

# CHAPTER 50 EMPLOYMENT LAW

## ARTICLE 1 LABOR AND INDUSTRIAL COMMISSION

### **50-1-1. Commission created; selection, term and qualifications of members. (Effective until July 1, 2000.)**

A. There is created a three-member "labor and industrial commission." The governor shall appoint two members with the consent of the senate who shall hold office at the pleasure of the governor for terms of four years. One member appointed by the governor shall be a person who, on account of his previous vocation, employment or affiliation can be classed as a representative of employers and the other member appointed by the governor shall be a person who, on account of his previous vocation, employment or affiliation, can be classed as a representative of employees. The third member shall be appointed by the other two members and shall hold office at the pleasure of the appointing members for a term of four years. The third member shall be a person who, on account of his previous vocation, employment or affiliation, cannot be classed as a representative of employers or employees. Not more than two members of the commission shall belong to the same political party. If a vacancy occurs in a position appointed by the governor between sessions of the legislature the position shall be filled by the governor. A person appointed by the governor to fill a vacancy on the commission between sessions shall serve until the next regular legislative session. The governor shall designate a chairman of the commission.

B. Members of the commission shall receive per diem and mileage pursuant to the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

**History:** 1978 Comp., § 50-1-1, enacted by Laws 1979, ch. 204, § 3.

### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Repeals and reenactments.** - Laws 1977, ch. 252, § 26, repealed 59-1-1, 1953 Comp., relating to creation of the labor and industrial commission and the selection, term and qualifications of its members, and enacted a former 50-1-1 NMSA 1978.

Laws 1979, ch. 204, § 3, repeals former 50-1-1 NMSA 1978, relating to definitions of "labor and industrial commission" and "labor commissioner," and enacts the above section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Employer's duty to furnish information regarding financial status to employees' representative under National Labor Relations Act, 106 A.L.R. Fed. 694.

### **50-1-1.1, 50-1-1.2. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 342, § 34 repeals 50-1-1.1 and 50-1-1.2 NMSA 1978, as enacted by Laws 1979, ch. 204, §§ 4, 5 relating to the appointment and term and the seal of the labor commissioner, effective July 1, 1987. For provisions of former section, see 1985 Cumulative Supplement to this pamphlet.

### **50-1-1.3. Oath of commission members and commissioners[; bond of commissioner]. (Effective until July 1, 2000.)**

The members of the labor and industrial commission shall before entering upon the duties of their respective offices take an oath for the faithful discharge of those duties.

**History:** 1978 Comp., § 50-1-1.3, enacted by Laws 1979, ch. 204, § 6; 1987, ch. 342, § 26.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**The 1987 amendment,** effective July 1, 1987, deleted "and the labor commissioner" following "commission" and deleted the former second sentence which read "The labor commissioner shall give bond as provided in the Surety Bond Act".

**Compiler's note.** - The provisions regarding bond of the commissioner, referred to in the catchline, were deleted in the amendment by Laws 1987, ch. 342, § 26.

### **50-1-1.4. Meetings of labor and industrial commission; chairman; functions. (Effective until July 1, 2000.)**

A. It shall be the duty of the labor and industrial commission to meet at the call of the chairman; provided, however, that any two members may petition the chairman to call a meeting, and the chairman shall thereupon set a date for the meeting not to exceed five days from receipt of the petition.

B. The commission shall receive reports from the secretary and act in an advisory capacity to the secretary in the enforcement of labor legislation.

**History:** 1978 Comp., § 50-1-1.4, enacted by Laws 1979, ch. 204, § 7; 1987, ch. 342, § 27.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**The 1987 amendment,** effective July 1, 1987, designated the two paragraphs as Subsections A and B, and, in Subsection B, substituted "from the secretary" for "from the labor commissioner" and "to the secretary" for "to the governor".

#### **50-1-1.5. Commissioner's office; supplies; hours; employees. (Effective until July 1, 2000.)**

A. The labor commissioner [director of the labor and industrial division of the department of labor] shall keep his office at the capital. The commissioner is authorized to procure all necessary office furniture, stationery, books, periodicals, maps, instruments, apparatus and appliances and other necessary supplies and incur such other expenses as may be actual and necessary.

B. All employees of the office of the labor commissioner [director] shall be covered by the Personnel Act, unless otherwise provided by law.

C. The office of the commissioner [director] shall be open for business every day, except Saturdays, Sundays and the holidays observed by other state offices.

**History:** 1978 Comp., § 50-1-1.5, enacted by Laws 1979, ch. 204, § 8.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Labor commissioner.** - Laws 1979, Chapter 204, transfers authority of the labor and industrial bureau of the employment services division of the human services department, the head of which was the "chief", to the labor and industrial commission, and creates the office of labor commissioner. Laws 1987, ch. 342, § 33C provides that all references in law to the labor commissioner shall be construed as references to the director of the labor and industrial division of the department of labor.

**Personnel Act.** - See 10-9-1 NMSA 1978 and notes thereto.

#### **50-1-1.6. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 342, § 34 repeals 50-1-1.6 NMSA 1978, as enacted by Laws 1979, ch. 204, § 9, relating to the powers and duties of the labor commissioner, effective July 1, 1987. For provisions of former section, see 1985 Cumulative Supplement to this pamphlet.

**50-1-2. Hearings; location; notice; conduct; witness fees; subpoenas; penalty. (Effective until July 1, 2000.)**

The director of the labor and industrial division shall have the power to hold hearings upon, and therein examine witnesses, administer oaths and take testimony in, all matters specified in any complaint with him filed and relating to his duties and the requirements of Chapter 50, Article 1 NMSA 1978, which hearings shall be held in some suitable place in the vicinity in which the testimony to be taken is applicable, and may issue subpoena for and compel the attendance of witnesses at such hearings; provided, however, that the director of the labor and industrial division shall serve upon the employer and such employees as he deems necessary, a written notice of the time, place, purpose and scope of the hearing at least ten days prior to the date thereof. At the hearing, the employer and any employees to be affected by any of the matters and things mentioned in the notice shall have the right to appear in person or by counsel, to cross-examine witnesses and to introduce such testimony as is competent, relevant and material to the subject, purpose and scope of the hearing as stated in the notice; provided, however, that no witness fees shall be paid to any witness unless he is required to testify at a place more than five miles from his place of residence, in which event the witness shall be paid the same fees as a witness before a district court. Any person duly subpoenaed under the provisions of this section who willfully refuses or neglects to testify at the time and place named in the subpoena shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500) or by imprisonment in the county jail not less than ten days nor more than thirty days or by both such fine and imprisonment.

**History:** Laws 1931, ch. 9, § 8; 1941 Comp., § 57-108; 1953 Comp., § 59-1-8; 1987, ch. 342, § 28.

**ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Cross-references.** - For fees of witnesses in district court, see 38-6-4 NMSA 1978.

**The 1987 amendment,** effective July 1, 1987, twice substituted "director of the labor and industrial division" for "labor commissioner" in the first sentence and made minor stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 294 et seq.

Right to assistance of counsel in administrative proceedings, 33 A.L.R.3d 229.

51A C.J.S. Labor Relations §§ 501, 505, 511, 598 to 617; 73A C.J.S. Public Administrative Law and Procedure § 115 et seq.

### **50-1-3. [Powers and duties of director of the labor and industrial division.] (Effective until July 1, 2000.)**

Said commissioner [director of the labor and industrial division] shall inform himself of all laws of the state for the protection of life and limb in any of the industries of the state, all laws regulating the hours of labor, the employment of minors, the payment of wages and all other laws enacted for the protection, health and benefit of employees, and thereunder foster, promote and develop the welfare of wage earners, advance opportunities for profitable employment; require, acquire and disseminate useful information on all subject [subjects] connected with labor, and assist in the enforcement of the workman's compensation laws and the employers' liability acts of the state. He shall have the power and authority, when in his judgment he deems it necessary, to take assignment of wage claims and prosecute actions for collection of wages or other claims or demands of employees or ex-employees, who are financially unable to employ counsel in cases in which in the judgment of the commissioner [director] such claims and demands are valid and enforceable in the courts. It shall be the duty of said labor commissioner [director] to enforce all labor laws in the state of New Mexico, the enforcement of which is not specifically and exclusively vested in any other officer, board or commission, state or federal, and whenever after due inquiry, he shall be satisfied that any such law has been violated or that any employee or ex-employee financially unable to employ counsel, has a just, valid and enforceable claim for wages or other claims or demands, he shall present the facts to the district attorney of the county in which such violation occurred or wage claim accrued, and it shall be the duty of such district attorney to prosecute the same. Said labor commissioner [director] shall also prosecute claims arising as between employment agencies and those seeking employment when in his judgment they are valid and enforceable in the courts.

**History:** Laws 1931, ch. 9, § 9; 1941 Comp., § 57-109; 1953 Comp., § 59-1-9.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Cross-references.** - As to public employment offices, see 50-1-6, 50-8-1, 50-8-2, 51-1-33 NMSA 1978.

As to occupations exempted from act, see 50-1-8 NMSA 1978.

As to powers and duties respecting payment of wages, see 50-4-8 to 50-4-12, 50-4-26, 50-4-27 NMSA 1978.

As to actions on assigned wage claims, see 50-4-11, 50-4-12 NMSA 1978.

As to employment of minors, see 50-6-1 NMSA 1978 et seq.

For Public Works Minimum Wage Act, see 13-4-11 to 13-4-17 NMSA 1978.

For Workers' Compensation Act, see 52-1-1 NMSA 1978 et seq.

For accident reports filed with director, see 52-1-58 to 52-1-61 NMSA 1978.

For Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 et seq.

As to safety provisions for miners, see 69-8-1 NMSA 1978 et seq.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Implied authority to promulgate rules.** - The fact that the legislature has empowered the labor commissioner to prosecute claims between employment agencies and prospective employees creates the implied authority to promulgate rules and regulations for the orderly and efficient pursuance of this duty. 1968 Op. Att'y Gen. No. 68-96.

**Not to enforce laws concerning discrimination in employment.** - With the creation of the human rights commission, the state labor and industrial commission has no duty or power to enforce any laws concerning discrimination in employment and, therefore, none of its general purpose appropriation can be used for that purpose. 1969 Op. Att'y Gen. No. 69-116.

**And not to make new law.** - The language of 50-1-5, 50-1-7 NMSA 1978 and this section is aimed at enforcement of existing law rather than the making of new law by way of regulation. 1964 Op. Att'y Gen. No. 64-61.

**Limited by statutory authority.** - Neither the labor commissioner nor commission have the statutory authority to prescribe rules and regulations involving industrial safety devices. 1964 Op. Att'y Gen. No. 64-61.

**Prosecution of wage claims.** - The manner of prosecuting wage claims referred to him by the labor commissioner is left to the judgment of the district attorney. When costs must be paid, they should be paid by the claimant and taxed as costs against the losing party. 1931-32 Op. Att'y Gen. 93.

**And intervention on wage claims.** - Intervention permitted by 50-1-3 NMSA 1978 is with reference to wage claims and not personal injury claims under the Workmen's [Workers'] Compensation Act. 1966 Op. Att'y Gen. No. 66-53.

**Appealability of wage claim determination.** - A party who is involved in a wage claim determination by the labor commissioner [now director] may not appeal that

determination directly to the court of appeals. *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

Once the statutory provisions for enforcement of wage claims are invoked through proceedings in the district court (50-4-8 NMSA 1978 and this section) claimants may appeal the district court's decision pursuant to Rule 3, N.M.R. App. P. (Civ.) (now Rule 12-201). *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

Appeal authorized by 12-8-16 NMSA 1978 does not allow appeals from determinations of the labor commissioner, since the Administrative Procedures Act (12-8-1 to 12-8-25 NMSA 1978) applies only to agencies made subject to the act "by agency rule or regulation if permitted by law", or which is specifically placed by law under the act. *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48 Am. Jur. 2d Labor and Labor Relations § 614 et seq.

Refusal of NLRB to file unfair labor practice complaint as subject to review in independent suit in federal district court, 69 A.L.R. Fed. 870.

Construction of provision of 29 USCS § 481(c) that unions and their officers shall "refrain from discrimination in favor of or against any candidate (for union office) with respect to use of lists of members", 113 A.L.R. Fed. 389.

Employer's duty to furnish particular information, other than financial or wage information, to employees' representative under National Labor Relations Act, 113 A.L.R. Fed. 425.

51 C.J.S. Labor Relations § 16; 51A C.J.S. Labor Relations §§ 506, 509, 517, 681; 30 C.J.S. Employer-Employee §§ 75, 76.

#### **50-1-4. [Annual report of director of the labor and industrial division; contents.] (Effective until July 1, 2000.)**

The commissioner [director of the labor and industrial division] shall collect, systematize and present in annual reports to the governor statistical details relating to his office and especially as bearing upon the commercial, social and sanitary conditions of the employees, the means of escape from dangers incident to their employment; the protection of life and health in factory or other places of employment; the labor of women and children and the hours of labor exacted from them and in general all matters which tend to affect the prosperity of the mechanical, manufacturing and productive industries of this state and of the persons employed therein.

**History:** Laws 1931, ch. 9, § 10; 1941 Comp., § 57-110; 1953 Comp., § 59-1-10.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA and notes thereto.

**50-1-5. [Inspections by director of the labor and industrial division; penalty for obstructing; notice; offenses of director or agents; penalties.] (Effective until July 1, 2000.)**

Said labor commissioner [director of the labor and industrial division] shall have the power to enter any store, factory, foundry, mill, office, workshop, mine or public or private works at any time during working hours and remain as long as necessary for the purpose of gathering facts and statistics contemplated by this act [50-1-1 to 50-1-8 NMSA 1978], and to examine safeguards and methods of protection from danger to employees, the sanitary conditions of the buildings and surroundings, and make a record thereof; and any owner, corporation, occupant or officer who shall refuse such entry to said labor commissioner [chief], his officers or agents, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars [(\$50.00)] nor more than five hundred dollars [(\$500)], or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment.

Provided, that said labor commissioner [director] or his agent or agents, shall, upon entering any store, factory, foundry, mill, office, workshop, mine or any other public or private works, notify the owner, manager, superintendent or anyone in charge of such place of labor, of his intention to make such visit of inspection, and such owner, manager, superintendent or party in charge, shall have the right, either by himself or agent, to accompany such commissioner [director], or his agent or agents, during the entire time he spends upon such premises.

And, provided, further, that it shall be unlawful for any such labor commissioner [director], his agent or agents, during the term of office to which such commissioner [director] shall have been appointed, to either directly or indirectly, verbally or by written or printed matter, advocate the organization, or changes in organization, or the attempt at disorganization of labor organization or labor unions, or to officially do any act either for or against any political party in the state of New Mexico. Any commissioner [director], or his agent or agents who fail to give such notice of such visit, or refuses such owner, manager, superintendent or party in charge, or his agent, the right to accompany him at all times on visits of inspection, provided for herein, or who participates in the organization, changing or disorganization of the labor union or labor association, contrary to the provisions hereof, or who officially does any act for or against any political party in the state of New Mexico, during his term of office, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined any sum not less than fifty dollars [(\$50.00)] nor more than five hundred dollars [(\$500)], or [punished] by imprisonment in the county jail of not less than ten days nor more than thirty days, or by both such fine and imprisonment.



**History:** Laws 1931, ch. 9, § 11; 1941 Comp., § 57-111; 1953 Comp., § 59-1-11.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Aimed at enforcement.** - The language of 50-1-3, 50-1-7 NMSA 1978 and this section is aimed at enforcement of existing law rather than the making of new law by way of regulation. 1964 Op. Att'y Gen. No. 64-61.

#### **50-1-6. [Free employment agency.] (Effective until July 1, 2000.)**

The labor commissioner [director of the labor and industrial division] may, if deemed necessary, maintain and operate a free employment agency for the purpose of supplying labor to all branches of industry.

**History:** Laws 1931, ch. 9, § 12; 1941 Comp., § 57-112; 1953 Comp., § 59-1-12.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**Cross-references.** - For public employment agencies, see 50-8-1, 50-8-2 and 51-1-33 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

#### **50-1-7. Reporting violations of labor and industrial laws. (Effective until July 1, 2000.)'**

It is the duty of the director of the labor and industrial division of the labor department to report to the district attorney of the district in which such violations occur, any violation of labor and industrial laws of New Mexico, and it is the duty of the district attorneys of the several districts, upon the complaint of the director, to prosecute all violations of law which may be reported to the district attorney by the director.

**History:** Laws 1931, ch. 9, § 13; 1941 Comp., § 57-113; 1953 Comp., § 59-1-13; Laws 1977, ch. 252, § 27; 1989, ch. 49, § 1.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

**The 1989 amendment**, effective June 16, 1989, substituted "director of the labor and industrial division of the labor department" for "labor commissioner", deleted "except violations of the state child labor law, which shall be reported to the children and youth services bureau of the social services division of the human services department" following "New Mexico", and made minor stylistic changes.

**Aimed at enforcement.** - The language of 50-1-3, 50-1-5 NMSA 1978 and this section is aimed at enforcement of existing law rather than the making of new law by way of regulation. 1964 Op. Att'y Gen. No. 64-61.

### **50-1-7.1. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1987, ch. 342, § 34 repeals 50-1-7.1 NMSA 1978, as enacted by Laws 1979, ch. 204, § 10, relating to report of operations and expenses of the labor commissioner's office, effective July 1, 1987. For provisions of former section, see 1985 Cumulative Supplement to this pamphlet.

### **50-1-8. [Occupations exempted from act.] (Effective until July 1, 2000.)**

None of the provisions of this act [50-1-2 to 50-1-7, 50-1-8 NMSA 1978] shall apply to the industries of agriculture or stock raising, or to any labor employed in connection therewith, or to labor exclusively employed in domestic service.

**History:** Laws 1931, ch. 9, § 15; 1941 Comp., § 57-115; 1953 Comp., § 59-1-15.

#### **ANNOTATIONS**

**Delayed repeals.** - See 50-1-9 NMSA 1978.

### **50-1-9. Termination of agency life; delayed repeal. (Effective until July 1, 2000.)**

The labor and industrial commission and the office of the director of the labor and industrial division of the department of labor are terminated on July 1, 1999 pursuant to the Sunset Act [12-9-11 to 12-9-21 NMSA 1978]. The commission and the director shall continue to operate according to the provisions of Chapter 50, Article 1 NMSA 1978 until July 1, 2000. Effective July 1, 2000, Chapter 50, Article 1 NMSA 1978 is repealed.

**History:** 1978 Comp., § 50-1-3.1, enacted by Laws 1987, ch. 333, § 2; 1993, ch. 83, § 1.

#### **ANNOTATIONS**

**The 1993 amendment**, effective June 18, 1993, substituted "the director of the labor and industrial division of the department of labor" for "labor commissioner" and "July 1, 1999" for "July 1, 1993" in the first sentence; substituted "director" for "labor commissioner" and "July 1, 2000" for "July 1, 1994" in the second sentence; substituted "July 1, 2000" for "July 1, 1994" in the third sentence; and made a minor stylistic change.

**Compiler's note.** - This section was enacted as 50-1-3.1 NMSA 1978 by Laws 1987, ch. 333, § 2 but was redesignated as 50-1-9 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

## **ARTICLE 2**

### **CORRUPT AND COERCIVE PRACTICES**

#### **50-2-1. Findings and policies.**

A. Findings. Hearings conducted by the McClellan committee of the United States senate, without reflecting upon the aims or integrity of the vast majority of employers and labor unions have disclosed collusive, coercive and corrupt practices indulged in by a small minority of irresponsible employers and leaders of labor unions.

These practices, which shock the conscience of our citizens and are deplored by all right thinking people, have been tolerated and encouraged by the absence of appropriate statutory prohibitions and declared governmental policy.

New Mexico, on the threshold of its greatest era of economic development, for the welfare and protection of its citizens, should by statute eliminate those practices which are so destructive to good employee-employer relationships, and which in many cases have been shown to have resulted in a denial of the civil liberties of many persons.

The legislature finds that the coercive and collusive practices prohibited herein represent a serious menace to the peace, safety, morals and welfare of the people of this state. The elimination of such practices by affording effective relief therefrom is a necessary condition to the realization of personal freedom for the employee, the encouragement of employee representation according to the free will of the employees and for their greater welfare, and the protection of the public interest generally.

B. Public Policy. An [In] interpretation and the application of this act [50-2-1 to 50-2-3 NMSA 1978], it is hereby declared to be the public policy of this state to mitigate and eliminate certain coercive and collusive practices of labor organizations and employers with the view of promoting and protecting the exercise by employees of the fullest possible freedom with respect to self-organization, choice of bargaining representative, collective bargaining and all other legitimate concerted activities, it being fully recognized by the legislature that employees should have an equal freedom to refrain

from any such activity or activities except to the extent that such freedom may be limited by a valid agreement in writing requiring membership in a labor organization as a condition of employment.

**History:** 1953 Comp., § 59-13-1, enacted by Laws 1959, ch. 26, § 1.

## ANNOTATIONS

**Inapplicable to public employer-employee relations.** - State statutes regulating labor relations in private industry, such as this section, are not applicable to public employer-employee relations. 1963-64 Op. Att'y Gen. No. 63-52.

**Acceptable collective bargaining agreement provisions.** - Institutions of higher learning may enter into collective bargaining agreements which contain provisions for settlements of disputes by way of compulsory arbitration. 1974 Op. Att'y Gen. No. 74-3.

Institutions of higher learning may legally enter into collective bargaining agreements which provide for modified agency shop and dues check-off system. 1974 Op. Att'y Gen. No. 74-3.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48 Am. Jur. 2d Labor and Labor Relations § 657 et seq.

Union security arrangements in state public employment, 95 A.L.R.3d 1102.

Modern status of rule that employer may discharge at-will employee for any reason, 12 A.L.R.4th 544, 32 A.L.R.4th 1221, 33 A.L.R.4th 120.

Procedural rights of union members in union disciplinary proceedings - modern state cases, 79 A.L.R.4th 941.

Effectiveness of employer's disclaimer of representations in personnel manual or employee handbook altering at-will employment relationship, 17 A.L.R.5th 1.

Effect of First Amendment on jurisdiction of national labor relations board over labor disputes involving employer operated by religious entity, 63 A.L.R. Fed. 831.

Prohibition or limitation on display of signs by employees as unfair labor practice, 86 A.L.R. Fed. 321.

Recording of collective bargaining or grievance proceeding as unfair labor practice, 86 A.L.R. Fed. 844.

When is subsequent business operation bound by existing collective bargaining agreement between labor union and predecessor employer, 88 A.L.R. Fed. 89.

Requirements for obtaining court approval of rejection of collective bargaining agreement by debtor in possession or trustee in bankruptcy under 11 USC § 1113(b) and (c), 89 A.L.R. Fed. 299.

Suits by union members against union officers under 29 USCS § 501(b), 114 A.L.R. Fed. 417.

