

HOUSE LABOR AND HUMAN RESOURCES COMMITTEE SUBSTITUTE FOR
HOUSE BILL 493

49TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2009

AN ACT

RELATING TO EMPLOYMENT LAW; INCLUDING STATE AND LOCAL
SUBDIVISIONS IN THE MINIMUM WAGE ACT; PROVIDING FOR
COMPENSATORY TIME PURSUANT TO FEDERAL LAW; ALLOWING THE FILING
OF COMPLAINTS WITH THE LABOR RELATIONS DIVISION OF THE
WORKFORCE SOLUTIONS DEPARTMENT; REQUIRING EMPLOYERS TO
COOPERATE IN INVESTIGATIONS; PROVIDING FOR FINES FOR FAILURE TO
RESPOND TO INVESTIGATIONS; TOLLING THE STATUTE OF LIMITATIONS
DURING STATE INVESTIGATIONS OF WAGE AND HOUR VIOLATIONS;
REQUIRING MAINTENANCE OF WAGE RECORDS; PROVIDING A CLASS ACTION
DEVICE; DESIGNATING ANY REMAINING CLASS ACTION PROCEEDS TO THE
STATE; CREATING A FUND.

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

Section 1. Section 50-4-8 NMSA 1978 (being Laws 1937,
Chapter 109, Section 8, as amended) is amended to read:

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1 "50-4-8. DUTIES OF THE [~~LABOR COMMISSIONER~~] DIRECTOR--
2 HEARINGS--COMPLAINTS--FINE.--

3 A. [~~It is the duty of the labor commissioner to~~]
4 The director of the labor relations division of the workforce
5 solutions department shall investigate any violations of
6 [Sections 50-4-1 through 50-4-12] Chapter 50, Article 4 NMSA
7 1978 and [~~to~~] institute or cause to be instituted actions for
8 the enforcement of the same. The [~~labor commissioner~~] director
9 may hold hearings to [~~satisfy himself as to~~] determine the
10 justice of any claim. [~~and he~~] The director shall cooperate
11 with any employee in the enforcement of any claim against [~~his~~]
12 the employee's employer whenever, in the opinion of the [~~labor~~
13 ~~commissioner~~] director, the claim is just and valid.

14 B. An employer who fails to respond adequately and
15 in good faith within thirty days after receipt of notice of an
16 investigation by the director of the labor relations division
17 or who fails to cooperate adequately and in good faith during
18 the course of the investigation shall be fined one hundred
19 dollars (\$100) for every day that the employer does not comply
20 with this subsection. The fine shall be levied at one hundred
21 dollars (\$100) a day for each employee affected by the
22 investigation.

23 C. An employee, a person acting on behalf of an
24 employee or any other interested person may file a complaint
25 with the director alleging a violation of Chapter 50, Article 4

1 NMSA 1978 or any rule implementing its provisions. The
 2 complaint shall be promptly investigated and resolved.

3 ~~[B.]~~ D. It is the duty of all district attorneys to
 4 prosecute all cases, both civilly and criminally, ~~[which]~~ that
 5 are referred to them by the ~~[labor commissioner]~~ director.

6 ~~[C.]~~ E. It shall not be a defense to any action
 7 brought pursuant to this section that the plaintiff or
 8 complainant is an undocumented worker. It is not intended by
 9 this section to create any right to collect unemployment
 10 compensation nor to mandate any wage rate."

11 Section 2. Section 50-4-9 NMSA 1978 (being Laws 1937,
 12 Chapter 109, Section 9) is amended to read:

13 "50-4-9. ~~[RECORDS, SUBPOENAS, ETG]~~ EMPLOYER DUTIES--
 14 INVESTIGATIONS--PENALTY--TOLLING OF STATUTE.--

15 A. An employer shall provide an employee at the
 16 time of hire the employer's name, address and telephone number
 17 in writing.

