for alcohol or drugs;

(c) advise workers that workers' compensation benefits may be reduced if their intoxication or influence contributes to a work place injury;

(d) advise workers that refusal to submit to or an intentional delay of post-accident testing may result in a complete denial of benefits pursuant to Section 52-1-12.1(E) NMSA 1978.

(e) advise workers that they may request a second test of the original sample within twelve (12) months of the original drug and alcohol test at the worker's expense.

(2) Notice of the policy may be given to workers through any of the following methods: posting the policy in a conspicuous place, including the policy in an employee policy handbook, having the worker sign an acknowledgement form that is placed in the worker's personnel file, a wallet card, a flyer inserted semi-annually with pay checks, or any other method employer reasonably believes will be successful in alerting the worker.

D. TESTING AND CUT OFF LEVELS

(1) Test samples, whether urine, breath or blood, shall only be collected by facilities, medical providers, or health care providers certified to collect such samples, provided that nothing prohibits an employer from relying on testing performed by law enforcement pursuant to the New Mexico Implied Consent Act.

(2) Sample collection, testing, and storage methods shall substantially comply with generally accepted standards in the medical or scientific community, which may include standards established by the federal Department of Transportation, the New Mexico Department of Transportation, the federal Substance Abuse and Mental Health Administration, or the New Mexico State Personnel Office.

(3) Post-accident alcohol testing shall be conducted as soon as practicable after the accident. Any post-accident alcohol test conducted more than 8 hours after the accident shall not be relied upon to reduce benefits under Section 52-1-12.1, unless the worker intentionally caused the delay in the testing.

(4) Post-accident drug testing shall be conducted as soon as practicable after the accident. Any post-accident drug test conducted more than 32 hours after the

accident shall not be relied upon to reduce benefits under Section 52-1-12.1, unless the worker intentionally caused the delay in the testing.

(5) A worker who requests a second test of an original sample shall be responsible for any costs associated with the testing of that sample. The worker shall provide timely written notice of the worker's request for a second test to the laboratory or custodian of the sample and to the employer.

(6) Provisions set forth in Section 52-1-12.1(F) requiring storage of samples shall only apply to testing facilities selected by the employer and shall not apply to hospitals or facilities providing emergency medical care to the worker.

(7) Cut off concentration levels for intoxication or influence

(a) An otherwise valid post-accident alcohol test creates a rebuttable presumption of intoxication or influence under Section 52-1-12.1 if the test results show a blood or breath alcohol concentration of .04 or above.

(b) An otherwise valid post-accident drug test creates a rebuttable presumption of intoxication or influence under Section 52-1-12.1 if initial and confirmatory testing performed by the testing facility show concentration levels at or above the cut off concentration levels set forth herein.

(c) Initial test cut off concentrations

(i)	Marijuana metabolites:	50 (ng/mL)
(ii)	Cocaine metabolites:	150 (ng/mL)
(iii)	Opiate metabolites (Codeine/Morphine):	2,000 (ng/mL)
(iv)	6-Acetylmorphine:	10 (ng/mL)
(v)	Phencyclidine (PCP):	25 (ng/mL)
(vi)	Amphetamines (AMP/MAMP):	500 (ng/mL)
(vii)	Methylenedioxymethamphetemine (MDMA):	500 (ng/mL)

(d) Confirmatory test cut off concentrations

(i)	Marijuana metabolite (Delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA))	15 (ng/mL)
(ii)	Cocaine metabolite (Benzoylecgonine):	100 (ng/mL)

(iii) Opiate metabolites: 2,000 (ng/mL)

(iv) 6-Acetylmorphine: 10 (ng/mL)

(v) Phencyclidine (PCP): 25 (ng/mL)

(vi) Amphetamines / Methamphetamine: 250 (ng/mL) (to be reported as positive for methamphetamine, the sample must also contain amphetamine at a concentration equal to or greater than 100 ng/ML)

(vii) Methylenedioxymethamphetamine (MDMA), Methenedioxyamphetamine (MDA), or Methylenedioxyethylamphetamine (MDEA): 250 (ng/ML)

(e) For any other drug not specifically enumerated in these rules, a cut off level established by any other nationally recognized authority may be relied upon.

(8) The employer shall provide a copy of the test results to the worker if relied upon to reduce benefits or upon worker's request.

[11.4.3.12 - N, 6/16/16]

11.4.3.13 CONDUCT OF PARTIES:

A. Worker's duties:

(1) Worker shall answer reasonable requests from the employer regarding work status.

(2) When a worker is receiving disability benefits, worker shall report to employer, within 15 days, any return to work, any written medical release to return to work provided to worker, and any physical limitations imposed by a physician and provided to worker in writing.

(3) Worker shall, upon request, give employer the names, addresses, relationship and degree of dependency of all dependents, and may be required to make a verified statement regarding these matters.

(4) Worker may be required to sign the authorization form approved by the WCA to release medical information as a condition of receipt of workers' compensation benefits.

B. Employer's duties:

(1) Upon receipt of a medical release to return to work employer shall notify worker about any required procedures for application for a pre-injury job or modified work.

(2) The employer shall not require the worker to sign any medical release form, other than the WCA approved worker's authorization for use and disclosure of health records, as a condition of receipt of workers' compensation benefits. If a health care provider refuses to accept the WCA approved worker's authorization for use and disclosure of health records, the worker may be required to execute the health care provider's requested release.

(3) The employer shall sign any notice of accident form on the date submitted by the worker.

(4) The employer shall report every accident to their insurer or, in the case of a self-insured employer or member of a self-insurance group, their claims administrator, whether or not the employer considers the claim to be valid, within 72 hours of the earlier of:

(a) actual knowledge of the accident by the employer; or

(b) presentation of a notice of accident form to the employer.

(5) An insured employer is prohibited from making any payment of statutory workers' compensation benefits directly to a worker, the dependents of a worker, or to a health care provider on behalf of a worker, except when the employer is a self-insurer, or member of a group self-insurance program, certified by the director. Payments of statutory benefits by a certified self-insurer or a member of a certified group self-insurance program must be made by the authorized claims administrator for the self-insurance program. This prohibition does not preclude any employer from paying a worker his or her full wage or salary pursuant to a wage continuation program, or from paying wages or salary to a worker for limited or light duty employment.

(6) Employers who are subject to the Act but uninsured at the time of a compensable accident shall pay statutory workers' compensation benefits directly to a worker or eligible dependent, or HCP upon request. Any uninsured employer paying a claim under this subsection shall inform the director in writing within 10 days of the initial payment, and shall provide the employer's business location, the total number of employees, and the worker's name, address, and benefit status. The director may impose upon the employer any conditions regarding the manner of payment of benefits as may reasonably be required to protect the interests of the worker and insure compliance with the act.

[5/26/87, 6/20/89, 1/24/91, 6/1/96; 11.4.3.12 NMAC – Rn & A, 11 NMAC 4.3.12, 11/30/04; A, 10/1/15; Rn & A, 6/16/16]

11.4.3.14 CONDUCT OF ATTORNEYS AND REPRESENTATIVES APPEARING BEFORE THE WCA:

A. An attorney or other representative of a party may not engage in or advocate meritless claims or defenses when appearing before the WCA.

B. An attorney or other representative of a party shall be courteous and professional and shall be punctual for mediations and hearings.

C. Attorneys and other representatives of a party shall be attired in an appropriate manner, suitable to a court proceeding.

D. The director may sanction any attorney or representative who engages in the conduct proscribed by Subsections A, B and C of this Section or who violates any provision of the Act or these rules. In cases of repeated violations, or a single act of an egregious nature, and upon a written finding that the attorney or representative's behavior is not likely to be controlled by imposition of a fine, the director's sanctions may include suspension, termination or limitation of the right to practice before the WCA.

E. The director's imposition of a sanction against an attorney or representative shall be governed by the procedures in 11.4.5 NMAC.

[5/26/87, 6/1/96; 11.4.3.13 NMAC - Rn, 11 NMAC 4.3.13, 11/30/04; Rn & A, 6/16/16]

11.4.3.15 ENFORCEMENT:

Any violation of these rules may be investigated and penalized pursuant to the procedures in 11.4.5 NMAC.

[N, 6/16/16]

PART 4: CLAIMS RESOLUTION

11.4.4.1 ISSUING AGENCY:

Workers' Compensation Administration ("the WCA").

[11.4.4.1 NMAC - Rp, 11.4.4.1 NMAC, 1/1/2023]

11.4.4.2 SCOPE:

These rules apply to parties involved in claims arising under the Workers' Compensation Administration Act and Occupational Disease and Disablement Law (collectively "the act").

[11.4.4.2 NMAC - Rp, 11.4.4.2 NMAC, 1/1/2023]

11.4.4.3 STATUTORY AUTHORITY:

Section 52-5-4 NMSA 1978 authorizes the director to adopt reasonable rules and regulations for effecting the purposes of the act.

[11.4.4.3 NMAC - Rp, 11.4.4.3 NMAC, 1/1/2023]

11.4.4.4 DURATION:

Permanent.

[11.4.4.4 NMAC - Rp, 11.4.4.4 NMAC, 1/1/2023]

11.4.4.5 EFFECTIVE DATE:

January 1, 2023, unless a later date is cited at the end of a section.

[11.4.4.5 NMAC - Rp, 11.4.4.5 NMAC, 1/1/2023]

11.4.4.6 OBJECTIVE:

The objective of 11.4.4 NMAC is to establish rules governing the resolution of claim disputes under the act, including but not limited to the process for filing and service of pleadings and the conduct of mediation conferences, discovery, and formal hearings.

[11.4.4.6 NMAC - Rp, 11.4.4.6 NMAC, 1/1/2023]

11.4.4.7 DEFINITIONS:

See 11.4.1.7 NMAC.

A. "Initial pleading" means a workers' compensation complaint, application to workers' compensation judge, application to director, petition for lump sum payment, or notice of change of HCP that opens or reopens an action or case before the WCA.

B. "Insurer" means any workers' compensation insurance carrier, a self-insured association or group, an individual self-insured employer, or a third-party claims administrator operating in the state of New Mexico.

C. "Party representative" means an individual or firm that enters an appearance before the WCA to represent or advocate on behalf of a named party. This may include attorneys licensed to practice law in the state of New Mexico, as well as claims administration or adjusting personnel.

[11.4.4.7 NMAC - Rp, 11.4.4.7 NMAC, 1/1/2023]

11.4.4.8 OMBUDSMAN RULES:

A. An ombudsman shall provide information and facilitate communication regarding the act. An ombudsman is required to maintain a neutral position when providing information or facilitating communication. When responding to inquiries, an ombudsman shall:

(1) confer with workers, employers, insurers, HCPs or other interested persons;

(2) provide information or facilitate communication, when requested, about:

(a) individual rights and responsibilities established by the act;

(b) medical proof required to establish or deny the right to workers' compensation;

(c) HCP selection;

(d) mediation conferences, related forms, and other administrative practices and procedures;

(e) determination of disability;

(f) the right to representation by a lawyer or the right to proceed as a pro se party; and

(g) other disputes arising under the act;

(3) help workers, employers, insurers, HCPs or other interested parties complete administrative forms for submission to the administration;

(4) actively inquire into matters presented by workers, employers, insurers, HCPs or other interested persons. An ombudsman shall contact the parties involved and attempt to resolve the problem informally; and

(5) refer all inquiries concerning uninsured employers to the WCA employer compliance bureau.

B. When responding to inquiries, an ombudsman shall not:

(1) practice law or give legal advice;

(2) act as an advocate for any person;

(3) attend a mediation conference as a representative of a party;

(4) provide assistance to any party after the filing of a rejection of a recommended resolution;

(5) provide assistance to a party represented by an attorney;

(6) offer an opinion on whether to accept or reject a settlement offer or a recommended resolution; or

(7) be called as a witness in a mediation conference or adjudication proceeding before a WCA judge.

[11.4.4.8 NMAC - Rp, 11.4.4.8 NMAC, 1/1/2023]

11.4.4.9 FILING AND SERVICE:

A. General provisions:

(1) WCA employees shall be addressed in a courteous and respectful manner at all times.

(2) Unless otherwise stated or necessarily implied in these rules, the rules of civil procedure for the district courts of New Mexico shall apply to and govern all proceedings conducted pursuant to these rules.

(3) Pleadings filed with the WCA Clerk shall:

(a) include a caption identifying the state of New Mexico workers' compensation administration as the legal forum, the name of each party, a descriptive title of the document, and the WCA case number if one has been assigned; and

(b) contain a signature block which includes the signature of the party in interest or party representative(s) followed by the typewritten name(s), the mailing address, telephone number with area code and email address.

(4) Duplicate or multiple copies of the same pleading shall not be filed. Duplicate copies will not be docketed and may be destroyed.

(5) Amended or subsequent pleadings shall be clearly identified (e.g., "Second Complaint").

(6) Pleadings shall not be submitted to the clerk by facsimile transmission.

(7) Pleadings shall not be submitted with cover letters or correspondence.

(8) Parties shall use the mandatory forms available on the WCA website. Items on the mandatory forms may not be deleted, but additional information may be provided at the end of the text. Mandatory forms include:

(a) workers' compensation complaint;

(b) summons for workers' compensation complaint;

(c) worker's authorization for use and disclosure of health records;

(d) informal response to workers' compensation complaint;

(e) notice of acceptance or rejection of recommended resolution;

(f) application to workers' compensation judge;

(g) summons for application to workers' compensation judge;

(h) subpoena or subpoena duces tecum;

(i) request for setting;

(j) health care provider disagreement form;

(k) petition for lump sum payment;

(l) summons for petition for lump sum payment;

(m)joint request for expedited hearing;

(n) application to director; and

(o) summons for application to director .

(9) Filing of initial pleadings:

(a) The workers' compensation complaint shall be filed with a summons and, if filed by a worker, with an executed authorization to release the worker's medical information.

(b) The application to judge, application to director, or petition for lump sum payment shall be filed with a request for setting. A summons shall also be filed if no service of process has previously occurred in the case.

(10) WCA clerk's review of submitted pleadings:

(a) The clerk may reject pleadings that do not conform to these rules. Rejected pleadings will not be filed and will be destroyed.

(b) The clerk shall promptly notify the filing party or party representative of a rejection and the reason(s) for the rejection.

(c) The clerk's rejection of a pleading does not extend or stay the period in which a pleading is due or otherwise delay an applicable deadline.

(d) Reasons for rejecting a pleading may include, but are not limited to:

(i) the caption, WCA number, or party information is not correct;

(ii) the pleading is unsigned;

(iii) the document is incomplete or pages are missing;

(iv) the document is of such poor quality making the content unreadable;

(v) the pleading was not submitted on a mandatory form; and

(vi) initial pleadings to open or reopen the case were not submitted.

B. Electronic Filing:

(1) Effective January 1, 2018, unless exempted herein, all pleadings filed with the WCA shall be filed, served, and received by electronic means through the electronic filing portal on the WCA website.

(2) Electronic filing is not mandatory for pro se workers or for uninsured employers; however, pro se workers and uninsured employers are encouraged to register and use the WCA electronic filing portal. It shall be the duty of all parties not participating in electronic filing to keep the WCA clerk of the court informed of any change in mailing address while they are a party to a proceeding pending before the WCA.

(3) All insurers providing workers' compensation coverage in New Mexico shall register with the WCA with a single, general delivery, e-mail address for receipt of documents including initial pleadings. Insurers shall promptly update the WCA on any changes to the registered email address. Insurers shall confirm annually with the WCA, within the first two weeks of a new calendar year, their mailing address, phone number, and general delivery email address for service of documents. Non-compliance with registration and updating requirements may result in a referral for an administrative investigation and enforcement by the enforcement bureau.

(4) All party representatives, including attorneys and adjusters, shall register with the WCA with a single, general delivery, e-mail address and thereby consent to receive documents from other party representatives and the WCA at that address. Party representatives shall promptly update the WCA on any changes to the registered email address.

(5) Registered parties shall be familiar and comply with the WCA electronic filing requirements set forth in the WCA's electronic filing user guide available on the WCA website.

(6) The WCA shall not be responsible for inoperable email addresses, unread email, or undeliverable emails.

(7) Pleadings filed through the WCA electronic filing portal shall contain the electronic signature of the party in interest or party representative denoted by either a graphic version of the signature or an "s/" followed by signatory's typewritten name.

(8) The date that a pleading is filed through the WCA electronic filing portal is the filing date for the purpose of filing deadlines. For purposes of electronic transmission, a day begins at 12:01 a.m. and ends at midnight.

(9) Registered parties shall have access through the WCA electronic filing portal to case documents after the final date of disposition in accordance with WCA electronic storage capabilities. The clerk shall provide paper copies of pleadings to parties and party representatives upon receipt of a records request. The clerk shall charge a reasonable fee for each copy requested. If the requested copies are mailed, adequate postage for mailing must be paid to the clerk.

C. Service of process:

(1) Initial pleadings:

(a) The clerk shall serve initial pleadings on a responding party. Service shall be accomplished through the WCA electronic filing system for registered parties or by certified mail for pro se workers or uninsured employers who have not registered to use the WCA electronic filing system. When the clerk's attempt at service is unsuccessful, the clerk shall notify the filing party using the e-mail address or postal address provided at the time of filing. The filing party shall then be responsible for service on the responding party.

(b) An employer's insurer is the employer's registered agent for service of process of an initial pleading. If an employer is uninsured, the initial pleading shall so state and the clerk shall then serve the uninsured employer and the uninsured employers' fund separately.

(2) All other pleadings:

(a) All pleadings generated by the WCA, including but not limited to orders and notices, shall be electronically served by the clerk except that the clerk shall serve all unregistered pro se workers and uninsured employers by U.S. mail.

(b) The clerk shall serve notice of all other filed pleadings on registered parties and the parties shall be responsible for logging into the WCA electronic filing portal to access said pleadings.

(c) Unregistered pro se workers and uninsured employers shall be responsible for service on all parties of record. Service on unregistered pro se workers and unregistered uninsured employers shall be the responsibility of the filing party.

D. The clerk shall accept a notice of lien filed by the child support enforcement bureau of the New Mexico department of human services. The notice of lien shall state the worker's name and social security number, and the total dollar amount of the lien. The notice of lien shall include a copy of the district court order requiring the payment of child support by the worker.

[11.4.4.9 NMAC - Rp, 11.4.4.9 NMAC, 1/1/2023]

11.4.4.10 MEDIATION RULES:

A. Mediation of complaints:

(1) The director's designee, a mediator, shall evaluate all initial complaints in new cases.

(2) The mediator shall evaluate and mediate the merits of the complaint for jurisdiction, proper parties, compensability, the nature and extent of any benefits due the worker, and the strength or availability of any defenses. A mediator may also evaluate the compliance of the parties with the mediation rules.

B. Mandatory production:

(1) The purpose of mandatory production is to ensure that the parties and the mediator have access to all pertinent information regarding the issues disputed in the complaint.

(2) No later than five days before the mediation, the parties shall exchange all of the following within the parties' possession:

(a) medical records, including unpaid bills;

(b) payroll records, including average weekly wage calculations;

(c) job description;

(d) witness statements;

(e) documents and correspondence regarding the initial selection of HCP;

(f) indemnity and payment ledgers; and

(g) any other documents related to a claim or defense.

(3) The documents outlined above need not be produced if they are unrelated to a claim or defense, were previously produced, or if there is a good faith objection or privilege.

(4) Parties shall deliver mandatory production and an exhibits list directly to the mediation bureau no less than five days before the scheduled mediation conference. Mandatory production delivered to the mediation bureau shall not be part of the case record, although parties may file a notice with the clerk indicating compliance with the rule. Mandatory production shall be destroyed by the WCA following issuance of the recommended resolution.

C. Mediation conferences:

(1) Responses:

(a) Respondent shall file an informal response to the complaint not less than five days prior to the mediation conference.

(b) The response shall include a statement of facts and affirmative defenses together with a short summary of reasons for denials of any benefits claimed.

(c) Respondent may file an answer as set forth in this rule, in lieu of an informal response.

(2) By agreement, and subject to the mediation bureau calendar, the parties may reschedule a mediation conference to occur within 75 days of filing the complaint. In doing so, the parties stipulate to waiving the 60-day requirement for the WCA to issue a recommended resolution. Requests by the parties to reschedule a conference that is set in less than five days will only be granted upon demonstration of good cause shown as determined by the mediation bureau chief.

(3) Mediation conferences shall be held using an online web platform and/or telephonic conferencing. At least five days before the scheduled conference, any party may request an in-person mediation conference. All parties must agree to an in-person mediation conference, or it must be approved by the director or director’s designee. If the mediation conference is held through an online web platform, the parties will enable and use video, if available. Recording of mediation conferences is prohibited.

(4) The mediator may recommend an amendment to the caption of the complaint to correct an improperly named party or to reflect the joining of appropriate parties who otherwise have notice or attended the mediation conference.

(5) Purposes of mediation conferences and duties of the mediator:

(a) to bring the parties together and attempt to negotiate or settle disputed issues by discussing the facts and applicable law pertaining to the complaint and by suggesting compromises using mediation and other dispute resolution techniques;

(b) to define, evaluate, and make recommendations on all issues remaining in dispute;

(c) to state an opinion of the strength of any argument or position, and the possible results if the complaint is tried by a judge;

(d) to issue a recommended resolution within 60 days of the filing of the complaint unless waived by the parties;

(e) to identify all potential parties;

(f) to make a recommendation regarding attorney's fees; and

(g) to refer any violation of these rules or the act to the enforcement bureau for administrative investigation and enforcement, if appropriate.

(6) Parties are encouraged to communicate before the mediation conference and, if possible, reach a stipulated agreement, of terms to resolve the complaint. When submitting their proposed stipulated agreement to the mediation bureau the parties should utilize the stipulated recommended resolution form provided on the WCA website. If the stipulated agreement is provided before the mediation conference and is adopted by the assigned mediator, the mediation conference will be vacated, and the stipulated recommended resolution will be filed with the clerk of the court. A scheduled mediation conference can only be vacated at the direction of the assigned mediator or mediation bureau chief.

(7) Conduct of mediation conferences:

(a) Mediation conferences shall be in the control of the mediator.

(b) Each party shall come to the mediation conference prepared to discuss settlement of the case. Parties will ensure that they are available for the entirety of the time scheduled for the mediation conference and will ensure that if they are participating through an online web platform or telephonically that there are no background distractions.

(c) The mediator shall be addressed in a courteous and respectful manner by all parties.

(d) Mediation conferences are informal meetings with no transcript of the proceedings. No motions practice shall be allowed. Conferences shall be conducted in a civil, orderly manner, with all presentation geared towards discussion and negotiation of disputed issues. Attorneys and other representatives of the parties shall be attired in an appropriate manner, suitable to a court proceeding.

(e) Employer and attorney, or a representative if no attorney has entered an appearance, and worker and attorney, if any, shall attend the mediation conference. If a party fails to attend a scheduled mediation conference without a reasonable excuse as determined by the mediator, the mediator may still file a recommended resolution based upon the information provided by the attending party and applicable workers' compensation law. If the non-attending party rejects the recommendation, the assigned workers' compensation judge in the interest of justice may refer the matter back to mediation.

(f) Appearances by a legal assistant, paralegal, or other agent or employee of the attorney, in lieu of a personal appearance by an attorney, are prohibited. This rule does not prohibit the appearance of an employer through an adjuster or third-party administrator, nor does it prohibit a worker from attending a mediation conference with the assistance of an unpaid assistant. The attendance and level of participation of any other person at the mediation conference is subject to the discretion of the mediator.

(g) All issues may be considered at the discretion of the mediator when consistent with the goals of economy and fairness, and when an opportunity can be granted for additional response.

(h) The parties are encouraged to prepare written narratives and summaries to assist the mediator.

D. Recommended resolutions:

(1) The mediator shall file the recommended resolution within 60 days of the filing of the complaint unless the parties have stipulated to a waiver of the 60-day requirement and the mediator approves. The mediator may allow additional time to supplement the file prior to issuance of the recommended resolution.

(2) The clerk shall serve a copy of the recommended resolution on parties.

(3) Service on an unregistered party by certified mail domestic return receipt with a signature and date of receipt shall create a presumption of receipt of the recommended resolution on the indicated date. Service through My E-File shall create a presumption of receipt upon transmission.

(4) An acceptance or rejection of the recommended resolution must be filed with the WCA clerk on or before the 30th day after receipt of the recommended resolution. A rejection shall contain a statement of the party's reasons for rejecting the recommended resolution.

(5) Effect of recommended resolution:

(a) The recommended resolution and its terms are not binding and do not reflect an agreement between the parties until all parties have accepted the recommendation or fail to timely reject the recommended resolution.

(b) A rejection in whole or in part of a recommended resolution shall result in assignment to a judge for a determination of all issues in a formal hearing.

(c) Once a party has filed an acceptance or a rejection of a recommended resolution, the party is bound to the acceptance or rejection, unless permitted to withdraw it by written order of the director. The party requesting leave to withdraw a previously filed acceptance or rejection shall submit a written application and proposed order to the director, reciting good cause, within 30 days following receipt by that party of the recommended resolution. The clerk may cancel any judge assignment when a rejection is withdrawn.

(d) If a rejection appears to be untimely, the clerk shall notify the parties of the untimeliness. A party requesting that a rejection be considered timely shall submit a written application to the director and proposed order within 60 days of receipt of the recommended resolution. The application shall state the grounds to support a finding of excusable neglect.

E. Penalties:

(1) Willful failure or refusal to participate in the mediation process shall not preclude the issuance of a recommended resolution, and may constitute bad faith or unfair claims processing.

(2) The assigned mediator, or any party, may refer any such violation for administrative investigation and enforcement by the enforcement bureau.

(3) Failure to comply with the mediation rules, including those requiring mandatory production of evidence and submission of an informal response five (5) days prior to the mediation conference, may subject a party or party's representative to penalties as provided in the Act or the rules of the WCA.

F. Amendment of recommended resolution: The recommended resolution may be amended by a mediator or by the agreement of the parties within the time allowed for acceptance or rejection of a recommended resolution, which time shall not be expanded or modified in any way by the issuance of an amended recommended resolution.

G. A mediator's notes taken in conducting a mediation conference are confidential, not subject to discovery, and shall not be admissible as evidence in any legal proceeding. A mediator may not be called to testify in a workers' compensation or other proceeding regarding a mediation conference they facilitated.

[11.4.4.10 NMAC - Rp, 11.4.4.10 NMAC, 1/1/2023]

11.4.4.11 DIRECTOR'S MATTERS:

A. The following matters shall be pleaded on the mandatory application to director form:

(1) judge assignment disputes;

(2) request for relief from an untimely rejection of a recommended resolution;

(3) request to withdraw an acceptance of a recommended resolution;

(4) appointment of a recipient of benefits for a minor child or an incompetent worker;

(5) approval of an out of state health care provider, if necessary;

(6) attorney withdrawal when no judge is assigned;

(7) objection to case management or utilization review by the WCA; and

(8) any other matter within the director's jurisdiction.

B. A party responding to an application to the director may submit a written response.

C. Recipient of benefits for minors and incompetent workers:

(1) General provisions.

(a) "Recipient" means the individual or entity approved to receive benefit payments on behalf of a minor child or incompetent worker pursuant to Section 52-5-11 NMSA 1978.

(b) The director may designate a judge to resolve applications brought pursuant to Section 52-5-11 NMSA 1978 when other matters are pending before the judge.

(2) Designation of recipient.

(a) An application to the director and request for setting shall be filed and accompanied by a summons if one has not previously been issued in the case.

(b) The application shall have attached any applicable marriage certificate, birth certificates for all known minor children, or a record reflecting worker's incompetency.

(c) The proposed recipient shall provide a copy of a driver's license or other state issued identification at the hearing.

(d) When it is in the best interests of the minor child or incompetent worker, the director may designate a recipient who does not have care, custody, and control of a minor or incompetent worker.

(e) When it is in the best interests of a minor child or incompetent worker, the director may designate a professional or corporate recipient for a minor or incompetent worker. The employer shall pay reasonable administrative fees requested by the alternative recipient and approved by the director.

(f) As a condition of appointment, the recipient must agree to manage and protect benefit payments for the benefit of the minor child or incompetent worker.

(g) A minor child who has reached the age of 16 may apply to the director to receive benefit payments directly.

(3) Accounting of benefits.

(a) The director may require an accounting of how benefits were used on behalf of a minor child or incompetent worker. Unless otherwise ordered by the director, accountings shall be submitted on the approved form and shall be submitted quarterly for the first year and annually thereafter.

(b) The director may suspend benefit payments, in whole or in part, for failure to provide the ordered accounting of benefits or failure to comply with any other condition placed on the recipient.

[11.4.4.11 NMAC - Rp, 11.4.4.11 NMAC, 1/1/2023]

11.4.4.12 HCP RULES:

A. HCP general provisions:

(1) These rules apply to claims governed by the 1990 amendments to the act.

(2) The assigned judge shall decide HCP choice disputes. If no judge has been assigned, a judge shall be appointed by the clerk solely to resolve the HCP dispute.

(3) The HCP judge appointed by the clerk is not assigned pursuant to Subsection C of Section 52-5-5 NMSA 1978. The peremptory right to disqualify a judge allowed by Subsection D of Section 52-5-5 NMSA 1978, does not apply to the appointment of the HCP judge.

B. HCP choice:

(1) Emergency care: The provision of emergency medical care shall not be considered a choice of a treating HCP by the employer or worker.

(2) Selection of HCP:

(a) The employer shall decide either to select the initial HCP or to permit the worker to select the initial HCP. The decision made by the employer shall be made in writing to the worker. Employer may communicate the decision to select the initial HCP or to permit the worker the selection by any method reasonably calculated to notify workers. The employer may use a wallet card, a poster stating the decision posted with the WCA poster, a flyer inserted semi-annually with pay checks, or any other method employer reasonably believes will be successful in alerting the worker.

(b) If the decision of the employer is not communicated in writing to the worker, then the medical care received by the worker prior to written notification shall not be considered a choice of treating HCP by either party.

(c) Medical treatment provided to the worker prior to the employer's written communicated decision to either select the HCP, or to permit the worker to select the HCP, shall be considered authorized health care, the cost of which shall be borne by the employer.

(d) If a provider not licensed in New Mexico treats a worker, the employer must, upon receipt of the initial billing from that provider, either request approval of the out-of-state HCP pursuant to the act, or immediately notify the worker in writing that the provider is not acceptable pursuant to Section 52-4-1 NMSA 1978.

C. Referrals by an authorized HCP:

(1) A referral by an authorized HCP to another HCP shall be deemed a continuation of the selection of the referring HCP.

(2) The 60 day effective period allowed in Subsection B of Section 52-1-49 NMSA 1978, is not enlarged by the HCP's referral.

D. Notice of change of HCP:

(1) The 60 day period of initial HCP choice shall run from the date of first treatment or examination by, or consultation with, the initial HCP.

(2) The notice of change of HCP shall provide:

(a) name, address and telephone number of worker, employer and insurance carrier, if any;

(b) date and county of accident;

(c) nature of injury;

(d) the names, addresses and telephone numbers of the current and proposed HCPs;

(e) the signature of the party requesting the change of HCP; and

(f) the following text: "your rights may be affected by your failure to respond to this notice; if you need assistance and are not represented by an attorney, contact an ombudsman of the WCA."

(3) After 50 days of the initial 60 day period, the party denied the initial selection may give notice of change of HCP.

E. Issuance of notice of change: The party seeking the change of HCP shall issue a notice of change of HCP. A copy of the notice shall be provided to the other party 10 days prior to provision of any medical treatment by the proposed HCP.

F. Effective date of notice of change:

(1) The notice of change shall be effective, unless an objection is filed with the clerk within three days from receipt of the notice of change. A copy of the notice of change shall be attached to any objection filed with the clerk. If no objection is filed, the HCP declared on the notice of change form shall be designated as the authorized treating HCP and may begin treating the worker 11 days after issuance of the notice of change.

(2) An objection can be filed after the three day period, but any bills incurred for medical treatment rendered after the effective date of the notice of change and prior to a ruling by the judge on the objection shall be paid by the employer. A party required to pay for medical treatment pursuant to this rule shall not be deemed to have waived any objections to the reasonableness or necessity of the treatment provided.

G. Responsibility for payment of HCP services:

(1) The employer shall be responsible for all reasonable and necessary medical services provided by an authorized HCP from the date the notice of change is effective.

(2) The worker shall be responsible for any medical services rendered by an unauthorized HCP.

(3) The designation of an authorized HCP shall remain in effect until modified by agreement of the parties or by order of the judge.

(4) Effective July 1, 2013, all medical services rendered pursuant to recommended treatment contained in the most recent edition of the official disability guidelines™ (ODG) is presumed reasonable and necessary; there is no presumption regarding any other treatment.

H. Reasonable and necessary disputes: Disputes concerning the reasonableness and necessity of prescribed treatment may be brought before the administration pursuant to 11.4.7.11 NMAC.

I. Hearing on objection to notice of change: If an objection to notice of change of HCP is filed with the clerk, the objection shall be heard by the judge within seven days from the filing of the objection. The judge may issue a minute order at the conclusion of the hearing on the objection.

J. Request for change of HCP: If a disagreement arises over the selection of a HCP, and the parties cannot otherwise agree, a request for change of HCP must be submitted to the clerk. The request for change of HCP may be submitted at any time, including the initial 60 day period.

K. Request for change of HCP form:

(1) The request for change of HCP must state the specific reasons for the requested change.

(2) The request for change of HCP may suggest an alternative HCP's name.

L. Burden of proof: The applicant requesting a change of HCP must prove the authorized HCP is not providing the worker reasonable and necessary medical care. If the applicant fails to establish the provision of medical care is not reasonable, the request for change shall be denied.

M. Hearing on request for change of HCP: The request for change of HCP disagreement shall be heard by the judge within seven days from the filing of the request for change of HCP. The judge may issue a minute order at the conclusion of the hearing on the request for change.

[11.4.4.12 NMAC - Rp, 11.4.4.12 NMAC, 1/1/2023]

11.4.4.13 ADJUDICATION PROCESS:

A. Assignment of judge:

(1) Upon receipt of a timely rejection of a recommended resolution, an application to judge or petition for lump sum payment, the clerk shall assign a judge to the case and shall serve notice on all parties. Pro se parties shall be served by certified mail unless registered with the WCA electronic filing system. This notice shall be considered the initial notice of judge assignment.

(2) Each party shall have the right to disqualify a judge by filing a notice of disqualification of judge no later than 10 days from the date of filing of the notice of assignment of judge. The clerk shall assign a new judge to the case and notify all registered parties. A party who has not exercised the right of disqualification may do so no later than 10 days from the filing of the notice of reassignment of judge.

(3) No action may be taken by any judge on a case until the expiration of the time for all parties to exercise the peremptory right to disqualify a judge. To expedite the adjudication process, the parties may file a joint waiver of the right to disqualify a judge. Such waiver shall forever bar the parties' right to disqualify a judge in that case.

(4) Disputes related to the assignment, re-assignment, or disqualification of a judge shall be raised by written application to the director, which shall be filed with the clerk.

(5) The director may designate an on-call judge for the limited purpose of reviewing and approving lump sum payment petitions on a voluntary walk-in basis. The director shall provide notice to the public about the schedule for any on-call judge availability. Such designation shall not be considered a judge assignment or reassignment under this section if further adjudication action is needed.

B. Application to judge:

(1) Unless otherwise provided, all claims under the act shall be initiated by filing a complaint form, and the clerk shall schedule the claim for mediation. A party may file an application to judge, and the clerk shall assign the case to a judge to adjudicate the following limited forms of relief only:

(a) physical examination pursuant to Section 52-1-51 NMSA 1978;

(b) independent medical examination pursuant to Section 52-1-51 NMSA 1978;

(c) determination of bad faith, unfair claims processing, fraud or retaliation;

(d) supplemental compensation order;

(e) award of attorney fees;

(f) stipulated reimbursement agreement pursuant to Section 52-5-17 NMSA 1978;

(g) consolidation of payments into quarterly payments (not a lump sum under Section 52-5-12 NMSA 1978);

(h) approval of limited discovery where no complaint is pending before the agency, including but not limited to approval of a communication to a treating health care provider when the parties cannot otherwise agree on the form or content; or

(i) request for release of medical records.

(2) If any claim not enumerated above is raised on an application to judge, the application shall be deemed a complaint and the clerk shall refer it for mediation.

(3) For an application seeking relief under subparagraphs (a) (b) (c) (d) (h) or (i) of Paragraph 1 of Subsection A of 11.4.4.13 NMAC above, an application to judge may not be filed if a complaint has been filed in the same case and the time period for acceptance or rejection of the recommended resolution has not yet expired. Any other claim for relief arising during that time period shall be raised in the mediation process.

(4) Following the rejection of a recommended resolution and during the pendency of a complaint, those claims for forms of relief set forth above shall be sought through motion rather than an application.

(5) Responses to an application to a judge, if any, shall be filed within 15 days of service. A response to application to judge may not raise new claims or issues.

(6) All applications to a judge shall be accompanied by a summons, if one has not previously been issued in the case, and a request for setting. Hearings as necessary may be scheduled by the assigned judge.

C. Petition for lump sum payment:

(1) Parties may request approval of a lump sum payment by filing the WCA mandatory petition form, which shall be signed and verified by the worker or the worker’s dependents.

(2) Petitions under Subsection D of Section 52-5-12 NMSA 1978 shall also be signed by the employer or its representative or, where applicable, the UEF.

(3) Parties to lump sum payment petitions filed pursuant to Subsection D of Section 52-5-12 NMSA 1978 shall attend a lump sum payment approval hearing for a determination that the agreement is voluntary, that the worker understands the terms, conditions and consequences of the settlement agreement or any release, and that the settlement is fair, equitable and provides substantial justice to the parties. For all other joint lump sum payment petitions, a hearing may be held at the discretion of a judge pursuant to Sections 52-5-12 and 52-5-13 NMSA 1978.

(4) Any lump sum payment petition filed pursuant to this rule shall comply with Section 52-1-54 NMSA 1978 and counsel for the parties may concurrently seek approval or award of attorney fees, if appropriate, to be heard in the context of the lump sum payment hearing.

(5) Written responses to the petition, if any, shall be filed within 10 days of service of a petition.

(6) All petitions shall be accompanied by a request for setting, and a summons, if one has not previously been issued in the case. Such hearings will be promptly scheduled by the assigned judge.

D. The adjudication process for complaints shall commence upon the clerk's receipt of a timely rejection of a recommended resolution. An answer to complaint shall be filed within 20 days of the filing of the initial notice of assignment of judge unless already filed in lieu of the informal response. The answer shall admit or deny each claim asserted in the complaint. Any affirmative defenses to the complaint shall be stated in the answer.

E. Amended complaints may be filed during the adjudication process only by leave of the assigned judge or by written consent of the adverse party. Leave shall be freely given when justice so requires. Amended complaints filed during the adjudication process shall not be referred back to the mediation process nor shall a new recommended resolution be issued.

F. The judge may hold pre-trial conferences as necessary, establish appropriate deadlines, mandate evidentiary disclosures between the parties, approve formal discovery, and otherwise control all other aspects of the adjudication process in order to enable the prompt adjudication of the case.

G. Discovery: Authorized interrogatories, requests for production or inspection, requests for admissions, depositions, and subpoenas shall be governed by the rules of civil procedure of the district courts of New Mexico.

H. Depositions: Upon the filing of a complaint and by written stipulation of the parties, good cause is presumed and depositions may be taken of the worker, employer representative, authorized HCP, and any provider of an independent medical examination.

(1) Reasonable notice shall be deemed to be not less than five days prior to the date set for the deposition.

(2) The original deposition transcript shall be kept by the party who noticed the deposition.

(3) The parties shall make a good faith effort to obtain a completed and signed form letter to HCP prior to setting the deposition of the HCP.

(4) Deposition testimony of authorized HCPs shall be admissible in lieu of live testimony.

(5) Depositions of other witnesses identified by the parties may be admissible, if noticed for use at trial, provided that nothing prohibits either party from issuing a subpoena to order the deposed witness to testify at trial.

(6) A party intending to use a deposition shall notify the other party of the intended use at least 10 days prior to trial. Any objection to the use of the deposition shall be determined at the adjudication hearing.

(7) The party that notices a deposition may request the return of the original transcript after final disposition of the case. The clerk may return a transcript or any exhibits tendered to the submitting party or its attorney. If no request for the deposition or exhibits is received, the deposition or exhibits will be destroyed. Notice of intent to destroy exhibits is published in the New Mexico bar bulletin.

I. Subpoenas: The clerk may issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico who represents a party before the WCA may also issue and sign a subpoena as an officer of the court on behalf of the WCA.

J. Appointment of interpreter:

(1) It is the responsibility of the parties to determine if interpretive services are necessary.

(2) An interpreter may be appointed by the judge, director, or mediator. The interpreter shall be court-certified, except that a non-certified interpreter may serve at mediation conferences.

(3) The employer shall be responsible for the cost and arrangement of a qualified interpreter for the hearing or mediation conference. This responsibility may fall to the uninsured employers' fund when named as a party.

K. Motions: All motions, except those made in open court, shall be written and comply with the New Mexico district court rules of civil procedure.

L. Settlement/pre-trial conferences: The judge shall have discretion to schedule settlement conferences. A settlement conference facilitated by the assigned judge shall require the consent of all parties either on the record or in writing.

M. Orders: Proposed orders or other documents requiring a judge's signature shall not be filed with the clerk but shall be submitted directly to the judge.

N. Admissibility of evidence:

(1) Live medical testimony shall not be permitted, except by an order of the judge.

(2) A judge may admit evidence, including hearsay evidence, provided that the evidence is relevant, has sufficient indicia of reliability and authenticity, and will assist the judge in determining a fact or issue in dispute, including, but not limited to:

(a) personnel records, payroll records, or other employment files for worker;

(b) pre-injury medical records of treatment received for a period of 10 years prior to the date of injury through the time of hearing on the merits;

(c) form letters approved by the WCA;

(d) records of authorized health care providers and their referrals, including functional capacity evaluations;

(e) reports of independent medical examinations ("IMEs") performed pursuant to the act or as otherwise agreed by the parties;

(f) toxicology or drug and alcohol test reports;

(g) records of the office of medical examiner, including autopsy and toxicology reports; or

(h) records of the New Mexico board of pharmacy prescription monitoring program.

O. Continuance of hearing: A judge may continue an adjudication hearing for good cause shown. All discovery, disclosure, and exchange deadlines shall be extended by a continuance unless otherwise ordered.

P. Trials and other hearings:

(1) Parties shall appear personally at the adjudication hearing, without the necessity of a subpoena. Parties shall appear personally or through their legal representatives at all other hearings properly noticed, unless excused by a judge.

(2) Failure to appear at a hearing after proper notice and without good cause may result in the imposition of sanctions.

(3) The employer shall make all necessary arrangements and pay all costs incurred for telephonic conference calls. The director or judge may appear telephonically for the conference call.

(4) All hearings shall be recorded by audio tape recording or by any other method approved by the director.

(5) Prior to commencement of the adjudication hearing, the parties shall confer with the court monitor to ensure that all exhibits are properly marked. Any exhibit to be jointly tendered shall be marked and offered as a joint exhibit. All other exhibits shall be marked by party and exhibit number or letter. Depositions shall be marked as exhibits.

(6) Under exceptional circumstances and in the interest of justice, a judge has discretion to direct or allow supplementation of evidence within 10 days of the close of the adjudication hearing.

Q. Consolidated cases:

(1) A judge may order the consolidation of cases when the issues or facts in dispute in the cases are common or when consolidation will expedite resolution of the issues or facts in dispute.

(2) A party may request an order for consolidation of cases by filing a motion requesting consolidation in each case sought to be consolidated and serving each party and their counsel, if any, for each case sought to be consolidated.

(3) Motions to consolidate cases will be adjudicated by the final judge assigned to the case with the lowest case number.

(4) A judge’s order of consolidation shall be filed in each consolidated case.

(5) After consolidation, all pleadings shall only be filed in the case with the lowest case number and the case number of each consolidated case shall appear in the caption of all pleadings. The caption of the lowest case number shall appear on all pleadings.

(6) All parties of record and their counsel shall have access to view the filed pleadings for each case.

(7) In the event of an appeal, the notice of appeal shall include the case number for each consolidated case and shall be filed in the case with the lowest case

number. The record proper on appeal shall include all pleadings in each of the consolidated cases.

R. Release of medical records:

(1) A judge shall decide medical record disputes. If no judge has been assigned, the clerk shall appoint a judge upon a party filing an application to judge for release of medical records.

(2) An application to judge for the release of medical records shall be allowed notwithstanding the provisions of any other rule, and shall be disposed of separate and apart from all rule provisions and procedures pertaining to resolution of other disputes arising from a claim for benefits.

(3) The judge will determine whether the protected health information in controversy is material to the resolution of any matter presently at issue or likely to be at issue in the administration of the claim and shall order the release of protected health information upon agreement of the parties or a finding of materiality by a preponderance of evidence.

(4) A bench order or formal order of release of medical records shall have the force of law with respect to the parties and to the HCP or medical facility.

(5) If an HCP or medical facility fails to provide records after a judge has ordered the release of records pursuant to this rule, then the party to receive the records may notify the HCP or medical facility through My E-File of the obligation to produce the records and an endorsed copy of the order. If the records are not produced within five days of service of the notice, the payer's obligation to timely pay shall be tolled until the actual production of the records.

(6) If any judge involved in the adjudication of the case finds that the withholding of records of health information after an order to produce has obstructed the efficient administration or adjudication of a case, then the judge may schedule a hearing to determine if the withholding of records was unreasonable. If the judge finds after notice and an opportunity to be heard that the withholding of records by the HCP or medical facility is unreasonable, the director may find the HCP or medical facility in violation of this rule and assess a penalty pursuant to Section 52-1-61 NMSA 1978 (1990).

[11.4.4.13 NMAC - Rp, 11.4.4.13 NMAC, 1/1/2023]

11.4.4.14 WITHDRAWAL AND SUBSTITUTION OF COUNSEL:

A. The entry of appearance of an attorney or a firm for a party in a pending case shall not be withdrawn without permission of the judge or by the director if no judge has been assigned to the case. A motion to the judge or application to director requesting

withdrawal shall be filed with the clerk and shall indicate whether the client concurs with the withdrawal.

B. A motion to the judge or application to director seeking withdrawal of counsel shall clearly state whether the withdrawing attorney is asserting a request for attorneys' fees for services rendered. If no statement is made, and if the motion or application to withdraw is granted, the withdrawing attorney is barred from thereafter seeking attorneys' fees for services rendered on the case. A statement asserting a request for attorneys' fees shall serve as notice to the parties and new legal counsel, if any.

C. When a new attorney assumes a case, a notice of substitution of counsel shall be filed and served on each party. The notice shall contain the new attorney's mailing address, phone number, and e-mail address.

D. The attorney of record shall be subject to notice of hearings or other proceedings until permitted to withdrawal from the case.

[11.4.4.14 NMAC - Rp, 11.4.4.14 NMAC, 1/1/2023]

11.4.4.15 APPROVAL OF ATTORNEY FEES AND LIENS:

A. Parties may request the award of attorney fees by application to a judge. The application must contain sufficient information to determine if the fee requested is appropriate. The contested application should indicate the date and terms of any offers of settlement made; the present value of the benefits awarded the worker, including, but not limited to medical expenses and past and future weekly benefits; the total number of hours reasonably expended by counsel to secure benefits for the worker; the hourly billing rate of counsel; and any other relevant information for the determination of fees.

B. No attorney fees shall be paid until the case has been settled or adjudged. For purposes of the act, settled or adjudged includes:

(1) the entry of a compensation order; or

(2) the acceptance by both parties of a recommended resolution; or

(3) an order granting or denying any petition or application when no other cases are pending before the administration; or

(4) the WCA has administratively closed the file; or

(5) when there is a good faith belief that all pending issues or questions have been resolved, whether or not the jurisdiction of the administration has been invoked.

C. An attorney withdrawing from representation during the pendency of a case and before the case has been settled or adjudged shall assert a request for attorney fees, if

any, within the motion to judge or application to director seeking to withdraw as counsel. The request for attorney fees shall not be decided until the case is settled or adjudged.

D. When a subsequent attorney requests attorney fees, the attorney shall give notice to the withdrawn attorney by serving on the withdrawn attorney a copy of all relevant pleadings at the time of filing.

E. No attorney fee lien shall be filed in a case until a judge has awarded fees pursuant to Section 52-1-54 NMSA 1978.

[11.4.4.15 NMAC - Rp, 11.4.4.15 NMAC, 1/1/2023]

11.4.4.16 SANCTIONS:

A. The judge may sanction any party, attorney, or personal representative for conduct that interferes with the orderly administration of the court or a hearing, including, but not limited to:

(1) rejecting a recommended resolution without reasonable basis, or without reasonable expectation of doing better at formal hearing;

(2) failing to obey a lawful order of the court;

(3) failing to appear for a hearing or deposition; or

(4) advancing a meritless position in order to harass or vex the opposing party.

B. The judge will conduct a separate hearing on the imposition of sanctions according to the procedures in this part.

C. As a sanction, the judge may do any or all of the following:

(1) assess reasonable attorney’s fees against a party pursuant to Section 52-1-54 NMSA 1978;

(2) reduce the fees of an attorney for a party;

(3) assess prejudgment interest from the date of the recommended resolution in the claim;

(4) strike a claim or defense;

(5) limit the evidence which may be introduced;

(6) dismiss an action;

(7) order the suspension or forfeiture of compensation benefits;

(8) assess expenses and costs against a party; or

(9) impose a civil penalty pursuant to Sections 52-1-28.1, 52-1-28.2, 52-3-45.1 or 52-3-45.2 NMSA 1978.

D. For patterns of misconduct beyond a single case, the judge may refer the matter to the WCA enforcement bureau for further investigation, administrative prosecution and imposition of penalties.

[11.4.4.16 NMAC - Rp, 11.4.4.16 NMAC, 1/1/2023]

11.4.4.17 SEALING OF PUBLIC COURT RECORDS:

A. Public court records filed with the clerk of court or offered as evidence in an administrative or adjudicative hearing shall not be sealed based solely on the agreement or stipulation of the parties.

B. The party requesting to seal court records subject to public inspection shall establish the same requirements for sealing court records as set forth in the rules of civil procedure for the district courts of New Mexico.

C. The order sealing the court records may seal the records from public inspection but shall not prohibit WCA staff from accessing the court record as necessary to enforce the provisions of the act.

[11.4.4.17 NMAC - Rp, 11.4.4.17 NMAC, 1/1/2023]

PART 5: ENFORCEMENT AND ADMINISTRATIVE INVESTIGATIONS

11.4.5.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11.4.5.1 NMAC - Rp, 11 NMAC 4.5.1, 10/1/2014]

11.4.5.2 SCOPE:

Rules apply to any party to a claim arising under the act and any person receiving medical payments from an employer under the act.

[11.4.5.2 NMAC - Rp, 11 NMAC 4.5.2, 10/1/2014]

11.4.5.3 STATUTORY AUTHORITY:

Section 52-5-4 NMSA 1978 (Repl. Pamp. 1991), authorizes the WCA to adopt reasonable rules and regulations for effecting the purposes of the act. Section 52-1-28.1 NMSA 1978 (Repl. Pamp. 1991), authorizes the director to promulgate rules and regulations regarding the prohibition against bad faith and unfair claims processing. Section 52-5-1.3 NMSA 1978 (Repl. Pamp. 1991), empowers the director to investigate, penalize or refer allegations of fraud. Section 52-1-61 NMSA 1978 (Repl. Pamp. 1991), authorizes the director to penalize persons who violate the provisions of the act.

[11.4.5.3 NMAC - Rp, 11 NMAC 4.5.3, 10/1/2014]

11.4.5.4 DURATION:

Permanent.

[11.4.5.4 NMAC - Rp, 11 NMAC 4.5.4, 10/1/2014]

11.4.5.5 EFFECTIVE DATE:

October 1, 2014, unless a later date is cited at the end of a section.

[11.4.5.5 NMAC - Rp, 11 NMAC 4.5.5, 10/1/2014]

11.4.5.6 OBJECTIVE:

The purpose of this rule is to provide a method for enforcement by the WCA of the prohibition against bad faith, unfair claims processing, fraud, and of any other obligation of a party or agent of a party under the act and the WCA rules and regulations.

[11.4.5.6 NMAC - Rp, 11 NMAC 4.5.6, 10/1/2014]

11.4.5.7 DEFINITIONS:

A. "Enforcement Bureau" means the division of the WCA charged with investigating and prosecuting violations of the act or WCA rules.

B. *See also* 11.4.1.7 NMAC.

[11.4.5.7 NMAC - Rp, 11 NMAC 4.5.7, 10/1/2014]

11.4.5.8 INITIATION OF INVESTIGATION:

A. Any person may bring an allegation of prohibited conduct under the act, including criminal fraud, bad faith, unfair claims processing, retaliation, or non-compliance with the requirements of the act, to the attention of the WCA’s enforcement bureau.

B. Any party may initiate a charge of bad faith, unfair claims processing, or retaliation by the filing of a complaint or an application to a judge.

C. The director may initiate an investigation of any act or pattern of action with potential for adverse impact upon the workers' compensation system by referring the matter for investigation to the enforcement bureau.

[11.4.5.8 NMAC - Rp, 11 NMAC 4.5.8, 10/1/2014]

11.4.5.9 CONDUCT OF INVESTIGATIONS:

A. The enforcement bureau may serve a notice of pending investigation to appropriate persons or entities by hand delivery or certified mail, domestic return receipt requested, or by electronic mail for those parties registered with the WCA.

B. The notice of pending investigation shall identify, with reasonable specificity, the persons or entities subject to the investigation, and shall describe the alleged prohibited conduct.

C. Upon receipt of the notice of pending investigation, complainants and subjects must cooperate in the investigation of the charge. Upon request of the WCA, a party shall produce documentary evidence or other information related to a charge within the party's possession or control.

D. Upon receipt of the notice of pending investigation, complainants and subjects must make available any supervisor or employee for the purpose of permitting WCA personnel to take a statement regarding the charge.

[11.4.5.9 NMAC - Rp, 11 NMAC 4.5.9, 10/1/2014]

11.4.5.10 ENFORCEMENT OF THE ACT BY THE DIRECTOR:

A. These rules establish a procedure for the administrative enforcement of the act by the director. These rules do not govern procedure for criminal prosecution by the WCA's enforcement bureau.

B. Administrative enforcement proceedings shall be presided over by the director or designee and shall be conducted with dignity, in a manner conducive to deliberation.

C. Administrative enforcement hearings shall be recorded by a certified court monitor in compliance with the rules governing the recording of judicial proceedings adopted by the New Mexico supreme court.

D. No right of peremptory disqualification: The peremptory right of disqualification does not apply to proceedings conducted under the provisions of this rule.

E. The rules of civil procedure shall apply where not inconsistent with the provisions of these rules. The rules of evidence shall not apply. The rules of privilege shall apply to the extent that they are required to be recognized in civil actions in the district courts of New Mexico.

[11.4.5.10 NMAC - Rp, 11 NMAC 4.5.10, 10/1/2014; A, 1/1/2023]

11.4.5.11 INITIATION OF ADMINISTRATIVE ENFORCEMENT PROCEEDINGS:

A. Commencement of action:

(1) An action may be commenced by the issuance of a notice of administrative enforcement proceeding by the enforcement bureau chief. The notice shall be delivered immediately to the director.

(2) The notice of administrative enforcement proceeding shall be in the form of a signed statement containing the name, address and phone number of the violator, a statement of facts, the specific violation charged and the specific rule or statutory provision violated.

B. Probable cause determination:

(1) A probable cause determination shall be made by the director in each case where a notice of administrative enforcement proceeding has been issued. The probable cause determination shall be made promptly, but in any event within 30 days after the service of the notice.

(2) The director may make the determination of probable cause solely upon a paper review of the administrative file.

(3) If the director determines no probable cause exists to believe a violation has been committed, the proceeding shall be dismissed and the notice of administrative enforcement shall not be filed with the clerk or served on any party.

(4) If the director determines probable cause exists, a finding of probable cause and a notice of proposed penalty indicating the maximum penalty shall be filed with the clerk along with the notice of administrative enforcement proceedings.

C. When the alleged violator is a party to a pending workers' compensation complaint and the director deems the alleged violations material to the issues raised in the pending complaint, the director shall file the finding of probable cause and notice of proposed penalty and the notice of administrative enforcement proceeding in the case file for the pending complaint and the enforcement proceedings shall be referred to the assigned workers' compensation judge for determination.

[11.4.5.11 NMAC - Rp, 11 NMAC 4.5.11, 10/1/2014; A, 1/1/2023]

11.4.5.12 ADMINISTRATIVE ENFORCEMENT PROCEEDINGS BEFORE THE DIRECTOR:

For every case not referred to a workers' compensation judge and upon the filing of the notice of administrative enforcement proceedings and finding of probable cause:

A. Summons: A summons shall be issued by the clerk, directed to the alleged violator and must contain:

(1) The name and street address of the WCA, the docket number of the case and the name of the person(s) or entity the summons is directed to;

(2) A direction that the alleged violator shall appear before the director or director's designee in the manner prescribed by the summons, to respond to the charges;

(3) the time and place of the hearing, including video conference and telephone information if appropriate;

(4) A notice that unless the alleged violator appears as directed, the maximum proposed penalty may be imposed; and

(5) The name, address, telephone number and e-mail address of the prosecuting attorney for the enforcement bureau.

B. Service of the summons:

(1) The summons shall be served by any means listed in Rule 1-004 NMR Civ. P. Dist. Ct. unless the director orders service by other manner reasonably calculated to apprise the alleged violator of the existence and pendency of the action.

(2) Service of the summons shall be completed no less than 15 days before the date the alleged violator is scheduled to appear for a hearing on the violation.

(3) The summons shall be served with endorsed copies of the notice of administrative enforcement proceeding and the director's finding of probable cause and notice of proposed penalty.

C. Service of papers:

(1) Unless the director orders otherwise, every pleading subsequent to the service of the summons shall be served on the violator and filed with the clerk.

(2) When a party is represented by an attorney, service shall be made upon the attorney.