**50-2-2. [Prohibited acts; picketing; coercion or intimidation; obstructing ways of entrance or egress; interfering with use of transportation facilities; damages from violation of law; injunction.]**

A. It shall be unlawful for a labor organization or its representatives to engage in picketing or to induce others to engage in picketing where an object thereof is:

(1) coercing or inducing an employer or self-employed person to join or contribute to a labor organization; or

(2) coercing or inducing an employer to recognize or bargain with a labor organization as the representative of his employees unless a majority of said employees favor such representation, provided, that the provisions of this subsection shall not apply when a majority of employees favored such representation at the commencement of such picketing, and the employer has eliminated such majority by the discharge of any employee favoring such representation, or the hiring of any additional employees opposed to such representation for the purpose of availing himself of the remedies provided in this section.

B. It shall be unlawful in connection with any labor dispute for any person individually or in concert with others to hinder or prevent by mass picketing, violence or threats of violence, force, coercion or intimidation of any kind, the pursuit of any lawful work or employment, or to obstruct or interfere with entrance to or egress from any place of employment, or to obstruct or interfere with free or uninterrupted use of any public roads, streets, highways, railways, airports or other ways of travel or conveyance.

C. Whoever shall be injured in his employment, business or property by reason of any violation of this section shall recover the actual damages by him sustained as a result of said violation and such punitive or exemplary damages as the court or jury may allow.

D. Any person or persons may be restrained by injunction from doing any of the acts prohibited by this section without regard to the conditions and restrictions set forth in Sections 50-3-1 and 50-3-2 NMSA 1978.

**History:** 1953 Comp., § 59-13-2, enacted by Laws 1959, ch. 26, § 2.

**ANNOTATIONS**

**"Person" to include labor organizations.** - "Person" being inclusive, rather than exclusive, and its meaning including bodies of persons as well as individuals, union defendants are subject to this section as a labor organization is included within the word "person." *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

**Jurisdiction over claim of violence.** - Claim of statutory violation based on violence or threats of violence is a claim over which the trial court has jurisdiction. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

**Jurisdiction based on involved conduct.** - The proposed distinction between a common law tort and a statutory violation is without merit. The conduct involved is the basis for jurisdiction. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

**State jurisdiction generally.** - Contention that the portion of this section relating to violence or threats of violence cannot be given effect by New Mexico courts because that portion is "arguably subject" to 29 U.S.C. §§ 157, 158, and therefore that the New Mexico courts have no jurisdiction because the section poses a potential conflict with federal statutes, is incorrect as state jurisdiction in these situations is not overridden in the absence of clearly expressed congressional direction. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

**Federal labor law preemptive.** - New Mexico courts cannot give effect to those portions of this section authorizing damages for peaceful activities in connection with a labor dispute where federal labor law is applicable as its jurisdiction over such activities is preempted by federal labor law. *Gonzales v. Oil, Chem. & Atomic Workers Int'l Union*, 77 N.M. 61, 419 P.2d 257 (1966).

**Access of customers may not be obstructed.** - The provisions of Subsection B which prohibit the obstruction of the access of other employees to a place of employment also apply to the access of customers. *PTA Sales, Inc. v. Retail Clerks Local 462*, 96 N.M. 581, 633 P.2d 689 (1981).

**Injunction limiting area picketed and number of pickets authorized.** - An injunction which limits the number of pickets allowed, confines the area in which they may present themselves, and keeps them out of any place in which they would impede, albeit peacefully, foot traffic and access to a place of business is within the subject matter jurisdiction of a court under Subsection D. *PTA Sales, Inc. v. Retail Clerks Local 462*, 96 N.M. 581, 633 P.2d 689 (1981).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48 Am. Jur. 2d Labor and Labor Relations § 700 et seq.

Validity of statute or ordinance against picketing, 35 A.L.R. 1200, 108 A.L.R. 1119, 122 A.L.R. 1043, 125 A.L.R. 963, 130 A.L.R. 1303.

Unfair labor practice, within National Labor Relations Act or similar state statute, predicated upon statements or acts by employees not expressly authorized by employer, 146 A.L.R. 1062.

Conduct of employees or labor union as unfair labor practice within labor relations acts, 149 A.L.R. 464.

State criminal prosecutions of union officer or member for specific physical threats to employer's property or person, in connection with labor dispute - modern cases, 43 A.L.R.4th 1141.

Settlement of unfair labor practice cases, 14 A.L.R. Fed. 25.

Union discipline for crossing picket line as unfair labor practice, 47 A.L.R. Fed. 669, 72 A.L.R. Fed. 330.

Collective bargaining agreement as restricting right to engage in concerted activities, other than striking or picketing, under § 7 of National Labor Relations Act (29 USCS § 157), 69 A.L.R. Fed. 812.

Refusal of NLRB to file unfair labor practice complaint as subject to review in independent suit in federal district court, 69 A.L.R. Fed. 870.

Existence and nature of employer's obligation to remedy unfair labor practices committed by predecessor - modern cases, 102 A.L.R. Fed. 575.

Damages for allegedly wrongful interference with employment rights as received "on account of personal injuries," so as to be excludible from income tax under 26 USCS § 104(a)(2), 106 A.L.R. Fed. 321.

51A C.J.S. Labor Relations §§ 267, 341 to 348; 51B C.J.S. Labor Relations §§ 811 to 821, 1343.

### **50-2-3. [Gift to representative of labor organization to influence action; solicitation; acceptance; penalty.]**

A. It shall be unlawful:

(1) for any person to give or offer to give any money, property or other thing of value to any representative of a labor organization, with the intent to influence him with respect to any of his acts, decisions or other duties as such representative, or to induce him to prevent or cause a strike by the employees of any person; or

(2) for any representative of a labor organization to solicit or accept or agree to accept from any person any money, property or other thing of value upon any agreement or understanding, express or implied, that he shall be influenced with respect to any of his

acts, or decisions or other duties as such representative, or upon any agreement or understanding, express or implied, that he shall refrain from causing or shall prevent a strike or work stoppage or picket line or any form of injury to any business.

B. Any person who violates any of the provisions of this section shall upon conviction thereof be guilty of a misdemeanor and be subject to a fine of not more than \$500.00 or to imprisonment of not more than 30 days, or both.

**History:** 1953 Comp., § 59-13-3, enacted by Laws 1959, ch. 26, § 3.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 51A C.J.S. Labor Relations §§ 336, 337; 51B C.J.S. Labor Relations § 1343.

#### **50-2-4. Promise concerning union membership.**

A. Every promise between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

(1) not to join or not to remain a member of a labor organization or of an employer organization; or

(2) to withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

B. Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who, without fraud, violence or threat thereof, advise such party to act in disregard of such promise.

C. The term "promise" includes promise, undertaking, contract or agreement, whether written or oral, express or implied.

D. Any person who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor.

**History:** 1953 Comp., § 59-13-4, enacted by Laws 1967, ch. 241, § 1.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Liability, under statute, of labor union or its membership for torts committed in connection with primary labor activities - state cases, 85 A.L.R.4th 979.



## ARTICLE 3

# INJUNCTION IN LABOR DISPUTES

### 50-3-1. [Restrictions on granting of injunctions.]

No court nor any judge or judges thereof within the state of New Mexico shall have jurisdiction to issue a permanent injunction or restraining order in any case involving or growing out of a labor dispute, within the state, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered and presented, and except after findings of all the following facts by the court or judge or judges thereof:

A. that unlawful acts have been threatened or committed and will be executed or continued unless restrained;

B. that substantial and irreparable injury to complainant's property will follow unless the relief requested is granted;

C. that complainant has no adequate remedy at law; and

Such hearing shall be held after due notice as may be ordered in the discretion of the court, and in such manner as the court shall direct, to all known persons against whom relief is sought.

**History:** Laws 1939, ch. 195, § 1; 1941 Comp., § 57-201; 1953 Comp., § 59-2-1.

### ANNOTATIONS

**"Labor dispute" generally.** - No precise or particularized definition of term "labor dispute" is practicable, but in analyzing the facts of each controversy, fact finder must determine that a real and sincere dispute exists bearing some relation to the employer and concerning some aspect of employment in his enterprise and then, before injunctive relief may yet be denied, he must determine that the collective bargaining activities are in furtherance of some legitimate interest of labor and not in contravention of public policy of the state. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Scope of "labor disputes".** - Judicial determination which confines the meaning of "labor dispute" to direct controversies between employer and employee is inconsistent with the guarantee of freedom of speech. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**And embraces organizational disputes.** - Labor disputes are not necessarily limited to disputes between employer and employees, but the term embraces organizational

disputes as well. *Romero v. Journeyman Barbers Local 501*, 63 N.M. 443, 321 P.2d 628 (1958).

**Authorization for strike and collective bargaining.** - Authorization from majority of employees is not necessarily required before a strike or picketing may be lawfully commenced and although some employees subsequently repudiate their authorizations, these acts cannot retroactively destroy the relationship existing between them and the union at the time collective bargaining began. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Unlawful strikes.** - Teachers and employees of a local public school system may not lawfully strike against the local school board in the absence of express legislative authority to so strike. 1964 Op. Att'y Gen. No. 64-47.

**And when picketing not protected.** - Picketing in an unlawful manner, or for an unlawful objective, is not constitutionally protected, even though there may exist at the moment a labor dispute. *Romero v. Journeyman Barbers Local 501*, 63 N.M. 443, 321 P.2d 628 (1958).

**Unlawful conduct generally.** - While court cannot condone isolated instances of violence on the part of pickets in labor dispute, where employers likewise did not conduct themselves at all times in a peaceful manner, the latter cannot in equity complain of these acts. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Not applicable to public employee strikes.** - This section does not apply to strikes and work stoppages by public employees in the absence of an express statutory provision. *City of Albuquerque v. Campos*, 86 N.M. 488, 525 P.2d 848 (1974).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 3631 et seq.

Lawfulness of strike to compel collective bargaining, 20 A.L.R. 1513.

Right of state or United States to maintain suit to enjoin strike or acts in furtherance thereof, 25 A.L.R. 1245.

Validity and effect of statutes restricting remedy by injunction in industrial disputes, 27 A.L.R. 411, 35 A.L.R. 460, 97 A.L.R. 1333, 106 A.L.R. 361, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868.

Injunction against strike as violating constitutional provision against involuntary servitude, 46 A.L.R. 1541.

Sufficiency of complaint in action to enjoin breach of collective bargaining agreement, 156 A.L.R. 652.

Employer's right to injunction against picketing by labor union to enforce a demand, compliance with which would constitute an unfair labor practice, 162 A.L.R. 1438.

Legality of, and injunction against, peaceable picketing by labor union, of plant whose employees are represented by another union as statutory bargaining agent, 166 A.L.R. 185.

Lawfulness or purpose of peaceable picketing as affecting right to injunction, 174 A.L.R. 593.

Relief against union activities as affected by fact owner operates own business or does part of own work, 2 A.L.R.2d 1196, 13 A.L.R.2d 642.

Injunction against peaceful picketing as affected by employer's lack of opportunity to negotiate with union or employees, 11 A.L.R.2d 1069.

Injunction against peaceful picketing to force employees to join union or to compel employer to enter into a contract which would in effect compel them to do so, in the absence of a dispute between employer and employees as to terms or conditions of employment, 11 A.L.R.2d 1338.

Mandatory injunction prior to hearing of case, 15 A.L.R.2d 213.

Right of third party in area picketed during labor dispute, who has no connection with the dispute, to an injunction against such picketing, 15 A.L.R.2d 1396.

Nonprofit charitable institutions as within operation of labor statutes, 26 A.L.R.2d 1020.

Applicability of Norris-LaGuardia Act and similar state statutes to injunction action by private complainant, 29 A.L.R.2d 323.

State court's power to enjoin picketing as affected by Labor Management Relations Act, 32 A.L.R.2d 1026.

Injunction against picketing, by employees of a plant where labor dispute exists, at another plant of employer where there is no labor dispute, 37 A.L.R.2d 687.

Rights and remedies of workmen blacklisted by labor union, 46 A.L.R.2d 1124.

Legality of peaceful labor picketing on private property, 10 A.L.R.3d 846.

Peaceful picketing of private residence, 42 A.L.R.3d 1353.

Pre-emption, by § 301(a) of Labor-Management Relations Act of 1947 (29 USCS § 185(a)), of employee's state-law action for infliction of emotional distress, 101 A.L.R. Fed. 395.

51B C.J.S. Labor Relations § 781 et seq.

### **50-3-2. [Temporary restraining order; when issued; security for loss.]**

If a complainant shall also allege that unless a temporary restraining order shall be issued before such hearing may be had, a substantial and irreparable injury to complainant's property will be unavoidable, such temporary restraining order may be granted as the court may direct by order to show cause.

Such order to show cause shall be served upon such party or parties as are sought to be restrained and as shall be specified in said order, and the restraining order shall issue only upon testimony, or in the discretion of the court, upon affidavits, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing as herein provided for.

No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security, to be fixed by the court, sufficient to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs and expenses against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

**History:** Laws 1939, ch. 195, § 2; 1941 Comp., § 57-202; 1953 Comp., § 59-2-2.

#### **ANNOTATIONS**

**"Labor dispute" generally.** - No precise or particularized definition of term "labor dispute" is practicable, but in analyzing the facts of each controversy, fact finder must determine that a real and sincere dispute exists bearing some relation to the employer and concerning some aspect of employment in his enterprise and then, before injunctive relief may yet be denied, he must determine that the collective bargaining activities are in furtherance of some legitimate interest of labor and not in contravention of the public policy of state. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Scope of "labor dispute".** - Judicial determination which confines the meaning of "labor dispute" to direct controversies between employer and employee is inconsistent with the guarantee of freedom of speech. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Authorization for strike and collective bargaining.** - Authorization from majority of employees is not necessarily required before a strike or picketing may be lawfully commenced and although some employees subsequently repudiate their authorizations, these acts cannot retroactively destroy the relationship existing between them and the

Union at the time collective bargaining began. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Unlawful conduct generally.** - While court cannot condone isolated instances of violence on the part of pickets in labor dispute, where employers likewise did not conduct themselves at all times in a peaceful manner, the latter cannot in equity complain of these acts. *Pomonis v. Hotel, Restaurant & Bartenders' Local 716*, 56 N.M. 56, 239 P.2d 1003 (1952).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 3661 et seq.

51B C.J.S. Labor Relations §§ 911 to 968.

## **ARTICLE 4**

### **LABOR CONDITIONS; PAYMENT OF WAGES**

#### **50-4-1. Definitions.**

A. Whenever used in this act [50-4-1 to 50-4-12 NMSA 1978], "employer" includes every person, firm, partnership, association, corporation, receiver or other officer of the court of this state, and any agent or officer of any of the above mentioned classes, employing any person in this state, except employers of domestic labor in private homes and employers of livestock and agricultural labor.

B. "Wages" shall mean all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount.

**History:** Laws 1937, ch. 109, § 1; 1941 Comp., § 57-301; 1953 Comp., § 59-3-1.

#### **ANNOTATIONS**

**Cross-references.** - As to employees to be given time to vote, see 1-12-42 NMSA 1978.

As to coercing employees in election matters, see 1-20-13 NMSA 1978.

As to minimum wages on public works contracts, see 13-4-11 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 53 Am. Jur. 2d Master and Servant § 72.

Servant's right to compensation for extra work or overtime, 25 A.L.R. 218, 107 A.L.R. 705.

Necessity in indictment charging violation of statute regarding wages, or hours, of naming particular employees, 81 A.L.R. 76.

Waiver or loss of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 A.L.R. 842, 129 A.L.R. 1145.

Fair Labor Standards Act as affecting validity of wage agreements respecting compensation for overtime, 169 A.L.R. 1326.

Payment in excess of wages then due as offsetting underpayment for overtime, 6 A.L.R.2d 95.

Right to overtime pay under Portal-to-Portal Act as affected by contract or custom, 21 A.L.R.2d 1327, 26 A.L.R. Fed. 607.

Nonprofit charitable institutions as within operation of labor statutes, 26 A.L.R.2d 1020.

Tips as wages, 65 A.L.R.2d 974.

Sufficiency of notice of modification in terms of compensation of at-will employee who continues performance to bind employee, 69 A.L.R.4th 1145.

Employee's protection under § 15(a)(3) of Fair Labor Standards Act (29 USCS § 215(a)(3)), 101 A.L.R. Fed. 220.

30 C.J.S. Master and Servant § 132 et seq.

## **50-4-2. Semimonthly and monthly pay days.**

A. Every employer in this state shall designate regular pay days, not more than sixteen days apart, as days fixed for the payment of wages to all employees paid in this state. The employer shall pay for services rendered from the first to the fifteenth days, inclusive, of any calendar month by the twenty-fifth day of the month during which services are rendered, and for all services rendered from the sixteenth to the last day of the month, inclusive, of any calendar month by the tenth day of the succeeding month. Where computation of earnings and of amounts due, preparation of payrolls and issuance of paychecks are at a central location outside New Mexico, the employer shall pay for services rendered from the first to the fifteenth days, inclusive, of any calendar month by the last of the month during which services are rendered, and for all services rendered from the sixteenth to the last day of the month, inclusive, of any calendar month by the fifteenth day of the succeeding month.

B. Employers shall pay such wages in full, less lawful deductions and less payroll deductions authorized by the employer and employee, in lawful money of the United States or in checks, payroll vouchers or drafts on banks, convertible into cash on demand at full face value or, with the voluntary authorization of the employer, employee

and financial institution, by deposit to the account of the employee in any bank, savings and loan association, credit union or other financial institution authorized by the United States or one of the several states to receive deposits in the United States, without any reduction or deduction, except such as may be specifically stated in the written contract of hiring entered into at the time of hiring. Every employer shall provide his employee with a written receipt that identifies the employer and sets forth the employee's gross pay, the number of hours worked by the employee, the total wages and benefits earned by the employee and an itemized listing of all deductions withheld from the employee's gross pay. Nothing contained in Sections 50-4-1 through 50-4-12 NMSA 1978 shall in any way limit or prohibit the payment of wages or compensation at more frequent intervals than those set forth in this section. Where the labor or service to be rendered to an employer is recompensed on a task, piece or commission basis or other method of calculating the amount of wages to be paid, other than a definite and fixed amount in cash, the employer and the employee may agree in writing at the time of hiring that the wages shall be paid on a monthly basis, but in all such cases, payment shall be made on or before the tenth day of the succeeding calendar month.

C. Notwithstanding the provisions of Subsection A of this section, every employer may pay professional, administrative or executive employees or employees employed in the capacity of outside salesman, as those terms are defined under the federal Fair Labor Standards Act, one time per month, excluding those employees whose salaries are subject to provisions of collective bargaining agreements.

**History:** Laws 1937, ch. 109, § 2; 1941 Comp., § 57-302; Laws 1949, ch. 117, § 1; 1953 Comp., § 59-3-2; Laws 1975, ch. 223, § 1; 1991, ch. 95, § 1; 1993, ch. 26, § 1.

### ANNOTATIONS

**Cross-references.** - As to state employees' salaries payable at least semimonthly, see 10-7-2 NMSA 1978.

As to pay period for certified school personnel, see 22-10-7 NMSA 1978.

As to pay period for water masters and assistants, see 72-3-4 NMSA 1978.

**The 1991 amendment**, effective April 2, 1991, substituted "50-4-1 through 50-4-12 NMSA 1978" for "59-3-1 through 59-3-13 NMSA 1953" in the second sentence in Subsection B and added Subsection C.

**The 1993 amendment**, effective July 1, 1993, inserted the second sentence of Subsection B and made minor stylistic changes.

**Fair Labor Standards Act.** - The federal Fair Labor Standards Act, referred to in Subsection C, appears as 29 U.S.C. § 201 et seq.

**Pay intervals not more than 30 days.** - This section requires employers to pay employees at intervals of not more than 30 days. *Advance Loan Co. v. Kovach*, 79 N.M. 509, 445 P.2d 386 (1968).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4196 et seq.

Constitutionality of statute regulating the time of payment of wages, 12 A.L.R. 635, 26 A.L.R. 1396.

30 C.J.S. Master and Servant §§ 177, 178.

### **50-4-3. Joint adventurers.**

None of the provisions of this act [50-4-1 to 50-4-12 NMSA 1978] shall apply to cases where an agreement is entered into between the employer and the employee at the time of hiring, providing that the employee, as part of his wages or compensation, shall have an interest in the success of the particular work or enterprise in connection with which the employee is hired. In all such cases the employer shall be subject to the provisions of this act only to the extent of that portion of the wages or compensation to be paid in cash, and as to the balance the employer and employee shall stand as joint adventurers.

**History:** Laws 1937, ch. 109, § 3; 1941 Comp., § 57-303; 1953 Comp., § 59-3-3.

## **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 46 Am. Jur. 2d Joint Ventures §§ 25, 57.

48A C.J.S. Joint Ventures § 1 et seq.

### **50-4-4. Discharges [Discharged] employees.**

A. Whenever an employer discharges an employee, the unpaid wages or compensation of such employee, if a fixed and definite amount, and not based on a task, piece, commission basis or other method of calculation, shall, upon demand become due immediately, and the employer shall pay such wages to the employee within five days of such discharge.

B. In all other cases of discharged employees the settlement and payment of wages or compensation shall be made within ten days of such discharge.

C. In case of failure to pay wages or compensation due an employee within the time hereinbefore fixed, the wages and compensation of the employee shall continue from the date of discharge until paid at the same rate the employee received at the time of discharge, and may be recovered in a civil action brought by the employee; provided



that the employee shall not be entitled to recover any wages or compensation for any period subsequent to the date of discharge unless he pleads in his complaint and establishes that he made demand within a reasonable time upon his employer at the place designated for payment and payment was refused, provided further that the employee shall not be entitled to recover any wages or compensation for any period subsequent to the sixtieth day after the date of discharge.

**History:** Laws 1937, ch. 109, § 4; 1941 Comp., § 57-304; 1953 Comp., § 59-3-4; Laws 1975, ch. 23, § 1.

## ANNOTATIONS

**Purpose of statutes of limitation.** - Statutes of limitation are not only enacted to do away with stale claims, but also to encourage an employee seeking the benefits of the statute to act promptly. *Spikes v. Mittry Constr. Co.*, 295 F.2d 207 (10th Cir. 1961).

**Wages and commissions separate.** - Upon timely payment of fixed and definite wages or compensation employer has no further obligation to employee in relation thereto under this section. However additional commissions not fixed and definite and not paid within 10 days continue to be payable until paid or tender thereof is made by employer. *Litteral v. Singer Bus. Machs. Co.*, 87 N.M. 365, 533 P.2d 754 (1975).

**Scope of section.** - In an action to exact a penalty from an employer for failure to pay wages, the time limitations of this section control over 37-1-3 NMSA 1978. *Spikes v. Mittry Constr. Co.*, 295 F.2d 207 (10th Cir. 1961).

