

# CHAPTER 28 HUMAN RIGHTS

## ARTICLE 1 HUMAN RIGHTS

### **28-1-1. Short title. (Effective until July 1, 1994.)**

This act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] may be cited as the "Human Rights Act".

**History:** 1953 Comp., § 4-33-1, enacted by Laws 1969, ch. 196, § 1.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Cross-references.** - For commission on status of women, see 28-3-1 NMSA 1978.

As to sex discrimination prohibited, see N.M. Const., art. II, § 18.

For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.

**Effect on municipalities.** - The passage of the 1969 "Human Rights Act" does not remove the authority municipalities already possess in the realm of human rights. Whatever ordinance is passed cannot lower or be inconsistent with the state standards that have been set for human rights in this article. 1971 Op. Att'y Gen. No. 71-64.

**Notice requirement where federal court action.** - Failure to give notice to New Mexico human rights commission before bringing action in federal court bars recovery in federal court. *Harris v. Ericson*, 457 F.2d 765 (10th Cir. 1972).

**Employer's burden of proof in sex discrimination and wrongful discharge cases.** - In a sex discrimination case, as with damages recoverable in cases of wrongful discharge, the employer has the burden of proving the employee did not exercise reasonable diligence in mitigating lost earnings. It is for the jury to decide, under the facts of each case, whether seeking formal education represents care or diligence to minimize damages. *Montoya v. Super Save Whse. Foods*, 111 N.M. 212, 804 P.2d 403 (1991).

**Availability of equal protection claim.** - The law in New Mexico is unsettled as to whether a claim of discrimination in employment that is asserted under this act can also be maintained under the equal protection clause of the New Mexico constitution. *Roybal v. City of Albuquerque*, 653 F. Supp. 102 (D.N.M. 1986).

**Law reviews.** - For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

For article, "The Tort of 'Outrageous Conduct' In New Mexico: Intentional Infliction of Emotional Harm Without Physical Injury," see 19 N.M.L. Rev. 425 (1989).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

## **28-1-2. Definitions. (Effective until July 1, 1994.)**

As used in the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978]:

A. "person" means one or more individuals, a partnership, association, organization, corporation, joint venture, legal representative, trustees, receivers or the state and all of its political subdivisions;

B. "employer" means any person employing four or more persons and any person acting for an employer;

C. "commission" means the human rights commission;

D. "director" means the director of the human rights division of the department of labor;

E. "employee" means any person in the employ of an employer or an applicant for employment;

F. "labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment;

G. "employment agency" means any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit or refer employees;

H. "public accommodation" means any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment which is by its nature and use distinctly private;

I. "housing accommodation" means any building or portion of a building which is constructed or to be constructed, which is used or intended for use as the residence or sleeping place of any individual;

J. "real property" means lands, leaseholds or commercial or industrial buildings, whether constructed or to be constructed, offered for sale or rent, and any land rented or leased for the use, parking or storage of house trailers;

K. "secretary" means the secretary of labor;

L. "unlawful discriminatory practices" means those unlawful practices and acts specified in Section 28-1-7 NMSA 1978;

M. "physical or mental handicap" means a physical or mental impairment that substantially limits one or more of an individual's major life activities. An individual is also considered to be physically or mentally handicapped if he has a record of a physical or mental handicap or is regarded as having a physical or mental handicap;

N. "major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working; and

O. "applicant for employment" means a person applying for a position as an employee.

**History:** 1953 Comp., § 4-33-2, enacted by Laws 1969, ch. 196, § 2; 1973, ch. 155, § 1; 1983, ch. 241, § 1; 1987, ch. 76, § 1; 1987, ch. 342, § 16.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**University of New Mexico is not a "public accommodation"** within the meaning of the New Mexico Human Rights Act, and is not subject to the jurisdiction of the human rights commission in the instance of a nursing student's complaint of racial discrimination. Human Rights Comm'n v. Board of Regents, 95 N.M. 576, 624 P.2d 518 (1981).

**Meaning of "places of accommodation" in former law.** - Single dwellings, duplexes and apartment buildings, being in their nature distinctly private, were not "places of accommodation" as defined in the Civil Rights Act, 49-8-1 to 49-8-7, 1953 Comp. (now repealed), and consequently the restrictions against discrimination did not apply thereto. 1963-64 Op. Att'y Gen. No. 63-150.

**Law reviews.** - For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 Nat. Resources J. 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 N.M.L. Rev. 541 (1982).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Meaning of term "employer" as defined in § 701(b) of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e(b)), 69 A.L.R. Fed. 191.

Who is "employee" within meaning of Age Discrimination in Employment Act (29 USCS §§ 621 to 634), 69 A.L.R. Fed. 700.

### **28-1-3. Human rights commission. (Effective until July 1, 1994.)**

A. There is created the "human rights commission" consisting of eleven members appointed by the governor with the advice and consent of the senate. Not more than six of the members shall be of the same political party. Not more than one member may be appointed from any one county. The governor shall designate a member to serve as chairman. The commission shall designate one of its members as vice chairman to preside in the absence or incapacity of the chairman.

B. The term of office of each member of the commission is for four years; however, of the commissioners first appointed, one shall be appointed for a term ending December 31, 1969, one for a term ending December 31, 1970, one for a term ending December 31, 1971 and two for terms ending December 31, 1972; provided, the two additional members added pursuant to this 1975 amendment shall be initially appointed for staggered terms of two and three years respectively so that one term ends on December 31, 1977 and one ends on December 31, 1978. The four additional commissioners added pursuant to this 1991 amendment shall be appointed for staggered terms; two shall be appointed for terms ending December 31, 1992; and two shall be appointed for terms ending December 31, 1993.

C. Any member chosen to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the remainder of the unexpired term. Six members of the commission constitute a quorum to conduct business. Vacancies on the commission shall not impair the right of the remaining members to exercise the powers of the commission.

D. Each member of the commission shall be reimbursed, as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], during the performance of official duties and shall receive no other compensation, perquisite or allowance.

**History:** 1953 Comp., § 4-33-3, enacted by Laws 1969, ch. 196, § 3; 1975, ch. 124, § 1; 1987, ch. 342, § 17; 1991, ch. 104, § 1.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**The 1991 amendment**, effective June 14, 1991, in Subsection A, substituted "eleven members" for "seven members" in the first sentence and "six of the members" for "four of the members" in the second sentence; added the second sentence in Subsection B; and, in Subsection C, substituted "the remainder of the unexpired term" for "the unexpired term of the member whom he is to succeed" at the end of the first sentence and "Six members" for "Four members" at the beginning of the second sentence.

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

### **28-1-4. Powers and duties. (Effective until July 1, 1994.)**

A. The commission may:

(1) hear complaints and issue orders, including cease and desist orders concerning alleged unlawful discriminatory practice;

(2) hold hearings, subpoena witnesses and compel their attendance, administer oaths, take the testimony of any person under oath, order depositions and require the production for examination of any books, records, correspondence, documents and other evidence relating to any matter under investigation or in question before the commission. Contumacy or refusal to obey a subpoena issued pursuant to this section constitutes contempt punishable by the district court of the judicial district in which the witness may be found. No individual shall be excused from attending and testifying or from producing evidence in obedience to a subpoena issued pursuant to this section on the grounds that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or a forfeiture. However, no individual shall be prosecuted or subjected to any penalty or forfeiture concerning any matter for which he is compelled to testify or give evidence after having claimed his right against self-incrimination. Nevertheless, the individual so testifying shall not be exempt from prosecution and punishment for perjury committed while testifying.

B. The division may:

(1) receive and investigate complaints of alleged unlawful discriminatory practice;

(2) seek to eliminate discrimination through conciliation and persuasion by voluntary conferences with interested parties;

(3) recommend application by the director to a district court in the county where the violating party resides for specific performance of any conciliation agreement or for enforcement of any order issued by the commission;

(4) endeavor to eliminate prejudice and to further good will. The division in cooperation with the state department of public education and local boards of education shall encourage an educational program for all residents of the state, calculated to eliminate prejudice, its harmful effects and its incompatibility with principles of fair play, equality and justice;

(5) encourage voluntary advisory groups to study problems of discrimination in all fields, to foster, through community efforts, good will and cooperation in this state and to make recommendations to the secretary for the development of policies and procedures which the secretary may recommend to appropriate state agencies;

(6) seek and enlist the cooperation and contributions and grants of individuals and foundations, private, charitable, religious, labor, civic and benevolent organizations and the federal government for the purposes of this section;

(7) issue publications and release the results of investigation and research which in the secretary's judgment will tend to promote good will and prevent or eliminate discrimination; and

(8) submit annually a written report of all its activities and recommendations to the secretary, the governor and the legislature.

**History:** 1978 Comp., § 28-1-4, enacted by Laws 1987, ch. 342, § 18.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Repeals and reenactments.** - Laws 1987, ch. 342, § 18 repeals former 28-1-4 NMSA 1978, as enacted by Laws 1969, ch. 196, § 4, effective July 1, 1987 and enacts the above section. For provisions of former section, see 1983 Replacement Pamphlet.

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

## **28-1-5. Procedures for adopting regulations. (Effective until July 1, 1994.)**

A. The secretary may adopt, promulgate, amend and repeal rules and regulations to carry out the provisions of the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978].

B. No rule or regulation of general application may be adopted, amended or repealed without a public hearing before the secretary or his designee.

C. The public hearing shall be in Santa Fe, and notice of the subject, time and place of the meeting, the manner in which interested persons may present their views and the method by which copies of the proposed rule, regulation or amendment may be obtained shall be:

(1) published in each county at least thirty days prior to the hearing date in a newspaper of general circulation; and

(2) mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of the hearing.

D. The secretary shall allow all interested persons a reasonable opportunity to submit arguments and to examine witnesses testifying at the hearing.

E. The secretary may designate a hearing officer to take evidence at the hearing.

F. Any person appearing or represented at the hearing shall be given written notice of the secretary's action on the proposed rule, regulation, amendment or repeal.

G. No rule, regulation, amendment or repeal shall become effective until thirty days after its filing.

**History:** 1953 Comp., § 4-33-5, enacted by Laws 1969, ch. 196, § 5; 1987, ch. 342, § 19.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

### **28-1-6. Validity of regulation; judicial review. (Effective until July 1, 1994.)**

A. Any person who is or may be affected by a regulation adopted by the secretary 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.

B. The procedure for perfecting an appeal to the court of appeals under this section consists of the timely filing of a notice of appeal with a copy of the regulation from which the appeal is taken. The appellant shall certify in his notice of appeal that arrangements have been made with the secretary for preparation of a sufficient number of transcripts of the record of the hearing on which the appeal depends to support his appeal to the court, at the expense of the appellant, including three copies which he shall furnish to the secretary.

C. Upon appeal, the court of appeals shall set aside the regulation only if found to be:

(1) arbitrary, capricious or an abuse of discretion;

(2) not supported by a preponderance of evidence in the record; or

(3) otherwise not in accordance with law.

**History:** 1953 Comp., § 4-33-6, enacted by Laws 1969, ch. 196, § 6; 1987, ch. 342, § 20.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

### **28-1-7. Unlawful discriminatory practice. (Effective until July 1, 1994.)**

It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or medical condition; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age;

B. a labor organization to exclude an individual or to expel or otherwise discriminate against any of its members or against any employer or employee because of race, religion, color, national origin, ancestry, sex, physical or mental handicap or medical condition;

C. any employer, labor organization or joint apprenticeship committee to refuse to admit or employ any individual in any program established to provide an apprenticeship or other training or retraining because of race, religion, color, national origin, ancestry, sex, physical or mental handicap or medical condition;

D. any person, employer, employment agency or labor organization to print or circulate or cause to be printed or circulated any statement, advertisement or publication, to use any form of application for employment or membership or to make any inquiry regarding prospective membership or employment which expresses, directly or indirectly, any limitation, specification or discrimination as to race, color, religion, national origin, ancestry, sex, physical or mental handicap or medical condition unless based on a bona fide occupational qualification;

E. an employment agency to refuse to list and properly classify for employment or refer an individual for employment in a known available job, for which the individual is otherwise qualified, because of race, religion, color, national origin, ancestry, sex or physical or mental handicap unless based on a bona fide occupational qualification, or to comply with a request from an employer for referral of applicants for employment if the request indicates either directly or indirectly that the employer discriminates in employment on the basis of race, religion, color, national origin, ancestry, sex, physical

or mental handicap or medical condition unless based on a bona fide occupational qualification;

F. any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

G. any person to:

(1) refuse to sell, rent, assign, lease or sublease or offer for sale, rental, lease, assignment or sublease any housing accommodation or real property to any individual or to refuse to negotiate for the sale, rental, lease, assignment or sublease of any housing accommodation or real property to any individual because of race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

(2) discriminate against any individual in the terms, conditions or privileges of the sale, rental, assignment, lease or sublease of any housing accommodation or real property or in the provision of facilities or services in connection therewith because of the race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation; or

(3) print, circulate, display or mail or cause to be printed, circulated, displayed or mailed any statement, advertisement, publication or sign or use any form of application for the purchase, rental, lease, assignment or sublease of any housing accommodation or real property, or to make any record or inquiry regarding the prospective purchase, rental, lease, assignment or sublease of any housing accommodation or real property, which expresses any preference, limitation or discrimination as to race, religion, color, national origin, ancestry, sex or physical or mental handicap, provided that the physical or mental handicap is unrelated to an individual's ability to acquire or rent and maintain particular real property or housing accommodation;

H. any person to whom application is made either for financial assistance for the acquisition, construction, rehabilitation, repair or maintenance of any housing accommodation or real property or for any type of consumer credit including financial assistance for the acquisition of any consumer good, as defined by Section 55-9-109 NMSA 1978, to:

(1) consider the race, religion, color, national origin, ancestry, sex or physical or mental handicap of any individual in the granting, withholding, extending, modifying or renewing

or in the fixing of the rates, terms, conditions or provisions of any financial assistance or in the extension of services in connection with the request for financial assistance; or

(2) use any form of application for financial assistance or to make any record or inquiry in connection with applications for financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, religion, color, national origin, ancestry, sex or physical or mental handicap;

I. any person or employer to:

(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so;

(2) engage in any form of threats, reprisal or discrimination against any person who has opposed any unlawful discriminatory practice or has filed a complaint, testified or participated in any proceeding under the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978]; or

(3) willfully obstruct or prevent any person from complying with the provisions of the Human Rights Act or to resist, prevent, impede or interfere with the commission or any of its members, staff or representatives in the performance of their duties under the Human Rights Act; or

J. any employer to refuse or fail to accommodate to an individual's physical or mental handicap or medical condition unless such accommodation is unreasonable or an undue hardship.

**History:** 1953 Comp., § 4-33-7, enacted by Laws 1969, ch. 196, § 7; 1973, ch. 58, § 1; 1973, ch. 155, § 2; 1975, ch. 62, § 1; 1983, ch. 241, § 2; 1987, ch. 76, § 2.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Constitutionality of section.** - This section defines what is an unlawful discriminatory practice with sufficient particularity to effectuate the legislative intent of the Human Rights Act, and therefore is not repugnant to the New Mexico constitution. *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973).

**Guidance provided by interpretation of federal law.** - The evidentiary methodology adopted by the United States Supreme Court in interpreting the federal Civil Rights Act of 1964 provides guidance for proving a violation of the New Mexico Human Rights Act. *Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990).

**Prospective employee may be required to enter race on application for security reasons** despite provisions of 59-4-4C, 1953 Comp. (similar to Subsection D of this section). 1963-64 Op. Att'y Gen. No. 63-163.

**Age and race discrimination shown.** - Fifty-nine year-old Navajo Indian made out a case that he was terminated because of his age and race, where he identified age and race-based animus, and demonstrated that he was treated differently than similarly situated young, non-Native Americans, to a degree sufficient to support a judgment and award of damages. *Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990).

**Race discrimination not shown.** - Shopping center manager did not discriminate against an East Indian store owner by refusing to renew the owner's lease of a space in the shopping center, where the decision not to renew the lease was purely a business judgment based on efforts to improve the center's "tenant mix". *Goradia v. Hahn Co.*, 111 N.M. 779, 810 P.2d 798 (1991).

**Law reviews.** - For comment, "Public Accommodations in New Mexico: The Right to Refuse Service for Reasons Other Than Race or Religion," see 10 *Nat. Resources J.* 635 (1970).

For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 *N.M.L. Rev.* 51 (1976-77).

For note, "Human Rights Commission v. Board of Regents: Should a University be Considered a Public Accommodation Under the New Mexico Human Rights Act"? see 12 *N.M.L. Rev.* 541 (1982).

For article, "Defending the Abusively Discharged Employee: In Search of a Judicial Solution," see 12 *N.M.L. Rev.* 711 (1982).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 *N.M.L. Rev.* 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 15 *Am. Jur. 2d Civil Rights* §§ 28 to 34, 41 to 60, 98 to 175, 193 to 206, 226 to 242, 249 to 256.

Tenants or buyers: race or religious belief as permissible consideration in choosing tenants or buyers of real estate, 14 *A.L.R.2d* 153.

Discharge from private employment on ground of political views or conduct, 51 *A.L.R.2d* 742, 29 *A.L.R.4th* 287.

Businesses or establishments falling within state civil rights statute provisions prohibiting discrimination, 87 *A.L.R.2d* 120.

Blockbusting: validity and construction of anti-blockbusting regulations designed to prevent brokers from inducing sales of realty because of actual or rumored entry of racial group in neighborhood, 34 *A.L.R.3d* 1432.

Exclusion of or discrimination against physician or surgeon by hospital, 37 A.L.R.3d 645.

Aliens: constitutionality of enactment or regulation forbidding or restricting employment of aliens in public employment or on public works, 38 A.L.R.3d 1213.

Discrimination in provision of municipal services or facilities as civil rights violation, 51 A.L.R.3d 950.

Trailer park as place of public accommodation within meaning of state civil rights statutes, 70 A.L.R.3d 1142.

Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

State laws prohibiting sex discrimination as violated by dress or grooming requirements for customers of establishments serving food or beverages, 89 A.L.R.3d 7.

Construction and effect of state legislation forbidding job discrimination because of physical handicap, 90 A.L.R.3d 383.

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

Application of state law to age discrimination in employment, 96 A.L.R.3d 195.

Prohibition, under state civil rights laws, of racial discrimination in rental of privately owned residential property, 96 A.L.R.3d 497.

Identification of jobseeker by race, religion, national origin, sex, or age, in "situation wanted" employment advertising as violation of state civil rights laws, 99 A.L.R.3d 154.

On-the-job sexual harassment as violation of state civil rights law, 18 A.L.R.4th 328.

Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

What constitutes illegal discrimination under state statutory prohibition against discrimination in housing accommodations on account of marital status, 33 A.L.R.4th 964.

What constitutes employment discrimination on basis of "marital status," for purposes of state civil rights laws, 44 A.L.R.4th 1044.

Discipline or discharge for sexual conduct as violative of state fair employment laws, 47 A.L.R.4th 863.

Liability of employer, supervisor, or manager for intentionally or recklessly causing employee emotional distress, 52 A.L.R.4th 853.

AIDS infection as affecting right to attend public school, 60 A.L.R.4th 15.

Accommodation requirement under state legislation forbidding job discrimination on account of handicap, 76 A.L.R.4th 310.

Handicap as job disqualification under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 265.

Discrimination "because of handicap" or "on the basis of handicap" under state statutes prohibiting job discrimination on account of handicap, 81 A.L.R.4th 144.

State civil rights legislation prohibiting sex discrimination in housing, 81 A.L.R.4th 205.

What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

Refusal to hire, or dismissal from employment, on account of plaintiff's sexual lifestyle or sexual preference as violation of federal constitution or federal civil rights statutes, 42 A.L.R. Fed. 189.

Sex discrimination in law enforcement and corrections employment, 53 A.L.R. Fed. 31.

Actions, under 42 USCS § 1983, for violations of federal statutes pertaining to rights of handicapped persons, 63 A.L.R. Fed. 215.

Age as bona fide occupational qualification "reasonably necessary" for normal conduct of business under § 4(f)(1) of Age Discrimination in Employment Act (29 USCS § 623(f)(1)), 63 A.L.R. Fed. 610.

Admissibility, in action under Title VII of the Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), of evidence of discriminatory practices predating the Act, 63 A.L.R. Fed. 891.

Liability under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.) of employer, as successor employer, for discriminatory employment practices of predecessor, 67 A.L.R. Fed. 806.

Disparate impact test for sex discrimination in employment under Title VII of Civil Rights Act of 1964 (42 USCS § 2000e et seq.), 68 A.L.R. Fed. 19.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment in violation of Title VII of Civil Rights Act of 1964, as amended (42 USCS § 2000e et seq.), 78 A.L.R. Fed. 252.

Reinstatement as remedy for discriminatory discharge or demotion under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 78 A.L.R. Fed. 575.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621-634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

Who is "qualified" handicapped person protected from employment discrimination under Rehabilitation Act of 1973 (29 USCS §§ 701 et seq.) and regulations promulgated thereunder, 80 A.L.R. Fed. 830.

Effect of mixed or dual motives in actions under Title VII (equal employment opportunities subchapter) of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 83 A.L.R. Fed. 268.

Actionability, under federal and state antidiscrimination legislation, of foreign employer's discriminating in favor of foreign workers in hiring and other employment matters, 84 A.L.R. Fed. 114.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 231.

Circumstances which warrant finding of constructive discharge in cases under Age Discrimination in Employment Act (29 USCS § 621 et seq.), 93 A.L.R. Fed. 10.

When does adverse employment decision based on person's foreign accent constitute national origin discrimination in violation of Title VII of Civil Rights Act of 1964 (42 USCS §§ 2000e et seq.), 104 A.L.R. Fed. 816.

14 C.J.S. Civil Rights, §§ 53 to 67, 146 to 181.

## **28-1-8. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1983, ch. 241, § 6, repeals 28-1-8 NMSA 1978, relating to certification of preexisting disability.

