

AN ACT

RELATING TO UNEMPLOYMENT BENEFITS; ALLOWING THE WORKFORCE SOLUTIONS DEPARTMENT TO SEEK TO RECOVER BENEFITS AFTER A DECISION ALLOWING BENEFITS HAS BEEN MODIFIED OR REVERSED; PROVIDING A CIVIL PENALTY FOR FRAUDULENTLY OBTAINING OR INCREASING BENEFITS OR PREVENTING OR REDUCING THE PAYMENT OF BENEFITS.

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

**SECTION 1.** Section 51-1-8 NMSA 1978 (being Laws 1936 (S.S.), Chapter 1, Section 6, as amended) is amended to read:

"51-1-8. CLAIMS FOR BENEFITS.--

A. Claims for benefits shall be made in accordance with such regulations as the secretary may prescribe. Each employer shall post and maintain printed notices, in places readily accessible to employees, concerning their rights to file claims for unemployment benefits upon termination of their employment. Such notices shall be supplied by the division to each employer without cost to the employer.

B. A representative designated by the secretary as a claims examiner shall promptly examine the application and each weekly claim and, on the basis of the facts found, shall determine whether the claimant is unemployed, the week with respect to which benefits shall commence, the weekly benefit amount payable, the maximum duration of benefits, whether the

claimant is eligible for benefits pursuant to Section 51-1-5 NMSA 1978 and whether the claimant shall be disqualified pursuant to Section 51-1-7 NMSA 1978. With the approval of the secretary, the claims examiner may refer, without determination, claims or any specified issues involved therein that raise complex questions of fact or law to a hearing officer for the division for a fair hearing and decision in accordance with the procedure described in Subsection D of this section. The claims examiner shall promptly notify the claimant and any other interested party of the determination and the reasons therefor. Unless the claimant or interested party, within fifteen calendar days after the date of notification or mailing of the determination, files an appeal from the determination, the determination shall be the final decision of the division; provided that the claims examiner may reconsider a nonmonetary determination if additional information not previously available is provided or obtained or whenever the claims examiner finds an error in the application of law has occurred, but no redetermination shall be made more than twenty days from the date of the initial nonmonetary determination. Notice of a nonmonetary redetermination shall be given to all interested parties and shall be subject to appeal in the same manner as the original nonmonetary determination. If an appeal is pending at the time a redetermination is issued, the appeal, unless

withdrawn, shall be treated as an appeal from the redetermination.

C. In the case of a claim for waiting period credit or benefits, "interested party", for purposes of determinations and adjudication proceedings and notices thereof, means:

(1) in the event of an issue concerning a separation from work for reasons other than lack of work, the claimant's most recent employer or most recent employing unit;

(2) in the event of an issue concerning a separation from work for lack of work, the employer or employing unit from whom the claimant separated for reasons other than lack of work if the claimant has not worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant's weekly benefit amount; or

(3) in all other cases involving the allowance or disallowance of a claim, the secretary, the claimant and any employing unit directly involved in the facts at issue.

D. Upon appeal by any party, a hearing officer designated by the secretary shall afford the parties reasonable opportunity for a fair hearing to be held de novo, and the hearing officer shall issue findings of fact and a decision that affirms, reverses or modifies the determination

of the claims examiner or tax representative on the facts or the law, based upon the evidence introduced at such hearing, including the documents and statements in the claim or tax records of the division. All hearings shall be held in accordance with regulations of the secretary and decisions issued promptly in accordance with time lapse standards promulgated by the secretary of the United States department of labor. The parties shall be duly notified of the decision, together with the reasons therefor, which shall be deemed to be the final decision of the department, unless within fifteen days after the date of notification or mailing of the decision further appeal is initiated pursuant to Subsection H of this section.

E. Except with the consent of the parties, no hearing officer or members of the board of review, established in Subsection F of this section, or secretary shall sit in any administrative or adjudicatory proceeding in which:

(1) either of the parties is related to the hearing officer, member of the board of review or secretary by affinity or consanguinity within the degree of first cousin;

(2) the hearing officer, member of the board of review or secretary was counsel for either party in that action; or

(3) the hearing officer, member of the board of review or secretary has an interest that would prejudice

the rendering of an impartial decision.