(3) Service shall be made either by mailing a copy by first class mail with proper postage or by handing a copy to the attorney or to the party, unless the director orders service by other means.

[11.4.5.12 NMAC - Rp, 11 NMAC 4.5.12, 10/1/2014; A, 1/1/2023]

11.4.5.13 MOTIONS AND DISCOVERY:

A. Unless otherwise stated in Part 5 or approved by the director, motion practice shall not be allowed in administrative enforcement proceedings.

B. The use of discovery is discouraged. Discovery may be approved only by the director or the director's designee, in exceptional circumstances where justice demands.

[11.4.5.13 NMAC - Rp, 11 NMAC 4.5.15, 10/1/2014; A, 1/1/2023]

11.4.5.14 SUBPOENAS:

A. The issuance of subpoenas to compel attendance at the hearing shall be issued pursuant to the Supreme Court Rules Annotated 1986, 1-045. The clerk of the WCA may issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party before the WCA, as an officer of the court, may also issue and sign a subpoena on behalf of the WCA.

B. Any objections to a subpoena shall be raised within five (5) days of actual receipt by filing a motion to quash with the WCA.

[11.4.5.14 NMAC - Rp, 11 NMAC 4.5.16, 10/1/2014]

11.4.5.15 HEARING:

A. The hearing shall be conducted expeditiously, but each party shall be permitted to present their position amply and fairly. The director may admit any documentary evidence, including hearsay evidence, provided that the evidence is relevant, has sufficient indicia of reliability and authenticity, and will assist the director in determining a fact or issue in dispute.

B. The parties shall have the right to call and cross examine witnesses. Oath of witnesses shall be administered by the director.

C. Following the hearing, the director may orally announce the decision and enter the appropriate order.

D. The director may delay issuing the decision for a period not exceeding 60 days if findings of facts and conclusions of law or briefs are to be submitted.

[11.4.5.15 NMAC - Rp, 11 NMAC 4.5.17, 10/1/2014; A, 1/1/2023]

11.4.5.16 PENALTIES:

A. If the director finds a violation of the act or these rules, a notice of penalty shall be filed. A notice of penalty shall contain sufficient facts to support the penalty, and the dollar amount of the penalty.

B. A party may request reconsideration of a notice of penalty by filing a motion for reconsideration within fifteen (15) days of service of the notice of penalty.

C. The director may file an action for enforcement of any final penalty in the appropriate district court if payment is not made within thirty (30) days of entry of the notice of penalty or within fifteen (15) days of an order on a motion for reconsideration.

[11.4.5.16 NMAC - Rp, 11 NMAC 4.5.16, 10/1/2014]

PART 6: JUDICIAL SELECTION

11.4.6.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11.4.6.1 NMAC - Rp, 11 NMAC 4.6.1, 12/31/13]

11.4.6.2 SCOPE:

All appointments and reappointments of judges.

[11.4.6.2 NMAC - Rp, 11 NMAC 4.6.2, 12/31/13]

11.4.6.3 STATUTORY AUTHORITY:

Section 52-5-2 NMSA 1978 (Repl. Pamp. 1991).

[11.4.6.3 NMAC - Rp, 11 NMAC 4.6.3, 12/31/13]

11.4.6.4 DURATION:

Permanent.

[11.4.6.4 NMAC - Rp, 11 NMAC 4.6.4, 12/31/13]

11.4.6.5 EFFECTIVE DATE:

December 31, 2013, unless a later date is cited at the end of a section.

[11.4.6.5 NMAC - Rp, 11 NMAC 4.6.5, 12/31/13]

11.4.6.6 OBJECTIVE:

The purpose of this rule is to provide a mechanism for selection of Judges that allows for public notice of vacancies, public comment on reappointment of judges and public inspection of judicial applications.

[11.4.6.6 NMAC - Rp, 11 NMAC 4.6.6, 12/31/13]

11.4.6.7 DEFINITIONS:

See 11 NMAC 4.1.7.

[11.4.6.7 NMAC - Rp, 11 NMAC 4.6.7, 12/31/13]

11.4.6.8 JUDICIAL SELECTION:

A. The director may review the performance of workers' compensation judges at least once each year in a manner determined by the director.

B. The director shall announce the expiration of the term of a current workers' compensation judge not later than 120 days prior to the expiration of that term. Any incumbent seeking reappointment must apply to the director by filing an application for reappointment not later than 110 days prior to the expiration of the term to which the incumbent was appointed.

C. After the director receives the application from the incumbent, the workers' compensation administration shall issue a request for public comment regarding the incumbent on its website, and by email solicitation from the WCA public information officer the workers' compensation community. Public comment shall be directed to the WCA general counsel office. The public comment period shall be open for two weeks.

D. Information relating to the incumbent that is obtained pursuant to these rules shall not be a public record under the inspection of public records act.

E. After the public comment period has ended, the general counsel office shall compile the information gathered from the public and provide it to the director without identifying information regarding the person or entity that provided the comment. All public comments will not be provided to the candidate, or if they are shared, that any identifying information will be redacted to protect the identity of the commentator.

F. The director shall review the public comment and the performance of each current judge on the 90th day prior to the expiration of each judge's term, or the closest business day thereto. The director shall consider any relevant factor including, but not limited to the performance of an incumbent judge, public comment regarding the

incumbent judge, the continuing and projected need for judicial staffing and any factor that may be considered by the New Mexico judicial nominations commission for the district court in making a decision regarding reappointment.

G. Upon announcement of a judicial vacancy by the director, any candidate seeking appointment to the vacancy shall submit an application to the director in a standard format prepared by the director.

(1) All such applications shall be considered public records, not a record of the WCA for the purposes of Section 52-5-21 NMSA 1978 (1991).

(2) The director shall consider any relevant factor including, but not limited to the performance of a judicial candidate before the WCA, the continuing and projected need for judicial staffing and any factor that may be considered by the New Mexico judicial nominations commission for the district court in making a decision concerning appointment.

H. Notwithstanding the above, the director may appoint judges pro tempore when necessary for the efficient and orderly disposition of workers' compensation claims.

[11.4.6.8 NMAC - Rp, 11 NMAC 4.6.8, 12/31/2013; A, 1/1/2023]

PART 7: PAYMENTS FOR HEALTH CARE SERVICES

11.4.7.1 ISSUING AGENCY:

Workers' Compensation Administration (WCA).

[11.4.7.1 NMAC - Rp, 11.4.7.1 NMAC, 1/1/2023]

11.4.7.2 SCOPE:

This rule applies to workers, employers, and insurers and to all workers' compensation health care services providers, caregivers, pharmacies, and suppliers and all payers for such services and supplies.

[11.4.7.2 NMAC - Rp, 11.4.7.2 NMAC, 1/1/2023]

11.4.7.3 STATUTORY AUTHORITY:

Sections, 52-4-2, 52-4-3, 52-4-5, 52-5-4, and NMSA 1978.

[11.4.7.3 NMAC - Rp, 11.4.7.3 NMAC, 1/1/2023]

11.4.7.4 DURATION:

Permanent.

[11.4.7.4 NMAC - Rp, 11.4.7.4 NMAC, 1/1/2023]

11.4.7.5 EFFECTIVE DATE:

January 1, 2023, unless a later date is cited at the end of a section.

[11.4.7.5 NMAC - Rp, 11.4.7.5 NMAC, 1/1/2023]

11.4.7.6 OBJECTIVE:

The purpose of these rules is to establish and enforce a system of maximum allowable fees and reimbursements for health care services and related non-clinical services provided by all practitioners, to establish billing dispute procedures and to establish the procedures for cost containment, including case management, utilization review and Return-to-work (RTW) services.

[11.4.7.6 NMAC - Rp, 11.4.7.6 NMAC, 1/1/2023]

11.4.7.7 DEFINITIONS:

The definitions in 11.4.1.7 NMAC shall apply to this rule. In addition, the following definitions apply to the provision of all services.

A. "Business day" means any day on which the WCA is open for business.

B. "By-Report (BR)" means a maximum amount for a service has not been established in the HCP fee schedule.

C. "Cannabis Program" means the State of New Mexico Department of Health Medical Cannabis Program.

D. "Caregiver" means any provider of health care services not defined and specified in Section 52-4-1 NMSA 1978.

E. "Case management" means the on-going coordination of health care services provided to an injured or disabled worker including, but not limited to:

(1) developing a treatment plan to provide appropriate health care service to an injured or disabled worker;

(2) systematically monitoring the treatment rendered and the medical progress of the injured or disabled worker;

(3) assessing whether alternate health care services are appropriate and delivered in a cost-effective manner based upon acceptable medical standards;

(4) ensuring that the injured or disabled worker is following the prescribed health care plan; and,

(5) formulating a plan for the return to work.

F. "Contractor" means any organization that has a legal services agreement currently in effect with the workers' compensation administration (WCA) for the provision of utilization review or case management or peer review services.

G. "Corrected claim" means a claim that has already been processed by the payer, whether paid or denied, and is resubmitted with additional charges, different procedure or diagnosis codes or any information that would change the way the claim originally processed.

H. "Current procedural terminology ("CPT®")" means a systematic listing and coding of procedures and services performed by HCPs of the American medical association, adopted in the director's HCP fee schedule order. Each procedure or service is identified with a numeric or alphanumeric code (CPT® code). This was developed and copyrighted by the American medical association. The five character codes included in the rules governing the health care provider fee schedule are obtained from current procedural terminology (CPT®), by the American medical association (AMA). CPT® is developed by the American Medical Association (AMA) as a listing of descriptive terms and five character identifying codes and modifiers for reporting medical services and procedures performed by physicians. The responsibility for the content of the rules governing the health care provider fee schedule is with WCA and no endorsement by the AMA is intended or should be implied. The AMA disclaims responsibility for any consequences or liability attributable or related to any use, nonuse or interpretation of information contained in rules governing the health care provider fee schedule. Fee schedules, relative value units, conversion factors or related components are not assigned by the AMA, are not part of CPT®, and AMA is not recommending their use. The AMA does not directly or indirectly practice medicine or dispense medical services. The AMA assumes no liability for data contained or not contained herein. Any use of CPT® outside of rules governing the health care provider fee schedule should refer to the most recent edition of the current procedural terminology which contains the complete and most current listing of CPT® codes and descriptive terms. Applicable FARS/DRARS apply. CPT® is a registered trademark of the American medical association.

I. "Diagnostic and statistical manual of mental disorders (DSM)" means the current edition of the manual, which lists and describes the scientifically diagnosed mental disorders and is commonly referred to as "DSM".

J. "Department of health (DOH)" means the state of New Mexico department of health.

K. "Director" means director of the workers' compensation administration (WCA) or designee.

L. "Durable medical equipment (DME)" means supplies and equipment that are rented, leased, or permanently supplied to a patient and which have been prescribed to aid the recovery or improve the function of an injured or disabled worker.

M. "Employer" means, collectively: an employer subject to the act; a self-insured entity, group or pool; a workers' compensation insurance carrier or its representative; or any authorized agent of an employer or insurance carrier, including any individual owner, chief executive officer or proprietor of any entity employing workers.

N. "Freestanding ambulatory surgical center (FASC)" means a separate facility that is licensed by the New Mexico department of health as an ambulatory surgical center.

O. "Healthcare Common Procedure Coding System (HCPCS)" means a set of health care procedure codes based on the American Medical Association's Current Procedural Terminology (CPT®).

P. "Health care provider (HCP) or provider" means any person, entity, or facility authorized to furnish health care to an injured or disabled worker pursuant to Section 52-4-1 NMSA 1978, including any provider designated pursuant to Section 52-1-49 NMSA 1978, and may include a provider licensed in another state if approved by the director, as required by the act. The director has determined that certified registered nurse anesthetists (CRNAs) and certified nurse specialists (CNSs) who are licensed in the state of New Mexico are automatically approved as health care providers pursuant to Subsection P of Section 52-4-1 NMSA 1978.

Q. "HCP fee schedule" means the WCA Health Care Provider Fee Schedule & Billing Instructions document and is used for ease of reference.

R. "Hospital" means any place currently licensed as a hospital by the department of health pursuant to Subsection A of Section 52-4-1 NMSA 1978, where services are rendered within a permanent structure erected upon the same contiguous geographic location as are all other facilities billed under the same name.

S. "Implants, instrumentation and hardware" means:

(1) surgical implants are defined as any single-use item that is surgically inserted, deemed to be medically necessary and approved by the payer which the physician does not specify to be removed in less than six weeks, such as bone, cartilage, tendon or other anatomical material obtained from a source other than the

patient; plates, screws, pins, cages; internal fixators; joint replacements; anchors; permanent neurostimulators; and pain pumps;

(2) disposable instrumentation includes ports, single-use temporary pain pumps, external fixators and temporary neurostimulators and other single-use items intended to be removed from the body in less than six weeks.

T. "Independent medical examination (IME)" means a specifically requested evaluation of an injured or disabled worker's medical condition performed by an HCP, other than the treating provider, as provided by Section 52-1-51 NMSA 1978.

U. "Licensed producer" means an individual or entity located in New Mexico licensed and certified by the department of health to produce, manufacture, or dispense medical cannabis.

V. "Medical cannabis" means medical cannabis in the form of flower, bud, cannabis derived products, edibles, oils, tinctures, or any other form regulated by the department of health.

W. "Medical records" means:

(1) all records, reports, letters, and bills produced or prepared by an HCP or caregiver relating to the care and treatment rendered to the worker;

(2) all other documents generally kept by the HCP or caregiver in the normal course of business relating to the worker, including, but not limited to, clinical, nurses' and intake notes, notes evidencing the patient's history of injury, subjective and objective complaints, diagnosis, prognosis or restrictions, reports of diagnostic testing, hospital records, logs and bills, physical therapy records, and bills for services rendered, but does not include any documents that would otherwise be inadmissible pursuant to Subsection C of Section 52-1-51 NMSA 1978.

X. "New Mexico gross receipts tax (NMGRT)" means the gross receipts tax or compensating tax as defined in Chapter 7, Article 9 of the New Mexico Statutes Annotated 1978 (the "Gross Receipts and Compensating Tax Act"). This tax is collected by the New Mexico taxation and revenue department.

Y. "Peer review" means an individual case by case review of services for medical necessity and appropriateness conducted by an HCP licensed in the same profession as the HCP whose services are being reviewed.

Z. "Physical impairment ratings (PIR)" means an evaluation performed by an MD, DO, or DC to determine the degree of anatomical or functional abnormality existing after an injured or disabled worker has reached maximum medical improvement. The impairment is assumed to be permanent and is expressed as a percent figure of either the body part or whole body, as appropriate, in accordance with the provisions of the

Workers' Compensation Act and the most current edition of the American medical association's guides to the evaluation of permanent impairment (AMA guide).

AA. "Prescription drug" means any drug, generic or brand name, which requires a written order from an authorized HCP for dispensing by a licensed pharmacist or authorized HCP.

BB. "Provider's Report of Physical Ability (PROPA)" means the WCA form available to all parties on the WCA agency website which may be completed by HCPs.

CC. "Referral" means the sending of a patient by the authorized HCP to another practitioner for evaluation or treatment of the patient and it is a continuation of the care provided by the authorized HCP.

DD. "Services" means health care services, the scheduling of the date and time of the provision of those services, procedures, drugs, products or items provided to a worker by an HCP, pharmacy, supplier, caregiver, or freestanding ambulatory surgical center which are reasonable and necessary for the evaluation and treatment of a worker with an injury or occupational disease covered under the New Mexico Workers' Compensation Act or the New Mexico Occupational Disease Disablement Law.

EE. "Telemedicine services" means a two-way, real time interactive communication between the worker and the provider at a distant site. At a minimum, telemedicine includes audio and video telecommunications equipment.

FF."Telephonic services" means non-face to face services provided to a patient using the telephone. Such services can include medical discussions, between a physician or other healthcare professional and a patient, that do not require direct, in person contact.

GG. "Unlisted service or procedure" means a service performed by an HCP or caregiver which is not listed in the edition of the American medical association's current procedural terminology referenced in the director's HCP fee schedule order or has not otherwise been designated by these rules.

HH. "Usual and customary fee" means the monetary fee that a practitioner normally charges for any given health care service. It shall be presumed that the charge billed by the practitioner is that practitioner's usual and customary charge for that service unless it exceeds the practitioner's charges to self-paying patients or non-governmental third party payers for the same services and procedures.

II. "Utilization review" means the evaluation of the necessity, appropriateness, efficiency, and quality of health care services provided to an injured or disabled worker and may include peer group utilization review of selected provider services as set forth in Section 52-4-2 NMSA 1978.

JJ. "Worker" means an injured or disabled employee.

[11.4.7.7 NMAC - Rp, 11.4.7.7 NMAC, 1/1/2023]

11.4.7.8 GROUND RULES FOR BILLING AND PAYMENT:

A. Basic ground rules.

(1) These rules apply to all charges and payments for medical, other health care treatment, and related non-clinical services covered by the New Mexico Workers' Compensation Act and the New Mexico Occupational Disease Disablement Law.

(2) These rules shall be interpreted to the greatest extent possible in a manner consistent with all other rules promulgated by the WCA. In the event of an irreconcilable conflict between these rules and any other rules, the more specific set of rules shall control.

(3) Nothing in these rules shall preclude the separate negotiation of fees between a provider and a payer within the HCP fee schedule for any health care service as set forth in these rules.

(4) These rules and the director's HCP fee schedule order adopting the HCP fee schedule utilize the edition of the current procedural terminology referenced in the director's HCP fee schedule order, issued pursuant to Subsection A of 11.4.7.9 NMAC. All references to specific CPT® code provisions, in these rules shall be modified to the extent required for consistency with the director's HCP fee schedule order.

(5) Employers are required to inform a worker of the identity and source of their coverage for the injury or disablement.

B. Authorization for treatment and services.

(1) A provider or inpatient facility may seek pre-authorization from payer for all services or treatment plans. If authorization is sought, all requests for authorization of referrals and all other procedures shall be approved or denied by the payer within five business days of receipt of all supporting documentation and no later than five business days before the procedure.

(2) Once a worker has been admitted to an inpatient facility, all requests for authorization of referrals and procedures during the inpatient stay shall be approved or denied by the payer by the close of the next business day after receipt of all supporting documentation.

(3) A payer shall not be required to respond to a provider's request for authorization within the deadlines set forth in this rule if the payer has previously denied a claim in writing.

(4) Pre-authorization is required prior to scheduling or performing any of the following services:

(a) independent medical examinations;

(b) physical impairment ratings;

(c) functional capacities evaluations;

(d) physical therapy;

(e) caregiver services; and

(f) durable medical equipment (DME).

(5) Pre-authorization, as outlined in (a) through (f) above, must be obtained by the HCP before services or equipment are provided or the payer will not be held liable for payment of the service or equipment provided.

(6) If an authorization, a pre-authorization or a denial is not received by the provider by the deadlines set forth in this rule, the requested service or treatment will be deemed authorized. The provider and the payer shall document all attempts to obtain authorization from the date of the initial request.

C. Billing provision ground rules.

(1) Billing shall be made in accordance with HCP fee schedule issued by the director in conjunction with the director's HCP fee schedule order.

(2) Submitting a bill to any party for the difference between the usual and customary charges and the maximum amount of reimbursement allowed for compensable health care services or items, also known as balance billing, is prohibited.

(3) Coding and billing separately for procedures that do not warrant separate identification because they are an integral part of a service for which a corresponding CPT® code exists, also known as unbundling, is prohibited.

(4) The appropriate CPT® code must be used for billing by providers.

(5) Initial billing of outpatient services by providers, hospitals and FASC's, shall be submitted no later than 60 days from the date on which services were

rendered. Initial billing of inpatient services shall be issued no later than 60 days from the date of discharge.

(6) A HCP's documented, good faith effort to bill within the time-limits provided by these rules shall not constitute untimely filing.

(7) Failure of the provider to submit billing, or to demonstrate a good faith effort to submit billing, within the time limits provided by these rules shall constitute a violation of these rules and shall absolve the employer of financial responsibility for the bill.

(8) Unlisted services or procedures are billable and payable on a by-report (BR) basis as follows:

(a) The fee for the performance of any BR service shall be negotiated between the provider and the payer prior to delivery of the service. Payers should ensure that a CPT® code with an established HCP fee schedule amount is not available.

(b) Performance of any BR service requires that the provider submit a written report, for which no separate charge is allowed, with the billing to the payer. The report shall substantiate the rationale for not using an established CPT® code and shall include pertinent information regarding the nature, extent, and special circumstances requiring the performance of that service and an explanation of the time, effort, personnel, and equipment necessary to provide the service.

(c) Information provided in the medical record(s) may be submitted in lieu of a separate report if that information satisfies the requirements of Paragraph (12) of Subsection C of 11.4.7.8 NMAC.

(d) In the event a dispute arises regarding the reasonableness of the fee for a BR service, the provider shall make a prima facie showing that the fee is reasonable. In that event, the burden of proof shall shift to the payer to show why the proposed fee is not reasonable.

(9) If payer and provider agree to enter into a global fee agreement at any time, a global fee can be used. All services not covered by the global fee agreement shall be coded and paid separately, to the extent substantiated by medical records. Agreement to use a global fee creates a presumption that the HCP will be allowed to continue care throughout the global fee period.

(10) If a service that is ordinarily a component of a larger service is performed alone for a specific purpose it may be considered a separate procedure for coding, billing, and payment purposes. Documentation in the medical records must justify the reasonableness and necessity for providing such services alone.

(11) Initial bills for every visit shall be accompanied by appropriate office notes (medical records) which clearly substantiate the service(s) being billed and are legible.

(12) Records provided by hospitals and FASCs shall have a copy of the admission history and physical examination report and discharge summary, hospital emergency department medical records, imaging, ambulatory surgical center medical records or outpatient surgery records.

(13) No charge shall be made to any party to the claim for the initial copy of required information.

(14) The worker shall not be billed for health care services provided by an authorized HCP as treatment for a valid workers' compensation claim unless payer denies compensability of a claim or payer does not respond to a bill within the time limit set forth in Paragraph (2) of Subsection D of 11.4.7.8 NMAC.

(15) Diagnostic coding shall be consistent with the most current version of the international classification of diseases, clinical modification or diagnostic and statistical manual of mental disorders guidelines required by CMS as appropriate.

(16) For any reimbursement under the HCP fee schedule or these rules that is based upon provider’s cost, the provider shall submit a copy of the invoice showing that cost at the time of billing.

(17) The health care facility is required to submit all requested data to the payer. Failure to do so could result in fines and penalties imposed by the WCA. All payers are required to notify the economic research bureau of unreported data fields within 10 days of payment of any inpatient bill.

D. Payment provision ground rules.

(1) The provision of services gives rise to an obligation of the employer to pay for those services. Accordingly, all services are controlled by the rules in effect on the date the services were provided.

(2) For all reasonable and necessary services provided to a worker with a valid workers' compensation claim, payer is responsible for timely good faith payment within 30 days of receipt of a bill for services unless payment is pending in accordance with the criteria for contesting bills and an appropriate explanation of benefits has been issued by the payer. Payment for non-contested portions of any bill shall be timely.

(3) All medical services rendered pursuant to recommended treatment contained in the most recent edition of the official disability guidelines™ (ODG) is presumed reasonable and necessary pursuant to Subsection A of Section 52-1-49 NMSA 1978; there is no presumption regarding any other treatment.

(4) If a service has been pre-authorized or is provided pursuant to a treatment plan that has been pre-authorized by an agent of the payer, it shall be presumed that the service provided was reasonable and necessary. The presumption may be overcome by competent evidence that the payer, in the exercise of due diligence, did not know that the compensability of the claim was in doubt at the time that the authorization was given.

(5) An employer/insurer who subcontracts bill review services remains fully responsible for timely payment of reasonable and necessary services along with compliance with these rules.

(6) Fees and payments for all physician professional services, regardless of where those services are provided, are reimbursed within the HCP fee schedule.

(7) Bills may be paid individually or batched for a combined payment; however, each service, date of service and the amount of payment applicable to each procedure must be appropriately identified.

(8) All bills shall be paid in full unless one or more of the following criteria are met. These criteria are the only permissible reasons for contesting workers' compensation bills submitted by authorized providers:

(a) compensability is denied;

(b) services are deemed not to be reasonable and necessary;

(c) incomplete billing information or support documentation;

(d) inaccurate billing or billing errors; or

(e) reduction specifically authorized by this rule.

(9) Whenever a payer contests a bill or the payment for services is denied, delayed, reduced or otherwise differs from the amount billed, the payer shall issue to the provider a written EOB which shall clearly relate to each payment disposition by procedure and date of service. Only the EOBs listed in the HCP fee schedule may be used.

(10) Failure of the payer to indicate the appropriate EOB(s) constitutes an independent violation of these rules.

(11) The prorating of the provider's fees for time spent providing a service, as documented in the provider's treatment notes, is not prohibited by these rules provided an appropriate EOB is sent to the provider. Evaluation and management CPT® codes shall not be prorated. The provider's fees should not be prorated to exclude time spent

in pre- and post-treatment activity, such as equipment setup, cleaning, disassembly, etc., if it is directly incidental to the treatment provided and is adequately documented.

(12) A request for reconsideration, including corrected claims, shall be submitted to the payer within 30 days of receipt of the payer's written disposition. Failure to comply with the deadline for a request for reconsideration or for seeking a director's determination as provided below shall result in acceptance of the payer's position.

(13) Payment or disposition of a request for reconsideration shall be issued within 30 days of payer's receipt of the request for reconsideration. Failure to comply with the established deadline shall result in the payer accepting the provider's position asserted in the request for reconsideration.

[11.4.7.8 NMAC - Rp, 11.4.7.8 NMAC, 1/1/2023]

11.4.7.9 FEES FOR HEALTH CARE SERVICES:

A. HCP fee schedule.

(1) The director shall issue an order pursuant to Section 52-4-5 NMSA 1978 not less than once per annum setting the HCP fee schedule which shall list the maximum amount of reimbursement for, or the method for determining the maximum amount of reimbursement for medical services, treatments, devices, apparatus, and medicine.

(2) In addition to the HCP fee schedule, the director's HCP fee schedule order shall contain a brief description of the technique used for derivation of the HCP fee schedule and a reasonable identification of the data upon which the HCP fee schedule was based.

(3) The HCP fee schedule is procedure-specific and provider-neutral. Any code listed in the edition of the current procedural terminology adopted in the director's HCP fee schedule order may be used to designate the services rendered by any qualified provider within the parameters set by that provider's licensing regulatory agencies combined with applicable state laws, rules, and regulations.

(4) The HCP fee schedule shall be released to the public not less than 30 days prior to the date upon which it is adopted and public comments will be accepted during the 30 days immediately following release.

(5) After consideration of the public comments the director shall issue a final director's HCP fee schedule order adopting a HCP fee schedule, which shall state the

date upon which it is effective. The final director's HCP fee schedule order shall be available at the WCA clerk's office not less than 20 days prior to its effective date.

B. Telehealth and telephonic services.

(1) Both telehealth and telephonic services are allowable for workers' compensation patients

(2) Telehealth and telephonic services shall be reimbursed according to fees set forth in the HCP fee schedule.

C. Hospital reimbursement.

All hospitals shall be reimbursed according to the methodology set forth in the HCP fee schedule and with the director's HCP fee schedule order.

D. Prescription medicine.

(1) The maximum payment that a pharmacy or authorized HCP is allowed to receive for any prescription medicine shall be determined by the method set forth in the HCP fee schedule.

(2) Pharmacies shall not dispense more than a 30 day supply of medication unless authorized by the payer.

(3) Only generic equivalent medications shall be dispensed unless a generic does not exist and unless specifically ordered by the HCP.

(4) Compounded medication shall be paid in accordance with the HCP fee schedule.

(5) Any medications dispensed and administered in excess of a 24 hour supply to a registered emergency room patient shall be paid according to the hospital ratio.

(6) Health care provider dispensed medications shall not exceed a 10 day supply for new prescriptions only. The payment for health care provider dispensed medications shall not exceed the cost of a generic equivalent.

E. Medical cannabis reimbursement.

(1) General Provisions

(a) The maximum payment that a worker may be reimbursed for medical cannabis shall be determined by the method and amount set forth in the HCP fee schedule.

(b) Medical cannabis may be a reasonable and necessary medical treatment only where an authorized health care provider certifies that other treatment methods have failed.

(c) At least one physician certifying worker for participation in the cannabis program shall be an authorized health care provider.

(d) The worker must be an enrolled in the cannabis program and provide proof of enrollment and qualifying condition prior to the date of purchase of medical cannabis to be eligible for reimbursement.

(2) Worker shall be reimbursed upon the following conditions:

(a) Only the worker shall be reimbursed for the out of pocket cost of medical cannabis;

(b) Worker shall submit an itemized receipt issued by a licensed producer that includes the name and address of the licensed producer and the worker, the date of purchase, the quantity in grams of dry weight, the form of medical cannabis purchased, and the purchase price;

(c) Worker shall be reimbursed no more than the maximum amount set forth in the HCP fee schedule;

(d) Reimbursement shall be limited to the quantity set forth in the HCP fee schedule;

(e) Reimbursement for paraphernalia, as defined in the Controlled Substances Act, shall not be made; and

(f) Reimbursement is not allowed for expenses related to personal production or cannabis acquired from sources other than a licensed producer.

F. Referrals.

(1) If a referral is made within the initial 60 day care period as identified by Subsection B of Section 52-1-49 NMSA 1978, the period is not enlarged by the referral.

(2) When referring the care of a patient to another provider, the referring provider shall submit pertinent medical records for that patient, including imaging, upon request of the referral provider, at no charge to the patient, referral provider or payer.

(3) When transferring the care of a patient to another provider, the transferring provider shall submit complete medical records, including imaging, for that patient to the subsequent provider at no charge to the patient, subsequent provider or payer.

G. Independent medical examinations.

(1) All IMEs and their fees must be authorized by the claims payer prior to the IME scheduling and service, regardless of which party initiates the request for an IME.

(2) In the event that an IME is authorized and the HCP and claims payer are unable to agree on a fee for the IME, the judge may set the fee or take other action to resolve the fee dispute.

H. Physical impairment ratings.

(1) All PIRs and their fees shall be authorized by the claims payer prior to their scheduling and performance regardless of which party initiated the request for a PIR. The PIR is inclusive of any evaluation and management code.

(2) Impairment ratings performed for primary and secondary mental impairments shall be billed pursuant to the HCP fee schedule and shall conform to the guidelines, whenever possible, presented in the most current edition of the AMA guides to the evaluation of permanent impairment.

(3) A PIR is frequently performed as an inherent component of an IME. Whenever this occurs, the PIR may not be unbundled from the IME. The HCP may only bill for the IME at the appropriate level.

(4) In the event that a PIR with a specific HCP is ordered by a judge and the HCP and claims payer are unable to agree on a fee for the PIR, the judge may set the fee or take other action to resolve the fee dispute.

[11.4.7.9 NMAC - Rp, 11.4.7.9 NMAC, 1/1/2023]

11.4.7.10 QUALIFICATION OF OUT OF STATE HEALTH CARE PROVIDERS:

A. An HCP that is not licensed in the state of New Mexico must be approved by the director to qualify as an HCP under the act.

B. No party shall have recourse to the billing and payment dispute resolution provisions of these rules with respect to the services of an HCP who is not licensed in New Mexico or approved by the director.

C. The director's approval may be obtained by submitting an application to the director and proposed order, supported by an original affidavit of the HCP seeking approval. Nothing in this rule shall prevent the director from entering into agreements with any party or HCP to provide for simplified and expeditious qualification of HCPs in

individual cases, provided, however, that all such agreements shall be considered public records.

D. The director's approval of a health care provider in a particular case, pursuant to the provisions of Section 52-4-1 NMSA 1978 will be deemed given when an out of state health care provider provides services to that injured worker and the employer/insurer pays for those services. Unless otherwise provided, the approval obtained by this method will not apply to the provision of health care by that provider to any other worker, except by obtaining separate approval as provided in these rules.

E. The out of state health care provider shall comply with the New Mexico HCP fee schedule, however, nothing in these rules shall preclude the separate negotiation of fees between an out of state provider and a payer within the HCP fee schedule for any health care service as set forth in these rules.

F. In lieu of a formal director’s approval, the payer may accept an original Out of State Health Care Provider Affidavit, as provided on the WCA website, from an HCP who is licensed by their state and in good standing.

[11.4.7.10 NMAC - Rp, 11.4.7.10 NMAC, 1/1/2023]

11.4.7.11 BILLING AND PAYMENT DISPUTE RESOLUTION:

A. In the event of a billing or payment dispute any party may submit to the medical cost containment bureau a request for director’s determination on the approved form located on the WCA website.

B. The request shall be made in writing within 30 days of the documented receipt date of the payer's disposition, nonpayment of the bill, or denial of a request for reconsideration. A request for director's determination shall consist of a brief explanation of the disputed billing and payment issue(s) and shall be accompanied by a copy of the bill(s) in question, a copy of the payer's explanation, and all supporting documentation necessary to substantiate the performance of the service(s) and the accuracy of the associated charges.

C. Upon receipt of a request, the administration will initially attempt to resolve the dispute informally. If this is unsuccessful, a notice of receipt of request for director's determination shall be filed with WCA clerk of the court and issued to both parties.

D. Both parties shall have 15 days from the date of the notice of receipt of request for director's determination to present to the WCA clerk of the court and opposing party any pertinent responses or appropriately captioned exhibits.

E. Parties who present responses or exhibits shall be responsible for service of such documents to all parties of record.

F. The director in his discretion may conduct such hearings and receive such evidence as is necessary to make a determination concerning the reasonableness and necessity of the services provided. A final determination shall issue within 45 days of the issuance of the notice of receipt of request for director's determination or the close of the hearing, whichever is later.

G. The director's determination of the billing and payment dispute is final. Any further attempt, directly or indirectly, to charge any party for any disallowed services or to fail to pay within 30 days of documented receipt of the director's determination for such services as may have been found to be due and owing shall be considered a violation of this rule.

H. The director's determination shall not be considered with regard to the compensability of the claim and shall have no legal force or effect beyond the resolution of the billing and payment disputes.

I. Any time frame set forth in 11.4.7.11 NMAC may be waived by the director, in writing, for good cause shown.

J. Nothing in this rule shall prohibit the parties from resolving their billing dispute prior to or following referral to the administration.

[11.4.7.11 NMAC - Rp, 11.4.7.11 NMAC, 1/1/2023]

11.4.7.12 INPATIENT ADMISSIONS, CASE MANAGEMENT AND UTILIZATION REVIEW:

A. Basic provisions.

(1) All workers and their legal representatives are required to cooperate with the WCA or its contractor, if any, with respect to all reasonable requests for information necessary for any provision of service.

(2) For the purpose of facilitating the provision of services, all employers, insurers, and third party administrators are required to communicate, cooperate and provide information, without charge, to the WCA or its contractor, if any.

(3) The WCA or its contractor, if any, shall report any refusal to cooperate to the director. Failure to provide requested information shall be presumed to be a refusal to cooperate. Any dispute concerning the reasonableness of any request for information may be submitted, in writing, to the director. The determinations of the director concerning the reasonableness of such requests are final.

(4) In any hearing before the WCA, the worker's refusal to cooperate in any services may be considered by a workers' compensation judge on the issues of

reasonableness and necessity of medical charges or reasonableness, necessity, or appropriateness of medical treatment.

(5) The contractor shall avoid conflicts of interest or the appearance of impropriety when performing case management services and utilization review.

(6) Nothing in these rules prohibits an employer from establishing their own system of case management or utilization review at the employer’s expense as provided in Section 52-4-3 NMSA 1978.

B. Inpatient admission review.

(1) For every inpatient admission the following information shall be provided to the WCA or its contractor at least 48 hours prior to the admission or before the close of the next business day after any emergency admission:

(a) worker's/patient's name;

(b) worker's/patient's social security number;

(c) worker's/patient's employer;

(d) employer's insurance carrier or third party administrator and a statement of whether they have authorized the admission;

(e) date of injury/onset of symptoms;

(f) admitting diagnosis, including primary, secondary, and tertiary, if any;

(g) planned treatment(s) and procedures;

(h) planned date of admission; and

(i) proposed length of stay.

(2) For planned or elective hospital admissions any practitioner ordering the admission of a worker for evaluation or treatment of their injury or occupational disease disablement shall report the admission to the WCA.

(3) For emergency hospital admissions, the hospital shall report the admission to the WCA.

C. Case management.

(1) Referral process

(a) Any party may refer a claim to the WCA for case management by the WCA or its contractor, if any, by submitting the appropriate form to the WCA medical cost containment bureau. The form is located on the agency website.

(b) A WCA judge may refer a claim for case management by submitting a written referral to the medical cost containment bureau and with a copy placed in the court file.

(c) Within 20 days of receiving a referral and all supporting documentation, the medical cost containment bureau shall notify the parties and the judge, if any, of its decision either accepting or denying the referral. The medical cost containment bureau may assign approved cases to the WCA's contractor.

(d) Any party who objects to the decision of the medical cost containment bureau shall notify the WCA of its objection by filing an application to the director not later than 15 days from service of the decision.

(2) Procedures

(a) The WCA will consider the following factors when determining eligibility of a case referred for case management:

(i) severe or complex injury including total loss of limb/amputation, severe injury to multiple body parts or limbs, severe burns over a large part of body, traumatic brain injury, spinal cord injury, reflex sympathetic dystrophy/complex region pain syndrome;

(ii) language barrier, including hearing impairment;

(iii) a record or pattern of non-compliance with prescribed treatment, care plan or medical appointments;

(iv) multiple health care providers, including providers of different disciplines, requiring coordination between them;

(v) inpatient admission lasting longer than five days or multiple admissions or emergency room visits;

(vi) failure to reach maximum medical improvement after one year from the date of injury;

(vii) psychological issues that complicate provision of services; and

(viii) any other reasonable criteria as approved by the director.

(b) The WCA will monitor case management services to ensure progress pursuant to Section 52-4-3 NMSA 1978. The WCA may terminate or reassign services as it deems appropriate with notice to the parties.

(c) The contractor shall have the right to contact the worker, insurer, third party administrator, legal representatives, and all HCPs involved in the case. The contractor shall give reasonable notice and an opportunity to the worker or his or her representative to be present during, or to participate in, any and all contacts by the case manager.

(d) The contractor providing case management services may help coordinate services by bringing treatment options or return to work opportunities to the attention of the health care provider.

(e) The contractor shall provide status reports to the WCA as directed, with copies to the parties identified in the initial assignment.

D. Utilization review.

(1) Referral process

(a) Any party may refer a claim to the WCA for utilization review by the WCA or its contractor, if any, by submitting the appropriate form to the WCA medical cost containment bureau. The form is located on the agency website.

(b) A utilization review request for pre-admission review of hospital admissions, except for emergency services, shall also follow this same referral and procedural process.

(c) Within 20 days of receiving a referral and all supporting documentation, the medical cost containment bureau shall notify the parties of its decision either accepting or denying the referral. The medical cost containment bureau may assign approved cases to the WCA's contractor.

(d) Any party who objects to the decision of the medical cost containment bureau shall notify the WCA of its objection by filing an application to the director not later than 15 days from service of the decision.

(2) Procedures

(a) Utilization review shall consider only the medical reasonableness, clinical necessity, efficiency and quality of the treatment under review.

(b) Only one treatment is appropriate for utilization review.

(c) Utilization review shall not include issues of compensability, including:

(i) the causal relationship between the treatment under review and the worker's work-related injury;

(ii) whether the worker is disabled; and

(iii) whether the worker is at maximum medical improvement.

(d) If the medical cost containment bureau or its contractor requests additional information, the parties shall provide the requested information within 15 days. The WCA shall issue its utilization review decision within 60 days of receiving all necessary documentation.

(e) The WCA in its sole discretion may assign a claim to its contractor for peer review. Peer review shall only be conducted by a licensed healthcare provider who is in a similar field or equivalent discipline as the provider whose service is being reviewed. Peer review shall be independent and the physician or health care provider should not have prior involvement in the worker's care or treatment.

(f) The medical cost containment bureau shall communicate the utilization review findings in writing with a copy to all parties. The WCA may adopt the findings of its contractor after utilization review.

(g) Any party who objects to the utilization review findings shall file an application to director within 15 days from service of the utilization review findings. If an application is not filed within 15 days, the utilization review findings shall become binding on the parties.

(h) The director may set a utilization review matter for hearing. An order issued by the director after hearing or receipt of an application to director is final and binding on the parties.

[11.4.7.12 NMAC - Rp, 11.4.7.12 NMAC, 1/1/2023]

11.4.7.13 NON-CLINICAL SERVICES:

A. For medical records and report copies requested for the purpose of investigating or administering a workers' compensation claim, a practitioner may charge for paper and electronic copies as set forth in the HCP fee schedule, except as provided in Paragraphs (12), (13), (14) and (15) of Subsection C of 11.4.7.8 NMAC. This fee is inclusive of any and all fees, including, but not limited to, administrative, processing, and handling fee of any kind.

B. A practitioner may charge for the completion of the WCA Form Letter to Health Care Provider the amount set forth in the HCP fee schedule.

C. A practitioner may charge for the completion of the WCA Provider's Report of Physical Ability according to the criteria and amount set forth in the HCP fee schedule.

D. Depositions

(1) An HCP may not charge more than $400 for the first hour or any portion thereof; and not more than $360 per hour for the second and subsequent hours, prorated in five minute increments. An HCP may not charge more than $200 for the first hour of deposition preparation time actually spent, and not more than $120 per hour for the second or third hours, prorated in five minute increments, up to a maximum of three hours.

(2) No compensation shall be paid for travel time to or from the deposition, waiting time prior to the scheduled beginning of the deposition, or time spent reading or correcting depositions. For good cause shown, a judge may enter a written order providing recompense to an HCP for reading and correcting a deposition.

(3) An HCP may require that they be paid for the first hour of the deposition testimony either before or at the time of the deposition.

(4) A non-refundable fee of up to $400 may be charged by an HCP for deposition appointments at which the attorney making the appointment is a no-show or fails to cancel at least 48 hours in advance.

(5) Any notice of deposition to a practitioner shall contain the following language: "The rules of the WCA provide a schedule of maximum permissible fees for deposition testimony. No more than $400 for the first hour and $360 for each subsequent hour is permitted. Fees for the second and subsequent hours shall be prorated in five minute increments. An HCP may not charge more than $200 for the first hour of deposition preparation time actually spent, and not more than $120 for the second or third hours, prorated in five minute increments, up to a maximum of three hours."

E. Live testimony by a health care provider: Such testimony is allowed only pursuant to an order by a judge. Fees for live testimony, travel, lodging, and preparation time shall be set by the judge.

F. Disputes concerning the HCP fee schedule shall be raised with the assigned judge, if any, or pursuant to the medical billing dispute process set forth in 11.4.7.11 NMAC.

[11.4.7.13 NMAC - Rp, 11.4.7.13 NMAC, 1/1/2023]

11.4.7.14 ENFORCEMENT:

Any complaint of a violation of these rules shall be made, in writing, to the medical cost containment bureau, enforcement bureau, or assigned workers' compensation judge, if any.

[11.4.7.14 NMAC - Rp, 11.4.7.15 NMAC, 12/31/2013; A, 10/1/2015, Rp, 1/1/2023]

11.4.7.15 DATA ACQUISITION:

A. The insurer must report an inpatient hospital bill to the WCA within 10 to 90 days of payment of the bill. Reports may be submitted by mail, fax, or electronic media in batches daily, weekly, or monthly from the insurer or insurer's representative.

B. The paid inpatient services data shall be submitted in a format acceptable to the WCA. The economic research bureau shall distribute a specific set of instructions for the submission of required data.

If the required paid inpatient services data is not received from payer as stated under Subsection A of this section, the economic research bureau may petition for a hearing before the WCA director and seek penalties pursuant to Section 52-1-61 NMSA 1978.

[11.4.7.15 NMAC - Rp, 11.4.7.16 NMAC, 1/1/2023]

11.4.7.16 RETURN-TO-WORK:

The agency website shall contain educational Return-To-Work best practice tools and resources for workers' compensation stakeholders.

[11.4.7.16 NMAC – N, 1/1/2023]

PART 8: INDIVIDUAL SELF-INSURANCE

11.4.8.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11.4.8.1 NMAC - Rp, 11.4.8.1 NMAC, 10/1/15]

11.4.8.2 SCOPE:

This rule applies to all corporations, companies or other entities applying for self-insurance, those who are or were certified for self-insurance, and to their agents and representatives.

[11.4.8.2 NMAC - Rp, 11.4.8.1 NMAC, 10/1/15]

11.4.8.3 STATUTORY AUTHORITY:

Chapter 52 NMSA 1978.

[11.4.8.3 NMAC - Rp, 11.4.8.3 NMAC, 10/1/15]

11.4.8.4 DURATION:

Permanent.

[11.4.8.4 NMAC - Rp, 11.4.8.4 NMAC, 10/1/15]

11.4.8.5 EFFECTIVE DATE:

October 1, 2015, unless a later date is cited at the end of a section.

[11.4.8.5 NMAC - Rp, 11.4.8.5 NMAC, 10/1/15]

11.4.8.6 OBJECTIVE:

The purpose of these rules is establish the minimum qualification criteria for a private company or qualifying public entity to apply to the director for permission to self-insure their workers' compensation risk and to establish the criteria to maintain such self-insured status after it is granted by the director.

[11.4.8.6 NMAC - Rp, 11.4.8.6 NMAC, 10/1/15]

11.4.8.7 DEFINITIONS:

A. "Approved excess insurer" means an insurer domiciled within the United States of America or an alien insurer listed in the national association of insurance commissioner's (NAIC) quarterly listing of alien insurers with a rating of "A" or better by A.M. Best or similar rating organization approved by the director.

B. "Approved security" means a letter of credit or surety bond issued by an approved financial institution or surety respectively and used for the payment of claims and related expenses in the event of default by the employer and for reimbursement to the guarantee fund for any benefits paid by the fund on behalf of the employer.

C. "Approved surety" means a financial institution with at least one location in New Mexico or a New Mexico admitted carrier, that is not in the control of the self-insured, and that has a rating of "A" or better from A.M. Best, a rating of "good" or better by Bauer Financial, or similar ratings from organizations approved by the director.

D. "Completed application" means an application for certificate of self-insurance that demonstrates all the eligibility criteria and that attaches all required documentation, as set forth in these rules.

E. "Director" means the director of the workers' compensation administration.

F. "Financially solvent" means an employer's current and continuing ability to pay, as they become due, all existing and future obligations, including workers' compensation benefits to which it is or becomes obligated under the Act.

G. "Guarantee fund" means the fund created by Paragraph (A) of Section 52-8-7 NMSA 1978 to provide benefits to workers and the families of workers of private individual self-insurers who become insolvent or otherwise unable to meet their financial obligations.

H. "Guarantee board" means the board of directors of the self-insurers' guarantee fund commission.

I. "Parent" means ownership of a subsidiary entity of greater than 50 percent.

J. "Reserves" means the value of claims without regard to expected excess insurance or other recoveries.

K. "Risk management program" means an entity's claims administration personnel, policies and procedures, safety program and personnel, and adequate excess insurance.

L. "Tangible net worth" means net worth less intangible assets.

[11.4.8.7 NMAC - Rp, 11.4.8.7 NMAC, 10/1/15]

11.4.8.8: INDIVIDUAL SELF-INSURANCE:

A. An employer seeking to be certified as a self-insurer under the Act shall make application on a form prescribed by the director.

B. The director shall notify the chairman of the guarantee board of the identity of any applicant for self-insurance within 15 days of the receipt of the application. The guarantee board shall respond in writing to the director within 30 days of receipt of the notification or be deemed to have expressed no objection to the applicant's membership in the commission. The administration's self-insurance audit staff shall take any written objections into account when making its final recommendation to the director.

C. The director may decline to approve an application for self-insurance if not satisfied that the employer will be able to meet all its obligations under the Act and these rules.

D. Eligibility: Applicants for self-insurance must demonstrate the following base eligibility criteria, each of which must be continuously maintained during the period of self-insurance to maintain eligibility:

(1) a current tangible net worth of at least two million, five hundred thousand dollars ($2,500,000);

(2) the employer has been in business for a period of not less than three years. This requirement may be waived by the director under circumstances where the form of business organization has changed within the three year period but the management and function of the business entity has substantially stayed the same;

(3) a strong trend of financial health and financial solvency;

(4) an acceptable risk management program;

(5) workers' compensation specific excess insurance from an approved excess insurer with retention of two hundred fifty thousand dollars ($250,000) or less per occurrence and statutory upper limits; an acceptable policy of excess insurance shall provide coverage for all provisions of the Act, contain no exclusion of such coverage, and include a current New Mexico amendatory endorsement;

(6) an approved security issued in favor of the New Mexico self-insurers' guarantee fund;

(7) a bona fide employment relationship exists between the employer and the employees which it proposes to self-insure; employees who receive wages from or are under the control of any other entity with respect to the day to day supervision and assignment of the work may not come under an individual self-insurance program; employee leasing companies are prohibited from receiving a certificate of self-insurance;

(8) if the employer is a subsidiary, a parental guarantee from the subsidiary's upper-most parent in a form acceptable to the director; a parent company may self-insure its subsidiaries under one certificate in the name of the parent provided the parent meets all eligibility criteria and provides parental guarantees for the subsidiaries and guarantees by each subsidiary for the other(s); and

(9) any other reasonable criteria deemed necessary by the director to guarantee payment of workers' compensation claims to injured workers.

E. Application: The employer's application for certificate of self-insurance shall be accompanied by documentation sufficient to demonstrate eligibility, including the following:

(1) a one hundred fifty dollar ($150) non-refundable filing fee made out to the workers' compensation administration;

(2) proof of valid workers' compensation insurance in force for the three years preceding the date of application and continuing in force up to the approved date of self-insurance;

(3) employer's audited financial statements for the most recent fiscal year, presented in accordance with generally accepted accounting principles (GAAP), and financial statements for the preceding two years;

(4) if the employer is a corporation, proof of a resolution adopted by employer's board of directors authorizing and directing the corporation to undertake to self-insure its risks and to comply with the provisions of the Act and the rules of the director; a similar official ratification is required from the governing body of any governmental entity;

(5) a detailed accounting of the employer's workers' compensation loss history for the last three years, and experience modifiers for the same period, which shall include all claims covered under a claims "buy-back" program and deductible programs;

(6) an explanation of the safety program, a copy of the safety manual, and resumes of all personnel responsible for the New Mexico safety program;

(7) proof of a proposed policy for workers' compensation excess insurance that complies with the eligibility requirements set forth in this rule, including the declaration page of such policy and all endorsements providing or limiting coverage in New Mexico.

(8) a letter of intent from an approved surety to issue an approved security in an amount and form to be specified by the director, but not less than two hundred thousand dollars ($200,000); and

(9) proof of compliance with Section 52-1-6.2 NMSA 1978 for the most recent year.

F. Certification.

(1) The director shall act upon a completed application for a certificate of self-insurance within 90 days.

(2) Upon approval, the director shall issue a certificate acknowledging the employer's status as a self-insured under the act; the certificate shall be effective continuously until terminated at the request of the self-insured or revoked by the director.

(3) Upon a merger or other combination by two self-insured employers, the employers may continue to be self-insured under one certificate provided that the

administration is given adequate disclosure, and guarantees and subject to the approval of the director.

(4) The director may issue a provisional certificate, good for not more than one year, to a self-insurer if the director is convinced that any defects are minor in nature and can be corrected within the one year period.

G. Continuing eligibility requirements: Following certification by the director, a self-insured employer shall:

(1) notify the director prior to liquidation, sale, or transfer of ownership and prior to any material change in the employer's financial condition or in New Mexico operations;

(2) obtain the director's approval prior to making any material change in any excess insurance policy or approved security;

(3) notify the director prior to any change in the provider or scope of risk management program;

(4) have at least one claims representative licensed and located within New Mexico to pay workers' compensation claims of claimants residing or located in New Mexico, and to ensure that all adjusters and third party administrators are licensed in New Mexico, regardless of their physical location, and to promptly pay all claims from accounts in financial institutions located within New Mexico;

(5) be subject to sanctions for any act or omission by its agents;

(6) provide proof of coverage for excess insurance policies within 30 days of effective date or renewal and to provide the complete policy within 60 days of effective date or renewal; unauthorized changes appearing in any policy will require immediate remediation by way of reinstatement of approved terms or other measures deemed appropriate by the director; and

(7) comply with all conditions required as stated in the employer's self-insurance certificate.

H. Financial responsibility and payment of claims:

(1) The employer shall pay claims for which it becomes obligated in accordance with the act and these rules.

(2) The payment of claims shall continue without regard to the self-insurance status of the employer and without regard to any amount of security posted, whether or not the security is called. An approved security shall be maintained until all claims have expired, subject to determination of the director.

(3) The employer shall maintain a level of reserves at the full undiscounted value of each claim, including indemnity and medical only claims, sufficient to pay all claims and associated expenses.

(4) The employer shall promptly pay guarantee fund assessments, provide documentation supporting assessment calculations, and maintain in good standing membership in the guarantee fund.

(5) The employer shall report loss runs, regardless of type or cost, to the administration in the format prescribed by the director on a semi-annual basis not later than January 31 and July 31 of each year.

(6) Failure to maintain minimum financial criteria and an approved risk management program may result in increased security requirements, termination of self-insurance status, or any other measure deemed necessary by the director for the protection of benefits of injured workers and the guarantee fund.

(7) Upon voluntary or involuntary termination of employer's self-insurance status, the employer shall:

(a) provide any information requested by the director for the purpose of establishing claims liability and financial condition;

(b) comply with any requirement by the director to increase security;

(c) make claims files available to the director for the performance of any audit, examination or review, or for administration of claims in the event of a default;

(d) notify the administration of any changes in address/location, pertinent personnel, claims administration services, location of claims files and related claims personnel, and financial condition; and

(e) promptly notify the director of the employer's current ownership, organizational structure and the employer's ability to pay workers' compensation obligations;

(8) All government entities must have a pre-funded system. All past, present, and future liabilities existing at any time shall be fully accounted for by liquid assets or other assets agreeable to the director. No government entity shall be required to post security.

(9) A self-insurer shall maintain compliance with the requirements of Workers' Compensation Act, WCA rules and the conditions set forth in its certificate of self-insurance.

I. Audits and examinations:

(1) An applicant or self-insured employer is subject to initial or periodic examination or audit by the administration to determine initial or continued eligibility for self-insurance. The applicant or self-insured agrees to bear the costs of any reviews or evaluations and to provide a reasonably private space to conduct the audit and all records required for such audits and examinations.

(2) Audits or examinations under these rules may include, but are not limited to:

(a) audits or reviews of the applicant's or self-insured's records regarding any representation made on its financial statement or application for self-insurance;

(b) audits or reviews of the applicant's or self-insured's records pertaining to its loss history, claims administration, reserves and claimant files;

(c) audits or reviews of safety programs;

(d) interviewing or taking the testimony of the applicant or self-insured, or any of its agents or employees, regarding any matter pertaining to the obligations of the applicant or self-insured under the act or the director's rules; and

(e) audits or examinations the director deems necessary to ensure a self-insured's continued compliance with these rules.

(3) An applicant or self-insured employer shall cooperate fully with administration representatives in any examination or audit and to attempt in good faith to resolve any issues raised in those examinations or audits.

(4) A self-insured employer shall provide its annual audited financial statements to the administration within 90 days of the end of each fiscal year.

J. Denials, revocation and probationary certificates:

(1) The denial, revocation, or probation of a certificate of self-insurance shall be made by an order signed by the director. Every such order shall state its effective date and shall concisely state what is ordered, the grounds on which the order is based, and the provisions of the act or rules pursuant to which the action is taken.

(2) The director shall deny an application for self-insurance if the employer has failed to demonstrate to the director's satisfaction that the employer meets all requirements of the Act and these rules or has failed to demonstrate its ability to meet all its obligations under the act.

(3) A certificate of self-insurance may be revoked or placed on probationary status if the director, with good cause, ceases to be satisfied that the employer is able to meet all its obligations under the act and these rules. The occurrence of any of the

following events shall constitute good cause to revoke or place on probationary status a certificate of self-insurance:

(a) failure of the employer to comply with any provisions or requirements of the act, these rules, or any lawful order or communication of the director;

(b) failure of the approved surety to remain financially solvent, or any other impairment of any aspect of the employer's financial responsibility requirements;

(c) failure to comply with any other statutes, laws, rules, or regulations of the state of New Mexico;

(d) failure to cooperate with the administration to mitigate adverse consequences for injured workers caused by the employer filing for protection under the federal bankruptcy laws; or

(e) failure to maintain membership in the New Mexico self-insurers' guarantee fund commission in good standing.

(4) An employer that has been decertified or placed on probation must still comply with the financial responsibilities set forth in these rules and the following additional requirements:

(a) The security amount set after decertification shall account for both known claims and associated expenses, as well as claims incurred but not reported (IBNR) and associated expenses.

(b) If the employer is subject to Section 52-1-6 NMSA 1978, proof of coverage must be provided.

(c) No adjustments to the security will be allowed for three years from the date of the decertification. If after three years, the director has determined that adequate time has passed to reasonably determine the expected long-term liabilities and that there is no risk to benefits of injured workers or the guarantee fund, reduction in security may be approved. At that time, the director may, in his discretion, reduce or return some or all of the security.

(5) Probationary certifications:

(a) A probationary certificate means the temporary revocation of the self-insured's existing self-insurance certificate.

(b) Failure to comply with the Act or these rules may result in the issuance of a probationary certificate of individual self-insurance.

(c) During a probationary period, the employer must comply with all terms specified as conditions of probation within the probationary certificate or in any other lawful order of the director.

(d) The duration of the probationary period shall be within the director's discretion, but shall not extend for a period greater than one year.

(e) The probationary certificate may be withdrawn and the original certificate of self-insurance reinstated, if the self-insured comes into full compliance with the Act, these rules, and all probationary conditions. The reinstatement of the original certificate is subject to the sole discretion of the director.

(f) If the self-insured fails to come into compliance with the Act and the rules by the end of the probationary period, the self-insured's status as a self-insured will be revoked.

K. Recertification:

(1) Any employer formerly certified as a self-insurer who ceases to be certified may not apply for recertification until three years after revocation.