**Failure to comply with statutory conditions.** - An employer failed to comply with statutory conditions since it did not pay the amount conceded to be due employees within the times required by this section and since it could not show that it gave written notice of the amount conceded to be due as required by 50-4-7 NMSA; giving a payroll check to employees for undisputed wages did not satisfy the latter requirement. *Wolf v. Sam's Town Furn.*, N.M. App. , 904 P.2d 52 (1995).

**Accrued vacation pay** was a fixed and definite amount, and the nonpayment of vacation time invoked the penalty of continued payment of both vacation time and wages for a maximum period of sixty days. *Wolf v. Sam's Town Furn.*, N.M. App. , 904 P.2d 52 (1995).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4278.

Construction and application of provision of contract for compensation of employee upon dismissal or discharge, 147 A.L.R. 151, 40 A.L.R.2d 1044.

Estoppel to rely on statute of limitations, 24 A.L.R.2d 1413.

Right to discharge allegedly "at-will" employee as affected by employer's promulgation of employment policies as to discharge, 33 A.L.R.4th 120.

Damages recoverable for wrongful discharge of at-will employee, 44 A.L.R.4th 1131.

Validity, construction, and effect of state laws requiring payment of wages on resignation of employee immediately or within specified period, 11 A.L.R.5th 715.

Effectiveness of employer's disclaimer of representations in personnel manual or employee handbook altering at-will employment relationship, 17 A.L.R.5th 1.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period, 18 A.L.R.5th 577.

When statute of limitations commences to run as to cause of action for wrongful discharge, 19 A.L.R.5th 439.

Liability for breach of employment severance agreement, 27 A.L.R.5th 1.

30 C.J.S. Master and Servant §§ 133 to 135.

### **50-4-5. Employees quitting employment.**

Whenever an employee (not having a written contract for a definite period) quits or resigns his employment, the wages or compensation shall become due and be payable at the next succeeding payday. Nothing in this section shall prohibit or restrict the right of the employer to make immediate payment at the time of quitting.

**History:** Laws 1937, ch. 109, § 5; 1941 Comp., § 57-305; 1953 Comp., § 59-3-5.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4278.

Validity, construction, and effect of state laws requiring payment of wages on resignation of employee immediately or within specified period, 11 A.L.R.5th 715.

### **50-4-6. Industrial disputes.**

In the event of the suspension of work as the result of an industrial dispute, the wages and compensation earned and unpaid at the time of such suspension shall become due and payable at the next payday as provided in Section 2 [50-4-2 NMSA 1978] of this act, including, without abatement or reduction, other than such deductions as may be required by law, or as may be specified in the contract of hiring, all amounts due to all persons whose work has been suspended as a result of such industrial dispute,

together with any deposit or other guaranty held by the employer for the faithful performance of the duties of the employee.

**History:** Laws 1937, ch. 109, § 6; 1941 Comp., § 57-306; 1953 Comp., § 59-3-6.

### **ANNOTATIONS**

**Accrued leave and vacation pay included.** - The words "wages and compensation earned and unpaid" include accrued leave and vacation pay. 1961-62 Op. Att'y Gen. No. 62-69.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Reexhaustion of arbitration procedure as appropriate course for resolving backpay issues arising as a result of resolution of grievance, 59 A.L.R. Fed. 501.

### **50-4-7. Unconditional payment of wages conceded to be due.**

In case of dispute over wages, the employer shall give written notice to the employee of the amount of wages which he concedes to be due, and shall pay such amount, without condition, within the times fixed by this act [50-4-1 to 50-4-12 NMSA 1978]. The acceptance by the employee of any payment so made, shall not constitute a release as to the balance of his claim. The provisions of Section 4 [50-4-4 NMSA 1978] shall not be applicable in cases arising under this section, except as herein provided.

**History:** Laws 1937, ch. 109, § 7; 1941 Comp., § 57-307; 1953 Comp., § 59-3-7.

### **ANNOTATIONS**

**Failure to comply with statutory conditions.** - An employer failed to comply with statutory conditions since it did not pay the amount conceded to be due employees within the times required by 50-4-4 NMSA and since it could not show that it gave written notice of the amount conceded to be due as required by this section; giving a payroll check to the employees for undisputed wages did not satisfy the latter requirement. *Wolf v. Sam's Town Furn.*, N.M. App. , 904 P.2d 52 (1995).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4196 et seq.

Validity, construction, and effect of state laws requiring payment of wages on discharge of employee immediately or within specified period, 18 A.L.R.5th 577.

Reexhaustion of arbitration procedure as appropriate course for resolving backpay issues arising as a result of resolution of grievance, 59 A.L.R. Fed. 501.

### **50-4-8. Duties of the labor commissioner [director].**

A. It is the duty of the labor commissioner [director] to investigate any violations of Sections 50-4-1 through 50-4-12 NMSA 1978 and to institute or cause to be instituted actions for the enforcement of the same. The labor commissioner [director] may hold hearings to satisfy himself as to the justice of any claim, and he shall cooperate with any employee in the enforcement of any claim against his employer whenever, in the opinion of the labor commissioner [director], the claim is just and valid.

B. It is the duty of all district attorneys to prosecute all cases, both civilly and criminally, which are referred to them by the labor commissioner.

C. It shall not be a defense to any action brought pursuant to this section that the plaintiff or complainant is an undocumented worker. It is not intended by this section to create any right to collect unemployment compensation nor to mandate any wage rate.

**History:** Laws 1937, ch. 109, § 8; 1941 Comp., § 57-308; 1953 Comp., § 59-3-8; Laws 1983, ch. 157, § 1.

## ANNOTATIONS

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Appealability of wage claim determination.** - A party who is involved in a wage claim determination by the labor commissioner (now director) may not appeal that determination directly to the court of appeals. *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

Once the statutory provisions for enforcement of wage claims are invoked through proceedings in the district court (this section and 50-1-3 NMSA 1978) claimants may appeal the district court's decision pursuant to Rule 3, N.M.R. App. P. (Civ.) (now Rule 12-201). *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

Appeal authorized by 12-8-16 NMSA 1978 does not allow appeals from determinations of the labor commissioner, since the Administrative Procedures Act (12-8-1 to 12-8-25 NMSA 1978) applies only to agencies made subject to the act "by agency rule or regulation if permitted by law", or which is specifically placed by law under the act. *Eastern Indem. Co. v. Heller*, 102 N.M. 144, 692 P.2d 530 (Ct. App. 1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4188 et seq.

51 C.J.S. Labor and Labor Relations § 16.

**50-4-9. Records, subpoenas, etc.**

A. Every employer shall keep a true and accurate record of hours worked and wages paid to each employee. The employer shall keep such records on file for at least one year after the entry of the record.

B. The labor commissioner [director of the labor and industrial division] and his authorized representatives shall have the right at all reasonable times to inspect such records for the purpose of ascertaining whether the provisions of this act [50-4-1 to 50-4-12 NMSA 1978] are complied with.

C. Any interference with the labor commissioner [director] or his authorized representatives in the performance of their duties shall be deemed a violation of this act and punished as such.

D. The labor commissioner [director] and his authorized representatives shall have the power to administer oaths and examine witnesses under oath, issue subpoenas, compel the attendance of witnesses, and the production of payroll records and take depositions and affidavits in any proceedings before said labor commissioner [director].

E. In case of failure of any person to comply with any subpoena lawfully issued, or upon the refusal of any witness or witnesses to testify upon any matter which he or they may be lawfully interrogated, the labor commissioner [director] may apply to the district court in the proper county, or to the judge thereof, for a writ of attachment to compel said witness to respond to said subpoena or to testify as the case may be.

**History:** Laws 1937, ch. 109, § 9; 1941 Comp., § 57-309; 1953 Comp., § 59-3-9.

### ANNOTATIONS

**"Best evidence" purpose.** - This section does not operate as a statute of limitations, and the employer's records are the "best evidence" in establishing whether a violation exists under the act and they should be produced, if available. 1957-58 Op. Att'y Gen. No. 57-74.

**Time limitations for demanding records.** - The time limitation placed upon a representative of the labor commission, or a district attorney acting on his request, in demanding the records of an employer to determine whether a violation exists under the New Mexico wage and hour laws is two years, if the purpose for demanding the records is to charge the employer in a criminal case; and four years, if the purpose is for bringing a civil action under the act against the employer. 1957-58 Op. Att'y Gen. No. 57-74.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 122 et seq.; 48A Am. Jur. 2d Labor and Labor Relations § 4436 et seq.

51A C.J.S. Labor Relations §§ 598 to 617.

### **50-4-10. Forfeiture and penalties.**

Any employer who shall violate any provision of this act [50-4-1 to 50-4-12 NMSA 1978] or fail to comply with any provision of this act, shall be guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not less than twenty-five dollars [(\$25.00)] nor more than fifty dollars [(\$50.00)] for each separate offense, or by imprisonment of not less than ten days nor more than ninety days, or by both such fine and imprisonment. In case the employer is a corporation the fine hereinbefore provided shall be assessed against said corporation as a penalty.

**History:** Laws 1937, ch. 109, § 11; 1941 Comp., § 57-311; 1953 Comp., § 59-3-11.

### **50-4-11. [Wage claims and liens to secure claims; assignment to director of the labor and industrial division for collection.]**

The labor commissioner [director of the labor and industrial division] shall have power and authority to take assignments of wage claims, of employees against employers, and shall also have power to take assignments of liens upon real or personal property securing the claims of employees and laborers, and shall have power and authority to prosecute actions for the collection of such claims and for the foreclosure of liens of such persons securing such claims of persons, who, in the judgment of the labor commissioner [director], are entitled to the services of the labor commissioner [director], and who, in his judgment, have claims or liens or both which are valid and enforceable in the courts. In cases where the commissioner [director] has taken assignments of labor claims which are lienable under the lien laws of the state of New Mexico he shall have power to join any number of claimants in one statement of claim or lien, and in case of suit to join any number of claimants in one cause of action.

**History:** Laws 1937, ch. 109, § 12; 1941 Comp., § 57-312; Laws 1945, ch. 48, § 1; 1953 Comp., § 59-3-12.

## **ANNOTATIONS**

**Cross-references.** - As to actions by employees under Minimum Wage Act, see 50-4-26 NMSA 1978.

As to acknowledgements for wage and salary assignments, see 14-13-11 NMSA 1978.

As to joinder of claims, see Rule 1-018 SCRA 1986.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4494.

Assignability of statutory claim against employer for nonpayment, 48 A.L.R.2d 1385.

**50-4-12. [Wage claim actions by director of the labor and industrial division; costs; jurisdiction; district attorney to represent director of the labor and industrial division when necessary; appeals.]**

A. In all actions brought by the labor commissioner [director of the labor and industrial division] as assignee under the provisions of the preceding section [50-4-11 NMSA 1978] the labor commissioner [director] shall be entitled to free process and shall not be obligated or required to give any bond or other security for costs.

B. Any sheriff, constable or other officer requested by the labor commissioner [director] to serve any summons, writ, complaint or order shall do so without requiring the labor commissioner [director] to advance the fees or furnish any security or bond therefor.

C. Where the claim or claims are less, or when joined together are less in the aggregate, than the sum of two hundred dollars [(\$200)], the labor commissioner [director] may institute action therefor against the employer in any justice of the peace court [magistrate court] having jurisdiction, without referring the same to the district attorney. In the event that during the course of the proceedings an attorney at law to represent the labor commissioner [director] becomes necessary, or in his judgment advisable, it shall be his duty to notify the district attorney of the pendency of said cause, and the date of the hearing thereof; and it shall be the duty of said district attorney to appear by himself or his assistant in said justice of the peace court [magistrate court], and represent said labor commissioner [director] in such cause. In the event such cause is appealed by the state labor commissioner [director], or docketed in the district court for judgment, no security for costs shall be required or fees charged to the commissioner [director] for court costs or sheriff's fees in serving process.

**History:** Laws 1937, ch. 109, § 13; 1941 Comp., § 57-313; Laws 1945, ch. 48, § 2; 1953 Comp., § 59-3-13.

**ANNOTATIONS**

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Jurisdiction, etc., of justices of the peace transferred.** - The office of justice of the peace has been abolished, and the jurisdiction, powers and duties have been transferred to the magistrate court. See 35-1-38 NMSA 1978.

**Meaning of "bond".** - Under Subsection A of this section, the word "bond" relates only to the costs of a proceeding and relieves labor commissioner (now director) from giving a cost bond under the provisions of 39-2-14 NMSA 1978, and the word "bond" in Subsection B refers only to guaranteeing the fees of the sheriff or other officer. *Cal-M, Inc. v. McManus*, 73 N.M. 91, 385 P.2d 954 (1963).

**But not waiver of bond in attachment proceeding.** - 50-4-11 NMSA 1978 and this section relating to wage-claim actions by the labor commissioner do not waive the requirement for the furnishing of a bond in an attachment proceeding under 42-9-4 and 42-9-7 NMSA 1978. *Cal-M, Inc. v. McManus*, 73 N.M. 91, 385 P.2d 954 (1963).

### **50-4-13. [Hours of employment; eating establishments.]**

Any person or persons, firm, association or corporation, owning any hotel, restaurant, cafe or eating house within this state, shall not be allowed to cause any male employee therein to labor more than ten hours in any twenty-four hours of any one day, nor more than seventy hours in any one week of seven days.

The hours of labor may be so arraigned [arranged] so as to permit the employment of any male employee so engaged at any time so that they shall not work more than ten hours in any twenty-four hours of any one day, nor more than seventy hours in any one week of seven days.

**History:** Laws 1933, ch. 149, § 3; 1941 Comp., § 57-314; 1953 Comp., § 59-3-14.

#### **ANNOTATIONS**

**Cross-references.** - As to maximum hours for females, see 50-5-1 NMSA 1978 et seq.

As to maximum hours for children under fourteen, see 50-6-3 NMSA 1978.

For equal rights amendment, see N.M. Const., art. II, § 18.

**Constitutionality of former sections.** - The first two sections of this act (Laws 1933, ch. 149, §§ 1, 2), relating to employment of males for not more than eight of 24 hours and for not more than 48 hours of a six day week, were declared unconstitutional in *State v. Henry*, 37 N.M. 536, 25 P.2d 204 (1933). Prior compilers retained Laws 1933, ch. 149, §§ 3 to 8, in spite of the holding that Laws 1933, ch. 149, §§ 1 and 2, are unconstitutional, since there has been a shift of opinion in this country on the question whether such statutes violate the freedom to contract guaranteed by the due process clause; Laws 1933, ch. 149, §§ 3 to 8, are compiled as 50-4-13 to 50-4-18 NMSA 1978).

**This section applies to any or all employees of a hotel**, including bellboys, desk clerks, chamber maids, etc. 1953-54 Op. Att'y Gen. No. 5704.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4422.

Necessity in indictment charging violation of statute regarding wages or hours of labor of naming particular employees, 81 A.L.R. 76.



Constitutionality of statute limiting hours of labor in private industry, 90 A.L.R. 814.

Waiver or loss of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 A.L.R. 842, 129 A.L.R. 1145.

51B C.J.S. Labor Relations §§ 1192 to 1203.

#### **50-4-14. [Emergency cases; hours permitted; rate for excessive hours.]**

Nothing in Section 3 [50-4-13 NMSA 1978] of this act, shall be construed so as to prevent work in excess of ten hours per day in emergency cases; provided that in no one week of seven days shall there be permitted more than seventy-four hours of labor, and provided that work in excess of seventy hours of labor in any one week of seven days, shall be paid for on the basis of time and one-half for such excess.

**History:** Laws 1933, ch. 149, § 4; 1941 Comp., § 57-315; 1953 Comp., § 59-3-15.

#### **ANNOTATIONS**

**Cross-references.** - As to time-and-a-half for more than 40 hours under the Minimum Wage Act, see 50-4-22 NMSA 1978.

As to time-and-a-half for females for more than 40 hours, see 50-5-1 NMSA 1978.

As to time-and-a-half for females for more than 48 hours, see 50-5-7 NMSA 1978.

As to time-and-a-half for more than 56 hours for female transportation company employees, see 50-5-14 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4260 et seq.

51B C.J.S. Labor Relations § 1206.

#### **50-4-15. [Uniform time for beginning work; notice of change.]**

The beginning of the day of labor shall be uniform as provided for by the rules or regulations governing to [the] place of employment; provided, however, that in case any change in the time of the beginning of the day of labor is desired, it shall be the duty of the management of such an establishment, to notify such employee of such change, on the day prior to such change contemplated, said notice shall be served during the working day.

**History:** Laws 1933, ch. 149, § 5; 1941 Comp., § 57-316; 1953 Comp., § 59-3-16.

## ANNOTATIONS

**Cross-references.** - As to uniform time for beginning work for females, see 50-5-3 NMSA 1978.

### **50-4-16. [Time records; inspection.]**

Every employer to whom this act [50-4-13 to 50-4-18 NMSA 1978] applies shall be required to keep a time record showing the number of hours each male employee worked each day.

Such record shall be open at all reasonable hours to the inspection of the state labor commissioner [director of the labor and industrial division], his agents or agent, record of which is required to be kept as herein provided for.

**History:** Laws 1933, ch. 149, § 6; 1941 Comp., § 57-317; 1953 Comp., § 59-3-17.

## ANNOTATIONS

**Cross-references.** - As to time records and inspection thereof for women employees, see 50-5-8, 50-5-17 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**This section applies to any and all employees of a hotel,** including bellboys, desk clerks, chambermaids, etc. 1953-54 Op. Att'y Gen. No. 5704.

### **50-4-17. [Failure to keep record or comply with act; penalty.]**

The failure of any employer [any employer who fails] to keep such a record, or [makes] any false entry therein, or the failure [fails] to comply with the provisions of this act [50-4-13 to 50-4-18 NMSA 1978], shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than seventy-five dollars [(\$75.00)], or more than three hundred dollars [(\$300)] for each offense.

**History:** Laws 1933, ch. 149, § 7; 1941 Comp., § 57-318; 1953 Comp., § 59-3-18.

### **50-4-18. [Disposition of fines.]**

All fines collected for violation of this act [50-4-13 to 50-4-18 NMSA 1978] shall be deposited with the state treasurer, and be covered in the free textbook fund.

**History:** Laws 1933, ch. 149, § 8; 1941 Comp., § 57-319; 1953 Comp., § 59-3-19.

## ANNOTATIONS

**Compiler's note.** - N.M. Const., art. XII, § 4, provides that all fines and forfeitures collected under general laws shall constitute part of the current school fund of the state.

### **50-4-19. Declaration of state public policy.**

It is declared to be the policy of this act (1) to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency and general well-being, and (2) to safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not provide adequate standards of living.

**History:** 1953 Comp., § 59-3-20, enacted by Laws 1955, ch. 200, § 1.

#### **ANNOTATIONS**

**Cross-references.** - As to minimum wages on public works, see 13-4-11 to 13-4-17 NMSA 1978.

**Meaning of "this act".** - The words "this act" refer to Laws 1955, ch. 200, the unrepealed sections of which are compiled herein as 50-4-19, 50-4-21, 50-4-22, 50-4-25, 50-4-26, 50-4-28, 50-4-29 NMSA 1978.

### **50-4-20. Short title.**

Sections 50-4-19 through 50-4-30 NMSA 1978 may be cited as the "Minimum Wage Act".

**History:** 1953 Comp., § 59-3-20.1, enacted by Laws 1963, ch. 227, § 1.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Labor and Labor Relations § 2551 et seq.

51B C.J.S. Labor Relations § 1017 et seq.

### **50-4-21. Definitions.**

As used in the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978]:

A. "employ" includes suffer or permit to work;

B. "employer" includes any individual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time, acting directly or indirectly in the interest of an employer in

relation to any employee, but shall not include the United States, the state or any political subdivision thereof; and

C. "employee" includes any individual employed by any employer, but shall not include:

(1) any individual employed in domestic service in or about a private home;

(2) any individual employed in a bona fide executive, administrative or professional capacity and foremen, superintendents and supervisors;

(3) any individual employed by the United States or by the state or any political subdivision thereof;

(4) any individual engaged in the activities of an educational, charitable, religious or nonprofit organization where the employer-employee relationship does not, in fact, exist or where the services rendered to such organizations are on a voluntary basis. The employer-employee relationship shall not be deemed to exist with respect to any individual being served for purposes of rehabilitation by a charitable or nonprofit organization, notwithstanding the payment to the individual of a stipend based upon the value of the work performed by the individual;

(5) salesmen or employees compensated upon piecework, flat rate schedules or commission basis;

(6) students regularly enrolled in primary or secondary schools working after school hours or on vacation;

(7) registered apprentices and learners otherwise provided by law;

(8) persons eighteen years of age or under who are not students in a primary, secondary, vocational or training school;

(9) persons eighteen years of age or under who are not graduates of a secondary school;

(10) persons employed by ambulance services;

(11) G.I. bill trainees while under training;

(12) seasonal employees of any employer obtaining and holding a valid certificate issued annually by the state labor commissioner [director of the labor and industrial division]. The certificate shall state the job designations and total number of employees to be exempted. In approving or disapproving an application for a certificate of exemption, the commissioner shall consider the following:

(a) whether such employment shall be at an educational, charitable or religious youth camp or retreat;

(b) that such employment will be of a temporary nature;

(c) that the individual will be furnished his room and board in connection with such employment, or if the camp or retreat is a day camp or retreat, the individual will be furnished board in connection with such employment;

(d) the purposes for which the camp or retreat is operated;

(e) the job classifications for the positions to be exempted; and

(f) any other factors that the commissioner deems necessary to consider;

(13) any employee employed in agriculture:

(a) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor;

(b) if such employee is the parent, spouse, child or other member of his employer's immediate family; for the purpose of this subsection, employer shall include the principal stockholder of a family corporation;

(c) if such employee:

1) is employed as a hand-harvest laborer and is paid on a piece-rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment;

2) commutes daily from his permanent residence to the farm on which he is so employed; and

3) has been employed in agriculture less than thirteen weeks during the preceding calendar year;

(d) if such employee, other than an employee described in Subparagraph (c) of this paragraph:

1) is sixteen years of age or under and is employed as a hand-harvest laborer, is paid on a piece-rate basis in an operation which has been, and is generally recognized as having been, paid on a piece-rate basis in the region of employment;

2) is employed on the same farm as his parent or person standing in the place of his parent; and

3) is paid at the same piece-rate as employees over age sixteen are paid on the same farm; or

(e) if such employee is principally engaged in the range production of livestock; or

(14) employees of charitable, religious or nonprofit organizations who reside on the premises of group homes operated by such charitable, religious or nonprofit organizations for mentally retarded or emotionally or developmentally disabled persons.

**History:** 1953 Comp., § 59-3-21, enacted by Laws 1955, ch. 200, § 2; 1963, ch. 227, § 2; 1965, ch. 121, § 1; 1967, ch. 188, § 1; 1971, ch. 232, § 1; 1973, ch. 392, § 1; 1975, ch. 71, § 1; 1975 (1st S.S.), ch. 3, § 1; 1977, ch. 214, § 1; 1979, ch. 269, § 1; 1983, ch. 311, § 1.

