

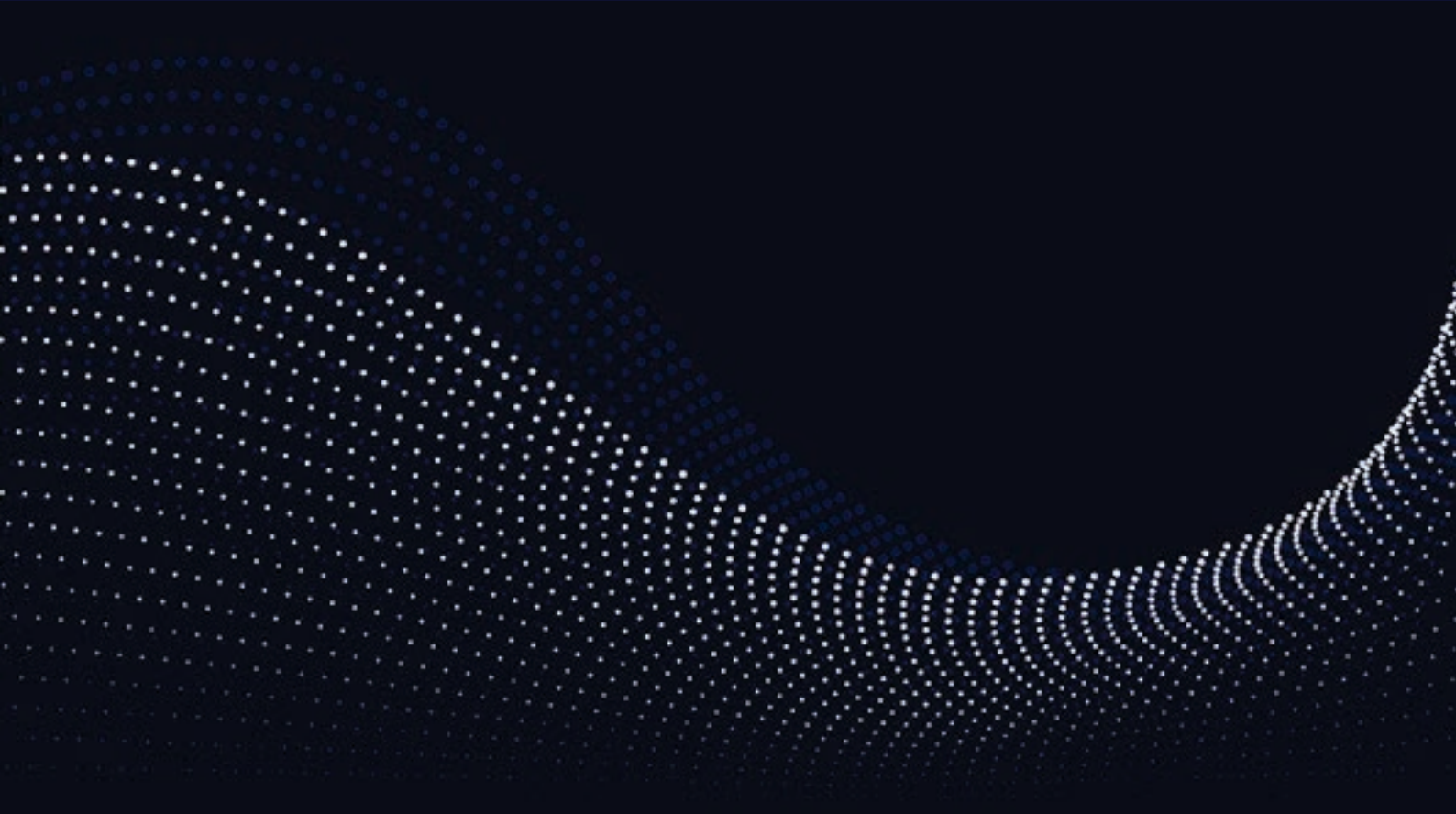


LEXOLOGY

Getting The Deal Through

EMPLOYMENT: NORTH AMERICA 2023

Contributing Editor



Employment: North America 2023

Consulting Editor

Quick reference guide enabling side-by-side comparison of key considerations, emerging issues and reform proposal for each state; the employment relationship; hiring; wage and hour laws; discrimination, harassment and family leave; privacy in the workplace; trade secrets and restrictive covenants; labour relations; and discipline and termination procedures.