(2) An employer who seeks to reinstate its certificate of self-insurance shall reapply to the director on the form prescribed pursuant to these rules. A non-refundable filing fee of one hundred fifty dollars ($150) must accompany the application for recertification.

(3) If there is a change of ownership whereby the controlling interest of a self-insured changes, the new ownership shall submit a new application to the director for a certificate of self-insurance. A non-refundable filing fee of one hundred fifty dollars ($150) must accompany the new application.

L. Hearings: Any person aggrieved by a decision of the director under these rules may request in writing a hearing before the director. The request shall briefly state the respects in which the party is aggrieved, the relief sought, and the grounds relied upon as the basis of relief.

M. Penalty: In addition to any other sanctions provided herein, failure to comply with any of the provisions of the Act or these rules renders the applicant or self-insured employer subject to penalties as provided in Section 52-1-61 NMSA 1978.

N. Waiver: Any requirement contained in these rules may be waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing.

[11.4.8.8 NMAC - Rp, 11.4.8.8 NMAC, 10/1/15; A, 9/30/16]

11.4.8.9 SELF-INSURERS' GUARANTEE FUND:

A. Commission membership is composed of all self-insurers as defined in Paragraph (J) of Section 52-8-3 NMSA 1978, as a condition of their authority to individually self-insure in the state of New Mexico.

B. Withdrawal of membership:

(1) A member shall be automatically withdrawn from the commission upon the termination of its self-insurance certificate and payment of all assessments due to the date of such termination.

(2) Notwithstanding the termination of membership of a self-insured for whatever reason, that self-insured shall remain liable to the commission for any assessments imposed and based upon insolvencies occurring while the terminated self-insured was a member of the commission.

C. Board of directors:

(1) A board of directors shall be appointed pursuant to Section 52-8-5 NMSA 1978. Every member of the board of directors shall currently be a representative of a commission member in good standing. The board may adopt by-laws governing the functioning of the commission including the filling of vacancies on the board, removal of board members and conflicts of interest. The board of directors shall elect a chairperson, who shall also be president of the corporation, and a vice-chairman, who shall also be vice president of the corporation. The director shall be the secretary/treasurer of the corporation.

(2) The commission shall maintain such financial records as are necessary to properly reflect assessments, receipts and disbursements (including paid claims) of all funds of the commission. Such records shall also reflect the financial condition of the commission at all times. The commission shall make available its financial records to the administration when so requested.

(3) The commission shall make all necessary records available to an independent auditor to facilitate audits of the commission.

(4) All board members, and such other personnel as may be employed by the board, shall be bonded in an amount determined by the board to be adequate to protect the interests of the commission.

(5) The board may open one or more insured accounts in any number of state or federally chartered financial institutions located in the state of New Mexico, in order to conduct commission business. Reasonable delegation of deposit and withdrawal authority in such accounts may be made, consistent with prudent fiscal policy, but,

except as is expressly provided herein, the withdrawal of commission funds shall require the signatures of any two members of the board.

D. Powers and duties of the commission:

(1) The commission, through its board of directors, shall have the power to:

(a) sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person;

(b) adopt and use a common corporate seal and alter the same; provided, however, that such seal shall always contain the words "not for profit corporation";

(c) elect or appoint such officers and agents as its officers shall require and allow them reasonable compensation;

(d) make contracts and incur liabilities, borrow money at such rates of interest as the corporation may determine, issue its notes, bonds, other obligations and secure any of its obligations by mortgage and pledge of any or all of its property, franchises or income;

(e) purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real and personal property, or any interest therein, wherever situated;

(f) have and exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is organized;

(g) purchase reinsurance or excess insurance as is determined by the board of directors to be necessary to effectuate the purposes and intent of Paragraph (A) of Section 52-8-6 NMSA 1978;

(h) review all applicants for membership in the commission and make recommendations to the director concerning the appropriateness of inclusion in, or termination from, membership in the commission with respect to any applicant or member;

(i) provide for imposition of assessments upon members to insure the financial stability of the fund as provided in Paragraph (A) of Section 52-8-6 NMSA 1978; and

(j) request, upon a majority vote of the board, that the administration determine the condition of any member of the commission which the board in good faith believes may no longer be qualified to be a member of the commission; within 30 days of receipt of such request or for good cause shown, the administration shall make such determination and shall advise the board of its findings; each request for a

determination shall be kept on file by the administration and it shall not be open to public inspection pursuant to Section 52-5-21 NMSA 1978.

(2) The commission through its board of directors shall have the following duties:

(a) The commission shall incorporate as a not-for-profit corporation under the laws of New Mexico and shall maintain its corporate status in good standing.

(b) The commission shall be deemed to stand in the place of an insolvent employer to the extent of its obligations on covered claims and, to such extent, shall have all rights, duties and obligations of the insolvent employer as if the employer had not become insolvent.

(c) As to any insolvency proceeding, the commission shall periodically file with the receiver or liquidator of the insolvent member statements of the covered claims paid by the commission and estimates of anticipated claims on the commission. Such filing shall preserve the rights of the commission against the assets of the insolvent member.

(d) To maintain an insolvency fund to meet the obligations of insolvent members, pursuant to Section 52-8-7 NMSA 1978.

(e) At the conclusion of any member insolvency in which the commission was obligated to pay covered claims, prepare a report on the history and cause of such insolvency, based on information available to the commission and submit such report to the administration.

(f) Not later than May 31st each year, submit a financial report for the preceding calendar year in a form approved by the director.

E. Procedure for handling claims:

(1) The commission shall accept for processing all claims against insolvent members which are made by the injured party or their representative.

(2) The commission shall be obligated to pay benefits to injured workers to the same extent as the insolvent member and shall be added as a party in any complaint for benefits or complaints for reduction or termination of benefits filed with respect to the insolvent employer.

(3) The commission may employ persons to process covered claims, giving them reasonable authority to process claims. Any processing of claims in excess of that authority shall be subject to prior approval by the board, or a claims committee established by the board for that purpose.

(4) The commission shall use every reasonable means to expedite the handling of covered claims submitted by the injured worker or representative, and may adopt a protocol for the handling of those claims.

F. Assessments: Determination and payment of assessment:

(1) Each member shall be given not less than 30 days' notice of the date that an assessment is due and payable.

(2) The assessment notice shall advise the member to remit the assessment payable to the commission. Upon receipt of the assessments, the commission shall deposit said funds in the commission's accounts and shall use them for the purposes stated in the Self-Insurers' Guarantee Fund Act.

(3) The commission shall immediately notify the director if a member fails to pay an assessment when due. The director may penalize the member or revoke its authority to self-insure pursuant to Section 52-1-61 NMSA 1978, and these rules.

(4) The board shall enforce its right to collect any assessment remaining unpaid 60 days after it shall have become due by appropriate action at law or in equity against the non-paying member.

(5) For purposes of calculating assessments, the self-insured may deduct any subrogation recovery in such amounts as are recovered in the same assessment year as they are paid.

(6) If two or more self-insureds combine certificates, the fund balance for the combined entity shall be combined.

(7) Assessments paid by a parent on behalf of a subsidiary which has its own certificate shall be allocated to the subsidiary.

[11.4.8.9 NMAC - Rp, 11.4.8.9 NMAC, 10/1/15; A, 9/30/16]

PART 9: GROUP SELF-INSURANCE

11.4.9.1 ISSUING AGENCY:

Workers' Compensation Administration.

[8/1/96; 11.4.9.1 NMAC - Rn, 11 NMAC 4.9.1, 1/14/05]

11.4.9.2 SCOPE:

These rules apply to the application, qualification, evaluation and regulatory requirements pertaining to group self-insureds authorized pursuant to NMSA 1978, Chapter 52, Article 6.

[8/1/96; 11.4.9.2 NMAC - Rn, 11 NMAC 4.9.2, 1/14/05]

11.4.9.3 STATUTORY AUTHORITY:

The authority for this part derives from the director's powers under NMSA 1978, Sections 52-6-1 through 52-6-25 and 52-1-4A.

[8/1/96; 11.4.9.3 NMAC - Rn, 11 NMAC 4.9.3, 1/14/05]

11.4.9.4 DURATION:

Permanent.

[8/1/96; 11.4.9.4 NMAC - Rn, 11 NMAC 4.9.4, 1/14/05]

11.4.9.5 EFFECTIVE DATE:

August 1, 1996, unless a later date is cited at the end of a section.

[8/1/96; 11.4.9.5 NMAC - Rn & A, 11 NMAC 4.9.5, 1/14/05]

11.4.9.6 OBJECTIVE:

The purpose of these rules is to provide criteria and procedures to apply to the issuance and maintenance of certificates of self-insurance to group employers under the Group Self-Insurance Act, NMSA 1978, Chapter 52, Article 6.

[6/23/87, 8/1/96; 11.4.9.6 NMAC - Rn, 11 NMAC 4.9.6, 1/14/05]

11.4.9.7 DEFINITIONS:

The definitions adopted below shall apply to all WCA rules, especially those for group self insurance.

A. "Same or similar type of business" means that each individual business to be insured by a group at the time the risk is bound, without regard to ownership, is appropriate under the by-laws and the underwriting guidelines of the group on file with the WCA. Each such business must have at least 50 percent of the workers' compensation manual premium for each individual business member in risks normally associated with either the general division groupings (designated by lettered headings in the standard industrial classification manual) or any other three or four digit classifications specifically designated from within the standard industrial classification

manual, which has received prior approval from the director. Where more than one business shares common ownership, the businesses may be considered one entity for purposes of eligibility determination.

B. "Standard industrial classification manual" means the most current edition of standard industrial classification manual published by the executive office of the president of the United States, office of management and budget. Major groups of businesses are designated by a two digit code in the standard industrial classification manual.

[8/1/96, 11/15/96; 11.4.9.7 NMAC - Rn, 11 NMAC 4.9.7, 1/14/05]

11.4.9.8 GROUP SELF INSURANCE:

A. Application and maintenance:

(1) All the requirements for application and maintenance of a certificate of group self-insurance are contained in NMSA 1978, Section 52-6-5. In addition, the following shall apply:

(a) Submit with the application a non-refundable filing fee of five hundred dollars ($500.00).

(b) The application shall include the group’s pro forma financial statement, following generally accepted accounting principles, presented in a format acceptable to the director.

(c) If a surety bond is posted to satisfy the security requirements of the act, the surety bond shall be written by an insurance company rated "A" or better by A.M. Best or similar rating service approved by the director written by a New Mexico admitted surety.

(d) If a financial security endorsement is posted to satisfy the security requirements of the act, the instrument shall be written by a financial institution with locations in New Mexico rated "good" or better by Bauer Financial or similar rating service approved by the director.

(e) Specific excess insurance shall be written with statutory upper limits. The insurance shall be written by an insurance company rated "A" or better by A.M. Best or similar rating service approved by the director, domiciled within the United States of America or an alien insurer listed in the national association of insurance commissioner’s (NAIC) quarterly listing of alien insurers, the policy must include the current New Mexico amendatory endorsement.

(f) The required fidelity bond for the service company providing claims service shall be written at a minimum of two hundred fifty thousand dollars ($250,000) and issued by a New Mexico admitted carrier.

(g) A performance bond issued by a New Mexico admitted carrier of two hundred fifty thousand dollars ($250,000) shall be provided for the service company providing claims service, if requested by the director.

(h) A fidelity bond for any member of the board of trustees of the group having signatory authority with respect to the group's funds or investments, or as a condition precedent to any board of trustees action creating or changing such signatory authority, is required and shall be written at a minimum of two hundred fifty thousand dollars ($250,000) and issued by a New Mexico admitted carrier.

(i) The required fidelity bond for the administrator shall be written at a minimum of two hundred fifty thousand dollars ($250,000) and issued by a New Mexico admitted carrier.

(j) A statement of the type of business in which employers in the proposed group are engaged and an explanation of how they meet the criteria of "same or similar" contained in NMSA 1978, Section 52-6-2(B).

(k) An actuarial report/study based on at least 3 years loss history of the group's proposed members, including loss projections for the group.

(2) After considering the group's application and all supportive documentation, the director shall act upon a completed application for a certificate of approval within sixty (60) business days. If, because of the number of applications pending, the director is unable to act upon an application within that period, the director shall have an additional sixty (60) days to act.

(3) The definitions in Subsections A and B of 11.4.9.7 NMAC shall be applied prospectively only, commencing with the effective date of this rule. Existing members of a group which would be ineligible for membership under this rule shall not be excluded from membership in the group on the basis of this rule. In the event that a member's coverage is not reinstated within thirty days of the delivery to the director of the notice of cancellation or termination required in NMSA 1978, Section 52-6-9 (B), the former member will be considered a new applicant for purposes of qualifying as a member of the group.

(4) Each group will screen applicants to their group based upon the definition of "same or similar type of business" contained in this rule. No group shall admit any prospective member that is not in the same or similar type of business.

(a) Each group will designate in writing for the director, a general category from the standard industrial classification manual, designated as a lettered division

heading, which most closely fits the type of businesses represented by the sponsoring trade or professional association.

(b) The director will presume that businesses properly included in that division are in the same or similar type of business as are other businesses in the group.

(c) A group may request in writing that additional two digit major group codes, three digit industry group codes or four digit industry codes from the standard industrial classification manual, other than those under the group's designated lettered division heading, be approved.

(i) The request for designation of a business as a same or similar type of business for a group shall be accompanied by a written explanation which must satisfy the director that the businesses are significantly related to the sponsoring trade association's industry.

(ii) The director may consult widely accepted publications which classify types of businesses for the purpose of considering the approval or disapproval of such requested designations.

(d) Upon prior written approval by the director, a group may add to its roster an individual business which is not otherwise clearly eligible for membership. A request for approval of such individual business shall be accompanied by a written explanation demonstrating to the satisfaction of the director that the business, because of its particular circumstances should be deemed to be in the same or similar type of business as the other members of the group.

(e) The director shall approve or disapprove such requests in writing.

(f) The WCA will follow its established protocol to ensure prompt response to requests for such designations.

(5) By submitting the roster of additions the group certifies that any additions to the group's roster are in the same or similar type of business as the other members of the group.

(6) Groups may offer claims "buy back" programs to their members provided:

a written narrative describing the program shall be provided to the participants and the WCA; and, details of claims bought back must be provided to the participating member, or its designee, or to the WCA upon request.

B. Evaluation factors: The director shall decline to approve an application for group self-insurance
upon a finding that the proposed group does not meet all the requirements of the Group

Self-Insurance Act and the rules thereunder. In determining whether a group can meet the requirements of the Group Self-Insurance Act

(NMSA 1978, Sections 52-6-1through 52-6-25) and the rules thereunder, the factors to be considered by the director shall include, but not be limited to, the following:

(1) organizational structure and management background;

(2) compliance with NMSA 1978, Section 52-6-2(B);

(3) services provided by the group;

(4) statistical reporting and expertise;

(5) workers' compensation loss history and risk;

(6) source and reliability of financial information;

(7) sufficiency of premium;

(8) proposed bylaws, underwriting guidelines, membership application, and membership agreement;

(9) the distribution of group members as to size, premium and loss exposure;

(10) adequacy of reserve methodology;

(11) proposed excess insurance coverage;

(12) adequacy and form of security;

(13) claims administration personnel, policies and procedures;

(14) safety program;

(15) financial condition of proposed members;

(16) results of financial evaluation of the group.

C. Financial responsibility:

(1) The group shall submit audited financial statements on an annual basis within one hundred and eighty (180) days of its fiscal year end.

(2) Every group self-insured shall have actuarially determined financial strength sufficient to meet their obligations.

(3) The actuarial opinion and report required by NMSA 1978, Section 52-6-12, shall be filed annually and include the actuarial report from which the reserves for known claims and associated expenses and claims incurred but not reported and associated expenses were obtained.

(4) The group shall set rates utilizing the advisory loss costs published by the national council of compensation insurance, and adhere to uniform classification system, uniform experience rating plans, and manual rules filed with the superintendent of insurance, provided, however:

(a) Permission to apply premium discounts shall be requested by the group, subject to approval by the director, and shall be based on the group's expense levels and loss experience.

(b) Permission to make and use its own rates shall be requested by the group, subject to approval by the director and shall be based on at least three years of the group's experience.

(c) All requests for permission regarding rates or discounts shall be accompanied by an actuarial opinion supporting the request.

(d) Retroactive rate decreases and retroactive premium discounts are prohibited.

(e) All requests for rate reductions or premium discounts shall be approved or disapproved by the director within sixty (60) days after the submission of the request and any additional data requested by the director.

(5) Except as provided for in Section 52-6-5 B(1) NMSA 1978, each group shall annually certify to the director the group's continued compliance member net worth requirements by submitting a compilation consisting of each member's assets, liabilities and net worth. No member's financial statements used for this compilation shall be more than 12 months old.

(6) In any month where the group's membership roster changes, each group shall submit to the administration an update of additions and deletions to the group's membership roster.

(7) Each group shall provide within 30 days of the end of each calendar quarter a roster of members including the number of employees employed by each member on the last day of the quarter.

(8) The group shall promptly notify the director of insolvencies or bankruptcies of members.

(9) The board of trustees shall adopt a policy statement regarding the admission to, or continued membership in, the group of any prospective member or current member with negative net worth. Such statement shall be provided to the director and to each member and prospective member of the group.

(10) Permission to declare and issue a dividend or refund shall be requested by the group not less than twelve months after the end of the fund year, subject to approval by the director, and shall be based on funds in excess of the amount necessary to fund all obligations for that fund year.

(a) All requests for dividend distributions shall be accompanied by financial information and an actuarial opinion supporting the request.

(b) All dividend refunds shall be approved or disapproved by the director within sixty (60) days after the submission of the request, and any additional data requested by the director.

(11) The group shall provide proof of coverage for all excess insurance policies and fidelity bonds within thirty (30) days of effective date or renewal, and complete excess insurance policies, and fidelity bonds within ninety (90) days. Unauthorized changes appearing in any policy will require immediate remediation by way of retroactive reinstatement of approved terms or other measures deemed necessary by the director.

(12) The group must provide proof of renewal or replacement of posted security fifteen (15) days before expiration date.

(13) The group shall provide loss runs on a semi-annual basis on a format approved by the director, by January 31 and July 31 each year.

D. Certification: By signing and submitting an application, and as a condition of the continuing
privilege of certification as a group self-insurer under the Group Self-Insurance Act, the group agrees to:

(1) promptly discharge all of the group's liabilities to injured employees or their dependents in accordance with the requirements of the Act and to comply with the Act and any rules of the director adopted thereunder;

(2) obtain the director's approval prior to making any change in any excess insurance policy, fidelity bond, or security which results in diminished coverage;

(3) notify the director of changes in the kind or amount of services provided by any third party claims administrator;

(4) promptly notify the director of any material change in the group's financial condition or group operations;

(5) cooperate fully with administration representatives in any evaluation or audit of the group self-insurance program, and to resolve, in good faith, issues raised in those evaluations or audits; it is specifically contemplated that such evaluation and audit issues may include notice of inadvertent or mistaken failures to pay benefits which were not paid when due, where no apparent ground existed at the time to contest the payment in good faith; failure to correct such inadvertent or mistaken failures to pay, after notice, may constitute a failure to resolve such audit issues in good faith in violation of this rule, and may result in any sanction appropriate under the group Self-Insurance Act; any dispute concerning issues raised shall be referred by the self-insurance bureau chief to the director for determination if not first informally resolved;

(6) the group shall be responsible for compliance with the act and the rules and shall be subject to sanction by the administration for acts or omissions in violation of the act or the rules by itself or by any person or entity acting in an agency relationship with the group; it shall be a defense to any sanction proposed that the group has appropriately fulfilled its duty to monitor, educate and control its agents; nothing in this rule is intended to alter the liability for workers compensation benefits of groups or their agents;

(7) The group agrees to comply with any requirements specified in the group's regular, probationary or provisional certificate of self-insurance.

E. Probationary certification: The group shall be responsible for compliance with the Act and the rules. Failure to comply with the Act or the rules may result in the issuance of a probationary certificate of group self-insurance.

(1) A probationary certificate means the revocation of the group's existing self-insurance certificate.

(2) The duration of the probationary period shall be within the director's discretion but shall not extend for more than one year's time.

(3) The group may be sanctioned for any violations that occur during the probationary period pursuant to NMSA 1978, section 52-6-21.

(4) If the group fails to come into compliance with the act and the rules by the end of the probationary period, the group's status as a self-insured may be revoked.

(5) All conditions of the act and the rules still apply and nothing in this rule is intended to alter the responsibilities for workers' compensation benefits of groups or their agents.

(6) The probationary certificate may be withdrawn and the original certificate of self-insurance may be reinstated if the group comes into full compliance with the Act and the rules. The reinstatement of the original certificate shall be at the sole discretion of the director.

(7) A probationary certificate of self-insurance shall be made by an order signed by the director or by his authority. Every such order shall state its effective date and shall concisely state: what is ordered; the grounds on which the order is based; and the provisions of the act or rules pursuant to which the action is taken.

F. Waiver: Any requirement not mandated by statute contained in these rules may be varied or waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing.

[6/22/87, 6/23/87, 8/1/96, 11/15/96; 11.4.9.8 NMAC - Rn & A, 11 NMAC 4.9.8, 1/14/05; A, 12/29/06; A, 10/1/15]

PART 10: SELF-INSURANCE POOLING OF PUBLIC ENTITIES

11.4.10.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11/29/97; 11.4.10.1 NMAC - Rn, 11 NMAC 4.10.1, 1/14/05]

11.4.10.2 SCOPE:

These rules apply to the qualification, evaluation and regulating requirements pertaining to the governmental entities insured for workers' compensation benefits by the New Mexico county insurance authority, the New Mexico self-insurer's fund and the New Mexico public school insurance authority or any other organization formed, organized or reorganized, contemplating the pooling of the risks of workers' compensation by governmental entities.

[11/29/97; 11.4.10.2 NMAC - Rn, 11 NMAC 4.10.2, 1/14/05]

11.4.10.3 STATUTORY AUTHORITY:

The authority for this part derives from the director's powers under NMSA 1978, Sections 52-1-2, 52-1-4(A), 52-1-6 and 52-5-4.1.

[11/29/97; 11.4.10.3 NMAC - Rn, 11 NMAC 4.10.3, 1/14/05]

11.4.10.4 DURATION:

Permanent.

[11/29/97; 11.4.10.4 NMAC - Rn, 11 NMAC 4.10.4, 1/14/05]

11.4.10.5 EFFECTIVE DATE:

November 29, 1997 unless a later date is cited at the end of a section.

[11/29/97; 11.4.10.5 NMAC - Rn & A, 11 NMAC 4.10.5, 1/14/05]

11.4.10.6 OBJECTIVE:

The purpose of these rules is to provide criteria and procedures to apply to the issuance and maintenance of certificates of self-insurance for governmental entities insured through the organizations identified in 11.4.10.2 NMAC.

[11/29/97; 11.4.10.6 NMAC - Rn, 11 NMAC 4.10.6, 1/14/05]

11.4.10.7 DEFINITIONS:

For the purposes of these rules:

A. "workers' compensation" also means "workman's compensation";

B. "administrator" means an individual, partnership or corporation engaged by a pool's board of trustees to carry out the policies established by that board to provide day-by-day management of the pool;

C. "pool" means an entity, regarded as an "agency" under the State Audit Act, that provides insurance collectively to governmental entities for workers' compensation benefits;

D. "service company" means a person or entity which provides services not provided by the administrator which may include claims adjustment; safety engineering; compilation of statistics and the preparation of premium; loss and tax reports; preparation of other required self-insurance reports; development of members' assessments and fees; and administration of a claim fund;

E. "director" means the director of the workers' compensation administration;

F. "workers' compensation benefits" means benefits paid pursuant to the Workers' Compensation Act or the New Mexico Occupational Disease and Disablement Law.

[11/29/97; 11.4.10.7 NMAC - Rn, 11 NMAC 4.10.7, 1/14/05]

11.4.10.8 POOL SELF-INSURANCE:

A. A governmental entity not insured by an insurance company in the voluntary market nor certified as an individually self-insured employer shall be deemed in compliance with NMSA 1978, Section 52-1-4 if the director has issued a certificate of pool self-insurance pursuant to these rules.

B. In order to obtain and maintain a certificate of pool self-insurance a governmental entity shall meet the following requirements:

(1) Within 30 days of the effective date of these rules the governmental entities shall direct the pool's administrator to provide the director with a current membership roster and contact information for each governmental entity insured by the pool. All governmental entities on the roster will be deemed to have applied for a certificate of pool self-insurance.

(2) A governmental entity that has not applied pursuant to Paragraph (1) of Subsection B of 11.4.10.8 NMAC shall apply to the director at least 30 days prior to the desired effective date of the certificate for pool self-insurance, on forms approved by the director.

(3) A governmental entity insured under a certificate of pool self-insurance shall be responsible for compliance with the provisions of Articles 1-5 of the Workers' Compensation Act, NMSA 1978, Chapter 52 and all rules promulgated thereunder and shall be subject to sanction by the director for violations, acts or omissions by itself or by any person or entity acting in an agency relationship with the governmental entity, including its administrator and service company.

(4) Specific occurrence excess insurance or specific occurrence reinsurance for all governmental entities insured through a pool in a form and in an amount acceptable to the director is required. The insurance shall be written by an acceptably rated company admitted to write insurance in the state of New Mexico or a company that is otherwise approved by the director. The policy must include the New Mexico amendatory endorsement.

(5) A fidelity bond or commercial crime policy for any officer, agent or member of the board of trustees of the pool having signatory authority with respect to the pool's funds or investments, or as a condition precedent to any board of trustees action creating or changing such signatory authority, is required and shall be written at a minimum of two hundred fifty thousand dollars ($250,000), unless the director prescribe a higher amount.

C. Certification and termination:

(1) All governmental entities who have applied for a certificate of pool self-insurance pursuant to Paragraph (1) of Subsection B of 11.4.10.8 NMAC shall be deemed to be eligible for a certificate of pool self-insurance.

(2) The certificate of pool self-insurance shall remain in effect until terminated at the request of the governmental entity or revoked by the director. The director shall not grant the request of any governmental entity to terminate its certificate of pool self-insurance unless the governmental entity has insured or reinsured all incurred workers' compensation and occupational disease and disablement obligations or has otherwise secured payment of their obligation in a manner approved in writing by the director. Such obligations shall include both known claims and associated expenses and claims incurred but not reported and associated expenses.

[11/29/97; 11.4.10.8 NMAC - Rn & A, 11 NMAC 4.10.8, 1/14/05]

11.4.10.9 INFORMATION REQUIREMENTS:

A. As a condition precedent to maintenance of a certificate of pool self-insurance, each pool shall compel its administrator and any service company to provide to the director the following information and access to records:

(1) a copy of any reinsurance or excess insurance agreements;

(2) an explanation of reserving methodology and accident year claims data on an annual basis;

(3) rate change information within thirty days of approval by the board of directors of the pool;

(4) loss runs in a format acceptable to the director within 60 days of receipt by the administrator of the director's request; and

(5) an annual actuarial opinion.

(a) This opinion shall include actuarially appropriate reserves for (1) known claims and associated expenses; and (2) claims incurred but not reported and associated expenses.

(b) This actuarial opinion shall also include a rate adequacy evaluation.

(c) The actuarial opinion shall be given by a member of the American academy of actuaries.

(6) a copy of any rate adequacy evaluations and reviews of loss and loss adjustment expenses prepared for the pool by an actuary who shall be a member of the American academy of actuaries.

(7) notification to the director of any additions or deletions to the pool's membership roster; additionally, each pool shall provide within 30 days of the end of

each calendar quarter a roster of members, including the number of employees employed by each member on the last day of the quarter.

B. Examination and reviews:

(1) The director or his designees may examine the affairs, transactions, accounts, records and assets and liabilities of each governmental entity that has been issued a certificate of pool self-insurance pertaining to the entity's activities under that certificate, whether considered individually or through its pool as often as deemed advisable, whether such information is maintained by a governmental entity, the pools administrator or the pool's service company.

(a) The governmental entity, pool, administrator or pool service company shall cooperate fully with the director's representatives in any evaluation or audit of the pool self-insurance program, and resolve, in good faith, issues raised in those evaluations or audits.

(b) Failure to resolve such audit issues in good faith will constitute a violation of this rule, and may result in sanctions.

(c) Any dispute concerning issues raised shall be referred by the deputy director for compliance to the director for determination, if not first informally resolved.

(2) In lieu of performing the examination, the director may request:

(a) financial audits conducted by a certified public accountant approved by the state auditor;

(b) audits of claims management by the pool performed by the pool's reinsurer or other outside claims auditing firm;

(c) loss control audits performed by the pool's reinsurer; or

(d) any other independent claims audit of a scope and by an auditing organization deemed acceptable by the director.

(3) Each governmental entity that has been issued a certificate of pool self-insurance, individually, or collectively through its pool, shall be reviewed at least annually by an auditor acceptable to the director to verify proper classifications, experience rating, payroll and rates.

C. A governmental entity that has been issued a certificate of pool self-insurance under these rules shall assist the director in any investigation of specific allegations of unfair claims processing, bad faith or fraud within the scope of NMSA 1978, Section 52-1-28.1, by directing the administrator of the pool to make all records concerning any such claim available to the director upon written request by the director or the records.

[11/29/97; 11.4.10.9 NMAC - Rn & A, 11 NMAC 4.10.9, 1/14/05]

11.4.10.10 WAIVER AND ENFORCEMENT:

A. Any requirement contained in these rules may be waived by specific written authorization of the director. Any interested person may request such a variance or waiver in writing. Such waiver requests will be considered, approved or denied dependent upon the nature of the request and the conditions pertinent to the request prevailing at the time of the request.

B. Enforcement: failure to comply with any provision of Articles 1-5 of the Workers' Compensation Act, NMSA 1978, Chapter 52, or the rules promulgated thereunder may be sanctioned by impositions of the monetary penalty pursuant to NMSA 1978, Section 52-1-61, or any other lawful remedy.

[11/29/97; 11.4.10.10 NMAC - Rn, 11 NMAC 4.10.10, 1/14/05]

PART 11: PROOF OF COVERAGE

11.4.11.1 ISSUING AGENCY:

Workers' Compensation Administration.

[11.4.11.1 NMAC - Rp, 11 NMAC 4.11.1, 9/30/16]

11.4.11.2 SCOPE:

This rule applies to all insurers issuing workers' compensation coverage in the state of New Mexico, all self-insured groups issuing workers' compensation coverage in the state of New Mexico and all vendors submitting proof of coverage information either on behalf of themselves or for others who are required to report such coverage.

[11.4.11.2 NMAC - Rp, 11 NMAC 4.11.2, 9/30/16]

11.4.11.3 STATUTORY AUTHORITY:

Sections 52-1-4.1 and 52-5-4 NMSA 1978 (Repl. Pamp. 1991) and department of insurance regulation 17, rule 2.

[11.4.11.3 NMAC - Rp, 11 NMAC 4.11.3, 9/30/16]

11.4.11.4 DURATION:

Permanent.

[11.4.11.4 NMAC - Rp, 11 NMAC 4.11.4, 9/30/16]

11.4.11.5 EFFECTIVE DATE:

September 30, 2016 unless a later date is cited at the end of a section.

[11.4.11.5 NMAC - Rp, 11 NMAC 4.11.5, 9/30/16]

11.4.11.6 OBJECTIVE:

The purpose of this rule is to establish requirements governing workers' compensation insurance proof of coverage.

[11.4.11.6 NMAC - Rp, 11 NMAC 4.11.6, 9/30/16]

11.4.11.7 DEFINITIONS:

A. "Certified vendor" (also referred to as a "vendor") means a company or business which electronically transmits proof of coverage insurance information to the workers' compensation administration either for itself or for others and is certified by the WCA as being qualified to submit POC data using the IAIABC format. The terms "certified vendor" and "vendor" are used interchangeably within this rule and carry the same meaning. A vendor's identity is not considered a record of the workers' compensation administration and is therefore not protected by the confidentiality provision.

B. "Filed" means that the policy information required under these rules has successfully passed all edits and has been accepted, date and time stamped and uploaded into the workers' compensation administration's database.

C. "IAIABC" means the international association of industrial accident boards and commissions.

D. "Insurer" means any insurance carrier or self-insured group or other entity that issues a workers' compensation insurance policy or provides workers' compensation coverage for itself or subsidiaries by any other means.

E. "POC" means proof of coverage.

F. "POC flat file" or "POC flat file format" means the IAIABC defined standard in which proof of coverage data is electronically submitted to the WCA.

G. "WCA certified" or "WCA certification" means a vendor has received approval from the WCA to submit POC data electronically. WCA certification is required prior to submitting POC data.

[11.4.11.7 NMAC - Rp, 11 NMAC 4.11.7, 9/30/16]

11.4.11.8 PROOF OF COVERAGE:

A. Filing requirements:

(1) Every insurer shall file proof of coverage with the workers' compensation administration within 30 days of the effective date of any workers' compensation policy or within 30 days of the date of extension, renewal, reinstatement or amendment to such policy.

(2) Every insurer shall, in the event of a policy cancellation, file a notice of cancellation with the workers' compensation administration within 10 days of such cancellation.

(3) Vendor certification

(a) In order to be certified as a vendor for submission of POC data with the workers' compensation administration, an entity must receive certification from the workers' compensation administration.

(b) In order to maintain certified vendor status, the vendor must maintain certification with the workers' compensation administration, which includes continuous compliance with the workers' compensation administration POC business plan.

B. POC submission procedures and requirements:

(1) POC data must be submitted in the IAIABC POC flat file format.

(2) A vendor must provide optional ways for insurers to submit POC data to the vendor such as hard copy, mag tape, web page form or IAIABC flat file.

(3) Once certified, vendors must notify the workers' compensation administration of any changes they make in hardware or software and complete re-certification with the workers' compensation administration prior to using such changed or new hardware or software to submit POC data. Vendors must also comply with IAIABC requirements pertaining to hardware and software changes.

(4) A current information form and sender/vendor information form must be on file with the workers' compensation administration before electronic filings will be accepted.

(5) All POC data is the property of the New Mexico workers' compensation administration and such data cannot be used for any purpose other than that designated by the workers' compensation administration.

(6) Failure to file POC data in accordance with the act and these rules will subject the insurer to penalties and fines permitted by the act and the rules.

(7) After notice and opportunity to be heard, the director may decertify a vendor for good cause shown.

C. Exempt entities:

(1) The legislatively mandated pools governed by 11.4.10 NMAC are required to provide membership information to the workers' compensation administration through the self-insurance bureau and may exempt themselves from the electronic filing requirements at their option.

(2) Self-insurance groups, authorized to provide workers' compensation insurance to their members based upon a valid and active certificate of self-insurance issued by the director of the workers' compensation administration and whose membership roster does not exceed 75 members are required to provide membership information to the workers' compensation administration through the self-insurance bureau and may exempt themselves from the electronic filing requirements at their option.

(3) Individual self-insurers in possession of a valid and active certificate of self-insurance issued by the director of the workers' compensation administration and those subsidiaries listed on such certificate are exempt from the filing requirements.

D. Affirmative election forms: Affirmative election forms for executive employees shall be deemed filed with the director pursuant to Section 52-1-7 NMSA 1978 by filing the form with the insurance carrier that is issuing or will be issuing the workers' compensation insurance policy to the employer. Election forms for executive employees need not be submitted to the WCA.

E. Referral to enforcement bureau: If proof of coverage is not provided within the deadlines given by the WCA to obtain coverage, the potential violation may be referred for investigation and prosecution in accordance with 11.4.5 NMAC.

[11.4.11.8 NMAC - Rp, 11 NMAC 4.11.8, 9/30/16]

PART 12: UNINSURED EMPLOYERS' FUND

11.4.12.1 ISSUING AGENCY:

New Mexico Workers' Compensation Administration.

[11.4.12.1 NMAC - N, 10/15/03]

11.4.12.2 SCOPE:

This rule applies to all employers in the state of New Mexico who are subject to the Workers' Compensation Act and Occupational Disease and Disablement Law.

[11.4.12.2 NMAC - N, 10/15/03; A, 11/15/04]

11.4.12.3 STATUTORY AUTHORITY:

Chapter 258, Laws of 2003 and NMSA 1978, Section 52-5-4, authorizes the director to adopt reasonable rules and regulations for implementing the purposes of the act.

[11.4.12.3 NMAC - N, 10/15/03; A, 11/15/04]

11.4.12.4 DURATION:

Permanent.

[11.4.12.4 NMAC - N, 10/15/03]

11.4.12.5 EFFECTIVE DATE:

October 15, 2003 unless a later date is cited at the end of a section.

[11.4.12.5 NMAC - N, 10/15/03; A, 11/15/04]

11.4.12.6 OBJECTIVE:

The purpose of this rule is to establish requirements governing the uninsured employers' fund and establishing penalties against uninsured employers pursuant to Chapter 258, Laws of 2003.

[11.4.12.6 NMAC - N, 10/15/03]

11.4.12.7 DEFINITIONS:

A. "Claim" means any allegation of entitlement to benefits under Chapter 258, Laws of 2003, which has been communicated to the uninsured employer's fund or to the fund through the workers' compensation administration.

B. "Eligible" and **"eligibility"** mean that the claim is properly subject to payment by the fund to the extent that the claim is compensable. The compensability determination is independent of the eligibility determination. Eligibility and compensability shall be determined in accordance with applicable law.

C. "Fund" means the uninsured employers' fund established by Chapter 258, Laws of 2003 as administered by the workers' compensation administration.

D. "Fund administrator" means a designee of the director charged with administering the fund and implementing the provisions of this rule.

E. "TRD" means the New Mexico taxation and revenue department.

F. "UEF in-house counsel" means lawyers who are employees of the workers' compensation administration who litigate claims on their merits on behalf of the fund and who pursue reimbursement from uninsured employers after the UEF has paid benefits to or on behalf of the worker.

G. "WCA" means the workers' compensation administration of the state of New Mexico.

[11.4.12.7 NMAC - N, 10/15/2003; A, 11/15/2004; A, 12/31/2011, A, 1/1/2023]

11.4.12.8 PROCEDURES FOR SUBMISSION OF CLAIMS:

A. All claims shall be submitted on the mandatory complaint form available on the WCA website for workers' compensation benefits naming the uninsured employers' fund.

(1) The date of presentation to the fund shall be deemed to be the earliest date shown on the claim or complaint by an official WCA date stamp.

(2) If a claim is presented to the fund administrator prior to the running of the statute of limitations, the date of presentation shall toll the statute of limitations for purposes of filing against the fund.

B. Eligibility for benefits.

(1) Only those claims for injuries or illnesses that arose from accidents or exposures occurring in New Mexico and on or after June 22, 2003, shall be eligible to make claims against the fund.

(2) Only claims that would have been subject to the terms of the Workers' Compensation Act or Occupational Disease Disablement Law at the time of the injury or exposure shall be eligible to make claims against the fund.

(3) Only claims by workers employed by those employers who, despite the obligation to do so, were not insured pursuant to the Workers' Compensation Act shall be eligible to make claims against the fund.

(4) A worker shall not be eligible to make a claim against the fund if the worker has filed a valid election pursuant to Section 52-1-7 NMSA 1978.

(5) No claim that is eligible for payment by an insurer's guaranty fund, a self-insurer's guaranty fund, or pursuant to the joint and several liability provisions contained in the by-laws or other authorizing documents of a certified group self-insurer shall be

eligible to make claims against the fund unless that source of payments is demonstrated by the worker to be insolvent and unable to assume the claim.

(6) A final district court determination that the employer of a worker making the claim was not insured at the time of the worker's injury or occupational illness shall be conclusive with respect to the issue of insurance coverage only. In such cases, all other eligibility issues are reserved for the fund.

C. If a mediator or WCJ determines that it is more likely than not that a complaint before them presents a claim that is eligible for payment by the uninsured employers' fund, the mediator or WCJ shall amend the caption of the complaint to name the fund as a party. Any complaint amended pursuant to this provision shall be forthwith returned to the WCA clerk for further processing pursuant to the provisions of Section 52-5-5 NMSA 1978, notwithstanding the provisions of any other rule.

[11.4.12.8 NMAC - N, 10/15/2003; A, 11/15/2004; A/E, 4/1/2008; A, 12/31/2011; A, 1/1/2023]

11.4.12.9 CLAIMS ADMINISTRATION:

A. The WCA may contract with a an independent adjusting company for the adjusting of those claims that are determined to be eligible for payment by the fund, purchase a loss portfolio transfer covering some or all of the liabilities of the fund, or may purchase a policy of commercial insurance to cover the liabilities of the fund upon a finding by the director that such purchases are in the best interests of the workers eligible to receive benefits from the fund and the entities paying assessment to support the fund.

(1) The fund, in conjunction with the independent adjusting company, if any, shall pay, or oppose, claims on their merits, and shall be treated for purposes of mediation and adjudication of disputes as a party with all rights and responsibilities applicable under law.

(2) With approval of the director, the independent adjusting company may engage outside counsel for representation when necessary.

(3) The fund or the independent adjusting company may solicit information concerning the average weekly wage of the worker from the employer. Provision of such information to the fund or the independent adjusting company shall not constitute an admission that the worker was an employee. In the event that the employer does not respond to the request for wage information, the employer will be informed, in writing, at the last known address of the employer, or by any means authorized by the director or his designee, that wages are in dispute and that the worker's evidence concerning wages shall be used to calculate average weekly wage. In the event that the employer does not respond within a reasonable time from the date the letter described in this paragraph, an affidavit from the worker concerning the wages earned

while employed by the uninsured employer shall be deemed sufficient evidence upon which to pay benefits. Any suspected fraudulent reporting of wages by any party shall be reported to the enforcement bureau for investigation.

(4) In the event of a dispute concerning the wage basis for benefits, or in the event of other disputed benefits, the fund and the independent adjusting company may pay indemnity or other benefits, under reservation of rights, to the worker based upon available wage or other claim information.

B. With respect to any complaint filed with the WCA arising from a dispute about the provision of any benefit due on any claim eligible for payment by the fund, the fund and the employer at the time of injury or last injurious exposure shall be named as parties.

C. The independent adjusting company shall regularly report to the WCA on expenditures made to and on behalf of workers from the fund.

(1) The independent adjusting company shall file the first report of injury or illness (E1.2) with the WCA within 10 days of the eligibility determination and provide a copy of the E1.2 to the worker.

(2) The independent adjusting company shall file all payment reports required by law.

(3) The independent adjusting company shall maintain records sufficient to allow the WCA director or his designee to audit the administration of claims and shall provide those records upon request to the WCA. The independent adjusting company shall be subject to audit by the WCA or its contractor with respect to the administration of claims against the fund.

(4) The independent adjusting company shall actively support the WCA in its efforts to provide information to the public concerning the fund and to prosecute penalty collection proceedings against an uninsured employer pursuant to this rule.

D. The fund shall have the right to subrogation as provided by Section 52-1-9.1 NMSA 1978.

(1) The independent adjusting company may pursue subrogation rights on behalf of, and at the direction of, the fund.

(2) The independent adjusting company shall be entitled to retain reimbursement for reasonable legal fees and expenses plus ten percent of the sum recovered in subrogation net of legal fees and expenses. The remainder of the subrogation recovery shall be paid to the fund.

E. The fund shall be liable only for those benefits that are due under the Workers' Compensation Act or Occupational Disease Disablement Law.

(1) The fund shall be entitled to the protections of the exclusive remedy provisions of the Workers' Compensation Act or Occupational Disease Disablement Law to the same extent it would if it were the insured employer of any worker who is eligible for benefits against the fund.

(2) The fund shall not be subject to claims for payments of a judgment obtained in a third party lawsuit, nor for payment of a judgment obtained in a tort action against an uninsured employer.

F. Duplicate recovery of workers' compensation benefits is strictly prohibited.

(1) The fund shall immediately cease payments to or on behalf of any worker who is receiving workers' compensation payments from another source for the same injury and arising out of the same accident.

(2) The fund shall have the right of first reimbursement for workers' compensation benefit payments made that duplicate any payments received by the injured worker from another source and may offset subsequent payments, institute collection proceedings, request criminal investigation or seek any other lawful remedy to recover duplicate payments of workers' compensation benefits.

G. Payments under the fund shall not constitute payments by the employer for purposes of the exclusive remedy provisions of the Act. The fund shall be entitled to assert all defenses and subrogation rights that would be available to an insured employer.

[11.4.12.9 NMAC - N, 10/15/2003; A, 11/15/2004; A, 12/31/2011; A, 1/1/2023]

11.4.12.10 FINANCIAL RESPONSIBILITY OF EMPLOYER:

The employer shall pay claims, costs, interest and penalties for which it becomes obligated under the New Mexico Workers' Compensation Act, the Occupational Disease Disablement Law, and Uninsured Employers' Fund (UEF) Act.

[11.4.12.10 NMAC - N, 10/15/03; A, 11/15/04; N/E, 12/23/05; A, 12/31/11]

11.4.12.11 CAP ON BENEFITS:

A. Notwithstanding the provisions of the Workers' Compensation Act and Occupational Disease Disablement Law, injured employees or an employee's beneficiaries who pursue a claim for benefits from the uninsured employers' fund (UEF) are not guaranteed payment for full workers' compensation benefits from the UEF.

B. The liability of the state, the uninsured employers' fund and the state treasurer, with respect to payment of any compensation benefits, expenses, fees or

disbursements properly chargeable against the UEF, is limited to the assets in the UEF, and they are not otherwise liable for any payment.

C. For any job-related accident date occurring on or before June 30, 2023, the liability of the UEF for payment of indemnity benefits to an injured worker or their beneficiary shall not exceed $40,000 for each date of accident, nor shall payment of medical expenses $40,000 for each date of accident. If indemnity benefit payments do not reach $40,000, any unused portion can be applied to payment of medical expenses, over and above the $40,000 limit for medical benefits.

D. For any job-related accident date occurring on or after July 1, 2023, payment of indemnity benefits to an injured worker or their beneficiary shall not exceed $60,000 for each date of accident, nor shall payment of medical expenses exceed $60,000 for each date of accident. If indemnity benefit payments do not reach $60,000, any unused portion can be applied to payment of medical expenses, over and above the $60,000 limit for medical benefits.

E. For any job-related accident date occurring on or after July 1, 2025, and subject to the financial solvency of the UEF as determined by the director, payment of indemnity benefits to an injured worker or their beneficiary shall not exceed $75,000 for each date of accident, nor shall payment of medical expenses exceed $75,000 for each date of accident. If indemnity benefit payments do not reach $75,000, any unused portion can be applied to payment of medical expenses, over and above the $75,000 limit for medical benefits.

[11.4.12.11 NMAC - N, 10/15/2003; A, 11/15/2004; N/E, 12/23/2005; A, 1/1/2023]

11.4.12.12 PENALTIES COLLECTED FROM UNINSURED EMPLOYERS:

If the WCA director or workers' compensation judge determines that an employer was obligated to pay workers' compensation benefits to or on behalf of a worker and has not done so due to its failure to obtain and keep in force a policy of workers' compensation insurance that is valid pursuant to the Workers' Compensation Act, the WCA director or the workers' compensation judge shall impose a penalty against the employer of not less than fifteen percent and not more than fifty percent of the value of the total award in connection with the claim that shall be paid into the uninsured employers' fund. The determination of the appropriate percentage of penalty imposed shall be treated as a statutorily authorized discretionary act by a state agency, for purposes of judicial review. This penalty is separate from, and in addition, to any penalty or remedy sought against an uninsured employer pursuant to Sections 52-1-61 or 52-1-62 NMSA 1978 for failure to have insurance when required to do so. This penalty is intended to protect the health, safety and welfare of the citizens of the state of New Mexico and shall be considered a governmental penalty for purposes of the dischargeability provisions of the federal bankruptcy code.

A. Any final compensation order addressing the compensability of the workers' claim shall not be subject to collateral attack.

B. The actual benefits provided to or on behalf of a worker or his dependents shall be presumed valid as the basis for the assessment of a penalty.

C. Billing and medical records in the possession of the UEF or the independent adjusting company shall be considered records of the WCA for purposes of authentication.

D. The UEF may use any legal process for collecting any imposed penalty, or collecting reimbursement from the employer for indemnity and medical benefits, costs, and attorneys' fees paid by UEF, including, but not limited to, reduction of the penalty to judgment in district court, seeking and obtaining writs of garnishment and execution, contempt citations or any other legal process in aid of collection and participating as a party in any bankruptcy action, including filing an involuntary petition in federal bankruptcy court to liquidate personal or business assets for the purpose of enforcing the penalty.

E. For the purposes of these actions, the UEF shall, at all times act pursuant to the commissions of its personnel as special assistant attorneys general. All proceedings before the WCA director for enforcement of the provisions of this section shall be conducted in accordance with 11.4.5 NMAC.

F. The fund may seek reimbursement of the costs and attorney fees of any legal action instituted in a proceeding to determine or collect a penalty or reimbursement pursuant to this subsection.

[11.4.12.12 NMAC - Rn, 11.4.12.10 NMAC, 12/23/2005; A, 12/31/2011; A, 1/1/2023]

11.4.12.13 ASSESSMENTS:

A. The fiscal year of the fund coincides with the fiscal year of the state.

B. Beginning with the calendar quarter ending September 30, 2004, and for each calendar quarter thereafter, there is assessed against each employer who is required or elects to be covered by the Workers' Compensation Act a fee equal to two dollars thirty cents ($2.30) per covered employee. Thirty cents per employee of the fee assessed against an employer shall be distributed to the credit of the uninsured employers' fund.

C. Penalties, pursuant to NMSA 1978, Section 52-1-61 for non-reporting, incorrect reporting or non-payment of assessments due shall accrue on a monthly basis, with each month of noncompliance constituting a separate offense.

(1) Penalties pursuant to this provision shall be in addition to any penalties imposed by the New Mexico department of insurance or the New Mexico taxation and revenue department.

(2) The director may seek any remedy available under law for enforcement of penalties imposed pursuant to this provision.

(3) The respondent shall pay costs incurred to enforce penalties.

[11.4.12.13 NMAC - Rn, 11.4.12.11 NMAC, 12/23/05]

11.4.12.14 MISCELLANEOUS PROVISIONS:

A. The fund may purchase excess insurance from the fund corpus if, in the judgment of the director, it is fiscally prudent to do so.

B. Auditing of the fund by the superintendent of insurance shall occur yearly, commencing thirty (30) days after the close of the fund’s fiscal year.

(1) The final report of the audit of the fund (after an opportunity to contest and respond to findings made by the auditor) shall be treated as a public document.

(2) In the event of any audit exceptions in the final report of the audit, the fund will issue a public statement of corrective actions that it will implement to prevent future exceptions.

(3) The fund shall comply with all requirements for the reporting of losses and claims expenditures for statistical purposes that would apply to a self-insured employer.

[11.4.12.14 NMAC - Rn, 11.4.12.12 NMAC, 12/23/05]

PART 13: CONTROLLED INSURANCE PLANS

11.4.13.1 ISSUING AGENCY:

New Mexico Workers' Compensation Administration (WCA).

[11.4.13.1 NMAC - N, 11/15/04]

11.4.13.2 SCOPE:

These rules cover all parties regulated pursuant to NMSA 1978, Section 52-1-4.2 and all parties seeking to establish a "controlled insurance plan" or a "wrap-up " insurance plan, as defined below, for the purpose of insuring workers' compensation liability.

[11.4.13.2 NMAC - N, 11/15/04]

11.4.13.3 STATUTORY AUTHORITY:

The director is authorized by NMSA 1978, Section 52-5-4 to adopt reasonable rules and regulations to implement the legislative purposes of the Workers' Compensation Act (Act). The director is empowered to seek administrative penalties pursuant to NMSA 1978, Section 52-1-61. Regulatory authority over controlled insurance plans is set forth at NMSA 1978, Section 52-1-4.2.

[11.4.13.3 NMAC - N, 11/15/04]

11.4.13.4 DURATION:

Permanent.

[11.4.13.4 NMAC - N, 11/15/04]

11.4.13.5 EFFECTIVE DATE:

November 15, 2004 unless a later date is cited at the end of a section.

[11.4.13.5 NMAC - N, 11/15/04]

11.4.13.6 OBJECTIVE:

This part sets forth the requirements and processes for application and regulation of controlled insurance plans, enumerates prohibited acts and sets forth enforcement procedures.

[11.4.13.6 NMAC - N, 11/15/04]

11.4.13.7 DEFINITIONS:

A. "Unit statistical data" means the detailed exposure, premium, and loss (claim) information at the classification code level. Data providers submit unit statistical data to the designated rate service organization for use in ratemaking and experience rating.

B. "Single construction site" means the defined contiguous geographical area in which all accidents that occurred during the duration of the controlled insurance plan shall be covered by the controlled insurance plan.

C. "Noncontiguous construction site" means an area, or areas, in which construction is taking place that is not described on the official application, or amended application, as being within the controlled insurance plan by both a narrative description and a map designation which shows the construction site outlined by a single, non intersecting, boundary line.

D. "Controlled insurance plan," "OCIP," "CCIP," "wrap-up," "owner controlled insurance plan," and "contractor controlled insurance plan" individually and collectively mean the controlled insurance plan subject to regulation under this rule.

E. "Same project" means a construction project on a single construction site defined and funded at the time of the application required by these rules.

F. "Director" means the director of the workers' compensation administration or his designee.

G. "WCA" or "agency" means the workers' compensation administration of the state of New Mexico.

H. "Applicant" means the person or entity that sought approval of a controlled insurance plan, any person designated by the applicant as their agent for interaction with the WCA and any substituted applicant approved as a substitute in writing by the director.

I. "Equipment and furnishings" means any item that is shown in, or specified on, construction documents for the single construction site.

[11.4.13.7 NMAC - N, 11/15/04]

11.4.13.8 APPLICATIONS:

A. Any party proposing a controlled insurance plan pursuant to Section 52-1-4.2 NMSA 1978, shall submit an application for approval to the director on a form provided for that purpose not less than 30 days prior to the commencement of bidding procedures for the primary contractor.

(1) A provisional or contingent application for approval shall be allowed, provided that neither final approval nor permission to break ground may be given to any provisional or contingent application.

(2) Approvals of provisional or contingent applications are advisory only and no approval that is not designated as a final approval and that does not bear the signature of the director shall be deemed final.

(3) Every application for approval of a controlled insurance plan shall contain a detailed financial statement demonstrating that the aggregate construction cost, as statutorily defined, has been satisfied, and further showing that the sources of funding for the project conform with the definition of the term, "same project" contained in these rules. The financial statement shall be supported by an affidavit executed by the signatory to the application attesting to the accuracy and completeness of the financial statement.

B. No controlled insurance plan construction project shall break ground until final written approval of the controlled insurance plan, subject to amendment, is provided by the director. The director is authorized to seek injunctive relief to prohibit construction at a site until final approval of an application for a controlled insurance plan is given or the construction project is operated under a non-controlled insurance plan otherwise complying with the act, in addition to any other relief sought.

C. Failure to provide and maintain current information on the application form on file with the director, and to update any change information within ten calendar days of the change shall constitute a violation of these rules. The applicant shall have a continuing duty to maintain the currency and correctness of the application on file with the director.

D. Amendments to an application to conform with any modifications to the job, modifications to the safety plan or modifications to the designated single construction site and all other information required by this rule or the application for approval of a controlled insurance plan are required prior to the commencement of work pursuant to the amended provisions.

(1) The insurance policy for a controlled insurance plan must be conformed to any revisions in the application prior to commencement of work pursuant to the revisions.

(2) All contractors and subcontractors shall be notified in writing upon any request for amendment or revision to the application, and shall be separately notified of the approved amendments or revisions prior to the commencement of work pursuant to any approved amendments or revisions.

E. The director or his designee shall be available to applicants for controlled insurance plans to provide counseling in aid of the development of acceptable applications, but in no event shall such assistance be construed as the director's approval of the application or as a promise that the director will approve an application.

F. The director or his designee shall attempt to complete the application review process within 30 days of submission of the final application, and shall inform the applicants in writing of the reasons for, and expected duration of, any delay beyond the 30 day period.

G. The applicants shall specify the names of at least two individuals authorized to accept notices and service of process applicable to the controlled insurance plan. For each named individual, both street and mailing addresses shall be specified, and the applicant shall notify the WCA of any changes in the authorized representatives for receipt of notices and process or the applicable addresses for such representatives within 10 business days of any such change.

H. The applicant shall specify the name of at least one person, who may also be designated to perform other functions under this part, who is knowledgeable concerning

the handling of workers' compensation claims under the act. The director shall approve the designated claims management professional after submission of credentials and resume, prior to the commencement of the work. The designated claims management professional shall be available within 24 hours of any accident at the single construction site and shall consult with the injured worker's employer within 72 hours of any accident at the single construction site, concerning the handling of the claim and return to work issues.

[11.4.13.8 NMAC - N, 11/15/2004; A, 1/1/2023]

11.4.13.9 CONTROLLED INSURANCE PLAN CONSIDERATION UNDER THE EXTRA-HAZARDOUS EMPLOYER PROVISIONS OF THE WORKERS' COMPENSATION ACT:

The controlled insurance plan shall be considered a single employer for purposes of WCA regulations concerning extra-hazardous employers, promulgated pursuant to Subsection (E) of Section 52-1-6.2 NMSA 1978. The North American industrial classification system (NAICS) code applicable to the general contractor shall be the industry code utilized for comparison of the controlled insurance plan loss record to its industry standard. The controlled insurance plan project shall be examined every 90 days, while construction is ongoing, for purposes of determining extra- hazardous employer status.

[11.4.13.9 NMAC - N, 11/15/2004; A, 1/1/2023]

11.4.13.10 SAFETY PLANS:

A. Criteria for approval. The following requirements must be met for initial approval of a safety plan and for final approval of an application for a controlled insurance plan. Failure to maintain continuous compliance with each of these requirements shall be considered a violation of these rules and the director shall be authorized to seek injunctive action to prohibit construction work until such failure is corrected.

(1) New Mexico OSHA compliance;

(2) Appointment of a site safety manager acceptable to the director;

(a) The site safety manager shall have a minimum of three-year's experience in programs covered by 29 CFR part 1910 or 29 CFR part 1926, as applicable.