## ANNOTATIONS

**Scope of coverage.** - A desk clerk is a person employed in an establishment coming within the definition of service establishment. Unless the desk clerk can bring himself within the exceptions of Subsection C, Paragraphs (1) to (12) [now Paragraphs (1) to (7), (10) to (14)], he certainly is a service employee. 1955-56 Op. Att'y Gen. No. 6338.

A retail sales clerk, employed for a 48-hour week, paid a minimum weekly wage of \$30, plus commissions on sales, is not exempt from the Minimum Wage Act. 1957-58 Op. Att'y Gen. No. 57-248.

A nonprofit organization, furnishing working mothers with child day care services, where mothers pay for services on the basis of financial ability and the nursery is directed and staffed by a supervisor and several other persons who are paid for their services, creates an employer-employee relationship. The employees are persons who devote full time and energy to providing services for salaries or wages and are not exempt under Subsection C(4) of this section. 1968 Op. Att'y Gen. No. 68-4.

**And tips may not be included in determining minimum wage.** - Bellhops come under the provisions of this section as service employees, entitled to \$.50 per hour as a minimum wage, but in the absence of an explicit understanding between parties, tips belong to the bellhop and cannot be included in determining minimum wage. 1955-56 Op. Att'y Gen. No. 6309.

**No exemption for irrigation district employees.** - If immunity from suit and exemption from taxation are not necessary to carry out the purposes for which irrigation districts are organized, exemption from paying the minimum wage to employees of the district is not necessary for such a purpose. 1967 Op. Att'y Gen. No. 67-90.

**Unless employed in agriculture.** - Under certain situations one employed to supply water to be used for agricultural purposes may be employed in agriculture and therefore the employer would be exempt from the provisions of the Minimum Wage Act. It is a

question of fact whether this would include specific employees of irrigation districts. 1967 Op. Att'y Gen. No. 67-90.

**Piece-work basis employees exempt.** - The compensation of employees for the separation of mica on the basis of so much per 100 or 200 pounds constitutes the employment of labor on a piece-work basis and is, therefore, exempt from the requirements of the New Mexico wage and hour laws. 1957-58 Op. Att'y Gen. No. 58-204.

**Goodwill workers may not be employees under this section.** 1968 Op. Att'y Gen. No. 68-2.

**Two businesses not single employer.** - The fact that the two businesses occupy proximate premises or even the same premises does not make them a single employing unit. 1957-58 Op. Att'y Gen. No. 57-173.

**Workmen's compensation cases not considered in construing meaning of "work".** - In arguing the meaning of "work" in the context of the Minimum Wage Act, workmen's compensation cases should not be considered because they deal with statutory definitions which differ from the definitions in the Minimum Wage Act. *Garcia v. American Furn. Co.*, 101 N.M. 785, 689 P.2d 934 (Ct. App. 1984).

**Coaching and managing employer's softball team not equivalent to "employment"** by that employer for purposes of the Minimum Wage Act. *Garcia v. American Furn. Co.*, 101 N.M. 785, 689 P.2d 934 (Ct. App. 1984).

**Hospital employees.** - Hospitals did not have to pay their employees the hourly wage rate prescribed by the 1963 Minimum Wage Act because hospital employees were not covered by the minimum wage provision pertaining to "employees". 1963-64 Op. Att'y Gen. No. 63-67.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Substantial evidence to support finding that worker was administrative employee exempted from act.** - See *Valentine v. Bank of Albuquerque*, 102 N.M. 489, 697 P.2d 489 (1985).

**Law reviews.** - For note, "Public Labor Disputes - A Suggested Approach for New Mexico," see 1 N.M. L. Rev. 281 (1971).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Who is employed in "professional capacity," within exemption, under 29 USCS § 213(a)(1), from minimum wage and maximum hours provisions of Fair Labor Standards Act, 77 A.L.R. Fed. 681.

What constitutes "amusement or recreational establishment" within meaning of seasonal amusement exemption from Fair Labor Standards Act (29 USCS § 213(a)(3)), 88 A.L.R. Fed. 880.

## **50-4-22. Minimum wages.**

A. Every employer, except as provided in Section 50-4-21 NMSA 1978, shall pay the minimum wage rate of \$4.25 an hour excepting that an employer furnishing food, utilities, supplies or housing to an employee who is engaged in agriculture may deduct the reasonable value of such furnished items from any wages due to the employee.

B. All employees covered by Subsection A of this section who customarily and regularly receive more than thirty dollars (\$30.00) a month in tips shall be paid a minimum hourly wage of two dollars twelve and one-half cents (\$2.125). The employer may consider tips as part of wages, but such a wage credit shall not exceed fifty percent of the minimum wage. All tips received by such employees shall be retained by the employee, except that nothing herein shall prohibit the pooling of tips among employees.

C. No employee covered by the provisions of Subsection A of this section shall be required to work more than forty hours in any week of seven days, unless he is paid one and one-half times his regular hourly rate of pay for all hours worked in excess of forty hours.

**History:** 1953 Comp., § 59-3-22, enacted by Laws 1955, ch. 200, § 3; 1957, ch. 161, § 1; 1963, ch. 227, § 3; 1965, ch. 121, § 2; 1967, ch. 188, § 2; 1973, ch. 392, § 2; 1975 (1st S.S.), ch. 3, § 2; 1979, ch. 269, § 2; 1983, ch. 59, § 1; 1993, ch. 217, § 1.

### **ANNOTATIONS**

**Cross-references.** - As to time-and-a-half for more than 40 hours for females, see 50-5-1 NMSA 1978.

As to time-and-a-half for more than 48 hours for females, see 50-5-7 NMSA 1978.

As to time-and-a-half for more than 56 hours for female transportation company employees, see 50-5-14 NMSA 1978.

**The 1993 amendment,** effective July 1, 1993, rewrote this section to the extent that a detailed comparison is impracticable.

**Meaning of "this act".** - The term "this act", referred to in the introductory paragraph in Subsection A, first appeared in Laws 1967, ch. 188, presently compiled as 50-4-21, 50-4-22 and 50-4-25 to 50-4-27 NMSA 1978. However, as used in this section, "this act" apparently means the Minimum Wage Act, which appears as 50-4-19 to 50-4-30 NMSA 1978.



**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4188 et seq.

Waiver of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 A.L.R. 842, 129 A.L.R. 1145.

Validity of minimum wage statutes relating to private employment, 39 A.L.R.2d 740.

Tips as wages, 65 A.L.R.2d 974.

Vacation pay rights of private employees not covered by collective labor contract, 33 A.L.R.4th 264.

Who is executive, administrator, supervisor, or the like, under exemption for such employees from state minimum wage and overtime pay statutes, 85 A.L.R.4th 519.

Employee training time as exempt from minimum wage and overtime requirements of Fair Labor Standards Act, 80 A.L.R. Fed. 246.

51B C.J.S. Labor Relations § 1017 et seq.

**50-4-23. Handicapped persons; minimum wage; labor commissioner [director of the labor and industrial division] powers and duties.**

A. The state labor commissioner [director of the labor and industrial division], to the extent necessary in order to prevent curtailment of opportunities for employment, shall, by regulation, provide for the employment under special certificates of individuals, including individuals employed in agriculture, whose earning or productive capacity is impaired by physical or mental deficiency or injury, at wages which are lower than the minimum wage applicable under Section 50-4-22 NMSA 1978, but not less than fifty percent of such wage.

B. The state labor commissioner [director], pursuant to his regulations and upon certification of any state agency administering or supervising the administration of vocational rehabilitation services, may issue special certificates, which allow the holder thereof to work at wages which are less than those required by Subsection A of this section and which are related to the workers' productivity, for the employment of:

(1) handicapped workers engaged in work which is incidental to training or evaluation programs; and

(2) multihandicapped individuals and other individuals whose earning capacity is so severely impaired that they are unable to engage in competitive employment.

C. The state labor commissioner [director] may, by regulation or order, provide for the employment of handicapped individuals in work activities centers under special certificates at wages which are less than the minimums applicable under Section 59-3-22 New Mexico Statutes Annotated, 1953 Compilation, [50-4-22 NMSA 1978] or less than that prescribed in Subsection A of this section, and which constitute equitable compensation for such individuals. As used in this subsection, "work activities centers" means centers planned and designed exclusively to provide therapeutic activities for handicapped persons whose physical or mental impairment is so severe as to make their productive capacity inconsequential.

D. The state agency administering or supervising the administration of vocational rehabilitation may issue a temporary certificate for a period not to exceed ninety days pursuant to Subsections A, B and C of this section and may request an extension of the certification by the state labor commissioner [director] when it is determined that the severity of disability of an individual or circumstances warrants an extension of the certification.

**History:** 1953 Comp., § 59-3-22.1, enacted by Laws 1967, ch. 242, § 1.

### ANNOTATIONS

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

There was no 59-2-22, 1953 Comp., referred to in the first sentence in Subsection C. The correct reference seems to be 59-3-22, 1953 Comp., which appears as 50-4-22 NMSA 1978.

**Legislative intent.** - This section does not use the term "employee" in describing those intended to be covered by its provisions. The legislature undoubtedly was aware that a true employer-employee relationship does not in fact exist between an organization such as goodwill industries and its handicapped workers and avoided the "employee" terminology to assure coverage for these workers. 1968 Op. Att'y Gen. No. 68-2.

**Handicapped within scope of section.** - Goodwill's handicapped workers are within the scope of this section and may not be employees under 50-4-21 C(4) NMSA 1978. 1968 Op. Att'y Gen. No. 68-2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Charity-sponsored work programs for handicapped persons as subject to provisions of National Labor Relations Act (29 USCS § 141 et seq.), 68 A.L.R. Fed. 905.

### **50-4-24. Employers exempt from overtime provisions for certain employees.**

Any employer of workers engaged in the ginning of cotton for market, in any place of employment located within a county where cotton is grown in commercial quantities,

and each employee is employed for a period of not more than fourteen weeks in the aggregate in any calendar year, is exempt from the overtime provisions of Subsection D of Section 50-4-22 NMSA 1978.

**History:** 1953 Comp., § 59-3-22.2, enacted by Laws 1975, ch. 275, § 1.

### **ANNOTATIONS**

**Compiler's note.** - The reference to Subsection D of 50-4-22 NMSA 1978 seems incorrect, since Subsection C of 50-4-22 NMSA 1978 now relates to overtime following the 1993 amendment to that section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Who is executive, administrator, supervisor, or the like, under exemption for such employees from state minimum wage and overtime pay statutes, 85 A.L.R.4th 519.

### **50-4-25. Posting of summary of the act.**

Every employer subject to the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978] shall keep a summary of it, furnished by the labor commissioner [director of the labor and industrial division] without charge, posted in a conspicuous place on or about the premises wherein any person subject to the Minimum Wage Act is employed, and the summary shall clearly and conspicuously set forth the current minimum wage.

**History:** 1953 Comp., § 59-3-23, enacted by Laws 1955, ch. 200, § 4; 1967, ch. 188, § 3; 1969, ch. 88, § 1.

### **ANNOTATIONS**

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

### **50-4-26. Enforcement.**

A. Penalties:

(1) any employer who violates any of the foregoing provisions shall be deemed guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars (\$25) or more than three hundred dollars (\$300) or by imprisonment for not less than ten nor more than ninety days or by both such fine and imprisonment;

(2) it shall be the duty of the state labor commissioner [director of the labor and industrial division] to enforce and prosecute violations of the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978]. The labor commissioner [director] is hereby empowered to institute in the name of the state of New Mexico an action in the district court of the county wherein the employer who has failed to comply with the Minimum Wage Act resides, or has his principal office or place of business, for the purpose of prosecuting

violations. It shall be the duty of the district attorney for the district wherein any violation hereof occurs to aid and assist the labor commissioner [director] in the prosecution thereof.

**B. Employees' remedies:**

(1) any employer who violates any provision of Section 50-4-22 NMSA 1978 shall be liable to the employees affected in the amount of their unpaid minimum wages, as the case may be, and in an additional equal amount as liquidated damages;

(2) action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf [behalf] of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action before and in behalf of all employees similarly situated.

The court in any action brought under Paragraph (2) shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action and reasonable attorneys' fees to be paid by the defendant. In any proceedings brought pursuant to the provisions of this section, the employee shall not be required to pay any filing fee or other court costs necessarily incurred in such proceedings.

**History:** 1953 Comp., § 59-3-24, enacted by Laws 1955, ch. 200, § 5; 1967, ch. 188, § 4.

## **ANNOTATIONS**

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4188 et seq.

73A C.J.S. Public Administrative Law and Procedure § 172 et seq.

### **50-4-27. Authority of labor commissioner [director of the labor and industrial division] to promulgate rules; hearing on rules; notice; publication.**

The state labor commissioner [director of the labor and industrial division] shall have the authority to promulgate and issue rules and regulations necessary to administer and accomplish the purposes of the Minimum Wage Act [50-4-19 to 50-4-30 NMSA 1978]. Such rules and regulations shall be adopted after notice and public hearing. A copy of the notice of hearing together with a copy of the proposed regulations shall be filed with the librarian of the supreme court library at least twenty days prior to the hearing. In addition, a copy of the notice of hearing shall be sent to all known interested persons. Any interested person shall have the right to appear and present evidence.

**History:** 1953 Comp., § 59-3-24.1, enacted by Laws 1967, ch. 188, § 5.

### **ANNOTATIONS**

**Cross-references.** - For State Rules Acts, see Chapter 14, Article 4 NMSA 1978.

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 152 et seq.

73 C.J.S. Public Administrative Law and Procedure § 87 et seq.

### **50-4-28. Right of collective bargaining.**

Nothing in this act shall be deemed to interfere with, impede or in any way diminish the right of employees to bargain collectively with their employers through representatives of their own choosing in order to establish wages or other conditions of work in excess of the applicable minimum under the provisions of this act.

**History:** 1953 Comp., § 59-3-25, enacted by Laws 1955, ch. 200, § 6.

### **ANNOTATIONS**

**Meaning of "this act".** - See same catchline in notes to 50-4-19 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Failure to pursue or exhaust remedies under union contract as affecting employee's right of state civil action for retaliatory discharge, 32 A.L.R.4th 350.

Collective bargaining agreement as restricting right to engage in concerted activities, other than striking or picketing, under § 7 of National Labor Relations Act (29 USCS § 157), 69 A.L.R. Fed. 812.

Employer's duty to furnish wage information to employees' representative under National Labor Relations Act, 112 A.L.R. Fed. 81.

### **50-4-29. Relation to other laws.**

Any standards relating to minimum wage, maximum hour or other working conditions in effect at the date of the passage of this act by or under any other law of this state, which are more favorable to employees than those applicable to such employees under this act, shall not be deemed to be amended, rescinded or otherwise affected by this act but shall continue in full force and effect.

**History:** 1953 Comp., § 59-3-26, enacted by Laws 1955, ch. 200, § 7.

## ANNOTATIONS

**Meaning of "this act".** - See same catchline in notes to 50-4-19 NMSA 1978.

### **50-4-30. Daily maximum hours of employment; exceptions.**

A. No employee other than a fireman, law enforcement officer or farm or ranch hand whose duties require them to work longer hours, or employees primarily in a stand-by position, shall be required to work for any employer within the state more than sixteen hours in any one day of twenty-four hours except in emergency situations.

B. Any person violating any of the provisions of this act [section] shall be guilty of a misdemeanor.

**History:** 1953 Comp., § 59-3-27, enacted by Laws 1971, ch. 169, § 1.

## ANNOTATIONS

**Cross-references.** - As to maximum hours of employment for females, see 50-5-1 to 50-5-17 NMSA 1978.

As to eight-hour day in public employment, see N.M. Const., art. XX, § 19.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 4191 et seq.

What employers are within "hours of labor" statutes, 16 A.L.R. 537.

Constitutionality of statutes limiting hours of labor in private industry, 90 A.L.R. 814.

51B C.J.S. Labor Relations §§ 1186 to 1209.

## **ARTICLE 5 EMPLOYMENT OF WOMEN**

### **50-5-1. Maximum hours of labor for certain occupations; exemptions.**

No female shall be employed in any industrial or mercantile establishment, hotel, restaurant, cafe or eating house; or in any laundry, or in any office as a stenographer, clerk, bookkeeper or in any other clerical position; or in any place of amusement; or in any telephone or telegraph office, within the state more than eight hours in any one day of twenty-four hours, nor more than forty-eight hours in any one week of seven days. The provisions of this act [50-5-1 to 50-5-9 NMSA 1978] shall not apply to hospitals or sanitariums, or to registered or practical nurses wherever employed; or to midwives

while engaged in their duties as such; or to any female who signs a written agreement to work more than eight hours a day or more than forty hours a week; provided that every such agreement shall provide for any hourly rate of compensation equal to one and one-half times the regular hourly rate of pay, for each hour in excess of forty hours which are worked in any one week.

**History:** Laws 1933, ch. 148, § 1; 1939, ch. 196, § 1; 1941 Comp., § 57-401; 1953 Comp., § 59-5-1; Laws 1969, ch. 274, § 1.

## ANNOTATIONS

**Cross-references.** - As to time-and-a-half for more than 40 hours, see 50-4-22, 50-5-7 NMSA 1978.

As to hours of labor for telephone and telegraph office employees, see 50-5-6 NMSA 1978.

As to emergency overtime provisions being inapplicable to telephone and telegraph office employees, see 50-5-7 NMSA 1978.

As to emergency overtime provisions, see 50-5-7, 50-5-14 NMSA 1978.

As to hours of labor for transportation company employees, see 50-5-13 NMSA 1978.

For equal rights amendment, see N.M. Const., art. II, § 18.

**Limited application not intended.** - As a general rule the word "employee" is held not to apply to persons occupying positions of authority, or to officers or officials. If the statute read: "No female employee shall", etc., there would be a constrained feeling to read into the use of the word "employee" all the limitations that have been placed on that word in judicial reasoning. But the statute does not use the word "employee"; it says: "No female shall be employed. . . ". 1959-60 Op. Att'y Gen. No. 60-176.

**Scope of coverage.** - While a female manager of a hotel, motel or restaurant might not be included in the word "employee", if that word had been used in the statute, it seems indisputable that a woman manager is "employed", for she is hired to perform services, and is engaged by an employer. That being so, she is subject to the maximum hours regulations prescribed by this section, for there is no exemption for females employed in hotels, restaurants, cafes, eating houses, industrial or mercantile establishments, regardless of the capacity in which they are employed. 1959-60 Op. Att'y Gen. No. 60-176.

When the statute listed industrial or mercantile establishments, hotels, restaurants, cafes and eating houses, it meant that no female could be employed in those places, even in the capacity of manager of the office, or manager of the entire operation, except as prescribed by law. 1959-60 Op. Att'y Gen. No. 60-176.

**And in emergency cases.** - A cleaning establishment being a mercantile establishment may work its women employees in excess of eight hours per day in emergency cases, but for all excess work over 48 hours in any one week or seven days will have to be paid on the basis of time and a half. 1955-56 Op. Att'y Gen. No. 6197.

**But exemptions from coverage.** - A female dental assistant, if her activities are not entirely clerical, comes within the exemption provided in this section. The provisions of this section do not apply to dental assistants unless the work done by them is entirely clerical or stenographic. 1953-54 Op. Att'y Gen. No. 5744.

Since a woman podiatry assistant is not mentioned in this section, she is exempted from the female eight-hour law of this section. 1959-60 Op. Att'y Gen. No. 59-211.

The statute specifically exempts hospitals and sanitariums, registered and practical nurses wherever employed and midwives while engaged in their duties as such. The proviso exempts from the provisions of the section employees of any hospital or sanitarium, including clerks, cleaning women, etc. In other words these employees last mentioned can be made to work more than eight hours in any one day of 24 hours and more than 48 hours in any one week of seven days. 1953-54 Op. Att'y Gen. No. 5704.

**Not enforceable against some employers.** - This statute is unenforceable against those employers who meet the definition of an employer in Title 7 of the Civil Rights Act of 1964, so that such employer is not prohibited from employing a female in the state more than 48 hours in any one week. 1972 Op. Att'y Gen. No. 72-22.

**Employer violations.** - Any employer who works a female employee in a hotel, restaurant or cafe more than 48 hours in any one week of seven days, without a rest period of at least one day per week, is violating these provisions. 1953-54 Op. Att'y Gen. No. 6025.

**The state labor commissioner (now chief of labor and industrial board) has no jurisdiction over state officers,** departments or institutions relative to the employees thereof and has no authority to require such state agencies to comply with the provisions of the laws pertaining only to private business and industry. 1953-54 Op. Att'y Gen. No. 5703.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

Servant's right to compensation for extra work or overtime, 25 A.L.R. 218, 107 A.L.R. 705.

Constitutionality of statute limiting hours of labor of women in private industry, 90 A.L.R. 815.



Waiver or loss of statutory right to minimum wage or benefit of regulation as to hours of labor, 102 A.L.R. 842, 129 A.L.R. 1145.

51B C.J.S. Labor Relations § 1197.

### **50-5-2. Arrangement of hours; shifts restricted.**

Except as provided in Section 50-5-1 NMSA 1978, the hours of labor may be so arranged so as to permit the employment of any female so engaged, so that they shall not be employed more than eight hours in any twenty-four hours in any one day, nor more than forty-eight hours in any one week of seven days; provided, however, that the working day shall not be divided into more than three shifts.

**History:** Laws 1933, ch. 148, § 2; 1939, ch. 196, § 2; 1941 Comp., § 57-402; 1953 Comp., § 59-5-2; Laws 1969, ch. 274, § 2.

### **50-5-3. [Beginning time of working day to be uniform; changing; notice.]**

The beginning of the day shall be uniform as provided for by the rules or regulations governing the place of employment; provided, however, that in case any change in time of the beginning of the day of labor is desired, it shall be the duty of the management of such an establishment, to notify such an employee of said change, on the day prior to such change contemplated, said notice shall be served during the working day.

**History:** Laws 1933, ch. 148, § 3; 1941 Comp., § 57-403; 1953 Comp., § 59-5-3.

#### **ANNOTATIONS**

**Cross-references.** - As to notice of change of uniform time for beginning work, see 50-4-15 NMSA 1978.

### **50-5-4. [Exemptions from act; mealtime.]**

Nothing in Section 1 [50-5-1 NMSA 1978], shall be construed to apply to those so engaged as domestic servants, neither shall any portion of this act [50-5-1 to 50-5-9 NMSA 1978] be construed to apply to those so engaged in interstate commerce, where the hours of labor are governed by any act of congress of the United States, and mealtime shall not be included as a part of the working day; provided, however, that not less than thirty minutes shall be allowed for such mealtime.

**History:** Laws 1933, ch. 148, § 4; 1941 Comp., § 57-404; 1953 Comp., § 59-5-4.

#### **ANNOTATIONS**

**"Domestic servants"**. - "Domestic servants", as used in this section, does not include housekeepers, chambermaids, waitresses, etc. in hotels and eating houses. 1939-40 Op. Att'y Gen. 68.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Servant's right to compensation for extra work or overtime, 25 A.L.R. 218, 107 A.L.R. 705.

