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HOUSE BILL 115

**51ST LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2014**

INTRODUCED BY

Miguel P. Garcia

AN ACT

RELATING TO LABOR; PROTECTING WORKER RIGHTS TO WAGES EARNED;  
REVISING INVESTIGATION PROCEDURES; REQUIRING TRANSLATION OF  
CERTAIN DOCUMENTS; EXTENDING RECORD RETENTION; PROVIDING  
PROCEDURES FOR CLASS ACTION LAWSUITS; PROVIDING FOR A WAGE  
THEFT STUDY; ESTABLISHING THE WAGE AND HOUR ENFORCEMENT FUND;  
PROVIDING PENALTIES; MAKING AN APPROPRIATION.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 50-4-1 NMSA 1978 (being Laws 1937,  
Chapter 109, Section 1) is amended to read:

"50-4-1. DEFINITIONS.--

~~[(a)]~~ A. Whenever used in ~~[this act]~~ Sections  
50-4-1 through 50-4-12 NMSA 1978, "employer" includes every  
person, firm, partnership, association, corporation, receiver  
or other officer of the court of this state and any agent or

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1 officer of any of the above-mentioned classes employing any  
2 person in this state, except employers of domestic labor in  
3 private homes and employers of livestock and agricultural  
4 labor. In determining whether a person is an employer pursuant  
5 to Chapter 50, Article 4 NMSA 1978, the workforce solutions  
6 department and courts shall consider all relevant evidence.

7 [~~(b)~~] B. "Wages" [shall mean] means all amounts at  
8 which the labor or service rendered is recompensed, including  
9 cash payment, whether the amount is fixed or ascertained on a  
10 time, task, piece or commission basis or other method of  
11 calculating such amount."

12 SECTION 2. Section 50-4-8 NMSA 1978 (being Laws 1937,  
13 Chapter 109, Section 8, as amended) is amended to read:

14 "50-4-8. INVESTIGATIONS--DUTIES OF THE [LABOR  
15 COMMISSIONER] WORKFORCE SOLUTIONS DEPARTMENT AND DISTRICT  
16 ATTORNEYS.--

17 A. [~~It is the duty of the labor commissioner to]~~  
18 The workforce solutions department shall investigate any  
19 violations of Sections 50-4-1 through 50-4-12 NMSA 1978 and  
20 [~~to~~] institute or cause to be instituted actions for the  
21 enforcement of the same. The [labor commissioner] department  
22 may hold hearings to [satisfy himself as to] determine the  
23 justice and validity of any claim, and [he] the department  
24 shall cooperate with any employee in the enforcement of any  
25 claim against [his] the employee's employer whenever, in the

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1 opinion of the [~~labor commissioner~~] department, the claim is  
2 just and valid.

3 B. The department shall provide all written  
4 communications, notices and decisions related to investigations  
5 pursuant to this section in both English and Spanish and in  
6 other translations, as appropriate, and shall comply with  
7 federal laws requiring the translation of vital documents.

8 [~~B. It is the duty of all~~] C. District attorneys  
9 [~~to~~] shall prosecute all cases [~~both civilly and criminally,~~  
10 ~~which~~] that are referred to them by the [~~labor commissioner~~]  
11 department.

12 [~~G.~~] D. It shall not be a defense to any action  
13 brought pursuant to this section that the plaintiff or  
14 complainant is an undocumented worker. [~~It is not intended by~~]  
15 This section is not intended to create any right to collect  
16 unemployment compensation nor to mandate any wage rate."

17 SECTION 3. Section 50-4-9 NMSA 1978 (being Laws 1937,  
18 Chapter 109, Section 9) is amended to read:

19 "50-4-9. RECORDS, SUBPOENAS [~~ETC.~~] AND TESTIMONY.--

20 [~~(a)~~] A. Every employer shall keep a true and  
21 accurate record of hours worked and wages paid to each  
22 [~~employee~~] of the employer's employees. The employer shall  
23 keep such records on file for at least [~~one year~~] four years  
24 after the entry of the record.