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

22 ~~[(b)]~~ C. The ~~[labor commissioner and his]~~ director
 23 of the labor relations division of the workforce solutions
 24 department and the director's authorized representatives shall
 25 have the right at all reasonable times to inspect ~~[such]~~ an

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1 employer's records for the purpose of ascertaining whether the
2 provisions of [~~this act~~] Chapter 50, Article 9 NMSA 1978 are
3 complied with.

4 [~~(e)~~] D. Any interference with the [~~labor~~
5 ~~commissioner or his~~] director or the director's authorized
6 representatives in the performance of their duties shall be
7 deemed a violation [~~of this act~~] and punished [~~as such~~]
8 pursuant to the provisions of Section 50-4-10 NMSA 1978.

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

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

24 G. The statute of limitations for civil actions
25 brought pursuant to Chapter 50, Article 4 NMSA 1978 shall be

1 tolled during a labor relations division investigation of an
 2 employer, but such an investigation shall not be a prerequisite
 3 to a person bringing a civil action nor shall it operate to bar
 4 a civil action pursuant to Chapter 50, Article 4 NMSA 1978."

5 Section 3. Section 50-4-21 NMSA 1978 (being Laws 1955,
 6 Chapter 200, Section 2, as amended) is amended to read:

7 "50-4-21. DEFINITIONS.--As used in the Minimum Wage Act:

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

9 B. "employer" includes any individual, partnership,
 10 association, corporation, business trust, legal representative
 11 or any organized group of persons employing one or more
 12 employees at any one time, acting directly or indirectly in the
 13 interest of an employer in relation to an employee, but shall
 14 not include the United States [~~the state or any political~~
 15 ~~subdivision of the state; provided, however, that for the~~
 16 ~~purposes of Subsection A of Section 50-4-22 NMSA 1978,~~
 17 ~~"employer" includes the state or any political subdivision of~~
 18 ~~the state]; and~~

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

21 (1) an individual employed in domestic service
 22 in or about a private home;

23 (2) an individual employed in a bona fide
 24 executive, administrative or professional capacity and
 25 forepersons, superintendents and supervisors;

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1 (3) an individual employed by the United States
2 ~~[the state or any political subdivision of the state; provided,~~
3 ~~however, that for the purposes of Subsection A of Section~~
4 ~~50-4-22 NMSA 1978, "employee" includes an individual employed~~
5 ~~by the state or any political subdivision of the state];~~

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

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

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

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

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

25 (9) persons eighteen years of age or under who

1 are not graduates of a secondary school;

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

3 (11) seasonal employees of an employer obtaining
4 and holding a valid certificate issued annually by the director
5 of the labor relations division of the workforce solutions
6 department. The certificate shall state the job designations
7 and total number of employees to be exempted. In approving or
8 disapproving an application for a certificate of exemption, the
9 director shall consider the following:

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

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

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

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

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

22 (f) any other factors that the director
23 deems necessary to consider;

24 (12) any employee employed in agriculture:

25 (a) if the employee is employed by an

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1 employer who did not, during any calendar quarter during the
2 preceding calendar year, use more than five hundred man-days of
3 agricultural labor;

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

8 (c) if the employee: 1) is employed as a
9 hand-harvest laborer and is paid on a piece-rate basis in an
10 operation that has been, and is customarily and generally
11 recognized as having been, paid on a piece-rate basis in the
12 region of employment; 2) commutes daily from the employee's
13 permanent residence to the farm on which the employee is so
14 employed; and 3) has been employed in agriculture less than
15 thirteen weeks during the preceding calendar year;

16 (d) if the employee, other than an employee
17 described in Subparagraph (c) of this paragraph: 1) is sixteen
18 years of age or under and is employed as a hand-harvest
19 laborer, is paid on a piece-rate basis in an operation that has
20 been, and is generally recognized as having been, paid on a
21 piece-rate basis in the region of employment; 2) is employed on
22 the same farm as the employee's parent or person standing in
23 the place of the parent; and 3) is paid at the same piece-rate
24 as employees over age sixteen are paid on the same farm; or

25 (e) if the employee is principally engaged

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1 in the range production of livestock or in milk production;

2 (13) an employee engaged in the handling,
3 drying, packing, packaging, processing, freezing or canning of
4 any agricultural or horticultural commodity in its
5 unmanufactured state; or

6 (14) employees of charitable, religious or
7 nonprofit organizations who reside on the premises of group
8 homes operated by such charitable, religious or nonprofit
9 organizations for persons who have a mental, emotional or
10 developmental disability."

