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HOUSE BILL 449

51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013

INTRODUCED BY

Miguel P. Garcia

AN ACT

RELATING TO LABOR; AMENDING THE DEFINITION OF "EMPLOYER";
REQUIRING DOCUMENTS TO BE PROVIDED IN ENGLISH AND SPANISH;
EXTENDING RECORD RETENTION; PROVIDING PROCEDURES FOR CLASS
ACTION LAWSUITS; PROVIDING PENALTIES; ESTABLISHING THE WAGE AND
HOUR ENFORCEMENT FUND; 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
officer of any of the above mentioned classes employing any

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1 person in this state, except employers of domestic labor in
2 private homes and employers of livestock and agricultural
3 labor. In determining whether a person is an employer pursuant
4 to Chapter 50, Article 4 NMSA 1978, the workforce solutions
5 department and courts shall consider all relevant evidence and
6 interpret the evidence liberally in favor of the existence of
7 an employer-employee relationship.

8 [~~(b)~~] B. "Wages" [shall mean] means all amounts at
9 which the labor or service rendered is recompensed, whether the
10 amount is fixed or ascertained on a time, task, piece or
11 commission basis or other method of 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. DUTIES OF THE [~~LABOR COMMISSIONER~~] SECRETARY OF
15 WORKFORCE SOLUTIONS.--

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

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1 B. An employer who fails to respond adequately and
2 in good faith within thirty days after receipt of notice of an
3 investigation by the director of the labor relations division
4 of the workforce solutions department, or who fails to
5 cooperate adequately and in good faith during the course of the
6 investigation, shall be fined by the secretary in the amount of
7 one hundred dollars (\$100) per employee affected by the
8 investigation for every day that the employer does not comply
9 with the provisions of this section.

10 C. It is the duty of the secretary and the
11 workforce solutions department to provide all communications,
12 notices and decisions related to investigations pursuant to
13 this section in both English and Spanish, and to comply with
14 federal laws requiring the translation of vital documents.

15 ~~[B.]~~ D. It is the duty of all district attorneys to
16 prosecute all cases, both civilly and criminally, ~~[which]~~ that
17 are referred to them by the ~~[labor commissioner]~~ secretary of
18 workforce solutions.

19 ~~[G.]~~ E. It shall not be a defense to any action
20 brought pursuant to this section that the plaintiff or
21 complainant is an undocumented worker. It is not intended by
22 this section to create any right to collect unemployment
23 compensation nor to mandate any wage rate."

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

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1 "50-4-9. RECORDS, SUBPOENAS, ETC.--

2 [~~(a)~~] A. Every employer shall keep a true and
3 accurate record of hours worked and wages paid to each
4 employee. The employer shall keep such records on file for at
5 least [~~one year~~] four years after the entry of the record.

6 [~~(b)~~] B. The [~~labor commissioner and his~~] director
7 of the labor relations division of the workforce solutions
8 department and the director's authorized representatives shall
9 have the right at all reasonable times to inspect such records
10 for the purpose of ascertaining whether the provisions of [~~this~~
11 ~~act~~] Sections 50-4-1 through 50-4-12 NMSA 1978 are complied
12 with.

13 [~~(c)~~] C. Any interference with the [~~labor~~
14 ~~commissioner or his~~] director or the director's authorized
15 representatives in the performance of their duties shall be
16 deemed a violation of [~~this act~~] Sections 50-4-1 through
17 50-4-12 NMSA 1978 and punished as such.

18 [~~(d)~~] D. The [~~labor commissioner and his~~] director
19 and the director's authorized representatives shall have the
20 power to administer oaths and examine witnesses under oath,
21 issue subpoenas, compel the attendance of witnesses and the
22 production of payroll records and take depositions and
23 affidavits in any proceedings before [~~said labor commissioner~~]
24 the director.