(b) An applicant shall submit a resume and credentials of the proposed site safety manager not less than 14 days before commencement of work on the project. The director, or his designee, shall review the resume credentials within 14 days. Work on the project shall not commence until the director or his designee has approved a site safety manager.

(c) An applicant shall submit a resume and credentials for any proposed substitute or standby site safety manager prior to any construction activities at the single construction site overseen by the substitute or standby site safety manager.

(d) In no event shall the applicant allow work at the single construction site to proceed for more than eight continuous hours without the approved site safety manager, or approved substitute or backup site safety manager being physically present at the single construction site.

(e) All approved safety plans must provide that the approved site safety manager, or approved standby or substitute site safety manager shall have plenary authority to close down the construction project in whole or in part, in the event that hazards to health or safety of workers present an imminent danger to worker health or safety. The approved site safety manager, backup site safety manager or substitute site safety manager has a duty to close down the construction project, in whole or in part, upon discovery of an imminent danger to worker health or safety that cannot be immediately rectified.

(3) A plan for coordination of site safety programs among all contractors and subcontractors by the site safety manager, including access for contractor and subcontractor safety personnel.

(a) The plan shall provide for review of the controlled insurance plan safety plan and drug and alcohol testing provisions by safety personnel employed by, or contracted to, individual contractors and subcontractors.

(b) The plan shall provide that any safety provisions, and drug and alcohol testing programs required by the contractor or subcontractor that are more stringent in the safety provisions or drug and alcohol testing programs required by the approved safety plan shall be enforceable against the employees and working conditions of the contractor or subcontractor and shall not be superseded by the approved controlled insurance plan safety plan or the approved controlled insurance plan drug and alcohol screening program.

(4) Third party safety consultant

(a) The applicant shall engage the services of an independently contracted safety consultant ("third party safety consultant") to provide independent inspections and oversight on safety issues to assist the site safety manager and the WCA.

(i) The third party safety consultant shall conduct work environment evaluation inspections of the single construction site at least twice per month during construction activities.

(ii) The third party safety consultant shall notify the site safety manager immediately of any hazardous condition disclosed by the third party safety consultant's inspection.

(iii) The third party safety consultant shall not be terminated in response to making a good-faith finding that a safety hazard exists or in response to reporting such safety violations as provided by these rules.

(b) The third party safety consultant shall have credentials at least equal to those required of the site safety manager.

(c) The third party safety consultant shall not be the backup site safety manager.

(d) The credentials of the third party safety consultant shall be presented to, and approved in writing by, the WCA prior to the commencement of construction

(e) In the event that the third party safety consultant is replaced during construction activities, the credentials of the replacement third party safety consultant shall be presented to the WCA within no more than 10 working days of the earlier of the termination of the contract or the cessation of work by the prior third party safety consultant.

(f) The third party safety consultant shall prepare written reports at least every 30 days from the date of commencement of construction detailing any safety issues or hazards discovered during the inspections that occurred during the prior month. Said reports shall be provided to the WCA, all contractors and all sub-contractors.

(g) The third party safety consultant shall also generate a written report in the event that he or she discovers any condition or hazards that constitute an imminent danger to worker health or safety that the independent safety consultant believes would justify closure of the construction site in whole or in part by the site safety manager. Said report shall be provided to the WCA, all contractors and all subcontractors within 2 days of the discovery of the condition or hazard.

(5) Drug and alcohol screening, complying with provisions of Section 52-1-12.1 NMSA 1978. Compliance with the drug and alcohol screening plan shall be the responsibility of the applicant provided that the applicant shall implement any more stringent plan incorporated pursuant to Subparagraph (a) of Paragraph (3) of Subsection A of 11.4.13.10 NMAC.

(6) Continuous coverage of the construction site shall be provided by an on-site registered nurse, who shall have demonstrated experience in the treatment of workers' compensation claimants, during all working hours.

(a) Credentials and resume for the registered nurse must be presented to the WCA and approved prior to the beginning of construction.

(b) Credentials for any registered nurse serving in a backup capacity or as a substitute for the original approved registered nurse must be presented to the WCA and approved prior to the first instance of coverage by that nurse.

(c) Should the retention of a registered nurse constitute a hardship on the applicant because of location or any other circumstance, the applicant may petition the director for a waiver of this requirement pursuant to 11.4.13.11 NMAC and the substitution of a certified, full-time, emergency medical technician (EMT). The applicant must demonstrate compliance.

(7) Emergency medical services plan

(a) The plan must include a provision requiring prominent display at the work site giving notice to workers of emergency facilities to be used in the event of an accident, including a map directing workers to the appropriate emergency facilities.

(b) The plan must include a provision requiring prominent display at the work site of notices concerning any contracted physicians or medical facilities.

(c) The plan must contain a provision for providing notice of initial choice of health care providers to workers, in compliance with WCA regulations.

(d) The plan must contain evidence of planning and contractual preparation for emergency medical evacuation by air, when medically appropriate.

(8) Evidence of a plan for facilitating return to work of injured employees.

(a) The plan must provide for appropriate communication to workers to ensure to the extent possible they are fully apprised concerning return to work policies.

(b) The plan must provide for the direct involvement of the employer of the injured worker in return to work planning and implementation commencing as soon as possible after the injury to the worker.

(c) The plan must provide for continued communication concerning return to work between the insurer, the worker and employer for all injuries persisting beyond the completion of the project.

(9) The site safety manager must certify to the owner of the property upon which the controlled insurance plan project is being built, all contractors and subcontractors and to the independent safety consultant, and to the WCA, that each worker on the single construction site has been specifically safety trained for each job function that they perform, within 10 days of the commencement, or change, of the

workers job duties on the single construction site. The certification shall be on a form approved by the director.

(10) The plan must provide for communications provided to the applicant regarding substance abuse testing, medical treatment and medical conditions, or injury reports to be promptly and specifically communicated to the workers employer within four calendar days of the communication to the applicant. The applicant is solely responsible for this requirement. The applicant shall specify, to the WCA and to each contractor and subcontractor, before the commencement of work at the single construction site, the names of at least two persons working full time at the single construction site who are authorized to assist the applicant in fulfilling this responsibility.

B. Failure to obtain approval for a safety plan or to maintain compliance with an approved safety plan is a serious violation of these rules and the director is authorized to seek injunctive relief to prevent commencement or continuation of construction until such situation is remedied in addition to any other relief sought.

[11.4.13.10 NMAC - N, 11/15/2004; A, 12/29/2006; A, 1/1/2023]

11.4.13.11 WAIVERS:

A waiver of any non-statutory requirement in this part may be sought by the applicant. No waiver of any requirement of this part shall be effective unless documented in writing, signed by the director. No waiver shall be granted under circumstances where the waiver has the effect of increasing the risk of injury or accident to any worker on the project, or increasing the impact or effect of any accidental injury or occupational disease upon any worker on the project. The director may consult with in-house or independent safety experts in making a determination under this section, but his determination shall not be overturned unless it is arbitrary, capricious, abusive of discretion or otherwise not in compliance with law.

[11.4.13.11 NMAC - N, 11/15/04]

11.4.13.12 BID NOTICES TO CONTRACTORS AND SUBCONTRACTORS:

A. All bid notices to contractors and subcontractors shall include specification of the single construction site proposed, and shall include a copy of the proposed controlled insurance safety plan.

B. The bid procedure utilized by the applicant must include a mechanism for contractors and subcontractors to have questions concerning the controlled insurance plan answered before the bid is due.

[11.4.13.12 NMAC - N, 11/15/04]

11.4.13.13 REPORTS AND OFFICIAL VISITS:

A. The controlled insurance plan shall submit a report on a quarterly basis or as otherwise determined by the director.

B. The director may require an official visit to the controlled insurance plan site to keep apprised of the progress of the controlled insurance plan and its compliance with the Workers' Compensation Act and WCA rules.

[11.4.13.13 NMAC - N, 11/15/04; 11.4.13.13 NMAC - N, 12/31/13]

11.4.13.14 DISPUTES CONCERNING APPROVAL OF THE APPLICATION FOR APPROVAL OF A CONTROLLED INSURANCE PLAN AND FOR THE REQUIRED SAFETY PLAN:

A. All application materials, and safety plan materials shall be submitted to the director at least 30 days before the planned commencement of construction.

B. Amendments to the application or safety plan, and any waivers of requirements, that are negotiated between the WCA and the applicant shall only be effective if reduced to writing and signed by both parties.

C. In the event that an impasse develops in negotiations or disputes arising from the application process, the safety plan or request for waivers of requirements, the director shall designate an informal dispute resolution coordinator to attempt to bring the parties together to help them reach a mutually agreeable solution.

D. In the event the informal dispute resolution fails to resolve the dispute, either the applicant or the WCA can request a formal hearing before the director.

E. The director, or his hearing officer, shall hear the positions of both sides and render an initial ruling within 15 days of the hearing. Motions practice and discovery procedures shall not be allowed. The rules of evidence are relaxed to the extent possible, consistent with the need to maintain order in the hearing and reach a fair decision.

F. Appeal from the ruling the director or his hearing officer after a formal hearing shall be by writ of certiorari to the district court, pursuant to SCRA 01-075.

[11.4.13.14 NMAC - N, 11/15/04; 11.4.13.14 NMAC - Rn, 11.4.13.13 NMAC, 12/31/13]

11.4.13.15 PROHIBITED ACTS:

The following acts are prohibited:

A. The establishment of the controlled insurance plan for projects that do not have an aggregate construction value in excess of $150 million, including equipment and

furnishings, expended within a five-year period as provided in NMSA 1978, Section 52-1-4.2 (A) and Section 11.4.7.9 of these rules.

B. The establishment of a rolling wrap-up plan or establishment of a construction project insured under a rolling wrap-up plan.

C. Establishment of a controlled insurance plan on a site other than the single construction site, or establishment of the controlled insurance plan on a noncontiguous construction site.

D. Failure to include appropriate notice of the controlled insurance plan in request for bids or request for proposals to construction contractors and subcontractors, and failure to include an accurate description of the single construction site or failure to include a copy of the proposed controlled insurance safety plan with the request for bids or request for proposals.

E. Failure to include copies of specifications for the controlled insurance plan with request for bids or request for proposals to construction contractors and subcontractors and failure to provide a mechanism for contractors and subcontractors to have their questions concerning the controlled insurance plan answered before the bid or proposal is due.

F. Failure to timely file the contract for a controlled insurance plan and evidence of compliance with NMSA 1978, Section 52-1-4.2 (A-E) with the WCA and the superintendent insurance at least 30 days before the date on which the applicant is to begin receiving bids or proposals on the project.

G. Failure to request and obtain written approval from the WCA of the application for approval and the site safety plan for the controlled insurance project, prior to the commencement of work on the project.

H. Failure to distribute project performance based refunded premiums or dividends to each participating contractor or subcontractor on a proportional basis, if such refunded premiums or dividends are provided for in the contract.

I. Failure to establish a method for timely reporting of job related injuries to employees of the contractor and subcontractors to their specific employer, the controlled insurance plan insurer and the WCA.

J. Failure to maintain and report unit statistical data to the insurance company writing the workers' compensation insurance policies for the contractors and subcontractors participating in the controlled insurance plan project within the time frame required by the insurance company.

K. Failure by contractors and subcontractors participating in the controlled insurance plan project to allow access to payroll records for payroll auditing purposes.

L. Failure to provide contractors and subcontractors with actual specific payroll audit data following the end of the annual policy period.

M. Failure to provide information to contractors and subcontractors concerning injuries to their workers in a form and format designed to quickly and accurately inform the contractors and subcontractors concerning the nature and extent of injuries and the circumstances in which the injury occurred.

N. Failure to cover the injury to an employee of any contractor or subcontractor that occurs within the physical confines of the single construction site.

O. Failure to update and keep current the application, safety plan, narrative description of the single construction site and visual diagram of the single construction site.

P. Failure to take steps to conform the controlled insurance plan policy to the single construction site definition before work is done, or knowingly allowing work to be commenced in any area intended to be covered by the controlled insurance plan, without ensuring that the controlled insurance plan policy is written to conform its geographic scope of coverage to the single construction site.

Q. Failure to comply with any provision of these rules, or to knowingly allow any contractor, subcontractor or employee or independent contractor of the general contractor to violate any provision of these rules.

[11.4.13.15 NMAC - N, 11/15/04; 11.4.13.15 NMAC - Rn, 11.4.13.14 NMAC, 12/31/13]

11.4.13.16 ENFORCEMENT:

A. In the event of violation of any of these rules, or in the event of the occurrence of any prohibited acts specified in these rules, the WCA may seek any or all of the following penalties singly or in combination, against the applicant, any individual responsible for the performance or non-performance of any duty or prohibited act and, with respect to injunctive relief, against the continuation of the controlled insurance project:

(1) A fine of up to $1000 for each violation pursuant to NMSA 1978, Section 52-1-61.

(2) A fine of up to $1000 for each day of the continuing violation, after notice is served upon the designated representative of the applicant that the director has made a finding of probable cause that a continuing violation of these rules has occurred.

(3) Injunctive relief for the cessation of construction activities at the single construction site for the noncontiguous construction site until full compliance with these rules is achieved, as specifically authorized in these rules.

B. The procedures to be utilized in enforcement proceedings pursuant to this section as set forth in 11 NMAC 4.5.

[11.4.13.16 NMAC - N, 11/15/04; 11.4.13.16 NMAC - Rn, 11.4.13.15 NMAC, 12/31/13]

CHAPTER 5: OCCUPATIONAL HEALTH AND SAFETY

PART 1: OCCUPATIONAL HEALTH AND SAFETY - GENERAL PROVISIONS

11.5.1.1 ISSUING AGENCY:

Environmental Improvement Board.

[5/1/1995; 11.5.1.1 NMAC - Rn, 11 NMAC 5.1.1, 10/30/2008]

11.5.1.2 SCOPE:

All employment and places of employment covered by the Occupational Health and Safety Act.

[5/1/1995; 11.5.1.2 NMAC - Rn, 11 NMAC 5.1.2, 10/30/2008]

11.5.1.3 STATUTORY AUTHORITY:

Sections 50-9-7, 50-9-13 and 74-1-9 NMSA 1978.

[5/1/1995; 11.5.1.3 NMAC - Rn, 11 NMAC 5.1.3, 10/30/2008]

11.5.1.4 DURATION:

Permanent.

[5/1/1995; 11.5.1.4 NMAC - Rn, 11 NMAC 5.1.4, 10/30/2008]

11.5.1.5 EFFECTIVE DATE:

May 1, 1995, except where a later effective date is indicated in the history note at the end of a section.

A. Initial promulgation: Sections 1 through 14 of this part were effective May 1, 1995.

B. Amendments and additions: The amendments to Sections 5 and 7 through 13 of this part and Sections 15 through 24 of this part are effective January 1, 1996.

[5/1/1995, 1/1/96, 9/15/97; 11.5.1.5 NMAC - Rn & A, 11 NMAC 5.1.5, 10/30/2008]

11.5.1.6 OBJECTIVE:

To establish definitions and procedures applicable to all employers subject to the Occupational Health and Safety Act.

[5/1/1995; 11.5.1.6 NMAC - Rn, 11 NMAC 5.1.6, 10/30/2008]

11.5.1.7 DEFINITIONS:

A. General: Unless otherwise specified, the terms used in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed in accordance with definitions contained in the state act. In addition, the following terms have the indicated meanings.

(1) "Bureau" means the occupational health and safety bureau of the department, or any other bureau of the department to which responsibility for enforcement of the state act may be assigned.

(2) "Chief" means the chief of the bureau or his or her designee.

(3) "Commission" means the occupational health and safety review commission.

(4) "Compliance officer" means a department employee who is carrying out the provisions of the state act.

(5) "Compliance program manager" means the person in the bureau who is primarily responsible for managing the compliance program.

(6) "Counsel" means an attorney licensed to practice law.

(7) "Department" means the New Mexico environment department.

(8) "Employee representative" means a representative of the employee's recognized or certified bargaining agent.

(9) "Imminent danger situations" means those situations in a place of employment which are such that a danger exists which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement provisions otherwise provided by the state act.

(10) "Interviewee" means the individual being questioned by the department's representative.

(11) "On-site consultation" means an inspection conducted by the bureau pursuant to Subsection B of 50-9-6 NMSA 1978.

(12) "Personal counsel" means counsel for an employee who requests representation for an employee interview, but does not want to use employer counsel. The employer may, if the employee requests such counsel prior to the interview, or the employer must, if employee uses company counsel during the interview and a conflict of interest arises during the interview in violation of the New Mexico rules of professional conduct, retain and pay for a counsel for the employee: (i) who is not currently representing the employer; (ii) does not have a retainer agreement with the employer; (iii) is not in-house counsel with the employer; (iv) will have a duty to represent employee in the context of the OSHA investigation; (v) will abide by the relevant New Mexico rules of professional conduct and (vi) and is a comparable attorney to the employer's counsel.

(13) "Private" means:

(a) for employee interviews, to the exclusion of an employer or employer representative, except if employee requests employee's representative, or requests employer counsel and both employer and employee consent in writing to the dual representation and the counsel abides by the relevant New Mexico rules of professional conduct; and

(b) for employer interviews, to the exclusion of an employee or employee representative.

(14) "Secretary" means the secretary of the environment department.

(15) "State act" means the Occupational Health and Safety Act, NMSA 1978, Sections 50-9-1 to 50-9-25, as it may be amended from time to time.

(16) "Trade secret" means the whole or any portion of a phase of any scientific or technical information, design, process, procedure, formula or improvement that is secret and of value. A trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.

(17) "USDOL" means the United States department of labor.

B. Terms in incorporated federal standards: Terms in the federal occupational safety and health standards incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be construed to be references to the corresponding entities in the state occupational health and safety program.

(1) "Act" shall be construed to mean the corresponding section of the state act.

(2) "Assistant secretary of labor" shall be construed to mean the secretary.

(3) "OSHA area director or area office" shall be construed to mean the compliance program manager.

(4) "OSHA area office" shall be construed to mean the bureau.

[8/30/1973, 9/3/1978, 3/21/1979, 5/10/1981, 1/19/1994, 5/1/1995, 1/1/1996; 11.5.1.7 NMAC - Rn & A, 11 NMAC 5.1.12, 10/30/2008; A, 12/31/2008]

11.5.1.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

This part shall be construed as amending and superseding all prior regulations. See history of 11.5.1 NMAC at the end of this part.

[1/19/1994, 5/1/1995, 1/1/96; 11.5.1.8 NMAC - Rn & A, 11 NMAC 5.1.7, 10/30/2008]

11.5.1.9 SEVERABILITY:

If any provision or application of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[5/1/1995, 1/1/1996; 11.5.1.9 NMAC -Rn & A, 11 NMAC 5.1.8, 10/30/2008]

11.5.1.10 SAVING CLAUSE:

Future amendments: No future amendment to 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC shall affect any administrative or judicial enforcement action pending on the effective date of the amendment.

[5/1/1995, 1/1/1996; 11.5.1.10 NMAC - Rn & A, 11 NMAC 5.1.9, 10/30/2008]

11.5.1.11 CONSTRUCTION:

The provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC shall be liberally construed to effectuate the purpose of the state act.

[5/1/1995, 1/1/1996, 11.5.1.11 NMAC - Rn & A, 11 NMAC 5.1.10, 10/30/2008]

11.5.1.12 COMPLIANCE WITH OTHER REGULATIONS:

Compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC does not relieve a person from the obligation to comply with other applicable state and federal regulations.

[5/1/1995, 1/1/1996; 11.5.1.12 NMAC - Rn & A, 11 NMAC 5.1.11, 10/30/2008]

11.5.1.13 COMPLIANCE WITH INCORPORATED STANDARDS; EFFECT:

An employer who is in compliance with the provisions of 11.5.1 NMAC through 11.5.4 NMAC and 11.5.6 NMAC, including any incorporated federal standards, shall be deemed in compliance with the requirement of Subsection A of Section 50-9-5 NMSA 1978, but only to the extent of the condition, practice, means, methods, operation or process covered by the provision.

[5/10/1981, 5/1/1995, 1/1/1996; 11.5.1.13 NMAC - Rn & A, 11 NMAC 5.1.13, 10/30/2008]

11.5.1.14 STAY OR INVALIDATION OF INCORPORATED FEDERAL STANDARDS; EFFECT:

If a federal court stays, invalidates, or otherwise renders unenforceable by USDOL, in whole or in part, any federal standard incorporated by reference in 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, such incorporated federal standard shall be enforceable by the department only to the extent it is enforceable by USDOL.

[5/1/1995; 11.5.1.14 NMAC - Rn & A, 11 NMAC 5.1.14, 10/30/2008]

11.5.1.15 LIMITATIONS:

The exemptions and limitations contained in the appropriation for the USDOL, including those applicable to the proposal or assessment of penalties, shall be construed as limitations on the department's use of any federal grant funds for enforcement of the state act and the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC; but nothing in such exemptions and limitations shall be construed to prohibit the department from enforcing any otherwise applicable provisions with the use of state funds only.

[1/20/1980, 7/19/1994, 1/1/1996, 11.5.1.15 NMAC - Rn & A, 11 NMAC 5.1.15, 10/30/2008]

11.5.1.16 RECORDKEEPING AND REPORTING OCCUPATIONAL INJURIES, ILLNESSES AND FATALITIES:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1904, Recording and Reporting Occupational Injuries and Illnesses (internet: www.osha.gov), are hereby incorporated into this section.

B. Exception: Work-related injuries, illnesses and fatalities which are required to be reported by 29 CFR Part 1904.39 shall be reported, by email, telephone or facsimile machine, to the bureau in lieu of the location specified in 29 CFR Part 1904.39. The bureau's address, email, and telephone/facsimile numbers are: occupational health and

safety bureau, New Mexico environment department, P.O. Box 5469, Santa Fe, NM 87502, email: nmenv-osha@state.nm.us, Tel: (505) 476-8700, Fax: (505) 476-8734.

[10/9/1975, 9/3/1978, 3/21/1979, 5/10/1981, 11/17/1983, 7/19/1994, 1/1/1996, 8/15/1998; 11.5.1.16 NMAC - Rn & A, 11 NMAC 5.1.16, 10/30/2008; A, 7/16/2015; A/E, 8/5/2020; A/E, 12/3/2020, A, 1/26/2021; A, 05/31/2023]

11.5.1.17 POSTING OF OCCUPATIONAL HEALTH AND SAFETY INFORMATION POSTER:

Posting of the occupational health and safety information poster is required by Subsection C of Section 50-9-5 NMSA 1978. Each employer shall post and keep posted one or more notices, to be furnished by the bureau, informing employees of the protections and obligations provided for in the state act, and that for assistance and information, employees should contact the department. The notices shall be posted where employees report each day or from which the employees operate to carry out their activities. Each employer shall take steps to insure that the notices are not altered, defaced, removed, or covered by other material.

[10/9/1975, 9/3/1978, 3/21/1979, 4/26/1981, 7/19/1994, 1/1/1996; 11.5.1.17 NMAC - Rn & A, 11 NMAC 5.1.17, 10/30/2008]

11.5.1.18 PETITIONS FOR VARIANCES FROM JOB SAFETY AND HEALTH REGULATIONS:

A. Permanent variances:

(1) The department may grant an individual variance from any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, whenever it is found that the proponent of the variance has demonstrated by a preponderance of the evidence, that the conditions, practices, means, methods, operations and processes used by an employer, although not conforming to a regulation, will, in fact, provide protection to the health and safety of the employees to a degree which is equal to or greater than that which is provided by the regulations.

(2) Any employer seeking a variance under this section shall do so by filing a written petition with the bureau. Petition forms may be obtained from the bureau. Petitions shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility or activity for which the variance is sought;

(d) state the address or description of the property upon which the facility or activity is located;

(e) identify the provision, including incorporated federal standard, if applicable, from which the variance is sought;

(f) state in detail the extent to which the petitioner wishes to vary from the provision;

(g) state why the petitioner believes the requested variance will provide protection to the health and safety of the petitioner's employees to a degree that is equal to or greater than that which is provided by the provision from which variance is sought;

(h) certify that the petitioner's employees have been informed of the petition, by giving a copy thereof to their authorized representatives; posting a statement giving a summary of the application and specifying where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(i) describe how employees have been informed of the application and of their right to request a hearing before the bureau;

(j) state the name and mailing address of the representatives of the petitioner's employees, if known; and

(k) be signed by the petitioner, or the petitioner's attorney or other authorized representative.

(3) The petitioner may submit with the petition any relevant documents or material which the petitioner believes would support the petition and may request a hearing, as provided in this section.

B. Temporary variance:

(1) The secretary may grant a temporary variance from any provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, including any incorporated federal standard, if it is found that the proponent of the variance has demonstrated by a preponderance of the evidence that:

(a) the petitioner is unable to comply with the provision by its effective date because of unavailability of professional or technical personnel or because necessary construction or alteration of facilities cannot be completed by the effective date;

(b) the petitioner is taking all available steps to safeguard the petitioner's employees against the hazards covered by the provision; and

(c) the petitioner has an effective program for coming into compliance with the provision as quickly as practicable.

(2) The petition for a temporary variance shall:

(a) state the petitioner's name and mailing address;

(b) state the date of the petition;

(c) describe the facility and activity for which the temporary variance is sought;

(d) identify the provision from which the variance is sought;

(e) describe the extent of current deviation from the provision, including numbers of employees affected;

(f) state the period of time for which the variance is desired;

(g) describe why the petitioner is unable to comply with the provision from which the variance is sought by its effective date;

(h) describe the methods taken to safeguard employees;

(i) show that the petitioner has an effective program for coming into compliance with the provision from which variance is sought;

(j) certify that the petitioner's employees have been informed of the petition by giving a copy thereof to their authorized representatives, posting a statement giving a summary of the application and specifying where a copy of the petition may be examined, at places where notices to employees are customarily posted (or in lieu of such summary, the posting of the petition), and by other appropriate means;

(k) describe how employees have been informed of the application and of their right to request a hearing before the department; and

(l) contain any request for hearing, as provided in this section.

(3) After an opportunity for a hearing, the secretary may issue an order granting a temporary variance. A temporary variance may be effective for one year or for the period needed by the petitioner to come into compliance, whichever is shorter. A temporary variance may be renewed no more than twice provided that:

(a) the application for a renewal must be submitted 90 days before expiration of the temporary variance; and

(b) no renewal may be for more than 180 days.

C. Modification, revocation and renewal of variances:

(1) Modification or revocation: The secretary may at any time on his own motion, or upon application by an employer or affected employee after six months have elapsed from the date of issuance of the order granting a temporary or permanent variance, after hearing, modify or revoke such order.

(a) An employer or affected employee (including employee representative) may petition the secretary for a modification or revocation of any variance issued under this section. The petition shall state the petitioner's name and mailing address; describe the relief sought; state with particularity the grounds for relief; if the petitioner is an employer, certify that the petitioner has informed the affected employees of the petition in the manner described for the original variance request; if the petitioner is an affected employee, certify that a copy of the petition has been furnished to the employer; and request a hearing, as provided in this section.

(b) If the secretary, on his own motion, proceeds to modify or revoke the variance, he shall so notify the affected employer by certified mail and shall take such action as necessary to give actual notice to affected employees. The secretary shall promptly schedule a hearing on the matter and notify the employer and affected employees of the time, date and place of said hearing.

(2) Renewal: Any final order for a variance may be renewed or extended as permitted by this section and in the manner prescribed for its issuance.

D. Interim order during variance consideration:

(1) An application may be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The secretary may rule ex parte upon the application.

(2) If an application filed for an interim order is denied, the applicant shall be given prompt notice of the denial which shall include, or be accompanied by, a brief statement of the grounds therefore.

(3) If an interim order is granted, a copy of the order including the terms of the order shall be served upon the applicant for the order and other parties. It shall be a condition of the order that the affected employer shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

E. Action on petition:

(1) Defective petitions: If a petition does not conform with the requirements of this section, the secretary may deny the petition. Prompt notice of denial of a petition shall be given to the petitioner. A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial. Such denial shall be without prejudice to the filing of another or amended petition.

(2) Adequate petitions:

(a) If a petition conforms with the requirements of this section, the department shall promptly notify the petitioner and employee representative that the petition has been accepted for review. The notice shall be posted by the employer in the same place and manner as the petition. In addition, the department shall publish notice of the filing of the petition in a newspaper of general circulation in the state. Such notice shall describe the relief requested and shall state the manner in which interested persons may submit data, views or arguments concerning the petition.

(b) The petitioner, any of the petitioner's employees, or an employee representative may request a hearing on the petition before the department. The request must be made in writing to the secretary within 15 days after the petition has been accepted by the department as being adequate.

(c) Where no timely request for a hearing has been made and the secretary determines that no substantial public interest is involved, the secretary shall promptly investigate the petition and make a decision thereon. The secretary shall notify the employer and the employees or the employee representative of the decision and reasons therefor. The decision shall be posted in the same place and manner as the petition. If the secretary is opposed to the granting of the variance, the petitioner may, within 15 days from receipt of the decision, request a hearing before the secretary. Unless a timely request for hearing is made, the decision of the secretary shall be final.

(3) Decisions:

(a) Decisions or orders of the department or secretary shall state the petitioner's name and mailing address; state the date the order was made; describe the facility or activity for which the variance was sought; state the address or description of the property upon which the facility or activity is located; identify the provision from which the variance was sought; state the nature of the variance requested; state the decision of the department or secretary; describe the conditions the employer must maintain, and the practices, means, methods, operations, and procedures which the employer must adopt and utilize to the extent they differ from the provision from which the variance was sought; state the reasons for the decision; and be signed by the secretary or his authorized representative.

(b) The decision shall be posted by the employer in the same place and manner as the petition.

(c) No variance shall be granted until the department or the secretary has considered the relative interests of the petitioner, his employees, and the general public.

(d) The bureau shall maintain a file of all variance orders. The file shall be open for public inspection subject to the limitations contained in Subsection F of 11.5.1.21 NMAC.

F. Hearings:

(1) If a timely request for hearing is made, the department shall, within 30 days after receipt of the request, notify the petitioner and his employees or employee representative by certified mail of the date, time and place of the hearing.

(2) The hearing shall be held not less than 10 nor more than 30 days from the date the notice of the hearing is mailed. Where a hearing is being held subsequent to an initial determination by the secretary without hearing, as authorized by Subparagraph (c) of Paragraph (2) of Subsection E of 11.5.1.18 NMAC, the hearing shall be conducted by a department employee who did not participate in the original decision on the petition.

(3) A record shall be made at each hearing, the cost of which shall be borne by the department. Transcript cost shall be paid by those persons requesting transcripts. In the hearings, the technical rules of evidence and rules of civil procedure shall not apply, but the hearing shall be conducted so that all relevant views are amply and fairly presented without undue repetition. The hearing officer may require reasonable substantiation of statements or records rendered and may require any view to be stated in writing when the circumstances justify. The hearing officer shall allow all parties to the hearing a reasonable opportunity to submit written and oral evidence and arguments, to examine witnesses and to introduce exhibits. All witnesses shall be subject to questioning by the hearing officer.

(4) Based upon the evidence presented at the hearing and the recommendation of the hearing officer, the secretary shall grant the variance, grant the variance subject to conditions, or deny the variance. All actions taken by the secretary shall be by written order within 10 days after the closing of the hearing. The secretary shall send the order to the petitioner by certified mail with a statement of the reasons for his order. A copy of the order shall be mailed to all persons testifying at the hearing, or who request a copy.

G. Multi-state variances: Where action has been taken by the USDOL, pursuant to the federal Occupational Safety and Health Act of 1970, on any temporary or permanent variance request to a federal standard that is identical to a provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC such action shall be an authoritative interpretation of an employer’s compliance obligation with regard to the provision, or portion thereof, identical to the federal standard, or portion thereof, affected by the action in the employment or places of employment covered by the variance application.

[8/30/1973, 10/9/1975, 9/3/1978, 4/26/1981, 1/1/1996; 11.5.1.18 NMAC - Rn & A, 11 NMAC 5.1.18, 10/30/2008]

11.5.1.19 ON-SITE CONSULTATIVE INSPECTIONS:

A. Upon an employer's request, the department shall provide an on-site consultation inspection of conditions and practices of the employer's work place.

B. Requests by employers for on-site consultation, pursuant to Subsection B of Section 50-9-6 NMSA 1978 shall be in writing and filed with the bureau.

C. On-site consultations shall be provided as bureau consultants are available. No compliance inspection will be delayed by a request for an on-site consultation. No regularly scheduled compliance inspection shall be made during any on-site consultation. An on-site consultation shall be deemed to exist for purposes of this regulation from the date that the bureau's consultant enters the workplace until the violations noted during the inspection are corrected or until the bureau determines that no such corrective action will be taken.

D. Bureau consultants shall upon arrival at the workplace, announce the nature, purpose, and scope of their visit. At the conclusion of the consultation, the consultant shall confer with the employer or his representative and advise him of any apparent violations of the state act or the provisions of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC disclosed by the consultation. If the employer fails to take necessary action to correct a serious violation within the duly established time frame for correction, or any extension therefore, the matter shall immediately be forwarded to appropriate bureau personnel for necessary compliance action.

E. Bureau consultants shall not issue citations or propose penalties for violations noted, provided imminent danger situations found during the on-site consultative visit must be pointed out to the employer. In the event imminent danger situations are pointed out but immediate steps are not taken by the employer to eliminate such danger, the emergency procedures provided in Section 50-9-14 NMSA 1978 shall be pursued by the department to assure timely abatement of the imminent danger situation.

[10/9/1975, 9/3/1978, 4/26/1981, 11/16/1983, 1/1/1996; 11.5.1.19 NMAC - Rn & A, 11 NMAC 5.1.19, 10/30/2008]

11.5.1.20 COMPLAINTS BY EMPLOYEES; REVIEW PROCEDURES:

A. Any employee or representative of employees may file a written complaint with the bureau concerning any alleged violation of a regulation or any hazardous condition in any workplace where such employee is employed. Any such complaint shall set forth with reasonable particularity the grounds therefore, and shall be signed by the employee or representative of employees. A copy of the complaints shall be provided to

the employer or his agent by the compliance officer at the time of the inspection. However, upon the request of the complainant, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released or made available by the bureau.

B. If upon receipt of such complaint the bureau determines that the complaint meets the requirements set forth in Subsection A of this section, it shall cause an investigation of the complaint to be made as soon as practicable. Investigations under this section are not limited to the matters referred to in the complaint.

C. If the bureau determines that the requirements of Subsection A of this section have not been met, it shall notify the complainant in writing of such determination. Such determination shall be without prejudice to the filing of a new complaint meeting the requirements of Subsection A of this section.

D. Prior to or during an inspection of a workplace, any employee or representative of employees employed in such workplace may notify the bureau or the compliance officer, in writing, of any violation of the state act which they have reason to believe exists in the workplace. Any such notice shall comply with the requirements of Subsection A of this section.

E. The bureau shall promptly notify the complainant and employer in writing of the results of the investigation and any action to be taken. If no action is contemplated, the bureau shall notify the complainant and include in the notice the reasons therefor.

F. If the bureau determines that no compliance action will be taken, the complainant may obtain review of such determination by submitting a written request to the secretary within 15 days of receipt of the notice specified in Subsection E of this section. Within five days after receiving the request, the secretary shall notify the employer by certified mail of the request and shall include a copy thereof. However, upon the request of the complainant, his name shall not appear on such copy.

G. Within 30 days after notice to the employer, the secretary shall hold such informal conferences as may be necessary for the complainant and the employer to present their views. After considering all written and oral views presented, the secretary shall affirm, modify, or reverse the determination of the bureau and furnish the complainant and the employer a written notification of his decision and the reasons therefore.

H. The secretary may designate an employee of the department to conduct the review, but such employee may not be the person who investigated the complaint. The decision of the secretary shall be final and not subject to further review.

[9/3/1978, 4/26/1981, 1/1/1996; 11.5.1.20 NMAC - Rn & A, 11 NMAC 5.1.20, 10/30/2008]

11.5.1.21 COMPLIANCE INSPECTIONS:

A. Authority; objection:

(1) The department's authorized representatives are authorized, in accordance with Section 50-9-10 NMSA 1978, to enter and inspect any place of employment at reasonable times and without delay; to question privately the employer and any employees of the employer; to inspect and investigate the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein, and other records which are directly related to the purpose of the inspection during regular working hours and at other reasonable times and in a reasonable manner.

(2) Upon a refusal to permit a compliance officer, in the exercise of official duties, to enter without delay and at reasonable times, any place of employment or portion thereof, to inspect, to review records, or to question privately any employer, owner, operator, agent or employee, in accordance with Section 50-9-10 NMSA 1978, and Paragraph (1) of Subsection A of this section, or to permit a representative of employees to accompany the compliance officer during the physical inspection of any workplace, the compliance officer shall either terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records or interviews concerning which no objection is raised. Nothing in this paragraph shall be construed to preclude the department from obtaining an administrative inspection order and returning to the place of employment to conduct an inspection, interview(s), or to review records as authorized by such order.

(3) Any permission to enter, inspect, review records or question any person shall not imply or be conditioned upon a waiver of any cause of action, citation or penalty under the state act. Compliance officers are not authorized to grant any such waiver.

B. Advance notice of inspections:

(1) Section 50-9-10 NMSA 1978, declares it unlawful for any person to give advance notice of any inspection to be conducted under the state act without the written approval of the secretary or his authorized representative.

(2) Advance notice of inspections may be given only:

(a) in cases of apparent imminent danger, to enable the employer to abate the danger as quickly as possible;

(b) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for the inspection;

(c) where necessary to assure the presence of representatives of the employer and employees or the appropriate personnel needed to aid in the inspection; or

(d) in other circumstances where the secretary determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(3) Advance notice in any of the situations described shall not be given more than 24 hours before the inspection is scheduled to be conducted, except in unusual circumstances.

(4) In the situations described in this section, advance notice of inspections may be given only if authorized by the secretary, except that in cases of apparent imminent danger, advance notice may be given by the compliance officer without such authorization if the secretary is not immediately available. When advance notice is given, it shall be the employer's responsibility promptly to notify the authorized representative of employees of the inspection, if the identity of such representatives is known to the employer.

C. Conduct of inspections; consultation with employees:

(1) At the beginning of an inspection, compliance officers shall present their credentials to the owner, operator, or agent in charge at the establishment; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in Subsection A of this section which they wish to review. However, such designation of records shall not preclude access to additional records specified in Subsection A of this section.

(2) Compliance officers shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately any employer, owner, operator, agent or employee of an establishment. As used in this paragraph, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other similar devices to employees in order to measure their exposures.

(3) In taking photographs and samples, compliance officers shall take reasonable precautions to insure that such actions with flash, spark-producing or other equipment would not be hazardous. Compliance officers shall comply with all employer safety and health rules and practices at the establishment being inspected, and shall wear and use appropriate protective clothing and equipment.

(4) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employer's establishment.

(5) In addition to compliance officers' private questioning of any employee, compliance officers may consult with employees concerning matters of occupational health and safety to the extent they deem necessary for the conduct of an effective and thorough inspection. Separately, employees may request a private interview with the compliance officers to inform the compliance officers of any information relevant to the investigation and to bring any violation of the state act that the employee has reason to believe exists in the workplace to the attention of the compliance officers.

D. Representative of employers and employees; accompaniment during physical site inspection:

(1) Compliance officers shall be in charge of inspections and questioning of persons. A representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the compliance officer during the physical inspection of any workplace for the purpose of aiding such inspection as required by Section 50-9-10 NMSA 1978. A different employer and employee representative may accompany the compliance officer during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(2) Compliance officers shall have authority to resolve all disputes as to who is the representative authorized by the employer and employees, for purposes of this section. If there is no authorized representative of employees or if the compliance officer is unable to determine with reasonable certainty who is such representative, he shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(3) The representative authorized by employees shall be an employee of the employer. However, if in the judgement of the compliance officer, good cause has been shown why accompaniment by a third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the compliance officer during the inspection.

(4) Compliance officers are authorized to deny the right of accompaniment under this regulation to any person whose conduct interferes with a fair and orderly inspection.

E. Private questioning:

(1) Purpose: Paragraph (2) of Subsection A of Section 50-9-10 NMSA 1978 provides that the department’s representatives, including but not limited to compliance officers, are authorized to, and may, question privately the employer or any employee, subject to regulation of the environmental improvement board. The purpose of privately questioning employees is to obtain useful information regarding the health and safety of the workplace being inspected or investigated. Information being sought includes but is not limited to uncovering any violation of the state act, providing an opportunity to an

employee to bring any potential violation of the state act to the bureau's attention in confidence, and to protect the employee being questioned from employer intimidation, retaliation, and discrimination. The purpose of questioning the employer is to, among other things, obtain useful information regarding the employer's health and safety policies, practices, and procedures and the employer's implementation thereof.

(2) General requirements:

(a) an employee being questioned by the department shall have the right to have personal counsel or other representative of his or her choosing present during the department’s questioning, except that counsel employed by the employer shall be excluded from personally representing an employee because of the inherent conflict of interest at issue;

(b) if the compliance officer has not already chosen to conduct the interview in private, the employee may request that the questioning be conducted in private; and

(c) the results of questioning not conducted in private shall be disclosable in accordance with Subsection B of Section 50-9-21 NMSA 1978.

(3) Interview process:

(a) in the event the compliance officer has not already determined that an interview will be conducted in private, prior to commencing an interview the compliance officer shall advise the individual to be interviewed of his or her right to a private interview; whenever the individual being interviewed expresses a preference for a private interview, the compliance officer shall honor the request; if the employee requests to have personal counsel present, the employee shall be given seven business days to secure personal counsel for the interview to be rescheduled as soon as possible;

(b) at the conclusion of the department’s private questioning or a reasonable time thereafter, the department shall provide the interviewee the opportunity to read or be read, the statement given to the compliance officer; any changes in form or substance which the interviewee desires to make shall be made; the statement shall then be signed by the interviewee unless the interviewee cannot be found or refuses to sign; if the statement is not signed within seven days of its submission to the interviewee, the compliance officer shall sign it and indicate on the statement that the interviewee was absent or refused to sign the statement, together with the reason, if any, given therefor; the interviewee shall be provided with a copy of the completed statement; any statement given in private shall be treated by the department as confidential to the extent allowed by law.

(4) Refusal to be privately interviewed: In the event the employer or any employee refuses to consent to a private interview, the department may compel by

subpoena the individual to be interviewed privately pursuant to Subsection D of Section 50-9-8, NMSA 1978 and Section 50-9-18, NMSA 1989 (1993).

(5) Obstruction of investigation: Employers or their representatives, agents or counsel, that obstruct or hamper an investigation violate the state act and may also be in violation of the Sarbanes-Oxley Act (18 U.S.C.A. 1514A, 1543(e)2002). Obstruction may include, but is not limited to, instructing employees to not cooperate with the department during an investigation; instructing employees to refuse to be interviewed by the department; directing employees to insist on counsel that represents the employer be present during a private interview; preventing employees directly or indirectly from being interviewed by the department; encouraging employees to lie; or suggesting to employees to withhold information or potential violations from the department.

F. Trade secrets:

(1) At the commencement of an inspection, the employer may identify areas in the establishment which contain or which might reveal a trade secret. If the compliance officer has no clear reason to question such identification, information obtained in such areas, including all negative and prints of photographs, and environmental samples, shall be labeled "confidential - trade secret" and shall not be disclosed except in accordance with the provisions of Section 50-9-2 NMSA 1978.

(2) Upon the request of an employer, any representative of employees accompanying the compliance officer during the inspection of an area containing trade secrets shall be an employee in that area or an employee authorized by the employer to enter that area. When there is no such representative or employee, the compliance officer shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

[10/9/1975, 9/3/1978, 4/26/1981, 5/10/1981, 10/1/1983, 1/19/1994, 1/1/1996; 11.5.1.21 NMAC - Rn & A, 11 NMAC 5.1.21, 10/30/2008]

11.5.1.22 IMMINENT DANGER:

Whenever and as soon as a compliance officer concludes on the basis of an inspection that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided in the state act, the compliance officer shall inform the employer and affected employees of the danger and that he is recommending that appropriate relief in accordance with the provisions of the state act be taken. Appropriate citations and notices of proposed penalties may be issued with respect to an imminent danger even though the employer immediately eliminates the imminence of the danger and initiates steps to abate such danger.

[3/21/1979, 5/10/1981, 1/1/1996; 11.5.1.22 NMAC - Rn, 11 NMAC 5.1.22, 10/30/2008]

11.5.1.23 ISSUANCE OF CITATIONS AND PROPOSED PENALTIES; FAILURE TO CORRECT VIOLATIONS:

A. Citations; notices of *de minimis* violations:

(1) The secretary or the secretary's authorized representative shall review the compliance officer's inspection report. If, on the basis of the report, the secretary or authorized representative believes that the employer has violated a requirement of Section 50-9-5 NMSA 1978, or any provision of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC, he shall issue to the employer, by certified mail, either a citation or, for violations that have no direct or immediate relationship to health or safety, a notice of *de minimis* violations. An appropriate citation or notice of *de minimis* violations shall be issued even though after being informed of an alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate, such alleged violation. Any citation or notice of *de minimis* violations shall be issued with reasonable promptness after termination of the inspection. No citation may be issued under this subsection after the expiration of six months following the occurrence of any alleged violation.

(2) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of the state act or of 11.5.1 NMAC through 11.5.4 NMAC or 11.5.6 NMAC (including incorporated federal standard) alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(3) If a citation or notice of *de minimis* violations is issued for a violation alleged in a request for inspection under Subsection A of 11.5.1.20 NMAC, or a notification of violation under Subsection D of 11.5.1.20 NMAC, a copy of the citation or notice of *de minimis* violations shall be sent to the employee or representative of employees who made such request or notification.

(4) After an inspection, if the secretary or authorized representative determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under Subsection A of 11.5.1.20 NMAC, or a notification of violation under Subsection D of 11.5.1.20 NMAC, the informal review procedures prescribed in Subsections F through H of 11.5.1.20 NMAC shall be applicable.

(5) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of the state act has occurred unless there is a failure to contest as provided for in the state act, or if contested, unless the citation is affirmed by the commission.

B. Proposed penalties:

(1) After, or concurrent with, the issuance of a citation and within a reasonable time after the termination of the inspection, the department shall notify the employer by certified mail of the penalty, if any, proposed to be assessed under the state act, or that no penalty is being proposed. Any notice of proposed penalty shall state that the proposed penalty shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notice, the employer notifies the department in writing that he intends to contest the citation or the notification of proposed penalty before the commission.

(2) The department shall determine the amount of any proposed penalty, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(3) Appropriate penalties may be proposed with respect to an alleged violation even though after being informed of such alleged violation by the compliance officer, the employer immediately abates, or initiates steps to abate such alleged violation. Penalties shall not be proposed for *de minimis* violations.

C. Failure to correct a violation for which a citation has been issued:

(1) If an inspection discloses that an employer has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, the department shall notify the employer by certified mail of such failure and of the additional penalty proposed under the act by reason of such failure. The period for correction of a violation for which a citation has been issued shall not begin to run until the entry of a final order of the commission in the case of any review proceedings initiated by the employer in good faith and not solely for delay or avoidance of penalties.

(2) Any employer receiving a notification of failure to correct a violation and of proposed additional penalty may notify the department in writing that he intends to contest such notification or proposed additional penalty before the commission. Such notice of intention to contest shall be postmarked within 15 working days of the receipt by the employer of the notification of failure to correct a violation and of proposed additional penalty. The department shall immediately transmit such notice to the commission in accordance with the rules of procedure prescribed by the commission.

(3) Each notification of failure to correct a violation and of proposed additional penalty shall state that it shall be deemed to be the final order of the commission and not subject to review by any court or agency unless, within 15 working days from the date of receipt of such notification, the employer notifies the department in writing that he intends to contest the notification or the proposed additional penalty before the commission.

[9/3/1978, 3/21/1979, 1/20/1980, 4/26/1981, 3/9/1983, 1/1/1996; 11.5.1.23 NMAC - Rn & A, 11 NMAC 5.1.23, 10/30/2008]

11.5.1.24 POSTING OF CITATIONS:

A. Upon receipt from the department of any notice of violation of any occupational health and safety regulation or incorporated standard, the employer shall immediately post the notice or a copy of it, unedited, at or near each place at which an alleged violation referred to in the notice occurred. Where, because of the nature of the employer's operations, it is not practicable to post the citation at or near each place of alleged violation, such citation shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. Where employees do not primarily work at or report to a single location, the citation may be posted at the location from which the employees operate to carry out their activities. The employer shall take steps to insure that the notice is not altered, defaced, removed or covered by other material. Notices of *de minimis* violations need not be posted.

B. Each notice or copy shall remain posted until the violation is abated or for three working days, whichever is later. The filing by the employer of a notice of intention to contest citations shall not affect his posting responsibility under this section unless and until the commission issues a final order vacating the citation.

C. An employer to whom the citation has been issued may post a notice in the same location where such citation is posted indicating that the citation is being contested before the commission, and such notice may explain the reasons for such contest. The employer may also indicate that specified steps have been taken to abate the violation.

[9/3/1978, 1/20/1980, 1/1/1996; 11.5.1.24 NMAC - Rn, 11 NMAC 5.1.24, 10/30/2008]

11.5.1.25 ABATEMENT VERIFICATION:

The provisions of 29 CFR Part 1903.19, Abatement Verification (internet: www.osha.gov), are hereby incorporated into this section.

[9/15/1997, 8/15/1998; 11.5.1.25 NMAC - Rn & A, 11 NMAC 5.1.25, 10/30/2008]

11.5.1.26 INFORMAL CONFERENCE:

At the request of an employer, affected employee, or representative of employees, the chief or the chief's designee, may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, proposed penalty, proposed petition for modification of abatement date or proposed petition for variance. When the conference is requested by the employer, an affected employee or representative shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee. When the conference is requested by an employee or representative of

employees, the employer shall be afforded an opportunity to participate, at the discretion of the chief or chief's designee.

A. The request for an informal conference and the informal conference meeting shall not extend or modify in any manner:

(1) an abatement date established in the citation;

(2) the filing deadline for an employer to file a notice of contest;

(3) any other filing deadline related to the citation; or

(4) any matter that is pending before the bureau.

B. Once an employer files a notice of contest, a petition for modification of the abatement date, a request for a commission hearing, a petition for variance, or other filing with the commission or department, the informal conference opportunity ends.

C. The settlement of any issue at the informal conference shall be subject to the commission's settlement procedural rules set forth in 11.5.5.503 NMAC.

[11.5.1.26 NMAC - N, 10/30/2008]

PART 2: OCCUPATIONAL HEALTH AND SAFETY - GENERAL INDUSTRY

11.5.2.1 ISSUING AGENCY:

Environmental Improvement Board.

[5/1/95; 11.5.2.1 NMAC - Rn, 11 NMAC 5.2.1, 10/30/08]

11.5.2.2 SCOPE:

All employment and places of employment subject to the Occupational Health and Safety Act, except as otherwise covered by 11.5.3 NMAC, Occupational Health and Safety - Construction Industry, or 11.5.4 NMAC, Occupational Health and Safety - Agriculture. In addition to this part, convenience stores are specifically covered in 11.5.6 NMAC.

[5/1/95; 11.5.2.2 NMAC - Rn & A, 11 NMAC 5.2.1, 10/30/08]

11.5.2.3 STATUTORY AUTHORITY:

Sections 50-9-7, 50-9-13 and 74-1-8 NMSA 1978.

[5/1/95; 11.5.2.3 NMAC - Rn, 11 NMAC 5.2.3, 10/30/08]

11.5.2.4 DURATION:

Permanent.

[5/1/95; 11.5.2.4 NMAC - Rn, 11 NMAC 5.2.4, 10/30/08]

11.5.2.5 EFFECTIVE DATE:

May 1, 1995, unless a later effective date is indicated in the history note at the end of a section.

[5/1/95, 7/15/96, 3/16/97; 11.5.2.5 NMAC - Rn & A, 11 NMAC 5.2.5, 10/30/08]

11.5.2.6 OBJECTIVE:

To establish standards related to employee occupational health and safety in general industry.

[5/1/95; 11.5.2.6 NMAC - Rn, 11 NMAC 5.2.6, 10/30/08]

11.5.2.7 DEFINITIONS:

A. The provisions of 11.5.1.7 NMAC are applicable to this part.

B. Additional definitions: The following definitions, in addition to these contained in 11.5.1.7 NMAC and the state act, are applicable to this section:

(1) "ANSI" means American national standards institute;

(2) "approved" means tested and listed as satisfactory by the bureau of mines of the United States department of interior, or jointly by the MSHA and NIOSH;

(3) "confined space" means an enclosure, usually having limited means of access or egress, or both, and poor natural ventilation, which may contain hazardous contaminants or be oxygen deficient, including but not limited to a storage tank, process tank, tank car, boiler, duct, sewer, tunnel, pipeline, pit or tube;

(4) "contaminant" means a harmful, irritating or nuisance material that is foreign to the normal atmosphere;

(5) "controlled breathing" means the ability of the wearer of an SCBA to maintain a breathing rate that is near normal for the activities being performed;

(6) "corrective lens" means a lens ground to the wearer’s individual corrective prescription;

(7) "dB" means decibel(s), a unit for measuring the relative loudness of sounds equal approximately to the smallest degree of difference of loudness ordinarily detectable by the human ear;

(8) "education" means the process of imparting knowledge or skill through systematic instruction, whether or not through formal classroom instruction;

(9) "exhalation valve" means a device that allows exhaled air to leave a facepiece and prevents outside air from entering through the valve;

(10) "eyepiece" means a gas-tight, transparent window or lens in a full facepiece through which the wearer can see;

(11) "face shield" means a heat and flame resistant device worn in front of the eyes and face, the predominant function of which is protection of the wearer’s eyes and face;

(12) "firefighter" means an individual who is assigned to firefighting activity, and is required to respond to alarms and performs emergency action at the location of a fire or fire danger;

(13) "firefighting activity" means physical action taken in the direct act of fire suppression, and rescue or hazardous duties performed at the location of a fire emergency and supportive activities related to firefighting;

(14) "fire department" means a paid or volunteer service group organized and trained for the prevention and control of loss of life and property from any fire or disaster;

(15) "full facepiece" means the portion of an SCBA covering the wearer’s nose, mouth, and eyes and designed to make a gas-tight fit with the face, including the head harness, exhalation valves, and connections for a source of respirable gas;

(16) "gas" means an aeriform fluid that is in the gaseous state at standard temperature and pressure;

(17) "hazardous atmosphere" means any atmosphere, whether or not immediately dangerous to life or health, that is oxygen deficient or that contains a toxic or disease-producing contaminant;

(18) "hazardous substance" means a substance which by reason of being explosive, flammable, poisonous, corrosive, oxidizing, irritant or otherwise harmful, is likely to cause injury;

(19) "Hg" means the element mercury;

(20) "head harness" means a device for holding the facepiece securely in place on the wearer’s head;

(21) "health professional" means a licensed physician, registered nurse, practical nurse, or certified emergency medical technician;

(22) "helmet" means a head protective device consisting of a shell, energy absorption system, and chin strap intended to be worn to provide protection for the head or portions thereof, against impact, flying or falling objects, electric shock, penetrations, heat and flame;

(23) "Hz" means hertz, a unit of frequency equal to one cycle per second;

(24) "immediately dangerous to life or health" means posing an immediate hazard to life or producing immediate irreversible effects on health that may be debilitating;

(25) "inhalation valve" means a device that allows respirable air or oxygen to enter the facepiece and prevents exhaled air or oxygen from leaving the facepiece through the intake opening;

(26) "MSHA" means the mine safety and health administration of the United States department of labor;

(27) "negative-pressure type apparatus" means an open or closed-circuit apparatus in which the pressure inside the facepiece, in relation to the immediate environment, is positive during exhalation and negative during inhalation;

(28) "NIOSH" means the national institute for occupational safety and health of the United States department of health and human services;

(29) "NFPA" means national fire protection association;

(30) "overhaul" means:

(a) the final stages of fire control, following suppression of the main body of fire, during which smoke conditions and visibility gradually improve and pockets of fire are sought out to complete extinguishment, searching for victims continues, and salvage operations may be carried out; or

(b) in a situation other than fire, the cleanup stage following the elimination of the emergency phase of the incident;

(31) "oxygen-deficient atmosphere" means an atmosphere that causes an oxygen partial pressure of 100 millimeters of mercury or less in the freshly inspired air saturated with water vapor in the upper portion of the lungs;

(32) "positive-pressure apparatus" means an open- or closed-circuit apparatus in which the pressure inside the facepiece in relation to the immediate environment is positive during both inhalation and exhalation;

(33) "provide" means to furnish, supply or to make arrangements for monetary reimbursement;

(34) "qualitative SCBA fitting test" means a fitting test in which the person wearing an SCBA is exposed to an irritant smoke, an odorous vapor, or another suitable test agent;

(35) "quantitative SCBA fitting test" means a fitting test in which a person wears an SCBA in a test atmosphere containing a test agent in the form of an aerosol, vapor, or gas, and instrumentation that samples the test atmosphere and the air inside the facepiece of the SCBA is used to measure quantitatively the penetration of the test agent into the facepiece;

(36) "sanitization" means the removal of dirt and the inhibiting of the action of agents that cause infection or disease;

(37) "SCBA" means self-contained breathing apparatus, which is a portable device that includes the supply of respirable breathing gas for the firefighter, but does not include a rebreather;

(38) "smoke" means the products of incomplete combustion or organic substances in the form of solid and liquid particles and gaseous products in air;

(39) "speaking diaphragm" means a device integral with the facepiece, designed to improve direct voice communication;

(40) "structural firefighting" means physical activity of fire suppression, rescue or both, of buildings or structures that are involved in a fire situation beyond the incipient stage; and

(41) "training" means the process of making proficient through instruction and hands-on practice in the operation of equipment, including respiratory protection equipment, that is expected to be used in the performance of assigned duties.

[9/12/84; 2/21/86; 5/1/95; 11.5.2.7 NMAC - Rn & A, 11 NMAC 5.2.7, 10/30/08]

11.5.2.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding:

(1) EIB/OHSR 200, General Standards, filed July 9, 1992, as amended; and

(2) EIB/OHSR 202, Firefighting, filed June 12, 1989, as amended.