Laws 1983, ch. 241, contains no effective date provision but was enacted at a session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

## **28-1-9. Exemptions. (Effective until July 1, 1994.)**

Nothing contained in the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] shall:

A. apply to any single family dwelling sold, leased, subleased or rented by an owner without the making of any notice, statement or advertisement with respect to the sale, lease, sublease or rental of a dwelling unit that indicates any preference, limitation or discrimination based on race, color, religion, national origin, ancestry or sex. This exemption is subject to these further reservations:

(1) to qualify for the exemption, the seller must not be an owner of or own or have reserved any interest in more than three single-family dwellings; and

(2) if the seller doesn't presently live in the dwelling or he was not the most recent occupant, then the exemption granted in this section will only apply to one sale in twenty-four months;

B. bar any religious or denominational institution or organization which is operated or supervised or controlled by or is operated in connection with a religious or denominational organization from limiting admission to or giving preference to persons of the same religion or denomination, or from making selections of buyers, lessees or tenants as are calculated by the organization or denomination to promote the religious or denominational principles for which it is established or maintained unless membership in the religious or denominational organization is restricted on account of race, color, national origin or ancestry;

C. apply to rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence;

D. apply to public rest rooms, public showers, public dressing facilities or sleeping quarters in public institutions, where the preference or limitation is based on sex; and

E. prevent the mandatory retirement of an employee upon reaching the age of sixty-five years or older, if the employer is operating under a retirement plan which meets the requirements of Public Law 93-406, the Employee Retirement Income Security Act of 1974.

**History:** 1953 Comp., § 4-33-8, enacted by Laws 1969, ch. 196, § 8; 1973, ch. 58, § 2; 1975, ch. 78, § 1.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Employee Retirement Income Security Act.** - The relevant provisions of the federal Employee Retirement Income Security Act of 1974, referred to in Subsection E, are compiled as 26 U.S.C. § 410 et seq.

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M.L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Validity, construction, and application of provisions of § 702 of Civil Rights Act of 1964 (42 USCS § 2000e-1) exempting activities of religious organizations from operation of Title VII Equal Employment Opportunity provisions, 67 A.L.R. Fed. 874.

Actions under Age Discrimination in Employment Act (29 USCS §§ 621 to 634) challenging hiring or retirement practices in law enforcement employment, 79 A.L.R. Fed. 373.

### **28-1-10. Grievance procedure. (Effective until July 1, 1994.)**

A. Any person claiming to be aggrieved by an unlawful discriminatory practice, and any member of the commission who has reason to believe that discrimination has occurred, may file with the human rights division a written complaint which shall state the name and address of the person alleged to have engaged in the discriminatory practice, all information relating to the discriminatory practice and any other information that may be required by the commission. All complaints shall be filed with the division within one hundred eighty days after the alleged act was committed.

B. The director shall advise the respondent that a complaint has been filed against him and shall furnish him with a copy of the complaint. The director shall promptly investigate the alleged act. If the director determines that the complaint lacks probable cause, he shall dismiss the complaint and notify the complainant and respondent of the dismissal. The complaint shall be dismissed subject to appeal as in the case of other orders of the commission.

C. If the director determines that probable cause exists for the complaint, he shall attempt to achieve a satisfactory adjustment of the complaint through persuasion and conciliation. The director and staff shall neither disclose what has transpired during the attempted conciliation nor divulge information obtained during any hearing before the commission or a commissioner prior to final action relating to the complaint. Any officer or employee of the labor department who makes public in any manner whatever any information in violation of this subsection is guilty of a misdemeanor and upon conviction shall be fined not more than one thousand dollars (\$1,000) or imprisoned not more than one year.

D. Any person who has filed a complaint with the human rights division may request and shall receive an order of nondetermination from the director one hundred eighty days after the division's receipt of the complaint. The order of nondetermination may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978.

E. In the case of a complaint filed by or on behalf of a person who has an urgent medical condition and has notified the director in writing of the test results, the director

shall make the determination whether probable cause exists for the complaint and shall attempt any conciliation efforts within ninety days of the filing of the written complaint or notification, whichever occurs last.

F. If conciliation fails or if, in the opinion of the director, informal conference cannot result in conciliation, the commission shall issue a written complaint in its own name against the respondent, except that in the case of a complaint filed by or on behalf of a person who has an urgent medical condition, who has notified the director in writing of the test results and who so elects, the director shall issue an order of nondetermination which may be appealed pursuant to the provisions of Section 28-1-13 NMSA 1978. The complaint shall set forth the alleged discriminatory practice, the secretary's regulation or the section of the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] alleged to have been violated and the relief requested. The complaint shall require the respondent to answer the allegations of the complaint at a hearing before the commission and shall specify the date, time and place of the hearing. The hearing date shall not be more than fifteen or less than ten days after service of the complaint. The complaint shall be served on the respondent personally or by registered mail, return receipt requested. The hearing shall be held in the county where the respondent is doing business or the alleged discriminatory practice occurred.

G. Upon the commission's petition, the district court of the county where the respondent is doing business or the alleged discriminatory practice occurred may grant injunctive relief pending hearing by the commission or pending judicial review of an order of the commission so as to preserve the status quo or to ensure that the commission's order as issued will be effective. The commission shall not be required to post a bond.

H. For purposes of this section "urgent medical condition" means any medical condition as defined by an appropriate medical authority through documentation or by direct witness of a clearly visible disablement and which poses a serious threat to the life of the person with the medical condition.

**History:** 1953 Comp., § 4-33-9, enacted by Laws 1969, ch. 196, § 9; 1981, ch. 220, § 1; 1983, ch. 241, § 3; 1987, ch. 342, § 21; 1991, ch. 45, § 1.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**The 1991 amendment,** effective July 1, 1991, inserted "human rights" in the first sentence of Subsection A; added Subsections D, E and H; redesignated former Subsections D and E as Subsections F and G; in Subsection F added the exception at the end of the first sentence; and made stylistic changes in Subsections A and B.

**Compliance with grievance procedure of Human Rights Act is prerequisite to suit** under the act. *Jaramillo v. J.C. Penney Co.*, 102 N.M. 272, 694 P.2d 528 (Ct. App. 1985).

**Notice required.** - Plaintiff has to give notice to the New Mexico human rights commission (now the human rights division of the department of labor) of the alleged discrimination before commencement of his action in federal court. *Harris v. Ericson*, 457 F.2d 765 (10th Cir. 1972).

**Where not timely filed.** - Failure to file within the time set forth in Subsection A deprives the New Mexico commission of a bona fide opportunity to consider or act upon the discrimination complaint, and plaintiff cannot successfully rely on the resultant rejection as such a termination of state proceedings within the meaning of § 706(d), of Title VII of 1964 Civil Rights Act, so as to invoke the extended federal filing period. *Dubois v. Packard Bell Corp.*, 470 F.2d 973 (10th Cir. 1972).

**Effect of not meeting state notice requirement on federal age discrimination action.** - The failure to satisfy the state notice requirement within the time limits specified by state law does not bar a federal action which has already been commenced, but such federal action should be held in abeyance so as to give the state agency the opportunity to entertain respondent's grievance. *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

**Commencement of state proceeding prerequisite to federal age discrimination action.** - The commencement of state proceedings, in so-called deferral states such as New Mexico, is a jurisdictional requirement of the federal Age Discrimination in Employment Act. *Mistretta v. Sandia Corp.*, 639 F.2d 588 (10th Cir. 1980).

**Where statutory period commences to run anew.** - The 90-day (now 180-day) statutory period commences to run anew from the last allegedly unlawful employment practice. *Molybdenum Corp. of Am. v. EEOC*, 457 F.2d 935 (10th Cir. 1972).

**Commencement where no continuing unlawful practice.** - The 90-day (now 180-day) limitation period for filing a complaint commenced to run when second employment application was denied for the same reason as first, and where refusal to hire was not actuated by a continuing discriminatory employment practice. *Molybdenum Corp. of Am. v. EEOC*, 457 F.2d 935 (10th Cir. 1972).

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 15 Am. Jur. 2d Civil Rights § 261.

14 C.J.S. Civil Rights, §§ 448 to 462.

**28-1-11. Hearing procedures. (Effective until July 1, 1994.)**

A. The respondent to a complaint made pursuant to Section 28-1-10 NMSA 1978 may file a written answer to the complaint, appear at the hearing, give testimony and be represented by counsel and may obtain from the commission subpoenas for any person or for the production of any evidence pertinent to the proceeding. The complainant must be present at the hearing and may be represented by counsel. Each party shall have the right to amend his complaint or answer.

B. A panel of three members of the commission designated by the chairman shall sit, and a decision agreed upon by two members of the panel shall be the decision of the commission. However, no commissioner who has filed a complaint may sit on the panel hearing his complaint.

C. A member of the division staff, the attorney general or special counsel shall present to the commission the case supporting the complaint. No evidence concerning prior attempts at conciliation shall be received. The director shall not participate in the hearing except as a witness.

D. The commission shall not be bound by the formal rules of evidence governing courts of law or equity but shall permit reasonable direct examination and cross-examination and the submission of briefs. Testimony at the hearing shall be taken under oath and recorded by tape or otherwise. Upon the request of any party, testimony shall be transcribed, provided that all costs of transcribing shall be paid by the party so requesting. Each commissioner may administer oaths.

E. If the commission finds from the evidence that the respondent has engaged in a discriminatory practice, it shall make written findings of fact, conclusions of law and its decision based upon the findings of fact and conclusions of law. Within five days after any order is rendered by the commission following a hearing, the commission shall serve upon each party of record and his attorney, if any, a written copy of the order by certified mail to the party's address of record. All parties shall be deemed to have been served on the tenth day following the mailing. As part of its order, the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorney's fees, if the complainant was represented by private counsel, and to take such affirmative action as the commission considers necessary, including a requirement for reports of the manner of compliance.

F. If the commission finds from the evidence that the respondent has not engaged in a discriminatory practice, it shall make written findings of fact and serve the complainant and respondent with a copy of the findings of fact and with an order dismissing the complaint.

**History:** 1953 Comp., § 4-33-10, enacted by Laws 1969, ch. 196, § 10; 1975, ch. 248, § 1; 1983, ch. 241, § 4; 1987, ch. 342, § 22.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Proceeding not stayed by filing federal suit.** - The filing of an age discrimination complaint in federal court does not stay a proceeding before the commission to redress the same alleged unlawful discriminatory practice. *Mares v. Sante Fe Pub. Schools*, 106 N.M. 354, 743 P.2d 110 (1987).

**"Actual damages".** - The law in New Mexico is unsettled as to whether the provision for "actual damages," Subsection E, encompasses damages for emotional harm. *Roybal v. City of Albuquerque*, 653 F. Supp. 102 (D.N.M. 1986).

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 15 Am. Jur. 2d Civil Rights § 261.

Award of front pay under state job discrimination statutes, 74 A.L.R.4th 746.

Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Nature and burden of proof in Title VII action alleging favoritism in promotion or job assignment due to sexual or romantic relationship between supervisor and another, 86 A.L.R. Fed. 231.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS §§ 3601 et seq.), 100 A.L.R. Fed. 97.

14 C.J.S. Civil Rights, §§ 454 to 459.

## **28-1-12. Enforcement. (Effective until July 1, 1994.)**

If a respondent to a complaint filed pursuant to the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978] is not complying with an order of the commission, the attorney general or district attorney, at the request of the secretary, shall secure enforcement of the commission's order by a district court. The proceeding shall be initiated by the filing of a petition in the district court where the respondent is doing business or the alleged discriminatory practice occurred. A copy of the petition shall be served on the respondent personally or by registered mail, return receipt requested. The court may make and enter upon the proceedings an order to decree enforcement of the order of the commission.

**History:** 1953 Comp., § 4-33-11, enacted by Laws 1969, ch. 196, § 11; 1987, ch. 342, § 23.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

### **28-1-13. Appeal. (Effective until July 1, 1994.)**

A. Any person aggrieved by an order of the commission may obtain a trial de novo in the district court of the county where the discriminatory practice occurred or where the respondent does business by filing a notice of appeal within thirty days from the date of service of the commission's order. A copy of the notice of appeal shall be served personally or by certified mail, return receipt requested, at their last known address on all parties who appeared before the commission and shall also be served at the division office in Santa Fe. No order of the commission shall be superseded or stayed during the appeal unless the district court so directs after notice to the commission and a hearing.

B. If testimony at the hearing was transcribed, the division shall, upon receipt of the notice of appeal, file so much of the transcript of the record as the parties requesting the transcript designate as necessary for the appeal with the district court.

C. Upon appeal, either party may request a jury. The jurisdiction of the district court is exclusive and its judgment is final, subject to further appeal to the supreme court.

D. In any action or proceeding under this section if the complainant prevails, the court in its discretion may allow actual damages and reasonable attorney's fees, and the state shall be liable the same as a private person.

**History:** 1953 Comp., § 4-33-12, enacted by Laws 1969, ch. 196, § 12; 1975, ch. 248, § 2; 1983, ch. 241, § 5; 1987, ch. 342, § 24.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

**Section applies only to de novo appeals from commission decision;** where the administrative procedure was never invoked, a district court action was not an appeal under this section. *Jaramillo v. J.C. Penney Co.*, 102 N.M. 272, 694 P.2d 528 (Ct. App. 1985).

The legislature intended that appeal for a trial de novo be limited to the district court of the county where the commission elected, as between a place of doing business or of the alleged discriminatory practice, to hear the complaint. *Montoya v. Super Save Whse. Foods*, 111 N.M. 212, 804 P.2d 403 (1991).

**Scope of review.** - In appeals from the human rights commission (now the human rights division of the department of labor), the district court, by virtue of specific provisions for trial de novo and jury trial, has the right to make an independent determination of the facts from the record in the case and such additional relevant evidence as may be presented. The general rule in respect to appeals from administrative bodies is not applicable. *Keller v. City of Albuquerque*, 85 N.M. 134, 509 P.2d 1329 (1973).

**Administrative review distinguished.** - The scope of judicial review contemplated by this section is much broader than in appeals brought generally under the Administrative Procedures Act (12-8-1 NMSA 1978 et seq.), where judicial review is restricted to the record. School district appealing decision of human rights commission was not required to state grounds for appeal, and therefore its notice of appeal was effective to give the district court jurisdiction to try the case de novo. *Linton v. Farmington Mun. Schools*, 86 N.M. 748, 527 P.2d 789 (1974).

**Review of jurisdiction.** - Court of appeals has no authority to review a judgment of the district court on the issue of jurisdiction. *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (Ct. App. 1981).

**Admissibility of reports not in record.** - Ordinary rules of evidence govern the admissibility of administrative findings, and the district court is not precluded from adherence to the hearsay evidence rule in ruling on the admissibility of official reports or statements that are not in the nature of a transcript of the record. *Behrmann v. Phototron Corp.*, 110 N.M. 323, 795 P.2d 1015 (1990).

**"Actual damages" construed.** - The term "actual damages" in Subsection D is synonymous with compensatory damages, and excludes punitive damages. As for prospective damages, because they are a species of actual damages, they properly may be granted where evidence has been presented as to their present worth. *Behrmann v. Phototron Corp.*, 110 N.M. 323, 795 P.2d 1015 (1990).

**Evidence supporting award of front pay.** - Evidence of plaintiff's inability to find full-time employment in his locality, despite his strenuous efforts, constitutes sufficient evidence of his inability to mitigate damages to support the court's discretion in determining that future employment would be unlikely and to support an award of front pay. *Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990).

**In determining the reasonableness of an award of attorney's fees,** a court should consider a variety of factors, including: (1) the time and effort required, considering the complexity of the issues and the skill required; (2) the customary fee in the area for similar services; (3) the results obtained and the amount of the controversy; (4) time limitations; and (5) the ability, experience, and reputation of the attorney performing the services. *Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433 (1990).

**Validity of certain jury instructions.** - The court did not abuse its discretion in giving "sex stereotyping" and "absence-of-direct-proof" instructions to the jury in an action brought by an employee who alleged that she was wrongfully terminated from her job as a salesperson because she became pregnant. *Behrmann v. Phototron Corp.*, 110 N.M. 323, 795 P.2d 1015 (1990).

**Law reviews.** - For article, "Age Discrimination in Employment: A Comparison of the Federal and State Laws and Remedies in New Mexico," see 7 N.M. L. Rev. 51 (1976-77).

For article, "Selecting an Analogous State Limitations Statute in Reconstruction Civil Rights Claims: The Tenth Circuit's Resolution," see 15 N.M.L. Rev. 11 (1985).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Damages and other relief under state legislation forbidding job discrimination on account of handicap, 78 A.L.R.4th 435.

Evidence of discriminatory effect alone as sufficient to prove, or to establish prima facie case of, violation of Fair Housing Act (42 USCS § 3601 et seq.), 100 A.L.R. Fed. 97.

### **28-1-14. Posting of law and information. (Effective until July 1, 1994.)**

Every person who is subject to the Human Rights Act [28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978], except an individual selling houses, shall keep posted in a conspicuous place on his premises notices prepared by the division which shall set forth excerpts of the Human Rights Act and other relevant information as determined by the secretary.

**History:** 1953 Comp., § 4-33-13, enacted by Laws 1969, ch. 196, § 13; 1987, ch. 342, § 25.

**Delayed repeals.** - See 28-1-15 NMSA 1978.

### **28-1-15. Termination of agency life; delayed repeal. (Effective until July 1, 1994.)**

The human rights commission is terminated on July 1, 1993 pursuant to the Sunset Act [12-9-11 to 12-9-21 NMSA 1978]. The commission shall continue to operate according to the provisions of Chapter 28, Article 1 NMSA 1978 until July 1, 1994. Effective July 1, 1994, Article 1, Chapter 28 NMSA 1978 is repealed.

**History:** 1978 Comp., § 28-1-14.1, enacted by Laws 1987, ch. 333, § 1.

## **ARTICLE 2 CRIMINAL OFFENDER EMPLOYMENT ACT**

### **28-2-1. Short title.**

Sections 1 through 6 [28-2-1 to 28-2-6 NMSA 1978] of this act may be cited as the "Criminal Offender Employment Act".

**History:** 1953 Comp., § 41-24-1, enacted by Laws 1974, ch. 78, § 1.

**Content of notice of contemplated action.** - The "evidence" to be set out in the notice of contemplated action under this statute is the evidence of the ground or grounds to be relied upon in taking the contemplated action under 61-5-14 NMSA 1978, not the evidence adduced by way of explanation and determination of rehabilitation under Criminal Offender Employment Act. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

**Law reviews.** - For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

## **28-2-2. Purpose of act.**

The legislature finds that the public is best protected when criminal offenders or ex-convicts are given the opportunity to secure employment or to engage in a lawful trade, occupation or profession and that barriers to such employment should be removed to make rehabilitation feasible.

**History:** 1953 Comp., § 41-24-2, enacted by Laws 1974, ch. 78, § 2.

**Law reviews.** - For note, "Negligent Hiring and Retention - Availability of Action Limited By Foreseeability Requirement," see 10 N.M.L. Rev. 491 (1980).

## **28-2-3. Employment eligibility determination.**

A. Subject to the provisions of Subsection B of this section and Sections 3 and 4 [Sections 4 and 5 (28-2-4 and 28-2-5 NMSA 1978)] of the Criminal Offender Employment Act, in determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration the conviction, but such conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession.

B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:

(1) records of arrest not followed by a valid conviction; and

(2) misdemeanor convictions not involving moral turpitude.

**History:** 1953 Comp., § 41-24-3, enacted by Laws 1974, ch. 78, § 3.

**Cross-references.** - For persons convicted of felonious or infamous crime ineligible for public office unless pardoned or restored to political rights, see 10-1-2 NMSA 1978.

**Compiler's note.** - The probable legislative intent was to refer to Laws 1974, ch. 78, §§ 4 and 5, as indicated by the brackets in Subsection A.

**State board of education subject to act.** - The state board of education is subject to the provisions of Criminal Offender Employment Act (COEA), because it is an agency which determines eligibility for employment with the state. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Testimony concerning indictment.** - Because an agency has wide discretion in receiving and excluding evidence in proceedings under the Uniform Licensing Act, any error in allowing reference to an indictment against a dentist was harmless. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

## **28-2-4. Power to refuse, renew, suspend or revoke public employment or license.**

A. Any board or other agency having jurisdiction over employment by the state or any of its political subdivisions or the practice of any trade, business or profession may refuse to grant or renew, or may suspend or revoke, any public employment or license or other authority to engage in the public employment, trade, business or profession for any one or any combination of the following causes:

(1) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction directly relates to the particular employment, trade, business or profession;

(2) where the applicant, employee or licensee has been convicted of a felony or a misdemeanor involving moral turpitude and the criminal conviction does not directly relate to the particular employment, trade, business or profession, if the board or other agency determines after investigation that the person so convicted has not been sufficiently rehabilitated to warrant the public trust; or

(3) where the applicant or employee has been convicted of trafficking in controlled substances, criminal sexual penetration or related sexual offenses or child abuse and the applicant or employee has applied for reinstatement or issuance of a teaching certificate, regardless of rehabilitation.

B. The board or other agency shall explicitly state in writing the reasons for a decision which prohibits the person from engaging in the employment, trade, business or profession if the decision is based in whole or in part on conviction of any crime described in Paragraphs (1) and (3) of Subsection A of this section. Completion of probation or parole supervision, or expiration of a period of three years after final discharge or release from any term of imprisonment without any subsequent conviction, shall create a presumption of sufficient rehabilitation for purposes of Paragraph (2) of Subsection A of this section.

**History:** 1953 Comp., § 41-24-4, enacted by Laws 1974, ch. 78, § 4; 1985, ch. 234, § 1.

**The purpose of a license revocation proceeding** is not to punish the licensee but to protect the public from practitioners who do not possess the necessary qualifications. *Varoz v. New Mexico Bd. of Podiatry*, 104 N.M. 454, 722 P.2d 1176 (1986).

**Jury determination of guilt relevant concern.** - For purposes of this article, a jury determination of a teacher's guilt of sexual misconduct with a minor acted as a conviction, despite subsequent dismissal of the case after the teacher completed his deferred sentence. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

**Decertified teacher has burden of proving rehabilitation.** - A teacher who was found guilty of sexual misconduct with a minor was convicted of a crime directly relating to the teaching profession and, therefore, had the burden of showing, upon application for recertification, that he had been sufficiently rehabilitated. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

**Revocation of dental license.** - Where a dentist was convicted of four counts of making or permitting a false claim for reimbursement for public assistance services, a conviction itself, as distinguished from the underlying conduct, is a sufficient basis for revoking a dental license. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

**Meaning of rehabilitation.** - While "rehabilitation" is not defined in this section (although the statute does create a presumption of rehabilitation after completion of parole, or after a certain period has elapsed after release from prison) its dictionary definition is to restore a condition of good health, ability to work or the like. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Board must state reasons why applicant has not been rehabilitated** and may not rely solely on the fact of conviction to deny an application. *Garcia v. State Bd. of Educ.*, 102 N.M. 306, 694 P.2d 1371 (Ct. App. 1984).