25 [~~(e)~~] E. In case of failure of any person to comply

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1 with any subpoena lawfully issued or upon the refusal of any
2 witness [~~or witnesses~~] to testify [~~upon~~] on any matter on which
3 [~~he or they~~] the witness may be lawfully interrogated, the
4 [~~labor commissioner~~] director may apply to the district court
5 in the proper county or to the judge thereof for a writ of
6 attachment to compel [~~said~~] the witness to respond to [~~said~~]
7 the subpoena or to testify, as the case may be."

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

10 "50-4-21. DEFINITIONS.--As used in the Minimum Wage Act:

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

12 B. "employer" includes any individual, partnership,
13 association, corporation, business trust, legal representative
14 or any organized group of persons employing one or more
15 employees at any one time, acting directly or indirectly in the
16 interest of an employer in relation to an employee, but shall
17 not include the United States, the state or any political
18 subdivision of the state; provided, however, that for the
19 purposes of Subsection A of Section 50-4-22 NMSA 1978,
20 "employer" includes the state or any political subdivision of
21 the state. In determining whether a person is an employer
22 pursuant to Chapter 50, Article 4 NMSA 1978, the workforce
23 solutions department and courts shall consider all relevant
24 evidence and interpret the evidence liberally in favor of the
25 existence of an employer-employee relationship; and

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

3 (1) an individual employed in domestic service
4 in or about a private home;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 (f) any other factors that the director
6 deems necessary to consider;

7 (12) any employee employed in agriculture:

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

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

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

24 (d) if the employee, other than an
25 employee described in Subparagraph (c) of this paragraph: 1)

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

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

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

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

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

23 "50-4-26. ENFORCEMENT--PENALTIES--EMPLOYEES' REMEDIES.--

24 A. An employer who violates any of the provisions
25 of the Minimum Wage Act is guilty of a misdemeanor and upon

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1 conviction shall be sentenced pursuant to the provisions of
2 Section 31-19-1 NMSA 1978.

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

12 C. In addition to penalties provided pursuant to
13 this section, an employer who violates any provision of Section
14 50-4-22 or 50-4-26.1 NMSA 1978 shall be liable to the employees
15 affected in the amount of their unpaid or underpaid minimum
16 wages plus interest, and in an additional amount equal to twice
17 the unpaid or underpaid wages.

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

24 E. The court in any action brought under Subsection
25 D of this section or Section 50-4-26.1 NMSA 1978 shall, in

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1 addition to any judgment awarded to the plaintiff or
2 plaintiffs, allow costs of the action and reasonable attorney
3 fees to be paid by the defendant. In any proceedings brought
4 pursuant to the provisions of this section, the employee shall
5 not be required to pay any filing fee or other court costs
6 necessarily incurred in such proceedings.

7 F. In addition to any remedy or punishment provided
8 pursuant to the Minimum Wage Act, a court may order appropriate
9 injunctive relief, including:

10 (1) requiring an employer to post in the place
11 of business a notice describing violations by the employer as
12 found by the court or a copy of a cease and desist order
13 applicable to the employer; and

14 (2) reinstatement, rehire and promotion of
15 employees and former employees.

16 G. A class action brought pursuant to this section
17 shall be governed by Rule 1-023 of the Rules of Civil Procedure
18 for the District Courts."

19 SECTION 6. A new section of Chapter 50, Article 4 NMSA
20 1978 is enacted to read:

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

22 A. The "wage and hour enforcement fund" is created
23 as a nonreverting fund in the state treasury and shall be
24 administered by the workforce solutions department. The fund
25 consists of money that is appropriated or donated or that

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1 otherwise accrues to the fund.

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

6 C. The workforce solutions department shall
7 establish procedures and adopt rules as required to administer
8 the fund and to make payments from the fund as approved by the
9 secretary of workforce solutions.

10 D. Money in the fund is appropriated to the labor
11 relations division of the workforce solutions department for
12 the purpose of funding wage and hour enforcement activities by
13 the division. Money shall be disbursed from the fund only on
14 warrant of the secretary of finance and administration pursuant
15 to vouchers signed by the secretary of workforce solutions or
16 the secretary's authorized representative. Any unexpended or
17 unencumbered balance remaining in the fund at the end of a
18 fiscal year shall not revert to the general fund."