B. References in other regulations: Any reference to EIB/OHSR 200 or EIB/OHSR 202 in any other rule shall be construed as a reference to the corresponding section of this part.

[5/1/95; 11.5.2.8 NMAC - Rn, 11 NMAC 5.2.8, 10/30/08]

11.5.2.9 INCORPORATED FEDERAL STANDARDS:

A. General: Except as otherwise provided in Subsection B of this section, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards (internet: www.osha.gov), are hereby incorporated into this section.

B. Modifications, exceptions and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1910 incorporated by Subsection A of this section:

(1) omit 1910.1;

(2) omit 1910.2(c), (d) and (e);

(3) omit 1910.4;

(4) omit 1910.5(a) and (f); and

(5) amend 1910.1200 Hazard Communication, as follows:

(a) 1910.1200(g)(9) is amended to read: Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. The information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(b) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training: (1) employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of

hazards (e.g. flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[1/20/80, 5/1/95, 7/15/96; 3/16/97, 9/15/97, 8/15/98; 11.5.2.9 NMAC - Rn & A, 11 NMAC 5.2.9, 10/30/08]

11.5.2.10 FIREFIGHTING:

A. Scope and application:

(1) Scope and purpose: This standard establishes minimum requirements for personal protective clothing and equipment, training, respiratory protection, and medical surveillance for firefighters when exposed to the hazards of firefighting activity. This standard is not intended to supersede any more stringent requirements in effect at any fire department in the state. Fire departments are encouraged to provide protection that exceeds the minimum requirements specified in the standard. This standard is not intended to cover catastrophic situations where private citizens not trained in firefighting are pressed into service.

(2) Application: The requirements of this standard apply to public fire departments, including those composed of private or contractual type fire departments primarily performing duties normally performed by public fire departments, and forest firefighting operations. For the requirements applicable to fire brigades, industrial fire departments, and private or contractual type fire departments generally, see 29 CFR Part 1910.156, Fire Brigades.

B. Firefighting equipment:

(1) General requirements:

(a) All firefighting equipment acquired after July 1, 1989 shall meet or exceed the requirements of the appropriate NFPA standard as published in the national fire codes as specified in Subsection K of this section.

(b) The employer shall inspect firefighting equipment at least annually and maintain records of such inspections. Firefighting equipment that is damaged or in an unserviceable condition shall be repaired or removed from service.

(c) A visual inspection of all equipment which has been utilized for firefighting shall be performed after each fire run or daily, whichever is less frequent.

(d) Personal protective clothing and equipment specified in this regulation shall be provided at no cost to the employee, or the employee shall be reimbursed for the purchase of such clothing and equipment. The protective clothing and equipment shall be used whenever such employees are required to work in a hazardous

environment that may be encountered during firefighting activities or under similar conditions during training activities.

(e) The employer shall assure that protective clothing protects the head, body, and extremities, and consists of at least the following components: foot and leg protection; hand protection; eye, face and head protection.

(f) The employer shall assure proper maintenance and use of all protective clothing and equipment.

(g) Employees shall be instructed to wear or utilize appropriate personal protective clothing and equipment when directed to work in a hazardous environment until such time as the officer in charge determines that such protection is no longer required.

(h) Personal protective clothing and equipment that has become damaged or otherwise defective to the point of voiding its intended protection shall be repaired or removed from service.

(2) Foot and leg protection:

(a) Foot and leg protection for structural firefighting may be achieved by either of the following methods:

(i) fully extended boots which provide protection for the entire leg; or

(ii) protective shoes or boots worn in combination with protective trousers that meet the requirements of Subsection E of this section.

(b) Protective footwear for structural firefighting or turnout boots shall meet the requirements of ASTM F2412-05 *"test methods for foot protection"* and ASTM F2413-05 *"specification for performance requirements for foot protection"* for class 75 footwear and shall have sole penetration resistance of 300 pounds (1330N) when tested in accordance with MIL-B-2885D (1973) and amendment dated 1975, "Military Specification for Firemen’s Boots". In addition, protective footwear shall be water resistant for at least five inches (12.7 cm) above the bottom of the heel and shall be equipped with slip resistant outer soles.

(c) Foot and leg protection provided for other than structural fires shall be appropriate for the potential hazards.

(3) Body protection:

(a) Body protection shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Body protection shall consist of turnout clothing

or an appropriate combination of a turnout coat and protective clothing meeting the requirements of this section.

(b) Performance, construction, testing and certification of firefighter turnout clothing and protective clothing shall be at least equivalent to the requirements of NFPA standard no. 1971 "*protective ensemble for structural fire fighting*" (2007 edition).

(c) Turnout coats in combination with turnout trousers, or turnout coats and protective clothing meeting these requirements shall be worn on all structural fires until such time as the officer in charge determines that such protection is no longer required. Body protection provided for other than structural fires shall be appropriate for the potential hazards.

(4) Hand protection:

(a) Protective gloves shall be provided for each firefighter when exposed to the hazards of structural firefighting activity. Such protective gloves shall be properly sized and suitable to the hazards encountered in fires and fire related emergencies.

(b) Protective gloves for firefighting shall be made of durable material designed to withstand the effects of flame, heat, vapor, liquids, sharp objects and other hazards encountered in fires and firefighting or shall be appropriate for the hazards encountered.

(c) Protective gloves shall meet the requirements of NFPA standard no. 1971, "*protective ensemble for structural firefighting*" (2007 edition), or a similar nationally approved standard.

(5) Head protection:

(a) Head protection shall be provided for each firefighter, and shall be maintained in a location of readiness for immediate response to fires and like emergencies. Head protection shall be worn by firefighters whenever they are exposed to head injury hazard. Head protection is normally provided for firefighters through the use of helmets.

(b) Helmets provided for use in structural firefighting shall meet the performance, construction, and testing requirements of NFPA standard no. 1971, "*protective ensemble for structural firefighting*" (2007 edition).

(6) Eye and face protection: employees exposed to eye or facial hazards shall be protected in accordance with the following provisions.

(a) Face shields of plastic or glass shall meet the optical qualities, impact resistance, and light transmission standards specified in ANSI Z87.1-2003, *"practice for occupational and educational eye and face protection"*.

(b) Whenever eye and face protection is not provided by the breathing apparatus facepiece, the face of the firefighter engaged in structural firefighting shall be protected by a face shield attached to the helmet or goggles and either heat and flame resistant hood or high collar and throat strap.

(c) Eye and face protection provided for other than structural fires shall be appropriate for the potential hazards.

C. Medical review:

(1) Firefighting activity requires that a firefighter be able to work with extreme exertion and with agility and endurance in a wide variety of hazardous situations in order to assure the safety of the firefighter and others. The exposures include ranges of heat and cold, smoke, possible allergens and toxins, and noise. The settings include those with poor lighting, slippery surfaces, confined spaces, and heights. The firefighter must be able to work using a self-contained breathing apparatus. The firefighter's life and safety as well as the lives and safety of others depend upon the firefighter's being physically and emotionally fit to work effectively in such situations.

(2) The employer shall assure that firefighters are physically and emotionally capable of performing the specific duties which may be assigned to them by instituting a program of medical review.

(3) Medical review is not intended to eliminate those volunteer firefighters from performing firefighting activities consistent with their medical limitations.

(4) Initial requirements:

(a) At the time of initial assignment the employer shall ensure that each firefighter completes the following forms or equivalents: "*medical history for firefighters*" Subsection L of this section; "*performance criteria for firefighters*" Subsection M of this section; and a medical screening examination, performed in conformance with the "*medical screening form for firefighters*" Subsection N of this section.

(b) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the *"medical history for firefighters"* Subsection L of this section shall be certified for firefighting activities by a physician in accordance with the *"physician's certification criteria for firefighters"* Subsection O of this section with the following exceptions: if a firefighter answers "yes" to item 21 or 22 of the *"medical history for firefighters"* Subsection L of this section, a certification from a specialist (e.g. optometrist, ophthalmologist, or audiologist) that the individual can function as a firefighter will suffice in lieu of a complete physician's certification; and if a firefighter answers "no" to item 27 of the *"medical history for firefighters"* Subsection L of this section, the employer is required to make a tetanus immunization available to the firefighter.

(c) A physician certifying a firefighter shall be provided with a copy of the medical requirements of this section.

(d) Candidates for firefighting activities answering "yes" to any of the questions or with responses left blank or specified as uncertain on the *"performance criteria for firefighters"* Subsection M of this section may be allowed to perform only those duties for which the employer determines they are fit.

(e) Candidates for firefighting activities who have been screened in accordance with the *"medical screening for firefighters"* Subsection N of this section and the health professional has designated an answer as "yes", the candidate shall be certified by a physician in accordance with the *"physician's certification criteria for firefighters"* Subsection O of this section with the following exception.

(f) If the response to item 4, 5, 6 or 7 is "yes", a certification from an optometrist or ophthalmologist that the individual can function as a firefighter in accordance with item 2 of the *"physician's certification criteria for firefighters"* Subsection O of this section will suffice in lieu of a complete physician's certification.

(5) Periodic requirements: The employer shall ensure that the medical surveillance required by this standard be performed every five years for firefighters below age 35, every two years from ages 35 to 45, and annually after age 45.

(6) Removal: A firefighter may be removed from firefighting activities when the employer becomes aware of a physical or mental condition as specified in Subsections K through R of this section which would affect the safe performance of specifically assigned duties. A firefighter shall be removed from those firefighting duties when it is certified that a firefighter has a physical or mental condition as specified in Subsections K through R of this section which would affect the safe performance of specifically assigned duties. The firefighter may return to such activities only after the changed capability is restored or the firefighter has been approved for those duties by a physician.

(7) Records:

(a) The employer shall maintain the medical records required in this standard for the length of employment of each firefighter plus five years.

(b) The employer shall make available upon request all records required to be maintained by this standard to the bureau for examination and copying.

D. Training:

(1) The employer shall provide training and education for all firefighters commensurate with those duties and functions that firefighters are expected to perform.

Such training and education shall be provided to firefighters before they perform emergency activities.

(2) Formal training or education shall be provided at least annually, and at least quarterly for those expected to perform interior structural firefighting.

(3) Suggested training sources are included in Subsection P of this section.

E. Respiratory protection equipment: Employers shall comply with the provisions of 29 CFR Part 1910.134, Respiratory Protection (internet: www.osha.gov).

F. Confined spaces: All confined spaces shall be considered to be immediately dangerous to life or health unless proven otherwise. No firefighter shall be permitted to enter a confined space for firefighting operations, including emergency rescue operations, without wearing a SCBA. Confined spaces include, but are not limited to, wells, cisterns, tunnels, pits and other such spaces where oxygen deficiency or hazardous airborne materials, or both, may be present.

G. Vision: Corrective lenses, if required, shall be fitted in the facepiece in way that provides good vision and shall be worn in such a manner as not to interfere with the seal of the face of the facepiece.

H. Absorption through or irritation of the skin: If toxic materials which irritate or can be absorbed through the skin are encountered or suspected and protective clothing worn by firefighters as specified in Subsection E of this section does not provide adequate protection, an effective fully body covering suit of impermeable materials shall be worn with the SCBA, as specified in hazardous chemical data, NFPA *"fire protection guide to hazardous materials 2001 edition"*.

I. Effects of ionizing radiation on the skin and whole body: The SCBA will not protect the skin or whole body against ionizing radiation from airborne concentrations of certain radioactive materials. All users of SCBA in such contaminated atmospheres shall be made aware of the fact that special protection is necessary in addition to the SCBA.

J. Notification requirements: Employers shall comply with the provisions of 11.5.1.16 NMAC, Recordkeeping and Reporting Occupational Injuries and Illnesses.

K. References:

(1) The following references are published by the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269:

(a) NFPA standard no. 1500, *"fire department occupational safety and health program"* (2007 edition);

(b) NFPA standard no. 1901, "*automotive fire apparatus*" (2003 edition);

(c) NFPA standard no. 1961, *"fire hose"* (2007 edition);

(d) NFPA standard no. 1962, *"inspection, care, and use of firehose, couplings, and nozzles and the service testing of fire hose"* (2003 edition);

(e) NFPA standard no. 1971, *"protective ensemble for structural fire fighting"* (2007 edition);

(f) NFPA standard no. 1981, *"open-circuit self-contained breathing apparatus (SCBA) for emergency services"* (2007 version); and

(g) NFPA *"fire protection guide to hazardous materials"* (2001 edition).

(2) The following references are published by the American National Safety Institute Inc. (ANSI), 1430 Broadway, New York, 10018:

(a) ASTM F2412-05 *"test methods for foot protection"* and ASTM F2413-05 *"specification for performance requirements for foot protection,"*;

(b) standard no. Z89.1-2003, *"American national standard for industrial head protection"*;

(c) ANSI standard no. Z87.1-2003, *"practice for occupational and educational eye and face protection"*;

(d) ANSI/CGA G-7.1-2004, *"American national standard commodity specification for air"*;

(e) ANSI Z88.2-1980, *"standard practices for respiratory protection"*; and

(f) ANSI S3.6-2004 *"specification[s] for audiometers"*.

(3) Copies of the references listed in Paragraphs (1) and (2) of this subsection are available for review in the Santa Fe office of the bureau.

L. Medical history form: The following form shall be used to record each firefighter's medical history:

MEDICAL HISTORY FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question.

Do you have or have you ever had:

		NO	YES
1.	Emphysema	( )	( )
2.	Chronic bronchitis	( )	( )
3.	Asthma	( )	( )
4.	Daily cough persistent for more than eight (8) weeks	( )	( )
5.	Coronary heart disease (heart attack or angina pectoris)	( )	( )
6.	History of heart murmur, congenital heart problem or rheumatic fever.	( )	( )
7.	Shortness of breath, difficulty staying up with healthy adults, or walking briskly 1/4 mile.	( )	( )
8.	Irregular heart beat or palpitations of heart	( )	( )
9.	Chest pain with exertion	( )	( )
10.	Other heart problem	( )	( )
11.	High blood pressure	( )	( )
12.	Diabetes	( )	( )
13.	Epilepsy or seizures	( )	( )
14.	Emotional illness	( )	( )
15.	Arthritis	( )	( )
16.	Back disease or injury	( )	( )
17.	Neurologic disorder (nerve or brain disease)	( )	( )
18.	Disease of muscle or bone	( )	( )
19.	Recurrent fainting or dizziness	( )	( )
Do you now have:			
20.	Other respiratory problem (severe or persistent)	( )	( )
21.	Impaired hearing	( )	( )
22.	Impaired vision (unless corrected with glasses)	( )	( )
23.	Hernia	( )	( )
24.	Allergies to substances in the environment or to smoke	( )	( )
25.	Other chronic serious disorders or disease requiring medication or medical care	( )	( )
26.	Alcohol or drug abuse problems	( )	( )
27.	Tetanus immunization within 10 years is important. For prevention of Tetanus. Have you had a Tetanus immunization within 10 years?	( )	( )

I certify that the answers to the above questions are true to the best of my knowledge.

_____ _____

DATE SIGNATURE

M. Performance criteria form. The following form shall be used to record each firefighter's performance criteria:

PERFORMANCE CRITERIA FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes". You need only answer the questions which apply to your work.

Do you have any physical or mental condition that would hamper your ability to do any of the following:

		NO	YES
1.	Use self-contained breathing apparatus (SCBA)	( )	( )
2.	Run	( )	( )
3.	Stand continuously for three (3) hours	( )	( )
4.	Keep balance	( )	( )
5.	Crawl	( )	( )
6.	Kneel	( )	( )
7.	Climb/work at heights greater than 10 feet	( )	( )
8.	Work in tight or enclosed places	( )	( )
9.	Reach above shoulder height with both arms	( )	( )
10.	Fully use both hands	( )	( )
11.	Use heavy exertion suddenly and continuously	( )	( )

Is there any reason that you cannot work under any of the following environmental conditions?

		NO	YES
1.	Very dry air	( )	( )
2.	Very humid air	( )	( )
3.	On slippery surfaces	( )	( )
4.	Heat	( )	( )
5.	Cold	( )	( )
6.	Very bright light	( )	( )
7.	Very dim light	( )	( )
8.	Noise	( )	( )
9.	Dust	( )	( )
10.	Smoke	( )	( )

I certify that my answers to the above questions are true to the best of my knowledge.

_____ _____

DATE SIGNATURE

N. Medical screening form. The following form shall be used for medical screening of each firefighter:

MEDICAL SCREENING FORM FOR FIREFIGHTERS

Name of Individual: _____

Social Security No: _____

Check appropriate response to each question. When in doubt record "Yes".

		NO	YES
1.	Systolic blood pressure (sitting) above 150 mm Hg	( )	( )
2.	Diastolic blood pressure (sitting) above 100 mm Hg	( )	( )
3.	Pulse (sitting) above 95 beats/min.	( )	( )
	Snellen test (contact lens not allowed)		
4.	Left eye (corrected) worse than 20/30	( )	( )
5.	Right eye (corrected) worse than 20/30	( )	( )
6.	Left eye (uncorrected) worse than 20/200	( )	( )
7.	Right eye (uncorrected) worse than 20/200	( )	( )

I certify that the findings are accurate.

_____ _____

DATE SIGNATURE

_____

PRINT NAME

_____

PRINT PROFESSIONAL TITLE

O. Physician's certification criteria. The following criteria shall be used by any physician in the examination of any firefighter for certification:

PHYSICIAN'S CERTIFICATION CRITERIA FOR FIREFIGHTERS

1. Hearing threshold level (corrected) in both ears not over 30 dB average at 500, 1000 and 2000 Hz, with no single frequency over 35 dB and not over 55 dB at 4,000 Hz based on the zero reference level as specified in the American National Standards Institute (ANSI) S3.6-1969 (R1973) "Specifications for Audiometers".

2. Vision acuity worse than 20/30 (corrected) or 20/200 (uncorrected) in either eye. (Contact lenses are not permitted.)

3. Cardiovascular disease including (a) either history or electrocardiographic evidence of myocardial infraction or angina pectoris, (b) abnormal electrocardiogram with dysrhythmia, conduction block, or chamber hypertrophy, unless specifically waived as being at risk for firefighting duties by a physician, and (c) systemic arterial hypertension uncontrolled down to levels below 150 mm Hg systolic and 100 mm Hg diastolic blood pressure.

4. Seizure disorder of any type unless free of seizures and not taking anti-seizure medication throughout previous five (5) years.

5. Chronic obstructive or chronic restrictive lung disease with vital capacity or forced expiratory volume in one second (FEV1) less than 75% predicted, or bronchial asthma requiring chronic or intermittent medication.

6. Other physical or mental conditions that preclude (a) strenuous effort (b) mobility, agility or alertness in dangerous situations, or (c) the carrying out of the duties of a firefighter without excess risk of harm to the firefighter's health or safety.

7. Incomplete tetanus immunization.

P. Suggested training sources:

(1) International Fire Service Training Association, Oklahoma State University, Fire Protection Publication, Stillwater, Oklahoma 74078-0118.

(2) National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.

(3) New Mexico State Fire Marshal's office, P.O. Box 1269, Santa Fe, NM 87504.

(4) National Inter-agency Qualification System, Publication Management System, 3833 S. Development Way, Boise, Idaho 83705.

Q. Inspection and maintenance check list for self-contained breathing apparatus:

SERIAL #_____ MANUFACTURER _____ MODEL #_____ LOCATION #_____

REGULATOR CHECK	CYLINDER CHECK	AUDI-LARM CHECK	APPARTUS CHECK	FACEPIECE CHECK	GASKET &	REMARKS	INSPECT BY & DA

					AIRLEAK TEST		

1. Regulator Check: The functions of the reducing value and of the emergency by-pass valve shall be checked for proper operation.

2. Cylinder Check: Cylinder pressure shall be at least 80% of the full operating pressure. Observation of cylinder pressure gauge and regulator guage for corresponding pressure.

3. Audi-Larm Check: Check for Audi-Larm function when system is activated and again when system is deactivated and pressure falls below 400-600 psi.

4. Apparatus Check: Inspect conditions of straps on harness, tightness of screws and fasteners, and locking devices.

5. Facepiece Check: Inspect facepiece components for damage and the condition of headband straps, exhalation valve, speaking diaphragm, breathing tube and facepiece lens.

6. Gasket & Airleak Test: Inspect condition of breathing tube, "O" rings, and speaking diaphragm. If a leak is suspected, apply soapy water to the threaded connection between the valve body and the cylinder, to the pressure gage and its connection between the valve body, to the safety plug, and to the regulator. Open the cylinder valve and apply soapy water to the valve stem and packing gland nut. Expanding bubbles indicate leaks.

7. Remarks: Use this column to list and describe any replacement parts used or any repairs made to the SCBA.

R. Qualitative fit test protocols (QLFT):

(1) Irritant smoke test: The irritant smoke is produced by air flowing through a commercially available stannic tetrachloride or titanium tetrachloride smoke tube normally used to check the performance of ventilation systems. Ventilation should be provided in the test room to prevent contamination of the room with smoke. If the respirator wearer detects penetration of smoke in the respirator during the test, the

wearer should be permitted to readjust the seal of the SCBA. The test operator operates the smoke tube to direct smoke over the SCBA while the wearer is inhaling, keeping the smoke tube about one foot from the facepiece, and watches the reactions of the wearer. If the wearer does not detect penetration of smoke into the facepiece, the test operator moves the smoke tube closer to the facepiece and observes the reactions of the wearer. When the smoke tube has moved to within six inches of the facepiece and the wearer still has not detected penetration of smoke, the smoke may be directed at potential sources of leakage (for example, beneath the chin and around the cheeks, temples and forehead) in the seal of the facepiece to the wearer. If the wearer still does not detect penetration of smoke, the wearer should carry out a series of exercises such as deep breathing, turning the head from side to side, nodding the head up and down, frowning, and talking while smoke is directed at the respirator. If the wearer is unable to detect penetration of smoke, a satisfactory fit has been achieved.

(2) Odorous vapor test:

(a) A material commonly used in the odorous vapor test is isoamyl acetate. The simplest means of carrying out the test is to saturate a piece of fabric or sponge or fill a stencil brush with liquid isoamyl acetate and then move the fabric, sponge or stencil brush around the facepiece of a respirator worn by a person. The fabric, sponge, or stencil brush should be passed close to the potential sources of leakage in the seal of the facepiece while the wearer is inhaling and performing the recommended exercises. If the wearer detects the odor of isoamyl acetate vapor during the test, the wearer should be permitted to readjust the seal of the facepiece. If the wearer is unable to detect the odor of isoamyl acetate vapor when inhaling, a satisfactory fit has been achieved.

(b) A major drawback of a test using isoamyl acetate vapor as the test agent is that the odor threshold varies widely among people. Most can detect by odor a concentration of isoamyl acetate vapor in air as low as 0.1 parts per million by volume. After a person has smelled the odor for a long period of time, olfactory fatigue may cause a failure to detect the odor of low concentration of isoamyl acetate vapor in the air. Several hours before a facepiece fitting test is performed, all those who are to undergo the test should first be tested to determine their ability to detect the odor of isoamyl acetate vapor in air. It should also be noted that people being tested can fake the test by indicating that they do not detect the odor when they actually do, or vice versa.

S. Availability of forms: The forms illustrated in Subsections L through Q of this section are available from the bureau.

[9/12/84, 2/21/86, 6/16/88, 7/11/89, 2/13/90, 4/13/90, 5/1/95, 9/15/98; 11.5.2.10 NMAC - Rn & A, 11 NMAC 5.2.10, 10/30/08]

PART 3: OCCUPATIONAL HEALTH AND SAFETY - CONSTRUCTION INDUSTRY

11.5.3.1 ISSUING AGENCY:

Environmental Improvement Board.

[5/1/95; 11.5.3.1 NMAC - Rn, 11 NMAC 5.3.1, 10/30/08]

11.5.3.2 SCOPE:

All employment and places of employment of every employee engaged in work for construction, alteration, or repair, including painting and decorating.

[5/1/95; 11.5.3.2 NMAC - Rn & A, 11 NMAC 5.3.2, 10/30/08]

11.5.3.3 STATUTORY AUTHORITY:

Sections 50-9-7, 50-9-13 and 74-1-8, NMSA 1978.

[5/1/95; 11.5.3.3 NMAC - Rn, 11 NMAC 5.3.3, 10/30/08]

11.5.3.4 DURATION:

Permanent.

[5/1/95; 11.5.3.4 NMAC - Rn, 11 NMAC 5.3.4, 10/30/08]

11.5.3.5 EFFECTIVE DATE:

May 1, 1995, unless a later effective date is indicated in the history note at the end of a section.

[5/1/95, 7/15/96, 3/16/97; 11.5.3.5 NMAC - Rn & A, 11 NMAC 5.3.5, 10/30/08]

11.5.3.6 OBJECTIVE:

To establish standards related to employee occupational health and safety in the construction industry.

[5/1/95; 11.5.3.6 NMAC - Rn & A, 11 NMAC 5.3.6, 10/30/08]

11.5.3.7 DEFINITIONS:

The provisions of 11.5.1.7 NMAC are applicable to this part.

[5/1/95; 11.5.3.7 NMAC - Rn, 11 NMAC 5.3.8, 10/30/08]

11.5.3.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding EIB/OHSR 300, Construction Standards, filed December 17, 1992, as amended.

B. References in other regulations: Any reference to EIB/OHSR 300 in any other rule shall be construed as a reference to this part.

[1/16/93; 7/28/93; 5/1/95; 11.5.3.8 NMAC - Rn, 11 NMAC 5.3.7, 10/30/08]

11.5.3.9 INCORPORATED FEDERAL STANDARDS:

A. General. Except as otherwise provided in Subsection C of this section, the provisions of 29 CFR Part 1926, Safety and Health Regulations for Construction (internet: www.osha.gov), are hereby incorporated into this section.

B. Incorporation of applicable general standards: Additionally, the provisions of 29 CFR Part 1910, Occupational Safety and Health Standards, identified by the United States department of labor as applicable to the construction industry and incorporated by 11.5.2 NMAC, Occupational Health and Safety-General Standards, are hereby made applicable to construction.

C. Modifications, exceptions, and amendments: The following modifications, exceptions and amendments are made to 29 CFR Part 1926, incorporated by Subsection A of this section:

(1) omit Subpart A-general 1926.1 through 5;

(2) omit Subpart B-general interpretations (1926.10 through 1926.16); and

(3) amend 1926.59, hazard communication, as follows:

(a) 1910.1200(g)(9) is amended to read: Where employees must travel between work places during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. This information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(b) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training: (1) employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have

not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity or specific chemicals). Chemical-specific information must always be available through labels and material safety data sheets.

[3/21/79, 1/20/80, 5/21/88, 5/1/95, 7/15/96, 3/16/97, 9/15/97, 8/15/98; 11.5.3.9 NMAC - Rn & A, 11 NMAC 5.3.9, 10/30/08]

PART 4: OCCUPATIONAL HEALTH AND SAFETY - AGRICULTURE

11.5.4.1 ISSUING AGENCY:

Environmental Improvement Board.

[5/1/95; 11.5.4.1 NMAC - Rn, 11 NMAC 5.4.1, 10/30/08]

11.5.4.2 SCOPE:

All employment and places of employment in agriculture subject to the provisions of the Occupational Health and Safety Act.

[5/1/95; 11.5.4.2 NMAC - Rn, 11 NMAC 5.4.2, 10/30/08]

11.5.4.3 STATUTORY AUTHORITY:

Sections 50-9-7, 50-9-13 and 74-1-8, NMSA 1978.

[5/1/95; 11.5.4.3 NMAC - Rn, 11 NMAC 5.4.3, 10/30/08]

11.5.4.4 DURATION:

Permanent.

[5/1/95; 11.5.4.4 NMAC - Rn, 11 NMAC 5.4.4, 10/30/08]

11.5.4.5 EFFECTIVE DATE:

May 1, 1995, unless a later effective date is indicated in the history note at the end of a section.

[5/1/95, 8/15/98; 11.5.4.5 NMAC - Rn & A, 11 NMAC 5.4.5, 10/30/08]

11.5.4.6 OBJECTIVE:

To establish standards related to employee occupational health and safety in agriculture.

[5/1/95; 11.5.4.6 NMAC - Rn, 11 NMAC 5.4.6, 10/30/08]

11.5.4.7 DEFINITIONS:

A. General: The provisions of 11.5.1.7 NMAC are applicable to this part.

B. Additional definitions: The following definitions, in addition to those contained in 11.5.1.7 NMAC and the state act, are applicable to this part.

(1) "Agricultural employer" means any person who owns or operates an agricultural establishment or on whose premises or in whose interest an agricultural establishment is operated and any person who is responsible for the management and condition of an agricultural establishment or who acts directly or indirectly in the interest of an employer in relation to any employee.

(2) "Agricultural establishment" means a business operation that uses paid employees in the production of food, fiber, or other materials such as seed, seedlings, plants, or parts of plants.

(3) "Hand-labor operations" means agricultural activities or operations performed by hand or with hand tools, including but not limited to the hand harvest of vegetables, nuts, and fruit, hand weeding of crops and hand planting of seedlings, but not including such activities as logging operations, the care or feeding of livestock, or hand-labor operations in permanent structures such as canning facilities or packing houses.

(4) "Handwashing facility" means a facility providing a basin, container, or outlet with an adequate supply of potable water, soap and single-use towels.

(5) "Potable water" means:

(a) water that meets the standards for drinking purposes by the state or local authority having jurisdiction; or

(b) water that meets the quality standards prescribed by the United States environmental protection agency’s National Interim Primary Drinking Water Regulations, published in 40 CFR Part 141.

(6) "Toilet facility" means a fixed or portable facility designed for defecation and urination, including a biological or chemical toilet, which is supplied with toilet paper adequate to employee needs.

[7/23/86, 5/1/95; 11.5.4.7 NMAC - Rn & A, 11 NMAC 5.4.8, 10/30/08]

11.5.4.8 AMENDMENT AND SUPERSESSION OF PRIOR REGULATIONS; REFERENCES IN OTHER REGULATIONS:

A. Amendment and supersession: This part shall be construed as amending and superseding:

(1) EIB/OHSR 400, Agricultural Standards, filed January 20. 1994, as amended;

(2) EIB/OHSR 401, Tools for Weeding and Thinning Crops, filed June 23, 1986; and

(3) EIB/OHSR 402, Field Sanitation, filed June 23, 1986.

B. References in other regulations: Any reference to EIB/OHSR 400, EIB/OHSR 401, or EIB/OHSR 402 in any other rule shall be construed as a reference to the corresponding section of this part.

[1/20/94, 5/1/95; 11.5.4.8 NMAC - Rn, 11 NMAC 5.4.7, 10/30/08]

11.5.4.9 INCORPORATED FEDERAL STANDARDS:

A. General: Except as otherwise provided, the provisions of 29 CFR Part 1928, Safety and Health Standards for Agriculture (internet: www.osha.gov), are hereby incorporated into this section.

B. Amendments: Amend 1928.21(a)(5), hazard communication 1910.1200, as follows:

(1) 1910.1200(g)(9) is amended to read: Where employees must travel between workplaces during a workshift, i.e., their work is carried out at more than one geographical location, the material safety data sheets may be kept at a central location at the primary workplace facility. In this situation, the employer shall ensure that employees can immediately obtain the required information in an emergency. The information shall be readily accessible by telephone, two-way communication, computer or actual copies of the material safety data sheets.

(2) The introductory paragraph to 1910.1200(h) is amended to read: Employee information and training. (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employee have not been trained about is introduced to their work area, with the exception that a new employee shall be deemed to have been trained provided the employer can demonstrate the employee has received training regarding the same hazards within the past twelve months. Information and training may be designed to cover categories of

hazards (e.g. flammability, carcinogenicity, or specific chemical). Chemical-specific information must always be available through labels and material safety data sheets.

[3/21/79, 1/27/80, 1/20/94, 7/14/94, 5/1/95, 8/15/98; 11.5.4.9 NMAC - Rn, 11 NMAC 5.4.9, 10/30/08]

11.5.4.10 TOOLS FOR WEEDING AND THINNING CROPS:

A. Scope: This section applies to any agricultural establishment where employees are engaged on any given day in hand-labor operations in the field.

B. Requirements: The use of a hoe, knife, or fork less than four feet in length for weeding and thinning crops is prohibited.

[7/23/86, 5/1/95; 11.5.4.10 NMAC - Rn & A, 11 NMAC 5.4.10, 10/30/08]

11.5.4.11 FIELD SANITATION:

A. Scope: This section applies to any agricultural establishment where on any given day there are employees engaged in hand-labor operations in the field.

B. Requirements: Agricultural employers shall provide the following for employees engaged in hand-labor operations in the field, without cost to the employee, and employees shall be allowed reasonable opportunities during the workday to use the toilet facilities.

(1) Potable drinking water:

(a) Potable water shall be provided and shall be placed in locations readily accessible to all employees.

(b) The water shall be suitably cool and in sufficient amounts, taking into account the air temperature, humidity and the nature of the work performed to meet employees' needs.

(c) The water shall be dispensed in single use drinking cups or by fountains. The use of common drinking cups or dippers is prohibited.

(2) Toilet and handwashing facilities:

(a) One toilet facility and one handwashing facility shall be provided for each 20 employees or fraction thereof, except as stated in Subparagraph (d) of this paragraph.

(b) Toilet facilities shall have doors that can be closed and latched from the inside and shall be constructed to insure privacy.

(c) Toilet and handwashing facilities shall be accessibly located, in close proximity to each other, and within one-quarter (1/4) mile (0.4 kilometers) of each employee's place of work in the field. Where it is not feasible to locate facilities accessibly and within the required distance due to the terrain, they shall be located at the point of closest vehicular access.

(d) Toilet and handwashing facilities are not required for employees who perform field work for a period of three hours or less (including transportation time to and from the field) during the day.

(3) Maintenance: Potable drinking water and toilet and handwashing facilities shall be maintained in accordance with appropriate public health sanitation practices, including the following:

(a) drinking water containers shall be covered, cleaned and refilled daily;

(b) toilet facilities shall be operational and maintained in clean and sanitary condition;

(c) handwashing facilities shall be maintained in clean and sanitary condition; and

(d) disposal of wastes from facilities shall not cause unsanitary conditions.

[7/23/86, 5/1/95; 11.5.4.11 NMAC - Rn & A, 11 NMAC 5.4.11, 10/30/08]

11.5.4.12 EMERGENCY MEDICAL CARE:

A. In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available. Appendix A to 29 CFR Part 1910.151 - first aid kits (non-mandatory) may be used as guidance in determining the adequacy of first aid supplies.

B. Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

[11.5.4.12 NMAC - N, 10/30/08]

PART 5: OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION PROCEDURES

11.5.5.1 ISSUING AGENCY:

Occupational Health and Safety Review Commission.

[1/1/96; Recompiled 11/30/01]

11.5.5.2 SCOPE:

All parties and advocates for parties to any proceeding before the commission.

[1/1/96; Recompiled 11/30/01]

11.5.5.3 AUTHORITY:

Section 50-9-9, NMSA 1978.

[1/1/96; Recompiled 11/30/01]

11.5.5.4 DURATION:

Permanent.

[1/1/96; Recompiled 11/30/01]

11.5.5.5 EFFECTIVE DATE:

January 1, 1996 [unless a later date is cited at the end of a section].

[1/1/96; Recompiled 11/30/01]

11.5.5.6 OBJECTIVE:

To establish procedures for the conduct of proceedings before the occupational health and safety review commission.

[1/1/96; Recompiled 11/30/01]

11.5.5.7 DEFINITIONS:

A. Terms defined in Act or in 11 NMAC 5.1.12. [now 11.5.1.7 NMAC] All terms defined in the Act or in 11 NMAC 5.1.12 [now 11.5.1.7 NMAC] and not otherwise defined in this Part have the same meanings given where defined.

B. Other terms: Except as otherwise provided in this Part, the following terms have the indicated meanings:

(1) "Act" means the Occupational Health and Safety Act, Sections 50-9-1 to 50-9-25 NMSA 1978.

(2) "Advocate" means any person authorized by a party to act on behalf of that party in a proceeding under this Part; provided, nothing in this Part shall be construed to preclude an advocate who is a lawyer from using the terms "attorney", "counsel", or "lawyer" in lieu of the term "advocate" in any document filed or served under this Part.

(3) "Affected employee" means an employee of a responsible employer who, as a result of the employee's assigned duties, is exposed to any alleged hazard described in the citation.

(4) "Citation" means any of the following documents issued by the department to an employer:

(a) a citation and notification of penalty (whether or not any penalty is, in fact, proposed);

(b) a notice of ee minimis violation; or

(c) a notification of failure to abate alleged violation.

(5) "Commission" means the occupational health and safety review commission created by Section 50-9-9 NMSA 1978.

(6) "Commission chair" means:

(a) the commission member designated by the governor, pursuant to the Act, to hold the office of chairman; or

(b) any commission member to whom the designated chairman delegates the authority to perform the functions delegated to the commission chair by this Part, during the designated chairman's absence or other inability to act.

(7) "Commission counsel" means:

(a) any member of the attorney general's staff designated by the attorney general to provide legal advice and assistance to the commission; or

(b) subject to approval of and funding by the legislature, a private lawyer hired by the commission to provide legal advice and assistance to the commission;

(8) "Commission secretary" means any department employee designated by the secretary of environment to provide staff support to the commission as provided in the department of Environment Act, Sections 9-7A-1 to 9-7A-14 NMSA 1978, provided, use of the term "commission secretary" is not intended to suggest any particular personnel classification to be held by any department employee so designated;

(9) "Complainant" means the department, in a case initiated by a notice of contest;

(10) "Conformed copy" means a copy of any document filed with the commission, showing the date of filing of the original, and stamped or otherwise marked to distinguish the copy from the original document;

(11) "Department" means the New Mexico environment department;

(12) "Document" means any pleading, motion, response, memorandum, decision, order, or other paper filed in a proceeding under this Part, but does not include a cover letter accompanying a document transmitted for filing.

(13) "Final resolution" means any of the following events:

(a) the filing of a notice of vacation or notice of withdrawal under the conditions specified in Section 307.A [now Subsection A of 11.5.5.307 NMAC];

(b) expiration of the deadline for the filing of objections to a proposed settlement agreement, as specified in Section 503.E [now Subsection E of 11.5.5.503 NMAC], with no objection having been filed by any person authorized to file objections, if the settlement agreement disposes of all issues in the case; or

(c) the date of filing of any order:

(i) deciding a case on the merits;

(ii) dismissing a notice of contest or a petition for modification of abatement period;

(iii) approving a settlement agreement following the receipt of timely objections; or

(iv) otherwise disposing of a case in its entirety.

(14) "Hearing" means a formal proceeding before the commission at which the parties are provided an opportunity to appear and present evidence or argument in person or through an advocate, but does not include a meeting at which the commission deliberates to decide a case or issue pending before the commission;

(15) "Hearing officer" means the commission chair or any other person appointed by the commission to perform the functions delegated to a hearing officer by this Part;

(16) "Hearing record" includes:

(a) the record proper; and

(b) the transcript of proceedings;

(17) "Intervenor" means any person:

(a) who has filed:

(i) a notice of intervention pursuant to Section 502.A [now Subsection A of 11.5.5.502 NMAC], if such notice has not been stricken; or

(ii) a motion to intervene pursuant to Section 502.B [now Subsection B of 11.5.5.502 NMAC] and SCRA 1986, 1-024.B, if such motion has been granted; and

(b) who has not subsequently been dismissed, or voluntarily withdrawn, as an intervenor.

(18) "Lawyer" means a person who is admitted to practice law in any jurisdiction;

(19) "NMSA 1978" stands for "New Mexico Statutes Annotated, 1978 Compilation", and when used in conjunction with a specific statutory citation (for example, " Section 50-9-1 NMSA 1978,"), refers to the most recent version of the cited statutory provision;

(20) "Notice of docketing" means a document prepared by the commission secretary to notify the complainant or petitioner and the respondent that a notice of contest or a petition for modification of abatement period has been received and docketed by the commission;

(21) "Order" means any document filed by the commission or, where applicable, by the hearing officer, containing:

(a) the commission’s decision on the merits of any case pending before the commission; or

(b) the commission’s or the hearing officer’s ruling, as applicable, on any other matter pending before the commission;

(22) "Party" includes only:

(a) the complainant or petitioner;

(b) any respondent; and

(c) any intervenor.

(23) "Petitioner" means any responsible employer, affected employee or representative of affected employees filing a petition for modification of abatement period.

(24) "Pleading" includes only those documents identified as pleadings in Section 401 [now 11.5.5.401 NMAC].

(25) "Record proper" includes all documents filed in a case, except any document offered as an exhibit at a hearing.

(26) "Representative of affected employees" means a labor union or other entity, including any local office thereof, authorized pursuant to the federal Fair Labor Standards Act or any state collective bargaining law to bargain collectively for, or otherwise represent in labor-management relations, any group of employees that includes one or more affected employees.

(27) "respondent" means:

(a) in a case initiated by a notice of contest, the responsible employer filing the notice of contest; or

(b) in a case initiated by a petition for modification of abatement period

(i) the department; and

(ii) if the petition is filed by an affected employee or a representative of affected employees, the responsible employer;

(28) "Responsible employer" means an employer named in a citation;

(29) "SCRA 1986" stands for "Supreme Court Rules Annotated, 1986 Compilation", and when used in conjunction with a specific rule citation (for example, "SCRA 1986, 1-001"), refers to the most recent version of the cited rule; and

(30) "Transcript of proceedings" includes:

(a) the verbatim record of any hearing as recorded by a court reporter; and

(b) all exhibits:

(i) admitted into evidence at the hearing; or

(ii) denied admission into evidence but tendered as an offer of proof pursuant to Section 707.B.2 [now Paragraph (2) of Subsection B of 11.5.5.707 NMAC].

C. Use of singular and plural. As used in this Part, words in the singular also include the plural, and vice versa.

[9/30/76; 4/25/78; 3/6/79; 12/28/81; 1/1/83; 1/1/84; 8/12/93; 1/1/94; 10/1/94; 1/1/96; Recompiled 11/30/01]

11.5.5.8 AMENDMENT AND SUPERSESSION OF PRIOR RULES; REFERENCES IN OTHER REGULATIONS:

This Part shall be construed as amending and superseding the Rules of Procedure, OHSRC 93-1, filed November 15, 1993, as amended. Any reference to the occupational health and safety review commission's rules of procedure in any other rule shall be construed as a reference to this Part.

[1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.9-11.5.5.99 [RESERVED]

11.5.5.100 SUBPART I: GENERAL PROVISIONS:

[see Sections 11.5.5.104 NMAC through 11.5.5.112 NMAC]

[Recompiled 11/30/01]

11.5.5.101-103 [RESERVED]

11.5.5.104 APPLICABILITY OF RULES OF CIVIL PROCEDURE:

In the absence of a specific provision in this Part governing an action, procedure shall be in accordance with the New Mexico Rules of Civil Procedure, SCRA 1986, 1-001 to 1-102.

A. Commission authority not expanded: The incorporation of the Rules of Civil Procedure shall not be construed to expand or otherwise modify the authority and jurisdiction of the commission under the Act.

B. Meaning of "judge" or "court": For purposes of this Part, "judge" or "court" as used in the Rules of Civil Procedure means the commission or the hearing officer.

[4/25/78; 1/1/94; Recompiled 11/30/01]

11.5.5.105 [RESERVED]

11.5.5.106 POWERS AND DUTIES OF COMMISSION, COMMISSION CHAIR, COMMISSION COUNSEL, HEARING OFFICER, AND COMMISSION SECRETARY:

A. Commission: The commission, acting through a quorum, shall exercise all powers and duties not specifically delegated to the commission chair, the commission counsel, the commission secretary, or a hearing officer.

B. Commission chair: The commission chair shall:

(1) preside at all meetings of the commission; and

(2) act as hearing officer in all cases pending before the commission until such time as another hearing officer is appointed.

C. Commission counsel: The commission counsel shall:

(1) advise the commission, the commission secretary, and the hearing officer on the legal aspects of matters pending before the commission;

(2) to the extent that doing so would not present a conflict of interest, advise individual commission members on legal matters affecting their individual obligations as commission members;

(3) if so designated by the commission, act as hearing officer for matters pending before the commission; and

(4) when requested by the commission, draft orders and opinions to implement decisions of the commission.

D. Hearing officer: The commission may appoint a hearing officer for any matter pending before the commission.

(1) A hearing officer may be a commission member, the commission counsel, or an independent contractor, but shall not be an officer or employee of any party.

(2) Except as otherwise provided in this Part, a hearing officer shall have full authority to:

(a) rule upon motions for extension of time, motions regarding discovery issues, and similar motions not seeking final resolution;

(b) examine witnesses;

(c) admit or exclude evidence;

(d) require parties to attend a prehearing conference, if deemed appropriate upon motion by a party or upon the hearing officer’s own motion;

(e) when requested by the commission, issue proposed findings of fact and conclusions of law, a recommended decision, or both; and

(f) take any other actions deemed necessary and appropriate for the maintenance of order and the conduct of a fair, impartial, and efficient adjudication of the issues in the hearing.

(3) Nothing in Paragraph 2 of this Subsection shall be deemed to preclude the hearing officer from consulting with the commission prior to making a ruling on any matter pending before the hearing officer, if the hearing officer deems such consultation appropriate.

E. Commission secretary: The secretary of environment shall designate one department employee as commission secretary, and one of more additional department employees to perform the functions of the commission secretary in the commission secretary's absence.

(1) The commission secretary shall:

(a) maintain the commission's official records;

(b) receive and file all documents required to be filed with the commission; and

(d) exercise all other powers and duties delegated by this Part or by the commission.

(2) The commission secretary may perform other duties for the department so long as such other duties do not interfere with the proper and timely performance of the duties required by this Part.

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.107 RECUSAL OR DISQUALIFICATION OF COMMISSION MEMBER OR HEARING OFFICER:

A. Notice of voluntary recusal: A commission member or hearing officer may file a notice of voluntary recusal at any time. The specific grounds for recusal need not be stated. Any commission member or hearing officer filing a notice of voluntary recusal shall serve a copy thereof on each party.

B. Motion to disqualify: Any party seeking to disqualify a commission member or the hearing officer shall file a timely motion for disqualification, stating the grounds therefor with particularity.

C. Ruling:

(1) A motion seeking disqualification of a commission member shall be ruled upon by that member, whose ruling shall not be subject to review by the commission.

(2) A motion seeking disqualification of a hearing officer shall be ruled upon initially by the hearing officer. Denial of such motion may be appealed to the commission within five (5) days after such denial. Any such appeal not ruled upon within ten (10) days after filing shall be deemed denied.

[1/1/94; Recompiled 11/30/01]

11.5.5.108 COMPUTATION AND EXTENSION OF TIME:

A. General:

(1) Unless otherwise specifically provided by the Act, by this Part, or by order, any period of time specified in the Act, in this Part, or in any order shall be counted beginning with the day after the event from which the time is measured and shall include every calendar day thereafter until the specified number of days has been reached, except that:

(a) if the last day is a Saturday, Sunday, or holiday, the time is extended until the next day that is not a Saturday, Sunday, or holiday; and

(b) if the applicable period of time is stated as a specified number of "working days," only days other than Saturdays, Sundays, or holidays shall be counted.

(2) When the Act, this Part, or any order requires that an action be accomplished within a specified period of time after service of a document, and the applicable document is served by mail, three (3) days shall be added to the time otherwise required for accomplishment of the action. The additional time shall not be allowed if the period of time specified for accomplishment of an action runs from any event other than service of a document.

B. Determination of date of mailing: When the date of mailing of a document is at issue, the date of mailing shall be determined:

(1) by the date of any legible United States postal service postmark appearing on the envelope in which the document was mailed; or

(2) in the absence of a legible United States postal service postmark, by the date of any other legible postmark appearing on the envelope in which the document was mailed; or

(3) in the absence of any legible postmark, by any other credible evidence.

C. Extension of time:

(1) An extension of time for the filing or [of]any document or the accomplishment of any other action may be granted upon timely motion of a party for good cause, except that no extension of time may be granted for the filing of:

(a) a Notice of Contest or a Petition for Modification of Abatement Period; or

(b) an appeal of any final resolution.

(2) A motion for extension of time shall be filed at least three (3) working days before the document is due or the action is to be accomplished, unless the party filing the motion demonstrates that the failure to file a timely motion was the result of excusable neglect.

D. Definition of "holiday": As used in this Section, "holiday" means any day designated as a legal public holiday in New Mexico pursuant to Section 12-5-2 NMSA 1978, or any other day during which the department is closed for business during any consecutive period of four (4) or more hours between 8:00 a.m. and 5:00 p.m.

[9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.109 COMMISSION RECORDS:

A. Official journal: Copies of all orders of the commission on the merits of any case, and copies of any other orders deemed by the commission to have precedential value, shall be kept by the commission secretary in an official journal, to be maintained indefinitely.

B. Public inspection: All records of the commission not otherwise protected by law will be available for inspection during normal business hours at the office of the commission secretary. Copies of such records will be provided upon request and payment of the cost of duplication. Certification of such copies, if requested, shall be provided at no additional charge.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.110 PROTECTION OF TRADE SECRETS AND OTHER CONFIDENTIAL INFORMATION:

Upon application by any person in a proceeding where trade secrets or other confidential matters may be divulged, the hearing officer shall issue such orders as may be appropriate to protect the confidentiality of such matters.

[9/30/76, 4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.111 APPEARANCE BY PARTIES OR ADVOCATES; SUBSTITUTION OF ADVOCATE:

A. General:

(1) At any stage of the proceedings:

(a) a party who is an individual may appear in person or through an advocate; and

(b) any other party shall appear through an advocate.

(2) An advocate may, but need not, be a lawyer. The commission recognizes, however, that commission proceedings, particularly those that continue beyond the informal administrative review, may involve complex legal and factual issues in which a party would be best served by obtaining the services of a lawyer as the party's advocate.

(3) Entry of appearance by an advocate on behalf of a party, regardless of whether the advocate is a lawyer, an officer or employee of the party, or an independent contractor other than a lawyer, constitutes a certification that the advocate has full authority to act on behalf of, and to bind, the party, subject only to the provisions of Subsection C of this Section.

(4) Entry of appearance by an advocate shall be in writing; provided that the filing of any pleading or motion signed by the advocate shall constitute an entry of appearance without the necessity of filing an additional document specifically as an entry of appearance.

B. Substitution or withdrawal of advocate:

(1) A party may replace its advocate with another advocate at any time not later than filing of the party's first pleading after docketing of the case:

(a) by filing of a written notice of substitution as illustrated in Section 1003 [now 11.5.5.1003 NMAC]; or

(b) if the party is replacing an advocate who is not a lawyer with an advocate who is a lawyer, by having the applicable pleading signed by the new advocate, without the necessity of a specific withdrawal by the original advocate.

(2) After expiration of the time specified in Paragraph 1 of this Subsection, an advocate may withdraw from the case only as specified in SCRA 1986, 1-089.

C. Standards of conduct: All advocates appearing in any proceeding under this Part shall conform to the New Mexico Rules of Professional Conduct, SCRA 1986, 16-101 to 16-805. For purposes of this Part, the term "lawyer" as used in the Rules of Professional Conduct means any advocate appearing in a proceeding under this Part, whether or not licensed to practice law in any jurisdiction.

[9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.112 EX PARTE DISCUSSIONS:

A. General:

(1) At no time during the pendency of a case shall any party or any advocate, officer, agent, or employee of a party discuss the merits of the case with any commission member, commission counsel, commission secretary, or hearing officer, except as provided in Subsection B of this Section.

(2) Paragraph 1 of this Subsection shall not be construed to preclude:

(a) the disclosure of any information contained in the commission's records to any person, including a party, so long as such information is not otherwise protected by law; nor

(b) the commission secretary or commission counsel from discussing individually with any party or any party's advocate, procedural matters such as the scheduling of hearings and similar non-substantive issues, so long as no party is afforded preferential treatment in any such discussion.

B. Communications to be on the record: Any communication by a party with the commission, any commission member, the commission counsel, or the hearing officer relating to the merits of any case pending before the commission shall be:

(1) in open hearing; or

(2) in writing and in compliance with the format and service requirements set forth in Subpart II [now Sections 11.5.5.201 through 11.5.5.203 NMAC] of this Part.

[4/25/78, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.113-11.5.5.199 [RESERVED]

11.5.5.200 SUBPART II: GENERAL DOCUMENT REQUIREMENTS:

[see Sections 11.5.5.201 NMAC through 11.5.5.203 NMAC]

[Recompiled 11/30/01]

11.5.5.201 FORM OF DOCUMENTS:

A. General: Unless otherwise provided in this Part, all documents, except exhibits attached to other documents, filed or served in any proceeding under this Part shall be substantially in the format illustrated in Section 1000 [now 11.5.5.1000 NMAC], or any

other applicable form illustrated in Subpart X [now Sections 11.5.5.1000 through 1018 NMAC].

B. Signing of documents:

(1) Except as provided in Paragraph 2 of this Subsection and in Subsection C of this Section, each document filed under this Part shall contain the name, address, and telephone number of, and shall be signed by, the party filing the document or by that party's advocate.

(a) The signature on a document constitutes a certificate that the signer has read the document; that to the best of the signer's knowledge, information and belief the statements made in the document are true; that there are good grounds to support the document; and that the document is not interposed for delay. If a document is signed with the intent to defeat the purpose of this Section, the document may be stricken as sham and false, and the case may proceed as if the document had not been filed or served.

(b) Only the original of a document is required to bear an original signature. Copies may either bear a copy of the signature or an indication, by rubber stamp, the symbol "s/", or other means, that the original was signed by the person whose signature block appears on the document.

(2) An affidavit of posting shall be signed by the person who actually accomplished the required posting, and shall contain that person's name, address and telephone number. An affidavit of explanation for non-posting filed in lieu of an affidavit of posting shall be signed by a person who has actual knowledge of the facts stated in the affidavit of non-posting. The certificate of service, if applicable, accompanying either form of affidavit shall be signed by the party filing the affidavit, or that party's advocate.

C. Exhibits:

(1) Exhibits prepared specifically for attachment to other documents filed or served under this Part shall, to the extent feasible, comply with the general format illustrated in Section 1000 [now 11.5.5.1000 NMAC], except that a heading and caption are not required, and a signature block is required only if otherwise appropriate (such as for an affidavit)

(2) Exhibits attached to other documents served or filed under this Part, but not prepared specifically for that purpose (for example, a copy of a pre-existing letter), need not comply with the format illustrated in Section 1000 [now 11.5.5.1000 NMAC]; but if feasible, documents larger than 8 1/2 x 11 inches shall be reduced to 8 1/2 x 11 inches before being attached as exhibits.

(3) Each exhibit shall be labelled with the word "EXHIBIT" followed by an exhibit letter (for example, "EXHIBIT A"), centered in the bottom margin.

[4/25/78, 1/1/83, 1/1/84; 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.202 FILING AND SERVICE OF DOCUMENTS:

A. General:

(1) The original of any document required to be filed under this Part shall be submitted directly to the commission secretary, except that the following documents first shall be submitted to the department for subsequent submission to the commission secretary:

(a) a notice of contest;

(b) an affidavit of posting providing proof of posting of a notice to affected employees (contest of citation), or an affidavit of explanation for non-posting filed in lieu thereof;

(c) a petition for modification of abatement period;

(d) an affidavit of posting providing proof of posting of a notice to affected employees (proposed modification of abatement period), or an affidavit of explanation for non-posting submitted in lieu thereof;

(e) an affidavit of posting providing proof of posting of a notice to affected employees (informal administrative review), or an affidavit of explanation for non-posting submitted in lieu thereof;

(f) a settlement agreement; and

(g) an affidavit of posting providing proof of posting of a notice to affected employees (settlement of case), or an affidavit of explanation for non-posting submitted in lieu thereof.

(2) Except as otherwise provided in this part, filing of any document shall be deemed complete:

(a) if the document is one required to be submitted directly to the commission secretary, only upon the commission secretary's receipt of the original of the document;

(b) if the document is a notice of contest, a petition for modification of abatement period, or an affidavit of posting or affidavit of explanation for non-posting filed simultaneously with either, only upon:

(i) receipt of the original document by the department's occupational health and safety bureau; or

(ii) deposit of the original document in the United States mail addressed to the department's occupational health and safety bureau; and

(c) if the document is any other document required to be submitted first to the department, only upon the department's filing of the original of the document with the commission secretary.

B. Service of documents filed:

(1) Except as otherwise provided in Paragraph 2 of this Subsection, a party filing any document in a proceeding under this Part shall serve a copy of the document, including copies of any exhibits to the document, on every other party.

(2) A party is not required to serve the department with additional copies of any of the documents required to be submitted first to the department, as listed in Subsection A(2) of this Section. Notwithstanding this provision:

(a) a copy of any document listed in Subsection A(2) of this Section, except a settlement agreement, must be served by the filing party upon any existing party other than the department and the filing party; and

(b) a copy of any settlement agreement must be served by one of the signatory parties upon any existing non-signatory party.

(3) Except as otherwise provided in Section 601.D [now Subsection D of 11.5.5.601 NMAC] for a supplemental response to discovery, service of a document, when required, shall be accomplished by, and shall be deemed complete upon:

(a) hand-delivery of a copy of the document to the office of the person upon whom service is made;

(b) deposit of a copy of the document in the United States mail, first class postage prepaid, addressed to the business address of the person upon whom service is made; or

(c) telefax of a copy of the document to any telefax number published for, or provided by, the person upon whom service is made.

(4) For any document required to be served upon any party, including documents specified in Paragraph (2) of this Subsection when applicable, proof of service of the document shall be provided by a certificate of service, in the format illustrated in Section 1001 [now 11.5.5.1001 NMAC], on the last page (exclusive of exhibits) of the document.

C. Orders; filing and service:

(1) All orders signed by the commission or the hearing officer shall, after signature, be provided to the commission secretary for filing and service.

(2) Upon filing of any order, the commission secretary shall serve a copy of the order upon each party, and attest to such service by a commission secretary's certificate of service in the format illustrated in Section 1002 [now 11.5.5.1002 NMAC].

D. Expanded definition of "party": Ased in this Section, "party" includes, in addition to the persons listed in Section 105.B.21 [now Paragraph 22 of Subsection B of 11.5.5.7 NMAC], any person who has filed a motion to intervene that has not been denied.