The secretary, any member of the board of review or appeal tribunal hearing officer shall withdraw from any proceeding in which the hearing officer, member of the board of review or secretary cannot accord a fair and impartial hearing or when a reasonable person would seriously doubt whether the hearing officer, board member or secretary could be fair and impartial. Any party may request a disqualification of any appeal tribunal hearing officer or board of review member by filing an affidavit with the board of review or appeal tribunal promptly upon discovery of the alleged grounds for disqualification, stating with particularity the grounds upon which it is claimed that the person cannot be fair and impartial. The disqualification shall be mandatory if sufficient factual basis is set forth in the affidavit of disqualification. If a member of the board of review is disqualified or withdraws from any proceeding, the remaining members of the board of review may appoint an appeal tribunal hearing officer to sit on the board of review for the proceeding involved.

F. There is established within the department, for the purpose of providing higher level administrative appeal and review of determinations of a claims examiner or decisions issued by a hearing officer pursuant to Subsection B or D of this section, a "board of review" consisting of three members.

Two members shall be appointed by the governor with the consent of the senate. The members so appointed shall hold office at the pleasure of the governor for terms of four years. One member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employers, and the other member appointed by the governor shall be a person who, on account of previous vocation, employment or affiliation, can be classed as a representative of employees. The third member shall be an employee of the department appointed by the secretary who shall serve as chair of the board. Either member of the board of review appointed by the governor who has missed two consecutive meetings of the board may be removed from the board by the governor. Actions of the board shall be taken by majority vote. If a vacancy on the board in a position appointed by the governor occurs between sessions of the legislature, the position shall be filled by the governor until the next regular legislative session. The board shall meet at the call of the secretary. Members of the board appointed by the governor shall be paid per diem and mileage in accordance with the Per Diem and Mileage Act for necessary travel to attend regularly scheduled meetings of the board of review for the purpose of conducting the board's appellate and review duties.

G. The board of review shall hear and review all

cases appealed in accordance with Subsection H of this section. The board of review may affirm, reverse or modify the decision of the hearing officer or remand any matter to the claims examiner, tax representative or hearing officer for further proceedings. Each member appointed by the governor shall be compensated at the rate of fifteen dollars (\$15.00) for each case reviewed up to a maximum compensation of twelve thousand dollars (\$12,000) in any one fiscal year.

H. Any party aggrieved by a final decision of a hearing officer may file, in accordance with regulations prescribed by the secretary, an application for appeal and review of the decision with the secretary. The secretary shall review the application and shall, within fifteen days after receipt of the application, either affirm the decision of the hearing officer, reverse the decision of the hearing officer, modify the decision of the hearing officer, remand the matter to the hearing officer, tax representative or claims examiner for an additional hearing or refer the decision to the board of review for further review and decision on the merits of the appeal. If the secretary affirms, reverses or modifies the decision of the hearing officer, that decision shall be the final administrative decision of the department and any appeal therefrom shall be taken to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary

remands a matter to a hearing officer, tax representative or claims examiner for an additional hearing, judicial review shall be permitted only after issuance of a final administrative decision. If the secretary refers the decision of the hearing officer to the board of review for further review, the board's decision on the merits of the appeal shall be the final administrative decision of the department, which may be appealed to the district court in accordance with the provisions of Subsections M and N of this section. If the secretary takes no action within fifteen days of receipt of the application for appeal and review, the decision shall be promptly scheduled for review by the board of review as though it had been referred by the secretary. The secretary may request the board of review to review a decision of a hearing officer that the secretary believes to be inconsistent with the law or with applicable rules of interpretation or that is not supported by the evidence, and the board of review shall grant the request if it is filed within fifteen days of the issuance of the decision of the hearing officer. The secretary may also direct that any pending determination or adjudicatory proceeding be removed to the board of review for a final decision. If the board of review holds a hearing on any matter, the hearing shall be conducted by a quorum of the board of review in accordance with regulations prescribed by the secretary for hearing appeals. The board of review shall



promptly notify the interested parties of its findings of fact and decision. A decision of the board of review on any disputed matter reviewed and decided by it shall be based upon the law and the lawful rules of interpretation issued by the secretary, and it shall be the final administrative decision of the department, except in cases of remand. If the board of review remands a matter to a hearing officer, claims examiner or tax representative, judicial review shall be permitted only after issuance of a final administrative decision.