25 [~~(b) The labor commissioner and his~~] B. Authorized

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1 representatives of the workforce solutions department shall  
2 have the right at all reasonable times to inspect [~~such~~]  
3 records made pursuant to this section for the purpose of  
4 ascertaining whether the provisions of [~~this act~~] Sections  
5 50-4-1 through 50-4-12 NMSA 1978 are complied with.

6 [~~(c)~~] C. Any interference with the [~~labor~~  
7 ~~commissioner or his~~] department's authorized representatives in  
8 the performance of their duties shall be deemed a violation of  
9 this [~~act and punished as such~~] section.

10 [~~(d)~~] D. The [~~labor commissioner and his~~]  
11 department's authorized representatives shall have the power to  
12 administer oaths and examine witnesses under oath, issue  
13 subpoenas, compel the attendance of witnesses and the  
14 production of payroll records and take depositions and  
15 affidavits in any proceedings before [~~said labor commissioner~~]  
16 the department.

17 [~~(e) In case of failure of~~] E. If any person fails  
18 to comply with any subpoena lawfully issued, or [~~upon the~~  
19 ~~refusal of~~] if any witness [~~or witnesses~~] refuses to testify  
20 [~~upon~~] on any matter on which [~~he or they~~] the witness may be  
21 lawfully interrogated, the [~~labor commissioner~~] department may  
22 apply to the district court in the proper county or to the  
23 judge thereof for a writ of attachment to compel [~~said~~] the  
24 witness to respond to [~~said~~] the subpoena or to testify, as the  
25 case may be."

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1           SECTION 4. Section 50-4-10 NMSA 1978 (being Laws 1937,  
2 Chapter 109, Section 11, as amended) is amended to read:

3           "50-4-10. [~~FORFEITURE AND~~] PENALTIES.--

4           A. An employer who fails to respond within thirty  
5 days after receipt of notice from the workforce solutions  
6 department of an investigation of a violation of Sections  
7 50-4-1 through 50-4-12 NMSA 1978, or who fails to cooperate  
8 during the course of the investigation, shall be fined by the  
9 department in the amount of one hundred dollars (\$100) per  
10 employee affected by the investigation for every day that the  
11 employer fails to respond to or cooperate with the  
12 investigation.

13           B. Notwithstanding the provisions of Subsection A  
14 of this section, an employer who violates or fails to comply  
15 with any provision of Sections 50-4-1 through 50-4-12 NMSA 1978  
16 is guilty of a misdemeanor and upon conviction for a first  
17 offense shall be sentenced pursuant to Section 31-19-1 NMSA  
18 1978.

19           [~~B.~~] C. A person who is convicted of a second or  
20 subsequent offense of violating or failing to comply with any  
21 provision of Sections 50-4-1 through 50-4-12 NMSA 1978 is  
22 guilty of a misdemeanor and shall be sentenced [~~pursuant to~~  
23 ~~Section 31-19-1 NMSA 1978~~] to imprisonment in the county jail  
24 for a definite term of less than one year and shall be fined no  
25 less than two hundred fifty dollars (\$250) and not more than

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1 one thousand dollars (\$1,000) for each offense for which the  
2 person is convicted, which fine shall not be suspended,  
3 deferred or taken under advisement.

4 ~~[G-]~~ D. Each occurrence of a violation for which a  
5 person is convicted is a separate offense. Multiple violations  
6 arising from transactions with the same person or multiple  
7 violations arising from transactions with different people  
8 shall be considered separate occurrences.

9 ~~[D-]~~ E. In case the employer is a corporation, the  
10 fine provided in this section shall be assessed against the  
11 corporation as a penalty."