**Distinction in treatment of crimes relates to burden of proof.** - The distinction in treatment, under this section, between crimes that directly relate to a profession and crimes that do not directly relate to a profession concerns the burden of proof: under Subsection A(1), an applicant for issuance or reinstatement of a license or certificate has the burden of proving that he or she has been sufficiently rehabilitated, while, under Subsection A(2), there is a presumption of rehabilitation and the board or agency has the burden of proving an applicant for issuance or reinstatement of a license or certificate has not been sufficiently rehabilitated. *New Mexico Bd. of Pharmacy v. Reece*, 100 N.M. 339, 670 P.2d 950 (1983).

**Where court accepted board rehabilitation decision.** - Probative evidence of rehabilitation of a teacher who was on one year's probation for one count of distribution of marijuana included her conscientious and successful performance at her job and the parents' perception of her as a person with whom they would trust their children; but evidence that she had become angry when her probation officer would not let her see her file, made a derogatory comment about the laws and "narcs," told a student who asked her about drugs that he could get in some trouble because of some bad laws, but for him to do what he wanted, was probative of what the board could conclude was a poor attitude towards criminal offenses for one who was a teacher, and since the state board members spoke to her at some length themselves and were able to draw their own impressions of her progress towards rehabilitation, the appellate court would not substitute its judgment for that of the board. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Standard for use of conviction to revoke license.** - In order for a conviction to be used as a basis for a license revocation, the licensing agency must explicitly state its reasons for a decision prohibiting the licensee from engaging in his or her employment or profession, and the agency must find that the licensee has not been sufficiently rehabilitated to warrant the public trust and must give reasons for this finding. *Weiss v. New Mexico Bd. of Dentistry*, 110 N.M. 574, 798 P.2d 175 (1990).

**Writing requirement explained.** - When a decision is made on grounds that a criminal conviction directly relates to a person's profession, the reasons for such a decision must be explicitly stated in writing. It is not sufficient to merely recite the language of the statute, but rather the "reasons" for the conclusion that there is a direct relation must be given, especially so that a reviewing body may know the reasons for the administrative body's conclusion; and if the conviction of a crime is to operate as other than an automatic bar to employment, the administrative agencies must explain what they perceive the detrimental effect of employment to be. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Scope of writing required under Subsection B.** - See *New Mexico Bd. of Pharmacy v. Reece*, 100 N.M. 339, 670 P.2d 950 (1983).

**Knowledge of public record not imputed to estop dismissal.** - Where the local school board did not have knowledge of a teacher's conviction until approached by her probation officer, although it was a matter of public record, the court of appeals declined to impute this knowledge to the board so as to estop it from dismissing her. *Bertrand v. New Mexico State Bd. of Educ.*, 88 N.M. 611, 544 P.2d 1176 (Ct. App. 1975), cert. denied, 89 N.M. 5, 546 P.2d 70 (1976).

**Required procedure for denial, suspension, or revocation of real estate license.** - In each instance in which the real estate commission contemplates the denial, suspension or revocation of a license because of a criminal conviction, certain steps

should be followed: 1) whether the conviction directly relates or does not directly relate to real estate, notice should be given to the licensee that the basis for the action is warranted by the Criminal Offender Employment Act; 2) evidence should be introduced on behalf of the commission supporting whether the conviction is directly related or not directly related to the business of a real estate broker or salesperson, and whether sufficient rehabilitation has been made, if required by the Criminal Offender Employment Act; 3) findings should be made after the hearing to uphold the decision of the commission under the Criminal Offender Employment Act as well as under the Real Estate Licensing Act. 1982 Op. Att'y Gen. No. 82-2.

**Prejudicial error resulted from failure to follow revocation procedures.** - Failure of real estate commission to follow the procedures established by this section in its revocation of a real estate license for conviction of conspiracy to import marijuana was prejudicial error. *McCoy v. New Mexico Real Estate Comm'n*, 94 N.M. 602, 614 P.2d 14 (1980).

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

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 51 Am. Jur. 2d Licenses and Permits §§ 56, 58, 106, 142; 63A Public Officers and Employees §§ 48 to 50, 184 to 186, 241 to 243, 291.

53 C.J.S. Licenses §§ 39, 52; 67 C.J.S. Officers and Public Employees §§ 22, 101, 110, 125.

### **28-2-5. Nonapplicability to law enforcement agencies.**

The Criminal Offender Employment Act [28-2-1 to 28-2-6 NMSA 1978] is not applicable to any law enforcement agency; however, nothing herein shall be construed to preclude a law enforcement agency in its discretion from adopting the policy set forth herein.

**History:** 1953 Comp., § 41-24-5, enacted by Laws 1974, ch. 78, § 5.

### **28-2-6. Applicability.**

The provisions of the Criminal Offender Employment Act [28-2-1 to 28-2-6 NMSA 1978] relating to any board or other agency which has jurisdiction over the practice of any trade, business or profession apply to authorities made subject to its coverage by law, or by any such authorities' rules or regulations if permitted by law.

**History:** 1953 Comp., § 41-24-6, enacted by Laws 1974, ch. 78, § 6.

**Suspension or revocation of real estate license.** - The provisions of the Criminal Offender Employment Act must be followed by the real estate commission in any action by the commission to suspend or revoke a broker's or salesperson's license because of

a conviction of a felony or misdemeanor involving moral turpitude. 1982 Op. Att'y Gen. No. 82-2.

## **ARTICLE 3**

### **COMMISSION ON THE STATUS OF WOMEN**

#### **28-3-1. Commission on the status of women; creation.**

A. The "commission on the status of women" is created. The commission consists of fifteen members, including one member of the human rights commission, representative of all fields of interest to women. Members shall be appointed by the governor. Members of the first commission shall be appointed for staggered terms, five ending on December 31, 1975 and five on December 31 of each of the following two years. Thereafter, appointments shall be for terms of three years or less made in such manner that the terms of five members expire on December 31 of each year. At least one member shall be appointed from, and reside in, each planning and development district. A majority of the members appointed shall be women and no more than eight members shall belong to any one political party.

B. A majority of the commission's members constitutes a quorum for the transaction of business. The governor shall designate a chairman and vice-chairman from among the membership.

**History:** 1953 Comp., § 4-33A-1, enacted by Laws 1974, ch. 90, § 1.

**Cross-references.** - For Human Rights Act, see 28-1-1 to 28-1-7, 28-1-9 to 28-1-14 NMSA 1978.

For discrimination on basis of sex prohibited, see N.M. Const., art. II, § 18.

**Commission on the status of women administratively attached.** - Pursuant to Laws 1977, ch. 252, § 9, the commission on the status of women is administratively attached to the human services department.

#### **28-3-2. Commission on the status of women; duties.**

The commission shall:

A. stimulate and encourage throughout the state the study and review of the status of women in New Mexico and may act as a clearinghouse for all activities involving the status of women;

B. recommend methods of overcoming discrimination against women in public and private employment;

C. promote methods for enabling women to develop their skills, continue their education and be retrained;

D. cooperate with and assist public and private entities dealing with women;

E. conduct periodic conferences throughout the state to apprise women of their rights and opportunities and to learn from them of their needs and problems; and

F. secure recognition of women's accomplishments and contributions to New Mexico.

**History:** 1953 Comp., § 4-33A-2, enacted by Laws 1974, ch. 90, § 2.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Application of state law to sex discrimination in employment, 87 A.L.R.3d 93.

### **28-3-3. Commission on the status of women; powers.**

The commission:

A. may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

B. is designated as the state agency for handling all United States government programs related to the status of women except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the United States government for this purpose.

**History:** 1953 Comp., § 4-33A-3, enacted by Laws 1974, ch. 90, § 3.

### **28-3-4. Commission on the status of women; staff.**

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ other necessary employees under the provisions of the Personnel Act.

**History:** 1953 Comp., § 4-33A-4, enacted by Laws 1974, ch. 90, § 4.

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

### **28-3-5. Commission on the status of women; reports.**

The commission shall submit reports on its preceding year's work to the governor and the legislature by December 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

**History:** 1953 Comp., § 4-33A-5, enacted by Laws 1974, ch. 90, § 5.

### **28-3-6. Commission on the status of women; compensation.**

Commission members shall be reimbursed as provided for nonsalaried public officers in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance.

**History:** 1953 Comp., § 4-33A-6, enacted by Laws 1974, ch. 90, § 6.

### **28-3-7. Short title.**

This act [28-3-7 to 28-3-11 NMSA 1978] may be cited as the "Displaced Homemakers Act".

**History:** 1953 Comp., § 4-33A-7, enacted by Laws 1977, ch. 292, § 1.

### **28-3-8. Findings and purpose of act.**

The legislature finds that there is an increasing number of persons in New Mexico who, in their middle years and having fulfilled the role of homemaker, find themselves displaced because of dissolution of marriage, death of a spouse or other loss of family income. As a consequence of this displacement such persons suffer a greatly reduced income, high rate of unemployment because of age, lack of work experience, discrimination and limited or no opportunity to collect funds of assistance such as social security, unemployment compensation, medicaid and other health insurance benefits or pension plans of the spouse. It is the purpose of this legislation to provide research and planning for programs to serve such displaced homemakers.

**History:** 1953 Comp., § 4-33A-8, enacted by Laws 1977, ch. 292, § 2.

### **28-3-9. Definitions.**

As used in the Displaced Homemakers Act [28-3-7 to 28-3-11 NMSA 1978]:

A. "displaced homemaker" means any individual who has worked in the home for a substantial number of years providing unpaid household services for family members and who:

(1) has difficulty obtaining adequate employment; or

(2) has been dependent on the income of another family member but is no longer supported by such income, has been dependent on federal assistance but is no longer eligible for such assistance or is supported as the parent of minor children by federal assistance or spousal support; and

B. "income of another family member" means any income in support of an entire family unit used for the purpose of providing that family with economic security, but does not include the payment of alimony or child support.

**History:** 1953 Comp., § 4-33A-9, enacted by Laws 1977, ch. 292, § 3.

### **28-3-10. Office for displaced homemakers; creation; research and planning for displaced homemaker programs.**

There is created in the commission on the status of women an "office for displaced homemakers." The office for displaced homemakers shall conduct research and planning for programs to meet the needs of displaced homemakers, which programs may include:

A. job counseling services specifically designed for a person entering the job market after a number of years as a homemaker;

B. job training and job placement services, including but not limited to:

(1) assistance in gaining admission to existing public and private job training programs and opportunities;

(2) development of training and placement programs for jobs in the private and public sectors, in conjunction with state and local government agencies, private employers and already existing training and placement programs; and

(3) identification of community needs and fundseeking for creation of new public service jobs which displaced homemakers might fill;

C. information and assistance with respect to health care, financial matters, education, nutrition and legal problems;

D. a clearinghouse of information to compile, coordinate and disseminate information about services and programs available to displaced homemakers;

E. training for service agency personnel who work with displaced homemakers; and

F. the development of methods and materials aimed at facilitating outreach and communication for displaced homemaker service agencies and programs.

**History:** 1953 Comp., § 4-33A-10, enacted by Laws 1977, ch. 292, § 4; 1978, ch. 126, § 1.

### **28-3-11. Report and recommendations.**

The director of the commission on the status of women, in conjunction with the office for displaced homemakers, shall submit to the legislature an annual report on the number of displaced homemakers served by existing public and private agencies and shall make recommendations for displaced homemaker programs which may include:

A. a plan for the establishment, funding and implementation of regional displaced homemaker service centers in New Mexico; and

B. recommendations for legislative action.

**History:** 1953 Comp., § 4-33A-11, enacted by Laws 1977, ch. 292, § 5; 1978, ch. 126, § 2.

## **ARTICLE 4**

### **STATE AGENCY ON AGING**

#### **28-4-1. Commission on aging [State agency on aging]; duties.**

The commission on aging [state agency on aging] shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population. Not by way of limitation, the commission [agency] shall:

A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;

B. promote the utilization of older persons in all phases of employment;

C. disseminate information to the aged relative to federal, state and local services for the aged;

D. encourage training programs, retraining programs and opportunities for older workers;

E. develop new methods of job placement for older workers;

F. promote public recognition of the advantages of hiring and retaining older workers; and

G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.

**History:** 1953 Comp., § 13-1-59, enacted by Laws 1969, ch. 55, § 2.

**Cross-references.** - As to elderly homeowners' maximum property tax liability and income tax credit or refund for excess, see 7-2-18 NMSA 1978.

For definitions applicable to provisions of the first three sections of this article, see 27-1-1 NMSA 1978.

**Bracketed material.** - The bracketed material in this section was inserted by the compiler, as the commission on aging was abolished by Laws 1977, ch. 252, § 5. Laws 1977, ch. 252, § 11, established an aging services bureau within the social services division of the human services department. However, Laws 1979, ch. 203, § 11, transferred all personnel, appropriations, property, equipment, supplies, money and contracts from the aging services bureau of the social services division of the human services department to the state agency on aging, which is administratively attached to the human services department. See 28-4-4 NMSA 1978. The bracketed material was not enacted by the legislature and is not part of the law.

### **28-4-2. Definitions.**

The commission on aging shall mean the aging services bureau of the social services division of the human services department [state agency on aging].

**History:** 1953 Comp., § 13-1-59.1, enacted by Laws 1977, ch. 252, § 17.

**Bracketed material.** - See same catchline in notes to 28-4-1 NMSA 1978.

### **28-4-3. Commission on aging [State agency on aging]; powers.**

The commission [agency]:

A. may receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the aging, except those designated by law as the responsibility of another state agency, and may enter into agreements and contracts with agencies of the federal government for this purpose.

**History:** 1953 Comp., § 13-1-60, enacted by Laws 1969, ch. 55, § 3.

**Bracketed material.** - See same catchline in notes to 28-4-1 NMSA 1978.

### **28-4-4. Agency created.**

There is created as an entity of state government the "state agency on aging," which shall be administratively attached to the human services department. The administrative head of the agency shall be the director, who shall be appointed by and serve at the pleasure of the governor.

**History:** Laws 1979, ch. 203, § 1.

### **28-4-5. Agency duties.**

The state agency on aging shall establish and maintain a comprehensive statewide program designed to meet the social service needs of the state's aged population, including but not limited to the following:

- A. strengthen and coordinate services of state and local public bodies for the benefit of the aged;
- B. promote the utilization of older persons in all phases of employment;
- C. disseminate information to the aged relative to federal, state and local services for the aged;
- D. encourage training programs, retraining programs and opportunities for older workers;
- E. develop new methods of job placement for older workers;
- F. promote public recognition of the advantages of hiring and retaining older workers; and
- G. promote and develop programs of community resources and facilities designed to meet the social needs of older persons.

**History:** Laws 1979, ch. 203, § 2.

### **28-4-6. Agency powers.**

A. The state agency on aging:

(1) may receive on behalf of the state any gifts, donations or bequests from any source to be used in carrying out its duties; and

(2) is designated as the state agency for handling all programs of the federal government related to the aged except those designated by law as the responsibility of another state agency and may enter into agreements and contracts with agencies of the federal government for this purpose.

B. The state agency on aging may adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out its duties. Unless otherwise provided by law, no rule or regulation affecting any person or agency outside that agency shall be adopted, amended or repealed without a public hearing on the proposed action before the director or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless otherwise permitted by statute. Notice of the subject matter of the rule or regulation, the action proposed to be taken, the time and place of the hearing, the

manner in which interested persons may present their views and the method by which copies of the proposed rule or regulation or proposed amendment or repeal of an existing rule or regulation may be obtained shall be published once at least thirty days prior to the hearing in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. The director of the state agency on aging shall also provide such notice to the director of each senior citizen center no later than forty days prior to the public hearing. All rules and regulations shall be filed in accordance with the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

**History:** Laws 1979, ch. 203, § 3; 1989, ch. 249, § 1.

### **28-4-7. Agency staff.**

The director shall hire such staff as is necessary, all of whom shall be subject to the Personnel Act.

**History:** Laws 1979, ch. 203, § 4.

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

### **28-4-8. Reports.**

The state agency on aging shall submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The reports shall contain recommendations on present and future needs of the aged.

**History:** Laws 1979, ch. 203, § 5.

### **28-4-9. Advisory committee.**

The governor shall appoint an eleven-member advisory committee to the state agency on aging in accordance with the provisions of the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978]. In establishing the committee, the governor shall take note of any federal requirements regarding membership and shall appoint members for staggered terms of four years. Members of the committee shall be reimbursed for services as provided for in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History:** Laws 1979, ch. 203, § 6; 1989, ch. 249, § 2.

## **ARTICLE 5 COMMITTEE ON CHILDREN AND YOUTH**

(Repealed by Laws 1988, ch. 101, § 51.)

## **28-5-1 to 28-5-3. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1988, ch. 101, § 51 repeals 28-5-1 to 28-5-3 NMSA 1978 as enacted by Laws 1977, ch. 252, § 18 and Laws 1967, ch. 235, §§ 2 and 3, relating to the committee on children and youth, effective July 1, 1989.

## **ARTICLE 6 AGE OF MAJORITY**

### **28-6-1. Age of majority; eighteen years; exception.**

A. Except as provided in Subsection B or otherwise specifically provided by existing law, any person who has reached his eighteenth birthday shall be considered to have reached his majority as provided in Section 12-2-2 NMSA 1978 and is an adult for all purposes the same as if he had reached his twenty-first birthday.

B. For the purposes of the Uniform Gifts to Minors Act [46-7-1 to 46-7-10 NMSA 1978], as it relates to any gift made prior to June 18, 1971, the donee shall not be entitled to delivery or payment over of the gift until he has reached his twenty-first birthday.

**History:** 1953 Comp., § 13-13-1, enacted by Laws 1971, ch. 213, § 1; 1973, ch. 138, § 12.

**Cross-references.** - For contributing to delinquency of minor, see 30-6-3 NMSA 1978.

For sexually oriented material harmful to minors, see 30-37-2 NMSA 1978.

For "adult" as person 18 years of age or over under Children's Code, see 32-1-3 NMSA 1978.

For educational loans, legal disability of minors removed, see 58-6-3 NMSA 1978.

For alcoholic beverages, sale to person under 21 unlawful, identity cards, employment, see 60-7B-1 to 60-7B-11 NMSA 1978.

**Uniform Gifts to Minors Act.** - The Uniform Gifts to Minors Act, referred to in Subsection B, formerly appeared as 46-7-1 to 46-7-10 NMSA 1978 but was by repealed Laws 1989, ch. 357, § 26. Present comparable provisions are in the Uniform Transfers to Minors Act, 46-7-11 NMSA et seq.

**Section not unconstitutional.** - Although trial court had continuing jurisdiction to modify divorce decree containing child custody provisions under the provisions of 40-4-7 NMSA 1978, that decree was considered final and not within the meaning of a "pending case" in N.M. Const., art. IV, § 34. Therefore, this section, which by its operation freed divorced father from making support payments to daughter who had reached age of 18, and thus, under the new section, was no longer a minor, is not unconstitutional. *Phelps v. Phelps*, 85 N.M. 62, 509 P.2d 254 (1973).

**Purpose of section.** - The phrase "for all purposes" does not bar the right of parties to a contract to agree that "of full age" may be stipulated to mean 21 years; the purpose of the statute is to substitute the age of 18 for the age of 21 when any prior special law fixes an adult age of 21 years, subject to the specific exception of liquor control, and there is no analogical or interpretive basis for the contention that "for all purposes" means that a person 18 years of age is an adult in every phase of law, including the law of contracts and the modification of contracts. *Peterson v. Romero*, 88 N.M. 483, 542 P.2d 434 (Ct. App. 1975)(decided under 1971 version of this statute).

**Effect of section on contracts where age stipulated.** - Rental contract requiring that the rented vehicle be driven by "persons of full age (21 years)" was not modified by this section, and therefore neither car lessee nor estate of 18-year-old deceased driver were covered by the insurance provisions of the rental contract. *Peterson v. Romero*, 88 N.M. 483, 542 P.2d 434 (Ct. App. 1975).

**On child-support payments.** - Divorced husband was relieved by enactment of this statute from making further child-support payments under decree which required husband to make such payments during minority of his children or until they earlier become married or otherwise emancipated, where children were age 20 and 18 respectively. *Mason v. Mason*, 84 N.M. 720, 507 P.2d 781 (1973).

**Relation between age and voluntariness of confession.** - Age is a factor to be considered in determining the voluntariness of a confession; however, a person who has reached the age of 18 is considered an adult for most purposes. *State v. Aguirre*, 91 N.M. 672, 579 P.2d 798 (Ct. App.), cert. denied, 91 N.M. 751, 580 P.2d 972 (1978).

**Law reviews.** - For symposium, "The Effects of an Equal Rights Amendment on the New Mexico System of Community Property: Problems of Characterization, Management and Control," see 3 N.M.L. Rev. 11 (1973).

For article, "Intestate Succession and Wills Law: The New Probate Code," see 6 N.M.L. Rev. 25 (1975).

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 42 Am. Jur. 2d Infants § 4.

Majority, when deemed attained, 5 A.L.R.2d 1147.

Infant's liability for medical, dental, or hospital services, 53 A.L.R.4th 1249.

43 C.J.S. Infants §§ 2, 3.

### **28-6-2. Short title.**

This act [28-6-2 to 28-6-8 NMSA 1978] may be cited as the "Emancipation of Minors Act".

**History:** Laws 1981, ch. 270, § 1.

**Cross-references.** - As to right of emancipated minor to consent to hospital, medical and surgical care, see 24-10-1 NMSA 1978.

### **28-6-3. Legislative findings and purpose.**

The New Mexico legislature finds and declares that the law of this state is unclear as to the definition and consequences of emancipation of minors; that a legislative statement is required; and that a process should be provided so that emancipated minors can obtain an official declaration of their status. It is the purpose of the Emancipation of Minors Act [28-6-2 to 28-6-8 NMSA 1978] to provide a clear statement defining emancipation and its consequences and to permit an emancipated minor to obtain a court declaration of his status. The Emancipation of Minors Act is not intended to affect the status of minors who are now or may become emancipated under present decisional law.