I. Notwithstanding any other provision of this section granting any party the right to appeal, benefits shall be paid promptly in accordance with a determination or a decision of a claims examiner, hearing officer, secretary, board of review or reviewing court, regardless of the pendency of the period to file an appeal or petition for judicial review that is provided with respect thereto in Subsection D or M of this section or the pendency of any such filing or petition until such determination or decision has been modified or reversed by a subsequent decision. The provisions of this subsection shall apply to all claims for benefits pending on the date of its enactment.

J. If a determination or decision allowing benefits is finally modified or reversed, the appropriate contributing employer's account will be relieved of benefit charges in accordance with Subsection B of Section 51-1-11

NMSA 1978.

K. The manner in which disputed claims shall be presented, the reports thereon required from the claimant and from employers and the conduct of hearings and appeals shall be in accordance with rules prescribed by the secretary for determining the rights of the parties, whether or not the rules conform to common law or statutory rules of evidence and other technical rules of procedure. A hearing officer or the board of review may refer to the secretary for interpretation any question of controlling legal significance, and the secretary shall issue a declaratory interpretation, which shall be binding upon the decision of the hearing officer and the board of review. A full and complete record shall be kept of all proceedings in connection with a disputed claim. All testimony at any hearing upon a disputed claim shall be recorded but need not be transcribed unless the disputed claim is appealed to the district court.

L. Witnesses subpoenaed pursuant to this section shall be allowed fees at a rate fixed by the secretary. Such fees and all administrative expenses of proceedings involving disputed claims shall be deemed a part of the expense of administering the Unemployment Compensation Law.

M. Any determination or decision of a claims examiner or hearing officer or by a representative of the tax section of the department in the absence of an appeal

therefrom as provided by this section shall become final fifteen days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted the remedies as provided in Subsection H of this section. The division and any employer or claimant who is affected by the decision shall be joined as a party in any judicial action involving the decision. All parties shall be served with an endorsed copy of the petition within thirty days from the date of filing and an endorsed copy of the order granting the petition within fifteen days from entry of the order. Service on the department shall be made on the secretary or the secretary's designated legal representative either by mail with accompanying certification of service or by personal service. The division may be represented in a judicial action by an attorney employed by the department or, when requested by the secretary, by the attorney general or any district attorney.

N. The final decision of the secretary or board of review upon any disputed matter may be reviewed both upon the law, including the lawful rules of interpretation issued by the secretary, and the facts by the district court of the county wherein the person seeking the review resides upon certiorari, unless it is determined by the district court where the petition is filed that, as a matter of equity and

due process, venue should be in a different county. For the purpose of the review, the division shall return on certiorari the reports and all of the evidence heard by it on the reports and all the papers and documents in its files affecting the matters and things involved in such certiorari. The district court shall render its judgment after hearing, and either the department or any other party affected may appeal from the judgment to the court of appeals in accordance with the rules of appellate procedure. Certiorari shall not be granted unless applied for within thirty days from the date of the final decision of the secretary or board of review. Certiorari shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workers' Compensation Act. It is not necessary in any proceedings before the division to enter exceptions to the rulings, and no bond shall be required in obtaining certiorari from the district court, but certiorari shall be granted as a matter of right to the party applying therefor."

**SECTION 2.** Section 51-1-34 NMSA 1978 (being Laws 1936 (S.S.), Chapter 1, Section 13, as amended) is amended to read:

"51-1-34. ADMINISTRATION FUNDS.--

A. There is created a special fund to be held in the custody of the state treasurer and known as the "unemployment compensation administration fund".

(1) All money paid into the fund is available to the secretary. All money in the fund shall be expended solely for the purposes and in the amount found necessary by the secretary of labor of the United States for the administration of the Unemployment Compensation Law. Except as provided in Subsection B of this section, the fund shall consist of money appropriated by the state, and all money received from the federal government or any of its agencies, including the department of labor of the United States, the railroad retirement board or from any other source for such purpose. Money received from the railroad retirement board as compensation for services or facilities supplied to the board shall be paid into the fund. All money in the fund shall be deposited, administered and disbursed in accordance with the Unemployment Compensation Law and regulations, except that money in the fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of the depository. Any balance in the fund shall not lapse at any time but shall be continuously available for expenditure consistent with the Unemployment Compensation Law. Such money is subject to the general laws applicable to the deposit of public money in New Mexico, and collateral pledged shall be maintained in a separate custody account.