12 **SECTION 5.** Section 50-4-21 NMSA 1978 (being Laws 1955,  
13 Chapter 200, Section 2, as amended) is amended to read:

14 "50-4-21. DEFINITIONS.--As used in the Minimum Wage Act:

- 15 A. "employ" includes suffer or permit to work;
- 16 B. "employer" includes any individual, partnership,  
17 association, corporation, business trust, legal representative  
18 or any organized group of persons employing one or more  
19 employees at any one time, acting directly or indirectly in the  
20 interest of an employer in relation to an employee, but shall  
21 not include the United States, the state or any political  
22 subdivision of the state; provided, however, that for the  
23 purposes of Subsection A of Section 50-4-22 NMSA 1978,  
24 "employer" includes the state or any political subdivision of  
25 the state. In determining whether a person is an employer

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1 pursuant to the Minimum Wage Act, the workforce solutions  
2 department and courts shall consider all relevant evidence; and

3 C. "employee" includes an individual employed by an  
4 employer, but shall not include:

5 (1) an individual employed in domestic service  
6 in or about a private home;

7 (2) an individual employed in a bona fide  
8 executive, administrative or professional capacity and  
9 forepersons, superintendents and supervisors;

10 (3) an individual employed by the United  
11 States, the state or any political subdivision of the state;  
12 provided, however, that for the purposes of Subsection A of  
13 Section 50-4-22 NMSA 1978, "employee" includes an individual  
14 employed by the state or any political subdivision of the  
15 state;

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

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1 (5) salespersons or employees compensated upon  
2 piecework, flat rate schedules or commission basis;

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

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

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

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

12 (10) G.I. bill trainees while under training;

13 (11) seasonal employees of an employer  
14 obtaining and holding a valid certificate issued annually by  
15 the director of the labor relations division of the workforce  
16 solutions department. The certificate shall state the job  
17 designations and total number of employees to be exempted. In  
18 approving or disapproving an application for a certificate of  
19 exemption, the director shall consider the following:

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

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

24 (c) that the individual will be  
25 furnished room and board in connection with such employment, or

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1 if the camp or retreat is a day camp or retreat, the individual  
2 will be furnished board in connection with such employment;

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

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

7 (f) any other factors that the director  
8 deems necessary to consider;

9 (12) any employee employed in agriculture:

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

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

18 (c) if the employee: 1) is employed as  
19 a hand-harvest laborer and is paid on a piece-rate basis in an  
20 operation that has been, and is customarily and generally  
21 recognized as having been, paid on a piece-rate basis in the  
22 region of employment; 2) commutes daily from the employee's  
23 permanent residence to the farm on which the employee is so  
24 employed; and 3) has been employed in agriculture less than  
25 thirteen weeks during the preceding calendar year;

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1 (d) if the employee, other than an  
2 employee described in Subparagraph (c) of this paragraph:  
3 1) is sixteen years of age or under and is employed as a  
4 hand-harvest laborer, is paid on a piece-rate basis in an  
5 operation that has been, and is generally recognized as having  
6 been, paid on a piece-rate basis in the region of employment;  
7 2) is employed on the same farm as the employee's parent or  
8 person standing in the place of the parent; and 3) is paid at  
9 the same piece-rate as employees over age sixteen are paid on  
10 the same farm; or

11 (e) if the employee is principally  
12 engaged in the range production of livestock or in milk  
13 production;

14 (13) an employee engaged in the handling,  
15 drying, packing, packaging, processing, freezing or canning of  
16 any agricultural or horticultural commodity in its  
17 unmanufactured state; or

18 (14) employees of charitable, religious or  
19 nonprofit organizations who reside on the premises of group  
20 homes operated by such charitable, religious or nonprofit  
21 organizations for persons who have a mental, emotional or  
22 developmental disability."

23 **SECTION 6.** Section 50-4-26 NMSA 1978 (being Laws 1955,  
24 Chapter 200, Section 5, as amended) is amended to read:

25 "50-4-26. ENFORCEMENT--PENALTIES--EMPLOYEES' REMEDIES.--

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1           A. An employer who violates any of the provisions  
2 of the Minimum Wage Act is guilty of a misdemeanor and upon  
3 conviction shall be sentenced pursuant to the provisions of  
4 Section 31-19-1 NMSA 1978.