### **50-5-5. [Public utility employees; maximum hours; arrangement.]**

No female shall be engaged by any person, firm or corporation engaged in any public utility business, more than eight hours in any twenty-four hours of any one day, nor more than forty-eight hours in any one week of seven days.

The hours of labor shall be so arranged so as to permit the employment of any female at any time so that they [she] shall not work more than eight hours in any one day of twenty-four hours, nor more than forty-eight hours in any one week of seven days.

**History:** Laws 1933, ch. 148, § 5; 1939, ch. 196, § 3; 1941 Comp., § 57-405; 1953 Comp., § 59-5-5.

### **ANNOTATIONS**

**Cross-references.** - As to hours of labor of female public utility employees, see 50-5-13 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality of statute limiting hours of labor of women, 90 A.L.R. 815.

51B C.J.S. Labor Relations § 1197.

### **50-5-6. [Telephone and telegraph offices; hours of labor; emergencies.]**

No female shall be so employed in any telephone or telegraph office, except telephone and telegraph offices where five or less are employed, more than eight hours in any one day of twenty-four hours, nor more than forty-eight hours in any one week of seven days, where the hours of labor are between the hours of 7:00 a.m. and 10:00 p.m., nor more than fifty-four hours of labor in any one week of seven days where the hours of labor are between the hours of 10:00 p.m. and 7:00 a.m., and mealtime shall not be a part of the working day, and be it provided, that the provisions of this act [50-5-1 to 50-5-9 NMSA 1978] shall not apply in cases of extreme emergency resulting from fire, flood, storm, epidemic of sickness or any other extreme emergency that could not have been reasonably contemplated.

**History:** Laws 1933, ch. 148, § 6; 1941 Comp., § 57-406; 1953 Comp., § 59-5-6.

## ANNOTATIONS

**Cross-references.** - As to telephone and telegraph office employees, see 50-5-1 NMSA 1978.

**Not applicable to federally regulated employees.** - The provisions of this section do not apply to employees of telegraph department of a railroad such as the Santa Fe since they are employed in interstate commerce and congress has passed legislation which regulates their hours of service. 1941-42 Op. Att'y Gen. No. 4097.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality of statute limiting hours of labor of women in private industry, 90 A.L.R. 815.

51B C.J.S. Labor Relations § 1197.

### **50-5-7. [Emergencies; maximum hours; excess compensation.]**

Nothing in Section [Sections] 1 and 5 [50-5-1 and 50-5-5 NMSA 1978] of this act shall be construed so as to prevent work in excess of eight hours per day in emergency cases; provided, that in no one week of seven days, shall there be permitted more than fifty hours of labor, and provided that labor in excess of forty-eight hours in any one week of seven days, shall be paid for on the basis of time and one-half for such excess. Nothing in this section shall apply to females so engaged in any telephone anl [and] telegraph offices.

**History:** Laws 1933, ch. 148, § 7; 1939, ch. 196, § 4; 1941 Comp., § 57-407; 1953 Comp., § 59-5-7.

## ANNOTATIONS

**Cross-references.** - As to time-and-a-half for overtime under the Minimum Wage Act, see 50-4-22 NMSA 1978.

As to time-and-a-half for overtime for females, see 50-5-1, 50-5-14 NMSA 1978.

As to time-and-a-half for overtime for female transportation company employees, see 50-5-14 NMSA 1978.

### **50-5-8. [Time records; inspection.]**

Every employer to whom this act [50-5-1 to 50-5-9 NMSA 1978] applies, shall be required to keep a time record showing for each day the hours of labor of each employee so engaged.

Such time record shall be open at all reasonable hours to the inspection of the state labor commissioner [director of the labor and industrial division], his agent or agents, record of which is required to be kept as herein provided for.

**History:** Laws 1933, ch. 148, § 8; 1941 Comp., § 57-408; 1953 Comp., § 59-5-8.

#### **ANNOTATIONS**

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

#### **50-5-9. [Failure to keep record or comply with act; penalty; disposition of fines.]**

The failure of any employer [Any employer who fails] to keep such a record, or makes any false entry therein, or fails to comply with the provisions of this act [50-5-1 to 50-5-9 NMSA 1978], shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than seventy-five dollars [(\$75.00)], or more than three hundred dollars [(\$300)] for each offense.

All fines collected for violation of this act shall be deposited with the state treasurer, and be covered in the free textbook fund.

**History:** Laws 1933, ch. 148, § 9; 1941 Comp., § 57-409; 1953 Comp., § 59-5-9.

#### **ANNOTATIONS**

**Compiler's note.** - New Mexico Const., art. XII, § 4, provides that all fines and forfeitures collected under general laws shall constitute part of the current school fund of the state.

#### **50-5-10. [Providing of suitable seats for women employees required; notice.]**

That every employer owning or operating any factory, mine, mill, workshop, mechanical or mercantile establishment, laundry, hotel, restaurant, or rooming house, theater or moving-picture show, barbershop, telegraph or telephone or other office, express or transportation company, the superintendent of any state institution or any other establishment, institution or enterprise where females are employed, shall provide and furnish suitable seats, to be used by such employees when not engaged in the active duties of their employment, and shall give notice to all such female employees by posting in a conspicuous place, on the premises of such employment in letters not less than one inch in height, that all such female employees will be permitted to use seats when not so engaged.

**History:** Laws 1931, ch. 109, § 1; 1941 Comp., § 57-410; 1953 Comp., § 59-5-10.

## ANNOTATIONS

**The state insane asylum comes under the provisions of this law.** 1931-32 Op. Att'y Gen. 90.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 131 et seq.

### **50-5-11. [Penalty for failure to furnish suitable seats.]**

Any employer who shall violate Section one [1] [50-5-10 NMSA 1978] of this act shall be guilty of a misdemeanor and shall be punishable by a fine of not less than fifty dollars (\$50.00) nor more than two hundred dollars (\$200.00), each day constituting a separate offense.

**History:** Laws 1931, ch. 109, § 2; 1941 Comp., § 57-411; 1953 Comp., § 59-5-11.

### **50-5-12. [Duty of director of the labor and industrial division.]**

It shall be the duty of the labor commissioner [director of the labor and industrial division] to see that the provisions of this act [50-5-10 to 50-5-12 NMSA 1978] are enforced.

**History:** Laws 1931, ch. 109, § 3; 1941 Comp., § 57-412; 1953 Comp., § 59-5-12.

## ANNOTATIONS

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

### **50-5-13. [Express, transportation, public utility and common carrier companies; hours of labor.]**

No female shall be employed in this state by any person, firm or corporation engaged in any express or transportation or public utility business or by any common carrier more than nine hours during any one day or more than fifty-six hours during any one week. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than nine hours during the twenty-four hours of any day and mealtime shall not be included as a part of the working hours of the day.

**History:** Laws 1921, ch. 180, § 3; C.S. 1929, § 80-203; 1941 Comp., § 57-405 note; 1953 Comp., § 59-5-13.

## ANNOTATIONS

**Cross-references.** - As to hours of labor of female public utility employees, see 50-5-5 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality of statute limiting hours of labor of women in private industry, 90 A.L.R. 815.

### **50-5-14. [Emergencies.]**

Nothing in Section 3 [50-5-13 NMSA 1978] of this act shall be construed so as to prevent work in excess of nine hours a day in emergency cases, provided that in no one week of seven days shall there be permitted more than sixty hours of labor, and provided that work in excess of fifty-six hours of labor in any one week shall be paid for on a basis of time and one-half for such excess.

**History:** Laws 1921, ch. 180, § 6; C.S. 1929, § 80-206; 1941 Comp., § 57-405 note; 1953 Comp., § 59-5-14.

## **ANNOTATIONS**

**Cross-references.** - As to time-and-a-half for overtime under the Minimum Wage Act, see 50-4-22 NMSA 1978.

As to time-and-a-half for overtime for females, see 50-5-1, 50-5-7 NMSA 1978.

### **50-5-15. [Exemptions.]**

The provisions of this act [50-5-13 to 50-5-17 NMSA 1978] shall not apply to any female engaged in interstate commerce where the working hours of any such female so engaged are regulated by any act of congress of the United States.

**History:** Laws 1921, ch. 180, § 8; C.S. 1929, § 80-208; 1941 Comp., § 57-405 note; 1953 Comp., § 59-5-15.

### **50-5-16. [Penalties.]**

Any employer who shall violate any of the provisions of this act [50-5-13 to 50-5-17 NMSA 1978], or who shall permit or suffer any overseer, superintendent or other agent of any such employer to violate any of the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense in a sum not less than one hundred dollars (\$100.00) nor more than five hundred dollars (\$500.00).

**History:** Laws 1921, ch. 180, § 9; C.S. 1929, § 80-209; 1941 Comp., § 57-405 note; 1953 Comp., § 59-5-16.

## **50-5-17. [Records; failure to keep; penalty.]**

Every employer to whom this act [50-5-13 to 50-5-17 NMSA 1978] shall apply shall keep a time book or record showing for each day that his establishment is open, the hours during which each and every female in his employ to whom this act applies, is employed. Such time book or record shall be open at all reasonable hours to the inspection of either the district attorney of the district, or the sheriff of the county, wherein the employment took place, record of which is required to be kept as herein provided. The failure or omission to keep such record or a false statement contained therein, shall be punishable on conviction thereof by a fine of not less than twenty-five dollars (\$25.00) nor more than two hundred and fifty dollars (\$250.00) for each offense.

**History:** Laws 1921, ch. 180, § 10; C.S. 1929, § 80-210; 1941 Comp., § 57-405 note; 1953 Comp., § 59-5-17.

## **ARTICLE 6 EMPLOYMENT OF CHILDREN**

### **50-6-1. Children under fourteen; employment during school hours prohibited.**

No child under fourteen years of age shall be employed or permitted to labor at any gainful occupation during the hours during which the schools in the district in which the child resides are in session. No child under the age of fourteen years shall be employed at any gainful occupation when the school of the district in which such child resides is not in session unless such child obtains a permit certificate issued in the manner and by the authority herein directed.

**History:** Laws 1925, ch. 79, § 1; C.S. 1929, § 80-106; 1941 Comp., § 57-501; 1953 Comp., § 59-6-1; Laws 1973, ch. 115, § 1.

### **ANNOTATIONS**

**Cross-references.** - As to children over age twelve permitted to sell or deliver newspapers, see 50-6-16 NMSA 1978.

For constitutional provision regarding child labor, see N.M. Const., art. XX, § 10.

For Compulsory School Attendance Law, see 22-12-1 NMSA 1978 et seq.

**When employment permitted.** - During hours of the day when school is not in session a child under age 14 may be employed if a permit is given therefor pursuant to 50-6-7 NMSA 1978, but he may not be employed under any conditions during hours when school is in session. 1943-44 Op. Att'y Gen. No. 4479.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 48A Am. Jur. 2d Labor and Labor Relations § 3808 et seq.

Constitutionality of Child Labor Law, 12 A.L.R. 1216, 21 A.L.R. 1437.

Construction and application of Child Labor Law as regards exhibitions or entertainments by children, 72 A.L.R. 141.

What is manufacturing establishment within meaning of child labor laws, 96 A.L.R. 1353.

Constitutionality of statute or ordinance relating to child labor in streets, 152 A.L.R. 579.

Inclusion or exclusion of day of birth in computing one's age, 5 A.L.R.2d 1143.

Nonprofit charitable institutions as within operation of labor statutes, 26 A.L.R.2d 1020.

Liability insurer's duty to defend action as affected by illegal employment of children,.

Master's liability to servant injured by farm machinery, 67 A.L.R.2d 1120.

Workers' compensation statute as barring illegally employed minor's tort action, 77 A.L.R.4th 844.

43 C.J.S. Infants § 99.

## **50-6-2. Certificate for children fourteen to sixteen during school term.**

No child over the age of fourteen years and under the age of sixteen years shall be employed or permitted to labor at any gainful occupation during the term of the school of the district in which the child resides, unless the child has procured and filed [a] permit certificate as herein provided for.

**History:** Laws 1925, ch. 79, § 2; C.S. 1929, § 80-107; 1941 Comp., § 57-502; 1953 Comp., § 59-6-2; Laws 1973, ch. 115, § 2.

### **ANNOTATIONS**

**The Workers' Compensation Act covers adults and minors** of the age of sixteen and over. *Benson v. Export Equip. Corp.*, 49 N.M. 356, 164 P.2d 380 (1945).

**Exclusive remedy provided by Workers' Compensation Act.** - The Workers' Compensation Act (52-1-1 NMSA 1978 et seq.) provides an exclusive remedy so that no right of action for injuries exists under the common law where a minor who was legally employed before reaching sixteen years of age was injured after reaching that



age when provisions of the Workers' Compensation Act were applicable to him. *Benson v. Export Equip. Corp.*, 49 N.M. 356, 164 P.2d 380 (1945).

**But not when minor illegally employed.** - The Workers' Compensation Act (52-1-1 NMSA 1978 et seq.) contains no specific language bringing illegally employed minors within its terms, and so an illegally employed minor may pursue a common-law action against his employer for injuries sustained during such employment. *Maynerich v. Little Bear Enters., Inc.*, 82 N.M. 650, 485 P.2d 984 (1971).

**Employment contract of a illegally employed minor** is at least voidable, giving that minor employee the right to pursue a common-law action against the employer if the minor is injured in the employment. *Howie v. Stevens*, 102 N.M. 300, 694 P.2d 1365 (Ct. App. 1984).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Infants § 99.

### **50-6-3. Maximum hours for children under fourteen.**

No child under the age of fourteen years shall be employed or permitted to labor at any gainful occupation for more than forty-four hours in any one week, nor more than eight hours in any one day, except under special circumstances to be determined by the officer who issued the permit, but in no case shall such child be permitted to work more than forty-eight hours in any one week nor shall such child begin work before 7:00 a.m. nor continue after 9:00 p.m. of any one day.

**History:** Laws 1925, ch. 79, § 3; C.S. 1929, § 80-108; 1941 Comp., § 57-503; 1953 Comp., § 59-6-3; Laws 1973, ch. 115, § 3.

## **ANNOTATIONS**

**Cross-references.** - As to children over age twelve permitted to sell or deliver newspapers, see 50-6-16 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Constitutionality of statute limiting hours of labor of children in private industry, 90 A.L.R. 815.

43 C.J.S. Infants § 99; 51B C.J.S. Labor Relations §§ 1021, 1043.

### **50-6-4. Prohibited occupations for children under sixteen; exceptions.**

No child under the age of sixteen years shall be employed or permitted to labor at any of the following occupations or in any of the following positions: on or around belted machines while in motion; power-driven woodworking machines used for cutting, shaping, forming, surfacing, nailing, stapling, wire stitching, fastening or otherwise assembling, processing or printing wood or veneer; power-driven hoisting apparatus

with the exception that this section shall not prohibit the operation of an automatic elevator which is controlled by pushbuttons making leveling, holding, opening and closing of the car and hoistway doors entirely automatic; prohibited in or about plants, establishments or jobs using, manufacturing or storing explosives or articles containing explosive components; electronics jobs where the child is exposed to electrical hazards; in or about any establishment where malt or alcoholic beverages are manufactured, packed, wrapped or bottled; municipal firefighting whether using volunteers or paid employees; manufacture of goods for immoral purposes; nor in any employment dangerous to lives and limbs, or injurious to the health or morals of children under the age of sixteen years. Provided further, that the provisions of this act [50-6-1 to 50-6-14 NMSA 1978] shall not apply to children engaged in working with equipment in any school or place where manual training or science is taught while under supervision of an instructor. This provision shall not apply to apprenticeships under the supervision of a journeyman or instructor. Additional hazardous occupations not specifically listed in this section will be determined by the state child labor inspector following consultation with the employer who wishes to employ minors under sixteen years of age.

**History:** Laws 1925, ch. 79, § 5; C.S. 1929, § 80-110; 1941 Comp., § 57-505; Laws 1943, ch. 112, § 1; 1953 Comp., § 59-6-5; Laws 1973, ch. 115, § 4.

## ANNOTATIONS

**Common-law remedy for illegally employed minor.** - The Workers' Compensation Act (52-1-1 NMSA 1978 et seq.) contains no specific language bringing illegally employed minors within its terms, and so an illegally employed minor may pursue a common law action against his employer for injuries sustained during such employment. *Maynerich v. Little Bear Enters., Inc.*, 82 N.M. 650, 485 P.2d 984 (1971).

**Employment in violation of federal law still governed by Worker's Compensation Act.** - Suit for wrongful death of 16-year-old who died from injuries incurred while working for employer was barred because the case was governed by the Worker's Compensation Act, despite the fact that the employment of the child was in violation of the Fair Labor Standards Act. The legislature's legalization of employment for 16-year-old workers in this section reflects an intent that the exclusivity of the Worker's Compensation Act apply to such employment. *Boyd v. Permian Servicing Co.*, 113 N.M. 321, 825 P.2d 611 (1992).

### **50-6-5. Prohibited occupations for children under eighteen.**

No child under the age of eighteen years shall be employed or permitted to labor in any mine or quarry underground or at or about any place where explosives are used. However, children under the age of eighteen years but not under the age of fourteen years may be employed to separate mica if blasting is done during periods when there is nobody working, and the mica is subsequently removed from the blasting area to another site for operation.

**History:** Laws 1925, ch. 79, § 6; C.S. 1929, § 80-111; 1941 Comp., § 57-506; 1953 Comp., § 59-6-6; Laws 1973, ch. 115, § 5.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Infants § 99.

#### **50-6-6. Messengers under sixteen; prohibited hours of labor; exceptions.**

No person under the age of sixteen years shall be employed or permitted to labor as a messenger for a telegraph, telephone or messenger company in the distribution, transmission or delivery of goods or messages before 7:00 a.m. or after 9:00 p.m. of any day.

**History:** Laws 1925, ch. 79, § 7; C.S. 1929, § 80-112; 1941 Comp., § 57-507; Laws 1943, ch. 112, § 2; 1953 Comp., § 59-6-7; Laws 1973, ch. 115, § 6.

#### **ANNOTATIONS**

**Newspaper boy not covered.** - A newspaper delivery boy less than 16 years of age is not covered by this section, though he is covered by the restrictions as to hours of labor set forth in 50-6-3 NMSA 1978. 1941-42 Op. Att'y Gen. No. 3701.

#### **50-6-7. Labor permit certificates; issuance; authorized officials; application; contents; proof; copies; maximum term.**

A. Permit certificates shall be issued only by the school superintendents, school principals, designated issuing school officers or the director of the labor and industrial division of the labor department or the director's designee.

B. No permit certificate shall be issued to any child until satisfactory proof has been furnished that the work in which the child is to engage is not dangerous to the child nor injurious to his health or morals.

C. The application for the certificate must show that the child is in good physical health and that the work to be performed would not result in injury to the health, morals or mental development of the child. Satisfactory proof of the age of the child at the date of the application shall be furnished. In the case of children over the age of fourteen years and under the age of sixteen years, any application for the employment of children at any gainful occupation during the session hours of the school of the district in which the child resides shall set forth, in addition to the foregoing, the necessity to the family or the dependents of the child or for his own support of the income to be derived from the employment or labor.

D. Whenever the person authorized to issue the labor permit is satisfied that the provisions of this section have been complied with, he shall issue to the child a labor permit, keeping one copy on file and sending one copy of this permit to the labor and industrial commission.

E. No permit certificate shall be in force without renewal for a longer period than one year from the date of issuance.

**History:** Laws 1925, ch. 79, § 8; C.S. 1929, § 80-113; 1941 Comp., § 57-508; Laws 1943, ch. 112, § 3; 1953 Comp., § 59-6-8; Laws 1963, ch. 175, § 1; 1973, ch. 115, § 7; 1989, ch. 49, § 2.

### **ANNOTATIONS**

**The 1989 amendment**, effective June 16, 1989, in Subsection A substituted the comma following "principals" for "or" and added all of the language following "officers".

#### **50-6-8. Renewal of labor permits.**

The officer authorized to issue permits may renew any labor permit at the expiration thereof, for a period not exceeding one year upon a satisfactory showing upon the part of the child, its parent or guardian or person in loco parentis, that the provisions of Sections 50-6-1 through 50-6-16 NMSA 1978 are being complied with and that such child is in good health. Such extension of time shall be made by such officer writing upon the certificate the following words: "this certificate is extended for a period of . . . . days from this date" and by signing his or her name thereto.

**History:** Laws 1925, ch. 79, § 9; C.S. 1929, § 80-114; 1941 Comp., § 57-509; 1953 Comp., § 59-6-9; Laws 1973, ch. 115, § 8.

#### **50-6-9. Employer's records; form of permits.**

Whenever any child is employed or permitted to labor at any gainful occupation permitted by the laws of this state the employer of such child shall preserve on file the labor permit of such child and shall keep posted in a conspicuous place about the premises where such child is employed a list of all children there at work by virtue of labor permits. The form for all labor permits shall be prepared by and shall contain such information concerning the identity of the child as may be prescribed by the labor and industrial commission.

**History:** Laws 1925, ch. 79, § 10; C.S. 1929, § 80-115; 1941 Comp., § 57-510; 1953 Comp., § 59-6-10; Laws 1973, ch. 115, § 9.

#### **50-6-10. Inspection of certificates, records and premises by labor and industrial commission.**

All employment certificates and records and the premises where children are employed are subject to inspection by representatives of the labor and industrial commission. The commission may, for cause, cancel any labor permit with the concurrence of the officer issuing the permit but, in case they disagree, the district court may cancel the permit on complaint, setting forth the grounds therefor under the provisions of Sections 50-6-1 through 50-6-14 NMSA 1978.

**History:** Laws 1925, ch. 79, § 11; C.S. 1929, § 80-116; 1941 Comp., § 57-511; 1953 Comp., § 59-6-11; Laws 1963, ch. 175, § 2; 1973, ch. 115, § 10.

### **50-6-11. [Habitual presence of child under sixteen at a place of work during school hours; prima facie evidence of employment.]**

The frequent presence of any child under sixteen years of age, during school hours, at any place where workers are at work more or less habitually shall be prima facie evidence that such child is unlawfully engaged in labor, if no permit is exhibited.

**History:** Laws 1925, ch. 79, § 12; C.S. 1929, § 80-117; 1941 Comp., § 57-512; 1953 Comp., § 59-6-12.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 16 C.J.S. Constitutional Law § 124 et seq.

### **50-6-12. Penalties for violation of act.**

Whoever employs a child, or whoever having under his control a child, permits such child to be employed, in violation of any of the provisions of Sections 50-6-1 through 50-6-16 NMSA 1978, shall be guilty of a misdemeanor, and shall be fined not less than twenty-five dollars (\$25.00) nor more than three hundred dollars (\$300), and on default of the payment of such fine may be sentenced to the county jail for not less than five days nor more than fifteen days. Each violation of Sections 50-6-1 through 50-6-16 NMSA 1978 shall constitute a separate offense. In the event of a second conviction of employer for violation of Sections 50-6-1 through 50-6-16 NMSA 1978, the court trying the cause shall sentence such employer to the county jail for a period of not less than thirty days; and for any succeeding conviction for the like offense, the court trying the cause shall sentence the employer to imprisonment in the state penitentiary for a period of not less than one year nor more than two years.