(2) If Section 303(a)(5) of Title 3 of the Social Security Act and Section 3304(a)(4) of the Internal

Revenue Code are amended to permit a state agency to use, in financing administrative expenditures incurred in carrying out its employment security functions, some part of the money collected, or to be collected, under the Unemployment Compensation Law, in partial or complete substitution for grants under Title 3, then the Unemployment Compensation Law shall be modified by proclamation and by general rules in the manner and to the extent and within the limits necessary to permit such use under the Unemployment Compensation Law, and the modification is effective on the same date as the use is permissible under federal amendments.

B. There is created a special fund to be held in the custody of the state treasurer and known as the "employment security department fund".

(1) The fund is separate from the unemployment compensation administration fund.

(2) All money paid into the employment security department fund may be expended only pursuant to an appropriation by the legislature or specific provision of law. The department shall submit its annual budget for expenditures from the fund in accordance with the rules and regulations established by the department of finance and administration governing the submission of budgets by state agencies. All balances in the fund at the end of the fiscal year that have not been appropriated for expenditure shall remain in the fund

and be invested by the state treasurer until appropriated by the legislature. The money in the fund, except for refunds of interest and penalties erroneously collected, and except for fiscal-year balances, shall be expended solely for the purposes and in the amount found necessary for the payment of the costs of administration not chargeable against federal grants or other funds received for the unemployment compensation administration fund. Nothing in this section shall prevent the unencumbered money of the fund from being used as a revolving fund to cover necessary and proper expenditures for which federal funds have been duly requested but not yet received, subject to the charging of such expenditures against such funds when received. Money shall not be expended or made available for expenditure in any manner that would permit its substitution for, or cause a corresponding reduction in, federal funds that would be available, in the absence of such money, to finance expenditures for the administration of the Unemployment Compensation Law. Except as provided in Paragraph (2) of Subsection B and Subsection D of Section 51-1-38 NMSA 1978, the fund shall consist of all interest collected on delinquent contributions and all penalties provided by the Unemployment Compensation Law and all other money received for the fund from any other source. All money in the fund shall be deposited, administered and disbursed in accordance with this

section, except that money in the fund shall not be commingled with other state funds but shall be maintained in a separate account on the books of the depository and is subject to the general laws applicable to the deposit of public money in New Mexico, and collateral pledged shall be maintained in a separate custody account.

C. The state treasurer is liable on the state treasurer's official bond for the faithful performance of duties in connection with the funds created by Subsections A and B of this section, in addition to the liability upon all other bonds."

**SECTION 3.** Section 51-1-38 NMSA 1978 (being Laws 1936 (S.S.), Chapter 1, Section 16, as amended) is amended to read:

"51-1-38. PENALTIES--LIABILITY FOR BENEFIT OVERPAYMENT.--

A. Whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact, to obtain or increase any benefit or other payment under the Unemployment Compensation Law either for that person or for any other person, shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each such false statement or misrepresentation or failure to disclose a material fact shall constitute a separate offense. In any case where, after



notice and an opportunity to be heard, any person is found by the secretary to have so obtained or increased the amount of any benefit for the person, the person shall, in addition to other penalties provided herein, forfeit all benefit rights under the Unemployment Compensation Law for a period of not more than one year from and after such determination.

B. In addition to the penalty pursuant to Subsection A of this section, whoever makes a false statement or representation knowing it to be false or knowingly fails to disclose a material fact to obtain or increase any benefit or other payment under the Unemployment Compensation Law, either for that person or for any other person, shall be required to pay a civil penalty of twenty-five percent of the amount of overpaid benefits, collected in the manner provided in Subsection B of Section 51-1-36 NMSA 1978. The penalty shall be distributed as follows:

(1) fifteen percent of the amount of overpaid benefits shall be distributed to the fund; and

(2) ten percent of the amount of overpaid benefits shall be distributed to the employment security department fund created pursuant to Subsection B of Section 51-1-34 NMSA 1978.

C. Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false or who

knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining subject hereto or to avoid or reduce any contribution or other payment required from an employing unit under the Unemployment Compensation Law or who willfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each such false statement or representation or failure to disclose a material fact and each day of such failure or refusal may constitute a separate offense.