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USA - New Mexico

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STATE SNAPSHOT

Key considerations

1 | Which issues would you most highlight to someone new to your state?

In many aspects of labor and employment law applicable to private employers, New Mexico follows federal law, but there are a number of local laws with implications for private employers:

Paid sick leave

Effective July 1, 2022, New Mexico offers state-wide paid leave mandate under the Healthy Workplaces Act (HWA). See [NM Chap. Laws 131 of 2021](#). The law requires all private employers in the state to allow employees to accrue and use earned sick leave for the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.

Cannabis legalization

The Cannabis Regulation Act includes protections for employers to implement a zero-tolerance policy for cannabis in the workforce. [2021 Special Session HB 2](#).

New Mexico also permits certain persons to use marijuana for medical purposes. Employers are prohibited from discriminating against an applicant or employee based on conduct allowed by the New Mexico medical marijuana law, subject to several exceptions ([2019 N.M. Laws Ch. 247, § 11](#)).

Key issues in New Mexico

There are laws specifically applicable to the healthcare industry, including the invalidation of restrictive covenants for certain healthcare providers ([NMSA § 24-11-1 et seq.](#)). New Mexico also has a Safe Harbor Act, providing protections for nurses who, in good faith, refuse to carry out an order ([NMSA §§ 61-3A-1 et seq.](#)).

Employers must report new hires to the state in a timely manner for inclusion in the new hire directory ([NMSA § 50-13-3\(F\)](#)).

New Mexico discrimination law includes protections for "physical or mental handicap or serious medical condition" ([N.M. Stat. Ann. § 28-1-7](#)). Employers must clearly understand the scope of the definitions.

2 | What do you consider unique to those doing business in your state?

The state offers attractive tax incentives to certain employers—including to create certain high-paying jobs ([NMSA § 7-9G-1](#)).

Under the Local Economic Development Act, communities can bolster infrastructure, job creation, and retail opportunities in the state. Employers may find attractive opportunities for partnership with government entities when considering locating to New Mexico.

3 | Is there any general advice you would give in the labor/employment area?

In the absence of a contract, employment relationships in New Mexico are presumed to be at will. However, New Mexico courts have held an implied contract may be created through written or oral statements and course of conduct both before and after hire, including oral representations made by managers or statements contained in employee handbooks or other materials. To avoid this, employee handbooks and other employment documents must include express disclaimers that such handbooks or documents do not constitute a contract, either express or implied.

Emerging issues

4 | What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Recent changes to employment law in New Mexico include the following:

- prohibition of some confidentiality agreements relating to sexual harassment, discrimination, or retaliation;
- creation of paid sick leave requirements; and
- legalization of recreational cannabis.

Guidance around reasonable accommodation of employee's use of marijuana for medical purposes continues to develop.

Proposals for reform

5 | Are there any noteworthy proposals for reform in your state?

There have been unsuccessful proposals to substantially and automatically increase the state-wide minimum wage with a cost-of-living adjustment.

The state-wide minimum wage increased to \$12.00 per hour on January 1, 2023. Employers can pay employees who are tipped more than \$30.00 per month an hourly rate of at least \$3.00 in 2023.

EMPLOYMENT RELATIONSHIP

State-specific laws

6 | What state-specific laws govern the employment relationship?

Chapters 28, 50, 51, and 52 of the New Mexico Statutes contains the most guidance pertaining to private employer-employee relationships.

New Mexico's Administrative Code includes the administrative rules governing employment issues, primarily Titles 9 and 11.

7 | Who do these cover, including categories of workers?

These laws generally cover employees. Some provisions, including anti-discrimination laws, also apply to applicants.

Misclassification

8 | Are there state-specific rules regarding employee/contractor misclassification?

Generally, employers must consult case-law interpretations and regulations regarding the definition of "employ," "employer," and "employee." A case applying a common-law definition of independent contractor in the worker's exclusivity compensation context is *Shipman v. MacCo Corp.* (1964-NMSC-091, 74 N.M. 174, 392 P.2d 9). The New Mexico Taxation and Revenue Department also has guidance concerning classifying workers as employees or independent contractors. See also [NMSA § 51-1-42\(F\)\(5\)](#) (unemployment) and [NMSA § 60-13-3.1](#) (construction contractors).