**History:** Laws 1981, ch. 270, § 2.

### **28-6-4. Emancipated minors; description.**

An emancipated minor is any person sixteen years of age or older who:

A. has entered into a valid marriage, whether or not such marriage was terminated by dissolution; or

B. is on active duty with any of the armed forces of the United States of America; or

C. has received a declaration of emancipation pursuant to Section 4 [28-6-5 NMSA 1978] of the Emancipation of Minors Act.

**History:** Laws 1981, ch. 270, § 3.

### **28-6-5. Emancipation by declaration.**

Any person sixteen years of age or older may be declared an emancipated minor for one or more of the purposes enumerated in Section 5 [28-6-6 NMSA 1978] of the Emancipation of Minors Act if he is willingly living separate and apart from his parents,

guardian or custodian, is managing his own financial affairs and the court finds it in the minor's best interest.

**History:** Laws 1981, ch. 270, § 4.

### **28-6-6. Over the age of majority; purposes.**

An emancipated minor shall be considered as being over the age of majority for one or more of the following purposes:

- A. consenting to medical, dental or psychiatric care, without parental consent, knowledge or liability;
- B. his capacity to enter into a binding contract;
- C. his capacity to sue and be sued in his own name;
- D. his right to support by his parents;
- E. the rights of his parents to his earnings and to control him;
- F. establishing his own residence;
- G. buying or selling real property;
- H. ending all vicarious liability of the minor's parents, guardian or custodian for the minor's torts; provided that nothing in this section shall affect any liability of a parent, guardian, custodian, spouse or employer of a minor imposed by the Motor Vehicle Code [Articles 1 to 8 of Chapter 66 NMSA 1978] or any vicarious liability which arises from an agency relationship; or
- I. enrolling in any school or college.

**History:** Laws 1981, ch. 270, § 5.

**Cross-references.** - As to consent to medical care by emancipated minors, see 24-10-1 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Infant's liability for medical, dental, or hospital services, 53 A.L.R.4th 1249.

### **28-6-7. Public entitlements of emancipated minors.**

A declared emancipated minor shall not be denied benefits from any public entitlement program to which he may have been entitled in his own right prior to the declaration of emancipation.

**History:** Laws 1981, ch. 270, § 6.

### **28-6-8. Declaration of emancipation; petition; contents; notice; mandate.**

A. A minor may petition the children's court of the district in which he resides for a declaration of emancipation as described in Section 4 [28-6-5 NMSA 1978] of the Emancipation of Minors Act. The petition shall be verified and shall set forth with specificity the facts bringing the minor within the provisions of that act.

B. Before the petition is heard, notice shall be given to the minor's parents, guardian or custodian in accordance with the Rules of Civil Procedure for the District Courts.

C. If the court finds that the minor is sixteen years of age or older and is a person described under Section 4 of the Emancipation of Minors Act, the court may grant the petition unless, after having considered all of the evidence introduced at the hearing, it finds that granting the petition would be contrary to the best interests of the minor.

D. If the petition is sustained, the court shall immediately issue a declaration of emancipation containing specific findings of fact and one or more purposes of the emancipation which shall be filed by the county clerk.

E. If the petition is denied, the minor shall have a right to file a petition for a writ of mandamus.

F. If the petition is sustained, the parents, guardian or custodian of the minor shall have a right to file a petition for a writ of mandamus if they have appeared in the proceeding and have opposed the granting of the petition.

G. A declaration of emancipation granted in accordance with the Emancipation of Minors Act [28-6-2 to 28-6-8 NMSA 1978] shall be conclusive evidence that the minor is emancipated.

**History:** Laws 1981, ch. 270, § 7.

## **ARTICLE 7 BLIND AND DISABLED PERSONS**

### **28-7-1. Short title.**

This act [28-7-1 to 28-7-7 NMSA 1978] may be cited as the "White Cane Law".

**History:** 1953 Comp., § 12-13-1, enacted by Laws 1967, ch. 232, § 1; recompiled as 1953 Comp., § 12-26-1, by Laws 1972, ch. 51, § 9.

**Cross-references.** - As to committee on concerns of handicapped, see 28-10-1 NMSA 1978 et seq.

For guide dogs for blind, penalty for refusing admittance, hearing ear aid dogs, exemption of guide dogs from municipal licensing, see 28-11-1 and 77-1-15.1 NMSA 1978.

For voting assistance, see 1-12-12 NMSA 1978 et seq.

For public employment, blind not barred from competitive examination, see 10-9-14 NMSA 1978.

For state lease of buildings, see 15-3-7 and 15-3-8 NMSA 1978.

For school for visually handicapped, see 21-5-1 NMSA 1978 et seq.

For division of services for blind, see 22-14-6 NMSA 1978.

For vending stand program for the blind, see 22-14-24 NMSA 1978 et seq.

For health insurance, see 59A-22-33 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Construction and effect of state legislation forbidding job discrimination on account of physical handicap, 90 A.L.R.3d 393.

## **28-7-2. Policy.**

It is the policy of this state to encourage and enable the blind, the visually handicapped and the otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment.

**History:** 1953 Comp., § 12-13-2, enacted by Laws 1967, ch. 232, § 2; recompiled as 1953 Comp., § 12-26-2, by Laws 1972, ch. 51, § 9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Construction and effect of state legislation forbidding job discrimination on account of physical handicap, 90 A.L.R.3d 393.

## **28-7-3. Equal right to use public facilities.**

A. The blind, the visually handicapped and the otherwise physically disabled have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places.

B. The blind, the visually handicapped and the otherwise physically disabled are entitled to full and equal accommodations, advantages, facilities and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, boats or any other public conveyances or modes of transportation, hotels, lodging places, places of public accommodation, amusement or resort and any other places to which the general public is invited, subject only to the conditions and limitations established by law and applicable alike to all persons.

C. Every totally or partially blind person shall have the right to be accompanied by a guide dog, specially trained for the purpose, in any of the places listed in this section without being required to pay an extra charge for the guide dog; provided that he shall be liable for any damage done to the property or facilities by the dog.

D. The attorney general, district attorney or any handicapped person may file an action in the judicial district when a building has been built or altered and the work has not been accomplished in accordance with Section 104 and Section 106 of the current uniform building code, other applicable publications and established handicapped [handicap] standards. The building official shall notify those applying for a permit that they must comply with established standards. Any interested person may appeal the granting or denial of a waiver to the district court where the building is located. If the court finds that the building owner was required to comply with handicap access standards of the uniform building code and has failed to comply with such standards within a reasonable period of time, then the party filing [an] action shall recover the court costs, attorneys' fees and appropriate injunctive relief to remedy the violation.

**History:** 1953 Comp., § 12-13-3, enacted by Laws 1967, ch. 232, § 3; recompiled as 1953 Comp., § 12-26-3, by Laws 1972, ch. 51, § 9; 1987, ch. 39, § 1.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Construction and effect of state legislation forbidding discrimination in housing on account of physical handicap, 28 A.L.R.4th 685.

Validity and construction of state statutes requiring construction of handicapped access facilities in buildings open to public, 82 A.L.R.4th 121.

#### **28-7-4. Driver to take precautions approaching blind; liability for damage.**

The driver of a vehicle approaching a totally or partially blind pedestrian who is carrying a cane predominantly white or metallic in color, with or without a red tip, or using a guide dog shall take all necessary precautions to avoid injury to such blind pedestrian, and any driver who fails to take such precautions shall be liable in damages for any injury caused to such pedestrian; provided that a totally blind or partially blind pedestrian not carrying such a cane or using a guide dog in any of the places, accommodations or conveyances listed herein, shall have all the rights and privileges conferred by law upon other persons, and the failure of a totally blind pedestrian to carry

such a cane or to use a guide dog in any such places, accommodations or conveyances shall not be held to constitute nor be evidence of contributory negligence.

**History:** 1953 Comp., § 12-13-4, enacted by Laws 1967, ch. 232, § 4; recompiled as 1953 Comp., § 12-26-4, by Laws 1972, ch. 51, § 9.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Contributory negligence, in motor vehicle accident case, of pedestrian under physical disability, 83 A.L.R.2d 769.

### **28-7-5. Interference with rights of blind; penalty.**

Any person or persons, firm or corporation, or the agent of any person or persons, firm or corporation who denies or interferes with admittance to or enjoyment of the public facilities enumerated herein, or otherwise interferes with the rights of a totally or partially blind or otherwise disabled person enumerated herein shall be guilty of a misdemeanor.

**History:** 1953 Comp., § 12-13-5, enacted by Laws 1967, ch. 232, § 5; recompiled as 1953 Comp., § 12-26-5, by Laws 1972, ch. 51, § 9.

### **28-7-6. Annual proclamation of white cane day by governor.**

Each year, the governor shall take suitable public notice of October 15 as white cane safety day. He shall issue a proclamation in which:

A. he comments upon the significance of the white cane;

B. he calls upon the citizens of the state to observe the provisions of the White Cane Law [28-7-1 to 28-7-7 NMSA 1978] and to take precautions necessary to the safety of the disabled;

C. he reminds the citizens of the state of the policies with respect to the disabled herein declared and urges the citizens to cooperate in giving effect to them;

D. he emphasizes the need of the citizens to be aware of the presence of disabled persons in the community and to keep safe and functional for the disabled the streets, highways, sidewalks, walkways, public buildings, public facilities, other public places, places of public accommodation, amusement and resort and other places to which the public is invited, and to offer assistance to disabled persons upon appropriate occasions.

**History:** 1953 Comp., § 12-13-6, enacted by Laws 1967, ch. 232, § 6; recompiled as 1953 Comp., § 12-26-6, by Laws 1972, ch. 51, § 9.

### **28-7-7. Policy of state on employment of disabled.**

It is the policy of this state that the blind, the visually handicapped and the otherwise physically disabled shall be employed in the state service, the service of the political subdivisions of the state, in the public schools and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

**History:** 1953 Comp., § 12-13-7, enacted by Laws 1967, ch. 232, § 7; recompiled as 1953 Comp., § 12-26-7, by Laws 1972, ch. 51, § 9.

**Cross-references.** - For public employment, blind not barred from competitive examination, see 10-9-14 NMSA 1978.

### **28-7-8 to 28-7-12. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1983, ch. 60, § 4, repeals 28-7-8 to 28-7-12 NMSA 1978, relating to administrative procedures for complaints against the division of services for the blind, and establishing a fair hearing board. For present provisions, see 22-14-12 NMSA 1978.

Laws 1983, ch. 60, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const., art. IV, § 23.

### **28-7-13. Prohibiting influence against joining organizations for the visually handicapped.**

No officer or employee of the state or any political subdivision of the state who is concerned with the administration of any program for the visually handicapped shall exert the influence of his office or position against the right of a person to join organizations for the visually handicapped.

**History:** 1953 Comp., § 12-13-13, enacted by Laws 1967, ch. 113, § 1; recompiled as 1953 Comp., § 12-26-13, by Laws 1972, ch. 51, § 9.

### **28-7-14. Medical eye care.**

There is created the "medical eye care and sight conservation program" which shall be operated and administered by the commission for the blind. The medical eye care and sight conservation program shall serve persons who meet the program qualifications established by the commission and who are not eligible for vocational rehabilitation services.

**History:** 1953 Comp., § 12-26-14, enacted by Laws 1976, ch. 39, § 1; 1986, ch. 108, § 15.

**Cross-references.** - For division of services for the blind and its powers transferred to vocational rehabilitation division, see 22-14-6 NMSA 1978.

For Special Medical Needs Act, see 27-4-1 NMSA 1978 et seq.

### **28-7-15. Short title.**

Sections 1 through 9 [28-7-15 to 28-7-23 NMSA 1978] of this act may be cited as the "Commission for the Blind Act".

**History:** Laws 1986, ch. 108, § 1.

### **28-7-16. Commission for the blind created.**

A. There is created the "commission for the blind", consisting of three members, at least one of whom shall be blind, appointed by the governor with the advice and consent of the senate. Members of the first commission shall be appointed for staggered terms, one ending on December 31, 1988, one ending December 31, 1990 and one ending December 31, 1992. Thereafter, appointments shall be for staggered terms of six years.

B. A majority of the members of the commission constitutes a quorum for the transaction of business. The commission shall elect a chairman from its membership.

C. Members of the commission shall be compensated as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] and shall receive no other compensation, perquisite or allowance.

**History:** Laws 1986, ch. 108, § 2.

### **28-7-17. Commission for the blind; powers and duties.**

The commission for the blind shall:

A. apply for and receive money from any state or federal agency to be used for purposes relating to blindness and receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out the commission's duties;

B. maintain a complete register of blind persons domiciled in New Mexico, specifying the nature and cause of blindness, capacity and need for educational or industrial training and other pertinent information;

C. maintain bureaus of information and industrial assistance to help blind persons find employment, train them in work which may be pursued in their own homes and assist them in merchandising and marketing their goods;

D. establish, equip and maintain a center with qualified instructors for vocational, industrial and other training of eligible blind persons. The center shall also provide for orientation and assistance for the adjustment of blind persons;

E. research and study the causes of blindness and its prevention in cooperation with the state or any other entity which the commission deems appropriate;

F. cooperate with appropriate state agencies in the adoption and carrying out of preventive measures relating to blindness;

G. promulgate rules and regulations necessary to effectuate the provisions of the Commission for the Blind Act [28-7-15 to 28-7-23 NMSA 1978]; and

H. publish an annual report on the activities and services of the commission.

**History:** Laws 1986, ch. 108, § 3.

### **28-7-18. Staff.**

The commission shall appoint a director, who is the administrative officer of the commission. The director shall employ such assistants and employees as are necessary for the efficient operation of the commission. The director and all employees are subject to the Personnel Act.

**History:** Laws 1986, ch. 108, § 4.

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

### **28-7-19. Qualification as blind; examinations required.**

A. Qualification of a person as blind shall be determined by means of an eye examination by a licensed ophthalmologist. Blindness shall be the major handicap in cases of multiple handicaps. Persons who are not blind but who have been certified by a licensed ophthalmologist as suffering from a deteriorating condition which will result in blindness also qualify as blind.

B. The commission shall determine the procedure to be followed for the examination of any person to establish blindness and shall maintain a list of all ophthalmologists currently licensed in New Mexico. The person may choose any licensed ophthalmologist to make the examination and the cost shall be paid by the commission pursuant to its regulations.

**History:** Laws 1986, ch. 108, § 5.

### **28-7-20. Corrective medical services.**

In addition to arranging and paying for examinations to determine blindness, the commission may arrange and pay for medical and surgical treatment of blind persons whenever a listed ophthalmologist judges that the treatment will be beneficial.

**History:** Laws 1986, ch. 108, § 6.

### **28-7-21. Reports.**

Whenever a licensed ophthalmologist finds a person he has examined to be blind, he shall report this fact, along with details of the examination, to the commission within thirty days of the examination date.

**History:** Laws 1986, ch. 108, § 7.

### **28-7-22. Receipt of federal funds; designation.**

The commission is authorized to receive and administer any federal funds relating to vocational rehabilitation of blind persons.

**History:** Laws 1986, ch. 108, § 8.

### **28-7-23. Hearing; appeal.**

The commission shall provide an opportunity for a fair hearing to any person applying for or receiving services who is dissatisfied with any act or failure to act arising from the operation of or administration of any program of the commission. The commission shall adopt rules and regulations as necessary to govern the conduct of such hearings.

**History:** Laws 1986, ch. 108, § 9.

## **ARTICLE 8 IDENTIFYING DEVICES AND CARDS FOR DISABLED PERSONS**

### **28-8-1. Definitions.**

As used in this act [28-8-1 to 28-8-7 NMSA 1978]:

A. "disabled condition" means the condition of being unconscious, semiconscious, incoherent or otherwise incapacitated to communicate;

B. "disabled person" means a person in a disabled condition;

C. "the emergency symbol" means the caduceus inscribed within a six-barred cross used by the American Medical Association to denote emergency information;

D. "identifying device" means an identifying bracelet, necklace, metal tag or similar device bearing the emergency symbol and the information needed in an emergency; and

E. "medical practitioner" means a person licensed or authorized to practice medicine or osteopathy.

**History:** 1953 Comp., § 12-31-1, enacted by Laws 1973, ch. 265, § 1.

### **28-8-2. Identifying devices for persons having certain conditions.**

A. A person who suffers from epilepsy, diabetes, a cardiac condition or any other type of illness that causes temporary blackouts, semiconscious periods or complete unconsciousness, or who suffers from a condition requiring specific medication or medical treatment, is allergic to certain medications or items used in medical treatment, wears contact lenses or is unable to communicate coherently or effectively in the English language, is authorized and encouraged to wear an identifying device.

B. Any person may carry an identification card bearing his name, type of medical condition, physician's name and other medical information.

C. By wearing an identifying device a person gives his consent for any peace officer or medical practitioner who finds him in a disabled condition to make a reasonable search of his clothing or other effects for an identification card of the type described in Subsection B of this section.

**History:** 1953 Comp., § 12-31-2, enacted by Laws 1973, ch. 265, § 2.

### **28-8-3. Duty of peace officer.**

A. A peace officer shall make a diligent effort to determin [determine] whether any disabled person he finds is an epileptic or a diabetic or suffers from some other type of illness that would cause the condition. Whenever feasible, this effort shall be made before the person is charged with a crime or taken to a place of detention.

B. In seeking to determine whether a disabled person suffers from an illness, a peace officer shall make a reasonable search for an identifying device and an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act and examine them for emergency information. The peace officer may not search for an identifying device or an identification card in a manner or to an extent that would appear

to a reasonable person in the circumstances to cause an unreasonable risk of worsening the disabled person's condition.

C. A peace officer who finds a disabled person without an identifying device or identification card is not relieved of his duty to that person to make a diligent effort to ascertain the existence of any illness causing the disabled condition.

D. A claim for relief against a peace officer does not arise from his making a reasonable search of the disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card. However, nothing found on the disabled person during a search authorized under this act [28-8-1 to 28-8-7 NMSA 1978] shall be admitted into evidence in any court in a criminal proceeding where the disabled person is a defendant if the admission of the product of the search would not be entitled to admission except for the authority to search granted in Subsection C of this section.

E. A peace officer who determines or has reason to believe that a disabled person is suffering from an illness causing his condition shall promptly notify the person's physician, if practicable. If the officer is unable to ascertain the physician's identity or to communicate with him, the officer shall make a reasonable effort to cause the disabled person to be transported immediately to a medical practitioner or to a facility where medical treatment is available. If the officer believes it unduly dangerous to move the disabled person, he shall make a reasonable effort to obtain the assistance of a medical practitioner.

**History:** 1953 Comp., § 12-31-3, enacted by Laws 1973, ch. 265, § 3.

#### **28-8-4. Duty of medical practitioners.**

A. A medical practitioner, in discharging his duty to a disabled person whom he has undertaken to examine or treat, shall make a reasonable search for an identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act and examine them for emergency information.

B. A claim for relief against a medical practitioner does not arise from his making a reasonable search of a disabled person to locate an identifying device or identification card, even though the person is not wearing an identifying device or carrying an identification card.

**History:** 1953 Comp., § 12-31-4, enacted by Laws 1973, ch. 265, § 4.

#### **28-8-5. Duty of others.**

A. A person, other than a peace officer or medical practitioner, who finds a disabled person may make a reasonable effort to notify a peace officer. If a peace officer or medical practitioner is not present, a person who finds a disabled person may:

(1) make a reasonable search for an identifying device; and

(2) if the identifying device is found, may make a reasonable search for an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act.

If a device or a card is located, the person making the search shall attempt promptly to bring its contents to the attention of a peace officer or medical practitioner.

B. A claim for relief does not arise from a reasonable search to locate an identifying device or identification card as authorized by Subsection A of this section.

**History:** 1953 Comp., § 12-31-5, enacted by Laws 1973, ch. 265, § 5.

### **28-8-6. Falsifying identification or misrepresenting condition.**

A person who, with intent to deceive, provides, wears, uses or possesses a false identifying device or an identification card of the type described in Subsection B of Section 2 [28-8-2 NMSA 1978] of this act is guilty of a misdemeanor and shall be fined not more than three hundred dollars (\$300) or imprisoned for not more than ninety days, or both.

**History:** 1953 Comp., § 12-31-6, enacted by Laws 1973, ch. 265, § 6.

### **28-8-7. Other duties.**

The duties imposed by this act [28-8-1 to 28-8-7 NMSA 1978] are in addition to, and not in limitation of, other duties existing under the law of this state.

**History:** 1953 Comp., § 12-31-7, enacted by Laws 1973, ch. 265, § 7.

## **ARTICLE 9 EMPLOYMENT OF BLIND PERSONS**

### **28-9-1 to 28-9-6. Recompiled.**

#### **ANNOTATIONS**

**Recompilations.** - Laws 1983, ch. 60, § 3, recompiles 28-9-1 to 28-9-6 NMSA 1978, relating to the employment of blind persons, as 22-14-24 to 22-14-29 NMSA 1978.

Laws 1983, ch. 60, contains no effective date provision, but was enacted at the session which adjourned on March 19, 1983. See N.M. Const. art. IV, § 23.

# ARTICLE 10

## EMPLOYMENT OF THE HANDICAPPED

### 28-10-1. Governor's committee on concerns of the handicapped.

A. There is created the "governor's committee on concerns of the handicapped," consisting of thirteen members, nine of whom shall be appointed by the governor. The four remaining members shall include the director of the division of vocational rehabilitation of the department of education, the director of employment services division of the human services department, the director of the behavioral health services division of the health and environment department [secretary of health] and the director of the social services division of the human services department. Initially, three members shall be appointed for terms ending December 31, 1978, three members for terms ending December 31, 1980 and three members for terms ending December 31, 1982. Thereafter, appointments shall be for six years, expiring on December 31 of even-numbered years. Appointed members shall be appointed from different geographic areas of the state and from the major handicapped services in the state. Appointed members shall include handicapped persons, representatives of government, private enterprise, parents or guardians of handicapped persons and professionals in, or those who are interested in, service for handicapped individuals. Not more than five of the members appointed by the governor shall be of the same political party.

B. A majority of the members of the committee constitutes a quorum for the transaction of business. The committee shall meet at least twice a year and shall annually elect a chairman and a vice chairman.