D. In addition to the penalty pursuant to Subsection C of this section, any employing unit or officer or agent of an employing unit that makes a false statement or representation knowing it to be false or that knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any individual entitled to benefits under the Unemployment Compensation Law shall be required to pay a civil penalty in an amount not to exceed ten thousand dollars (\$10,000), as determined by rule established by the department. The penalty shall be collected in a manner

provided in Subsection B of Section 51-1-36 NMSA 1978 and distributed to the fund.

E. Any person who willfully violates any provision of the Unemployment Compensation Law or any rule or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of the Unemployment Compensation Law and for which a penalty is neither prescribed herein nor provided by any other applicable statute, shall be punished by a fine of not more than one hundred dollars (\$100) or by imprisonment for not longer than thirty days or by both such fine and imprisonment, and each day such violation continues shall be deemed to be a separate offense.

F. Notwithstanding any other provision of the Unemployment Compensation Law, if any individual claiming benefits or waiting period credits, in connection with such claim, makes any false statement or representation, in writing or otherwise, knowing it to be false or knowingly fails to disclose any material fact in order to obtain or increase the amount of a benefit payment, such claim shall not constitute a valid claim for benefits in any amount or for waiting period credits but shall be void and of no effect for all purposes. The entire amount of the benefits obtained by means of such claim shall be, in addition to any other penalties provided herein, subject to recoupment by deduction from the claimant's

future benefits or they may be recovered as provided for the collection of past due contributions in Subsection B of Section 51-1-36 NMSA 1978.

G. Any person who, by reason of the nondisclosure or misrepresentation by the person or by another of a material fact (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received any sum as benefits under the Unemployment Compensation Law, while any conditions for the receipt of benefits imposed by the Unemployment Compensation Law were not fulfilled in the person's case and any person who receives any sum as benefits while the person knows or should know that the person is not entitled to such benefits because the person has received a notice of denial or disqualification or has received a monetary eligibility notice showing erroneous base period employers and wages, shall, in the discretion of the secretary and notwithstanding any action brought pursuant to Subsection A of this section, either be liable to have such sum deducted from any future benefits payable to the person under the Unemployment Compensation Law or be liable to repay to the department for the unemployment compensation fund a sum equal to the amount so received by the person, and such sum shall be collectible in the manner provided in Subsection B of Section 51-1-36 NMSA 1978 for the collection of past-due contributions.

H. Any person who has received benefits as a result of a determination or decision of the department or any court that the person was eligible and not disqualified for such benefits and such determination or decision is subsequently modified or reversed by a final decision as provided in Section 51-1-8 NMSA 1978, or who has received benefits as a result of administrative error or for any other reason while conditions for the receipt of benefits imposed by the Unemployment Compensation Law were not fulfilled in the person's case or while the person was disqualified from receiving benefits, irrespective of whether such overpayment of benefits was due to any fault of the person claiming benefits, shall, as determined by the secretary or the secretary's authorized delegate, either be liable to have such sum deducted from any future benefits payable to the person under the Unemployment Compensation Law at a rate to be determined by the secretary but not less than fifty percent of the weekly benefit amount payable to the person, or be liable to repay to the department, for the unemployment compensation fund or for credit to the appropriate reimbursable account, a sum equal to the amount of benefits received by the person for which the person was not eligible or for which the person was disqualified or that was otherwise overpaid to the person; provided, that for the purposes of this subsection, no determination or decision establishing an overpayment of

benefits shall be issued by the department against any person for failure to meet the eligibility conditions of Paragraph (3) of Subsection A of Section 51-1-5 NMSA 1978 more than one year after payment of benefits has been made, unless such condition of eligibility has been appealed or otherwise contested within such year.

I. Any amount of benefits for which a person is determined to be overpaid pursuant to this section may be collected in the manner provided in Subsection B of Section 51-1-36 NMSA 1978 for the collection of past-due contributions, notwithstanding that the person from whom the overpayment is to be collected has been assessed a penalty pursuant to Subsections A through E of this section.

J. A person shall be liable to repay the amount of benefits received for any period for which the person also received an award or settlement of back pay resulting from an action or grievance concerning a discharge unless the amount of the back pay award or settlement was reduced by the amount of benefits received during the period. The individual shall furnish the division with a signed copy of the award or settlement agreement that sets forth the person's name, the name of the employer, the period of time covered by the award or settlement and the amount by which the award or settlement was so reduced."

**SECTION 4. EFFECTIVE DATE.**--The effective date of the

provisions of this act is July 1, 2013. \_\_\_\_\_

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