**History:** Laws 1925, ch. 79, § 13; C.S. 1929, § 80-118; 1941 Comp., § 57-513; 1953 Comp., § 59-6-13; Laws 1973, ch. 115, § 11.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 43 C.J.S. Infants § 100.

### **50-6-13. [District court's jurisdiction.]**

The district courts are hereby given original jurisdiction in all cases of violations of the provisions of this act [50-6-1 to 50-6-14 NMSA 1978].

**History:** Laws 1925, ch. 79, § 14; C.S. 1929, § 80-119; 1941 Comp., § 57-514; 1953 Comp., § 59-6-14.

### **50-6-14. State child labor inspector; appointment; direction; qualifications.**

There shall be a state child labor inspector, appointed by and subject to the labor commissioner [director of the labor and industrial division]. The inspector must be qualified by special training and experience for this work and must pass a satisfactory examination given by the labor commissioner [director] for this purpose.

**History:** Laws 1925, ch. 79, § 15; C.S. 1929, § 80-120; 1941 Comp., § 57-515; 1953 Comp., § 59-6-15; Laws 1963, ch. 175, § 3.

## **ANNOTATIONS**

**Labor commissioner.** - See 50-1-1.5 NMSA 1978 and notes thereto.

### **50-6-15. Transfer of records.**

All records in the custody of the department of public welfare pertaining to the administration of Sections 50-6-1 through 50-6-14 NMSA 1978 shall be transferred to the labor and industrial commission.

**History:** 1953 Comp., § 59-6-15.1, enacted by Laws 1963, ch. 175, § 4.

### **50-6-16. Purpose; children over age twelve permitted to sell or deliver newspapers; exempt from other provisions of laws concerning employment of children; penalty.**

A. The purpose of this section is to provide children with an opportunity to develop business initiative and to promote in them a spirit of thrift and industry by encouragement of their employment in a particular situation where the child, parent and community will be benefited and which tends to prevent juvenile delinquency.

B. Children over age twelve shall be permitted to sell or deliver newspapers, with their parents' consent, during the school term or during vacation if the child is attending school as required by law and does not engage in such employment except at times when his presence is not required at school.

C. The employment of children in accordance with the provisions of this section shall not require a certificate as otherwise required under the provisions of Sections 50-6-1 and 50-6-2 NMSA 1978, nor shall the other provisions of Sections 50-6-1 through 50-6-11 NMSA 1978, apply to employment of a child in accordance with the provisions of this section.

D. Anyone who employs a child or anyone having under his control a child and permitting such child to be employed in violation of the provisions of this section shall be punished as provided under the provisions of Section 50-6-12 NMSA 1978.

**History:** 1953 Comp., § 59-6-16, enacted by Laws 1959, ch. 298, § 1.

## **ARTICLE 7 APPRENTICESHIP**

### **50-7-1. Declaration of policy.**

It is declared to be the policy of this act [50-7-1 to 50-7-4, 50-7-7 NMSA 1978]: to encourage the development of an apprenticeship system through the voluntary cooperation of management and labor and interested state agencies, and in cooperation with other states and the federal government; to provide for the establishment and furtherance of standards of apprenticeship to safeguard the welfare of apprentices; and to aid in the maintenance of an adequate skilled labor force.

**History:** 1953 Comp., § 59-7-13, enacted by Laws 1957, ch. 219, § 1.

### **ANNOTATIONS**

**Cross-references.** - For apprenticeship council, see 50-7-3 NMSA 1978.

**Generally.** - If a contractor voluntarily abides and complies with the provisions of this act or is a party to a valid apprenticeship contract the apprentice is entitled to the minimum wages for apprentices on public works, as provided by 13-4-11 NMSA 1978. 1955-56 Op. Att'y Gen. No. 6244.

In cases where a person is employed under theory of apprenticeship either under this statute or otherwise, and the employer does not comply with the indenture, educational training and other features of the apprenticeship law, then he is in violation thereof and the employee so misclassified has the right to demand the predetermined wages of 13-4-11 NMSA 1978 as a journeyman in that trade. 1955-56 Op. Att'y Gen. No. 6244.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 53 Am. Jur. 2d Master and Servant §§ 8 to 13.

6 C.J.S. Apprentices §§ 1 to 11.

## **50-7-2. Definitions.**

As used in this act [50-7-1 to 50-7-4, 50-7-7 NMSA 1978]: "apprentice" means a person at least sixteen years old who is covered by a written agreement with an employer, or with an association of employers or employees acting as agent for an employer, and approved by the state apprenticeship council, which apprentice agreement provides for not less than two thousand hours required for any given trade by reasonably continuous employment for such person, for his participation in an approved schedule of work experience through employment and for at least one hundred forty-four hours per year of related supplemental instruction.

**History:** 1953 Comp., § 59-7-14, enacted by Laws 1957, ch. 219, § 2; 1978, ch. 134, § 1.

## **50-7-3. Apprenticeship council.**

An "apprenticeship council", hereinafter referred to as the council, shall be appointed by the director of the labor and industrial division of the department of labor without regard to any other provisions of law regarding the appointment and compensation of employees of the state. It shall consist of three persons known to represent employers, three persons known to represent labor organizations, three public representatives and shall include, as ex-officio members without vote, the director of the labor and industrial division and the state supervisor of trade and industrial education. Persons appointed to the council must be familiar with apprenticeable occupations. The terms of office of the members of the council first appointed shall expire as designated by the director at the time of making the appointment: one representative each of employers, labor organizations and the public being appointed for one year; one representative each of employers, labor organizations and the public being appointed for two years and one representative each of employers, labor organizations and the public being appointed for three years. Thereafter, each member shall be appointed for a term of three years. Any member appointed to fill a vacancy occurring prior to the expiration of the term of his predecessor shall be appointed for the remainder of that term. Members of the council not otherwise compensated by public money shall be reimbursed for their official duties in accordance with the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] for attendance at not in excess of twelve meetings per year.

**History:** 1953 Comp., § 59-7-15, enacted by Laws 1957, ch. 219, § 3; 1977, ch. 252, § 28; 1978, ch. 134, § 2; 1979, ch. 204, § 11; 1991, ch. 198, § 1.

### **ANNOTATIONS**

**Cross-references.** - As to Public Works Apprenticeship and Training Act, see 13-14D-1 NMSA 1978 et seq.

As to Apprenticeship Assistance Act, see 21-19A-1 NMSA 1978 et seq.



**The 1991 amendment**, effective June 14, 1991, in the first sentence, substituted "director of the labor and industrial division of the department of labor" and "director of the labor and industrial division" for "commissioner of labor" in two places and substituted "labor organizations, three public representatives" for "employees, two public representatives" and rewrote the fourth sentence which read "The terms of office of the members of the council first appointed shall expire as designated by the commissioner at the time of making the appointment: One representative each of employers, employees and the public being appointed for one year; one representative each of employers, employees and the public being appointed for two years; and one representative each of employers, and employees for three years".

**Legislative intent to compensate.** - The legislature intended to limit the individuals "not otherwise compensated by public money" to those who are members of the council as a direct result of their particular public office and not those members of the council who are public servants serving the council on a voluntary basis. 1964 Op. Att'y Gen. No. 64-99.

**University professor compensable council member.** - Since a university professor is not a member of the council as a direct result of his position with the state, he is not already compensated by public money for his services as a member of the council and he may be paid necessary traveling and other expenses while engaged in the performance of his duties to the same extent as prescribed by law for officials of the state. 1964 Op. Att'y Gen. No. 64-99.

#### **50-7-4. Duties of the council.**

The council shall formulate standards to safeguard the welfare of apprentices, giving consideration to standards advocated by the bureau of apprenticeship of the United States department of labor, and shall formulate such additional policies as may be necessary to carry out the intent and purposes of the act [50-7-1 to 50-7-4, 50-7-7 NMSA 1978]. The council shall prescribe its own rules of procedure.

**History:** 1953 Comp., § 59-7-16, enacted by Laws 1957, ch. 219, § 4.

#### **ANNOTATIONS**

**Functions of apprenticeship council.** - The primary function of the apprenticeship council is to encourage the development and operation of apprenticeship programs which meet acceptable standards as to quality and content. Council may enter into contracts with the U.S. department of labor under which it would undertake to promote on-the-job training programs in the development and establishment of such training programs, and in providing advisory and technical assistance to businesses which undertake to establish on-the-job training programs and other programs of that nature. 1966 Op. Att'y Gen. No. 66-140.

**But no authority to operate programs.** - This agency only has powers to establish standards and policies concerning the carrying on and encouraging of apprenticeship programs. The council under this statute does not have authority to actually engage in the operation of an apprenticeship program. To the extent that the apprenticeship council intends to enter into contracts with the U.S. department of labor under which it would agree to operate an on-the-job training project itself, such contracts would not be proper. 1966 Op. Att'y Gen. No. 66-140.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 6 C.J.S. Apprentices § 11.

### **50-7-4.1. Administration.**

The commissioner of labor shall appoint a director of apprenticeship to be responsible for effectuating the policies set forth in Section 50-7-1 NMSA 1978, to carry out the policies approved by the apprenticeship council and otherwise to execute the provisions of Chapter 50, Article 7 NMSA 1978. Such appointment shall be subject to confirmation by a majority vote of the council. The commissioner of labor shall appoint the director and such additional personnel as may be necessary, subject to such laws and practices as are applicable to appointment, service and compensation of employees of the state.

Under the general direction of the commissioner of labor, the director in furtherance of the duties specified shall:

- A. encourage the voluntary participation of employers and employees in the furtherance of the objectives of Chapter 50, Article 7 NMSA 1978;
- B. devise necessary procedures and records;
- C. prepare statistical reports regarding apprenticeship;
- D. issue information related to apprenticeship; and
- E. perform such other duties as are necessary to carry out the intent of Chapter 50, Article 7 NMSA 1978.

**History:** 1978 Comp., § 50-7-4.1, enacted by Laws 1979, ch. 204, § 12.

### **50-7-5, 50-7-6. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1979, ch. 204, § 15, repeals 50-7-5 and 50-7-6 NMSA 1978, relating to the exclusion of the apprenticeship council from the authority of the commissioner of labor and to the administration of the apprenticeship program. For present provisions, see 50-7-4.1 NMSA 1978.

### **50-7-7. Limitation.**

A. This act [50-7-1 to 50-7-4, 50-7-7 NMSA 1978] does not apply to employers who, with their employees, are subject to the Railway Labor Act of congress or any act amendatory thereof.

B. The provisions of this act shall apply only to such persons, firms, political subdivisions, corporations, employer associations or organizations of employees as voluntarily elect to conform with its provisions, so long as they shall wish it to apply.

C. Notwithstanding any provision of this act the administration and supervision of related and supplemental instruction for apprentices, coordination of instruction with job experiences and the selection and training of teachers for such instruction is the responsibility of state or local boards responsible for vocational education, unless otherwise approved by the state council.

**History:** 1953 Comp., § 59-7-18, enacted by Laws 1957, ch. 219, § 6.

#### **ANNOTATIONS**

**Compiler's note.** - For the federal Railway Labor Act, see 15 U.S.C. §§ 21, 45; 18 U.S.C. § 373; 28 U.S.C. §§ 1291 to 1294 and 45 U.S.C. §§ 151 to 163, 181 to 188.

## **ARTICLE 8 NATIONAL EMPLOYMENT SYSTEM**

### **50-8-1. [Acceptance of federal act.]**

The state of New Mexico hereby accepts the provisions of the act of congress approved June 6, 1933, entitled:

"An act to provide for the establishment of a national employment system and for cooperation with the states in the promotion of such system, and for other purposes."

**History:** Laws 1934 (S.S.), ch. 15, § 1; 1941 Comp., § 57-601; 1953 Comp., § 59-8-1.

#### **ANNOTATIONS**

**Compiler's note.** - The federal act referred to in this section appears as 29 U.S.C. §§ 49 to 49c and 49d to 49k.

### **50-8-2. Agency of state for purpose of federal act.**

The employment security department is hereby designated and constituted the agency of the state of New Mexico for the purpose of such act, with full power to establish such

public employment offices throughout the state of New Mexico as it may deem necessary to fully carry out the purposes, to employ such agents, clerks and employees as are necessary therefor, with full power to cooperate with all authorities of the United States having powers or duties under said act of congress and to do and perform all things necessary to secure to this state the benefits of said act in the promotion and maintenance of a system of public employment offices. All funds made available to this state under said act of congress shall, upon receipt thereof, be paid into the general fund of the state treasury and are hereby appropriated therefrom to be expended by the department as provided by the act of congress and by this act [50-8-1, 50-8-2 NMSA 1978].

**History:** Laws 1934 (S.S.), ch. 15, § 2; 1941 Comp., § 57-602; 1953 Comp., § 59-8-2; Laws 1977, ch. 252, § 31; 1979, ch. 280, § 10.

### ANNOTATIONS

**Meaning of "such act" and "act of congress".** - See 50-8-1 NMSA 1978 and notes thereto.

## ARTICLE 9 OCCUPATIONAL HEALTH AND SAFETY

### 50-9-1. Short title.

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

**History:** 1953 Comp., § 59-14-1, enacted by Laws 1972, ch. 63, § 1; 1975, ch. 290, § 1; 1993, ch. 322, § 1.

### ANNOTATIONS

**Cross-references.** - For Occupational Disease Disablement Law, see 52-3-1 NMSA 1978 et seq.

**The 1993 amendment,** effective April 8, 1993, substituted "50-9-1 through 50-9-25 NMSA 1978" for "59-14-1 through 59-14-24 NMSA 1953".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 131 et seq.

Violation of OSHA regulation as affecting tort liability, 79 A.L.R.3d 962.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 A.L.R.4th 914.

Duty and liability of subcontractor to employee of another contractor using equipment or apparatus of former, 55 A.L.R.4th 725.

Tort liability for window washer's injury or death, 69 A.L.R.4th 207.

What constitutes "substantial evidence" within meaning of § 6(f) of the Occupational Safety and Health Act (29 U.S.C.S. § 655(f)) providing that the secretary of labor's determinations shall be conclusive if supported by substantial evidence in the record considered as a whole, 25 A.L.R. Fed. 150.

What constitutes "willful" violation for purposes of §§ 17(a) and (e) of Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 666(a) and 666(e)), 31 A.L.R. Fed. 551.

OSHA violation by employer or third party as providing cause of action for employee, 35 A.L.R. Fed. 461.

United States' tort liability for nonenforcement of OSHA, 35 A.L.R. Fed. 963.

Machinery and machine guarding OSHA general industry standards (29 CFR §§ 1910.211 - 1910.222), 38 A.L.R. Fed. 507.

Validity, construction, and application of personal protective equipment subpart of OSHA general industry standards (29 CFR §§ 1910.132 - 1910.140), 39 A.L.R. Fed. 141.

Pre-emptive effect of Occupational Safety and Health Act of 1970 (29 USCS §§ 651 - 678) and standards issued thereunder, 88 A.L.R. Fed. 833.

51 C.J.S. Labor Relations §§ 11, 12; 30 C.J.S. Employers' Liability § 52 et seq.

## **50-9-2. Purpose.**

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

A. the establishment of occupational health and safety regulations applicable to places of employment in this state;

B. the effective enforcement of the health and safety regulations;

C. education and training programs for employers and employees in recognition of their responsibilities under the Occupational Health and Safety Act and advice and assistance to them about effective means of preventing occupational injuries and illnesses; and

D. appropriate job-related accident and illness reporting procedures that will help achieve the objectives of the Occupational Health and Safety Act.

**History:** 1953 Comp., § 59-14-2, enacted by Laws 1972, ch. 63, § 2; 1993, ch. 322, § 2.

## **ANNOTATIONS**

**The 1993 amendment**, effective April 8, 1993, substituted "employee" for "working man and woman" in the introductory paragraph.

### **50-9-2.1. Legislative findings.**

The legislature finds that:

A. the proliferation of hazardous chemicals in the environment poses a growing threat to the public health, safety and welfare; and

B. it is in the public interest to establish a comprehensive program for the disclosure of information about hazardous substances in places of employment and to provide a procedure whereby employees may gain access to this information.

**History:** Laws 1987, ch. 178, § 1.

### **50-9-3. Definitions.**

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

A. "person" means any individual, partnership, firm, public or private corporation, association, trust, estate, political subdivision or agency or any other legal entity or their legal representatives, agents or assigns;

B. "employee" means an individual who is employed by an employer, but does not include a domestic employee or a volunteer nonsalaried firefighter;

C. "employer" means any person who has one or more employees, but does not include the United States;

D. "board" means the environmental improvement board;

E. "department" means the department of environment;

F. "place of employment" means any place, area or environment in or about which an employee is required or permitted to work;

G. "commission" means the occupational health and safety review commission established under the Occupational Health and Safety Act;

H. "chemical" means any element, chemical compound or mixture of elements or compounds;

I. "hazardous chemical" means any chemical or combination of chemicals that has been labeled hazardous by the chemical manufacturer, importer or distributor in accordance with regulations promulgated by the federal Occupational Safety and Health Act of 1970;

J. "label" means any written, printed or graphic material displayed on or affixed to containers of chemicals which identifies the chemical as hazardous;

K. "material safety data sheet" means written or printed material concerning a hazardous chemical that contains information on the identity listed on the label, the chemical and common names of the hazardous ingredients, the physical and health hazards, the primary route of entry, the exposure limits, any generally applicable control measures, any emergency or first aid procedures, the date of preparation and the name, address and telephone number of the chemical manufacturer, importer, employer or other responsible party preparing or distributing the material safety data sheet;

L. "mobile work site" means any place of employment in standard industrial classification codes 13, oil and gas extraction, and 15 through 17, construction, where work is performed in a different location than the principal office in a fixed location used by the employer; and

M. "secretary" means the secretary of environment.

**History:** 1953 Comp., § 59-14-3, enacted by Laws 1972, ch. 63, § 3; 1975, ch. 290, § 2; 1977, ch. 253, § 65; 1985, ch. 111, § 1; 1987, ch. 178, § 2; 1993, ch. 322, § 3.

## ANNOTATIONS

**The 1987 amendment**, effective April 1, 1988, added Subsections I through M.

**The 1993 amendment**, effective April 8, 1993, deleted former Subsection E, which defined "agency" or "division"; redesignated former Subsections F to M as Subsections E to L; substituted the definition of "department" in current Subsection E for " 'director' means the director of the environmental improvement division"; added current Subsection M; and made minor stylistic changes in Subsections I and K.

**Occupational Safety and Health Act.** - The federal Occupational Safety and Health Act of 1970, referred to in Subsection I, appears mainly as 29 U.S.C. § 651 et seq.

**Prison inmates not "employees".** - Notwithstanding the fact that prison industries must comply with occupational health and safety standards, inmates engaged in prison operated industries or enterprises are not "employees" of the penitentiary for purposes

of filing an occupational health and safety complaint with the environmental improvement division. 1981 Op. Att'y Gen. No. 81-23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Who is "employer" for purposes of Occupational Safety and Health Act (29 U.S.C.S. § 651 et seq.), 27 A.L.R. Fed. 943.

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

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

**History:** 1953 Comp., § 59-14-4, enacted by Laws 1972, ch. 63, § 4; 1993, ch. 322, § 4.

#### **ANNOTATIONS**

**The 1993 amendment,** effective April 8, 1993, substituted "department" for "agency".

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 128 et seq.

#### **50-9-5. Employer and employee duties.**

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

B. Every employer shall furnish and maintain a place of employment that must comply with the health and safety regulations promulgated by the board. The regulations shall provide for the adoption of practices, means, methods, operations, conditions and processes in order to provide safe and healthful employment and places of employment.

C. Each employer shall, through posting of notices at the place or places where notices to employees are normally posted or other appropriate means, keep his employees informed of their protections and obligations under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], including provisions of applicable regulations.

D. Each employee shall comply with the provisions of the Occupational Health and Safety Act and any rules and orders promulgated pursuant thereto which are applicable to his own actions and conduct in the course of his employment.

**History:** 1953 Comp., § 59-14-5, enacted by Laws 1972, ch. 63, § 5; 1975, ch. 290, § 3.

#### **ANNOTATIONS**



**Additional civil actions not allowed.** - Nowhere in the Occupational Health and Safety Act or in its legislative history can be found any indication that the legislature intended to allow additional civil actions instituted by aggrieved employees injured through violations of OSHA standards. *Arvas v. Feather's Jewelers*, 92 N.M. 89, 582 P.2d 1302 (Ct. App. 1978).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 34, 131.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.

Employer's liability for injury to babysitter in home or similar premises, 29 A.L.R.4th 304.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor, 34 A.L.R.4th 914.

Employer's liability to employee for failure to provide work environment free from tobacco smoke, 63 A.L.R.4th 1021.

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

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

B. Each employer shall obtain and maintain material safety data sheets for each chemical used in his place of employment and labeled as hazardous. Each employer shall ensure that the information on material safety data sheets for hazardous chemicals is readily accessible to employees during each work shift. The board shall promulgate regulations which assure reasonable compliance with this provision at mobile work sites. If a material safety data sheet has not been supplied from the manufacturer, importer or distributor of the hazardous chemical, the employer shall obtain the material safety data sheet by writing the manufacturer, importer or distributor and requesting that he send the material safety data sheet immediately.

C. Each employer shall maintain a current inventory of all chemicals that have been labeled as hazardous in his place of employment.

D. Each employer shall develop and implement a written hazard communication program for his place of employment which describes how the criteria specified for labels and other forms of warning, material safety data sheets and employee information and training will be met and which also includes the following:

(1) a list of the hazardous chemicals known to be present, using an identity that is referenced on the appropriate material safety data sheet. The list may be compiled for the place of employment as a whole or for individual work areas;

(2) the methods the employer will use to inform employees of the hazards of nonroutine tasks, for example, the cleaning of reactor vessels and the hazards associated with chemicals contained in unlabeled pipes in their work areas; and

(3) the methods the employer will use to inform any contract employers whose employees work in the employer's place of business of the hazardous chemicals their employees may be exposed to while performing their work and any suggestions for appropriate protective measures.

The employer may rely on an existing hazard communication program to comply with these requirements provided that it meets the provisions of this subsection. The employer shall make the written hazard communication program available upon request to employees, their designated representatives and the occupational health and safety bureau of the environmental improvement division of the health and environment department [department of environment].

E. Each employer shall provide employees with information and training on hazardous chemicals they use or may become exposed to during the course of employment.

F. The requirements of Subsection E of this section shall not apply to any hazardous chemical received by an employer in a sealed package or container and subsequently sold or transferred if the seal is maintained.