C. The committee shall be primarily concerned with those handicapped individuals who have a disability or condition which, regardless of its physical or mental origin, constitutes a substantial occupational disadvantage.

**History:** 1953 Comp., § 59-15-1, enacted by Laws 1973, ch. 349, § 1; 1977, ch. 198, § 1; 1979, ch. 34, § 1.

**Cross-references.** - For admission of handicapped to state educational institutions without charge other than tuition, see 22-14-16 NMSA 1978.

As to employment of blind persons, see 22-14-24 NMSA 1978 et seq.

**Bracketed material.** - The bracketed reference relating to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department and enacts a new 9-7-4 NMSA 1978 creating the department of health. Section 9-7-5 NMSA 1978, as amended by Laws 1991, ch. 25, § 17 makes the secretary of health the administrative head of the department. The bracketed material was not enacted by the legislature and is not part of the law.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - What constitutes handicap under state legislation forbidding job discrimination on account of handicap, 82 A.L.R.4th 26.

## **28-10-2. Governor's committee on concerns of the handicapped; powers and duties.**

The governor's committee on concerns of the handicapped shall establish and maintain a comprehensive statewide program designed to encourage and promote attention to the concerns of the training and employment of the handicapped persons in this state. To further this purpose, the committee shall:

- A. cooperate with the president's committee on employment of the handicapped and other federal efforts on behalf of handicapped concerns;
- B. cooperate with all employers and training leaders, both public and private, in locating or developing employment opportunities for the handicapped;
- C. encourage and assist in the organization and operation of committees at the community level, the chairpersons of which will automatically become members of the advisory council authorized under Section 28-10-4 NMSA 1978;
- D. assist state, local and federal agencies to coordinate their activities to secure maximum utilization of funds and efforts that aid in the training and employment of the handicapped;
- E. enter into written agreements with public and private employers, unions and rehabilitation agencies for the purpose of achieving the maximum employment of handicapped individuals;
- F. inform handicapped job seekers of specific facilities available to assist them in locating suitable training and employment;
- G. conduct educational programs via publications and other means to acquaint the public, the legislature and the governor with the abilities and the accomplishments of handicapped persons;
- H. promote the elimination of architectural barriers in construction so as to make buildings used by the public readily accessible and usable by persons with physical limitations;
- I. make such rules as it determines advisable for the conduct of its own business;
- J. designate standing subcommittees related to state planning, community organization, public relations and information, legislative action, federal coordination, state coordination, youth, medical rehabilitation, employers and awards;

K. designate such special subcommittees as necessary for undetermined periods to carry out special short-term programs; and

L. give advice and testimony on handicapped concerns to the governor or the legislature or any committee established by them upon request.

**History:** 1953 Comp., § 59-15-2, enacted by Laws 1973, ch. 349, § 2; 1977, ch. 198, § 2; 1979, ch. 34, § 2.

### **28-10-3. Additional powers.**

The governor's committee on concerns of the handicapped:

A. may receive on behalf of the state any gifts, donations or bequests from any source, to be used in carrying out its duties; and

B. is designated as the state agency for handling all programs of the federal government related to the concerns of the handicapped, except those designated by law as the responsibility of another state agency, and may enter into contracts and agreements with agencies of the federal government for this purpose which do not conflict with existing programs of other state agencies.

**History:** 1953 Comp., § 59-15-3, enacted by Laws 1973, ch. 349, § 3; 1977, ch. 198, § 3; 1979, ch. 34, § 3.

### **28-10-4. Advisory council.**

A. The governor's committee on concerns of the handicapped shall appoint an appropriate advisory council on concerns of the handicapped which shall include representatives of state departments and agencies and individuals attentive to the concerns of the handicapped.

B. The advisory council shall meet at the call of the chairman, and shall make recommendations to the governor's committee on concerns of the handicapped for the improvement and coordination of state activities relative to the concerns of the handicapped.

**History:** 1953 Comp., § 59-15-4, enacted by Laws 1973, ch. 349, § 4; 1977, ch. 198, § 4; 1979, ch. 34, § 4.

### **28-10-5. Fund for the handicapped created.**

There is created in the state treasury a "fund for the handicapped." All funds, gifts, donations, bequests and other income of the committee shall be deposited by the executive secretary of the committee in this fund and shall be available to the committee to further the purpose of this act [28-10-1 to 28-10-7 NMSA 1978] or for such purposes

stated by the donor or grantor of such funds. Money in the fund for the handicapped shall not revert, but shall be used only for the purposes of this act.

**History:** 1953 Comp., § 59-15-5, enacted by Laws 1973, ch. 349, § 5.

### **28-10-6. Reports.**

The governor's committee on concerns of the handicapped and the advisory council shall submit reports on their work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session. The report shall contain recommendations on present and future needs of handicapped individuals.

**History:** 1953 Comp., § 59-15-6, enacted by Laws 1973, ch. 349, § 6; 1977, ch. 198, § 5; 1979, ch. 34, § 5.

### **28-10-7. Compensation.**

Members of the governor's committee on concerns of the handicapped shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], but shall receive no other compensation, perquisite or allowance. Members of the advisory council may receive reimbursement in the same manner from funds available to the committee, only for advisory council meetings.

**History:** 1953 Comp., § 59-15-7, enacted by Laws 1973, ch. 349, § 7; 1977, ch. 198, § 6; 1979, ch. 34, § 6.

### **28-10-8. Administrative attachment.**

The governor's committee on concerns of the handicapped is administratively attached, as defined in the Executive Reorganization Act [9-1-1 to 9-1-10 NMSA 1978], to the department of finance and administration.

**History:** 1978 Comp., § 28-10-8, enacted by Laws 1982, ch. 13, § 1.

**Repeals and reenactments.** - Laws 1982, ch. 13, § 1, repeals former 28-10-8 NMSA 1978, relating to the administration and funding for the committee on concerns of the handicapped, and enacts the above section.

#### **28-10-8.1. Director; committee staff.**

The governor's committee on concerns of the handicapped shall appoint a director who is the administrative officer of the committee. The director shall employ other necessary employees under the provisions of the Personnel Act.

**History:** 1978 Comp., § 28-10-8.1, enacted by Laws 1982, ch. 13, § 2.

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

### **28-10-9. Short title.**

This act [28-10-9 to 28-10-12 NMSA 1978] may be cited as the "Handicapped Employment Act".

**History:** 1953 Comp., § 5-1-14, enacted by Laws 1969, ch. 129, § 1.

### **28-10-10. Definitions.**

As used in the Handicapped Employment Act [28-10-9 to 28-10-12 NMSA 1978], "handicapped" includes physical and mental handicaps.

**History:** 1953 Comp., § 5-1-15, enacted by Laws 1969, ch. 129, § 2.

### **28-10-11. State policy.**

In order to further the efforts of New Mexico in alleviating the problems of the handicapped, full consideration shall be given to the employment of such persons in state government in positions where they meet the necessary performance requirements or in positions where performance requirements can be modified to take advantage of their abilities without detriment to the state service.

**History:** 1953 Comp., § 5-1-16, enacted by Laws 1969, ch. 129, § 3.

### **28-10-12. Personnel board; rules.**

The state personnel board shall establish rules and procedures consistent with the state policy of employment of the handicapped. Such rules and procedures shall be adopted after consultation with appropriate vocational rehabilitation agencies, state institutions, interested private associations and organizations and interested individuals. Any rules or procedures adopted by the personnel board shall provide that:

A. certification in an appropriate form shall be required from an appropriate agency to the effect that:

(1) the handicapped person has the ability to perform the duties of the position sought;

(2) the handicapped person is physically qualified to do the work without hazard to himself or to others; and

(3) the handicapped person is socially competent to maintain himself in a work environment and, either independently or with continuing help as has been provided for him, in after-working-hours living; and

B. there be suitable periods of probation or trial employment for such handicapped persons before such employment becomes permanent under the provisions of the Personnel Act; and

C. the above processes of establishing the eligibility of such handicapped persons is construed to meet the requirements of competitive entrance examinations under the provisions of the state Personnel Act.

**History:** 1953 Comp., § 5-1-17, enacted by Laws 1969, ch. 129, § 4.

**Personnel board administratively attached.** - The personnel board is administratively attached to the general services department, as provided in 10-9-11 NMSA 1978.

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

## **ARTICLE 10A**

### **HUMAN IMMUNODEFICIENCY VIRUS TESTS AS CONDITION OF EMPLOYMENT**

#### **28-10A-1. Human immunodeficiency virus related test; limitation.**

A. No person may require an individual to disclose the results of a human immunodeficiency virus related test as a condition of hiring, promotion or continued employment, unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question.

B. A person who asserts that a bona fide occupational qualification exists for disclosure of an individual's human immunodeficiency virus related test results shall have the burden of proving that:

(1) the human immunodeficiency virus related test is necessary to ascertain whether an individual is currently able to perform in a reasonable manner the duties of the particular job or whether an individual will present a significant risk of transmitting human immunodeficiency virus to other persons in the course of normal work activities; and

(2) there exists no reasonable accommodation short of requiring the test.

**History:** Laws 1989, ch. 228, § 1.

## **ARTICLE 11**

### **HEARING EAR AID DOGS**

#### **28-11-1. Repealed.**

## ANNOTATIONS

**Repeals.** - Laws 1989, ch. 242, § 5 repeals 28-11-1 NMSA 1978, as enacted by Laws 1977, ch. 332, § 1, relating to hearing ear aid dogs, effective June 16, 1989. For provisions of former section, see 1987 Replacement Pamphlet.

### **28-11-2. Definitions.**

As used in this act [28-11-2 to 28-11-4 and 77-1-15.1 NMSA 1978] "qualified service animal" means:

- A. a guide dog trained by a recognized guide dog school to lead a partially or totally blind person;
- B. a hearing ear dog trained by a recognized hearing ear dog school to aid a hearing impaired person;
- C. a service dog trained by a recognized service dog school or training program to assist a mobility impaired person; or
- D. any other animal approved by the vocational rehabilitation division of the state department of public education as acceptable in public places and trained to provide some special assistance to a person with a mobility impairment.

**History:** Laws 1989, ch. 242, § 1.

### **28-11-3. Admittance of qualified service animals.**

- A. Notwithstanding any other provision of law, a qualified service animal shall be admitted to any building open to the public and all public accommodations such as restaurants, hotels, hospitals, swimming pools, stores, common carriers and theaters, provided that the qualified service animal is under the control of a totally or partially blind, hearing impaired or mobility impaired person.
- B. Pursuant to Subsection A of this section, no person shall be required to pay any additional charges for his qualified service animal, but he shall be liable for any damage done by his animal.

**History:** Laws 1989, ch. 242, § 2.

### **28-11-4. Penalty.**

Any person who violates any provision of Section 1 or 2 [28-11-2 or 28-11-3 NMSA 1978] of this act shall be guilty of a misdemeanor and, upon conviction, shall be sentenced in accordance with the provisions of Section 31-19-1 NMSA 1978.

**History:** Laws 1989, ch. 242, § 3.

## **ARTICLE 11A**

# **TELECOMMUNICATION DEVICES FOR THE DEAF**

### **28-11A-1. Legislative finding.**

The legislature finds that many state citizens who are unable to utilize telephone services in a regular manner due to hearing impairments are able to communicate through the use of telecommunication devices and that such devices should be installed in municipal police and county sheriff departments in areas where such units are in use by deaf persons and in the communications section of the state police in order to assure prompt response to emergency situations.

**History:** Laws 1981, ch. 260, § 1.

### **28-11A-2. Definitions.**

As used in this act [28-11A-1 to 28-11A-3 NMSA 1978]:

A. "deaf person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit him from understanding telephonic voice communications; and

B. "telecommunication device for the deaf" means a teletypewriter or other instrument for telecommunication in which speaking or hearing is not required for communication.

**History:** Laws 1981, ch. 260, § 2.

### **28-11A-3. Vocational rehabilitation division; purchase of telecommunication devices for the deaf.**

A telecommunication device for the deaf shall be purchased by the vocational rehabilitation division of the department of education and installed in the office of the municipal police department of any municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five telecommunication devices for the deaf are in use by deaf persons in the municipality, and in the office of the county sheriff in counties not having a municipality with a population in excess of ten thousand inhabitants if the division determines and verifies that at least five such devices are in use by deaf persons in that county.

**History:** Laws 1981, ch. 260, § 3.

# **ARTICLE 11B**

## **COMMISSION FOR DEAF AND HARD OF HEARING PERSONS**

### **28-11B-1. Commission for deaf and hard-of-hearing persons created.**

A. There is created the "commission for deaf and hard-of-hearing persons", consisting of seven members, a majority of whom shall be deaf or hard-of-hearing persons, appointed by the governor without regard for party affiliation, with the advice and consent of the senate. Initially, three members shall be appointed for terms ending December 31, 1993, two members for terms ending December 31, 1995 and two members for terms ending December 31, 1997. Thereafter, appointments shall be for six years, expiring on December 31 of odd-numbered years.

B. Appointments shall include:

- (1) the president of the New Mexico association for the deaf or his designee;
- (2) the superintendent of the New Mexico school for the deaf or his designee;
- (3) a parent of a deaf or hard-of-hearing child;
- (4) the director of the vocational rehabilitation division of the state department of public education or his designee who shall be knowledgeable in the area of deafness;
- (5) a professional person who is deaf or hard of hearing;
- (6) a deaf or hard-of-hearing person who resides in southern New Mexico; and
- (7) a deaf or hard-of-hearing person who resides in northern New Mexico.

C. A majority of the members of the commission for deaf and hard-of-hearing persons constitutes a quorum for transaction of business. The commission shall elect a chairman from its membership.

D. Members of the commission for deaf and hard-of-hearing persons shall be compensated as provided in the Per Diem and Mileage Act and shall receive no other compensation, perquisite or allowance.

**History:** Laws 1991, ch. 72, § 1.

**Effective dates.** - Laws 1991, ch. 72, § 5 makes the act effective on July 1, 1991.

## **28-11B-2. Commission for deaf and hard-of-hearing persons; powers and duties.**

The commission for deaf and hard-of-hearing persons shall:

- A. supervise the activities of the executive director of the commission;
- B. identify the needs of the deaf and hard-of-hearing population of New Mexico;
- C. provide educational assistance to state agencies and, specifically, ensure agency compliance with regulations pertaining to deafness promulgated pursuant to the federal Americans with Disabilities Act;
- D. coordinate with state agencies providing services for deaf and hard-of-hearing persons;
- E. advocate for equal access to services and opportunities for deaf and hard-of-hearing persons;
- F. provide continuing education services to deaf and hard-of-hearing persons;
- G. assist in the establishment of a statewide interpreter referral service;
- H. review and coordinate certification and evaluation processes for interpreters;
- I. convene a minimum of four times each year in varying locations throughout the state; and
- J. submit reports on its work for the preceding year to the governor and the legislature at least forty-five days prior to each regular legislative session.

**History:** Laws 1991, ch. 72, § 2.

**Effective dates.** - Laws 1991, ch. 72, § 5 makes the act effective on July 1, 1991.

## **28-11B-3. Commission; staff.**

- A. The commission for deaf and hard-of-hearing persons shall appoint an executive director, who shall be the administrative officer of the commission. A preference will be given to applicants for the executive director position who are deaf or hard of hearing.
- B. The executive director shall employ such assistants and employees as are necessary for the efficient operation of the commission for deaf and hard-of-hearing persons. There shall be a minimum of five full-time staff members. The executive director shall not be subject to the Personnel Act. All other staff members shall be subject to the Personnel Act.

**History:** Laws 1991, ch. 72, § 3.

**Effective dates.** - Laws 1991, ch. 72, § 5 makes the act effective on July 1, 1991.

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

#### **28-11B-4. Commission; task forces.**

The commission for deaf and hard-of-hearing persons may appoint task forces as they are needed to study specific issues regarding deaf and hard-of-hearing persons. The task forces shall make written recommendations to the commission regarding improvement and coordination of activities relative to the concerns of deaf and hard-of-hearing persons.

**History:** Laws 1991, ch. 72, § 4.

**Effective dates.** - Laws 1991, ch. 72, § 5 makes the act effective on July 1, 1991.

## **ARTICLE 12 INDIAN ARTS AND CRAFTS**

### **28-12-1. [Preservation and development of Indian arts and crafts; dissemination of knowledge of traditional Indian rites.]**

The intertribal Indian ceremonial association, now existing as a nonprofit corporation under and by virtue of the laws of the state of New Mexico is hereby designated as an official agency of the state of New Mexico for the purpose of encouraging the preservation and development of the Indian arts and crafts among the Indian tribes and pueblos of the state of New Mexico, and for the further purpose of encouraging the preservation of the traditional rites and ceremonials of the said Indian tribes and pueblos, and for the further purpose of affording an opportunity for the development of knowledge and appreciation of such arts, crafts, rites and ceremonials among other people.

**History:** Laws 1939, ch. 42, § 1; 1941 Comp., § 55-2901; 1953 Comp., § 73-31-1.

**Cross-references.** - As to sale of Indian-made articles as genuine, penalty, see 30-33-1 and 30-33-9 NMSA 1978.

For Indian Arts and Crafts Sales Act, see 30-33-1 to 30-33-11 NMSA 1978.

**Temporary provisions.** - Laws 1991, ch. 108, § 1, effective April 2, 1991, provides that it is appropriate and necessary for the public health, safety and welfare to encourage and complement programs for the advancement of the contributions of Indian art and culture to the state, including those of the institute of American Indian arts, and that

such institute is undertaking plans to expand its programs and to construct new facilities in the state utilizing federal and private funding at an estimated cost of \$30,000,000 to \$50,000,000 to promote and preserve Indian arts and culture.

**First amendment rights not infringed by association.** - The first amendment rights of young Navajo Indians were not infringed upon when officials of the intertribal Indian ceremonial association prevented them from distributing printed leaflets during an Indian ceremonial where youths had agreed to stop distributing the pamphlets but continued to do so and no attempt was made to prevent the circulation of the pamphlets anywhere except the ceremonial grounds. There was a clear and present danger of violence and disorder and the officials were not required to wait until the feared conditions actually happened to take preventive action, the action of the public officials was not directed toward the dissemination of ideas or opinions, but solely to maintain peace and order on the ceremonial grounds and the prevention of violence and a riotous situation. *Benson v. Rich*, 448 F.2d 1371 (10th Cir. 1971), cert. denied, 405 U.S. 978, 92 S. Ct. 1197, 31 L. Ed. 2d 254 (1972).

**Law reviews.** - For comment, "The Subject Matter Jurisdiction of New Mexico District Courts over Civil Cases Involving Indians," see 15 N.M.L. Rev. 75 (1985).

## **28-12-2. Powers additional to corporate powers.**

In addition to the powers which it may now have, the intertribal Indian ceremonial association shall have power:

- A. to acquire by purchase, gift, grant, loan, lease or trust, and hold and dispose of real or personal property or rights or interest therein, and retain the proceeds therefrom;
- B. to build, construct, improve, repair and maintain buildings, structures, improvements, grounds and equipment;
- C. to acquire any project or projects, and to own, operate and maintain such project;
- D. to accept grants of money or materials or property or services of any kind;
- E. to borrow money and issue bonds and to provide for the payment of the principal and interest of the same and for the rights of the holders thereof; and
- F. to perform all acts and do all things necessary and convenient to carry out the powers herein granted, or heretofore granted, to obtain loans or grants or both from any agency, and to accomplish the purposes of this act [28-12-2, 28-12-3 NMSA 1978].

**History:** 1953 Comp., § 73-31-1.1, enacted by Laws 1967, ch. 299, § 1.

**Bonds exempt from registration.** - Any bond issued by the intertribal Indian council as authorized under this section will be exempt from registration under the State Securities

Act by virtue of the provisions of 58-13-29 (now see 58-13B-26) NMSA 1978. 1969 Op. Att'y Gen. No. 69-32.

**Power to issue bonds limited.** - The legislature did not intend to give the association power to issue general obligation bonds or revenue bonds as in the case of a political subdivision of the state. 1969 Op. Att'y Gen. No. 69-32.

**Intent of Subsection F where bond issue.** - By Subsection F of this section it was intended that the association be given the power to determine the terms, covenants and conditions of bonds which it may issue. 1969 Op. Att'y Gen. No. 69-32.

**Funding for association relocation or park creation.** - The relocation of the intertribal Indian ceremonial association or the creation of an Indian memorial park cannot be accomplished with industrial revenue bonds under 3-32-4 NMSA 1978, but should be done under either this section or legislative appropriation. 1968 Op. Att'y Gen. No. 68-11.

### **28-12-3. Prohibition against obligating the state.**

Nothing in this act [28-12-2, 28-12-3 NMSA 1978] shall be construed to authorize the intertribal Indian ceremonial association to contract a debt on behalf of, or in any way obligate the state of New Mexico.

**History:** 1953 Comp., § 73-31-1.2, enacted by Laws 1967, ch. 299, § 2.

### **28-12-4. New Mexico office of Indian affairs created; membership; terms; vacancies.**

A. There is created, as an agency of New Mexico, a commission to be known as the "New Mexico office of Indian affairs," hereinafter called the "commission."

B. Members of the commission shall be appointed by the governor for staggered terms of four years, with the initial commission to be composed of three members appointed for terms ending on June 30, 1976, three members appointed for terms ending on June 30, 1978, and four members appointed for terms ending on June 30, 1980. Thereafter, members shall be appointed for terms of four years or less, appointed in such a manner that the terms of three members expire on June 30 of each even-numbered year. Vacancies shall be filled by appointment of the governor for the unexpired term and such appointments to fill vacancies or to succeed a member whose term has expired and in the case of an Indian member shall be made from the same Indian tribe or Pueblo council that their predecessors were appointed from. At the time of making the appointment, the governor shall designate the chairman.

C. Members of the commission shall be residents of New Mexico and shall consist of three Pueblo Indians, three Navajo Indians, two Apache Indians, and may be appointed by the governor from lists of names submitted by the all Indian Pueblo council, the

Jicarilla and Mescalero tribal councils and the eastern Navajo tribal council, and two non-Indians.

D. When a member of the commission fails to carry out the duties of his office, any five commission members shall recommend to the governor the removal and replacement of such member.