[1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96, Recompiled 11/30/01]

11.5.5.203 NON-CONFORMING DOCUMENTS; NOTIFICATION OF DEFECTS; RESUBMISSION:

A. General: The commission secretary shall record the date of receipt of, but shall not file, any document, other than a notice of contest or a petition for modification of abatement period, that:

(1) is not on 8 1/2 x 11-inch paper (except for exhibits);

(2) is not an original;

(3) does not contain a case caption and a case number;

(4) is not signed by the party submitting the document or that party's advocate; or

(5) does not include a certificate of service, unless the document is one for which this Part does not require a certificate of service.

B. Notification; resubmission: When a document is not filed for one or more of the reasons listed in Subsection A of this Section, the commission secretary shall notify the party or advocate submitting the document of the non-filing and the reasons therefor. If the errors resulting in non-filing of the document are corrected within ten (10) days after notification by the commission secretary, the document shall then be filed, and such filing shall be effective for all purposes as if the document had been filed on the original date of submission.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.204-11.5.5.299 [RESERVED]

11.5.5.300 SUBPART III: INITIATION OF CASE AND INFORMAL ADMINISTRATIVE REVIEW:

[see Sections 11.5.5.301 NMAC - 11.5.5.307 NMAC]

[Recompiled 11/30/01]

11.5.5.301 ISSUANCE AND AMENDMENT OF CITATION:

A. General: Issuance of a citation shall be in accordance with the requirements of the Act and 11 NMAC 5.1.23 [now 11.5.1.23 NMAC].

B. Amended citation: After receipt of a notice of contest or a petition for modification of abatement period, the department may amend a citation only:

(1) by leave of the commission pursuant to motion of the department; or

(2) pursuant to a settlement agreement.

C. Vacation of citation: Nothing in Subsection B of this Section shall preclude the department from unilaterally vacating a citation as provided in Section 307.A.1.a [now Subparagraph (a) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC].

[10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.302 NOTICE OF CONTEST:

A. Who may file: A notice of contest may be filed by any responsible employer.

B. Grounds: A notice of contest may be based upon any combination of:

(1) the existence or classification of any violation alleged in the citation;

(2) the amount of the penalty proposed for any violation; or

(3) the reasonableness of the abatement period for any violation alleged in the citation.

C. Deadline: A notice of contest shall be filed with the department within fifteen (15) working days after the employer’s receipt of the citation.

D. Format: A notice of contest shall:

(1) substantially comply with the format illustrated in Section 1011[now 11.5.5.1011 NMAC];

(2) name the department as the complainant, and the responsible employer filing the notice as the respondent;

(3) for each citation contested, identify the items within that citation that are contested;

(4) for each item contested, state whether the contest relates to:

(a) the alleged violation itself (either the existence of the alleged conditions or that such conditions constitute a violation of the cited provision);

(b) the classification of the alleged violation;

(c) the proposed penalty;

(d) the abatement date; or

(e) a specified combination of any of the foregoing; and

(5) have attached to it:

(a) a copy of each citation to which the contest applies, with each such citation being marked as a separate exhibit; or

(b) if the contest applies only to certain items within the citation, a copy of each page on which any contested item appears, with each such item being marked as a separate exhibit (except that if two or more contested items appear on the same page, that page may be marked as a single exhibit).

E. Employee notification requirements:

(1) Upon filing of a notice of contest, except as provided in Paragraph 2 of this Subsection, the responsible employer shall post, at one or more locations reasonably accessible to the affected employees, a Notice to affected employees (contest of citation), as illustrated in Section 1004 [now 11.5.5.1004 NMAC], with an attached copy of the notice of contest (including all exhibits thereto, such notice shall remain posted until the earliest of the following events:

(a) the filing of a notice of withdrawal of contest by the respondent;

(b) the respondent’s receipt of a copy of a notice of vacation of citation filed by the department;

(c) the posting of a notice to affected employees (informal administrative review);

(d) the posting of a notice to affected employees (pendency of hearing); or

(e) the respondent's receipt of any order of the commission dismissing the notice of contest or vacating all citations in the case.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time the notice of contest is filed, the responsible employer has no affected employees.

(3) The responsible employer shall file, with the notice of contest:

(a) an affidavit of posting in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting in the format illustrated in Section 1010 [now 11.5.5.1010 NMAC].

F. Forwarding to commission secretary: The department shall forward the notice of contest, including all exhibits and accompanying documents, to the commission secretary within five (5) working days after receipt thereof. Any written document clearly stating an intention to contest any portion of an identifiable citation shall be forwarded as a notice of contest without regard to its timeliness or format.

G. Untimeliness; improper format:

(1) Any party alleging that a notice of contest is untimely may file a motion for dismissal of the contest on that ground.

(a) If the commission determines that such contest was filed later than fifteen (15) working days after receipt of the citation to which the notice of contest is directed, the commission shall dismiss the notice of contest unless the commission also finds that the untimeliness was caused by some action of the department.

(b) If the notice of contest includes a contest of any abatement period for which the time for filing a petition for modification of abatement period had not expired at the time the notice of contest was filed, the commission shall, in dismissing the notice of contest, grant leave for the filing of a petition for modification of abatement period within ten (10) days after dismissal of the notice of contest. If filed within that period, the petition shall be treated in all respects as timely as to any such abatement periods contested in the original notice.

(2) Any party alleging that a notice of contest is not substantially in the format required by this Section may file a motion seeking to require amendment of the notice of contest to conform with the requirements of this Section. If the hearing officer finds that

the notice of contest does not substantially conform with the requirements of this Section, the hearing officer may order the respondent to file an amended notice of contest, conforming to the requirements of this Section, within ten (10) days after service of the order on the respondent. If the respondent fails to comply with such order, the commission may, upon subsequent motion of the same party, dismiss the respondent's notice of contest.

[9/30/76, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.303 PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. Who may file: A petition for modification of abatement period may be filed by any responsible employer, any affected employee, or any representative of affected employees.

B. Grounds:

(1) A petition for modification of abatement period filed by a responsible employer shall be based upon allegations that the responsible employer has made a good faith effort to comply with the abatement requirements of a citation, but has been unable to complete such abatement because of factors beyond the responsible employer's reasonable control.

(2) A petition for modification of abatement period filed by an affected employee or a representative of affected employees shall be based upon allegations that the abatement period provided in the citation is unreasonable, and that the responsible employer reasonably can abate the violation within a shorter period.

C. Deadline: A petition for modification of abatement period shall be filed with the department:

(1) on or before the date on which abatement of the violation to which the petition relates was originally required if the petition is filed by a responsible employer;

(2) within fifteen (15) working days after posting of the citation, if the petition is filed by an affected employee or a representative of affected employees.

D. Format: A petition for modification of abatement period shall:

(1) substantially comply with the format requirements illustrated in Section 1012 [now 11.5.5.1012 NMAC];

(2) name the person filing the petition as the petitioner, and the department as a respondent;

(3) if the petition is filed by an affected employee or a representative of affected employees, name the responsible employer as an additional respondent;

(4) for each citation to which the petition applies, list each item within that citation for which modification of the abatement period is requested;

(5) include the following information for each item for which modification of the abatement period is requested:

(a) if filed by a responsible employer:

(i) all steps taken by the responsible employer in an effort to achieve compliance during the prescribed abatement period and the dates of such action;

(ii) the specific additional abatement time necessary in order to achieve compliance;

(iii) the reasons such additional time is necessary, including the unavailability of professional or technical personnel or of materials and equipment, or because necessary construction or alteration of facilities cannot be completed by the original abatement date; and

(iv) all available interim steps being taken to safeguard the employees against the cited hazard during the abatement period; or

(b) if filed by an affected employee or a representative of affected employees:

(i) the basis for the petitioner's belief that the original abatement period is unreasonable; and

(ii) the specific period of time within which the petitioner believes the responsible employer could reasonably abate the violation;

(6) have attached to it:

(a) a copy of each citation to which thepetition applies, with each such citation being marked as a separate exhibit; or

(b) if the petition applies only to certain items within the citation, a copy of each page on which any item to which the petition applies appears, with each such item being marked as a separate exhibit (except that if two or more contested items appear on the same page, that page may be marked as a single exhibit); and

(7) if filed by an affected employee or a representative of affected employees, include a certificate of service, as illustrated in Section 1001 [now 11.5.5.1001 NMAC], showing that the petition has been served on the responsible employer.

E. Employee notification requirements:

(1) Upon filing of a petition for modification of abatement period, except as provided in Paragraph 2 of this Subsection, the petitioner shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (proposed modification of abatement period), as illustrated in Section 1005 [now 11.5.5.1005 NMAC], with an attached copy of the petition (including all exhibits thereto. Such notice shall remain posted until the earliest of the following events:

(a) the filing of a notice of withdrawal of petition by the petitioner;

(b) the posting of a notice to affected employees (informal administrative review);

(c) the posting of a notice to affected employees (pendency of hearing); or

(d) the responsible employer's receipt of any order of the commission dismissing the petition for modification of abatement period.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if:

(a) the petition is filed by a responsible employer who has no affected employees at the time of filing; or

(b) the petition is filed by an affected employee, and the responsible employer has no other affected employees at the time of filing.

(3) The petitioner shall file, with the petition:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) Under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

F. Forwarding to commission secretary: The department shall forward the petition for modification of abatement period, including all exhibits and accompanying documents, to the commission secretary within five (5) working days after receipt thereof. Any written document clearly expressing a request for modification of the abatement period for any portion of an identifiable citation shall be forwarded as a petition for modification of abatement period without regard to its timeliness or format.

G. Untimeliness; improper format:

(1) Any party alleging that a petition for modification of abatement period is untimely as to any abatement period to which the petition is addressed may file a motion for dismissal of the petition, in whole or in part, on that ground.

(a) If the commission determines that such petition was filed later than any original abatement period addressed in the petition, the commission shall dismiss the petition as to each abatement period for which the petition is found to be untimely, unless the commission also finds that the untimeliness was caused by some action of the department.

(b) Dismissal of a petition for untimeliness as to one or more abatement periods shall not affect the validity of the petition as to any abatement periods for which the petition is timely.

(2) Any party alleging that a petition for modification of abatement period is not substantially in the format required by this Section may file a motion seeking to require amendment of the petition to conform with the requirements of this Section. If the hearing officer finds that the petition does not substantially conform with the requirements of this Section, the hearing officer may order the petitioner to file an amended petition, conforming to the requirements of this Section, within ten (10) days after service of the order on the petitioner. If the petitioner fails to comply with such order, the commission, upon subsequent motion of the same party, may dismiss the petition.

[4/25/78, 3/6/79, 12/28/81, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.304 DOCKETING OF CASE:

Promptly upon receipt of a notice of contest or a petition for modification of abatement period, the commission secretary shall docket the case, assign a case number, and issue a notice of docketing.

[1//194; 1/1/96; Recompiled 11/30/01]

11.5.5.305 STAY OF ABATEMENT PERIOD:

A. General: In a case initiated by a responsible employer in good faith and not solely for delay or avoidance of the penalty, the abatement period shall not begin to run until final resolution.

B. Lack of good faith or delay: Any findings of lack of good faith or of delay or avoidance of penalties must be set forth in an order by the commission together with the facts upon which the finding is based.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.306 INFORMAL ADMINISTRATIVE REVIEW:

A. General: The department shall initiate an informal administrative review promptly upon receipt of a notice of contest or a petition for modification of abatement period.

(1) Except as otherwise provided in this Section, scheduling and conduct of the informal administrative review shall be within the sole control of the department.

(2) When notifying the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of any meeting or telephone conference held as part of the informal administrative review, the department shall include with such notification:

(a) a form for the notice to affected employees (informal administrative review) (Section 1006) [now 11.5.5.1006 NMAC] which the responsible employer may complete as appropriate;

(b) a form for the affidavit of posting (Section 1009) [now 11.5.5.1009 NMAC], including a certificate of service (Section 1001) [now 11.5.5.1001 NMAC] if applicable, which the responsible employer may complete as appropriate; and

(c) a brief explanation of how each form should be completed and either posted, or served and filed, as applicable.

B. Who may participate: In addition to the department and the respondent, any affected employee or representative of affected employees may participate as a party in the informal administrative review by intervening in accordance with Section 502.A.1 [now Paragraph (1) of Subsection A of 11.5.5.502 NMAC].

C. Employee notification requirements:

(1) At least five (5) days prior to the date of any meeting or telephone conference scheduled as part of the informal administrative review, except as provided in Paragraph 2 of this Subsection, the respondent in a case initiated by a notice of aontest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (informal administrative review) as illustrated in Section 1006 [now 11.5.5.1006 NMAC]. Such notice shall remain posted until the earlier of the following events:

(a) the date of the meeting or telephone conference; or

(b) receipt by the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of any notification by the department rescheduling the meeting or telephone conference, at

which time the notice shall be replaced by another notice informing the affected employees of the rescheduled date.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall submit to the department, within five (5) days after posting or by the date of the scheduled meeting or telephone conference, whichever is earlier:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

(4) The department shall file the affidavit of posting or the affidavit of explanation for non-posting, as applicable, with the commission secretary within five (5) working days after receipt.

D. Conclusion:

(1) Except as otherwise provided in Subsection E of this Section or by order of the hearing officer, and unless a settlement agreement disposing of all issues in the case has been filed:

(a) in a case initiated by a notice of contest, the department shall file an administrative complaint with the commission within ninety (90) days after docketing of the case; and

(b) in a case initiated by a petition for modification of abatement period, the petitioner shall file a request for hearing with the commission within twenty (20) days after docketing of the case.

(2) The informal administrative review shall be deemed concluded:

(a) if the case was initiated by a notice of contest, upon the earlier of:

(i) the respondent's receipt of the department's administrative complaint; or

(ii) three (3) days after expiration of the deadline specified in Paragraph 1.a [now Subparagraph (a) of Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Subsection, or any extension of such time granted by the hearing officer or automatically as provided by Subsection E.2 [now Paragraph (2) of Subsection E of 11.5.5.306 NMAC] of this Section; and

(b) if the case was initiated by a petition for modification of abatement period, upon the earlier of:

(i) filing of the petitioner's request for hearing; or

(ii) expiration of the deadline specified in Paragraph 1.b [now Subparagraph (b) of Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Subsection, or any extension of such time granted by the hearing officer or automatically as provided by Subsection E.2 [now Paragraph (2) of Subsection of 11.5.5.306 NMAC] of this Section.

E. Automatic stay of time to file administrative complaint or request for hearing:

(1) The filing deadline otherwise specified in Subsection D.1 [now Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Section automatically shall be stayed by the filing, prior to expiration of the time otherwise provided by this Part or by any order, of any motion:

(a) seeking dismissal or other relief with the effect of ultimately disposing of a case; or

(b) to require the filing of an amended notice of contest or petition for modification of abatement period, as applicable.

(2) If any such motion is denied, the filing deadline otherwise specified in Subsection D.1 [now Paragraph (1) of Subsection D of 11.5.5.306 NMAC] of this Section automatically shall be extended for a period equal to the number of days between filing of the motion and filing of the commission's order. If the motion is one to require the filing of an amended notice of contest of petition for modification of abatement period, and such motion is granted, the filing deadline shall automatically be extended for a period equal to the number of days between filing of the motion and filing of the amended pleading.

F. Failure to file timely administrative complaint or request for hearing:

(1) If the department fails to file a timely administrative complaint in a case initiated by a notice of contest, the respondent may file a motion seeking vacation of the citations.

(2) If the petitioner fails to file a timely request for hearing in a case initiated by a petition for modification of abatement period, any respondent or intervenor may file a motion seeking dismissal of the petition.

(3) Upon the filing of a motion authorized by Paragraph 1 or 2 of this Subsection, the commission shall grant the relief sought unless the commission finds that:

(a) the pleading at issue was, in fact, timely filed;

(b) the failure to file a timely pleading was caused by some action of the respondent; or

(c) there is other good cause for the failure to file a timely pleading.

[1/1/82, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.307 UNILATERAL VACATION OF CITATION; WITHDRAWAL OF CONTEST OR PETITION:

A. General: At any time prior to conclusion of the informal administrative review, provided there are no intervenors:

(1) in a case initiated by a notice of contest:

(a) the department may unilaterally and unconditionally vacate all contested items of a citation by filing a notice of vacation in the format illustrated in Section 1013 [now 11.5.5.1013 NMAC]; or

(b) the respondent may unilaterally and unconditionally withdraw the notice of contest, by filing a notice of withdrawal in the format illustrated in Section 1014 [now 11.5.5.1014 NMAC]; and

(2) in a case initiated by a petition for modification of abatement period, the petitioner may unilaterally and unconditionally withdraw the petition, by filing a notice of withdrawal in the format illustrated in Section 1014 [now 11.5.5.1014 NMAC].

B. Commission approval unnecessary: Commission approval for vacation of a citation or withdrawal of a notice of contest or petition for modification of abatement period, under the conditions specified in Subsection A of this Section, is not necessary.

C. Effect:

(1) The effect of the department's vacation of a citation, as provided in Subsection A.1.a [now Subparagraph (a) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the citation had never been issued.

(2) The effect of the respondent's withdrawal of a notice of contest, as provided in Subsection A.1.b [now Subparagraph (b) of Paragraph (1) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the notice of contest had never been filed.

(3) The effect of the petitioner's withdrawal of a petition for modification of abatement period, as provided in Subsection A.2 [now Paragraph (2) of Subsection A of 11.5.5.307 NMAC] of this Section, shall be the same as if the Petition had never been filed.

D. When settlement agreement required: If there is an intervenor in the case, or at any time following conclusion of the informal administrative review, unilateral vacation of a citation or withdrawal of a notice of contest or a petition for modification of abatement period shall not be allowed; but such vacation or withdrawal may be accomplished by settlement agreement in accordance with Section 503 [now 11.5.5.503 NMAC].

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.308-11.5.5.399 [RESERVED]

11.5.5.400 SUBPART IV: PLEADINGS SUBSEQUENT TO DOCKETING:

[see Sections 11.5.5.401 NMAC - 11.5.5.404 NMAC]

[Recompiled 11/30/01]

11.5.5.401 SUBSEQUENT PLEADINGS ALLOWED:

A. Case initiated by notice of contest: The following pleadings, in addition to the notice of contest, are allowed in a case initiated by a notice of contest:

(1) the department's administrative complaint; and

(2) the respondent's answer (which shall be deemed a petition for hearing, whether or not the respondent includes a specific request for hearing).

B. Case initiated by petition for modification of abatement period: The following pleadings, in addition to the petition for modification of abatement period, are allowed in a case initiated by a petition for modification of abatement period:

(1) the petitioner's request for hearing; and

(2) the respondents' responses to the petition for modification of abatement period.

[1/1/94; Recompiled 11/30/01]

11.5.5.402 ADMINISTRATIVE COMPLAINT:

A. Content: The administrative complaint, in a case initiated by notice of contest, shall set forth, either directly or through incorporation by reference to the citation, all facts necessary to establish:

(1) the commission's jurisdiction over the parties and the subject matter;

(2) the date, location, and circumstances of each alleged violation that has been contested;

(3) any such alleged violations that have been settled and are no longer at issue, and all such alleged violations that are still at issue; and

(4) the considerations upon which each contested classification of violation, abatement period, or proposed penalty is based.

B. Service: The administrative complaint shall be served upon the respondent:

(1) by certified mail, return receipt requested; or

(2) if the administrative complaint is returned by the United States postal service after attempted service by mail, by hand-delivery.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.403 REQUEST FOR HEARING:

A. Content: The request for hearing, in a case initiated by a petition for modification of abatement period, shall state that the case has not been settled during the informal administrative review, and shall request that a hearing be scheduled on the petition for modification of abatement period, but need not reiterate the allegations contained in the petition.

B. Service: The request for hearing may be served upon the respondent by any method authorized by Section 202.B.2 [now Paragraph (2) of Subsection B of 11.5.5.202 NMAC].

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.404 ANSWER TO ADMINISTRATIVE COMPLAINT; RESPONSE TO PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. When filed:

(1) In a case initiated by notice of contest, the respondent's answer shall be filed within fifteen (15) days after the respondent's receipt of the administrative complaint.

(2) In a case initiated by a petition for modification of abatement period, each respondent's response to the petition for modification of abatement period shall be filed within ten (10) days after service of the petitioner's request for hearing.

B. Response to allegations: A respondent's answer to the administrative complaint, or response to the petition for modification of abatement period, as applicable, shall, as to each allegation of the notice of contest or the petition for modification of abatement period:

(1) state whether such allegation is admitted or denied;

(2) if the allegation cannot in good faith be fully admitted or fully denied, state the extent to which the allegation is admitted and the extent to which it is denied;

(3) if the respondent has insufficient knowledge to form a belief as to the truth of the allegation, so state and deny the allegation.

C. Affirmative defenses: Any affirmative defenses the respondent has to the administrative complaint or the petition for modification of abatement period shall be set forth in the answer or response, as applicable.

(1) Any affirmative defense not set forth in the answer or response, as applicable, except a defense of lack of subject matter jurisdiction, shall be waived unless the respondent demonstrates that the basis for the affirmative defense was not known, and could not reasonably have been discovered, by the respondent at the time the answer or response was filed.

(2) Any affirmative defense listed in SCRA 1986, 1-012.B shall be treated as a motion, to which the provisions of Section 501 [now 11.5.5.501 NMAC] shall apply, except that the affirmative defense shall be set forth in the answer or response, as applicable, rather than as a separate document.

[4/25/78, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.405-11.5.5.499 [RESERVED]

11.5.5.500 SUBPART V: MOTIONS, INTERVENTION, AND SETTLEMENT:

[see Sections 11.5.5.501 NMAC - 11.5.5.503 NMAC]

[Recompiled 11/30/01]

11.5.5.501 MOTIONS:

A. General: All motions, except those made orally during a hearing, shall:

(1) be in writing;

(2) specify the grounds for the motion;

(3) state the relief or order sought; and

(4) if the motion requires consideration of facts not already in the record, have attached as exhibits all affidavits, certificates, depositions, or other documentary evidence relied upon.

B. Determination of opposition: The moving party shall determine whether the motion will be opposed, except that the moving party may assume that the motion will be opposed if:

(1) the motion seeks dismissal or other relief with the effect of ultimately disposing of the case; or

(2) the moving party has been unable, after reasonable effort, to contact the non-moving party to determine whether the motion will be opposed.

C. Unopposed motions: If the motion will not be opposed, the motion shall state that concurrence of all other parties was granted.

(1) With any unopposed motion, the moving party shall submit a proposed order.

(2) The proposed order shall be approved by all parties. Approval of the moving party shall be indicated by the signature of the moving party or that party's advocate. Approval of a non-moving party may be indicated by the signature of the non-moving party or that party's advocate, or by a statement on the proposed order indicating that concurrence of that party was obtained by telephone.

(3) The hearing officer shall grant any unopposed motion, unless the hearing officer finds that granting of the motion would not be consistent with the purpose of the Act. If the hearing officer denies an unopposed motion, any party may, within five (5) days after service of the hearing officer's order, request review of such action by the commission.

D. Opposed motions:

(1) Any opposed motion shall state either that concurrence was sought and denied, or why concurrence was not sought.

(a) Except as otherwise provided in Subparagraph b of this Paragraph, an opposed motion shall be accompanied by a written argument.

(b) The following motions, even if opposed, need not be accompanied by a written argument, but shall cite the applicable provisions of the Act and of this Part, or any other authority deemed necessary:

(i) a motion to dismiss a notice of contest or a petition for modification of abatement period as untimely;

(ii) a motion to require submission of an amended notice of contest or petition for modification of abatement period when the original notice or petition does not comply with the format required by this Part;

(iii) a motion to dismiss a notice of contest for the respondent's failure, or a petition for modification of abatement period for the petitioner's failure, to file: (a) a timely affidavit of posting as proof of compliance with any applicable employee notification requirements; or (b) a timely affidavit of explanation for non-posting in lieu of an affidavit of posting, when applicable;

(iv) a motion to vacate the citations for the department's failure to file a timely administrative complaint;

(v) a motion to dismiss a notice of contest for the respondent's failure to file a timely answer;

(vi) a motion to dismiss a petition for modification of abatement period for the petitioner's failure to file a timely request for hearing;

(vii) a motion seeking summary approval of a petition for modification of abatement period for the respondent's failure to file a timely response to the petition; or

(viii) any motion made orally during the course of a hearing.

(2) Any party upon whom an opposed motion is served shall have ten (10) days from the date of service to file a response and any documentary evidence in support of the response. A non-moving party who fails to file a response within that time, or any extension of the time granted by the commission chair, shall be deemed to have consented to the granting of the motion.

(3) The moving party may, but is not required to, submit a reply to the non-moving party's response within five (5) days after service of the response.

(4) When every party upon whom a motion has been served is deemed to have consented to granting of the motion pursuant to Paragraph 2 of this Subsection, the moving party shall submit a proposed order granting the motion. A copy of the proposed order shall be attached as an exhibit to a supplementary document filed by the moving party no later than five (5) days after the response was due.

(5) All opposed motions will be decided without a hearing, whether or not a hearing is requested by a party, unless otherwise ordered by the commission or the hearing officer, as applicable. Any request for hearing must be filed simultaneously with:

(a) the motion, if requested by the moving party; or

(b) the response to the motion, if requested by any non-moving party.

(6) The decision shall be implemented by written order, except that a decision on an oral motion made during a hearing on the merits may be incorporated into the commission's order on the merits.

(a) The commission or the hearing officer, as applicable, shall specify whether the order on an opposed motion, except one on which the decision will be incorporated into the order on the merits, will be drafted by:

(i) the commission counsel;

(ii) a commission member;

(iii) the hearing officer; or

(iv) the prevailing party or that party's advocate.

(b) The drafter of the proposed order shall attach a copy thereof to a cover document, which shall then be filed with the commission secretary and served upon each party or advocate except, if applicable, the party whose advocate drafted the proposed order.

(c) Any party may file an objection to the proposed order within five (5) days after service. A copy of the objection shall be served on each party and, if the drafter is anyone other than a party or a party's advocate, on the drafter. The objection:

(i) shall be directed to the form of the proposed order;

(ii) shall not raise any substantive issue unless the issue relates to a ground for the proposed order that was not raised by any party; and

(iii) shall include, as an exhibit, an alternative form of proposed order.

(d) If the order is issued by the commission, any member who dissented from the decision, or who differed with the grounds upon which the majority reached the decision, may write a dissenting or concurring opinion to be attached to the order.

E. Withdrawal of motion: The party filing a motion may voluntarily, and without the necessity of obtaining the consent of any other party, withdraw the motion at any time prior to entry of an order ruling on the motion.

F. Applicability to affirmative defenses: This Section shall be applicable to any affirmative defense based on the grounds listed in SCRA 1986, 1-012.B, except that a defense asserting a lack of subject matter jurisdiction shall not be denied solely for failure to comply with the procedural requirements of this Section.

[4/25/78, 3/6/79, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.502 INTERVENTION:

A. Intervention as of right:

(1) In any case, whether initiated by a notice of contest or a petition for modification of abatement period, any affected employee or representative of affected employees may intervene as of right by filing a notice of intervention, in the format illustrated in Section 1015 [now 11.5.5.1015 NMAC], at any time prior to commencement of the commission's hearing on the merits or filing of a settlement agreement, whichever is earlier.

(2) Any party who believes that a notice of intervention has been filed by a person not entitled to intervene as of right under this Subsection may, within five (5) days after being served with the notice of intervention, move to strike the notice of intervention.

B. Permissive intervention: Any person not entitled to intervene as of right pursuant to Subsection A of this Section may file a motion to intervene, pursuant to SCRA 1986, 1-024.B, at least five (5) days prior to commencement of the commission's hearing on the merits or filing of a settlement agreement, whichever is earlier.

C. Untimely intervention: No intervention shall be allowed after expiration of the time limits specified in Subsections A and B or this Section unless the person seeking to intervene demonstrates, to the commission's satisfaction, that there was good cause for failure to intervene within such time limits.

D. Withdrawal of intervention: An intervenor may unilaterally and unconditionally withdraw from the case at any time prior to final resolution by filing a notice of

withdrawal of intervention in the format illustrated in Section 1016 [now 11.5.5.1016 NMAC].

[1/1/83, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.503 SETTLEMENTS:

A. Settlement encouraged: Settlement upon terms that are consistent with the provisions of the Act is encouraged at any stage of the proceedings.

B. Content of settlement agreement: Every proposed settlement agreement shall:

(1) state how each contested item of every citation in the case is affected by the settlement;

(2) if the settlement is contingent upon certain action by the respondent, describe the contingency and the consequences of the respondent's failure to meet the contingency;

(3) if the settlement is not intended as a full and complete settlement of all issues in the case, list those issues not settled;

(4) if the case was initiated by a notice of contest contain:

(a) a withdrawal of the respondent's contest, except as to any items not settled;

(b) statements that:

(i) the cited violations, except any alleged violations vacated by the settlement: a) have been abated; or b) will be abated by a date specified in the settlement agreement; and

(ii) the penalty, if any: a) previously has been paid; b) is tendered with the settlement agreement; or c) will be paid by a specified date;

(5) bear the signature and date of signature of:

(a) the complainant or petitioner, or that party's advocate;

(b) the respondent, or that party's advocate; and

(c) if there are intervenors, each intervenor who approves the settlement agreement, or their advocates; and

(6) if there are parties who have not approved the settlement agreement, include a certificate of service signed by one of the approving parties or by the advocate for one of the approving parties, and attesting to service of a copy of the settlement agreement on each party who has not approved the settlement agreement.

C. Additional terms allowed: A settlement agreement may contain additional terms and conditions deemed appropriate by the parties, so long as such additional terms and conditions are consistent with the provisions of the Act.

D. Employee notification requirements:

(1) Prior to the filing of any settlement agreement, the respondent in a case initiated by a notice of contest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (proposed settlement of case), as illustrated in Section 1008 [now 11.5.5.1008 NMAC], with an attached copy of the settlement agreement signed by all approving parties. Such notice shall remain posted until at least twenty (20) days after filing of the settlement agreement.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall submit to the department, within five (5) days after posting, the original settlement agreement and:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

E. Filing: The department shall be responsible for filing a settlement agreement regardless of which party initiated the settlement agreement. As soon as practicable after receipt of the settlement agreement and the affidavit of posting or affidavit of explanation for non-posting, as applicable, the department shall file the settlement agreement and the affidavit with the commission secretary.

F. Objections:

(1) At any time prior to expiration of twenty (20) days after filing of a settlement agreement, objections to the settlement agreement may be filed by:

(a) any affected employee or representative of affected employees other than a party;

(b) any party who has not approved the settlement agreement; or

(c) any commission member.

(2) Any objection filed shall be served on each party and, if filed by any person other than a commission member, shall state the reasons for the objection. The objection must include a certificate of service in the format illustrated in Section 1001 [now 11.5.5.1001 NMAC].

G. Approval of settlement agreement:

(1) If no timely objection to a settlement agreement is filed:

(a) the settlement agreement shall become a final order of the commission, without further action, upon expiration of the time for filing of objections; and

(b) the commission secretary shall promptly issue a notice of finality of settlement agreement and serve a copy on each party.

(2) If a timely objection is filed, the commission shall meet and consider the proposed settlement agreement, with or without a hearing as the commission deems appropriate. The commission may approve the settlement agreement, notwithstanding the objection, if the commission finds that the settlement agreement is consistent with the purpose of the Act and is otherwise appropriate.

[4/25/78, 1/1/83, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.504-11.5.5.599 [RESERVED]

11.5.5.600 SUBPART VI: DISCOVERY AND SUBPOENAS:

[see Sections 11.5.5.601 NMAC - 11.5.5.608 NMAC]

[Recompiled 11/30/01]

11.5.5.601 GENERAL RULES REGARDING DISCOVERY:

A. Timing of discovery: Unless otherwise ordered by the hearing officer pursuant to Section 607 [now 11.5.5.607 NMAC], no discovery shall be allowed until after conclusion of the informal administrative review.

B. Filing not required; service and notice: Except as otherwise provided, neither a request for discovery nor any response shall be filed with the commission.

(1) A party requesting discovery shall serve the discovery request upon the party from whom discovery is sought and shall file a notice with the commission, in the format illustrated in Section 1017 [now 11.5.5.1017 NMAC], indicating the date of service of the discovery request, the type of discovery sought, and the party from whom discovery is sought.

(2) A party responding to a discovery request shall serve the response upon the party making the request and shall file a notice with the commission, in the format illustrated in Section 1017 [now 11.5.5.1017 nMAC], indicating the date of service of the response, the type of discovery request to which the party is responding, and the party upon whom the response was served.

(3) A party making or responding to a discovery request shall, upon the request of any party other than the party upon whom the request or response is required to be served, provide a copy of the discovery request or response to that party.

C. Reliance upon facts established through discovery:

(1) A party wishing to rely upon facts established through discovery shall:

(a) if the facts are relied upon in support of a motion, attach the relevant documents to the motion as exhibits; or

(b) if the facts are relied upon at the hearing, offer the relevant documents into evidence at the hearing.

(2) A party seeking to compel discovery from another party, or seeking sanctions against another party for failure to comply with a request for discovery, shall include copies of the relevant requests and any responses thereto as exhibits to the motion to compel or for sanctions.

D. Continuing obligation to supplement responses: Any party from whom discovery is sought has a continuing obligation, subject to any objections interposed and not overruled by the hearing officer, to supplement any responses with relevant information obtained after serving of the initial response and any previous supplemental responses. Unless otherwise ordered by the hearing officer, supplemental responses shall be served within the same time, after the new information is obtained, as required for the initial response after service of the discovery request; provided, if the hearing is

set for a time sooner than the supplemental response would otherwise be due, the supplemental response shall be served:

(1) at least eight (8) working days prior to the hearing, if served by first-class mail;

(2) at least six (6) working days prior to the hearing, if served by a courier service with guaranteed overnight delivery;

(3) at least five (5) working days prior to the hearing, if served by hand-delivery or by facsimile transmission; or

(4) if the new information is obtained later than five (5) working days prior to the hearing, by hand-delivery or facsimile transmission within one (1) working day after the new information is obtained but in no event later than:

(a) the beginning of the hearing, if obtained before the beginning of the hearing;

(b) the conclusion of the hearing, if obtained after the beginning, but before the conclusion, of the hearing; or

(c) the close of the record, if obtained after the conclusion of the hearing but before the close of the record.

E. Failure to make discovery; sanctions: The hearing officer may, upon motion by a party and a showing that another party from whom discovery was requested has failed to respond within the required time, enter an order requiring such other party to respond within the time specified by the hearing officer. If a party who has been ordered to respond to a discovery request persists in failing to respond, then upon subsequent motion by the requesting party:

(1) the hearing officer may impose such sanctions as may be appropriate, including:

(a) refusal to allow the testimony of a witness not identified in a response to a request for identity of witnesses;

(b) denial of admission of a document not disclosed in response to a request for access to documents; or

(c) drawing of adverse inferences against the non-responsive party; and

(2) the commission may:

(a) order the non-responding party to pay the requesting party's costs of compelling discovery; or

(b) order dismissal or default judgment against the non-responding party.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.602 IDENTITY OF WITNESSES:

A. Definition: As used in this Section, "witness" means any person known or reasonably believed to have first-hand knowledge of the facts or circumstances of any matter relevant to any issue in a proceeding under this Part, whether or not any party intends to call such person to testify at the hearing.

B. Request: Except as otherwise provided in Subsection C of this Section, any party, upon request made to another party prior to hearing, is entitled to obtain the following information, to the extent known to the party from whom the information is requested:

(1) the names and addresses of all witnesses;

(2) the relationship, if any, of each such witness to the party of whom the request is made;

(3) a description of the general subject matter of the knowledge of each witness relevant to any issue in the case; and

(4) with regard to each witness, whether the party from whom the information is requested intends to call to testify at the hearing.

C. Response: A party upon whom a request for identity of witnesses has been served shall, within five (5) days after service or such other period as the hearing officer may order upon motion and for good cause, serve upon the requesting party a response providing the requested information, except that:

(1) such information need not be provided as to any officer, employee or agent of the party making the request, unless the party responding to the request intends to call the officer, employee or agent to testify at the hearing; and

(2) if the party responding to the request files a motion for a protective order pursuant to Subsection D of this Section on or before the date the response is due, such information need not be provided as to any person whose identity the responding party is seeking to protect.

D. Protection of witness identity: The hearing officer may, upon motion and for good cause shown, protect the identity of any witness from disclosure.

(1) If such motion is granted, the moving party may not call the witness to testify at the hearing unless the moving party files a supplemental response, not later than ten (10) days before the hearing, providing the information required by Subsection B of this Section.

(2) If such motion is denied, the moving party shall file a supplemental response, within five (5) days after such denial, providing the information required by Subsection B of this Section.

[9/30/76, 4/25/78, 3/6/79, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.603 PRODUCTION OF DOCUMENTS:

A. Definition: As used in this Section, "document" includes writings, drawings, graphs, charts, photographs, audio recordings and other data compilations from which information can be obtained, and if necessary, translated through detection devices into reasonably usable form. In addition, each copy of a document that is not identical in all respects to every other copy shall be considered a separate document.

B. Request: Any party, upon written request made to another party, is entitled to inspect and make copies of any relevant documents in the possession or control of the other party, whether or not such documents are intended to be offered into evidence, subject only to such privilege as may be interposed. The request shall:

(1) set forth the items to be inspected, either by individual item or by category;

(2) describe each item and category with reasonable particularity; and

(3) specify a reasonable time, place and manner of making the inspection and copying the documents.

C. Response: A party upon whom a request for access to documents is served shall fully comply with the request unless such party serves a written objection upon the requesting party. Any such objection shall be served no later than seven (7) days prior to the specified date of inspection or, if the request is received later than seven (7) days prior to such date, on or before the specified date of inspection.

(1) If objection is made to the time, place or manner specified for inspection and copying of documents, the responding party shall specify an alternate time, place or manner. If the parties subsequently are unable to agree as to the time, place, and manner of document inspection, the hearing officer, upon motion of the party seeking access, shall determine the time, place and manner thereof.

(2) If objection is made to production of specified documents, the specific ground for objection as to each such document shall be stated. Inspection of the documents specified in the objection shall not be allowed except upon order of the

hearing officer. The hearing officer may conduct an in camera review of such documents as an aid in determining whether inspection should be allowed.

[9/30/76, 4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.604 REQUEST FOR ADMISSIONS:

A. Request: At any time after docketing of the case, any party may serve upon any other party a written request for the admission of any relevant facts set forth in the request, including the genuineness of any document. Each fact as to which admission is requested shall be set forth separately. A copy of any document referred to in the request shall be attached to the request as an exhibit, unless the document is already in the record. If the document is already in the record, it will be referred to with sufficient particularity to enable the party to whom the request is directed to identify the document with reasonable certainty.

B. Response: Each fact as to which admission is requested shall be deemed admitted unless, within ten (10) days after service of the request, or within such other period as the hearing officer may order upon motion and for good cause, the party to whom the request is directed serves upon the requesting party a written response specifically denying such fact.

[4/25/78, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.605 INTERROGATORIES:

A. Request: Any party may serve upon any other party, without leave of the hearing officer, a single document containing no more that fifteen (15) written interrogatories. Each separately identified Subsection of any interrogatory shall be considered a separate interrogatory. Interrogatories exceeding the scope authorized by this Subsection shall be allowed only by order of the hearing officer in accordance with the procedures set forth in Section 607 [now 11.5.5.607 NMAC].

B. Response: The party to whom the interrogatories are directed shall answer the interrogatories in writing, under oath, within ten (10) days after service of the interrogatories, or within such other period as the hearing officer may order upon motion and for good cause. The response shall be based not only upon the personal knowledge of the person signing on behalf of the responding party, but also upon information reasonably available to that person upon diligent inquiry.

[4/25/78, 3/6/79, 4/25/79, 1/1/94; Recompiled 11/30/01]

11.5.5.606 DEPOSITIONS:

A. Discovery depositions: Discovery depositions shall not be allowed except by order of the hearing officer pursuant to the provisions set forth in Section 607 [now 11.5.5.607 NMAC].

B. Depositions to preserve evidence: Any party may, for the purpose of preserving evidence, take the deposition of any person who would otherwise be called to testify at the hearing if the party taking the deposition reasonably believes that the deponent is likely to be unavailable at the hearing, within the meaning of SCRA 1986, 11-804.A.

(1) Any party who intends to take a deposition as authorized by this Subsection shall serve a notice of deposition on each other party, stating the name of deponent; the date, time and place of the deposition; and the grounds for believing the deponent is likely to be unavailable at the hearing. In addition, the party intending to take the deposition shall have the deponent served with a subpoena, except that no subpoena shall be required for any person who is a party or an officer, agent or employee of a party.

(2) Any party or the deponent may move for a protective order at any time within five (5) days after service of a notice of deposition or a subpoena, or at any time prior to the beginning of the deposition if the deposition is set for a time less than five (5) days after service of the notice of deposition or the subpoena.

[4/25/78, 3/6/79, 1/1/94; Recompiled 11/30/01]

11.5.5.607 OTHER DISCOVERY:

A. Additional discovery not favored: Discovery not specifically provided for under this Part, including any discovery to be conducted prior to the conclusion of the informal administrative review, shall be permitted only upon determination by the hearing officer that:

(1) such discovery will not unreasonably delay the proceeding;

(2) the information to be obtained is not otherwise reasonably obtainable, may be lost, or may become unavailable because of physical illness or infirmity;

(3) there is a substantial reason to believe that the information sought will be admissible at the hearing or will be likely to lead to the discovery of admissible evidence; and

(4) if the party seeking to conduct the discovery seeks to do so prior to conclusion of the informal administrative review, that there is good cause to allow the discovery at that time.

B. Motion for additional discovery: Any party to the proceeding desiring an order of discovery shall file a motion therefor setting forth:

(1) the circumstances warranting the taking of the discovery;

(2) the nature of the information expected to be discovered; and

(3) the proposed time and place where the discovery will be taken.

C. Order for additional discovery: Upon determining that a motion for additional discovery should be granted, the hearing officer shall issue an order for the taking of such discovery together with any conditions and terms of the additional discovery.

[1/1/94; Recompiled 11/30/01]

11.5.5.608 SUBPOENAS:

A. Issuance:

(1) The commission secretary shall, upon request by a party and without the necessity for notice to any other party, issue a subpoena requiring the attendance and testimony of any witness and the production of any evidence in the possession or under the control of the witness, at a hearing or at a deposition authorized by Section 606 [now 11.5.5.606 NMAC] or by order of the hearing officer. The party requesting the subpoena shall be responsible for:

(2) Any party requesting a subpoena shall be responsible for:

(a) providing the commission secretary with a subpoena form as illustrated in Section 1018 [now 11.5.5.1018 NMAC], completed except for the commission's seal and the name and signature of the commission secretary; and

(b) having the subpoena served upon the witness to whom it is directed.

(3) The commission secretary shall maintain on hand a supply of blank subpoena forms to be provided to a party upon request.

B. Motion to quash: The person to whom the subpoena is directed may move, in writing, to quash or modify the subpoena.

(1) A motion to quash or modify a subpoena shall be filed within ten (10) days after service on the party seeking to quash or modify it, or on or before the time specified in the subpoena for compliance if such time is less than ten (10) days after service. The motion shall comply with all requirements of Section 501 [now 11.5.5.501 NMAC], and shall be served upon all parties to the proceeding, except that no copy

need be served upon any party represented by the same person representing the person filing the motion.

(2) The hearing officer shall quash or modify the subpoena only upon a finding that:

(a) the evidence sought does not relate to any matter relevant to the proceeding;

(b) the subpoena does not describe with sufficient particularity the evidence sought;

(c) the evidence sought is privileged; or

(d) the subpoena is invalid for any other reason sufficient in law.

C. Action to compel compliance: Upon the failure of any person to comply with a subpoena, the party upon whose request the subpoena was issued may initiate proceedings, in the name of the commission, for enforcement of the subpoena in the appropriate court. A copy of each pleading or other document filed in such action shall be furnished to the commission by the party initiating the action.

[9/30/76, 3/6/79, 1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.609-11.5.5.699 [RESERVED]

11.5.5.700 SUBPART VII: HEARING PROCEDURES:

[see Sections 11.5.5.701 NMAC - 11.5.5.708 NMAC]

[Recompiled 11/30/01]

11.5.5.701 SCHEDULING OF HEARING:

A. Time limitations: Hearings shall be scheduled within the following time limits:

(1) Any hearing on a motion or settlement agreement shall be scheduled as promptly as feasible.

(2) Any hearing on the merits shall be scheduled to commence on a date within thirty (30) days after filing of the answer or request for hearing, as applicable.

B. Location of hearings: The location of the hearing shall be as directed by the commission or the hearing officer. Specification of a location in the hearing notice shall be sufficient evidence of the direction of the commission or the hearing officer, without the necessity of a separate written order.

C. Notice of hearing:

(1) The commission secretary shall issue a notice of hearing and serve a conformed copy upon each party, at least ten (10) days in advance of the hearing.

(2) With the notice of hearing served upon the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, the commission secretary shall include:

(a) a form for the notice to affected employees (pendency of hearing) (Section 1007) [now 11.5.5.1007 NMAC] which the responsible employer may complete as appropriate;

(b) a form for the affidavit of posting (Section 1009) [now 11.5.5.1009 NMAC], including a certificate of service (Section 1001) [now 11.5.5.1001 NMAC], which the responsible employer may complete as appropriate; and

(c) a brief explanation of how the forms should be completed and either posted, or served and filed, as applicable.

D. Employee notification requirements:

(1) At least five (5) days prior to the date of any hearing, except as provided in Paragraph 2 of this Subsection, the respondent in a case initiated by a notice of contest or the petitioner in a case initiated by a petition for modification of abatement period shall post, at one or more locations reasonably accessible to the affected employees, a notice to affected employees (pendency of hearing) as illustrated in Section 1007 [now 11.5.5.1007 NMAC]. Such notice shall remain posted until the earlier of the following events:

(a) the date of the hearing; or

(b) receipt by the respondent in a case initiated by a notice of contest, or the petitioner in a case initiated by a petition for modification of abatement period, of a notice of rescheduled hearing, at which time the notice shall be replaced with a new notice informing the affected employees of the rescheduled date.

(2) Posting of the notice specified in Paragraph 1 of this Subsection is not required if, at the time posting otherwise would be required:

(a) the case was initiated by a notice of contest and the responsible employer has no affected employees; or

(b) the case was initiated by a petition for modification of abatement period filed by an affected employee, and the responsible employer has no other affected employees.

(3) The person responsible for posting the notice specified in Paragraph 1 of this Subsection shall file with the commission secretary, within five (5) days after posting or by the date of the hearing, whichever is earlier:

(a) an affidavit of posting, in the format illustrated in Section 1009 [now 11.5.5.1009 NMAC], attesting to posting of the notice specified in Paragraph 1 of this Subsection; or

(b) under the circumstances specified in Paragraph 2 of this Subsection, an affidavit of explanation for non-posting.

[9/30/76, 4/25/78, 1/1/83, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.702 CONTINUANCE OF HEARINGS:

A. General:

(1) Except as provided in Paragraph 2 of this Subsection, the hearing officer may grant a continuance of any hearing upon motion of any party and for good cause.

(2) In a case initiated by a notice of contest, no continuance that would result in the commencement of the hearing on the merits later than thirty (30) days after the commission secretary's receipt of the respondent's answer shall be granted without the concurrence of the respondent, unless the hearing officer finds that the continuance is reasonably required due to some action, or failure to act, on the part of the respondent.

B. Scheduling of continued hearing:

(1) If the hearing officer orders a continuance of the hearing, the order may specify the time and place of such continuance, or direct the commission secretary to issue a new notice of hearing for a time and place to be determined by the commission secretary subject to any limitation the hearing officer may order.

(2) If the order granting a continuance directs the commission secretary to issue a new notice of hearing, the commission secretary shall make a reasonable effort to secure the agreement of all parties on the time and place of such continued hearing before issuing the new notice of hearing. If the secretary is unable to secure such agreement by the parties, the continued hearing shall be set for a time and place determined by the commission secretary subject only to the limitations imposed by the hearing officer. The provisions of Section 701.C [now Subsection C of 11.5.5.701 NMAC] shall apply to the new notice of hearing.

[9/30/76, 3/6/79, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.703 PREHEARING CONFERENCE:

At any time prior to a hearing on the merits, the hearing officer may, with or without motion by a party, order the parties to participate in a prehearing conference for the purpose of considering matters for simplification of the issues or expedition of the hearing.

[9/30/76, 1/1/94; Recompiled 11/30/01]

11.5.5.704 FAILURE TO APPEAR:

A. Sanction: If a party fails to appear for a hearing, the commission or the hearing officer may impose such sanctions as the commission or hearing officer, as applicable, deems appropriate; provided, any such sanctions having the effect of ultimately disposing of the case may be imposed only by the commission.

B. Setting aside of sanction: The commission or hearing officer, as applicable, shall set aside any sanctions imposed pursuant to Subsection A of this Section only upon motion of the party failing to appear and a showing that:

(1) the party did not receive the notice of hearing; or

(2) the party's failure to appear was not reasonably avoidable.

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.705 CONDUCT OF HEARING:

A. New Mexico Rules of Evidence as general guidance: Except as otherwise provided in Subsection B of this Section, the New Mexico Rules of Evidence, SCRA 1986, 11-101 to 11-1102, shall be used as a general guide to the principles of evidence and may be used by the commission or hearing officer in determining the weight to be given any item of evidence, but shall not be binding in the determination of the admissibility of evidence.

B. Specific provisions of Rules of Evidence applicable to commission proceedings:

(1) The following provisions of the New Mexico Rules of Evidence shall be binding in commission proceedings:

(a) Article 2, Judicial Notice; provided, the term "judicial notice" shall be construed to mean "official notice";

(b) Article 4, Relevancy and its Limits; provided, for purposes of SCRA 1986, 11-408, the informal administrative review shall be deemed a compromise negotiation;

(c) Article 5, Privileges;

(d) the following portions of Article 6, Witnesses:

(i) Rule 11-603, Oath or Affirmation;

(ii) Rule 11-604, Interpreters;

(iii) Rule 11-605, Competency of Judge as Witness;

(iv) Rule 11-614, Calling and Interrogation of Witnesses by Judge; and

(v) Rule 11-615, Exclusion of Witnesses; and

(e) Rule 11-804.A, Definition of Unavailability.

(2) The term "judge" or "court", as used in any provision of the New Mexico rules of evidence made applicable to commission proceedings by Paragraph 1 of this Subsection, shall be construed to mean, as the context requires, the commission, any commission member, or the hearing officer.

C. Exhibits:

(1) All exhibits offered in evidence shall be marked with a designation identifying the party by whom the exhibit is offered, and numbered serially in the sequence in which they are offered.

(2) Large charts and diagrams, models, and other bulky exhibits are discouraged. Exhibits shall be limited to 8 1/2 x 11 inches, or be capable of being folded and placed in an 8 1/2 x 11-inch envelope, unless the hearing officer finds that an exception is necessary for adequate presentation of the offering party’s case.

(3) The original of each exhibit shall be given to the court reporter. Unless the hearing officer finds it impractical, a copy of each exhibit shall be given to the hearing officer, each commission member, the commission counsel, and each party. Copies for any person entitled to a copy but not present at the hearing shall be given to the commission secretary or, in the absence of the commission secretary, the hearing officer, unless otherwise ordered by the hearing officer.

(4) Exhibits denied admission into evidence shall not be included in the tanscript of proceedings unless the party offering the exhibits tenders the exhibit as an offer of proof pursuant to Section 707.B.2 [now Paragraph (2) of Subsection B of 11.5.5.707 NMAC].

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 1/1/94; Recompiled 11/30/01]

11.5.5.706 BURDEN OF PROOF:

A. Case initiated by notice of contest: In proceedings commenced by the filing of a notice of contest, the department shall have the burden of establishing a prima facie case as to:

(1) the existence and classification of each alleged violation;

(2) the propriety of the proposed penalty, if any, for each alleged violation; and

(3) the reasonableness of the abatement period for each alleged violation.

B. Case initiated by petition for modification of abatement period: In proceedings commenced by a petition for modification of abatement period, the burden of establishing a prima facie case shall rest with the petitioner.

C. Affirmative defenses: In all cases, the respondent shall have the burden of establishing a prima facie case as to any affirmative defenses asserted.

D. Rebuttal: In any case, once a prima facie case has been established by the party with the burden of doing so, the burden then shifts to any opposing party to introduce sufficient evidence to rebut such prima facie case.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.707 OBJECTIONS:

A. General: Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds for the objection. All objections, and the hearing officer's rulings thereon, shall be included in the record.

(1) If a quorum of the commission is present at the hearing, any party dissatisfied by a ruling of the hearing officer may immediately take exception to such ruling.

(a) If an exception is taken, the commission shall immediately decide whether to sustain or reverse the hearing officer's ruling.

(b) Failure to take an exception when a quorum of the commission is present shall constitute a waiver of the objection.

(2) If a quorum of the commission is not present at the hearing, an exception to the hearing officers's ruling is automatic, and shall not be deemed waived by further participation in the hearing.

B. Offer of proof: Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof which shall be included in the record of the proceedings.

(1) For excluded oral testimony, an offer of proof shall consist of a brief statement describing the nature of the excluded evidence.

(2) For an excluded exhibit, an offer of proof shall consist of insertion of such exhibit into the transcript of proceedings. Excluded exhibits placed in the transcript of proceedings as offers of proofs shall be clearly identified as such, and kept separate from admitted exhibits.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.708 TRANSCRIPTION OF PROCEEDINGS:

Unless otherwise ordered by the commission, a verbatim transcript of the hearing shall be made by a certified court reporter. The cost of transcription, including the cost of the commission's copies of the transcript, shall be paid by the commission. The cost of copies of the transcript for the parties shall be paid by the parties requesting such copies.

[9/30/76, 4/25/78, 1/1/83, 1/1/84, 8/12/93, 1/1/94; Recompiled 11/30/01]

11.5.5.709-11.5.5.799 [RESERVED]

11.5.5.800 SUBPART VIII: POST-HEARING PROCEDURES:

[see Sections 11.5.5.801 NMAC - 11.5.5.807 NMAC]

[Recompiled 11/30/01]

11.5.5.801 FILING OF TRANSCRIPT; NOTICE; CORRECTION:

A. Filing: A copy the original of the transcript, duly certified by the reporter, shall be filed with the commission secretary as soon as practicable after conclusion of the hearing.

B. Notice of transcript filing: Upon receipt of the transcript of proceedings, the commission secretary shall issue a notice of transcript filing and serve a conformed copy upon each party.

C. Corrections to transcript: Corrections to the transcript may be made by the following procedure:

(1) All parties to a case may stipulate to a correction to the transcript. The original of any such stipulation shall be filed with the commission secretary, and a copy thereof shall be served on the court reporter by the party initiating the stipulations.

(2) If the parties are unable to stipulate to correction of the transcript, then within ten days after service of the notice of transcript filing a party seeking to make corrections shall send to the court reporter a list of the proposed corrections, by page and line number, setting forth the language as it appears in the transcript and the language as the party believes it should appear. The list shall also include adequate space for the court reporter to make the annotations required by Subparagraph b of this Paragraph.

(a) A copy of the correspondence with the court reporter shall be sent to each other party to the case, but shall not be filed with the commission at the time it is sent.

(b) Upon receipt of the proposed transcript corrections, the court reporter will check the original stenographic record and will indicate, in the space provided for each proposed correction:

(i) concurrence, if the court reporter agrees with the proposed correction;

(ii) non-concurrence, if the court reporter believes the original language is correct; or

(iii) the language as it should appear, if the court reporter determines that the original language is in error but does not agree with the proposed correction.

(c) Upon completion of the actions required by Subparagraph b of this Paragraph, the court reporter shall return the annotated list of proposed corrections to the party submitting it.

(d) Upon receipt of the annotated list of proposed transcript corrections, the initiating party shall prepare an appropriate document in the format illustrated in Section 1000 [now 11.5.5.1000 NMAC], attach the proposed corrections as an exhibit, file the document with the commission secretary, and serve a copy on each other party and on the court reporter.

(e) Any other party may file objections to the proposed transcript corrections within five (5) days after the date of service of the corrections. Any party filing objections shall serve a copy of the objections on each other party to the case and on the court reporter.

(i) In the absence of a timely objection, the proposed transcript corrections as annotated by the court reporter shall be accepted as accurate.

(ii) If a timely objection is filed, the hearing officer shall rule on such objections. Such ruling shall be without hearing, unless otherwise ordered by the hearing officer. A copy of such ruling shall be served by the commission secretary on each party and on the court reporter.

(3) The commission secretary shall enter on the original transcript of hearing in the case file all corrections made pursuant to this Subsection, and shall enter and sign the following annotation on the first page of the transcript: "Transcript corrections made pursuant to [stipulation] [proposed corrections] [order] filed [date of filing]."

D. Non-delay of briefing schedule: The submission of proposed transcript corrections shall not delay the date by which briefs or proposed findings of fact and conclusions of law are due, pursuant to Section 802 [now 11.5.5.802 NMAC], unless otherwise ordered by the hearing officer on motion of a party.

[4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.802 FILING OF BRIEFS AND PROPOSED FINDINGS AND CONCLUSIONS:

Unless otherwise ordered by the hearing officer upon motion of a party, each party may file proposed findings of fact and conclusions of law, a closing brief, or both, within twenty (20) days after service of the notice of transcript filing.

[4/25/78, 1/1/83, 1/1/94; Recompiled 11/30/01]

11.5.5.803 REOPENING OF HEARING:

A. General: A hearing may be reopened to permit the taking of additional evidence at any time prior to issuance of an order on any issue heard at the hearing, upon a finding by the commission or the hearing officer, as applicable:

(1) as to any excluded evidence, whether or not in response to a motion of a party, that such exclusion was both erroneous and prejudicial; provided:

(a) if a quorum of the commission was present at the hearing, the party offering the evidence took exception to the hearing officer’s ruling; and

(b) in any event, the party offering the evidence submitted an offer of proof; or

(2) upon motion of a party alleging that new evidence exists, that such new evidence:

(a) was not, and could not have been, considered at the hearing; and

(b) is relevant and likely to be admissible at the hearing.