For the purposes of assessing liability in civil litigation, New Mexico's Uniform Jury Instructions provide definitions of both "employer" and "independent contractor."

Contracts

9 | Must an employment contract be in writing?

No, New Mexico recognizes oral and implied contracts (*Lopez v. Kline*, 1998-NMCA-016, 124 NM 539, 953 P.2d 304 and *West v. Washington Tru Solutions, LLC*, 2010-NMCA-001, 147 NM 424, 224 P.3d 651).

10 | Are any terms implied into employment contracts?

Subject to certain limitations (including at-will employment contracts and express provisions addressed by the terms of an integrated, written contract), New Mexico law implies a duty of good faith and fair dealing into all contractual obligations, including employment contracts (*Melnick v. State Farm Mut. Auto. Ins. Co.*, 1988-NMSC-012, 16, 106

N.M. 726, 730, 749 P.2d 1105, 1109; *Beaudry v. Farmers Ins. Exch.*, 2018-NMSC-012, 22, 412 P.3d 1100, 1107).

11 | Are mandatory arbitration agreements enforceable?

“Arbitration is a ‘highly favored’ method of resolving disputes . . . as a result, when parties have agreed to arbitrate, the courts must compel arbitration” (*Piano v. Premier Distrib. Co.*, 2005-NMCA-018, 5, 137 N.M. 57, 60, 107 P.3d 11, 14).

Subject to important conditions and limitations, the New Mexico Uniform Arbitration Act permits arbitration of employment disputes (NMSA § 44-7A-1 and following).

12 | How can employers make changes to existing employment agreements?

The employer can change an employment agreement expressly, in writing (provided the employer meets the requirements for a valid contract and/or amendment under state contract law).

Employers can also modify an employment agreement based on verbal (e.g., statements made by managers) or written (e.g., in a handbook) statements and/or course of conduct, under an implied contract theory.

HIRING

Advertising

13 | What are the requirements relating to advertising open positions?

NMSA § 28-1-7(D) makes it unlawful for any employer to advertise any statement, use any form of application, or make any inquiry regarding the applicant’s membership in a protected class under the New Mexico Human Rights Act or that expresses any limitation or discrimination based on a protected class; for employers with fifty or more employees, the prohibition is extended to spousal affiliation.

Background checks

WAGE AND HOUR

Pay

21 | What are the main sources of wage and hour laws in your state?

NMSA § 50-4-1 and following.

I

22 | What is the minimum hourly wage?

The minimum wage increased to \$12.00 per hour on January 1, 2023 (2019 N.M. Laws Ch. 114, § 2(A)). For tipped employees who customarily and regularly receive more than \$30 a month in tips, employers may pay a lower hourly rate, as long as the total received is at least the state minimum wage per hour. The hourly rate payable to tipped employees is \$3.00 per hour in 2023 (2019 N.M. Laws Ch. 114, § 2(D)). New Mexico has different minimum wage rules for students enrolled in secondary school (2019 N.M. Laws Ch. 114, § 2(B)).

Local variations

The cities of Santa Fe, Albuquerque, and Las Cruces, as well as the counties of Santa Fe and Bernalillo, have minimum wage rates higher than the state minimum wage.

23 | What are the rules applicable to final pay and deductions from wages?

If discharged by the employer, an employee's unpaid wages must be paid within five days of the discharge (NMSA § 50-4-4(A)). Otherwise, the final paycheck must be issued within 10 days of the discharge (NMSA § 50-4-4(B)).

If an employee resigns employment, the final payment for wages or compensation must be paid no later than the next payday (NMSA § 50-4-5). Wage disputes are addressed in NMSA § 50-4-7.

NMSA § 50-4-2(B) regulates deductions.

Hours and overtime**24** | What are the requirements for meal and rest breaks?

New Mexico has no state laws requiring or regulating meal or rest periods.

25 | What are the maximum hour rules?