G. Nothing in this section shall supersede any other requirements in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978].

**History:** 1978 Comp., § 50-9-5.1, enacted by Laws 1987, ch. 178, § 3.

## **ANNOTATIONS**

**Bracketed material.** - The bracketed reference to the department of environment was inserted by the compiler, as Laws 1991, ch. 25, § 4 establishes the department of environment and provides that all references to the environmental improvement division of the health and environment department shall be construed to mean the department of environment. The bracketed material was not enacted by the legislature and is not part of the law.

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

A. The department shall provide for the establishment and supervision of programs for the education and training of employers and employees in the recognition, avoidance and prevention of unsafe working conditions in employment and places of employment

and consult with, advise and assist employers and employees about effective means of preventing occupational injuries and illnesses.

B. Upon an employer's request, the department shall provide an on-site consultation inspection of conditions and practices of the employer's work place without issuing citations or proposing penalties for violations noted, provided that imminent danger situations found during the on-site consultative visit must be pointed out to the employer. In the event the imminent danger is pointed out by the department consultant but immediate steps are not taken by the employer to eliminate such danger, the emergency procedures provided in Section 50-9-14 NMSA 1978 shall be pursued by the department to assure timely abatement of the imminent danger situation.

C. The secretary is responsible for programs involving research in occupational health and safety, for surveys and recommendations for occupational health and safety programs and for promotional, educational and advisory activities in occupational health and safety.

D. The board or the secretary may appoint special committees composed of technicians or professionals specializing in occupational health or safety to assist in carrying out the objectives of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. Members of such committees shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

**History:** 1953 Comp., § 59-14-6, enacted by Laws 1972, ch. 63, § 6; 1975, ch. 290, § 4; 1993, ch. 322, § 5.

## ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" near the beginning of Subsection A and throughout Subsection B; made a minor stylistic change near the middle of Subsection A; substituted "50-9-14 NMSA 1978" for "59-14-13 NMSA 1953" in the second sentence of Subsection B; and substituted "secretary" for "director" near the beginning of Subsections C and D.

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

A. The board shall promulgate regulations that are and will continue to be at least as effective as standards promulgated pursuant to the federal Occupational Safety and Health Act of 1970 to prevent or abate detriment to the health and safety of employees. In adopting, amending and repealing its regulations, the board shall provide an opportunity for representatives of employers and employees affected by the regulations to be heard and shall give weight it deems appropriate to all relevant facts and circumstances presented at the public hearing, including but not limited to:

(1) character and degree of injury to or interference with the health and safety of employees proposed to be abated or prevented by the regulation;

(2) technical practicability and economic reasonableness of the regulation and the existence of alternatives to the prevention or abatement of detriment to the health and safety of employees proposed by the regulation; and

(3) the public interest, including the social and economic effects of work-related accidents, injuries and illnesses.

B. In promulgating regulations dealing with toxic materials or harmful physical agents, the board shall provide regulations that most adequately assure to the extent feasible, on the basis of the best available technology, that no employee will suffer material impairment of health or functional capacity even if the employee has regular exposure to the hazard dealt with by the regulations for a period of his working life. Whenever practicable, the regulation promulgated shall be expressed in terms of objective criteria and of the performance desired.

C. The regulation shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment and proper conditions and precautions of safe use or exposure. Where appropriate, the standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with the hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to the hazards in order to most effectively determine whether the health of the employees is adversely affected by the exposure. Cost of medical examinations for research as ordered by the secretary shall be paid for by the department. Results of examinations shall be made available to the secretary, to the employer and, upon the request of the employee, to the employee's physician. The board may make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring and medical examinations, as may be warranted by experience, information or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

**History:** 1953 Comp., § 59-14-7, enacted by Laws 1972, ch. 63, § 7; 1975, ch. 290, § 5; 1993, ch. 322, § 6.

## ANNOTATIONS

**Cross-references.** - As to exemption of environmental improvement board from authority of secretary of environment, see 9-7A-12 NMSA 1978.

**The 1993 amendment,** effective April 8, 1993, substituted "secretary" for "director" and "department" for "agency" in the fourth sentence of Subsection C; substituted

"secretary" for "director upon his request" in the fifth sentence of Subsection C; and made minor stylistic changes throughout the section.

**Occupational Safety and Health Act.** - The federal Occupational Safety and Health Act of 1970, referred to in Subsection A, appears mainly as 29 U.S.C. § 651 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 152 et seq.

Economic feasibility as factor affecting validity of, or obligation of compliance with, standards established under Occupational Safety and Health Act (29 USCS § 651 et seq.), 68 A.L.R. Fed. 732.

73 C.J.S. Public Administrative Law and Procedure § 87 et seq.

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

The department shall:

A. prevent or abate detriment to the health and safety of employees arising out of and in the course of employment;

B. develop an effective and comprehensive program for the prevention or abatement of detriment to the health and safety of employees within the state;

C. advise and recommend an effective and comprehensive program of occupational health and safety applicable to all employees of public agencies of the state and its political subdivisions;

D. cause to be instituted legal proceedings to compel compliance with the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or any regulation of the board;

E. accept, receive and administer grants or other funds or gifts from public or private agencies, including the federal government;

F. take reasonable steps to inform employees of their protections and obligations under the Occupational Health and Safety Act, including the provisions of applicable regulations; and

G. make reports to the secretary of the United States department of labor in the form and containing the information as the secretary may from time to time require.

**History:** 1953 Comp., § 59-14-8, enacted by Laws 1972, ch. 63, § 8; 1993, ch. 322, § 7.

### **ANNOTATIONS**

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" in the catchline and in the introductory paragraph and made minor stylistic changes in Subsection G.

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

A. The occupational health and safety review commission is hereby established. The commission shall be composed of three members who shall be appointed by the governor, by and with the advice and consent of the senate, from among persons who by reason of training, education or experience are qualified to carry out the functions of the commission under the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. One member each shall be chosen to reflect the views of labor, industry and of the general public. The governor shall designate one of the members of the commission to serve as chairman.

B. Terms of commission members shall be six years except that members of the commission first taking office shall serve as designated by the governor at the time of appointment: one for a term of two years, one for a term of four years and one for a term of six years. A vacancy caused by death, resignation or removal of a member prior to the expiration of the term for which he was appointed shall be filled only for the remainder of such unexpired term. A member of the commission may be removed by the governor for inefficiency, neglect of duty or malfeasance in office.

C. For the purpose of carrying out its functions under the Occupational Health and Safety Act, two members of the commission shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

D. Every official act of the commission shall be entered of record and its hearings and records shall be open to the public. The commission is authorized to make such rules as are necessary for the orderly transaction of its proceedings.

E. The commission may order testimony to be taken by deposition in any proceedings pending before it. Any person whose testimony may be material may be compelled to appear and testify, and to produce books, papers or documents in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the commission.

F. The commission may designate a hearing officer to take evidence in the hearing. The commission will then make its decision based on the evidence in the transcript of the hearing proceedings.

G. Members of the commission shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

**History:** 1953 Comp., § 59-14-8.1, enacted by Laws 1975, ch. 290, § 6.

## ANNOTATIONS

**Cross-references.** - As to exemption of occupational health and safety review commission from authority of secretary of environment, see 9-7-15 NMSA 1978.

As to staff support from environmental improvement division, see 9-7-15 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 131 et seq.

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

A. In order to carry out the purposes of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978], the department's authorized representatives, upon presenting appropriate credentials to the owner, operator or agent in charge, are authorized to and may:

(1) enter and inspect any place of employment at reasonable times and without delay; and

(2) question privately the employer and employees and to inspect and investigate during regular working hours and at other reasonable times and within reasonable limits and in a reasonable manner, the place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein. The department's representative is not authorized to question privately the employer or employees until the board has adopted regulations protecting the rights of such employer and employees.

B. Any employee or representative of employees may file a written complaint with the department concerning any alleged violation of a regulation or any hazardous condition. A copy of the complaint shall be provided to the employer at the time of the inspection. However, upon the request of the complainant, the complainant's shall not appear on the copy. The department shall investigate the complaint and notify the complainant and employer in writing of the results of the investigation and any action to be taken. If no action is contemplated, the department shall notify the complainant and include in the notice the reasons therefor. The department shall provide for the informal review of decisions not to take compliance action at the request of the complainant. The review shall not be by those who investigated the complaint.

C. In order to aid inspections, a representative of the employer and a representative authorized by employees shall be given an opportunity to accompany the department inspector during the physical inspection of the work place. If there is no authorized employee representative, the department inspector shall consult with a reasonable number of employees.

D. Prior to or during any inspection of a work place, any employees or representative of employees employed in such work place may notify the department or the department inspector in writing of any violation of the Occupational Health and Safety Act which they have reason to believe exists in such work place. The department shall establish procedures for informal review of the decision made by the inspector, and, if no citation is issued with respect to the alleged violation, it shall furnish the employee requesting such review a written statement of the reasons for the department's final disposition of the case.

E. If an inspection reveals that employees are exposed to toxic materials or harmful physical agents at levels in excess of those prescribed by regulations of the board, the department shall provide the employees with access to the results of the inspection. The employer shall promptly notify the employees who are being exposed to the agents or materials in excess of the applicable regulations and inform them of the corrective action being taken or that review has been requested in accordance with Section 50-9-17 NMSA 1978.

F. It is unlawful for any person to give advance notice of any inspection to be conducted under the Occupational Health and Safety Act without the written approval of the secretary or the secretary's authorized representative.

G. The board shall adopt regulations to implement this section.

**History:** 1953 Comp., § 59-14-9, enacted by Laws 1972, ch. 63, § 9; 1975, ch. 290, § 7; 1983, ch. 49, § 1; 1993, ch. 322, § 8.

### ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department's" for "agency's" and "department" for "agency" throughout the section and, in Subsection F, substituted "secretary" for "director" and made a minor stylistic change.

**Regulations permitting private interviews are void.** - The regulations promulgated by the environmental improvement board permitting private interviews of employees by the division inspector are void. *Kent Nowlin Constr., Inc. v. Environmental Imp. Div.*, 99 N.M. 294, 657 P.2d 621 (1982)(decided prior to 1983 amendment).

**Employees may request that counsel of their choosing be present during interviews** by the environmental improvement division, unless such counsel obstructs and impedes the division's investigation. The employee's counsel may be company counsel. *Kent Nowlin Constr., Inc. v. Environmental Imp. Div.*, 99 N.M. 294, 657 P.2d 621 (1982).

**Employers are allowed to have company counsel or representatives present** during agency interviews with employees. *Kent Nowlin Constr., Inc. v. Environmental Imp. Div.*, 99 N.M. 294, 657 P.2d 621 (1982).



**Prison inmates may not file complaint.** - Notwithstanding the fact that prison industries must comply with occupational health and safety standards, inmates engaged in prison operated industries or enterprises are not "employees" of the penitentiary for purposes of filing an occupational health and safety complaint with the environmental improvement division. 1981 Op. Att'y Gen. No. 81-23.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 132, 137, 138.

Validity, under federal constitution, of provisions of Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 651 et seq.) relating to inspections, enforcement of civil penalties, and administrative or judicial review, 34 A.L.R. Fed. 82.

Right, under § 8(e) of Occupational Safety and Health Act (29 U.S.C.S. § 657(e)), of representative of employer or employees to accompany inspector during OSHA inspection, 35 A.L.R. Fed. 47.

Admissibility of evidence obtained by unconstitutional search in proceedings under Occupational Safety and Health Act (29 USCS § 651 et seq.), 67 A.L.R. Fed. 724.

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

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

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

**History:** 1953 Comp., § 59-14-10, enacted by Laws 1972, ch. 63, § 10; 1975, ch. 290, § 8; 1993, ch. 322, § 9.

## ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" in the first sentence of Subsection A and made a minor stylistic change in Subsection B.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 56 et seq.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.

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

A. Any person may recommend or propose regulations to the board for promulgation. The board shall determine whether to hold a hearing within sixty days of submission of a proposed regulation.

B. No regulations shall be adopted, amended or repealed until after a public hearing by the board. Notice of the hearing shall be given at least thirty days prior to the hearing date and shall state the subject, time and place of the hearing and the manner in which interested persons may secure copies of any regulations proposed to be adopted, amended or repealed. The notice shall be published in a newspaper of general circulation in the state. Reasonable effort shall be made to give notice to all persons who have made a written request to the board for advance notice of hearings. At the hearing, the board shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing. Any person heard or represented at the hearing shall be given written notice of the action by the board. The board may designate a hearing officer to take evidence in the hearing and present the evidence to the board. A record shall be made of each hearing.

C. Notwithstanding the provisions of Subsection B of this section, the secretary may adopt an emergency regulation to take immediate effect upon its filing under the State Rules Act [Chapter 14, Article 4 NMSA 1978] if the secretary determines:

(1) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards; and

(2) that the emergency regulation is necessary to protect employees from the danger.

D. The emergency regulation shall be effective until superseded by a final regulation promulgated in accordance with the procedures prescribed in Subsection B of this section. The final regulation shall be promulgated within one hundred twenty days of the date of promulgation of the relevant emergency regulation.

E. If the emergency regulation is promulgated in response to an emergency temporary standard issued pursuant to the federal Occupational Safety and Health Act of 1970,

then such regulation shall only be enforceable to the same extent as the federal emergency temporary standard.

F. If the federal emergency temporary standard is superseded by a federal permanent standard, then the state emergency regulation shall remain in effect for an additional one hundred twenty days after promulgation of the superseding standard. During this additional one hundred twenty days, the board shall promulgate a regulation in accordance with the procedures prescribed in Subsection B of this section.

**History:** 1953 Comp., § 59-14-11, enacted by Laws 1972, ch. 63, § 11; 1975, ch. 290, § 9; 1982, ch. 73, § 20; 1984, ch. 80, § 1; 1993, ch. 322, § 10.

### ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, deleted the former final sentence of Subsection B, which read "No regulation, amendment or repeal thereof adopted by the board shall become effective until thirty days after its filing under the State Rules Act"; substituted "secretary may adopt" for "agency shall provide for" in the introductory paragraph of Subsection C; substituted "board" for "agency" in the second sentence of Subsection F; and made minor stylistic changes throughout the section.

**Occupational Safety and Health Act.** - The federal Occupational Safety and Health Act of 1970, referred to in Subsection E, appears mainly as 29 U.S.C. § 651 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 2 Am. Jur. 2d Administrative Law § 152 et seq.; 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 132, 137, 138.

73 C.J.S. Public Administrative Laws and Proceedings § 87 et seq.

### 50-9-13. Adopting standards by reference.

In the event the board wishes to adopt regulations that are identical with standards approved by an agency of the federal government, the board, after notice and hearing, may adopt the regulations by reference to the standards without setting forth the provisions of the standards.

**History:** 1953 Comp., § 59-14-12, enacted by Laws 1972, ch. 63, § 12; 1993, ch. 322, § 11.

### ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, deleted the former second sentence, which read "Copies of standards adopted by reference must be attached to the regulations filed under the State Rules Act."

### 50-9-14. Emergency procedures.

A. The district courts shall have jurisdiction, upon petition of the secretary, to restrain any conditions or practices in any place of employment which are such that a danger exists that could reasonably be expected to cause death or serious physical harm immediately or before the imminence of the danger can be eliminated through the enforcement procedures otherwise provided by the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978]. Any order issued under this section may require such steps to be taken as may be necessary to avoid, correct or remove the imminent danger and prohibit the employment of any individual in locations or under conditions where the danger exists, except individuals whose presence is necessary to avoid, correct or remove such imminent danger or to maintain the capacity of a continuous process operation to resume normal operations without a complete cessation of operations or, where a cessation of operations is necessary, to permit such to be accomplished in a safe and orderly manner.

B. Upon the filing of a petition, the district court may grant injunctive relief or a temporary restraining order in accordance with the New Mexico rules of civil procedure pending the outcome of an enforcement proceeding pursuant to the Occupational Health and Safety Act.

C. When the secretary or the secretary's representative determines that an emergency exists, he shall immediately inform the employees and employers of the hazards and take steps to obtain immediate abatement of the hazards by the employer.

D. If the secretary arbitrarily or capriciously fails to seek relief under this section, any employee who may be injured by reason of such failure, or the representative of such employee, may bring an action against the secretary in the district court for the district in which the imminent danger is alleged to exist for a writ of mandamus to compel the secretary to seek an order of the court as provided in this section.

**History:** 1953 Comp., § 59-14-13, enacted by Laws 1972, ch. 63, § 13; 1975, ch. 290, § 10; 1993, ch. 322, § 12.

## ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "secretary" for "director" throughout the section and made minor stylistic changes in Subsections A and C.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 39, 41, 53.

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

A. Any person who is or may be affected by a regulation adopted by the board may appeal to the court of appeals for further relief. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days after

filing of the regulation under the State Rules Act [Chapter 14, Article 4 NMSA 1978]. The board shall be made a party to the action.

B. A variance petitioner may appeal to the court of appeals from an order of the department denying the variance. All appeals shall be upon the record made at the hearing and shall be taken to the court of appeals within thirty days from the date the order is made. The department shall be made a party to the action.

C. Upon appeal, the court of appeals shall set aside a regulation or order only if found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence in the record; or
- (3) otherwise not in accordance with law.

**History:** 1953 Comp., § 59-14-14, enacted by Laws 1972, ch. 63, § 14; 1993, ch. 322, § 13.

## ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" in two places in Subsection B; deleted former Subsection C, pertaining to the procedure for perfecting an appeal to the court of appeals; and redesignated former Subsection D as Subsection C.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 132.

Judicial relief against, or review of, action or orders of Occupational Safety and Health Review Commission under Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 651 et seq.), 22 A.L.R. Fed. 508.

Validity, under federal constitution, of provisions of Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 651 et seq.) relating to inspections, civil penalties, and administrative or judicial review, 34 A.L.R. Fed. 82.

### **50-9-16. Variances; temporary variances.**

A. The department may grant an individual variance from any regulation adopted pursuant to the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] setting health or safety standards whenever it is found by a preponderance of the evidence that the conditions, practices, means, methods, operations or processes used by the petitioner will provide employment and places of employment to his employees

which are as safe and healthful as those that would prevail if he complied with the existing regulation.

B. No variance shall be granted until the department has considered the relative interests of the petitioner, his employees and the general public. The order so issued shall describe the conditions the employer must maintain and the practices, means, methods, operations and procedures which he must adopt and utilize to the extent they differ from the regulation in question. The secretary may at any time on his own motion, or upon application by an employer or employee after six months have elapsed from the date of issuance of the order granting a variance, after a hearing, modify or revoke such order.

C. A petitioner for a variance shall file a petition with the department in the manner prescribed by regulation. The department shall give the affected employees prompt notice of the application for a variance and an opportunity to request a hearing. When properly filed, the secretary shall promptly investigate the petition and provide for the disposition thereof.

D. The department may grant the variance without hearing when no hearing has been requested by either employees or employer and if it deems that no substantial public interest is involved. If the department is opposed to the granting of the variance, then a hearing shall be held upon the request of the petitioner. A record shall be made of the hearing. In the hearing, the burden of proof shall be upon the petitioner.

E. Any employer may apply to the department for a temporary order granting a variance from a regulation promulgated under the Occupational Health and Safety Act by submitting a petition to the department in the manner prescribed by regulation. A temporary variance may be granted only if the employer establishes:

(1) that he is unable to comply with a regulation by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the regulation or because necessary construction or alteration of facilities cannot be completed by the effective date;

(2) that he is taking all available steps to safeguard his employees against the hazards covered by the regulation; and

(3) that he has an effective program for coming into compliance with the regulation as quickly as practicable.

F. Any temporary order issued under this section shall prescribe the practices, means, methods, operations and processes which the employer must adopt and use while the order is in effect and state in detail his program for coming into compliance with the regulation. Such a temporary variance may be granted only after notice to employees and an opportunity for a hearing. Provided that the department may issue one interim order to be effective until a decision is made or a decision rendered if a hearing is

requested. No temporary variance may be in effect for longer than the period needed by the employer to achieve compliance with the regulation or one year, whichever is shorter, except that such variance may be renewed not more than twice, so long as the requirements of this subsection are met and if an application for renewal is filed at least ninety days prior to the expiration date of the variance. No renewal of a temporary variance may remain in effect for longer than one hundred eighty days.

G. The department is authorized to grant a variance from any regulation whenever it determines that such a variance is necessary to an employer to participate in an experiment approved by the department designated to demonstrate or validate new and improved techniques to safeguard the health or safety of workers.

H. The department shall keep an appropriately indexed record of all variances granted under this section. The record shall be open for public inspection.

**History:** 1953 Comp., § 59-14-15, enacted by Laws 1972, ch. 63, § 15; 1975, ch. 290, § 11; 1993, ch. 322, § 14.

## ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" and "secretary" for "director" throughout the section; deleted "that the proponent of the variance has demonstrated" following "it is found" and substituted "the petitioner" for "an employer" near the middle of Subsection A; substituted "may be granted" for "will be granted" in the introductory paragraph of Subsection E; deleted "and" at the end of Paragraph (1) of Subsection E; and made a minor stylistic change in Subsection A.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 55, 132.

### 50-9-17. Enforcement.

A. If as a result of investigation the department has good cause to believe that any employer is violating any provision of the Occupational Health and Safety Act or any regulation of the board, the department shall send prompt notice of the violation by certified mail to the employer believed to be in violation. The citation shall describe with particularity the provision of the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or regulation alleged to have been violated. The notice shall also state the time for abatement of the violation. Each citation issued pursuant to this section, or a copy thereof, shall be promptly and prominently posted by the cited employer, as prescribed in regulations issued by the board, at or near the place where the violation occurred. No citation may be issued under this section after the expiration of six months following the occurrence of any violation. The board may issue a regulation prescribing procedures for the use of a notice in lieu of a citation with respect to de minimis violations that have no direct or immediate relationship to safety or health.

B. If the department issues a citation under Subsection A of this section, it shall, within a reasonable time after issuance of the citation, notify the employer by certified mail of the penalty, if any, proposed to be assessed and that the employer has fifteen working days within which to notify the department in writing that he wishes to contest the citation or proposed penalty. If, within fifteen working days from the receipt of the notice issued by the department, the employer fails to notify the department that he intends to contest the citation or proposed penalty and no notice is filed by an employee or employee representative as provided by Subsection D of this section within such time, the citation and the assessment of penalty, if any, as proposed shall be deemed the final order of the commission and not subject to review by any court or agency.

C. If the department has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the abatement period permitted, which period shall not begin to run until the entry of a final order by the commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties, the department shall notify the employer by certified mail of such failure to correct and of the penalty proposed to be assessed by reason of such failure and that the employer has fifteen working days within which to notify the department in writing that he wishes to contest the department's notification or the proposed assessment of penalty. If, within fifteen working days from the receipt of notification issued by the department, the employer fails to notify the department that he intends to contest the notification or proposed assessment of penalty, the notification and assessment as proposed shall be deemed a final order of the commission and not subject to review by any court or department.