B. Limitation of reopened hearing: Any hearing reopened pursuant to Subsection A of this Section shall be limited to the specific issues set forth in the order reopening the hearing.

[1/1/94, 1/1/96, Recompiled 11/30/01]

11.5.5.804 DECISIONS ON THE MERITS:

A. Form: All decisions on the merits shall be by written order signed by the commission members deciding the contest. The order shall set forth the facts necessary to an understanding of the case, the reasons for the decision, and the decision.

B. Concurring or dissenting opinion: Any commission member who does not agree in full with the majority may write a concurring or dissenting opinion, which shall be included with the commission's decision.

C. Filing and service of, and response to, recommended decision: If a hearing officer, other than a commission member or the commission counsel, has been directed by the commission to submit a recommended decision, the hearing officer shall serve a copy of the recommended decision upon each party and file the original with the commission secretary.

(1) Any party may file a response to the recommended decision, including argument for or against the recommended decision or for modification of the recommended decision, within twenty (20) days after service of the recommended decision.

(2) Any response to the recommended decision shall include appropriate citations to the hearing record or to legal authority. No new evidence shall be included in a response, nor shall any legal argument be presented that was not presented at the hearing unless the party filing the response shows that the issue addressed by such legal argument could not reasonably have been anticipated at the hearing.

(3) As used in this Subsection, "recommended decision" includes proposed findings of fact and conclusions of law.

D. Non-applicability of SCRA 1986, 1-058: The provisions of SCRA 1986, 1-058 shall not apply to orders of the commission or the hearing officer. The provisions of this Part regarding submission of and comment upon proposed orders shall instead apply.

E. Effective date of orders: All orders, whether issued by the commission or by the hearing officer, shall become effective immediately upon filing.

[9/30/76, 1/1/83, 1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.805 REHEARINGS:

A. Showing required: After final resolution, the commission shall not rehear the case unless the party requesting the rehearing demonstrates, to the satisfaction of the commission, that new evidence exists, that it was not, and could not have been, considered at the prior hearing, and that the new evidence could have affected the final resolution.

B. Effect on finality of order: A motion for rehearing does not affect the finality of the order nor suspend its operation.

[9/30/76, 4/25/78, 1/1/83, 1/1/94; Recompiled 11/30/01]

11.5.5.806 STAY OF ORDER:

A. Time for filing: Any motion for stay of an order shall be filed within fifteen (15) days after the order is filed.

B. Showing required; granting of stay: No stay shall be granted from any final resolution unless the party requesting the stay demonstrates, to the satisfaction of the commission, that good cause exists for a stay. If the commission finds that good cause exists, it may order a stay for the period requested or, at its discretion, for any period it deems appropriate.

C. Automatic denial: Any motion for stay that is not acted upon within fifteen (15) days after filing shall be deemed denied.

[4/25/78, 1/1/94; Recompiled 11/30/01]

11.5.5.807 APPEALS:

A. How taken: Appeals from commission orders shall be as provided by statute.

B. Preparation of record on appeal:

(1) The commission secretary shall be responsible for preparation and certification of the record proper in accordance with applicable court rules regarding appeals from decisions of administrative agencies.

(2) The court reporter who recorded the hearing shall be responsible for preparation of the transcript of hearing in accordance with applicable court rules regarding appeals from decisions of administrative agencies.

C. Costs: The cost of perfecting an appeal shall be borne by the appellant.

[4/25/78, 1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.808-11.5.5.899 [RESERVED]

11.5.5.900 SUBPART IX: MISCELLANEOUS PROVISIONS:

[see Sections 11.5.5.901 NMAC - 11.5.5.906 NMAC]

[Recompiled 11/30/01]

11.5.5.901 CONSTRUCTION:

This Part shall be construed so as to accomplish the purpose of the Act.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.902 WAIVER OF RULES:

Upon motion of a party and for good cause shown, the commission may waive any provision of this Part, provided that such waiver does not conflict with the Act nor affect any party's right to due process.

[4/25/78, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.903 SEVERABILITY:

If any provisions or application of this Part is held invalid, the remainder of this Part, or its application to other persons or situations, shall not be affected.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.904-11.5.5.905 [RESERVED]

11.5.5.906 SAVINGS CLAUSE:

No amendment to this Part shall apply to any case in which the notice of contest or the petition for modification of abatement period was filed prior to the effective date of such amendment.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.907-11.5.5.998 [RESERVED]

11.5.5.999 SUBPART X: SAMPLE FORMS:

[see Sections 11.5.5.1000 NMAC - 11.5.5.1018 NMAC]

[Recompiled 11/30/01]

11.5.5.1000 SAMPLE DOCUMENT (GENERAL):

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

[TITLE OF DOCUMENT]

[Documents filed or served pursuant to this Part, except for exhibits attached to other documents, must contain a heading and caption, as illustrated above, on the first page. The top margin shall be at least one and one-half (1 1/2) inches, and all other margins shall be at least one (1) inch. All pages after page 1 shall be numbered. The page number may appear within the bottom margin allowance. The body of the document (after the title) shall be double-spaced, except for footnotes, block-indented quotations, sub-headings, signature blocks, and similar material.]

[Signature]

_____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1001 SAMPLE CERTIFICATE OF SERVICE:

A. Format:

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing [title of document] was served on the following [parties/advocates of record], by [method of service], on [date of service]:

[Insert name(s) and address(es) of person(s) upon whom service is made.]

[Signature] _____

[Typed or printed Name]

B. Usage note: The certificate of service must appear on the signature page, or on the page immediately following the signature page, of the document to which it relates.

[1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1002 SAMPLE COMMISSION SECRETARY'S CERTIFICATE OF SERVICE:

A. Format:

COMMISSION SECRETARY'S CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing [title of document] was served on each party or advocate of record, on [date of service].

[Signature] _____

[Typed or printed Name]

commission secretary

B. Usage note: The commission secretary's certificate of service shall be stamped or typed on the signature page, or on the page immediately following the signature page, of the document to which it relates.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1003 SAMPLE NOTICE OF SUBSTITUTION OF ADVOCATE:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE OF SUBSTITUTION OF ADVOCATE

Pursuant to 11 NMAC 5.5.110.B.1 [now Paragraph (1) of Subsection B of 11.5.5.110 NMAC], the undersigned person hereby withdraws as advocate for [name of party].

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

The Following person hereby enters [his/her] appearance as advocate for [name of party].

[**Signature**] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1004 SAMPLE NOTICE TO AFFECTED EMPLOYEES (CONTEST OF CITATIONS):

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,

complainant,

v. [case no. omitted]

[NAME OF RESPONDENT],

respondent.

NOTICE TO AFFECTED EMPLOYEES

(CONTEST OF CITATIONS)

[Name of respondent] is filing the attached notice of contest pursuant to the Occupational Health and Safety Act. This contest will be the subject of an informal administrative review before the New Mexico environment department, and may be the subject of a hearing before the occupational health and safety review commission. Any affected employee or representative of affected employees may participate as a party in these proceedings, as provided in the Act and in 11 NMAC 5.5 [now 11.5.5 NMAC], Occupational Health and Safety Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____

[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the notice of contest, in accordance with Section 302.E [now Subsection E of 11.5.5.302 NMAC]. Neither the original nor a copy should be filed with the department or the commission.

[1//184, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1005 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PROPOSED MODIFICATION OF ABATEMENT PERIOD):

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF PETITIONER],

Petitioner,

v. . [case no. omitted]

NEW MEXICO ENVIRONMENT DEPARTMENT [and]

[NAME OF RESPONSIBLE EMPLOYER],

respondent[s].

NOTICE TO AFFECTED EMPLOYEES

(PROPOSED MODIFICATION OF ABATEMENT PERIOD)

[Name of petitioner] is filing the attached petition for modification of abatement period pursuant to the Occupational Health and Safety Act. Any affected employee or representative of affected employees may participate as a party in these proceedings, as provided in the Act and in 11 NMAC 5.5 [now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 [now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____

[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the petition for modification of abatement period in accordance with Section 303.E [now Subsection E of 11.5.5.303 NMAC]. Neither the original nor a copy should be filed with the department or the commission.

[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1006 SAMPLE NOTICE TO AFFECTED EMPLOYEES (INFORMAL ADMINISTRATIVE REVIEW):

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE TO AFFECTED EMPLOYEES

(INFORMAL ADMINISTRATIVE REVIEW)

A [meeting/telephone conference] between the New Mexico environment department and [name(s) of respondent(s)], as part of the informal administrative review of this case, has been scheduled for [time] on [date], at [location]. Any affected employee or representative of affected employees is entitled to participate as a party in the [meeting/telephone conference], as provided in the Occupational Health and Safety Act and in 11 NMAC 5.5[now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5 [now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____

[Typed or printed name]

B. Usage note: This document must be posted in accordance with Section 306.C [now Subsection C of 11.5.5.306 NMAC]. Neither the original nor a copy should be filed with the department or the commission.

[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1007 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PENDENCY OF HEARING:

A. Format

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE TO AFFECTED EMPLOYEES

(PENDENCY OF HEARING)

A hearing on [issue or issues to be heard] has been scheduled before the Occupational Health and Safety Review Commission to commence at [time] on [date], at [location]. Any affected employee or representative of affected employees is entitled to participate as a party in the hearing, as provided in the Occupational Health and Safety Act and in 11 NMAC 5.5[now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures. You may obtain a copy of 11 NMAC 5.5[now 11.5.5. NMAC] from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____

[Typed or printed name]

B. Usage note: This document must be posted in accordance with Section 701.C [now Subsection C of 11.5.5.701 NMAC]. Neither the original nor a copy should be filed with the department or the commission.

[1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1008 SAMPLE NOTICE TO AFFECTED EMPLOYEES (PROPOSED SETTLEMENT OF CASE):

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE TO AFFECTED EMPLOYEES

(PROPOSED SETTLEMENT OF CASE)

The attached settlement agreement has been entered into by the [signing] parties. Any affected employee [or representative of affected employees] who objects to

the settlement agreement should file a written objection, including reasons, by hand-delivery to the commission secretary at [street address], or by first class mail addressed to [mailing address]. Objections must be received by the commission secretary within twenty (20) days after filing of the settlement agreement. Specific procedures for objection are set forth in 11 NMAC 5.5 [now 11.5.5. NMAC], Occupational Health and Safety - Review Commission Procedures, a copy of which may be obtained from the commission secretary by calling [phone no.]. Copies of all documents filed in this matter may be inspected at [location].

[Date of posting] [Signature] _____

[Typed or printed name]

B. Usage note: This document must be posted, with an attached copy of the settlement agreement, in accordance with Section 503.D[now Subsection D of 11.5.5.503 NMAC]. Neither the original nor a copy should be filed with the department or the commission.

[1/1/84, 8/12/93, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1009 SAMPLE AFFIDAVIT OF POSTING:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

AFFIDAVIT OF POSTING

STATE OF [NAME OF STATE IN WHICH AFFIDAVIT SIGNED])

) ss.

COUNTY OF [NAME OF COUNTY IN WHICH AFFIDAVIT SIGNED])

[Name of person signing affidavit], being duly sworn, states:

1. I am the [title] of the [respondent/petitioner], [name of party], and I am authorized to make this affidavit.

2. I posted copies of the notice to affected employees ([specific type of notice]), [with an attached copy of the (title of attached document),] in accordance with 11 NMAC 5.5.203.A [now Subsection A of 11.5.5.203 NMAC], on [date of posting].

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

[Signature of notary] _____

Notary public

My commission expires:

[Expiration date] _____

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/84, 1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1010 SAMPLE AFFIDAVIT OF EXPLANATION FOR NON-POSTING:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent(s).

AFFIDAVIT OF EXPLANATION FOR NON-POSTING

STATE OF [NAME OF STATE IN WHICH AFFIDAVIT SIGNED])

) ss.

COUNTY OF [NAME OF COUNTY IN WHICH AFFIDAVIT SIGNED])

[Name of person signing affidavit], being duly sworn, states:

1. I am the [title] of the [respondent/petitioner], [name of party], and I am authorized to make this affidavit.

2. A notice to affected employees ([specific type of notice]) was not posted because [brief explanation of reason for not posting].

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

[Signature of notary] _____

Notary public

My commission expires:

[Expiration date]

B. Usage note: If applicable, include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1011 SAMPLE NOTICE OF CONTEST:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,

complainant,

v. [Case no. omitted]

[NAME OF RESPONDENT],

respondent.

NOTICE OF CONTEST

TO: [Name and address of person who signed citation for department]

[Name of respondent] contests the following portions of the citations issued by the New Mexico environment department on [date]:

[List, by citation and item number, each item being contested, and state what specific aspect (existence of cited condition, that cited condition constitutes a violation, classification, penalty, or abatement date) is being contested.]

[A copy/copies] of the relevant [citation(s)/item(s)] [is/are] attached hereto as Exhibit[s] A [through (last exhibit letter)].

Dated: [insert filing date] [Signature] _____

TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Attached exhibits must be labelled ("EXHIBIT A", etc.) in the center of the bottom margin. Each citation should be a separate exhibit, but items within a single citation should not be separate exhibits unless on non-consecutive pages. A certificate of service is not required, but an affidavit of posting (form 10) or affidavit of explanation for non-posting (Section 1010) [now 11.5.5.1010 NMAC] must be filed.

[1//194, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1012 SAMPLE PETITION FOR MODIFICATION OF ABATEMENT PERIOD:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF PETITIONER],

Petitioner,

v. [case no. omitted]

NEW MEXICO ENVIRONMENT DEPARTMENT

[and] [NAME OF RESPONSIBLE EMPLOYER],

respondent[s].

PETITION FOR MODIFICATION OF ABATEMENT PERIOD

TO: [Name and address of person who signed citation for department]

[Name of petitioner] petitions for amendment of the abatement dates for the following-listed items of the citation issued to [name of responsible employer] on [date]:

[List each item for which abatement date modification is requested, state what longer or shorter period is requested, and state reasons for request.]

[A copy/copies] of the relevant [citation(s)/item(s)] [is/are] attached hereto as Exhibit[s] A [through (last exhibit letter)].

Dated: [insert filing date] [Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Attached exhibits must be labelled ("EXHIBIT A", etc.) in the center of the bottom margin. Each citation should be a separate exhibit, but items within a single citation should be separate exhibits only if on non-consecutive pages. A certificate of service (Section 1001) [now 11.5.5.1001 NMAC], showing service on the responsible employer is required if the petition is filed by an affected employee or a

representative of affected employees. An affidavit of posting (form 10) or affidavit of explanation for non-posting (Section 1010) [now 11.5.5.1010 NMAC] must be filed.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1013 SAMPLE NOTICE OF VACATION OF CITATION:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

NEW MEXICO ENVIRONMENT DEPARTMENT,

complainant,

v. No. [insert case no.]

[NAME OF RESPONDENT],

respondent.

NOTICE OF VACATION OF CITATION[S]

complainant, New Mexico environment department, hereby gives notice of the unconditional vacation of [the/all] citation[s] at issue in this matter.

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Include certificate of service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1014 SAMPLE NOTICE OF WITHDRAWAL OF CONTEST OR PETITION:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE OF WITHDRAWAL OF [CONTEST/PETITION]

[respondent/Petitioner], [Name of respondent or Petitioner, as applicable], hereby gives notice of the unconditional withdrawal of the [Notice of Contest/Petition for Modification of Abatement Period] in this matter.

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC], on or immediately following the signature page.

[1/1/84, 1/1/94, 10/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1015 SAMPLE NOTICE OF INTERVENTION:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

[NAME OF INTERVENOR],

Intervenor.

NOTICE OF INTERVENTION

Notice is hereby given that [Name of Intervenor], [an affected employee/a representative of affected employees] of [Petitioner/respondent], [Name of Responsible Employer], intervenes in this case.

[Signature] _____

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following the signature page, to show service upon the other parties.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1016 SAMPLE NOTICE OF WITHDRAWAL OF INTERVENTION:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

[NAME OF INTERVENOR],

Intervenor.

NOTICE OF WITHDRAWAL OF INTERVENTION

Notice is hereby given that Intervenor [Name of Intervenor] withdraws from this case.

[Signature]

[TYPED OR PRINTED NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Include Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following the signature page, to show service upon the other parties.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1017 SAMPLE NOTICE OF SERVICE OF DISCOVERY REQUEST OR RESPONSE:

A. Format:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER],

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

NOTICE OF SERVICE OF

[RESPONSE TO] [TYPE OF DISCOVERY]

Notice is hereby given that a [Response to] [Type of Discovery] was served upon [Name of Party], by [type of service], on [date].

[Signature] _____

TYPED OR PRINTED

NAME]

[Address of signer (use as many lines as necessary)]

[Signer's telephone number]

B. Usage note: Insert Certificate of Service (Section 1001) [now 11.5.5.1001 NMAC] on or immediately following signature page.

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1018 SAMPLE SUBPOENA AND RETURN:

A. Format; subpoena:

STATE OF NEW MEXICO

BEFORE THE OCCUPATIONAL HEALTH AND SAFETY REVIEW COMMISSION

[NAME OF COMPLAINANT OR PETITIONER]

[complainant/Petitioner],

v. No. [insert case no.]

[NAME(S) OF RESPONDENT(S)],

respondent[s].

SUBPOENA [DUCES TECUM]

TO: [Name and address of person to whom Subpoena addressed]

You are hereby commanded to appear before [the Occupational Health and Safety Review commission/a Certified court reporter] at [location] on [date], at the hour of [time] and testify in this matter at the request of [party requesting Subpoena]. [You are further ordered to bring with you the following items:]

[If Subpoena Duces Tecum, list items to be brought.]

OCCUPATIONAL HEALTH AND SAFETY

REVIEW COMMISSION

[Location of commission Seal] By: [Signature] _____

[TYPED OR PRINTED NAME]

Commission secretary

Subpoena requested by: [List name, address, and phone no. of person requesting Subpoena]

B. Format; return of service: Include a return of service, in the following format, on the reverse of the Subpoena or on a separate page:

RETURN FOR COMPLETION BY SHERIFF OR DEPUTY

STATE OF NEW MEXICO)

) ss.

COUNTY OF [NAME OF COUNTY])

I certify that on [date], in the County of [Name of County], I served this Subpoena [Duces Tecum] on [name of person served], by delivering a copy of the Subpoena [Duces Tecum] to such person.

_____

SHERIFF OR DEPUTY

RETURN FOR COMPLETION BY

OTHER PERSON MAKING SERVICE

STATE OF NEW MEXICO)

) ss.

COUNTY OF [NAME OF COUNTY])

I, being duly sworn, on oath say that I am over the age of 18 years and not a party to this case, and that on [date], in the County of [name of county], I served this Subpoena [Duces Tecum] on [name of person served], by delivering a copy of the Subpoena[Duces Tecum] to such person.

_____

Person Making Service

SUBSCRIBED AND SWORN TO before me by [name of person signing affidavit] on [date].

_____

Judge, Notary, or Other Officer

Authorized to Administer Oaths

[1/1/94, 1/1/96; Recompiled 11/30/01]

11.5.5.1019-11.5.5.1099 [RESERVED]

PART 6: CONVENIENCE STORES

11.5.6.1 ISSUING AGENCY:

New Mexico Environmental Improvement Board.

[11.5.6.1 NMAC - N, 6/1/04]

11.5.6.2 SCOPE:

All convenience store employers and employees.

[11.5.6.2 NMAC - N, 6/1/04]

11.5.6.3 STATUTORY AUTHORITY:

NMSA 1978, Sections 50-9-7, 50-9-13, and 74-1-8.

[11.5.6.3 NMAC - N, 6/1/04]

11.5.6.4 DURATION:

Permanent.

[11.5.6.4 NMAC - N, 6/1/04]

11.5.6.5 EFFECTIVE DATE:

June 1, 2004, unless a later date is cited at the end of a section.

[11.5.6.5 NMAC - N, 6/1/04]

11.5.6.6 OBJECTIVE:

To establish standards related to the occupational health and safety of employees in the convenience store industry.

[11.5.6.6 NMAC - N, 6/1/04]

11.5.6.7 DEFINITIONS:

General: Unless otherwise specified, the following definitions, in addition to those contained in 11.5.1.7 NMAC and the state act, are applicable to this part.

A. "American society for testing materials standard D3935-02" means the American society for testing materials classification standards for transparent polycarbonate bullet-resistant materials.

B. "B rated" means a safe box industry standard, which, at a minimum, conforms to the specifics of a one-fourth inch body and a one-half inch door constructed of steel or an equivalent material.

C. "Controlled access area" means an enclosure of the service counter area with transparent polycarbonate or other bullet-resistant material that meets American society for testing materials or underwriters laboratory standards.

D. "Convenience store" means any business that is primarily engaged in the retail sale of convenience goods, or both convenience goods and gasoline, and employs one or more employees during the normal operating hours of the establishment. This term excludes businesses that operate as hotels, taverns, lodging facilities, restaurants, stores that sell prescription drugs, gasoline service stations, grocery stores, supermarkets, businesses that have more than 10,000 square feet of retail floor space, farmer’s markets, roadside stands, on-site farm markets, and other agricultural activities or operations.

E. "Convenience goods" means articles that are purchased frequently for immediate use in readily accessible stores and with a minimum of effort. This term includes consumable items that are generally limited in quantity and variety, and sold in their original containers. This definition is not intended to exclude convenience stores that sell a small quantity of fresh food or unpackaged products in addition to other convenience goods.

F. "Depository or time lock safe" means a B or higher rated safe box equipped with an electronic or manually programmed time lock, or drop slot, that prevents unauthorized access.

G. "Environmental engineering controls" means an established store floor plan adopted or developed by the employer to reduce theft or robbery by measures, which

include, but are not limited to, cash register placement in plain view of customers, properly functioning indoor and outdoor lighting, and proper placement of security cameras.

H. "Pass-through window" means a manually operated mechanical pass-through trough, front-loading deposit door, or other similar device that is encased in a transparent polycarbonate window or other bullet-resistant material that meets American society for testing materials standard D3935-02, or underwriters laboratory standard 752.

I. "Security surveillance system" means a VHS or digital camera surveillance system that is capable of recording and retrieving a clear video or digital recorded image.

J. "Security alarm system" means any device or series of devices, including, but not limited to, a signal system interconnected with a radio frequency method such as cellular, private radio signals, or other mechanical or electronic device used to notify law enforcement or a private security agency of an unlawful act in progress.

K. "Underwriters laboratories standard 752" means the underwriters laboratory standards for transparent polycarbonate bullet-resistant materials.

L. "Service counter" means, at a minimum, the counter space designated by the employer to include the service transaction area of the money register(s) and the surrounding perimeter.

M. "Signage" means posters, placards, neon lights, or logos, positioned in the convenience store windows and doors.

N. "Training curriculum" means the instruction manual or pamphlet adopted or developed by the employer containing security policies, safety and security procedures, and personal safety and crime prevention techniques.

[11.5.6.7 NMAC - N, 6/1/04; A, 12/01/04; A, 10/30/08]

11.5.6.8 SECURITY REQUIREMENTS:

All convenience stores shall be equipped with the following security devices and standards:

A. Exterior lighting: The employer shall provide and maintain exterior lighting during all evening and nighttime operating hours that ensures clear visibility of the parking areas, walkways, building entrances and exits, and gasoline pump areas.

B. Employee training:

(1) The employer shall provide each employee, at the time of his or her initial appointment, and by periodic review not to exceed four-month intervals, crime prevention and safety training in accordance with a written training curriculum. The training curriculum may include computer-based training. Periodic reviews shall include, at a minimum, review of the written training curriculum and site-specific issues. Training shall be conducted in a language that is understood by the employee. The employer shall conduct training, or designate a knowledgeable representative to conduct training, in accordance with the written training curriculum that includes but is not limited to:

(a) an overview of the potential risk of assault;

(b) operational procedures, such as cash handling rules, that are designed to reduce risk;

(c) proper use of security measures and engineering controls that have been adopted in the workplace;

(d) behavioral strategies to defuse tense situations and reduce the likelihood of violence, such as techniques of conflict resolution and aggression management;

(e) specific instructions on how to respond to a robbery and how to respond to attempted shoplifting; and

(f) emergency action procedures to be followed in the event of a robbery or violent incident.

(2) Store specific training shall be conducted by the employee's immediate supervisor.

(3) Current employees shall receive training within ninety days of the effective date of this regulation.

(4) All employers shall prepare training documentation for each employee and have employees sign a statement indicating the date, time, and place they received their safety training. Employers shall maintain documentation of an employee's training for a period of at least twelve months, or six months after termination of an employee's employment. Employee training documentation shall be made available within forty-eight hours of a department representative's request. The forty-eight hour period shall exclude holidays and weekends. Failure to provide employee training documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). Training curricula shall be kept on the convenience store premises and made available on request by the department.

C. Late night security measures:

(1) In addition to the other security requirements of this part, convenience stores operating between the hours of 11:00 p.m. and 5:00 a.m. shall employ at least one of the following security measures:

(a) two employee shift: the employer shall employ a minimum of two employees during the operating hours of 11:00 p.m. to 5:00 a.m.; or, shall substitute the second employee requirement by employing security personnel on the premises;

(b) controlled access area: the employer shall provide a controlled access area by means of a secured safety enclosure of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935-02 or underwriters laboratory standard 752;

(c) pass-through window(s): the employer shall provide a pass-through window of transparent polycarbonate or other bullet-resistant material that meets American society for testing materials standard D3935-02 or underwriters laboratory standard 752 that restricts access to and encompasses the service counter area, providing an enclosure that extends not less than five feet above the service counter; or

(d) alternative operation: between the hours of 11:00 p.m. and 5:00 a.m., the employer shall close the store and prohibit all sales transactions but allow employees to perform duties such as store stocking, maintenance, cleaning and other non-sales transaction duties. Signs shall be conspicuously posted on all entryways stating the store is closed.

D. Unobstructed view of the service counter: The employer shall maintain door and window signage, product displays, shelving, equipment, and other similar items so that a clear and unobstructed view of the service counter and cash register exists from outside the building.

E. Security surveillance system:

(1) The employer shall provide each convenience store with a fully operational VHS or digital security surveillance system that, at a minimum, shall:

(a) record a continuous unobstructed view of the service counter area and all entryways and exits during all operating hours; and

(b) include a high resolution black and white or color screen monitor with on screen date and time capabilities.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the security surveillance system, and, in the

event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises;

(b) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the security surveillance system. All documentation shall be made available within forty-eight hours of a department representative's request; and

(c) maintain a VHS or digital library of all in-store transactions recorded by the security surveillance system during normal operating hours of the convenience store for a period of no less than twenty business days;

(d) failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

F. Security alarm system:

(1) The employer shall provide and maintain in each convenience store a fully operational security alarm system with a working personal panic alarm for each employee that, when activated, notifies law enforcement or a private security agency when an unlawful act is in progress.

(2) The employer shall:

(a) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the alarm system, and, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(b) maintain documentation for a period of at least twenty-four months of all inspections, servicing, alterations, and upgrades performed on the security alarm system; all documentation shall be made available within forty-eight hours of a department representative's request. Failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(3) The security alarm activators shall be located in a location accessible to the employees and be available to the employees as a portable device that can be carried on their person.

G. Depository or time lock safe:

(1) The employer shall:

(a) provide at least one B or higher rated depository or time lock safe in each store;

(b) utilize each depository or time lock safe to ensure controlled access to cash;

(c) conduct a monthly maintenance inspection and make all necessary repairs to ensure the proper operation of the depository or time lock safe system, or, in the event of an extended mechanical malfunction that exceeds an eight hour period, provide alternative security that may include closure of the premises; and

(d) maintain documentation, for a period of at least twenty-four months, of all inspections, servicing, alterations, and upgrades performed on the depository or time lock safe; all documentation shall made available within forty-eight hours of a department representative's request; failure to provide equipment maintenance documentation within the forty-eight hour period shall subject the employer to the penalties provided for in NMSA 1978, Section 50-9-24 (1975). The forty-eight hour period shall not include holidays and weekends.

(2) The location of the depository time lock safe may be determined by the employer but shall be located within the service counter area, or in an office adjacent to the service counter area.

H. Cash management: The employer shall not have more than seventy-five dollars in any cash register at any time between the hours of 11:00 p.m. and 5:00 a.m. To protect employee safety, the employer shall maintain minimal amounts of cash in the cash registers at all other times.

I. Required signs:

(1) The employer shall conspicuously post a notice in English and in Spanish in the convenience store that contains, at a minimum, the following information:

(a) there is a safe in the store;

(b) employees do not have access to the safe;

(c) there is an active security alarm system;

(d) there is an active surveillance system; and

(e) there is a limited amount of cash in the cash register.

(2) Employers will not be cited by the department for providing employees access to a time lock or other safe.

J. Pay phones: The owner shall provide adequate lighting to the pay phone area.

K. Unobstructed view of sales area: The employer shall ensure an unobstructed view throughout the store from the service counter area. This may be accomplished by different means, including mirrors and video monitors.

[11.5.6.8 NMAC - N, 6/1/04; A, 12/01/04; A, 10/30/08]

11.5.6.9-11.5.6.20 [RESERVED]

11.5.6.21 COMPLIANCE PROVISION:

Unless otherwise provided, compliance with the sections of this part shall be achieved within sixty days of its effective date.

[11.5.6.21 NMAC - N, 6/1/04; A, 12/01/04]

11.5.6.22 CONSTRUCTION:

This regulation shall be liberally construed to carry out the purposes of the occupational health and safety regulations and the state act.

[11.5.6.22 NMAC - N, 6/1/04; A, 10/30/08]

11.5.6.23 SEVERABILITY:

If any provision or application of this regulation is held invalid, the remainder, or its application to other situations or persons, shall not be affected.

[11.5.6.23 NMAC - N, 6/1/04]

11.5.6.24 ENFORCEMENT AUTHORITY:

Department representatives shall be responsible for the enforcement of this regulation.

[11.5.6.24 NMAC - N, 6/1/04]

11.5.6.25 REFERENCES IN OTHER REGULATIONS:

Any reference to the Convenience Store regulations or 11.5.6 NMAC in any other rule shall be construed as a reference to this regulation.

[11.5.6.25 NMAC - N, 6/1/04]

11.5.6.26 COMPLIANCE WITH OTHER REGULATIONS:

Compliance with this regulation does not relieve a person from the obligation to comply with any other applicable federal, state, or local regulations.

[11.5.6.26 NMAC - N, 6/1/04]

11.5.6.27 SAVINGS CLAUSE:

Future amendments: no future amendment to 11.5.6 NMAC shall affect any administrative or judicial enforcement action pending on the effective date of the amendment.

[11.5.6.27 NMAC - N, 6/1/04]

CHAPTER 6: DAY LABORERS

PART 1: GENERAL PROVISIONS

11.6.1.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division.

[11.6.1.1 NMAC - N, 12-15-08]

11.6.1.2 SCOPE:

All day labor employers in New Mexico.

[11.6.1.2 NMAC - N, 12-15-08]

11.6.1.3 STATUTORY AUTHORITY:

Section 50-15-1 to 50-15-7 NMSA 1978.

[11.6.1.3 NMAC - N, 12-15-08]

11.6.1.4 DURATION:

Permanent.

[11.6.1.4 NMAC - N, 12-15-08]

11.6.1.5 EFFECTIVE DATE:

December 15, 2008, unless a later date is cited at the end of a section.

[11.6.1.5 NMAC - N, 12-15-08]

11.6.1.6 OBJECTIVE:

The objective of this rule is to establish regulations necessary for the enforcement of the Day Laborer Act.

[11.6.1.6 NMAC - N, 12-15-08]

11.6.1.7 DEFINITIONS:

A. "Check cashing service" means a business that offers to cash checks or other payment instruments or that advertises that it cashes checks or other payment instruments.

B. "Day labor" means employment that is under a contract between a day labor service agency and a third-party employer, that is occasional, irregular or for a limited time period.

C. "Day labor service agency" means an entity, including a labor broker or labor pool, that provides day laborers to third-party employers and that charges the third-party employer for the service of providing day laborers for employment offered by the employer. The provisions of the Workers' Compensation Act [52-1-1 et. seq. NMSA 1978] shall apply to day labor service agencies.

D. "Day laborer" means a person who contracts for day labor employment with a day labor service agency.

E. "Department" means the New Mexico department of workforce solutions.

F. "High percentage of workers" means 10% or more of the day laborers that a day labor service agency employs in a calendar year.

G. "Hours worked" means time a day laborer spent actually working. Time of work begins when the employer begins to control the day laborers time. Time spent by a day laborer in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked, consistent with existing wage and hour law. A day laborer who is required to remain waiting on call on the day labor service agency’s premises or on the third-party employer's premises is working while waiting, consistent with existing wage and hour law. Further, any preparation time required by the day labor service agency or third-party employer at a day labor service agency or an employer's premises or at a prescribed work place will be counted as hours worked, consistent with existing wage and hour law.

H. "Limited English proficient" means a day laborer who does not speak English as their primary language and who has a limited ability to read, speak, write or understand English.

I. "Payment instrument" means a paycheck, payment voucher or other negotiable instrument from an employer provided to an employee to pay for hours worked.

J. "Third-party employer" means a person or entity that contracts with a day labor service agency for the employment of day laborers.

[11.6.1.7 NMAC - N, 12-15-08]

11.6.1.8 EXEMPT EMPLOYERS:

The following agencies that provide employees on a short-term or otherwise temporary basis are exempted from the provisions of the Day Labor Act and these regulations:

A. business entities registered as farm labor contractors;

B. temporary services employment agencies where advanced applications, a screening process and job interviews are required;

C. a labor union hiring hall; and

D. a labor bureau or employment office operated by a business entity for the sole purpose of employing a person for its own use.

[11.6.1.8 NMAC - N, 12-15-08]

11.6.1.9 TIME FRAMES FOR PAYMENT:

A. Where day labor employment lasts less than one week, wages shall be paid at the end of each workday or sooner if requested by the day laborer.

B. Where day labor employment lasts more than a week, wages shall be paid at the end of each workweek or sooner if requested by the day laborer.

[11.6.1.9 NMAC - N, 12-15-08]

PART 2: DAY LABOR SERVICE AGENCIES AND THIRD PARTY EMPLOYERS DUTIES

11.6.2.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division.

[11.6.2.1 NMAC - N, 12-15-08]

11.6.2.2 SCOPE:

All day labor and third party employers in New Mexico.

[11.6.2.2 NMAC - N, 12-15-08]

11.6.2.3 STATUTORY AUTHORITY:

Section 50-15-1 to 50-15-7 NMSA 1978.

[11.6.2.3 NMAC - N, 12-15-08]

11.6.2.4 DURATION:

Permanent.

[11.6.2.4 NMAC - N, 12-15-08]

11.6.2.5 EFFECTIVE DATE:

December 15, 2008, unless a later date is cited at the end of a section.

[11.6.2.5 NMAC - N, 12-15-08]

11.6.2.6 OBJECTIVE:

The objective of this rule is to establish regulations necessary for the enforcement of the Day Laborer Act.

[11.6.2.6 NMAC - N, 12-15-08]

11.6.2.7 DEFINITIONS:

[RESERVED]

11.6.2.8 DUTIES APPLICABLE TO DAY LABOR SERVICE AGENCIES AND THIRD-PARTY EMPLOYERS:

A day labor service agency and third-party employer shall:

A. compensate a day laborer for all hours worked or otherwise due and owed to the day laborer;

B. compensate day laborers for hours worked by providing or making available commonly accepted payment instruments that are payable in cash, on demand, at a financial institution;

C. before or at the time of payment of wages, provide each day laborer with an itemized statement of payment with the laborer's name, the amount of time worked, the rate of pay and detail regarding each deduction made from wages, which shall include no less than the purpose of the deduction and the amount of the deduction;

D. not allow any deductions made other than those required by federal or state law to reduce a day laborer's wages below the federal minimum wage for the hours worked;

E. maintain true and accurate records of the day laborers employed and of the hours worked and wages paid to the day laborers for at least one year after the entry of the record; such records shall be kept as provided for herein and shall be open at all reasonable hours to the inspection of the director of the department or his or her agents.

[11.6.2.8 NMAC - N, 12-15-08]

11.6.2.9 DUTIES APPLICABLE TO DAY LABOR SERVICE AGENCIES ONLY:

A. A day labor service agency shall not restrict the right of a day laborer to accept a permanent position with a third-party employer to whom the day laborer has been referred for work or otherwise restrict the right of a third-party employer to offer employment to a day laborer.

B. A day labor service agency shall keep the official notice of the Day Laborer Act, furnished by the department of workforce solutions without charge, posted in a conspicuous place on or about the premises where the DLSA is hiring, registering or otherwise offering employment or payment to any day laborer seeking employment. A day labor service agency shall also provide an 8.5 x 11 size copy of the official notice of the Day Labor Act, provided by the department without charge, to each day laborer with each payment statement.

C. A day labor service agency may collect a reasonable placement fee from a third-party employer.

[11.6.2.9 NMAC - N, 12-15-08]

11.6.2.10 CHECK CASHING SERVICES; NOTICES; WAIVERS; PENALTIES:

A. If a day labor service agency provides a check cashing service, is a check cashing service, or allows a check cashing service to operate on its premises, it cannot charge a day laborer an amount in excess of two dollars ($ 2.00) for cashing a check or payment instrument that is issued by the agency.

B. A day labor service agency or a check cashing service that is operating within the office of a day labor service agency shall post a notice clearly visible in the area where it cashes checks or payment instruments, that clearly states limitations on the fee amount and its fee for cashing a check or payment instrument.

C. A day labor service agency or a check cashing service operating on the premises of a day labor service agency shall not charge any fees for cashing a check or payment instrument unless the day laborer is given the option of being paid with a check or payment instrument that is payable without a fee at a local financial institution and the day laborer voluntarily chooses to cash the check with the day labor service agency or at a check cashing service operating on the premises of a day labor service agency.

(1) If the day laborer elects to cash the check with the day labor service agency or a check cashing service operating on the premises of a day labor service agency, the day labor service agency must have the day laborer voluntarily sign a waiver in plain language. When a day laborer is limited English proficient, the, the day labor service agency is responsible for providing a waiver that is translated into the day laborer's primary language, indicating that the day laborer is aware they have the right to be paid with a payment instrument that can be cashed at a bank or other local financial institution free of charge and they have voluntarily elected to cash their check with the day labor service agency or check cashing service. This waiver must be signed each time the day laborer cashes a check with the day labor service agency or with a check cashing service operating on the premises of a day labor services agency.

(2) Waiver(s) must be kept on file for one (1) year from the date signed and shall be open at all reasonable hours to the inspection of the director of the department or his or her agents.

D. The day labor service agency must provide current and accurate information with the name, address and hours of a local financial institution where checks can be cashed without a fee, on the notice form provided by the department. This information shall be posted in an area where payment is made or checks are cashed, and shall be clearly visible and easily readable.

E. The notices required by this section shall be posted in English, Spanish, and any other written language where a high percentage of the workers speak that language, and will be provided by the department free of charge. The day labor service agency shall be responsible for posting the signs, completing blank sections with accurate information and ensuring the accuracy of any information they provide on the sign. In areas where a day labor service agency employs Navajo workers and the check cashing service cashes checks of Navajo workers, notices shall be provided by the department and posted in Navajo.

F. Failure of the day labor service agency to post notices or provide current and accurate check cashing information or local financial institution information as provided herein is a violation of these regulations and the Day Labor Act.

[11.6.2.10 NMAC - N, 12-15-08]

PART 3: DAY LABOR COMPLAINTS AND PENALTIES

11.6.3.1 ISSUING AGENCY:

New Mexico Department of Workforce Solutions, Labor Relations Division.

[11.6.3.1 NMAC - N, 12-15-08]

11.6.3.2 SCOPE:

All day labor employers in New Mexico.

[11.6.3.2 NMAC - N, 12-15-08]

11.6.3.3 STATUTORY AUTHORITY:

Section 50-15-1 to 50-15-7 NMSA 1978.

[11.6.3.3 NMAC - N, 12-15-08]

11.6.3.4 DURATION:

Permanent.

[11.6.3.4 NMAC - N, 12-15-08]

11.6.3.5 EFFECTIVE DATE:

December 15, 2008, unless a later date is cited at the end of a section.

[11.6.3.5 NMAC - N, 12-15-08]

11.6.3.6 OBJECTIVE:

The objective of this rule is to establish regulations necessary for the enforcement of the Day Laborer Act.

[11.6.3.6 NMAC - N, 12-15-08]

11.6.3.7 DEFINITIONS:

[RESERVED]

11.6.3.8 DAY LABOR ACT COMPLAINTS AND PROCEDURES:

A. Complaint forms alleging a violation of the Day Laborer Act are available at the Department of Workforce Solutions, 625 Silver Ave SW Suite 410 Albuquerque, NM

87102, and on the department of workforce solutions website (www.dws.state.nm.us), in English and Spanish.

B. Day Laborer Act complaint forms should be completed in English or Spanish, signed and returned to the Department Of Workforce Solutions, 625 Silver Ave SW Suite 410, Albuquerque, NM 87102.

C. Upon receiving a complaint of a violation of the act containing sufficient information, the department of workforce solutions will notify the affected employer of the day laborer claim filed against him/her or violation(s) of the act and allow ten (10) business days for him/her to file a written response. If the day labor service agency or third party employer does not respond, a finding will be made in favor of the complainant or the department. If the day labor service agency or third party employer disputes the claim, his/her written response will be given to the day laborer or the department, who will be allowed ten (10) business days in which to rebut the claim in writing.

D. A department of workforce solutions administrative law judge ALJ(s) may schedule an administrative hearing when, in their judgment, it would facilitate resolution of the complaint. The conduct of the hearing is governed by the procedures described in NMSA 1978, 50-1-2 and pursuant regulations.

E. The ALJ(s) may issue a subpoena duces tecum to compel the production of records they believe are necessary for the resolution of the complaint.

F. In every case in which a hearing has been completed, or in which the pleadings are sufficiently complete and a hearing is deemed unnecessary, or whenever they otherwise have sufficient evidence upon which to base their determination, the ALJ(s) will issue a written decision as to whether the Day Labor Act has been violated. In light of the transitory nature of day labor, the division will strive to complete determinations as quickly as possible, and no later than sixty (60) days after completion of the hearing or after a determination is made that the evidence is otherwise sufficient, unless good cause exists.

G. The ALJ(s) may, upon receipt of written assignment by the day laborer and pursuant to the discretion of the director, file complaints in any magistrate or metropolitan court in the state in order to resolve wage disputes or correct violations arising under Chapter 50 of the New Mexico state statutes, when in the ALJ(s) judgment it is appropriate for the resolution of the claim.

H. The ALJ(s) may, upon receipt of written assignment by the day laborer and pursuant to the discretion of the director, file a proof of claim on behalf of a day laborer in any U.S. bankruptcy court, when in the ALJ(s) judgment it is appropriate for the resolution of the claim.

I. The director of the department of workforce solutions, or his or her designee, shall, when satisfied as to the justice of any claim, cooperate with any employee in the enforcement of any claim against his employer, and refer violations of the Day Labor Act to the district attorneys office of the district in which the violation occurred for criminal prosecution, pursuant to NMSA 50-1-7.

[11.6.3.8 NMAC - N, 12-15-08]

11.6.3.9 VIOLATIONS, MISDEMEANORS AND PENALTIES:

A. Any day labor service agency, or its employee or agent, or any third-party employer or its employee or agent, who hires a day laborer and fails to pay a day laborer for work performed or time due, is liable for full payment of the wages not paid and civil damages equal to twice the value of the unpaid wages, court costs, and attorney fees and costs.

B. Any day labor service agency, or its employee or agent, or any third-party employer or its employee or agent, who violates the provisions of the Day Laborer Act, is for a first offense guilty of a misdemeanor, and shall be sentenced pursuant to Section 31-19-1 NMSA 1978. Offenders who violate this Act a second or subsequent times shall be guilty of a misdemeanor, shall be sentenced pursuant to Section 31-19-1 NMSA 1978, and shall be fined no less than two hundred fifty dollars ($250) and not more than one thousand dollars ($1,000) for each offense for which the offender is convicted, which fine shall not be suspended, deferred or taken under advisement.

C. In addition to any other fees or fines that may be imposed on an offender convicted pursuant to this section, the court may order the offender to pay restitution pursuant to Section 31-17-1 NMSA 1978.

D. Each occurrence of a violation for which a person is convicted is a separate offense.

E. Multiple violations arising from transactions with the same person or multiple violations arising from transactions with different people shall be considered separate occurrences.

F. It shall not be a defense to any action brought pursuant to this section that the plaintiff or complainant is an undocumented worker or otherwise has questionable immigrant status.

[11.6.3.9 NMAC - N, 12-15-08]

CHAPTER 7-19: [RESERVED]

CHAPTER 20: EMPLOYMENT RIGHTS [RESERVED]

CHAPTER 21: LABOR UNIONS/LABOR RELATIONS

PART 1: GENERAL PROVISIONS

11.21.1.1 ISSUING AGENCY:

Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM 87120, (505) 831-5422.

[11.21.1.1 NMAC - N, 3/15/2004]

11.21.1.2 SCOPE:

The scope of Part 1 of Chapter 21 applies to public employers, public employees and labor organizations as defined by the Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978.

[11.21.1.2 NMAC - N, 3/15/2004]

11.21.1.3 STATUTORY AUTHORITY:

Authority for Part 1 of Chapter 21 is the Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978.

[11.21.1.3 NMAC - N, 3/15/2004]

11.21.1.4 DURATION:

Permanent.

[11.21.1.4 NMAC - N, 3/15/2004]

11.21.1.5 EFFECTIVE DATE:

March 15, 2004, unless otherwise cited at the end of the section.

[11.21.1.5 NMAC - N, 3/15/2004]

11.21.1.6 OBJECTIVE:

The objective for Part 1 of Chapter 21 is to establish principles governing implementation of the New Mexico Public Employee Bargaining Act, Section 10-7E-1 through 10-7E-26 NMSA 1978 and to establish fair and expeditious procedures that further the purposes of that Act, which are: (1) to guarantee public employees the right to organize and bargain collectively with their employers; (2) to promote harmonious and cooperative relationships between public employers and public employees; and (3)

to protect the public interest by assuring, at all times, the orderly operation and functioning of the state and its political subdivisions. Section 10-7E-2 NMSA 1978, these rules should be interpreted consistently with the Public Employee Bargaining Act as presently written or as later amended.

[11.21.1.6 NMAC - N, 3/15/2004]

11.21.1.7 DEFINITIONS:

A. Statutory definition: The terms defined in Section 10-7E-4 NMSA 1978, shall have the meanings set forth therein.

B. Additional definitions: The following terms shall have the meanings set forth below.

(1) "Act" means the New Mexico Public Employee Bargaining Act, Sections 10-7E-1 through 10-7E-26 NMSA 1978 including any amendments to that statute.

(2) "Amendment of certification" means a procedure whereby an incumbent labor organization certified by the board to represent a unit of public employees or a public employer may petition the board to amend the certification to reflect a change such as a change in the name or the affiliation of the labor organization or a change in the name of the employer.

(3) "Certification of incumbent bargaining status" shall mean a procedure whereby a labor organization recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 petitions the board for a declaration of bargaining status under Subsection B of Section 10-7E-24 NMSA 1978. or after a local board certifying the representative ceases to exist by operation of Section 10-7E-10 NMSA 1978 (2020).

(4) "Challenged ballot" means the ballot of a voter in a representation election whose eligibility to vote is questioned either by a party to the representation case or by the director.

(5) "Challenged card" means a card or other showing of interest submitted pursuant to Sections 11 or 23 of 11.21.2 NMAC, that the director or a party to the case alleges does not meet the requirements of 11.21.2.11 NMAC.

(6) "Complainant" means an individual, labor organization, or public employer that has filed a prohibited practices complaint.

(7) "Delivering a copy" as it pertains to service or filing of pleadings or other documents means: (1) handing it to the board, to its agent(s), to opposing counsel or unrepresented parties; (2) sending a copy by facsimile or electronic submission in accordance with 11.21.1.10 NMAC or 11.21.1.24 NMAC; (3) leaving it at the board's,

opposing attorney's or party's office with a clerk or other person in charge thereof; or (4) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the unrepresented person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(8) "Director" means the director of the public employee labor relations board.

(9) "Document" means any writing, photograph, film, blueprint, microfiche, audio or video tape, data stored in electronic memory, or data stored and reproducible in visible or audible form by any other means.

(10) "Electronic submission" means the filing of a pleading or other document with the board using the electronic system established by the PELRB, service by the parties, or email communications.

(11) "On a form prescribed by the director" as used in these rules pertaining to the filing of documents with the board, shall include the electronic data submitted by use of any interactive form posted for that purpose on the board's website.

(12) "Probationary employee" for state employees shall have the meaning set forth in the State Personnel Act and accompanying regulations; for other public employees, other than public school employees, it shall have the meaning set forth in any applicable ordinance, charter or resolution, or, in the absence of such a definition, in a collective bargaining agreement; provided, however, that for determining rights under the PEBA non-state employees a public employee may not be considered to be a probationary employee for more than one year after the date of hire by a public employer. If otherwise undefined, the term shall refer to an employee who has held that position, or a related position, for less than six months.

(13) "Prohibited practice" means a violation of Section 10-7E-19, 10-7E- 20 NMSA 1978 or Subsection A of Section 10-7E-21 NMSA 1978.

(14) "Representation case" or **"representation proceeding"** means any matter in which a petition has been filed with the director requesting a certification or decertification election, or an amendment of certification, or unit clarification.

(15) "Respondent" means a party against whom a prohibited practices complaint has been filed.

(16) "Rules" means the rules and regulations of the board (these rules), including any amendments to them.

(17) "Unit accretion" means the inclusion in an existing bargaining unit of employees who do not belong to any existing bargaining unit, who share a community

of interest with the employees in the existing unit, and whose inclusion will not render the existing unit inappropriate.

(18) "Unit clarification" means a proceeding in which a party to an existing lawful collective bargaining relationship petitions the board to change the scope or description of an existing bargaining unit; a change in union affiliation; to consolidate existing bargaining units represented by the same labor organization; or to realign existing bargaining units of employees represented by the same exclusive representative into horizontal units, where the board finds the unit as clarified to be an appropriate bargaining unit and no question concerning, representation arises.

(19) "Unit inclusions or exclusions" means the status of an individual, occupational group, or group of public employees in clear and identifiable communities of interest in employment terms and conditions and related personnel matters, as being within or outside of an appropriate bargaining unit based on factors such as supervisory, confidential or managerial status, the absence thereof, job context, principles of efficient administration of government, the history of collective bargaining, and the assurance to public employees of the fullest freedom in exercising the rights guaranteed by the Public Employee Bargaining Act.

[11.21.1.7 NMAC - N, 3/15/2004; A, 2/28/2005; A, 10/16/2018; A, 7/1/2020; A, 8/9/2022]

11.21.1.8 COMPUTATION OF TIME:

When these rules state a specific number of days in which some action must or may be taken after a given event, the date of the given event is not counted in computing the time, and the last day of the period is deemed to end at close of business on that day. Saturday’s, Sundays and state recognized legal holidays observed in New Mexico shall not be counted when computing the time. When the last day of the period falls on a Saturday, Sunday or legal holiday observed in New Mexico, then the last day for taking the action shall be the following business day.

[11.21.1.8 NMAC - N, 3/15/2004]

11.21.1.9 EXTENSION OF TIME:

A party seeking an extension of time in which to file with the director, the board or a hearing examiner any required or permitted document may file with the director or the hearing examiner, an appropriate written request for an extension. Such a request shall be filed at least three days prior to the due date and shall state the position of all other parties, or that the filing party was unable to reach another party. The director, the board or the hearing examiner may grant an extension for good cause shown and, in granting an extension, may shorten the time requested.

[11.21.1.9 NMAC - N, 3/15/2004]

11.21.1.10 FILING WITH THE DIRECTOR OR THE BOARD:

To file a document with the director or the board, the document may be either hand-delivered to the board's office in Albuquerque during its regular business hours, or sent to that office by United States mail, postage prepaid, or by the New Mexico state government interagency mail or by sending a copy by facsimile or electronic submission. The director will be responsible for recording the filing of documents to be filed with the board, as well as documents to be filed with the director.

A. Time of filing: A document will be deemed filed when it is received by the director. For hand

delivered or mailed documents the date and time stamp affixed by the receiving board agent will be determinative. For faxed or electronically transmitted documents the time and date affixed on the cover page or the document itself by the board's facsimile machine or receiving computer will be determinative.

B. Additional time after service by mail: Whenever a party has the right or is required to do some act

or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three days shall be added to the prescribed period. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

C. Signatures: Parties or their representatives filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document. All electronically filed documents shall be deemed to contain the filer's signature. The signature in the electronic document may represent the original signature in the following ways:

(1) by scanning or other electronic reproduction of the signature; or

(2) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

D. Demand for original: A party shall have the right to inspect and copy any pleading or paper that

has been filed or served by facsimile or electronic submission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

[11.21.1.10 NMAC - N, 3/15/2004; A, 10/16/2018; A, 7/1/2020]

11.21.1.11 REPRESENTATION OF A PARTY:

A party may, be self-represented or be represented by counsel or other representative. Any representative of a party shall file with the board a signed notice of appearance, stating the name of the party; the title and official number (if available) of the case in which the representative is representing the party, and the name, address and telephone number of the representative. The filing of a pleading containing the above information is sufficient to fulfill this requirement.

[11.21.1.11 NMAC - N, 3/15/2004; A, 2/11/2020; A, 7/1/2020]

11.21.1.12 EX PARTE COMMUNICATIONS:

Except as otherwise provided in this rule, no party to a proceeding pending before this board or any of its agents shall communicate, or attempt to communicate, with a hearing examiner assigned to the case, with the Director, or with a board member, concerning any issue in the case, without, at the same time, transmitting the same communication to all other parties to the proceeding. It shall not be a violation of this rule to communicate concerning the status of a case, or to communicate concerning such procedural matters as the location or time of a hearing, the date on which documents are due, or the method of filing. It shall not be a violation of this rule for a party to communicate with the director during the investigatory phase of a proceeding. It shall not be a violation of this rule for a party to communicate with anyone concerning any rulemaking proceeding of the board, or to communicate with the director, a mediator, or board member at the director's, mediator's, or board member's request.

[11.21.1.12 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.13 DISQUALIFICATION:

No board agent, member nor hearing examiner shall decide or otherwise participate in any case or proceeding in which he or she (a) has a financial interest in the outcome; (b) is indebted to any party, or related to any party or any agent or officer of a party by consanguinity within the third degree; (c) has acted on behalf of any party within two years of the commencement of the case or proceeding; or (d) for some other reason or prejudice, he or she cannot fairly or impartially consider the issues in the proceeding.
[11.21.1.13 NMAC - N, 3/15/2004]

11.21.1.14 MOTION TO DISQUALIFY:

A. A motion to disqualify a board agent, member or hearing examiner in any matter, based upon the foregoing criteria, shall be filed with the board, with copies served on all parties, prior to any hearing or the making of any material ruling involving the pending issues.

B. Such motion shall set out the basis for the disqualification and all facts in support thereof.

C. If the board finds such motion meritorious upon due inquiry, it shall disqualify the board agent, member or hearing examiner and he or she shall withdraw from the proceeding. If the motion is denied, the board shall so rule and the matter shall proceed.

[11.21.1.14 NMAC - N, 3/15/2004**]**

11.21.1.15 RECORDS OF PROCEEDINGS:

All meetings of the board (whether general, special or emergency) and all rulemaking, unit determination, and prohibited practice hearings before the board or a hearing examiner of the board shall be audio-recorded, or, upon order of the board may be transcribed, except that board meetings or portions thereof lawfully closed shall not be recorded or transcribed, unless so directed by the board. Following the board's approval of the minutes of a meeting of the board, the minutes shall become the sole official record of the meeting, and the audio recording of the meeting may be erased. The director shall keep the audio recordings of the rulemaking, unit determination, and prohibited practices hearings for a period of at least one year following the close of the proceeding in which the hearing is held, or one year following the close of the last judicial or board proceeding (including any appeal or request for review) related to the case in which the hearing is held, whichever is later, or such longer period as may be required by law. No recording shall be made of any mediation proceeding, settlement discussion, or alternative dispute resolution effort except by agreement of all parties and participating officials. The board's recording or transcript shall be the only official record of a hearing.

[11.21.1.15 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.16 NOTICE OF HEARING:

A. After the appropriate notice or petition is filed in a representation, prohibited practices or impasse resolution case, the director shall hold a status and scheduling conference with the parties to determine the issues; establish a schedule for discovery, including the issuance of subpoenas, and pretrial motions; and set a hearing date.

B. Upon setting a rulemaking hearing, the director or the board shall cause notice of hearing to be issued setting forth the nature of the rulemaking proceeding, the time and place of the hearing, the manner in which interested persons may present their views, and the manner in which interested persons may obtain copies of proposed rules. Notices of rulemaking hearings shall be sent by regular mail to all persons who have made requests for such notice, and shall be published in at least one newspaper of general circulation in New Mexico at least 30 days prior to commencement of the hearing.

C. Upon setting a hearing or conference before the director or designee or before the board in any proceeding, the director or the board shall cause notice of hearing to be issued to all parties of record setting forth the time and place of the hearing or conference. A party to a representation, prohibited practices or impasse resolution case in which a hearing or conference is scheduled may request postponement of the hearing or conference by filing a written request with the director, and serving the request upon all other parties, at least five days before commencement of the hearing or conference. The requesting party shall state the specific reasons in support thereof. Upon good cause shown, the director shall grant a postponement to a date no more than 20 days after the previously set date. Only in extraordinary circumstances may the director grant a further postponement, or a postponement to a date more than 20 days after the previously set date, or a postponement with less than five days' notice.

[11.21.1.16 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020]

11.21.1.17 EVIDENCE ADMISSIBLE:

The technical rules of evidence shall not apply, but, in ruling of the admissibility of evidence, the hearing examiner or board may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt.

A. Irrelevant, immaterial, unreliable, unduly repetitious or cumulative evidence, and evidence protected by the rules of privilege (such as attorney-client, physician-patient or special privilege) shall be excluded upon timely objection.

B. The hearing examiner or board may receive any evidence not objected to, or may, upon the hearing examiner's or board's own initiative, exclude such evidence if it is irrelevant, immaterial, unreliable, unduly repetitious, cumulative or privileged.