No employee may be required to work for more than 16 hours in a 24-hour period, with the exception of firefighters, law enforcement officers, employees who are in a standby position or work in emergency situations, or farm or ranch hands whose duties require them to work longer hours (NMSA § 50-4-30).

The number of hours that children between the ages of 14 and 16 may work is also restricted (NMSA § 50-6-3).

26 | How should overtime be calculated?

Overtime must be paid to non-exempt employees at one-and-a-half times their regular hourly rate for hours worked in excess of 40 hours per seven-day work week.

27 | What exemptions are there from overtime?

NMSA § 50-4-21 excludes several classes of employees from overtime coverage, including:

- individuals in certain executive, administrative, superintendent, and supervisor roles (NMSA § 50-4-21(C)(2), NMAC 11.1.4.7(F));
- some volunteers of non-profit organizations (NMSA § 50-4-21(C)(4));
- persons compensated on a piecework, flat-rate schedule, or commission basis (NMSA § 50-4-21(C)(5));
- students regularly enrolled in primary or secondary schools (NMSA § 50-4-21(C)(6));
- registered apprentices and learners (NMSA § 50-4-21(C)(7));
- persons aged 18 or under who are not students (NMSA § 50-4-21(C)(8)) or who are not graduates of a secondary school (NMSA § 50-4-21(C)(9));
- G.I. Bill trainees while under training (NMSA § 50-4-21(C)(10)); and
- certain specified employees in the agriculture and horticulture industry (NMSA § 50-4-21(C)(12-13)).

NMSA § 50-4-24 provides for additional exemptions from overtime, including certain agricultural workers and employees of air carriers subject to the FRLA.

Record keeping

28 | What payroll and payment records must be maintained?

Employers are required to maintain accurate records of “hours worked and wages paid to each employee” for at least one year (NMSA § 50-4-9(A)).

In addition, New Mexico regulations require employers to maintain certain records for unemployment compensation purposes (NMAC 11.3.300.309; 11.3.400.401).

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

Protected categories

29 | (a) Age?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of age (NMSA § 28-1-7(A)).

30 | (b) Race?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of race (NMSA § 28-1-7(A)). “Race’ includes traits historically associated with race, including hair texture, length of hair, protective hairstyles or cultural or religious headdresses[.]” *Id.* at § 28-1-2. “Protective hairstyles’ includes such hairstyles as braids, locs, twists, tight coils or curls, cornrows, bantu knots, afros, weaves, wigs or head wraps[.]” *Id.* “[C]ultural or religious headdresses’ includes hijabs, head wraps or other headdresses used as part of an individual’s personal cultural or religious beliefs.” *Id.*

31 | (c) Disability?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “physical or mental handicap or serious medical condition” (NMSA § 28-1-7(A)).

Effective June 16, 2023, 2023 HB 207 changes the word “handicap” to “disability.” A legislative analysis for 2023 HB 207 suggests that the change is intended simply to modernize the terminology, rather than to effect any substantive change in meaning. [See website](#). (stating that the bill “adjusts the definition of the term ‘physical or mental handicap’ to make it more modern.”).

A number of definitions for the state’s disability and medical condition protections are defined in New Mexico regulations (NMAC 9.1.1.7 (R, S, T, V, X)).

32 | (d) Gender?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of sex (NMSA § 28-1-7(A)). Discrimination on the basis of “sex” includes harassment, as well as discrimination due to “pregnancy, childbirth, or related medical condition” (NMAC 9.1.1.7(AA)(1, 2)).

Effective June 16, 2023, 2023 HB 207 adds a definition for “sex” as follows: “a person’s categorization as male, female or intersex based on biology, physiology and physical characteristics;” (*Id.* at § 28-1-2(R)).

In addition, 2023 HB 207 also added “gender” to the list of protected bases in the Human Rights Act, effective June 16, 2023. (NMSA § 28-1-7 (A)). Under this amendment, “Gender”

is defined as “an individual or societal expectation or perception of a person as masculine or feminine based on appearance, behavior or physical characteristics.” (*Id.* at § 28-1-2(U)).

New Mexico employers of at least four employees cannot discriminate against an employee because of gender identity.