**History:** 1953 Comp., § 73-31-2, enacted by Laws 1975 (1st S.S.), ch. 11, § 1.

**Repeals and reenactments.** - Laws 1975 (1st S.S.), ch. 11, § 1, repeals 73-31-2, 1953 Comp., relating to the commission on Indian affairs, and enacts the above section.

**Office of Indian affairs administratively attached.** - Pursuant to Laws 1977, ch. 252, § 9, the office of Indian affairs is administratively attached to the human services department. See 9-8-8 NMSA 1978.

### **28-12-5. [Commission members allowed per diem and mileage.]**

Commission members shall serve without compensation but shall be allowed per diem and mileage, as provided by law for other state officials, when engaged in commission business.

**History:** 1953 Comp., § 73-31-3, enacted by Laws 1955, ch. 162, § 2.

### **28-12-6. Organization of commission; officers; meetings; executive director.**

The commission shall organize by the election of a vice chairman and a secretary, and by the adoption of rules and regulations pertinent to the conduct of the business of the commission. A record shall be kept of all proceedings and transactions. The commission shall meet at least once each quarter at such time and place as may be determined by the commission and shall hold such other meetings as may be called by the chairman. A majority of the commission membership shall constitute a quorum. The commission shall appoint an executive director who shall act as the administrative officer of the commission.

**History:** 1953 Comp., § 73-31-4, enacted by Laws 1955, ch. 162, § 3; 1975 (1st S.S.), ch. 11, § 2.

### **28-12-7. Powers and duties of commission.**

A. The commission shall be the coordinating agency for intergovernmental programs concerning tribal governments and the state of New Mexico.

B. The commission shall investigate, study, consider and act upon the entire subject of Indian conditions and relations within the state of New Mexico, including, but not restricted to, problems of health, economy, education, legislation and local, state and federal government. In performing its functions the commission shall provide an opportunity for the presentation and exchange of ideas in respect to Indian affairs of the state by all interested persons.

C. The commission shall assist in setting the policy for, and act as the clearinghouse for, all state programs affecting the Indian people of New Mexico.

D. The commission, in order to ensure the purposes of this section, may hold hearings, conduct meetings, make investigations and confer with officials of local, state and federal agencies in order to secure cooperation between the local, state, federal and Indian tribal governments in the promotion of the welfare of the Indian peoples.

E. The commission shall have the authority to accept and receive gifts, funds, grants, bequests and devises for use in furthering the purposes of the commission.

F. The commission may contract with public or private bodies to provide services and facilities for promoting the welfare of the Indian peoples.

**History:** 1953 Comp., § 73-31-5, enacted by Laws 1955, ch. 162, § 4; 1975 (1st S.S.), ch. 11, § 3.

### **28-12-8. Preservation of Indian legends.**

The New Mexico commission on Indian affairs may employ not more than two persons for each Indian tribe or pueblo in the state to record the legends of the tribe or pueblo in the English language for the purpose of making them available for dissemination to the public. Persons employed to record the legends shall be members of the tribe or pueblo, shall have a knowledge of both English and the language spoken by the particular tribe or pueblo and shall be familiar with a means of recording the legends in the English language. The commission may employ personnel and purchase recording equipment necessary to fulfill the purpose of this section.

**History:** 1953 Comp., § 73-31-5.1, enacted by Laws 1967, ch. 225, § 1.

### **28-12-9. [Reports of activities, findings and recommendations.]**

A written report of the activities, findings and recommendations of the commission shall be submitted to the governor on or before the last day of each calendar year. Interim reports may be made when deemed necessary or advisable by the commission and shall be made when so requested by the governor.

**History:** 1953 Comp., § 73-31-6, enacted by Laws 1955, ch. 162, § 5.

# ARTICLE 13

## VETERANS' SERVICES

### 28-13-1. Short title.

Sections 28-13-1 through 28-13-12 NMSA 1978 may be cited as the "Veterans' Service Act".

**History:** 1953 Comp., § 74-1-1, enacted by Laws 1977, ch. 252, § 33.

**Cross-references.** - As to special recreation and museum privileges for veterans and their immediate families on Veteran's Day, see 28-13A-1.

**Repeals and reenactments.** - Laws 1977, ch. 252, § 33, repeals 74-1-1, 1953 Comp., relating to the creation of the disabled soldier's relief commission, number, appointment, terms and expenses of members, and enacts the above section.

### 28-13-2. Veterans' service commission created.

For the purpose of administering the Veterans' Service Act [28-13-1 to 28-13-12 NMSA 1978], there is created the "New Mexico veterans' service commission" composed of five members who shall be veterans and who shall be appointed by the governor with the consent of the senate. Members of the commission shall serve without pay, compensation or other emolument; provided, however, members of the commission shall be paid per diem and mileage as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978] for attendance at regularly called meetings.

**History:** 1978 Comp., § 28-13-2, enacted by Laws 1979, ch. 317, § 1; 1981, ch. 200, § 1.

**Repeals and reenactments.** - Laws 1977, ch. 252, § 34, repealed 74-1-2, 1953 Comp., relating to name of commission changed, and enacted a new 74-1-2, 1953 Comp.

Laws 1979, ch. 317, § 1, repealed former 28-13-2 NMSA 1978, relating to the creation of a veterans' service bureau, and enacted a new 28-13-2 NMSA 1978.

### 28-13-3. Terms of commission members.

Members of the New Mexico veterans' service commission shall serve for terms of five years each. The present members shall serve for the unexpired balance of their terms. In making the initial appointment of the new members to the commission, the governor shall appoint one member for a term which expires July 1, 1982 and one member for a term which expires July 1, 1984. Thereafter, each member shall be appointed for a five-year term. Vacancies on the commission shall be appointed only for the remainder of the unexpired term of the member creating the vacancy.

**History:** 1978 Comp., § 28-13-3, enacted by Laws 1979, ch. 317, § 2; 1981, ch. 200, § 2.

**Repeals and reenactments.** - Laws 1977, ch. 252, § 35, repealed former 74-1-3, 1953 Comp., relating to powers and authority of commission unchanged, and enacted a new 74-1-3, 1953 Comp.

Laws 1979, ch. 317, § 2, repealed former 28-13-3 NMSA 1978, relating to a veterans' service committee, and enacted a new 28-13-3 NMSA 1978.

#### **28-13-4. Corporate powers.**

The New Mexico veterans' service commission shall be a public corporation under the name of the "New Mexico veterans' service commission." The director of veterans' affairs may execute all legal documents and undertakings, in the name of the commission, as may be necessary or required. Subject to the constitution of New Mexico, the commission may:

A. sue and be sued in any matters within the scope of its powers and authority as granted to it by the legislature; and

B. exercise all powers heretofore granted, and which may hereafter be granted.

**History:** 1978 Comp., § 28-13-4, enacted by Laws 1979, ch. 317, § 3.

**Repeals and reenactments.** - Laws 1979, ch. 317, § 3, repeals former 28-13-4 NMSA 1978, relating to the corporate powers of the veterans' service committee, and enacts the above section.

#### **28-13-5. Powers and duties of commission.**

The New Mexico veterans' service commission shall:

A. make rules and regulations as may be necessary;

B. disseminate information regarding all laws beneficial to veterans, their surviving spouses and their children;

C. assist veterans, their surviving spouses and their children in the preparation, presentation and prosecution of claims against the United States arising by reason of military or naval services;

D. assist veterans, their surviving spouses and their children in the establishing of all rights and the procurement of all benefits which have accrued or may hereafter accrue to them under the laws of this state;

E. cooperate with all agencies of the United States which are now or may hereafter be established for the beneficial interest of veterans, and to which end the commission is authorized and empowered to enter into any agreements or contracts with the United States which may be necessary for protecting or procuring rights or benefits for veteran residents of this state; and

F. make a report to the governor on or before the first day of December of each year covering all of its activities during the preceding year.

**History:** Laws 1927, ch. 147, § 3; C.S. 1929, § 122-102; Laws 1935, ch. 18, § 1 (122-102); 1941 Comp., § 66-1405; 1953 Comp., § 74-1-5; Laws 1963, ch. 284, § 1; 1977, ch. 252, § 37; 1979, ch. 317, § 4.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 77 Am. Jur. 2d Veterans and Veterans' Laws § 1 et seq.

Exemption of veteran's relief from taxation, 108 A.L.R. 1105.

Housing for war veterans, constitutionality, construction and application of statute respecting, 165 A.L.R. 814.

Veterans' housing provisions of Federal Housing and Rent Act of 1947, 10 A.L.R.2d 253.

Construction of §§ 301 and 700 of Soldiers' and Sailors' Civil Relief Act of 1940, as amended, relating to installment contracts for purchase of property, 24 A.L.R.2d 1074.

Provision of Soldiers' and Sailors' Civil Relief Act relating to taxation of property of military personnel, 32 A.L.R.2d 618.

Premiums paid, but subject to refund, as operating to prevent lapse or forfeiture of national service life insurance, 36 A.L.R.2d 1382.

Foreclosure of mortgages and trust deeds, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting, 40 A.L.R.2d 1262.

When the statute of limitations begins to run against an action on, or relating to, national service life insurance policy, 44 A.L.R.2d 1189.

Matrimonial actions, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting, 54 A.L.R.2d 390.

Exemption of proceeds of national service life insurance from claims of creditors, 54 A.L.R.2d 1335.

Trust, or contract to hold for benefit of another, with respect to proceeds of national service life insurance, 70 A.L.R.2d 1358.

Negligence actions, Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting, 75 A.L.R.2d 1062.

Serviceman's right to recover under Federal Tort Claims Act, 31 A.L.R. Fed. 146.

6 C.J.S. Armed Services § 251 et seq.

### **28-13-5.1. Repealed.**

#### **ANNOTATIONS**

**Repeals.** - Laws 1989, ch. 324, § 45 repeals 28-13-5.1 NMSA 1978, as enacted by Laws 1987, ch. 257, § 4, relating to additional power and creation of the veterans' national cemetery fund, effective July 1, 1990. For provisions of former section, see 1989 Cumulative Supplement.

### **28-13-6. Agents and employees.**

The New Mexico veterans' service commission within thirty days after the appointment of its members shall appoint and employ a director of veterans' affairs and other necessary assistants, both executive and clerical. All appointees and employees of the commission shall be veterans, except the clerical and secretarial help may be employed from the spouses, widows, widowers, siblings or children of veterans.

**History:** Laws 1927, ch. 147, § 4; C.S. 1929, § 122-103; Laws 1935, ch. 18, § 1 (122-103); 1941 Comp., § 66-1406; 1953 Comp., § 74-1-6; Laws 1971, ch. 83, § 1; 1971, ch. 234, § 9; 1977, ch. 252, § 38; 1979, ch. 317, § 5.

### **28-13-7. The term "veteran" defined.**

The term "veteran" for the purpose of this act (Sections 28-13-1 to 28-13-11 NMSA 1978) shall be any citizen of the United States who was regularly enlisted, drafted, inducted or commissioned, and who was accepted for and assigned to active duty in the armed forces of the United States who was not separated from such service under circumstances amounting to dishonorable discharge.

**History:** Laws 1927, ch. 147, § 5; C.S. 1929, § 122-104; Laws 1935, ch. 18, § 1 (122-104); 1941 Comp., § 66-1407; 1953 Comp., § 74-1-7; Laws 1955, ch. 22, § 1.

### **28-13-8. Oaths; powers to administer.**

The director of veterans' affairs and such employees designated by the director may administer oaths and affirmations, and execute attestations and certificates.

**History:** C.S. 1929, § 122-105, added by Laws 1935, ch. 18, § 1 (122-105); 1941 Comp., § 66-1408; 1953 Comp., § 74-1-8; Laws 1977, ch. 252, § 39; 1979, ch. 317, § 6.

**Veterans' service commission may avoid necessity of having staff officers become notaries** by having such officers utilize a commission seal, take oaths and acknowledgments and attest documents pursuant to this section. 1963-64 Op. Att'y Gen. No. 63-17.

### **28-13-9. Power to act as personal representative or conservator.**

A. The commission shall have the power and authority to act as personal representative of any deceased veteran, or as the conservator of the estate of any minor child of any veteran, or as the conservator of the estate of any insane or incompetent veteran, or as conservator of the estate of any person who is a bona fide resident of New Mexico and who is certified by the veterans' administration as having money due from the veterans' administration, the payment of which is dependent upon the appointment of a conservator for said person. No fee shall be allowed or paid to the commission for acting as such personal representative or conservator.

B. When the commission is appointed personal representative in the last will of any veteran, the court or officer authorized to grant letters testamentary in this state shall, upon the proper application, grant letters testamentary thereon to the commission. When application is made to any court or officer having authority to grant letters of administration with the will annexed upon the estate of any veteran or upon the estate of any deceased veteran who may have died intestate, and there is no person entitled to such letters who is qualified, competent, willing or able to accept such administration, such court or officer may, at the request of any party interested in the estate, grant letters of administration to the commission. Any court or officer having authority to grant letters of guardianship of any infant may, upon the same application as is required by law for the appointment of a guardian of such an infant appoint the commission as conservator of the estate of any infant who is the child of a veteran. Any court having jurisdiction to appoint a conservator of the estate of an incompetent or a habitual drunkard may appoint the commission to be such conservator when such incompetent or such habitual drunkard is a veteran. Any court having jurisdiction over any person who is a resident of New Mexico, and who is certified by the veterans' administration as having money due from the veterans' administration, the payment of which is dependent upon the appointment of a conservator for said person, may appoint the commission to be such conservator.

C. Such court or officer may make orders respecting the commission as such personal representative or conservator and require the commission to render all accounts which such court or officer might lawfully require if such personal representative or conservator were a natural person.

**History:** C.S. 1929, § 122-106, added by Laws 1937, ch. 87, § 2; 1941 Comp., § 66-1409; 1953 Comp., § 74-1-9; Laws 1955, ch. 20, § 1; 1977, ch. 63, § 1; 1977, ch. 252, § 40; 1979, ch. 317, § 7.

**Cross-references.** - For guardians of minors, see 45-5-201 NMSA 1978 et seq.

For guardians of incapacitated persons, see 45-5-301 NMSA 1978 et seq.

As to supervised administrations, see 45-3-501 NMSA 1978 et seq.

For personal representative, see 45-3-601 NMSA 1978 et seq.

### **28-13-10. Court proceedings for appointment as personal representative or conservator.**

The commission may institute any proceeding in any court of competent jurisdiction for appointment as personal representative of the estate of any deceased veteran or as conservator of the estate of any minor child of any veteran or as conservator of the estate of any insane or incompetent veteran as provided in Section 28-13-9 NMSA 1978 without cost and without tax.

**History:** C.S. 1929, § 122-107, added by Laws 1939, ch. 110, § 1; 1941 Comp., § 66-1410; 1953 Comp., § 74-1-10; Laws 1977, ch. 63, § 2; 1977, ch. 252, § 41; 1979, ch. 317, § 8.

**Cross-references.** - For guardians of minors, see 45-5-201 NMSA 1978 et seq.

For guardians of incapacitated persons, see 45-5-301 NMSA 1978 et seq.

As to supervised administrations, see 45-3-501 NMSA 1978 et seq.

For personal representative, see 45-3-601 NMSA 1978 et seq.

### **28-13-11. Action as personal representative or conservator; bond.**

The commission shall post with the secretary of state a corporate surety bond in an amount of five hundred thousand dollars (\$500,000). The bond shall be conditioned upon the faithful discharge of the commission's duties as personal representative or conservator and shall insure [inure] to the use and benefit of each person or estate for whom the commission is appointed to act. In any case or proceeding in which the commission shall be appointed personal representative of any veteran's estate or as conservator of the estate of any incompetent or insane veteran or as conservator of the estate of any minor children of any veteran, the commission shall act without additional bond and the court or official having jurisdiction shall so order in its order of appointment.

**History:** C.S. 1929, § 122-108, added by Laws 1939, ch. 110, § 2; 1941 Comp., § 66-1411; 1953 Comp., § 74-1-11; Laws 1957, ch. 176, § 2; 1977, ch. 63, § 3; 1977, ch. 252, § 42; 1979, ch. 317, § 9.

**When new bond bids required.** - The purchasing agent should advertise and attempt to secure new bids on a bond after receipt of a "termination notice" from the present bond holder. 1957-58 Op. Att'y Gen. No. 58-162.

### **28-13-12. Commission may prorate cost of bond premium.**

In each case where the commission is appointed to serve as personal representative or conservator of the estate of any beneficiary of the United States veterans' administration, the court in which the estate is filed shall authorize a charge for each estate's share of the bond premium to be paid from the assets of the estate. The commission shall determine the charge to be made against each estate, but in no case shall the charge exceed the sum of ten dollars (\$10.00). It is the intent of the legislature that this charge shall be each estate's share in the cost of the bond which the commission will post as heretofore provided.

**History:** 1953 Comp., § 74-1-12, enacted by Laws 1957, ch. 176, § 4; 1963, ch. 284, § 2; 1971, ch. 83, § 2; 1977, ch. 63, § 4; 1977, ch. 252, § 43; 1979, ch. 317, § 10.

### **28-13-13. Veterans' approval agency created.**

There is created within the office of military affairs the "veterans' approval agency" to carry out the state's obligations under the provisions of 38 U.S.C. Section 1771.

**History:** 1953 Comp., § 74-1-13, enacted by Laws 1973, ch. 83, § 1; 1978, ch. 169, § 1.

**Obligations under 38 U.S.C. § 1771.** - Title 38, U.S.C. § 1771, declares that states are to create veterans' approval agencies, or if not, to have an "administrator." The functions include approving courses and training for which the veteran may be eligible to receive financial assistance. See 28-13-14 NMSA 1978.

### **28-13-14. Function of agency.**

The veterans' approval agency shall evaluate and approve educational programs and training programs for all persons and veterans eligible for educational assistance pursuant to the provisions of Title 38 of the United States Code. Approval of all courses, educational programs and training programs, including training on the job, by the veterans' approval agency shall be in accordance with the provisions of Title 38 of the United States Code.

**History:** 1953 Comp., § 74-1-14, enacted by Laws 1973, ch. 83, § 2; 1978, ch. 169, § 2.

## **28-13-15. Repealed.**

### **ANNOTATIONS**

**Repeals.** - Laws 1979, ch. 317, § 12, repeals 28-13-15 NMSA 1978, relating to the exemption of the responsibilities of the veterans' service committee from the authority of the secretary of the human services department, effective July 1, 1979.

## **28-13-16. Soldier's discharge papers recorded without cost.**

The county clerks of the several counties of the state shall, upon presentation to them, record free of charge the discharge papers of any soldier, sailor, marine, aviator, army nurse or yeomanette who was accepted for service and served in the armed forces of the United States for thirty days or more.

**History:** Laws 1921, ch. 61, § 1; C.S. 1929, § 122-401; Laws 1941, ch. 103, § 1; 1941 Comp., § 66-1501; 1953 Comp., § 74-2-1; Laws 1987, ch. 217, § 1.

**Scope of provisions.** - The provisions of this section are available to veterans of World War II and of any other past war. 1945-46 Op. Att'y Gen. No. 4765.

**Certificate of service sufficient instrument.** - A certificate of service is a sufficient instrument showing that a soldier has been discharged and may be recorded free, though not in usual form, if the other requirements are met. 1943-44 Op. Att'y Gen. No. 4310.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - War risk insurance records as official records within purview of 28 USC § 1733 making such records admissible in evidence, 50 A.L.R.2d 1210.

## **ARTICLE 13A VETERANS' SPECIAL RECREATION AND MUSEUM PRIVILEGES**

### **28-13A-1. Special recreation and museum privileges.**

A. Any New Mexico resident who provides satisfactory proof that he is currently serving or has served in the armed forces of the United States, and his spouse and dependent children, shall be entitled to free use of:

(1) any state park or recreation area operated by the state park and recreation division of the energy, minerals and natural resources department, including the waiving of all admittance, camping, permit or other user fees or charges; and

(2) any exhibit of the museum of New Mexico, the New Mexico museum of natural history and the international space hall of fame.

B. Notwithstanding any other provision of law to the contrary, the museum board of regents and the board of trustees of the museum of natural history shall waive admission fees to museum exhibits and programs for persons entitled to special recreation and museum privileges under this section.

C. The special recreation and museum privileges described in Subsection A of this section shall be valid only on the federally designated legal holiday known as Veteran's Day.

**History:** Laws 1991, ch. 93, § 1.

**Cross-references.** - For the Veterans' Service Act, see 28-13-1 NMSA 1978.

As to source and disbursement of state park and recreation revenues, see 16-2-19 NMSA 1978.

As to the establishment, location, and property of the museum of New Mexico, see 18-3-1 NMSA 1978.

As to the space center division, see 18-7-1 NMSA 1978.

As to the Natural History and Science Museum, see 18-3A-1 NMSA 1978.

**Effective dates.** - Laws 1991, ch. 93 contains no effective date provision, but, pursuant to N.M. Const., art. IV, § 23, is effective on June 14, 1991.

## **ARTICLE 14**

### **AID TO CHILDREN OF DECEASED MILITARY AND STATE POLICE PERSONNEL**

#### **28-14-1. Use of funds for children of deceased New Mexico military personnel and state policemen.**

A. The funds set aside under the provisions of Sections 28-14-1 through 28-14-4 NMSA 1978 shall be used for the sole purposes of providing for matricular fees, board and room rent and books and supplies for the use and benefit of the children, not under sixteen and not over twenty-six years of age, of:

(1) those persons who were residents of New Mexico at the time of entry into military service and who entered the military service of the United States during World War I or II, or during any action in which the military forces of the United States are engaged in

armed conflict, and who were killed in action or died of other cause during the conflict or as a result of such military service;

(2) deceased members of the New Mexico national guard who were killed while on active duty in the service of the state after having been called to active duty by the governor; and

(3) deceased members of the New Mexico state police who were killed while on active duty in the service of the state.

B. The benefits enumerated in Subsection A of this section shall further be restricted to children who are attending or who may attend a state educational or training institution of a secondary or college grade. Children shall be selected under the provisions of Section 28-14-3 NMSA 1978 and shall be admitted to state institutions of secondary or college grade free of tuition.

**History:** 1941 Comp., § 66-1701, enacted by Laws 1949, ch. 170, § 1; 1953, ch. 31, § 1; 1953 Comp., § 74-4-1; Laws 1955, ch. 216, § 1; 1971, ch. 83, § 3; 1973, ch. 203, § 1; 1975, ch. 29, § 1; 1975, ch. 89, § 1.