C. Evidence may be tentatively received by the hearing examiner or board, reserving a ruling on its

admissibility until the issuance of a report or decision.

[11.21.1.17 NMAC - N, 3/15/2004]

11.21.1.18 MISCONDUCT:

As part of the board's statutory duty under Section 2 of the Act to ensure the orderly functioning of the state and its political subdivisions; and as part of its power to hold hearings and enforce the Act by the imposition of appropriate administrative remedies pursuant to Section 9 of the Act, the hearing examiner or body conducting a hearing or official performing duties under the Act may exclude or expel from any hearing or proceeding, any person, whether or not a party, who engages in violent, threatening, disruptive, abusive or unduly disrespectful behavior. An exercise of the board's power to control its proceedings under this rule may include prohibiting a representative from

appearing before the board or one of its hearing examiners for a period of time designated by the board, reprimanding, suspending, or recommending referral for other disciplinary action. In the event of such exclusion or expulsion the hearing examiner, body or official shall explain on the record the reasons for the exclusion or expulsion and may either proceed in the absence of the excluded person or recess such proceeding and continue at another time, as may be appropriate. An exercise of this power by an agent of the board is subject to review by the board.

[11.21.1.18 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.19 SUBPOENAS:

A. Any party to a proceeding in which a notice of hearing has issued may file a written request with the director for the issuance of a subpoena for witness testimony or a subpoena for the production of documents to procure testimony or documents at the hearing. Deadlines for requesting subpoenas shall be established pursuant to the scheduling order agreed to by the parties. A subpoena request shall state the name and number of the case; identify the person(s) or documents sought; and state the general relevance to an issue in the case of the testimony or documents sought. The director may refuse to issue a subpoena where the request fails to meet these requirements, or where it appears to the director that the documents or testimony sought are not relevant to issues in the case. Otherwise, the director shall immediately issue a subpoena to the requesting party.

B. The director, a hearing examiner, or the board may issue subpoenas on the initiative of the director, hearing examiner or board, in which case a showing of relevance is not required, and a notice of hearing need not have been issued.

C. A person upon whom a subpoena is served may move to quash the subpoena. A motion to quash shall be filed according to the scheduling order, or as permitted by the board, director or the hearing examiner.

D. Any applicable witness and travel fees shall be the responsibility of the subpoenaing party.

[11.21.1.19 NMAC - N, 3/15/2004]

11.21.1.20 EXCHANGE OF DOCUMENTS AND LISTS OF WITNESSES:

Pursuant to the scheduling order, each party shall serve upon all other parties all documents it intends to introduce at the hearing and a list of all witnesses it intends to call, along with a brief statement of the subjects about which each witness is expected to testify. No party may compel discovery other than as provided in this rule and Section 19 (subpoenas), except by a specific order of the board upon good cause shown. The hearing examiner may permit the admission in evidence of witness testimony or of

documents not timely supplied under this rule if, in the hearing examiner's judgment, there was sufficient reason for the failure to timely supply the names or documents.

[11.21.1.20 NMAC - N, 3/15/2004]

11.21.1.21 OWNERSHIP AND CONFIDENTIALITY OF SHOWING OF INTEREST:

Evidence of a showing of interest submitted to the director in support of a representation petition shall remain the property of the party submitting such evidence; shall not become property of the director or the board, shall be kept confidential by the director and the board; and shall be returned to the party that submitted the same upon the close of the case. [11.21.1.21 NMAC - N, 3/15/2004]

11.21.1.22 BURDEN OF PROOF:

A. Except in unit clarification proceedings, no party shall have the burden of proof in a representation proceeding. Rather, the director in the investigatory phase or the hearing examiner shall have the responsibility of developing a fully sufficient record for a determination to be made, and may request any party to present evidence or arguments in any order. In a unit clarification proceeding, a party seeking any change in an existing appropriate unit, or in the description of such a unit, shall have the burden of proof and the burden of going forward with the evidence.

B. In a prohibited practices proceeding, the complaining party has the burden of proof and the burden

of going forward with the evidence.

[11.21.1.22 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.23 MOTIONS AND RESPONSES TO MOTIONS:

All motions and responses to motions, except those made at a hearing, shall be in writing and shall be served simultaneously upon all parties to the proceeding. All written motions shall be filed and served on all parties pursuant to the scheduling order. Motions and responses made at hearings may be made orally. If a party decides to file a response to a written motion, the response shall be filed and simultaneously served pursuant to the scheduling order or, if no deadline is set forth in the scheduling order or such has yet to be issued, within 10 days.

[11.21.1.23 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.1.24 SERVICE:

Service of papers upon parties may be made by personal delivery by depositing in United States mail, first class postage prepaid, by facsimile ("fax") submission or by

electronic submission and, by the next scheduled work day after sending a "fax" or electronic submission, either personally delivering the document or depositing it in first class mail, in which case the date of "fax" or electronic submission shall be the date of service. Each document served shall be accompanied by a signed certification stating the name and address of each person served and the date and method of service. The certification may be placed on the document served. The board may serve any document by electronic transmission to an attorney or party or its representative under this rule.

[11.21.1.24 NMAC - N, 3/15/2004; A, 10/16/2018]

11.21.1.25 TESTIMONY OF BOARD AGENTS:

Agents of the board (including the director, investigators, hearing examiner, and board members), whether employees of the board or contractors, may not be compelled to testify in board proceedings.

[11.21.1.25 NMAC - N, 3/15/2004]

11.21.1.26 FORM OF PAPERS:

All papers required or permitted to be filed with the director, a hearing examiner, or the board shall be on an official form prepared by the director, if available, or on eight and one-half by 11 white paper, double spaced. All papers shall show at or near the top of the first page the case name and, if available, the case number, and shall be signed.

[11.21.1.26 NMAC - N, 3/15/2004]

11.21.1.27 APPEAL OR REVIEW BY THE BOARD:

Unless otherwise provided in these rules, appeal or request for review by the board shall be permitted only upon completion of proceedings before a hearing examiner or the director. Review by the board shall be based on the evidence presented or offered at the earlier stages of the proceeding, and shall not be de novo. An interlocutory appeal may be allowed with the permission of the board, director or the hearing examiner.

[11.21.1.27 NMAC - N, 3/15/2004]

11.21.1.28 DIRECTOR’S AUTHORITY:

Except as otherwise provided in these rules, the director shall have authority to delegate to other board employees or outside contractors any of the authority delegated to the director by these rules. In every case where these rules or the Act provide for the appointment of a hearing examiner, the director or the board shall appoint the hearing examiner, and may appoint the director or a board member as the hearing examiner.

[11.21.1.28 NMAC - N, 3/15/2004]

11.21.1.29 CLOSING OF CASES:

The director shall close a case following completion of all administrative and judicial proceedings related to the case. The director may, after notice to the parties, summarily close any case in which the moving party has taken no action within the previous six months, unless the delay is caused by factors beyond the party's control.

[11.21.1.29 NMAC - N, 3/15/2004]

11.21.1.30 PUBLICATION OF BOARD DECISIONS:

At the times and in the manner prescribed by the board, the director shall reproduce multiple copies of board decisions, classify and index the decisions, and make tables and indexes of the decisions, as well as compilations of the decisions, available to the public.

[11.21.1.30 NMAC - N, 3/15/2004]

11.21.1.31 TIME LIMITS FOR BOARD ACTIONS:

Whenever these rules set forth a period of time within which the board, the director, or a hearing officer must take any action, the board, director or hearing examiner may, for good cause, extend for a reasonable time, not to exceed 20 workdays for each extension, the date by which such action must be taken, unless the date is controlled by statute.

[11.21.1.31 NMAC - N, 3/15/2004]

11.21.1.32 MEETINGS BY TELEPHONE:

A. Pursuant to Subsection C of Section 10-15-1 NMSA, 1978, a member of the board may participate in a meeting of the public employee labor relations board by means of a conference telephone or other similar communications equipment in accordance with the provisions enumerated in Subsections B through E of 11.21.1.32 NMAC.

B. This rule shall only apply when it is otherwise difficult or impossible for the member to attend the meeting in person.

C. Each member participating by conference telephone must be identified when speaking.

D. All participants must be able to hear each other at the same time.

E. Members of the public attending the meeting must be able to hear any member of the board who speaks during the meeting.

[11.21.1.32 NMAC - N, 3/15/2004]

11.21.1.33 CHAIRPERSON SUCCESSION:

A. From among the three members appointed to the public employee labor relations board pursuant to Section 10-7E-8 NMSA 1978, the board shall appoint a chair to serve as the primary point of contact for the board's staff, to conduct the regular and special meetings of the board in a manner consistent with parliamentary procedure. In like manner the board shall appoint a vice-chair to serve in the capacity of chair in its absence or inability to serve and to provide for automatic succession when the term of the chair is up.

B. The chair and the vice-chair shall serve in those capacities for a period of one year. Upon completion of the chair's one-year term, the vice-chair shall automatically become the chair and assume the duties of that office. The past chair shall resume regular duties as a member of the board and the third board member, who has not served as vice-chair within the preceding year, shall assume that role.

C. Initial appointments under this rule shall be by seniority based on the board members' appointment letters. In the event of a tie, the chair shall be determined from between the two most senior members either by acclamation or by a coin toss supervised by the board's director.

[11.21.1.33 NMAC – N, 2/11/2020]

PART 2: REPRESENTATION PROCEEDINGS

11.21.2.1 ISSUING AGENCY:

Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM, 87120, (505) 831-5422.

[11.21.2.1 NMAC - N, 3/15/2004]

11.21.2.2 SCOPE:

The scope of Part 2 of Chapter 21 applies to public employers, public employees and labor organizations as defined by the Public Employee Bargaining Act (Sections10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.2.2 NMAC - N, 3/15/2004]

11.21.2.3 STATUTORY AUTHORITY:

Authority for Part 1 of Chapter 21 is the Public Employee Labor Relations Act, Sections 1 through 26 (10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.2.3 NMAC - N, 3/15/2004]

11.21.2.4 DURATION:

Permanent.

[11.21.2.4 NMAC - N, 3/15/2004]

11.21.2.5 EFFECTIVE DATE:

March 15, 2004, unless otherwise cited at the end of the section.

[11.21.2.5 NMAC - N, 3/15/2004]

11.21.2.6 OBJECTIVE:

The objective of Part 2 of Chapter 21 is to establish a standard for uniform petition filings in an easily understood form in which all pertinent information is given to the public employee labor relations board to determine an appropriate bargaining unit.

[11.21.2.6 NMAC - N, 3/15/2004]

11.21.2.7 DEFINITIONS:

[RESERVED]

[11.21.2.7 NMAC - N, 3/15/2004]

11.21.2.8 COMMENCEMENT OF CASE:

A representation case is commenced by filing a representation petition with the director on a form prescribed by the director. The form shall include, at a minimum, the following information: the petitioner's name, address, phone number, state or national affiliation, if any, and representative, if any; the name, address and phone number of the public employer or public employers whose employees are affected by the petition; a description of the proposed appropriate bargaining unit and any existing recognized or certified bargaining unit; the geographic work locations, occupational groups, and estimated numbers of employees in the proposed unit and any existing bargaining unit; a statement of whether or not there is a collective bargaining agreement in effect covering any of the employees in the proposed or any existing bargaining unit and, if so, the name, address and phone number of the labor organization that is party to such agreement; and a statement of what action the petition is requesting. A petition for certification or decertification must be supported by at least a thirty percent showing of

interest as described in 11.21.2.11 NMAC. A petition shall contain a signed declaration by the person filing the petition that its contents are true and correct to the best of his or her knowledge and, in the case of a decertification petition that the filer is a member of the labor organization to whom the decertification petition applies.

[11.21.2.8 NMAC - N, 3/15/2004; A, 2/28/2005; A, 6/14/2013; A, 7/1/2020; A, 8/9/2022]

11.21.2.9 SERVICE OF PETITION:

Upon filing a petition, the petitioner shall serve it upon the employer and any incumbent labor organization. Within 10 days of the filing of a petition, the director shall cause notice of the filing of the petition to be sent to any other interested party.

[11.21.2.9 NMAC - N, 3/15/2004]

11.21.2.10 FILING OF COLLECTIVE BARGAINING AGREEMENT:

Along with a representation petition, the petitioner shall file with the director a copy of any collective bargaining agreement, then in effect or recently expired, covering any of the employees in the petitioned-for unit.

[11.21.2.10 NMAC - N, 3/15/2004]

11.21.2.11 SHOWING OF INTEREST:

With the petition and at the same time the petition is filed, the petitioner shall deposit with the director a showing of interest consisting of signed, dated statements, which may be in the form of cards or a petition, by at least thirty percent of the employees in the proposed unit stating, in the case of a petition for certification, that each such employee wishes to be represented for the purposes of collective bargaining by the petitioning labor organization, and, in the case of a petition for a decertification election, that each such employee wishes a decertification election. Electronic signatures shall meet the requirements of the Uniform Electronic Transactions Act (Chapter 14, Article 16 NMSA 1978). Each signature shall be separately dated. Signatures dated more than one year prior to the filing of the petition not be considered when determining the sufficiency of a showing of interest or a determination of majority support, except for good cause shown. So long as it meets the above requirements, a showing of interest may be in the form of signature cards or a petition or other writing, or a combination of written forms and shall be presumed valid unless contradicted by the submission of clear and convincing evidence that they were obtained by fraud, forgery or coercion. No showing of interest need be filed in support of a petition for amendment of certification or unit clarification.

[11.21.2.11 NMAC - N, 3/15/2004; A, 8/9/2022]

11.21.2.12 INFORMATION REQUESTED OF PARTIES:

A. Within 10 days of the filing of a representation petition, the director shall by letter request of any party that appears to have an interest in the proceeding, including any public employees involved and any incumbent labor organizations, its position with respect to the appropriateness of the bargaining unit petitioned for; a statement of any issues of unit inclusion or exclusion that the party believes may be in dispute, and any other issue that could affect the outcome of the proceeding.

B. From any public employer involved, the director, within 10 days of the filing of a representation petition, shall also request a list of the employees holding positions in the petitioned-for unit or the unit to be decertified, based on the payroll period that ended immediately preceding the filing of the petition which contains the information described in Subsection A of Section 14 of the Act. The public-employer shall be instructed to file such a list within 10 days of the director's request. The board shall make the list available to the parties. If the petitioned-for unit is altered as a result of a hearing conducted pursuant to Section 13 of the Act, or by agreement of the parties, the employer shall provide an updated list of employees that were in the appropriate unit based on the payroll period that ended immediately preceding the filing of the petition no more than 10 days after receiving notice from the director of the changes to the petitioned-for unit.

[11.21.2.12 NMAC - N, 3/15/2004; A, 2/28/2005; A, 8/9/2022]

11.21.2.13 INITIAL INVESTIGATION OF PETITION:

After a petition has been filed, the director shall investigate the petition. The investigation shall include the following steps and shall be completed within 30 days of the filing of the petition.

A. The director shall determine the facial validity of the petition, including the facial appropriateness of the petitioned-for unit and may request the petitioner to amend a facially inappropriate petition. In the absence of an appropriate amendment, the director shall dismiss a petition asking for a certification of, or a clarification that would result in, a facially inappropriate unit, or that is otherwise facially improper, in which case he shall explain his reasons in writing.

B. The director shall determine whether there are significant issues of unit scope, unit inclusion or exclusion, labor organization or public employer status; a bar to the processing of the petition; or other matters that could affect the proceedings. The director shall make the determination pursuant to the provisions of Subsection C of Section 10-7E-13 and Section 10-7E-24 NMSA 1978, of the Public Employee Bargaining Act.

C. The director shall check the showing of interest (if applicable) against the list of employees in the proposed unit filed by the public employer pursuant to Subsection B of 11.21.2.12 NMAC, to determine whether the showing of interest has been signed and dated by a sufficient number of employees and that the signatures are sufficiently

current. If signatures submitted for a showing of interest meet the requirements set forth Section 11 of this rule, they shall be presumed valid unless the director is presented with clear and convincing evidence that they were obtained by fraud, forgery or coercion. In the event that evidence of such fraud, forgery or coercion is presented to the director, the director shall investigate the allegations as expeditiously as possible and shall keep the showing of interest confidential during the investigation. The director shall dismiss any petition supported by an improper or insufficient showing of interest, consistent with Section 23 (opportunity to present additional showing), and shall explain in writing the basis of the dismissal. The director's determination as to the sufficiency of a showing of interest is an administrative matter solely within the director's authority and shall not be subject to questions or review.

[11.21.2.13 NMAC - N, 3/15/2004; A, 2/28/2005; A, 8/9/2022]

11.21.2.14 SETTLEMENT/STIPULATION OF UNIT ISSUES:

If the director finds that there are significant issues affecting the proceeding that are or may be in dispute, the director shall confer with all parties to attempt to resolve the issues and to enter into a written stipulation stating the agreement. Any such stipulation shall be subject to approval of the board upon review, which may be requested by the board or sought by the director.

[11.21.2.14 NMAC - N, 3/15/2004]

11.21.2.15 NOTICE OF FILING OF PETITION:

Unless the director has determined that there is need for a representation hearing pursuant to Section 19, then within 30 days of receipt of a petition, the director shall issue a notice stating that the petition has been filed, naming the petitioner, stating the unit petitioned-for, and stating the procedures for intervention as set forth in Section 16, below, including the date by which an intervenor must file its petition and showing of interest. The director shall issue sufficient copies of the notice to each employer involved, and each such employer shall post such copies in places where notices to employees are normally posted. The notices shall remain posted continuously for at least five days.

[11.21.2.15 NMAC - N, 3/15/2004]

11.21.2.16 INTERVENTION:

A. At any time within 10 days after the employer’s posting of the notice of filing of petition, a labor organization other than the petitioner may file with the director an intervenor’s petition seeking to represent some or all of the employees in the petitioned-for unit. The intervenor’s petition shall contain the same information set forth in Section 8 above.

B. The intervenor's petition shall be accompanied by a showing of interest showing that at least thirty percent of the employees in the petitioned-for unit wish to be represented by the intervenor for purposes of collective bargaining. The showing of interest shall otherwise meet the requirements set forth in Section 11, above.

C. An intervenor that has presented a sufficient showing of interest in the unit found to be appropriate shall be placed on the ballot and shall be considered a party to the proceeding.

D. Upon application, an incumbent labor organization shall have automatic intervenor status if it is not the petitioner, pursuant to the provisions of Subsection B of Section 10-7E-24 NMSA 1978, of the Public Employee Bargaining Act.

[11.21.2.16 NMAC - N, 3/15/2004]

11.21.2.17 CONSENT ELECTION:

Where the parties are in agreement on all issues required to be resolved in order to proceed to an election, and the director is satisfied that the issues are so resolved, including unit scope, the director shall draw up a consent election agreement to be signed by all parties and by the director. Consent election agreements are subject to board review and may be set aside by the board on its own initiative. If a consent election agreement is not set aside at the board's next regular meeting or the following regular meeting, the director shall proceed to an election on the basis of the agreement.

[11.21.2.17 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.18 INVESTIGATION, REPORT, NOTICE OF HEARING:

A. In the absence of a consent election agreement, the director shall investigate the outstanding issues and shall issue and serve a report and direction of election, a report and dismissal of petition, or a notice of hearing within 45 days of the posting of the notice of filing of petition. If there is a dispute between the parties regarding unit composition, or the director is satisfied that the issues can best be resolved in a hearing, the director shall issue and serve a notice of hearing without first conducting a further investigation. A hearing concerning unit composition, where the parties are in dispute on that issue, shall be set for a date not later than 30 days following the director's notice of hearing or the director's receipt of notice of the dispute, whichever is sooner.

B. A report and direction of election or a report and dismissal of petition shall be subject to board review under the procedures set forth in Section 22 below. The issuance of a notice of hearing shall not be subject to board review.

[11.21.2.18 NMAC - N, 3/15/2004]

11.21.2.19 REPRESENTATION HEARING:

A. In the absence of a consent election agreement, and where there are significant unit issues that, in the director's view, should be resolved in a hearing, the director shall issue a notice of hearing.

B. Except in cases where the board appoints the hearing examiner, the director shall appoint the hearing examiner, and may appoint himself or herself to serve as hearing examiner.

C. The hearing examiner shall take evidence sufficient to make a full and complete record on all unresolved unit issues and any other issues necessary to process the petition. Details such as the time, date and place of the election, and whether there will be manual or mail ballots or a combination, shall not be resolved through the hearing process, but shall be resolved instead through the pre-election conference process described in Section 25.

D. The hearing examiner may examine witnesses, call witnesses, and call for introduction of documents.

[11.21.2.19 NMAC - N, 3/15/2004]

11.21.2.20 BRIEFS:

If any party requests permission to file a post-hearing brief, the hearing examiner shall permit all parties to file briefs and shall set a time, for the filing of briefs which normally shall be no longer than 10 days following the close of the hearing. Briefs shall be filed with the director and copies shall be served on all parties.

[11.21.2.20 NMAC - N, 3/15/2004]

11.21.2.21 HEARING EXAMINER REPORTS:

The hearing examiner shall issue his or her report following the close of the hearing. Except in extraordinary circumstances, which shall be set forth in the report, the report shall be issued no longer than 15 days following the close of the hearing or the submission of post-hearing briefs, whichever is later. The report shall make findings of fact, conclusions of law, and recommendations for the determination of issues, and shall adequately explain the hearing examiner's reasoning. The hearing examiner shall serve the report on all parties and the board.

[11.21.2.21 NMAC - N, 3/15/2004]

11.21.2.22 BOARD REVIEW OF HEARING EXAMINER REPORTS AND DIRECTOR DECISIONS:

A. Within 10 days after service of the hearing examiner's report, or, in a case where no hearing has been held, within 10 days after the issuance of a director's decision, any party may file a request for board review of the hearing examiner's or the director's recommended disposition. The request for review shall state the specific portion of the hearing examiner's or director's recommended disposition to which exception is taken and the factual and legal basis for such exception. The request may not rely on any evidence not presented to the hearing examiner or director. The request must be served on all other parties.

B. Within 10 days after service of a request for review, any other party may file and serve on all parties a response to the request for review.

C. Whether or not a party has filed a request for review, the board, within 60 days, shall review any recommended disposition regarding the scope of a bargaining unit made by the director or a hearing examiner. In addition, the board shall review any other issue properly raised by a party in a request for review. The board shall conduct its review on the basis of the existing record and may, in its discretion, hear oral argument.

D. Within 60 days following review, the board shall issue its decision ordering an election, dismissing the petition, setting a further hearing, or otherwise disposing of the case. The board may adopt or incorporate in and attach to its decision all or any portion of the hearing examiner's report or director's decision.

[11.21.2.22 NMAC - N, 3/15/2004]

11.21.2.23 OPPORTUNITY TO PRESENT FURTHER SHOWING OF INTEREST:

A. When the director finds that the petitioner or an intervenor has submitted an insufficient showing of interest in the unit petitioned for, the director shall notify the petitioner or intervenor, and that party shall have the opportunity to submit an additional showing of interest. The director shall then review the additional showing of interest to determine whether the total showing of interest submitted by the party is sufficient to sustain its petition or intervention.

B. In the event that the director, hearing examiner or board determines that a unit other than the unit petitioned for is appropriate and it appears to the board or director that the showing of interest filed by the petitioner or an intervenor is insufficient in the unit found appropriate the director shall notify the petitioner or intervenor and give such party a reasonable amount of time in which to file an additional showing. If the party fails to file a sufficient showing within that time, the director shall dismiss the petition or deny intervenor status.

[11.21.2.23 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.24 ELIGIBILITY TO VOTE:

A. Employees in the bargaining unit shall be eligible to vote in the election if they were employed during the last payroll period preceding date of the consent election agreement or the direction of election issued by the director or the board, and are still employed in the unit on the date of the election.

B. Employees in the bargaining unit who are eligible to vote but who will be absent on the day of voting because of hospitalization, temporary assignment away from normal post of duty, leave of absence, vacation at a location more than 50 miles distant from the polling place, or other legitimate cause, may request an absentee ballot from the director. Except for good cause shown, such a request must be received by the director at least 10 days before the election, in which case the director, after preliminarily determining the employee's eligibility to vote, shall provide the employee with a ballot to be submitted to the director by mail. To be counted, an absentee ballot must be received by the director at least one day before the ballot count. The director shall establish procedures to permit an absentee ballot to be challenged, as provided in Section 30, below.

C. The employer or employer's whose employees comprise the bargaining unit shall submit to the director and to all other parties a list of all employees eligible to vote in the election no later than 10 days before the commencement of the election balloting. Employees whose names do not appear on the list but who believe they are eligible to vote may cast ballots through the challenged ballot procedure set forth in Section 30, below.

[11.21.2.24 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.25 PRE-ELECTION CONFERENCE:

At a reasonable time at least 15 days before the election, the director shall conduct a pre-election conference with all parties to resolve such details as the polling location(s), the use of manual, electronic, or mail ballots the hours of voting, the number of observers permitted, and the time and place for counting the ballots. The director shall notify all parties by mail (and email if available) of the time and place of the pre-election conference, at least five days in advance of the conference. The conference may proceed in the absence of any party.

A. The director will attempt to achieve agreement of all parties on the election details, but in the absence of agreement, shall determine the details. In deciding the polling location(s) and the use of manual mail or electronic participation in the election by employees in the bargaining unit there shall be a strong preference for on-site balloting.

B. The parties may stipulate to a consent election agreement without the necessity of a pre-election conference subject to approval of its terms by the director, in which case the requirement for a pre-election conference shall be waived.

[11.21.2.25 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020; A, 7/1/2020]

11.21.2.26 NOTICE OF ELECTION:

A. The director shall issue and serve on the parties a notice of election setting forth all of the details of the election, as described in Section 25 above, no later than 10 days before the election. The notice of election shall also describe the bargaining unit whose members are eligible to vote and shall describe the challenged ballot procedure. The notice shall include a sample ballot.

B. The director shall provide a sufficient number of copies of the notice of election to each employer whose employees are eligible to vote so that the employer may post a notice of election in all lounges or common areas frequented by unit employees and in all places where notices to employees are commonly posted. The employer shall post the notices in all such areas at least 10 days before the election and shall take reasonable measure to assure that they are not removed, covered, altered or defaced.

[11.21.2.26 NMAC - N, 3/15/2004]

11.21.2.27 BALLOTS AND VOTING:

A. All voting shall be by secret ballot prepared by the director, position on the ballot shall be determined randomly. Ballots in an initial election shall include a choice of "no representation."

B. All elections shall be conducted by the director, whether electronically, by mail in ballots or on-site elections, subject to the provisions of 11.21.1.28 NMAC regarding the director’s authority to delegate duties.

C. Any voter who arrives at a polling area before the polls close will be permitted to vote.

D. Public employers whose employees are eligible to vote in an election shall allow their employees in the voting unit sufficient time away from their duties to cast their ballots and shall allow their employees who have been selected as election observers sufficient time away from their duties to serve as observers. This rule does not impose on public employers an obligation to change the work schedules of employees to accommodate voting hours.

[11.21.2.27 NMAC - N, 3/15/2004; A, 2/11/2020; A, 7/1/2020]

11.21.2.28 ELECTIONEERING:

No electioneering shall be permitted within 50 feet of any room in which balloting is taking place.

[11.21.2.28 NMAC - N, 3/15/2004]

11.21.2.29 OBSERVERS:

Each party shall be entitled to an equal number of observers to observe and assist in each polling area, and to witness the counting of ballots. The director has complete discretion to determine the number of observers. Observers shall not be supervisory or managerial employees or labor organization employees. However, representatives of the parties in addition to the observers may observe the counting of ballots.

[11.21.2.29 NMAC - N, 3/15/2004]

11.21.2.30 CHALLENGED BALLOTS:

A. Any party to an election, through its observer, or the election supervisor, may challenge the eligibility to vote of any person who presents himself or herself at the polls, and shall state the reason for the challenge. The director shall challenge any voter whose name does not appear on the list of employees eligible to vote.

B. The director shall furnish "challenge envelopes." On the outside of each challenge envelope, the director shall write the name and job classification of the challenged voter, the name of the party making the challenge, and the reason for the challenge.

C. Following the voting and before the votes are counted, the director shall attempt to resolve the eligibility of challenged voters by agreement of the parties. The ballots of challenged voters who are agreed eligible shall be mixed with the other ballots and counted.

D. Challenged ballot envelopes containing unresolved challenged ballots shall not be opened and the challenges shall not be investigated unless, after the other ballots are counted, the challenged ballots could be determinative of the outcome of the election.

E. If the challenged ballots could be determinative of the outcome of the election, the director shall declare the vote inconclusive; shall, as soon as possible, investigate the challenged ballots to determine voter eligibility; and shall issue a report thereon or a notice of hearing within 15 days of the election. Any party may request board review of the director’s report, following the procedures set forth in Section 22 above.

F. Following resolution of determinative challenged ballots, the director shall count the ballot of voters found to be eligible, adding the results of the earlier count and issuing a revised tally of ballots.

[11.21.2.30 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.31 TALLY OF BALLOTS:

Immediately following the counting of ballots, the election supervisor shall serve a tally of ballots upon one representative of each party. The tally shall show the number of votes cast for each labor organization listed on the ballot, the number of votes cast for no representation, the number challenged ballots, and the percentage of employees in the unit who cast ballots. The tally shall also state whether the results are conclusive, and, if so, what the conclusive vote is. If the tally shows that fewer than forty percent of the employees in the unit voted, or that the choice of "no representation" received fifty percent or more of the valid votes cast, then the tally shall reflect that no collective bargaining representation was selected.

[11.21.2.31 NMAC - N, 3/15/2004; A, 2/11/2020]

11.21.2.32 RUN-OFF ELECTIONS:

In an election where there are three or more choices on the ballot, if no ballot choice receives a majority of the valid votes cast, and at least forty percent of eligible voters voted, the director shall set a run-off election in which voters will be permitted to cast ballots for the two choices that received the highest number of votes. A new tally shall be issued and served following the counting of the votes of a run-off election. A run-off election must be conducted within the 15 day statutory period following completion of the initial election.

[11.21.2.32 NMAC - N, 3/15/2004]

11.21.2.33 CERTIFICATION:

A. If, after all issues concerning representation have been resolved, and the expiration of the intervention period described in Section 16, above, only one labor organization is seeking to represent the appropriate bargaining unit, the director shall compare the showing of interest with the employee list provided by the employer pursuant to Subsection B of Section 12 above, and determine whether the petitioning labor organization has demonstrated majority support. In cases where the showing of interest demonstrates majority support the director shall issue a certificate showing the name of the labor organization selected as the exclusive representative and setting forth the bargaining unit it represents as well as the numerical basis for the determination. In cases where more than one labor organization seeks to represent the unit, or has intervened pursuant to Section 16, above, or where the showing of interest does not demonstrate majority support, the director shall proceed with an election as described in these rules.

B. In cases where an election is conducted, if no objections are filed pursuant to Section 34, below, then the director shall issue as may be appropriate either a certificate showing the name of the labor organization selected as the exclusive representative and setting forth the bargaining unit it represents, or a certification of

results, showing that no labor organization was selected as bargaining representative. The results of each election shall be reviewed by the board and appropriate action taken at the next regularly scheduled meeting of the board after the objection period following the election.

[11.21.2.33 NMAC - N, 3/15/2004; A, 2/11/2020; A, 8/9/2022]

11.21.2.34 OBJECTIONS:

Within five days following the service of a tally of ballots or the issuance of a certification pursuant to Subsection A of Section 33 above, a party may file objections to conduct affecting the determination of majority support without an election of the result of the election. Objections shall set forth all grounds for the objection with supporting facts and shall be served on all parties to the proceeding. The director shall, within 30 days of the filing of such objections, investigate the objections and issue a report thereon. Alternatively, the director may schedule a hearing on the objections within 30 days of the filing of the objections. A determination to hold a hearing is not reviewable by the board and shall follow the same procedures set forth in Subsections B, C and D of Section 19, Section 20 and Section 21 above. A party adversely affected by the director's or hearing examiner's report may file a request for review with the board under the same procedures set forth in Section 22, above. If the director, hearing examiner or board finds that the objections have merit and that conduct improperly interfered with the results of the election, then the results of the election may be set aside and a new election ordered. In that event, the director in his or her discretion may retain the same period for determining eligibility to vote as in the election that was set aside, or may establish a new eligibility period for the new election.

[11.21.2.34 NMAC - N, 3/15/2004; A, 8/9/2022]

11.21.2.35 AMENDMENT OF CERTIFICATION:

A petition for amendment of certification may be filed at any time by an exclusive representative or an employer to reflect such a change as a change in the name of the exclusive representative or of the employer, or a change in the affiliation of the labor organization. The director shall dismiss such a petition within 30 days of its filing if the director determines that it raises a question concerning representation and the petitioner may proceed otherwise under these rules. If the director finds sufficient facts to show that the amendment should be made, after giving all parties notice and an opportunity to submit their views, the director shall issue an amendment of certification within 30 days of the filing of the petition. The director’s decision dismissing the petition or issuance of amended certification may be appealed to the board pursuant to the procedures set out in Section 22, above.

[11.21.2.35 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.36 CERTIFICATION OF INCUMBENT BARGAINING REPRESENTATIVE STATUS:

A labor organization that was recognized by a public employer as the exclusive representative of an appropriate bargaining unit on June 30, 1999 shall be recognized as the exclusive representative of the unit. Such recognition shall not be affected by a local labor board ceasing to exist pursuant to Section 10-7E-10 NMSA 1978 (2020). Such labor organization may petition for declaration of bargaining status under Subsection B of Section 10-7E-24 NMSA 1978 (2003).

[11.21.2.36 NMAC - N, 3/15/2004; A, 7/1/2020]

11.21.2.37 UNIT CLARIFICATION:

A. Except as provided in Section 24(A) of the Act, where the circumstances surrounding the creation of an existing collective bargaining unit are alleged to have changed sufficiently to warrant a change in the scope and description of that unit, or a merger or realignment of previously existing bargaining units represented by the same labor organization, either the exclusive representative or the employer may file with the director a petition for unit clarification. Such a petition seeking realignment of existing units into horizontal units may be filed and processed only when it relates to state employees.

B. Upon the filing of a petition for unit clarification, the director shall investigate the relevant facts, and shall either set the matter for hearing or shall issue a report recommending resolution of the issues within thirty (30) days of the filing of the petition. In the director's investigation or through the hearing, the director or hearing examiner shall determine whether a question concerning representation exists and, if so, shall dismiss the petition. In such a case, the petitioner may proceed otherwise under these rules.

C. If the director or hearing examiner determines that no question concerning representation exists and that the petitioned-for clarification is justified by the evidence presented, the director or hearing examiner shall issue a report clarifying the unit within 30 days of the filing of the petition if no hearing is determined necessary, or within 30 days of the hearing if a hearing is determined necessary. If the director determines that a question concerning representation exists, the petition shall be dismissed.

D. A director or hearing examiner determination on a unit clarification petition shall be appealable to the board under the same procedures set forth in Section 22, above.

[11.21.2.37 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020]

11.21.2.38 ACCRETION:

A. The exclusive representative of an existing collective bargaining unit, may petition the board to include in the unit employees who do not belong, at the time the petition is filed, to any existing bargaining unit, who share a community of interest with the employees in the existing unit, and whose inclusion in the existing unit would not render that unit inappropriate.

B. If the number of employees in the group sought to be accreted is less than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion does not raise a question concerning representation requiring an election, and the petitioner may proceed by filing a unit clarification petition under these rules. Such a unit clarification petition to be processed, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit. No group of employees may be accreted to an existing unit without an election if the board determines that such group would constitute a separate appropriate bargaining unit.

C. If the number of employees in the group sought to be accreted is greater than ten percent of the number of employees in the existing unit, the board shall presume that their inclusion raises a question concerning representation, and the petitioner may proceed only by filing a petition for an election under these rules. Such a petition, in an accretion situation, must be accompanied by a showing of interest demonstrating that no less than thirty percent of the employees in the group sought to be accreted wish to be represented by the exclusive representative as part of the existing unit.

[11.21.2.38 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.2.39 VOLUNTARY RECOGNITION:

A. A labor organization representing the majority of employees in an appropriate collective bargaining unit and a public employer, after a petition for certification has been filed, may enter into a voluntary recognition agreement in which the employer recognizes the labor organization as the exclusive representative of all of the employees in the unit. Such petition shall be accompanied by a showing of majority support, which shall be verified in accordance with the procedures of Section 11, above.

B. Prior to board approval of any voluntary recognition, the director shall post notice of filing of petition in the manner provided for in Section 15, above. The director shall also give notice to any individuals or labor organizations that register with the director to be informed of such petitions.

C. If an intervenor does not file a petition for intervention within 10 days then the board shall consider the petition for approval of the voluntary recognition if accompanied by consent of the employer.

D. The board shall treat a voluntary recognition relationship so established and approved the same as a relationship established through board election and certification, unless the board finds the agreed-to bargaining unit to be inappropriate. In that event, the board may require the filing and processing of a petition as provided for in these rules, and the conduct of an election, before recognizing the relationship.

E. If an intervenor files a proper petition pursuant to Section 16 above, within the 10 day time period, then the board may not approve a voluntary recognition, and the director shall proceed in the manner set forth for representation petitions as provided in Section 10 to 14 and 17 to 34 above.

[11.21.2.39 NMAC - N, 3/15/2004; A, 2/28/2005; A, 2/11/2020]

11.21.2.40 PETITION WITHDRAWAL:

The petitioner in a representation proceeding may request permission of the director to withdraw the petition at any time prior to an initial election. The director has discretion to grant or deny a withdrawal request only after soliciting the positions of all parties.

[11.21.2.40 NMAC - N, 3/15/2004; A, 7/1/2020]

11.21.2.41 SEVERANCE PETITION:

A severance petition is a representation petition filed by a labor organization that seeks to sever or slice a group of employees who comprise one of the occupational groups listed in Section 10-7E-13 NMSA from an existing unit for the purpose of forming a separate, appropriate unit. It must be accompanied by a thirty percent showing of interest among the employees in the petitioned-for unit. It may be filed no earlier than 90 days and no later than 60 days before the expiration date of a collective bargaining agreement or may be filed at any time after the expiration of the third year of a collective bargaining agreement with a term of more than three years.

[11.21.2.41 NMAC - N, 3/15/2004]

11.21.2.42 DISCLAIMER OF INTEREST:

Any labor organization holding exclusive recognition for a unit of employees may disclaim its representational interest in those employees at any time by submitting a letter to the PELRB and the employer disclaiming any representational interest in a unit for which it is the exclusive representative. Upon receipt of a letter disclaiming an interest under this rule, the board shall cause to be posted in a place or places frequented by employees in the affected bargaining unit, a notice that the union has chosen to relinquish representation of the employees and direct staff to dismiss any petitions to decertify the exclusive representative of the disclaimed unit.

[11.21.2.42 NMAC – N, 2/11/2020; A, 8/9/2022]

PART 3: PROHIBITED PRACTICES PROCEEDINGS

11.21.3.1 ISSUING AGENCY:

Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM, 87120, (505) 831-5422.

[11.21.3.1 NMAC - N, 3/15/2004]

11.21.3.2 SCOPE:

The scope of Part 3 of Chapter 21 applies to public employers, public employees and labor organization as defined by the Public Employee Bargaining Act (10-7E1 to 10-7E-26 NMSA 1978).

[11.21.3.2 NMAC - N, 3/15/2004]

11.21.3.3 STATUTORY AUTHORITY:

Authority for Part 1 of Chapter 21 is the Public Employee Labor Relations Act NMSA Sections 1 through 26 (10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.3.3 NMAC - N, 3/15/2004]

11.21.3.4 DURATION:

Permanent.

[11.21.3.4 NMAC - N, 3/15/2004]

11.21.3.5 EFFECTIVE DATE:

March 15, 2004, unless otherwise cited at the end of the section.

[11.21.3.5 NMAC - N, 3/15/2004]

11.21.3.6 OBJECTIVE:

The objective of Part 3 of Chapter 21 is to set forth an efficient and effective investigative process for collection and evaluating information to determine whether public employers, public employees or labor organizations have engaged in activities or conduct that constitutes a violation of the Public Employee Bargaining Act (Sections 10-7E-1 to 10-7E-26 NMSA 1978).

[11.21.3.6 NMAC - N, 3/15/2004]

11.21.3.7 DEFINITIONS:

[RESERVED]

[11.21.3.7 NMAC - N, 3/15/2004]

11.21.3.8 COMMENCEMENT OF CASE:

A. A prohibited practices case shall be initiated by filing with the director a complaint on a form furnished by the director. The form shall set forth, at a minimum, name, address and phone number of the public employer, labor organization, or employee against whom the complaint is filed (the respondent) and of its representative if known, the specific section of the Act claimed to have been violated; the name, address, and phone number of the complainant; a concise description of the facts constituting the asserted violation; and a declaration that the information provided is true and correct to the knowledge of the complaining party. The complaint shall be signed and dated, filed with the director, and served upon the respondent.

B. When an individual employee files a prohibited practices complaint alleging a violation of Subsection F and H of Section 19, Subsection C or D of Section 20 of the Act, an interpretation given to the collective bargaining agreement by the employer and the exclusive representative shall be presumed correct.

[11.21.3.8 NMAC - N, 3/15/2004; A, 8/9/2022]

11.21.3.9 LIMITATIONS PERIOD:

Any complaint filed more than six months following the conduct claimed to violate the Act or more than six months after the complainant either discovered or reasonably should have discovered each conduct, shall be dismissed.

[11.21.3.9 NMAC - N, 3/15/2004; A, 8/9/2022]

11.21.3.10 FILING OF ANSWER:

A. Within 15 days after service of a complaint, the respondent shall file with the director and serve upon the complainant its answer admitting, denying or explaining each allegation of the complaint. For purposes of this rule, the term "allegation" shall mean any statement of fact or assertion of law contained in a complaint. No particular form is required either to state allegations or to answer them.

B. If a respondent in its answer admits or fails to deny an allegation of the complaint, the director, hearing examiner or board may find the allegation to be true.

[11.21.3.10 NMAC - N, 3/15/2004]

11.21.3.11 DEFAULT DETERMINATION:

If a respondent fails to file a timely answer, the director shall serve on the parties a determination of violation by default, based upon the allegations of the complaint and any evidence submitted in support of the complaint.

[11.21.3.11 NMAC - N, 3/15/2004]

11.21.3.12 SCREENING/INVESTIGATION:

A. Upon receipt of a complaint, the director shall screen the complaint for facial adequacy. If the complaint is facially deficient, the director shall advise the complainant of the deficiency and give the complainant an opportunity to amend the complaint within five days. Absent an amendment curing a facially deficient complaint, the director shall dismiss the complaint, stating the reasons in writing and serving the dismissal on the parties. A complaint that is facially untimely pursuant to Section 9 shall be dismissed.

B. After screening a complaint, the director shall investigate the allegations. The director need not await the filing of an answer before commencing the investigation. At the director's request, the complainant shall immediately present to the director all evidence available to the complainant in support of the complaint, including documents and the testimony of witnesses.

C. If a complainant fails to timely produce evidence in support of its complaint pursuant to the director's request, or fails to produce evidence that in the director's opinion is sufficient to support the allegations of the complaint, the director shall request the complainant withdraw the complaint within five days and, absent such withdrawal, shall dismiss the complaint stating the director's reasons in writing and serving the dismissal on all parties.

[11.21.3.12 NMAC - N, 3/15/2004]

11.21.3.13 APPEAL TO BOARD OF DIRECTOR'S DISMISSAL:

A. The director's decision to dismiss a complaint shall be subject to board review by the complainant filing with the board and serving upon the other parties a notice of appeal within 10 days following service of the dismissal decision. In its appeal, the complainant shall state the particular findings or conclusions of the director to which it takes exception and shall identify specific evidence that the complainant presented or offered to the director which supports the complainant's position on appeal.

B. Within 10 days after service of a notice of appeal, any other party may file and serve a response to the appeal.

C. The board may consider the case on the papers filed with it or, in its discretion, may also hear oral argument. The board shall issue its decision affirming the director's

dismissal, ordering further investigation, or setting a hearing as soon as feasible following its consideration of the appeal but in any event no later than its next or the following regular meeting. The board may approve and incorporate in its decision all or any part of the director's dismissal decision.

[11.21.3.13 NMAC - N, 3/15/2004]

11.21.3.14 NOTICE OF HEARING:

If the director, following investigation and the filing of an answer, believes that there is sufficient evidence that the respondent has committed a prohibited practice to warrant a hearing, the director shall designate a hearing examiner, set a hearing, and serve a notice of the hearing upon all parties. The director shall dismiss the complaint or set a hearing within 30 days of filing of the complaint. A hearing shall be scheduled within 45 days of the filing of the complaint.

[11.21.3.14 NMAC - N, 3/15/2004]

11.21.3.15 PRE-HEARING SETTLEMENT EFFORTS:

A. Following service of a notice of hearing and before commencement of the hearing, the director shall attempt to settle the complaint with the parties. If the parties achieve a settlement, they shall reduce it to writing and submit it to the director for approval.

B. If the complaint cannot be settled by the parties prior to the hearing, the matter shall proceed to hearing. However, the complaint may be settled by the parties at any time prior to hearing.

C. The director or hearing examiner may submit a proposed settlement agreement to the board for its approval before the settlement becomes final.

D. The complainant may withdraw the complaint at any time prior to hearing, without approval by the director or the board. After commencement of the hearing, the complaint shall not be withdrawn or settled without the approval of the hearing examiner. After a hearing examiner's report has been issued, a complaint may not be withdrawn without board approval.

[11.21.3.15 NMAC - N, 3/15/2004]

11.21.3.16 PROHIBITED PRACTICES HEARINGS:

A. In the absence of an approved settlement agreement, the hearing examiner shall conduct a formal hearing, assigning the burden of proof and the burden of going forward with the evidence to the complainant, as stated in 11.21.1.22 NMAC.

B. The hearing examiner may examine witnesses called by the parties, call additional witnesses, or call for the introduction of documents.

[11.21.3.16 NMAC - N, 3/15/2004; A, 7/1/2020]

11.21.3.17 BRIEFS:

The filing of post-hearing briefs shall be permitted on the same basis as provided by 11.21.2.20 NMAC for briefs in representation cases.

[11.21.3.17 NMAC - N, 3/15/2004; A, 6/14/2013]

11.21.3.18 HEARING EXAMINER REPORTS:

The hearing examiner shall issue a "report and recommended decision" within the same time limits and following the same requirements provided in 11.21.2.21 NMAC for hearing examiner reports in representation cases.

[11.21.3.18 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020]

11.21.3.19 APPEAL TO BOARD OF HEARING EXAMINER'S RECOMMENDATION:

A. Any party aggrieved by the hearing officer's recommendation may obtain board review by filing with the board and serving on the other parties a notice of appeal within 10 days following service of the hearing officer's report. The notice of appeal shall specify which findings, conclusions, or recommendations to which exception is taken and shall identify the specific evidence presented or offered at the hearing that supports each exception.

B. Any other party may file a response to notice of appeal within 10 days of service of the notice of appeal.

C. The board may determine an appeal on the papers filed or, in its discretion, may also hear oral argument. The board shall decide the appeal and issue its decision within 60 days of the notice of appeal. The board may issue a decision adopting, modifying, or reversing the hearing examiner's recommendations or taking other appropriate action. The board may incorporate all or part of the hearing examiner's report in its decision.

D. If notice of appeal is not filed within the time set out in Subsection A of 11.21.3.19 NMAC, the hearing examiner's report and recommended decision shall be transmitted immediately to the board which may pro forma adopt the hearing examiner's report and recommended decision as its own. In that event, the report and decision so adopted shall be final and binding upon the parties but shall not constitute binding board precedent.

[11.21.3.19 NMAC - N, 3/15/2004]

11.21.3.20 RELIEF FROM PROHIBITED PRACTICES DETERMINATION:

A party may move to set aside a default determination entered against it within 30 days after the service thereof. Said motion shall be served upon all other parties and shall set out in detail the reasons in support thereof. Upon finding good cause for the motion and within 30 days of the filing of such motion, the director or board shall order such further proceeding as it deems appropriate. The failure to act within 30 days after the filing of such motion shall constitute a denial of the motion.

[11.21.3.20 NMAC - N, 3/15/2004]

11.21.3.21 ADMINISTRATIVE AGENCY DEFERRAL:

Where the board becomes aware that a complainant has initiated another administrative or legal proceeding based on essentially the same facts and raising essentially the same issues as those raised in the complaint, the board may take any of the following actions, at the board's discretion:

A. The board may hold the proceedings under the Act in abeyance pending the outcome of the other proceeding.

B. The board may go forward with its own processing. In so doing, the board may request that the other proceedings be held in abeyance pending outcome of the board proceeding. In the event that the resolution of the proceedings in such other forum is contrary to the Act or all issues raised before the board are not resolved, the board may proceed under the provisions of 11.21.3 NMAC.

C. For purposes of this rule, "board" shall mean the board or the director.

[11.21.3.21 NMAC - N, 3/15/2004; A, 8/9/2022]

11.21.3.22 ARBITRATION DEFERRAL:

A. If the subject matter of a prohibited practices complaint requires the interpretation of a collective bargaining agreement; and the parties waive in writing any objections to timeliness or other procedural impediments to the processing of a grievance, and the director determines that the resolution of the contractual dispute likely will resolve the issues raised in the prohibited practices complaint, then the director may, on the motion of any party, defer further processing of the complaint until the grievance procedure has been exhausted and an arbitrator's award has been issued.

B. Upon its receipt of the arbitrator's award, the complaining party shall file a copy of the award with the director, and shall advise the director in writing that it wishes either to proceed with the prohibited practice complaint or to withdraw it. The complaining party

shall simultaneously serve a copy of the request to proceed or withdraw upon all other parties.

C. If the complaining party advises the director that it wishes to proceed with the prohibited practices complaint, or if the board on its own motion so determines, then the director shall review the arbitrator's award. If in the opinion of the director, the issues raised by the prohibited practices complaint were fairly presented to and fairly considered by the arbitrator, and the award is both consistent with the Act and sufficient to remedy any violation found, then the director shall dismiss the complaint. If the director finds that the prohibited practice issues were not fairly presented to, or were not fairly considered by, the arbitrator, or that the award is inconsistent with the Act or that the remedy is inadequate, then the director shall take such other action deemed appropriate. Among such other actions, the director may accept the arbitrator's factual findings while substituting legal conclusions and remedies pursuant to Subsection F of Section 10-7E-9 NMSA 1978 appropriate for the prohibited practice issues.

D. In the event that no arbitrator's award has been issued within one year following deferral under this rule, then the director may, after notice and in the absence of good cause shown to the contrary, dismiss the complaint.

E. The director's decision either to dismiss or further process a complaint pursuant to this rule may be appealed to the board under the procedure set forth in 11.21.3.13 NMAC. Interim decisions of the director under this rule, including the initial decision to defer or not to defer further processing of a complaint pending arbitration, shall not be appealable to the board.

[11.21.3.22 NMAC - N, 3/15/2004; A, 2/28/2005; A, 7/1/2020; A, 8/9/2022]

PART 4: IMPASSE RESOLUTION [REPEALED]

[This part was repealed 2-14-2005.]

PART 5: LOCAL BOARDS

11.21.5.1 ISSUING AGENCY:

Public Employee Labor Relations Board, 2929 Coors NW, Suite #303, Albuquerque, NM 87120, (505) 831-5422.

[11.21.5.1 NMAC - N, 3/15/2004]

11.21.5.2 SCOPE:

The scope of Part 5 of Chapter 21 applies to public employers and labor organizations as defined by the Public Employee Bargaining Act (1-7E-1 to 10 7E-26 NMSA 1978).

[11.21.5.2 NMAC - N, 3/15/2004]

11.21.5.3 STATUTORY AUTHORITY:

Authority for Part 5 of Chapter 21 is the Public Employee Labor Relations Act, Sections 1 through 26 (10-7E-1 to 1-7E-26 NMSA 1978).

[11.21.5.3 NMAC - N, 3/15/2004]

11.21.5.4 DURATION:

Permanent.

[11.21.5.4 NMAC - N, 3/15/2004]

11.21.5.5 EFFECTIVE DATE:

March 15, 2004, unless otherwise cited at the end of the section.

[11.21.5.5 NMAC - N, 3/15/2004]

11.21.5.6 OBJECTIVE:

The objective of Part 5 Chapter 21 is to provide procedures necessary for a public employer other than the state to comply with the provisions of Sections 10-7E-9 and 10-7E-10 NMSA 1978 (2020) for continued operation of a local labor board.

[11.21.5.6 NMAC - N, 3/15/2004, A; 7/1/2020; A, 8/9/2022]

11.2.1.5.7 DEFINITIONS:

[RESERVED]

[11.21.5.7 NMAC - N, 3/15/2004]

11.21.5.8 BIENNIAL AFFIRMATIONS:

Any local board approved pursuant to Subsection A above, shall submit the affirmation required by Subsection D of Section 10 of the Act between November 1, and December 31 of each odd numbered year. Affirmations shall be filed with the board in accordance with NMAC 11.21.1.10 and shall substantially conform with the form created for that purpose and posted on the board's website.

[11.21.5.8 NMAC - N, 3/15/2004; A, 7/1/2020; A, 8/9/2022]

11.21.5.9 [RESERVED]:

[11.21.5.9 NMAC - N, 3/15/2004; Rn, 11.21.5.13 NMAC & A, 2/28/2005; A, 7/1/2020; Repealed 8/9/2022]

11.21.5.10 CONTENTS OF APPLICATION FOR VARIANCE FROM BOARD APPROVED ORDINANCE, RESOLUTION, OR CHARTER AMENDMENT:

A. In certain instances variances from the board approved ordinance, resolution or charter amendment may be required by the unique facts and circumstances of the relevant local public employer, to effectuate the purposes of the Act.

B. In such instances, an application for approval shall be submitted to the PELRB which specifies the particular facts and circumstances requiring such variance, and inform the board of any exclusive representing employees of the local public employer, and any other labor organizations believed by the public employer to be involved in attempting to organize any local public employees.

C. Upon receipt of an application for approval seeking variance from a board approved ordinance, resolution or charter amendment, the director shall hold a status conference with the local public employer or its representative and any identified interested labor organizations, to determine the issues and set a hearing date. Upon setting a hearing, the director shall cause notice of the hearing to be issued in accordance with Subsection B of 11.21.1.16 NMAC of these rules. In the event that the board determines that such variance is warranted, and the resolution, ordinance or charter amendment otherwise conforms to the requirements of the act and these rules, it shall authorize the director to proceed in processing the application pursuant to these rules.

[11.21.5.10 NMAC - N, 3/15/2004; Repealed 2/28/2005; N, 2/28/2005; A, 8/9/2022]

11.21.5.11 SUBMISSION OF RULES:

A. Each local board, shall submit a verified copy of the procedural rules enacted by the applying local board necessary to accomplish its functions and duties under the Act.

B. Any proposed changes to the procedural rules of a local board must be approved by the PELRB prior to being enacted by the local board using the procedure set forth in 11.21.5.9 NMAC for ordinances, resolutions, and charter amendments.

[11.21.5.11 NMAC – Rp, 11.21.5 NMAC, N, 7/1/2020; A, 8/9/2022]

11.21.5.12 REVIEW OF LOCAL BOARD APPLICATIONS BY THE BOARD:

A. Upon receiving an application for approval pursuant to 11.21.5.9 or 11.21.5.10 of these rules, the board shall conduct an administrative review of the application and, at a properly noticed public meeting or hearing, shall formally approve or disapprove the

application. Public notice of such meetings or hearings shall be provided as required by law.

B. In considering such an application for approval, the board shall review all applications for approval in light of the requirements of Section 10 of the Act and 11.21.5 NMAC. The board shall require that the ordinance, resolution or charter amendment creating the local board be amended as necessary in order to meet the requirements of Section 10 of the Act and 11.21.5 NMAC.

C. Upon a finding that the application meets statutory and regulatory requirements, the board shall approve such application If after approval pursuant to this rule a local board fails to act on or respond to a filing by an employee organization or public employer or public employee within a reasonable time, or otherwise acts in a manner inconsistent with Section 10-7E-9 NMSA 1978 (2020) the board shall exercise its jurisdiction over any matters then pending before the local board pursuant to Section 2 of the Act.

D. In the event an application demonstrates that the proposed change does not meet the standards of Section 10 of the Act and 11.21.5 NMAC, the application shall be rejected and returned to the public employer.

[11.21.5.12 NMAC - N, 3/15/2004; Rn, 11.21.5.14 NMAC & A, 2/28/2005; A, 2/11/2020; A, 7/1/2020; A, 8/9/2022]

11.21.5.13 LOCAL BOARD REPORTING REQUIREMENTS:

A. Following board approval of a local board, the local board or the public employer that created it shall file with the board any amendments to the ordinance, resolution, or charter amendment, creating the local board, or any procedural rules within 30 days of such changes, and timely respond to any inquiries by this board of its staff made pursuant to Sections 9 and 10 of the Act.

B. Each local board shall inform the board of any changes to the membership of the local board within 30 days of the resignation or appointment of any member of the local board. Such communications shall be in writing and filed with the board in accordance with NMAC 11.21.1.10.

[11.21.5.13 NMAC - N, 3/15/2004; Rn, 11.21.5.15 NMAC & A, 2/28/2005; A, 7/1/2020; A, 8/9/2022]

11.21.5.14 REVOCATION OF APPROVAL OF LOCAL BOARD:

Upon the issuance of a final order of the board or judgment by a court of competent jurisdiction, finding that a local board is not in compliance with the Act, all matters theretofore pending before the local board shall be removed to and come under the jurisdiction of the board.

[11.21.5.14 NMAC - N, 3/15/2004; Rn, 11.21.5.16 NMAC & A, 2/28/2005; A, 7/1/2020]

11.21.5.15 [RESERVED]

[11.21.5.15 NMAC - N, 3/15/2004; A, 2/28/2005]

11.21.5.16 [RESERVED]

[11.21.5.16 NMAC - N, 3/15/2004; A, 2/28/2005]

PART 6: CONCURRENT PENDING RELATED CASES [REPEALED]

[This part was repealed on July 1, 2020]