Effective June 16, 2023, 2023 HB 207 adds a definition for “gender identity” as follows: “a person’s self-perception, based on the person’s appearance, behavior or physical characteristics, that the person exhibits more masculinity or femininity or the absence of masculinity or femininity whether or not it matches the person’s gender or sex assigned at birth” (*Id.* at § 28-1-2(T)).

33 | (e) Sexual orientation?

New Mexico employers of at least four employees cannot discriminate against an employee because of sexual orientation.

Effective June 16, 2023, 2023 HB 207 adds a definition for “sexual orientation” as follows: “a person’s physical, romantic or emotional attraction to persons of the same or a different gender or the absence of any such attraction” (*Id.* at § 28-1-2(S)).

34 | (f) Religion?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of religion (NMSA § 28-1-7(A)).

35 | (g) Medical?

Employers will want to clearly understand the scope of the definitions of other protected categories of “physical or mental handicap” and “serious medical conditions.”

It is unlawful to fail to “accommodate a person’s physical or mental handicap or serious medical condition, unless such accommodation is unreasonable or an undue hardship” (NMSA § 28-1-7(J)).

Effective June 16, 2023, 2023 HB 207 changes the word “handicap” to “disability.” A legislative analysis for 2023 HB 207 suggests that the change is intended simply to modernize the terminology, rather than to effect any substantive change in meaning. [See website](#). (stating that the bill “adjusts the definition of the term ‘physical or mental handicap’ to make it more modern.”).

A number of definitions for the state’s disability and medical condition protections are defined in New Mexico regulations (NMAC 9.1.1.7 (R, S, T, V, X)).

36 | (h) Other?

Additional protected bases

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “color,” “national origin,” and/or “ancestry” (NMSA § 28-1-7(A)).

Spousal affiliation

If an employer has at least 50 employees, it is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “spousal affiliation” (NMSA § 28-1-7(A)).

Sex and pregnancy discrimination

Sex discrimination includes discrimination on the basis of “pregnancy, childbirth, or related medical condition” (NMAC 9.1.1.7(AA)(2)). Consequently, employers are prohibited from refusing to grant leave to pregnant employees on the same terms as are offered to employees with other medical conditions. Employers are also subject to accommodation requirements for pregnancy, childbirth or conditions related to the same.

Genetic information

It is unlawful to use genetic information in employment decisions (NMSA § 24-21-4(D)).

Harassment

37 | What is the state law in relation to harassment?

The New Mexico Human Rights Act prohibits harassment on any protected basis. See, e.g., *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 5, 136 N.M. 647, 650, 103 P.3d 571, 574. (harassment due to a statutory protected basis is actionable “when the offensive conduct becomes so severe and pervasive that it alters the conditions of employment in such a manner that the workplace is transformed into a hostile and abusive environment for the employee.”)

Family and medical leave

38 | What is the state law in relation to family and medical leave?

Effective July 1, 2022, New Mexico offers state-wide paid leave mandate under the Healthy Workplaces Act (HWA). See [NM Chap. Laws 131 of 2021](#). The law requires all private employers in the state to allow employees to accrue and use earned sick leave for the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.

Under the HWA and employer paid sick leave policies, employers are required to permit eligible employees to use accrued sick leave to care for certain family members in the same way that an employee can use accrued sick leave for the employee. See NM Chap. Laws 131 of 2021 (2021 Reg. Session HB 21).

PRIVACY IN THE WORKPLACE

Privacy and monitoring

39 | What are employees' rights with regard to privacy and monitoring?

New Mexico has no statute specifically addressing the monitoring of employees or employee communications. Because of the potential for common law tort claims (e.g., invasion of privacy), however, employers should notify employees in writing and obtain prior written acknowledgement and consent before conducting any monitoring. The consent should expressly state that employees do not have an expectation of privacy in any information or items brought onto the employer's premises or contained on or accessed through the employer's computer systems or devices.

Any monitoring should be tailored to a clearly articulated legitimate business interest. Video surveillance should be avoided (NMSA § 30-9-20).in any public or private place where a person "has a reasonable expectation of privacy" so that the "intimate areas" of a person are not viewed or recorded without the person's knowledge and consent. New Mexico is a one-party consent state for monitoring telephonic communications.

40 | Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

It is unlawful for an employer to request or require a prospective employee to provide a password to gain access, or to otherwise demand access, to the prospective employee's account or profile on a social media networking website (NMSA § 50-4-34).