D. If any employer notifies the department in writing that he intends to contest the citation issued to him under Subsection A or notification issued under Subsection B or C of this section, or if, within fifteen working days of the receipt of notice under this section, any employee of an employer so cited or any such employee's representative files a notice with the department alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the department shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the petitioner may request a hearing before the commission within fifteen days after the administrative review. The commission shall afford an opportunity for a hearing within thirty days after receipt of such petition. The commission shall thereafter issue an order, based on findings of fact, affirming, modifying or vacating the department's citation or the proposed penalty fixed by the department or directing other appropriate relief.

E. At any time prior to the expiration of an abatement period, an employer may notify the department in writing that he is unable to take the corrective action required within the period of abatement. The department shall provide prompt opportunity for informal administrative review. If the matter is not successfully resolved at the informal administrative review, the petitioner may request a hearing before the commission after the administrative review. The commission shall afford prompt opportunity for a hearing after receipt of such petition. The only grounds for modifying an abatement period under



this subsection are a showing by the employer of a good-faith effort to comply with the abatement requirement of a citation and that abatement has not been completed because of factors beyond the employer's control.

F. Affected employees or their representatives shall be provided an opportunity to participate as parties at both informal administrative review and commission hearings under this section.

G. Any person, including the department, adversely affected by an order of the commission issued under this section may obtain a review of the order in the court of appeals by filing a notice of appeal in such court within thirty days after issuance of the commission's order. Every person who participated as a party in the proceeding before the commission shall be made a party to the appeal, but the commission shall not be deemed a real party in interest and shall not be so named. The findings of the commission with respect to questions of fact, as supported by substantial evidence, shall be conclusive. Upon appeal, the court may set aside action of the commission only if found to be:

- (1) arbitrary, capricious or an abuse of discretion;
- (2) not supported by substantial evidence; or
- (3) beyond the scope of its legal authority.

**History:** 1953 Comp., § 59-14-16, enacted by Laws 1972, ch. 63, § 16; 1975, ch. 290, § 12; 1993, ch. 322, § 15.

### ANNOTATIONS

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" and "department's" for "agency's" throughout the section; made minor stylistic changes in Subsections A and B; deleted "occupational health and safety review" preceding "commission" in the second sentence of Subsection D and in the third sentence of Subsection E; deleted "and such order shall become final fifteen days after its issuance" at the end of Subsection D; rewrote Subsection G to the extent that a detailed comparison is impracticable; and deleted former Subsection H, pertaining to the procedure for appeals from decisions of the district court.

**Compiler's note.** - The Rules Governing Appeals to the Supreme Court of Appeals and Original Proceedings in the Supreme Court were recompiled in 1986 into the Rules of Appellate Procedure, which appear in Judicial Pamphlet 12.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 132.

Judicial relief against, or review of, action or orders of Occupational Safety and Health Review Commission under Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 651 et seq.), 22 A.L.R. Fed. 508.

Validity, under Federal Constitution, of provisions of Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 651 et seq.) relating to inspections, enforcement of civil penalties and administrative or judicial review, 34 A.L.R. Fed. 82.

Economic feasibility as factor affecting validity of, or obligation of compliance with, standards established under Occupational Safety and Health Act (29 USCS § 651 et seq.), 68 A.L.R. Fed. 732.

### **50-9-18. Subpoena power.**

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

**History:** 1953 Comp., § 59-14-17, enacted by Laws 1972, ch. 63, § 17; 1993, ch. 322, § 16.

## **ANNOTATIONS**

**Cross-references.** - As to witness fees, see 38-6-4 NMSA 1978.

As to depositions and discovery, see Rules 1-026 to 1-037.

**The 1993 amendment,** effective April 8, 1993, substituted "department" for "board or agency" in the first and third sentences and made a minor stylistic change.

**Employers may be present at discovery proceedings** conducted by the environmental improvement division. *Kent Nowlin Constr., Inc. v. Environmental Imp. Div.*, 99 N.M. 294, 657 P.2d 621 (1982).

### **50-9-19. Accident reports and records.**

A. Every employer shall keep records and submit reports of occupational injuries and illnesses as prescribed by the department. Reports shall not require employee identification by name.

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

**History:** 1953 Comp., § 59-14-18, enacted by Laws 1972, ch. 63, § 18; 1993, ch. 322, § 17.

#### **ANNOTATIONS**

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 137.

#### **50-9-20. Coordination.**

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

**History:** 1953 Comp., § 59-14-19, enacted by Laws 1972, ch. 63, § 19; 1993, ch. 322, § 18.

#### **ANNOTATIONS**

**The 1993 amendment**, effective April 8, 1993, substituted "department" for "agency" in the first sentence.

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

A. Nothing in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] shall be construed or held to supersede or in any manner affect the Workers' Compensation Act [52-1-1 to 52-1-70 NMSA 1978] or the New Mexico Occupational Disease Disablement Law [52-3-1 to 52-3-60 NMSA 1978] or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases or death of employees arising out of or in the course of employment.

B. Statements, reports and information obtained or received by the department in connection with an investigation under or the administration or enforcement of the provisions of the Occupational Health and Safety Act shall be made available except to the extent privileged by law. Information obtained under the provisions of Subsection B of Section 50-9-6 NMSA 1978 shall remain confidential. The information may be used for statistical purposes if the information revealed is not identified as applicable to any individual employer.

C. All information reported to or otherwise obtained by the secretary or the secretary's authorized representative in connection with any inspection or proceeding under this section which contains or might reveal a trade secret, as defined in Paragraph (2) of this subsection, shall be considered confidential, except that such information may be disclosed to other officers or employees concerned with carrying out the Occupational Health and Safety Act. In any such proceeding, the secretary, the secretary's authorized representative or a court of competent jurisdiction, as the case may be, shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

(1) It is unlawful for any employee of the agency to reveal to any individual other than another employee of the department the trade secrets of any employer except in response to an order of a district court, the court of appeals, the supreme court or a federal court in an action to which the state is a party and in which the information sought is material to the inquiry.

(2) For the purposes of this subsection, "trade secrets" means the whole or any portion or phrase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value. A trade secret shall be presumed to be secret when the owner takes measures to prevent it from becoming available to persons other than those selected by the owner to have access for limited purposes.

**History:** 1953 Comp., § 59-14-20, enacted by Laws 1972, ch. 63, § 20; 1975, ch. 290, § 13; 1983, ch. 49, § 2; 1984, ch. 80, § 2; 1993, ch. 322, § 19.

## ANNOTATIONS

**The 1993 amendment,** effective April 8, 1993, substituted "department" for "agency" in Subsection B and Paragraph (1) of Subsection C; substituted "secretary" for "director" in

two places in the introductory paragraph of Subsection C; and made minor stylistic changes in Subsections A and C.

**Regulations do not affect employer's liability under Workers' Compensation Act. -**

Regulations adopted under the authority of the state Occupational Health and Safety Act do not affect an employer's liability under the Workers' Compensation Act, and safety devices required by such regulations are not required by law for purposes of 52-1-10B NMSA 1978. *Casillas v. S.W.I.G.*, 96 N.M. 84, 628 P.2d 329 (Ct. App.), appeal dismissed, 454 U.S. 934, 102 S. Ct. 467, 70 L. Ed. 2d 242 (1981).

**OSHA violations as evidence of negligence. -** Occupational Safety and Health Act violations do not constitute a basis for assigning negligence as a matter of law, but evidence of such violations can be considered in determining the required standard of care. *Valdez v. Cillessen & Son*, 105 N.M. 575, 734 P.2d 1258 (1987).

**Modification of benefits using OSHA regulations precluded. -** The use of OSHA regulations to modify an employee's workers' compensation benefits is clearly precluded under Subsection A. *Bateman v. Springer Bldg. Materials Corp.*, 108 N.M. 655, 777 P.2d 383 (Ct. App. 1989).

**Law reviews. -** For annual survey of New Mexico law relating to workers' compensation, see 13 N.M.L. Rev. 495 (1983).

**Am. Jur. 2d, A.L.R. and C.J.S. references. -** 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws §§ 131, 132, 137.

Employer's tort liability to worker for concealing workplace hazard or nature or extent of injury, 9 A.L.R.4th 778.

Liability of labor union for injury or death allegedly resulting from unsafe working conditions, 14 A.L.R.4th 1161.

## **50-9-22. Preemption.**

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

B. Whenever the board prescribes or adopts a regulation under the procedures provided in the Occupational Health and Safety Act, the regulation shall, when a copy thereof is filed with the clerk of the political subdivision to which it applies, establish a minimum requirement concerning the matters covered by the regulation and shall be construed in connection with any local requirement relative to the same matter. The regulation of the board amends or modifies any requirement of the local standard which does not meet the regulation.

C. The Occupational Health and Safety Act and regulations promulgated under it, and not the acts and regulations enforced by the state mine inspector, shall apply to places of employment subject to the jurisdiction of the United States department of labor acting under the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590), as amended.

D. Compliance with a regulation of the board does not relieve any person from the obligation to comply with a stricter state agency or political subdivision health or safety requirement, but the state agency or political subdivision shall be responsible for the enforcement of the health and safety requirements established by that state agency or local authority.

**History:** 1953 Comp., § 59-14-21, enacted by Laws 1972, ch. 63, § 21; 1983, ch. 19, § 1.

### ANNOTATIONS

**Occupational Safety and Health Act.** - The federal Occupational Safety and Health Act of 1970, referred to in Subsection C, appears mainly as 29 U.S.C. § 651 et seq.

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

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

A. any federal agency except the United States department of labor acting under the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590); or

B. the board pursuant to the agreement specified in Section 74-3-15 NMSA 1978.

**History:** 1953 Comp., § 59-14-22, enacted by Laws 1972, ch. 63, § 22; 1983, ch. 19, § 2.

### ANNOTATIONS

**Occupational Safety and Health Act.** - The federal Occupational Safety and Health Act of 1970, referred to in Subsection A, appears mainly as 29 U.S.C. § 651 et seq.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Who is "employer" for purposes of Occupational Safety and Health Act (29 U.S.C.S. § 651 et seq.), 27 A.L.R. Fed. 943.

#### **50-9-24. Penalties.**

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

B. Any employer who has received a citation for a serious violation of any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act shall be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each such violation.

C. Any employer who has received a citation for a violation of any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act that is determined not to be of a serious nature may be assessed a civil penalty of up to seven thousand dollars (\$7,000) for each such violation.

D. Any employer who fails to correct a violation for which a citation has been issued within the period permitted for its correction, which period shall not begin to run until the date of the final order of the commission in the case of any review proceeding under Section 50-9-17 NMSA 1978 initiated by the employer in good faith and not solely for delay or avoidance of penalties, may be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each day during which the failure or violation continues.

E. Any civil penalty assessed against the state, a political subdivision of the state or any agency of either pursuant to Subsection B, C or G of this section shall not be collected during the time permitted for correction of the violation, and if the violation is corrected within such time, the civil penalty shall be deemed paid without further action of the state, political subdivision or agency.

F. For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition that exists or from one or more practices, means, methods, operations or processes that have been adopted or are in use in the place of employment unless the employer did not and could not with the exercise of reasonable diligence know of the presence of the violation.

G. Any employer who violates any of the posting requirements as prescribed by the Occupational Health and Safety Act shall be assessed a civil penalty not to exceed seven thousand dollars (\$7,000) for each violation.

H. The commission has authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer and the history of previous violations.

I. Civil penalties imposed under this section shall be paid into the general fund.

J. Any employer who willfully violates any provision of the Occupational Health and Safety Act or any regulation or order promulgated pursuant to that act causing death to any employee by that violation shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) or by imprisonment for not more than six months or by both; except that if the conviction is for a violation committed after a first conviction of such person, punishment shall be by a fine of not more than twenty thousand dollars (\$20,000) or by imprisonment for less than one year or by both.

K. Any person who gives advance notice of any inspection to be conducted under the Occupational Health and Safety Act without authority of the secretary shall, upon conviction, be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than six months or by both.

L. Whoever knowingly makes any false statement, representation or certification in any application, record, report, plan or other document filed or required to be maintained pursuant to the Occupational Health and Safety Act shall, upon conviction, be punished by a fine of not more than ten thousand dollars (\$10,000) for each such violation or by imprisonment for not more than six months or by both.

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

**History:** 1953 Comp., § 59-14-23, enacted by Laws 1975, ch. 290, § 14; 1979, ch. 153, § 1; 1992, ch. 45, § 1; 1993, ch. 322, § 20.

### ANNOTATIONS

**The 1992 amendment**, effective July 1, 1992, substituted all of the present language of Subsection A following "exceed" for "ten thousand dollars (\$10,000) for each violation"; deleted "other than the state, a political subdivision, or any agency of either" following "employer" in Subsection B; substituted "seven thousand dollars (\$7,000)" for "one thousand dollars (\$1,000)" in Subsections B, C, D, and G; deleted former Subsection C, relating to the state and political subdivisions; redesignated former Subsections D and E as present Subsections C and D; deleted "of the Occupational Health and Safety Act" following "1978" in Subsection D; and added present Subsection E.

**The 1993 amendment**, effective April 8, 1993, substituted "commission" for "director" in Subsection D; substituted "secretary" for "director or his authorized representative" in Subsection K; and made minor stylistic changes throughout the section.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 131 et seq.

What constitutes "willful" violation for purposes of §§ 17(a) and (e) of Occupational Safety and Health Act of 1970 (29 U.S.C.S. §§ 666(a) and 666(e)), 31 A.L.R. Fed. 551.



Validity, under federal constitution, of provisions of Occupational Safety and Health Act of 1970 (29 U.S.C.S. § 651 et seq.) relating to inspections, enforcement of civil penalties, and administrative or judicial review, 34 A.L.R. Fed. 82.

## **50-9-25. Discrimination.**

A. No person or employer shall discharge or in any manner discriminate against any employee because the employee has filed a complaint or instituted or caused to be instituted a proceeding under or related to the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] or has testified or is about to testify in any such proceeding or because of the exercise by the employee on behalf of himself or others of any right afforded by the Occupational Health and Safety Act.

B. Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within thirty days after such alleged violation occurs, file a complaint with the secretary, in writing and acknowledged by the employee, alleging such discrimination. Upon receipt of the complaint, the secretary shall cause such investigation to be made as he deems appropriate. Within sixty days of the receipt of a complaint filed under this section, the secretary shall notify the complainant of his determination. If, upon such investigation, the secretary determines that the provisions of this section have been violated, he shall file a petition in the district court for the political subdivision in which the alleged violation occurred to restrain the violation of Subsection A of this section and for other appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

**History:** 1953 Comp., § 59-14-24, enacted by Laws 1975, ch. 290, § 15; 1993, ch. 322, § 21.

### **ANNOTATIONS**

**The 1993 amendment,** effective April 8, 1993, substituted "secretary" for "director" in four places in Subsection B and made minor stylistic changes in Subsections A and B.

**Common-law remedy for wrongful discharge.** - This section does not provide the exclusive remedy for an employee alleging wrongful discharge in retaliation for reporting safety violations. An employee also has a common-law remedy for wrongful discharge. *Gutierrez v. Sundancer Indian Jewelry, Inc.*, 117 N.M. 41, 868 P.2d 1266 (Ct. App. 1993).

**Law reviews.** - For article, "Defending the Abusively Discharged Employee: In Search of a Judicial Solution," see 12 N.M.L. Rev. 711 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Liability for discharge of at-will employee for in-plant complaints or efforts relating to working conditions affecting health or safety, 35 A.L.R.4th 1031.

Liability for retaliation against at-will employee for public complaints or efforts relating to health or safety, 75 A.L.R.4th 13.

Pre-emption by Workers' Compensation Statute of employee's remedy under state "Whistleblower" Statute, 20 A.L.R.5th 677.

After-acquired evidence of employee's misconduct as barring or limiting recovery in action for wrongful discharge, 34 A.L.R.5th 699.

Federal pre-emption of whistleblower's state-law action for wrongful retaliation, 99 A.L.R. Fed. 775.

## **ARTICLE 10 SEWER GAS**

### **50-10-1. [Permitting entry into sewer line without testing atmosphere unlawful; detection of flammable gas or vapor; entry without adequate ventilation unlawful.]**

It shall be unlawful for any person, firm or corporation to require, authorize or knowingly permit any person in the employ or subject to the control of such person, firm or corporation, to enter through a manhole or otherwise into any sewer in this state, whether the same is in service or under construction, without first testing the atmosphere in said sewer at the place or places of entry by use of apparatus to detect the presence of any flammable gas or vapor; and in the event the presence of any flammable gas or vapor is so detected, it shall be unlawful for any such person, firm or corporation to require, authorize or knowingly permit any such employee or controlled person to enter into said sewer unless and until the same has been, at the intended place or places of entry, adequately ventilated and made safe from the hazards of fire and explosion.

**History:** 1953 Comp., § 12-10-1, enacted by Laws 1959, ch. 175, § 1.

#### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 61 Am. Jur. 2d Plant and Job Safety - OSHA and State Laws § 135 et seq.

### **50-10-2. [Testing atmosphere in sewer line; time and frequency.]**

The requirements of Section 1 [50-10-1 NMSA 1978] shall be followed at the beginning of every workday, and also at the resumption of work following each meal period and also at the beginning of each shift in the event more than one shift per day is used;

provided that such requirements need not be followed more often than once each four hours.

**History:** 1953 Comp., § 12-10-2, enacted by Laws 1959, ch. 175, § 2.

### **50-10-3. [Detection of flammable gas or vapor; danger suspected; entry without cautioning against use of exposed flame or creation of electrical spark unlawful.]**

In the event that the presence of flammable gas or vapor is detected in any sewer, or there exists reasonable ground for suspecting the danger therein of any such gas or vapor, then it shall be unlawful, irrespective of compliance with Section 1 [50-10-1 NMSA 1978] above, for any person, firm or corporation to require, authorize or knowingly permit any such employee or controlled person to enter into said sewer, through a manhole or otherwise, without first cautioning such employee or controlled person against using any exposed flame or creating any electrical spark while in or about the said sewer.

**History:** 1953 Comp., § 12-10-3, enacted by Laws 1959, ch. 175, § 3.

### **50-10-4. [Safety measures and devices; duty of employer to supply.]**

Nothing herein shall be construed to relieve any person, firm or corporation requiring, authorizing or knowingly permitting a person in the employ or subject to the control of such person, firm or corporation, to enter into or remain in a sewer in this state from any duty of taking or supplying proper and reasonable safety measures, practices and devices during the time or times that its said employee or other controlled person shall be in such sewer, to the end that no dangerous concentration of flammable gas or gases, or noxious gas or gases, shall occur; and the requirements of this act [50-10-1 to 50-10-6 NMSA 1978] shall be cumulative of such other duty or duties.

**History:** 1953 Comp., § 12-10-4, enacted by Laws 1959, ch. 175, § 4.

### **50-10-5. [Definitions.]**

The term "sewer" as used herein shall mean any underground conduit composed of metal, concrete, clay, vitreous or other materials designed for the flowage of water or any waste product or products (including, without being limited to, storm sewers and sanitary sewers), and shall include any and all junction boxes, manholes and gutters and other appurtenances constituting any part of the sewer or of a sewer system.

The term "apparatus to detect the presence of any flammable gas or vapor", as used herein, shall mean any of the standard devices commercially available designed to

detect, by the principle of the wheatstone bridge or other recognized technique, the presence in the atmosphere of flammable gas or vapor.

**History:** 1953 Comp., § 12-10-5, enacted by Laws 1959, ch. 175, § 5.

### **50-10-6. [Penalties for violation.]**

Any person, firm or corporation violating this act [50-10-1 to 50-10-6 NMSA 1978] shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000), or by imprisonment from one day to ten days, or by both such fine and imprisonment, and each day of violation shall constitute a separate offense.

**History:** 1953 Comp., § 12-10-6, enacted by Laws 1959, ch. 175, § 6.

## **ARTICLE 11 EMPLOYEE PRIVACY**

### **50-11-1. Short title.**

This act [50-11-1 to 50-11-6 NMSA 1978] may be cited as the "Employee Privacy Act".

**History:** Laws 1991, ch. 244, § 1.

### **ANNOTATIONS**

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - What is "record" within meaning of Privacy Act of 1974 (5 USCS § 552a), 121 A.L.R. Fed. 465.

### **50-11-2. Definitions.**

As used in the Employee Privacy Act [50-11-1 to 50-11-6 NMSA 1978]:

A. "employee" means a person that performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied, and includes a person employed by the state or a political subdivision of the state;

B. "employer" means a person that has one or more employees and includes an agent of an employer and the state or a political subdivision of the state; and

C. "person" means an individual, sole proprietorship, partnership, corporation, association or any other legal entity.

**History:** Laws 1991, ch. 244, § 2.

### **50-11-3. Employers; unlawful practices.**

A. It is unlawful for an employer to:

(1) refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions or privileges of employment because the individual is a smoker or nonsmoker, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours; or

(2) require as a condition of employment that any employee or applicant for employment abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours.

B. The provisions of Subsection A of this section shall not be deemed to protect any activity that:

(1) materially threatens an employer's legitimate conflict of interest policy reasonably designed to protect the employer's trade secrets, proprietary information or other proprietary interests; or

(2) relates to a bona fide occupational requirement and is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer.

**History:** Laws 1991, ch. 244, § 3.

### **50-11-4. Remedies.**

Any employee claiming to be aggrieved by any unlawful action of an employer pursuant to Section 3 of the Employee Privacy Act [50-11-1 to 50-11-6 NMSA 1978] may bring a civil suit for damages in any district court of competent jurisdiction. The employee may be awarded all wages and benefits due up to and including the date of the judgment.

**History:** Laws 1991, ch. 244, § 4.

### **50-11-5. Court fees and costs.**

In any civil suit arising from the Employee Privacy Act [50-11-1 to 50-11-6 NMSA 1978], the court shall award the prevailing party court costs and reasonable attorneys' fees.

**History:** Laws 1991, ch. 244, § 5.

### **50-11-6. Mitigation of damages.**

Nothing in the Employee Privacy Act [50-11-1 to 50-11-6 NMSA 1978] shall be construed to relieve a person from the obligation to mitigate damages.

**History:** Laws 1991, ch. 244, § 6.

## **ARTICLE 12 EMPLOYER IMMUNITY FOR EMPLOYEE REFERENCES**

### **50-12-1. Employer immunity from liability for references on former employee.**

When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee.

**History:** Laws 1995, ch. 152, § 1.

#### **ANNOTATIONS**

**Cross-references.** - For unlawful acts under the Personnel Act, see 10-9-22 NMSA 1978.

For the Tort Claims Act, see 41-4-1 NMSA 1978.

For limitations on recoverable damages tort actions based on single publication or utterance, see 41-7-1 NMSA 1978.

**Effective dates.** - Laws 1995, ch. 152 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 16, 1995, 90 days after adjournment of legislature. See Volume 14 NMSA 1978 for "Adjournment Dates of Sessions of Legislature" table.