5           B. The director of the labor relations division of  
6 the workforce solutions department shall enforce and prosecute  
7 violations of the Minimum Wage Act. The director may institute  
8 in the name of the state an action in the district court of the  
9 county wherein the employer who has failed to comply with the  
10 Minimum Wage Act resides or has a principal office or place of  
11 business for the purpose of prosecuting violations. The  
12 district attorney for the district ~~[wherein any]~~ in which a  
13 violation ~~[hereof]~~ occurs shall aid and assist the director in  
14 the prosecution.

15           C. In addition to penalties provided pursuant to  
16 this section, an employer who violates any provision of Section  
17 50-4-22 or 50-4-26.1 NMSA 1978 shall be liable to the employees  
18 affected in the amount of their unpaid or underpaid minimum  
19 wages plus interest, and in an additional amount equal to twice  
20 the unpaid or underpaid wages.

21           D. An action to recover such liability may be  
22 maintained in any court of competent jurisdiction by any one or  
23 more employees for and on behalf of the employee or employees  
24 and for other employees similarly situated, or such employee or  
25 employees may designate an agent or representative to maintain

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1 such action on behalf of all employees similarly situated.

2 E. The court in any action brought [~~under~~] pursuant  
3 to Subsection D of this section or pursuant to Section  
4 50-4-26.1 NMSA 1978 shall, in addition to any judgment awarded  
5 to the plaintiff or plaintiffs, allow costs of the action and  
6 reasonable attorney fees to be paid by the defendant. In any  
7 proceedings brought pursuant to the provisions of this section,  
8 the employee shall not be required to pay any filing fee or  
9 other court costs necessarily incurred in such proceedings.

10 F. In addition to any remedy or punishment provided  
11 pursuant to the Minimum Wage Act, a court may order appropriate  
12 injunctive relief, including requiring an employer to post in  
13 the place of business a notice describing violations by the  
14 employer as found by the court or a copy of a cease and desist  
15 order applicable to the employer.

16 G. Civil actions and appeals of civil actions  
17 brought to collect unpaid or underpaid wages, interest and any  
18 other amounts due [~~under~~] pursuant to this section shall be  
19 heard by the court at the earliest possible date and shall be  
20 entitled to a preference over all other civil actions, to the  
21 same extent as civil actions to collect contributions pursuant  
22 to Section 51-1-36 NMSA 1978, on the calendar of the court.

23 H. A class action brought pursuant to this section  
24 shall be governed by Rule 1-023 of the Rules of Civil Procedure  
25 for the District Courts."

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1           SECTION 7. A new section of Chapter 50, Article 4 NMSA  
2 1978 is enacted to read:

3           "[NEW MATERIAL] WAGE AND HOUR ENFORCEMENT FUND--CREATED.--

4           A. The "wage and hour enforcement fund" is created  
5 as a nonreverting fund in the state treasury and shall be  
6 administered by the workforce solutions department. The fund  
7 consists of appropriations, gifts, grants, donations, income  
8 from investment of the fund and any other money that is  
9 credited to the fund.

10           B. Any proceeds remaining from a judgment entered  
11 for a class of employees that cannot be distributed due to the  
12 unavailability of a class member employee or employees shall be  
13 deposited in the wage and hour enforcement fund.

14           C. Money in the fund is appropriated to the labor  
15 relations division of the workforce solutions department to  
16 fund wage and hour enforcement activities by the division.  
17 Money shall be disbursed from the fund only on warrant of the  
18 secretary of finance and administration pursuant to vouchers  
19 signed by the secretary of workforce solutions or the  
20 secretary's authorized representative. Money in the fund shall  
21 not revert to any other fund at the end of a fiscal year."

22           SECTION 8. APPROPRIATION.--Sixty-five thousand dollars  
23 (\$65,000) is appropriated from the general fund to the board of  
24 regents of New Mexico state university for expenditure in  
25 fiscal years 2015 and 2016 to complete a comprehensive study of

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1 wage theft in New Mexico. Any unexpended or unencumbered  
2 balance remaining at the end of fiscal year 2016 shall revert  
3 to the general fund.

4 SECTION 9. EFFECTIVE DATE.--The effective date of the  
5 provisions of this act is July 1, 2014.

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