Bring your own device

41 | What is the latest position in relation to bring your own device?

New Mexico law does not address the issue of bringing your own device to work or the use of personal devices at work.

Off-duty

42 | To what extent can employers regulate off-duty conduct?

Employers may not consider an employee's smoking or tobacco product use as a condition of employment. It is unlawful to require employees to abstain from using tobacco products during non-working hours.

It is also unlawful for an employer to discriminate against an applicant or employee based on conduct allowed by the New Mexico medical marijuana law, subject to several important exceptions.

New Mexico passed the Cannabis Regulation Act in 2021. Under the Act, employers are provided flexibility in their actions against employees for substance use or possession during work hours if noncompliance with a zero-tolerance policy would cause the company to be in violation of federal laws or regulations that would result in loss of federal contracts or funding.

Gun rights

43 | Are there state rules protecting gun rights in the employment context?

New Mexico has no specific state law preventing employers from adopting policies relating to guns in the workplace.

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual property

44 | Who owns IP rights created by employees during the course of their employment?

New Mexico has no statute generally governing ownership of employee creations, but there is a statute regulating creations of employees of private employers who are associated with a "technology research collaborative" (NMSA § 21-11-8.6(D)). There is a "research applications center" provision applicable to certain job titles requiring the use of NDAs prohibiting the employee "from acquiring an intellectual property right" (NMSA § 53-7B-8(B)(4)).

Restrictive covenants

45 | What types of restrictive covenants are recognized and enforceable?

In general, covenants not to compete and not to solicit employees or customers are enforceable if reasonable in scope, considering the interests of the parties and the public (*Lovelace Clinic v. Murphy*, 1966-NMSC-165, 417 P.2d 450, 454).

Non-compete

46 | Are there any special rules on non-competes for particular classes of employee?

Yes. For certain healthcare providers, the state has limited restrictive covenants (NMSA § 24-11-1 and following). The Rules of Professional Conduct governing attorneys also prohibit attorneys from entering into agreements that would restrict their right to practice in certain situations (NMRA 16-506).

LABOR RELATIONS

Right to work

47 | Is the state a “right to work” state?

No. The state has rejected “right to work” as a matter of policy. Instead, the state permits “union security” agreements which require an employer or union to require union membership as a condition of employment (NMSA § 50-4-35).

Unions and layoffs

48 | Is the state (or a particular area) known to be heavily unionized?

There are some unions that operate in New Mexico. In 2018, 6.8% of the state’s employed workers were members of a union, ranking New Mexico as number 32 out of the 50 states for the percentage of employees who are members in a union, according to data from the Bureau of Labor.

49 | What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

New Mexico has no “mini-WARN” statute.

DISCIPLINE AND TERMINATION

State procedures

50 | Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

In general, New Mexico has no law governing private employers’ use of discipline and grievance procedures. However, employers may, by their conduct or written or oral

statements, create an express or implied contract to follow specific procedures about discipline and grievance procedures, including a progressive discipline process.

At-will or notice

51 | At-will status and/or notice period?

New Mexico is an at-will state.

52 | What restrictions apply to the above?

At-will status can be modified by an express or implied contract or can be limited by a public policy exception. An implied contract can be established by reference to an employer's written materials (e.g., employee handbooks and policies), oral promises, and representations, and/or course of conduct.

There are numerous public policy exceptions to at-will employment when an employee is terminated. See (NMSA § 52-1-28.2).

Final paychecks

53 | Are there state-specific rules on when final paychecks are due after termination?

Yes. If an employee is discharged by the employer, unpaid wages or compensation of a "fixed and definite amount" must be paid within five days of the discharge (NMSA § 50-4-4(A)). Otherwise, the final paycheck must be issued to a discharged employee within 10 days of the discharge (NMSA § 50-4-4(B)). If not timely paid, the employee has a private right of action to recover damages. If an employee resigns, the final payment for wages or compensation must be paid by the next payday (NMSA § 50-4-5). Under NMSA § 50-4-7, if there is a dispute over wages the employer is required to give written notice to the employee of the amount of wages conceded to be due, and to pay such amount unconditionally, within the above-stated timeframes.



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