11 Section 4. Section 50-4-22 NMSA 1978 (being Laws 1955,
12 Chapter 200, Section 3, as amended) is amended to read:

13 "50-4-22. MINIMUM WAGES.--

14 A. An employer shall pay an employee the minimum wage
15 rate of six dollars fifty cents (\$6.50) an hour. As of January
16 1, 2009, an employer shall pay the minimum wage rate of seven
17 dollars fifty cents (\$7.50) an hour.

18 B. An employer furnishing food, utilities, supplies
19 or housing to an employee who is engaged in agriculture may
20 deduct the reasonable value of such furnished items from any
21 wages due to the employee.

22 C. An employee who customarily and regularly receives
23 more than thirty dollars (\$30.00) a month in tips shall be paid
24 a minimum hourly wage of two dollars thirteen cents (\$2.13).

25 The employer may consider tips as part of wages, but the tips

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1 combined with the employer's cash wage shall not equal less
2 than the minimum wage rate as provided in Subsection A of this
3 section. All tips received by such employees shall be retained
4 by the employee, except that nothing in this section shall
5 prohibit the pooling of tips among employees.

6 D. An employee shall not be required to work more
7 than forty hours in any week of seven days, unless the employee
8 is paid one and one-half times the employee's regular hourly
9 rate of pay for all hours worked in excess of forty hours. For
10 an employee who is paid a fixed salary for fluctuating hours
11 and who is employed by an employer a majority of whose business
12 in New Mexico consists of providing investigative services to
13 the federal government, the hourly rate may be calculated in
14 accordance with the provisions of the federal Fair Labor
15 Standards Act of 1938 and the regulations pursuant to that act;
16 provided that in no case shall the hourly rate be less than the
17 federal minimum wage.

18 E. The exemptions and provisions for public employers
19 provided in the federal Fair Labor Standards Act of 1938 and
20 regulations issued pursuant to that act shall apply to the
21 state and any political subdivision of the state."

22 Section 5. A new section of the Minimum Wage Act is
23 enacted to read:

24 "[NEW MATERIAL] CLASS ACTION--PROCEEDS.--

25 A. A class action brought pursuant to Section 50-4-26

1 NMSA 1978 shall be governed by Rule 1-023 of the Rules of Civil
2 Procedure for the District Courts.

3 B. Any proceeds remaining from a judgment entered for
4 a class of employees that cannot be distributed due to the
5 unavailability of a class member employee or employees shall be
6 recovered on behalf of the workforce solutions department and
7 deposited in the wage and hour enforcement fund for the purpose
8 of funding state wage and hour enforcement activities."

9 Section 6. A new section of Chapter 50, Article 4 NMSA
10 1978 is enacted to read:

11 "[NEW MATERIAL] WAGE AND HOUR ENFORCEMENT FUND--CREATED--
12 PURPOSE.--

13 A. The "wage and hour enforcement fund" is created in
14 the state treasury to be administered by the workforce
15 solutions department. The fund consists of proceeds remaining
16 from a judgment entered for a class of employees that cannot be
17 distributed due to the unavailability of a class member
18 employee or employees and any appropriations, gifts, grants and
19 donations made to the fund.

20 B. Money in the fund is subject to appropriation by
21 the legislature to the workforce solutions department for the
22 purpose of enforcing the wage and hour provisions of Chapter
23 50, Article 4 NMSA 1978. Interest earned on money in the fund
24 shall be credited to the fund. Balances in the fund shall not
25 revert to the general fund at the end of a fiscal year.

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