**Generally.** - A child may be granted a scholarship or other aid covering periods of more than one year. Further, there is no objection to granting these benefits to two or more children of the same deceased veteran. The only basis for determining who shall receive the benefits is "need and merit" as determined by the state board of education. 1955-56 Op. Att'y Gen. No. 6287.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 6 C.J.S. Armed Services § 113.

### **28-14-2. Amounts payable to institutions; eligibility.**

The amounts due to any educational or training institution shall be payable to such institutions on vouchers signed by the director of veterans' affairs of the New Mexico veterans' service commission, or his authorized representative. The commission shall determine the eligibility of children making application for the benefits provided in Sections 28-14-1 through 28-14-4 NMSA 1978, and satisfy itself of the attendance of such children and of the accuracy of charges submitted to the commission. No member of the commission shall receive any compensation for such service except as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978].

**History:** 1941 Comp., § 66-1702, enacted by Laws 1949, ch. 170, § 2; 1953 Comp., § 74-4-2; Laws 1975, ch. 29, § 2.

### **28-14-3. Selection by veterans' service commission.**

Children who are to receive the educational benefits provided under Section 28-14-1 NMSA 1978 shall be selected by the New Mexico veterans service commission on the basis of need and merit. Nominations shall be made by:

A. the New Mexico veterans service commission for children of deceased veterans;

B. the adjutant general of the state for children of deceased national guard members; and

C. the New Mexico state police board for children of the deceased state police members.

**History:** 1941 Comp., § 66-1703, enacted by Laws 1949, ch. 170, § 3; 1953 Comp., § 74-4-3; Laws 1973, ch. 203, § 2; 1975, ch. 29, § 3; 1975, ch. 89, § 2.

#### **28-14-4. Maximum payments.**

Not more than three hundred dollars (\$300) shall be paid, in addition to the free tuition, for any child for one year.

**History:** 1941 Comp., § 66-1704, enacted by Laws 1949, ch. 170, § 4; 1953 Comp., § 74-4-4; Laws 1975, ch. 29, § 4.

## **ARTICLE 15 REEMPLOYMENT OF PERSONS IN ARMED FORCES**

### **28-15-1. Reemployment of persons in armed forces.**

Any person who, since July 1, 1940, has left or leaves a position he has held, other than a temporary position, in the employ of any employer to enter the armed forces of the United States, national guard or organized reserve, and who serves on active duty and is honorably discharged or released from active duty to complete his remaining service in a reserve component, or is entitled to a certificate of service, or who terminates his service without dishonor, if an officer, and is still qualified to perform the duties of such position, and makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year shall be reemployed as follows:

A. if the person's position was in the employ of a private employer, the employer shall restore him to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; or

B. if the person's position was in the employ of the state of New Mexico or any political subdivision thereof, he shall be deemed to meet all the requirements of the Personnel

Act as well as all residency requirements or other provisions of law and shall be restored to such position or to a position of like seniority, status and pay.

**History:** Laws 1941, ch. 10, § 1; 1941 Comp., § 57-701; Laws 1945, ch. 24, § 1; 1953 Comp., § 74-5-1; Laws 1969, ch. 260, § 1; 1971, ch. 163, § 1.

**Cross-references.** - As to veteran's preference in Personnel Act, see 10-9-13.2 NMSA 1978.

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

**Generally.** - An "employee," who leaves a position to enter the armed forces of the United States, may remain in the service indefinitely and retain his reemployment rights. No distinction is made between volunteers and draftees under the Veterans' Reemployment Act (28-15-1 to 28-15-3 NMSA 1978). No distinction is drawn between officers and enlisted personnel under the Veterans' Reemployment Act. 1959-60 Op. Att'y Gen. No. 59-18.

**Scope of benefits.** - Volunteers as well as draftees are entitled to the benefits of this act (28-15-1 to 28-15-3 NMSA 1978). 1941-42 Op. Att'y Gen. No. 4104.

**Legislative intent.** - The legislative policy indicated by this act (28-15-1 to 28-15-3 NMSA 1978) is to restore the veteran to his old position whenever possible, and if not, to a position of like seniority, status and pay. 1945-46 Op. Att'y Gen. No. 4832.

**Intent regarding Personnel Act.** - The language of Subsection B makes it clear that the legislature does not intend for returning veterans seeking reemployment with the state to meet the standards of the Personnel Act. 1969 Op. Att'y Gen. No. 69-108.

**Officers of state not affected.** - This act (28-15-1 to 28-15-3 NMSA 1978) does not apply to officers of the state of New Mexico or its subdivisions, but only to employees. 1945-46 Op. Att'y Gen. No. 4882.

**Time between leaving employment and induction.** - An employee who left his employment within a reasonable time before induction without obtaining other employment in the meantime is entitled to reemployment. 1945-46 Op. Att'y Gen. No. 4829.

**Effect of return of veteran.** - Since contracts are entered into subject to existing statutes where a teacher is employed to fill a vacancy caused by the absence of a person in the armed forces his contract is terminated when the veteran returns to his former position. 1945-46 Op. Att'y Gen. Nos. 4813, 4818.

**Where seven year absence.** - A veteran who was employed within the state of New Mexico as a locomotive fireman and locomotive engineer on January 27, 1951, at which time he was called to active service with the United States Air Force, may upon his

discharge from military service on January 31, 1958 secure reemployment under 28-15-1 to 28-15-3 NMSA 1978. 1957-58 Op. Att'y Gen. No. 58-209.

**Salary increases.** - When a veteran returns to his former position he is entitled to proportionate salary increases and other benefits, if any, to which other employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 4815, 4832.

**Service credit for retirement purposes.** - Section 10-11-6A(1) must be interpreted in a manner consistent with the federal and state laws on veteran reemployment rights. If the veteran otherwise qualifies for reemployment and applies within 90 days of the termination of his active duty period, he still may acquire service credit for retirement purposes even though the employer does not actually rehire him until after the ninetieth day. 1988 Op. Att'y Gen. No. 88-24.

**Employee more rights than probationer.** - If a person contemplated by Subsection B has gained the status of an "employee" as that term is defined by 10-9-3 NMSA 1978 and the personnel board rules, he will have additional rights under the state personnel board rules that a "probationer" would not. 1969 Op. Att'y Gen. No. 69-108.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 77 Am. Jur. 2d Veterans and Veterans' Laws §§ 95 to 118.

Rights of non-civil service public employees, with respect to discharge or dismissal, under state veterans' tenure statutes, 58 A.L.R.2d 960.

When does sale or reorganization exempt business from reemployment requirements of military veterans' reemployment laws (38 USCS §§ 2021 et seq.), 63 A.L.R. Fed. 132.

6 C.J.S. Armed Services §§ 268 to 287.

## **28-15-2. [Status on reinstatement; restriction on discharge.]**

Any person who is restored to a position in accordance with the provisions hereof shall be considered as having been on furlough or leave of absence during his services in the armed forces of the United States, and shall be restored without loss of seniority, and shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person entered the armed forces of the United States, and shall not be discharged from such position without cause within one year after such restoration.

**History:** Laws 1941, ch. 10, § 2; 1941 Comp., § 57-702; 1953 Comp., § 74-5-2.

**Salary increases and benefits.** - When a veteran returns to his former position he is entitled to proportionate salary increases and other benefits, if any, to which other

employees who continued in service have become entitled. 1945-46 Op. Att'y Gen. Nos. 4815, 4832.

### **28-15-3. [Enforcement in district court; procedure.]**

In case any person acting either in a public or private capacity fails or refuses to comply with the provisions hereof the district court of the district in which such person maintains a place of business (if such person is a private employer), or in which such person is a public official, shall have power, upon the filing of a motion, petition or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer or public officials to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reasons of such employer's or official's unlawful action. The court shall order a speedy hearing in any such case, and shall advance it on the calendar. Upon application to the district attorney for the pertinent district by any person claiming to be entitled to the benefits of such provisions, such district attorney, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition or other appropriate pleading and the prosecution thereof to specifically require the compliance with such provisions: provided, that no fees or court costs shall be taxed against the person so applying for such benefits.

**History:** Laws 1941, ch. 10, § 3; 1941 Comp., § 57-703; 1953 Comp., § 74-5-3.

**Bringing suit to restore position.** - Only the returning veteran or the district attorney of the appropriate district can bring an action to have the veteran restored to his prior position if employment is refused. 1969 Op. Att'y Gen. No. 69-108.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - Applicability of doctrine of laches to bar veterans' re-employment claims where there is delay by government officials and agencies in rendering veterans' re-employment aid pursuant to 38 USCS § 2025, 53 A.L.R. Fed. 451.

## **ARTICLE 16 DEVELOPMENTAL DISABILITIES COMMUNITY SERVICES**

### **28-16-1. Short title.**

This act [28-16-1 to 28-16-12 NMSA 1978] may be cited as the "Developmental Disabilities Community Services Act".

**History:** Laws 1984, ch. 100, § 1; 1978 Comp., § 43-1A-1, recompiled as 1978 Comp. § 28-16-1.

## **28-16-2. Legislative purpose.**

It is the purpose of the legislature in enacting the Developmental Disabilities Community Services Act [28-16-1 to 28-16-12 NMSA 1978] to authorize the health and environment department [department of health] to plan and coordinate developmental disabilities community services in the state and to declare that priority shall be given to the development and implementation of community-based services for developmentally disabled minors and adults, which will enable and encourage such individuals to achieve their greatest potential for independent and productive living, which will enable them to live in their own homes and apartments or in facilities located within their own communities and which will assist clients to be diverted or be removed from unnecessary institutional placements.

**History:** Laws 1984, ch. 100, § 2; 1978 Comp., § 43-1A-2, recompiled as 1978 Comp., § 28-16-2.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

## **28-16-3. Definitions.**

As used in the Developmental Disabilities Community Services Act [28-16-1 to 28-16-12 NMSA 1978]:

A. "client" means any person who is requesting, receiving or being considered for developmental disabilities services;

B. "contractor" means a nonprofit corporation, tribal government or tribal organization, unit of local government or other organization which has entered into contract with the department for the purpose of providing developmental disabilities services;

C. "department" means the health and environment department [department of health];

D. "developmental disability" means a severe chronic disability of a person, other than a primary diagnosis of mental illness which is attributable to a mental or physical impairment or a combination of mental and physical impairments; is manifested before the person attains age twenty-two; is likely to continue indefinitely; results in substantial functional limitations in three areas of major life activity; and reflects the person's need for a combination and sequence of special interdisciplinary or generic care, treatment or other services which are individually planned and coordinated. Persons who are diagnosed as mentally retarded, cerebral palsied, epileptic or autistic and who have at least one functional limitation in an area of major life activity shall be considered developmentally disabled. Infants and preschool-aged children at risk of being developmentally disabled shall also be considered developmentally disabled for purposes of the Developmental Disabilities Community Services Act;

E. "diagnostic evaluation" means an empirical process that determines if, and to what degree, a child or an adult has developmental deficiencies and what interventions and services are needed for the child or adult and the family;

F. "habilitation" means the process by which professional persons and their staff assist the developmentally disabled person in acquiring and maintaining those skills and behaviors which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental and social efficiency. Habilitation includes programs of formal, structured education and treatment; and

G. "interdisciplinary team" means a group of persons drawn from or representing those professions that are relevant to identifying a child's or an adult's needs and designing a program to meet them and that is responsible for collectively evaluating the child's or adult's needs and developing an individual care plan to meet them. The team may include a pediatrician, a parent, a guardian and the client, as appropriate, social worker, speech-language pathologist, physical or occupational therapist, nurse or special educationalist and child or adult psychologist.

**History:** Laws 1984, ch. 100, § 3; 1978 Comp., § 43-1A-3, recompiled as 1978 Comp., § 28-16-3; Laws 1989, ch. 195, § 1.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

#### **28-16-4. Assessment of needs of state's developmentally disabled population.**

The developmental disabilities planning council, in order to comply with the provisions of 42 U.S.C. Section 6067, shall conduct a needs assessment to determine the number of developmentally disabled persons residing in New Mexico, the range and degree of severity of their disabilities, their present placement and services being received, their needs for services and the extent to which their needs are unserved or underserved. The assessment shall be completed within one year of the effective date of the Developmental Disabilities Community Services Act, and the findings shall be included in the state plan for developmental disabilities services. The assessment shall be repeated at least every two years.

**History:** Laws 1984, ch. 100, § 4; 1978 Comp., § 43-1A-4, recompiled as 1978 Comp., § 28-16-14.

**42 U.S.C. § 6067.** - Sections 42 U.S.C. § 6067 was omitted from the United States Code in the general revision of the chapter in which it appeared by PL 98-527.

#### **28-16-5. Planning for community services for persons with developmental disabilities.**

The developmental disabilities planning council shall coordinate, review and comment upon plans for services to persons with developmental disabilities developed by all major state agencies providing or funding services to persons with developmental disabilities based, to the greatest extent possible, upon the most recent needs assessment completed pursuant to Section 28-16-4 NMSA 1978. The health and environment department [department of health], the human services department, the vocational rehabilitation division of the state department of public education and the state department of public education shall each submit a plan for services to persons with developmental and other disabilities within a reasonable time to allow for meaningful coordination, review and comment by the development disabilities planning council. Each plan shall define and provide for such services as are required within the scope of each respective agency's applicable federal and state laws and regulations to achieve the goal of facilitating clients to maximize their potential and live as independently as possible in their own homes and communities and to achieve productive lives through involvement in integrated service settings.

**History:** 1978 Comp., § 28-16-5, enacted by Laws 1989, ch. 195, § 2.

**Repeals and reenactments.** - Laws 1989, ch. 195, § 2 repeals former 28-16-5 NMSA 1978, as enacted by Laws 1984, ch. 100, § 5, relating to planning for community services for developmentally disabled persons, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1987 Replacement Pamphlet.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

### **28-16-6. Authorization for provision of community-based services for the developmentally disabled.**

Subject to the availability of appropriations provided expressly for this purpose, the department is authorized to enter into contracts with contractors capable of providing habilitation and other needed services to developmentally disabled clients in an efficient and cost-effective manner. Such programs and services as are contracted for shall be consistent with and in furtherance of the objectives of the state plan prepared pursuant to Section 5 [28-16-5 NMSA 1978] of the Developmental Disabilities Community Services Act.

**History:** Laws 1984, ch. 100, § 6; 1978 Comp., § 43-1A-6, recompiled as 1978 Comp., § 28-16-6.

### **28-16-7. Standards for services.**

The department shall promulgate regulations as are appropriate to ensure compliance with recognized minimum professional standards for services and the constitutional and statutory rights of clients. Contractors providing services shall comply with these regulations and standards as a condition of payment and continuation of contract.

**History:** Laws 1984, ch. 100, § 7; 1978 Comp., § 43-1A-7, recompiled as 1978 Comp., § 28-16-7.

### **28-16-8. Admission and discharge of clients from developmental disabilities services purchased by the health and environment department [department of health].**

Within one year of the effective date of the Developmental Disabilities Community Services Act, the department shall establish minimum requirements for admission, discharge, and withdrawal of clients from services funded by the department. Requirements shall include eligibility requirements for state-funded services and a system of ranking individuals by need for services. Such a system shall take into account the ability of developmentally disabled adults to give consent and to voluntarily participate in habilitation services. Persons who have been institutionalized shall be included in any system of ranking individuals by need. The department shall have the evaluation and case management authority to implement this system.

**History:** Laws 1984, ch. 100, § 8; 1978 Comp., § 43-1A-8, recompiled as 1978 Comp., § 28-16-8.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

### **28-16-9. Programmatic review and monitoring compliance with regulations and contractual requirements.**

Each state agency subject to the provisions of Section 28-16-5 NMSA 1978 shall establish standards for service and adopt regulations as appropriate. Each agency shall be responsible for insuring compliance with its standards and regulations.

**History:** 1978 Comp., § 28-16-9, enacted by Laws 1989, ch. 195, § 3.

**Repeals and reenactments.** - Laws 1989, ch. 195, § 3 repeals former 28-16-9 NMSA 1978, as enacted by Laws 1984, ch. 100, § 9, relating to programmatic review and monitoring of compliance with regulations and contractual requirements, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1987 Replacement Pamphlet.

### **28-16-10. Determination of rates for payment for services.**

The department shall analyze community-based provider actual costs and shall develop and implement by July 1, 1989 a unit of service reimbursement system based on these costs for the purchase of services for developmentally disabled persons. The system shall be coordinated with the state plan required by Section 28-16-5 NMSA 1978 so as to enable the department to estimate accurate funding requirements to be submitted annually to the legislature as part of the regular budget cycle. Contractors shall be

required to submit records of units of service delivered, subject to monitoring by the department in accordance with Section 28-16-9 NMSA 1978.

**History:** Laws 1984, ch. 100, § 10; 1978 Comp., § 43-1A-10, recompiled as 1978 Comp., § 28-16-10; Laws 1989, ch. 70, § 1.

### **28-16-11. Independent status of contractors.**

Each contractor that provides developmental disabilities services shall be considered to be an independent contractor and not an entity of state government.

**History:** Laws 1984, ch. 100, § 11; 1978 Comp., § 43-1A-11, recompiled as 1978 Comp., § 28-16-11.

### **28-16-12. Developmental disabilities early childhood evaluation system.**

The state shall have a timely, comprehensive, multi-disciplinary system for evaluating infants, toddlers and preschool age children suspected of having developmental delays. Evaluations for infants and toddlers shall address family service needs and shall include training capabilities to education community providers and parents in the understanding and application of the evaluations. This evaluation system shall be jointly provided through a coordinated system by the children's medical services bureau of the public health division of the health and environment department [department of health], the university of New Mexico's developmental disabilities team and the state department of public education.

**History:** 1978 Comp., § 28-16-12, enacted by Laws 1989, ch. 195, § 4.

**Repeals and reenactments.** - Laws 1989, ch. 195, § 4 repeals former 28-16-12 NMSA 1978, as enacted by Laws 1984, ch. 100, § 12, relating to developmental disability diagnostic evaluation program, and enacts the above section, effective June 16, 1989. For provisions of former section, see 1987 Replacement Pamphlet.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

### **28-16-13. Disabled persons; information and referral system; coordination and continuation.**

The developmental disabilities planning council, to coordinate information and referral services and eliminate the duplication of effort, shall provide information and referral services for the following state agencies and institutions that provide services to disabled persons, including:

A. the human services department;

- B. the health and environment department [department of health];
- C. the state department of public education and its vocational rehabilitation division;
- D. the New Mexico school for the deaf;
- E. the New Mexico school for the visually handicapped; and
- F. the Carrie Tingley crippled children's hospital.

**History:** Laws 1987, ch. 194, § 1; 1991, ch. 11, § 1.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

**The 1991 amendment**, effective June 14, 1991, deleted provisions at the end of the section relating to the joint provision of information services by the named agencies and institutions through the developmental disabilities council beginning with the seventy-seventh fiscal year and the transfer of funds for such purpose and made minor stylistic changes in Subsections C and F.

#### **28-16-14. Developmental disabilities planning council; creation.**

There is created the "developmental disabilities planning council" in accordance with the federal Developmental Disabilities Assistance and Bill of Rights Act, which shall be an adjunct agency as provided in the Executive Reorganization Act [28-16-1 to 28-16-12 NMSA 1978]. The council shall consist of no less than eighteen members, at least half of whom shall be persons with developmental disabilities or parents, immediate relatives or guardians of persons with developmental disabilities. The membership of the council shall include the secretary of health and environment [secretary of health], the secretary of human services and the director of the state agency on aging or their designees, the directors of the special education unit and the division of vocational rehabilitation of the state department of public education, the director of the state protection and advocacy system established pursuant to the federal Developmental Disabilities Assistance and Bill of Rights Act, representatives of institutions of post-secondary education and representatives of local government agencies, non-government agencies or nonprofit groups concerned with services to the disabled. Members other than ex-officio members shall be appointed by the governor for terms of three years, except that the initial appointments by the governor shall be as follows:

- A. one-third of the appointed members shall be appointed for terms of one year;
- B. one-third of the appointed members shall be appointed for terms of two years; and
- C. one-third of the appointed members shall be appointed for terms of three years.

**History:** Laws 1989, ch. 92, § 1.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

**Compiler's note.** - The federal Developmental Disabilities Assistance and Bill of Rights Act, referred to in the first sentence, appears as 42 U.S.C. § 6000 et seq.

### **28-16-15. Developmental disabilities planning council; powers; duties.**

A. The developmental disabilities planning council shall:

- (1) act as a planning and coordinating body for persons with developmental disabilities;
- (2) provide statewide systems advocacy for populations with developmental disabilities;
- (3) work with appropriate state agencies to develop the developmental disabilities three-year plan as required by the federal Developmental Disabilities Assistance and Bill of Rights Act;
- (4) monitor and evaluate the implementation of the state developmental disabilities plan;
- (5) to the maximum extent feasible, review and comment on all state plans which relate to programs affecting persons with developmental disabilities;
- (6) submit to the secretary of the United States department of health and human services through the office of the governor such periodic reports as the secretary may request;
- (7) advise the governor and the legislature about the needs of the developmentally disabled; and
- (8) carry out any other activities authorized or required by the provisions of the federal Developmental Disabilities Assistance and Bill of Rights Act.

B. The developmental disabilities planning council is authorized to:

- (1) award grants and enter into contracts to carry out its duties; and
- (2) seek funding from sources other than the state.

**History:** Laws 1989, ch. 92, § 2.

**Compiler's note.** - The federal Developmental Disabilities Assistance and Bill of Rights Act, referred to in Subsection A(3), appears as 42 U.S.C. § 6000 et seq.

### **28-16-15.1. Development disabilities planning council; additional duty. (Effective until February 23, 1994.)**

A. The developmental disabilities planning council, in coordination with the health and environment department [department of health] and the human services department, shall develop a plan on the role of intermediate care facilities for the mentally retarded in the delivery of services to individuals with developmental disabilities. The plan shall contain:

(1) a methodology to determine the number of individuals with developmental disabilities who meet the level-of-care criteria for an intermediate care facility for the mentally retarded as defined by the human services department and the health and environment department [department of health];

(2) a description of the future role of intermediate care facilities for the mentally retarded in the developmental disabilities service system; and

(3) alternative proposals for controlling the growth of intermediate care facilities for the mentally retarded.

B. The developmental disabilities planning council shall present the plan developed in Subsection A of this section to the human services department and the health and environment department [department of health] for approval and implementation on or before October 1, 1990.

**History:** 1978 Comp., § 28-16-15.1, enacted by Laws 1990, ch. 97, § 2.

**Delayed repeals.** - Laws 1990, ch. 97, § 3 repeals 28-16-15.1 NMSA 1978, as enacted by Laws 1990, ch. 97, § 2, effective February 23, 1994.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

**Emergency clauses.** - Laws 1990, ch. 97, § 4 makes the act effective immediately. Approved March 5, 1990.

### **28-16-16. Developmental disabilities planning council; staff.**

The developmental disabilities planning council shall employ an executive director, who is the administrative officer of the council. The executive director shall employ other necessary employees under the provisions of the Personnel Act.

**History:** Laws 1989, ch. 92, § 3.

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

## **28-16-17. Developmental disabilities planning council; reports.**

The developmental disabilities planning council shall submit reports on its preceding year's work to the governor and the legislature by December 1 of each year. The reports shall contain recommendations, if any, for legislation or other appropriate action.

**History:** Laws 1989, ch. 92, § 4.

## **28-16-18. Developmental disabilities planning council; compensation.**

Developmental disabilities planning council members shall be reimbursed as provided in the Per Diem and Mileage Act [10-8-1 to 10-8-8 NMSA 1978], and shall receive no other compensation, perquisite or allowance.

**History:** Laws 1989, ch. 92, § 5.

# **ARTICLE 17 LONG-TERM CARE OMBUDSMAN**

## **28-17-1. Short title.**

Sections 1 through 19 [28-17-1 to 28-17-19 NMSA 1978] of this act may be cited as the "Long-Term Care Ombudsman Act".

**History:** Laws 1989, ch. 208, § 1.

**Cross-references.** - As to Continuing Care Act, see Chapter 24, Article 17 NMSA 1978.

**Am. Jur. 2d, A.L.R. and C.J.S. references.** - 40 Am. Jur. 2d Hospitals and Asylums § 36.

7 C.J.S. Asylums and Institutional Care Facilities §§ 5, 6, 14.

## **28-17-2. Purpose.**

The legislature recognizes that the state agency on aging pursuant to a grant from the federal government has established an office of the state long-term care ombudsman. The legislature declares that it is the public policy of this state to encourage community contact and involvement with patients, residents and clients of long-term care facilities. The legislature finds that in order to comply with the federal Older Americans Act and to effectively assist patients, residents and clients of long-term care facilities in the assertion of their civil and human rights, the structure, powers and duties of the office of the state long-term care ombudsman shall be specifically defined.

**History:** Laws 1989, ch. 208, § 2.

**Older Americans Act.** - The federal Older Americans Act, referred to in this section, appears as 42 U.S.C. § 3000 et seq.

### **28-17-3. Definitions.**

As used in the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978]:

A. "adult protective services" means the human services department pursuant to the Adult Protective Services Act [27-7-14 to 27-7-31 NMSA 1978];

B. "agency" means the state agency on aging;

C. "director" means the director of the state agency on aging;

D. "licensing and certification" means the licensing and certification bureau of the public health division of the health and environment department [department of health];

E. "long-term care facility" means:

(1) skilled nursing facility;

(2) intermediate care nursing facility;

(3) intermediate care facility for the mentally retarded;

(4) nursing facility;

(5) adult residential shelter care home;

(6) boarding home;

(7) other adult care home;

(8) continuing care community;

(9) any swing bed in an acute care facility or extended care facility; and

(10) any adult day health care facility;

F. "office" means the office of the state long-term care ombudsman;

G. "Older Americans Act" means the federal Older Americans Act;

H. "older individual" means any individual who is sixty years of age or older;

I. "ombudsman" means an individual trained and certified to act as a representative of the office of the state long-term care ombudsman;

J. "ombudsman coordinator" means the coordinator of a regional or local ombudsman program designated by the office of the state ombudsman; and

K. "state ombudsman" means the state long-term care ombudsman.

**History:** Laws 1989, ch. 208, § 3.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

**Older Americans Act.** - The federal Older Americans Act, referred to in Subsection G, appears as 42 U.S.C. § 3000 et seq.

#### **28-17-4. Establishment of the office of the state long-term care ombudsman; general duties of the office.**

A. Pursuant to the Older Americans Act, the agency shall establish and operate, either directly or by contract or other arrangement, an office of the state long-term care ombudsman.

B. The director shall designate the state ombudsman.

C. The office shall carry out a long-term care ombudsman program to:

(1) investigate and resolve complaints made by or on behalf of older individuals who are patients, residents or clients of long-term care facilities relating to action, inaction or decisions of providers, or their representatives, of long-term care services, of public agencies or of social service agencies which may adversely affect the health, safety, welfare or rights of such residents;

(2) provide for the training of staff and volunteers and promote the development of citizen organizations to participate in the ombudsman program;

(3) analyze and monitor the development and implementation of federal, state and local laws, regulations and policies with respect to long-term care facilities and services and recommend any changes in such laws, regulations and policies deemed by the office to be appropriate;

(4) establish a statewide uniform reporting system to collect and analyze data relating to complaints and conditions in long-term care facilities for the purpose of identifying and resolving significant problems. Such data shall be submitted to state licensing and certification at least on an annual basis;

(5) prepare an annual report for the director containing data and findings regarding the types of problems experienced and complaints received by or on behalf of individuals residing in long-term care facilities and provide policy, regulatory and legislative recommendations to solve such problems, resolve such complaints and improve the quality of care and life in long-term care facilities;

(6) provide information to public agencies, legislators and others, as deemed necessary by the office, regarding the problems and concerns, including recommendations related to such problems and concerns, of older individuals residing in long-term care facilities; and

(7) coordinate ombudsman services with the protection and advocacy systems for individuals with developmental disabilities and mental illness.

**History:** Laws 1989, ch. 208, § 4.

**Older Americans Act.** - The federal Older Americans Act, referred to in Subsection A, appears as 42 U.S.C. § 3000 et seq.

### **28-17-5. Rule-making authority of director.**

The director shall adopt and promulgate such reasonable rules and regulations as are deemed necessary to carry out the provisions of the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978]. Unless otherwise provided by statute, no regulation affecting any person or agency outside the office shall be adopted, amended or repealed without a public hearing on the proposed action before the director or a hearing officer designated by him. The public hearing shall be held in Santa Fe unless the public notice of hearing indicates otherwise. Notice of the subject matter of the regulation, the action proposed to be taken, the time and place of the hearing, the manner in which interested persons may present their views and the method by which copies of the proposed regulation may be obtained shall be published once at least thirty days prior to the hearing date in a newspaper of general circulation and mailed at least thirty days prior to the hearing date to all persons who have made a written request for advance notice of hearing. All rules and regulations shall be filed in accordance with the State Rules Act [14-3-24, 14-3-25, 14-4-1 to 14-4-9 NMSA 1978].

**History:** Laws 1989, ch. 208, § 5.

### **28-17-6. Regional and local long-term care ombudsman programs.**

The director shall establish criteria that the office shall use in designating a regional or local long-term care ombudsman program. A program shall be designated by the state ombudsman before it can provide ombudsman services. A program may be provisionally approved to provide ombudsman services pending designation by the state ombudsman. The criteria shall include, but are not limited to, the following:

- A. specifications regarding the location of the program's offices;
- B. requirements concerning the program's staffing, training and review; and
- C. requirements with regard to avoidance of conflicts of interest.

**History:** Laws 1989, ch. 208, § 6.

### **28-17-7. Training and certification.**

A. The state ombudsman shall ensure that office staff, including volunteers and other representatives of the office, are trained in:

- (1) federal, state and local laws, regulations and policies with respect to long-term care facilities in the state;
- (2) investigative techniques; and
- (3) such other matters as the agency deems appropriate.

B. The state ombudsman shall develop procedures for the certification of ombudsmen.

C. No officer, employee or other representative of the office shall investigate any complaint filed with the office unless such person is certified by the office.

**History:** Laws 1989, ch. 208, § 7.

### **28-17-8. Investigation and resolution of complaints.**

The office shall investigate and seek to resolve complaints and concerns communicated by or on behalf of patients, residents or clients of any long-term care facility. The office may initiate investigations based on its observations of the conditions in a long-term care facility. If the office does not investigate a complaint, the complainant shall be notified of the decision not to investigate and the reasons for the decision.

**History:** Laws 1989, ch. 208, § 8.

### **28-17-9. Referrals.**

A. When abuse, neglect or exploitation of a patient, resident or client of a long-term care facility is suspected, the office shall make a referral to adult protective services and licensing and certification, where appropriate. The office shall coordinate with adult protective services and licensing and certification pursuant to any investigation of abuse, neglect or exploitation undertaken by those agencies.

B. The following state agencies or boards shall endeavor to give priority to any complaint referred to them by the office:

- (1) licensing and certification;
- (2) the human services department;
- (3) the New Mexico board of medical examiners;
- (4) the board of nursing;
- (5) the state board of nursing home administrators; or
- (6) the board of pharmacy.

The office shall coordinate its efforts with those of any state agency or board to which it makes investigation referrals.

C. Any state agency or board which responds to a complaint against a long-term care facility or licensed individual that was referred to the agency by the office shall forward to the office copies of related inspection reports and plans of correction, notice of any citations and sanctions levied against the long-term care facility or the licensed individual.

**History:** Laws 1989, ch. 208, § 9.

### **28-17-10. Facility posting of ombudsman information.**

Every long-term care facility shall post in a conspicuous location a notice of the name, address and phone number of the office. The name and phone number of the nearest designated program and that of the ombudsman assigned to that long-term care facility shall be posted, where applicable. A brief description of the services provided by the office and the designated program shall be included in the notice. The form of the notice shall be approved by the office.

**History:** Laws 1989, ch. 208, § 10.

### **28-17-11. Access to agency records.**

Upon request, the office shall have access to any record of a state or local government agency which is necessary to carry out its responsibilities under the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978] and which is otherwise available to the patient, resident or client and which does not violate Section 7-1-8 NMSA 1978.

**History:** Laws 1989, ch. 208, § 11.

## **28-17-12. Access to long-term care facilities.**

Representatives of the office shall have immediate access to any patient, resident or client for the purpose of effectively carrying out the provisions of the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978].

**History:** Laws 1989, ch. 208, § 12.

## **28-17-13. Access to records of patients, resident or clients.**

A. In order for the office to carry out its responsibilities under the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978], the office shall have access to the medical and personal records of a patient, resident or client of a long-term care facility that are retained by the facility. If the patient, resident or client:

(1) has the ability to consent in writing, access may only be obtained by the written consent of the patient, resident or client;

(2) is unable to consent in writing, oral consent may be given in the presence of a third party as witness;

(3) is under a New Mexico guardianship or conservatorship that provides the guardian or conservator with the authority to approve review of records, the office shall obtain the permission of the guardian or conservator for review of the records, unless any of the following apply:

(a) the existence of the guardianship or conservatorship is unknown to the office or the facility; or

(b) the guardian or conservator cannot be reached within five working days; and

(4) is unable to express written or oral consent and there is no guardian or conservator or the notification of the guardian or conservator is not applicable for reasons set forth in Paragraph (3) of this subsection, or the patient, resident or client is deceased, inspection of records may be made by employees of the office, ombudsman coordinators and by ombudsmen approved by the ombudsman coordinator or the state ombudsman.

B. Copies may be reproduced by the office. If investigation of records is sought pursuant to this section, the ombudsman shall upon request produce a statement signed by the ombudsman coordinator or state ombudsman authorizing the ombudsman to review the records.

Facilities providing copies of records pursuant to this section may charge the office for the actual copying cost for each page copied.

C. Upon request by the office, a long-term care facility shall provide to the office the name, address and telephone number of the guardian, conservator, attorney-in-fact, legal representative or next-of-kin of any patient, resident or client.

D. The long-term care facility and personnel who disclose records pursuant to this section shall not be liable for the disclosure.

E. The office shall establish procedures to protect the confidentiality of records obtained pursuant to this section.

**History:** Laws 1989, ch. 208, § 13.

### **28-17-14. Confidentiality of information.**

A. Information relating to any complaint or investigation made pursuant to this act that discloses the identities of complainants, patients, residents or clients shall remain confidential except:

(1) where disclosure is authorized in writing by the complainant, patient, resident or client or the individual's guardian or legal representative;

(2) where disclosure is necessary to an investigation of abuse, neglect or exploitation and the disclosure is made to adult protective services, licensing and certification or the attorney general;

(3) where disclosure is necessary for the provision of services to the patient, resident or client and the patient, resident or client is unable to express written or oral consent; or

(4) upon court order.

B. Access to the records and files of the office relating to any complaint or investigation made pursuant to the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978] shall be permitted only at the discretion of the state ombudsman or the ombudsman having authority over disposition of such files except that the identity of any complainant, witness, patient, resident or client shall not be disclosed by such ombudsman except:

(1) where disclosure is authorized in writing by such complainant, witnesses, patient, resident or client or the individual's guardian or legal representative; or

(2) upon court order.

C. The director shall have access to the records and files of the office to verify the effectiveness and quality of the ombudsman program where the identity of any complainant, witness, patient, resident or client is not disclosed.

**History:** Laws 1989, ch. 208, § 14.

### **28-17-15. Conflict of interest.**

The agency shall ensure that:

A. no individual involved in the designation of the state ombudsman or the designation of the head of any regional or local program has a pecuniary or other interest in a long-term care facility;

B. no officer, employee or other representative of the office has a pecuniary or other interest in a long-term care facility; and

C. mechanisms are in place to identify and remedy all such or other similar conflicts.

**History:** Laws 1989, ch. 208, § 15.

### **28-17-16. Representatives of the office.**

Any regional or local ombudsman program designated by the office or any individual certified by the office, whether an employee or an unpaid volunteer, shall be treated as a representative of the office.

**History:** Laws 1989, ch. 208, § 16.

### **28-17-17. Immunity from liability.**

No representative of the office shall be liable under state law for the good faith performance of official duties pursuant to the Long-Term Care Ombudsman Act [28-17-1 to 28-17-19 NMSA 1978].

**History:** Laws 1989, ch. 208, § 17.

### **28-17-18. Availability of legal counsel.**

The agency shall ensure that:

A. adequate legal counsel is available to the office for advice and consultation and that legal representation is provided to any representative of the office against whom suit or other legal action is brought in connection with the performance of the representative's official duties; and

B. the office has the ability to pursue administrative, legal and other appropriate remedies on behalf of patients, residents and clients of long-term care facilities.

**History:** Laws 1989, ch. 208, § 18.

**28-17-19. Interference with the office and retaliation prohibited; penalty; civil.**

A. No person shall willfully interfere with the lawful actions of the office, including the request for immediate entry into a long-term care facility.

B. No person shall institute discriminatory, disciplinary or retaliatory action against any officer or employee of a long-term care facility or government agency or against any patient, resident or client of a long-term care facility or guardian or family member thereof for any communication by him with the office or for any information given or disclosed by him in good faith to aid the office in carrying out its duties and responsibilities.

C. Any person that violates Subsection A of this section shall be subject to a civil penalty of up to two thousand five hundred dollars (\$2,500) per occurrence. Any person that violates Subsection B of this section shall be subject to a civil penalty of up to five thousand dollars (\$5,000) per occurrence. The agency may assess and collect the penalty after notice and an opportunity for hearing, before a hearing officer designated by the agency to hear the matter, upon a determination that a person willfully interfered with the office or discriminated, disciplined or retaliated against an individual who communicated or disclosed information to the office in good faith pursuant to Subsections A and B of this section. The hearing officer has the power to administer oaths on request of any party and issue subpoenas and subpoenas duces tecum. However, if the violation is against a person covered by the Personnel Act, the office shall refer the matter to the agency employing the person for disciplinary action.

D. Any party may appeal to the court of appeals on the record within thirty days after the final decision of the agency.

**History:** Laws 1989, ch. 208, § 19.

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

**ARTICLE 18  
EDUCATION OF THE HANDICAPPED**

**28-18-1. Department designation; authorization; hearing requirement.**

A. The health and environment department [department of health] is designated as the state agency to cooperate with the federal government in the administration of the

provisions of the early intervention federal Education of the Handicapped Act of 1975, 20 U.S.C. Section 1471, et seq.

B. Consistent with Section 1471, et seq., of the federal Education of the Handicapped Act, the secretary of health and environment [secretary of health] is authorized to establish policies, adopt regulations and promote interagency agreements necessary to implement an early intervention system to provide family-focused services to children from birth through two years, who are developmentally delayed or who are at risk of becoming developmentally delayed.

C. In the course of adopting regulations, the health and environment department [department of health] shall hold public hearings at not fewer than three locations outside Santa Fe.

**History:** Laws 1990, ch. 4, § 1.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

## **28-18-2. Custodian of funds.**

The health and environment department [department of health] is designated as the custodian of all money that may be received by the state of New Mexico from any appropriation made by the congress of the United States for the purpose of implementing Section 1471, et seq., of the federal Education of the Handicapped Act.

**History:** Laws 1990, ch. 4, § 2.

**Bracketed material.** - See note with same catchline under 28-10-1 NMSA 1978.

**Federal Education of the Handicapped Act.** - Section 1471 et seq. of the federal Education of the Handicapped Act, referred to in this section, appears as 20 U.S.C. § 1471 et seq.

## **ARTICLE 19**

### **MARTIN LUTHER KING, JR. COMMISSION**

#### **28-19-1. Martin Luther King, Jr. commission; created; defined; members; terms; compensation.**

A. The "Martin Luther King, Jr. commission" is created. The purpose of the commission is to develop, promote, coordinate and review statewide plans and activities for the annual commemoration and celebration of the birthday of Martin Luther King, Jr. in accordance with Section 12-5-2 NMSA 1978.

B. As used in Sections 1 through 4 of this act [28-19-1 to 28-19-4 NMSA 1978], "commission" means the Martin Luther King, Jr. commission.

C. The commission shall be comprised of thirteen members as follows:

- (1) four members appointed by the governor;
- (2) one member appointed by the president pro tempore of the senate;
- (3) one member appointed by the minority leader of the senate;
- (4) one member appointed by the speaker of the house of representatives;
- (5) one member appointed by the minority leader of the house of representatives;
- (6) the state treasurer or his designee;
- (7) the secretary of state or his designee;
- (8) a native American appointed by the New Mexico office of Indian affairs;
- (9) the director of the human rights division of the labor department or his designee; and
- (10) the chairman of the New Mexico state corporation commission or his designee.

D. Members of the commission shall be appointed initially for terms as follows: seven members shall be appointed for terms of two years and six members shall be appointed for terms of four years. The initial terms shall be selected by random drawing. After the expiration of the initial terms, all members shall be appointed for four-year terms. The initial commission shall be appointed within forty-five days of the effective date of this act. Vacancies resulting from the death or resignation of a member shall be filled by appointment by the commission chairman for the unexpired portion of the term of the member creating the vacancy. In filling any vacancy, the commission chairman may accept recommendations from the person who originally appointed the member creating the vacancy.

E. The members of the commission shall receive no compensation for their service.

F. The members of the commission shall select a chairman from among the members of the commission.

G. The commission shall appoint an executive director to coordinate all activities on the commission's behalf.

**History:** Laws 1991, ch. 252, § 1.

**Emergency clauses.** - Laws 1991, ch. 252, § 5 makes the act effective immediately. Approved April 4, 1991.

## **28-19-2. Martin Luther King, Jr. fund; created.**

A. There is created within the state treasury for the commission a fund that shall be designated as the "Martin Luther King, Jr. fund" that shall consist of appropriations, endowments and bequests.

B. Money from the fund shall be disbursed upon warrant of the secretary of finance and administration pursuant to vouchers submitted by the executive director of the commission for the purpose of carrying out the provisions of this act.

**History:** Laws 1991, ch. 252, § 2.

**Emergency clauses.** - Laws 1991, ch. 252, § 5 makes the act effective immediately. Approved April 4, 1991.

**Meaning of "this act".** - The phrase "this act", referred to in this section, means Laws 1991, ch. 252, which appears as 28-19-1 to 28-19-4 NMSA 1978.

## **28-19-3. Duties of the commission.**

The duties and powers of the commission shall include, but not be limited to, the following:

A. to develop a plan for the commemoration and celebration of the official legal holiday honoring Martin Luther King, Jr.;

B. to develop and submit to the governor and the legislature recommendations for specific commemorative activities to be undertaken by the state for the Martin Luther King, Jr. holiday;

C. to coordinate state plans and activities with federal plans and activities for the commemoration and celebration of Martin Luther King, Jr.'s birthday;

D. to develop, with other agencies of the state, an interpretive program that explores the historical, social, political and cultural themes associated with the life and works of Martin Luther King, Jr.;

E. to develop and acquire interpretive materials and publications on the significance of Martin Luther King, Jr.'s work and develop a commemorative program for state employees, school children and the general public;

F. to create a process to facilitate the implementation of the master plan project and other recommendations made by the commission;

G. to prepare and provide to the general public advice, assistance and information on the Martin Luther King, Jr. holiday activities recommended by the commission;

H. to submit other studies, reports and recommendations to the governor and the legislature as are necessary with respect to activities for the continued commemoration and celebration of Martin Luther King, Jr.; and

I. to accept endowments and bequests for the Martin Luther King, Jr. fund.

**History:** Laws 1991, ch. 252, § 3.

**Emergency clauses.** - Laws 1991, ch. 252, § 5 makes the act effective immediately. Approved April 4, 1991.

#### **28-19-4. Commission report.**

The commission shall make an initial report to the governor and the legislature of its findings, conclusions, proposals and recommendations for the observance of the Martin Luther King, Jr. holiday within ninety days of the effective date of this act. The commission shall submit an annual report of its activities to the legislature no later than December 1 of each year. The first annual report shall be submitted no later than December 1, 1989.

**History:** Laws 1991, ch. 252, § 4.

**Emergency clauses.** - Laws 1991, ch. 252, § 5 makes the act effective immediately. Approved April 4, 1991.

**Meaning of "this act".** - The phrase "this act", referred to in this section, means Laws 1991, ch. 252, which appears as 28-19-1 to 28-19-4 NMSA 1978.