

Essential workers, Essential Rights!

United Workers' Center of N.M.
Somos un Pueblo Unido



&

Southwest Women's Law Center



History of HB 489 from 2009

- Extended Statute of Limitations & beyond
 - Provided for retaliation protections
 - Increased criminal penalties
 - Attorneys' fees
 - Treble damages
-
- Sponsored by State Rep. Miguel P. Garcia
 - Unanimously passed the NM Senate

2017 lawsuit against NM Dept. of Workforce Solutions

Additional state law changes

Paid Sick Leave (HB 20, 2021)

- For every 30 hours worked, a worker accumulates 1 (one) hour of paid sick time, with an annual limit of 64 hours.
- Takes effect July 2022.

Statewide Minimum Wage (SB437, 2019)

- \$10.50: beginning January 1, 2021,
- \$11.50: beginning January 1, 2022,
- \$12.00: on and after January 1, 2023.

What is wage theft?

- Nonpayment of minimum wage
- Nonpayment of overtime
- Off-the-clock work
- Tip misappropriation
- Pattern of late wage payments or partial wage payments
- Failure to issue a final paycheck
- “Try out” time

Impacts of wage theft

- Difficulty paying for family's food, clothes, health care, and other basic necessities; plunge into poverty
- Sub-standard living conditions or homelessness
- Increased state spending on food assistance
- Millions of dollars in lost payroll, GRT & income tax revenues to local, state and federal governments

How common is wage theft?

- FY 2014 through 2016, over 2,500 New Mexicans filed wage theft claims with the DWS, including minimum wage violations, nonpayment of overtime, off-the-clock work, or failure to issue a final paycheck.
- According to UNM study, about 25% of immigrants working in New Mexico have experienced wage theft.

State & Federal Wage Statutes

Federal

The Fair Labor Standards Act (FLSA)

29 U.S.C. § 201 *et seq.*

New Mexico

Wage Payment Act (WPA)

NMSA 1978 §§ 50-4-1 – 50-4-12

Minimum Wage Act (MWA)

NMSA 1978 §§ 50-4-19 - 50-4-30

The FLSA

The prime purpose of the [FLSA] was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum substance wage.

- *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n. 18, (1945).

The New Mexico MWA

In *New Mexico Dept. of Labor v. Echostar Communications Corp.*, 2006-NMCA-047, 139 N.M. 493, ¶ 7, 134 P.3d 780, the Court of Appeals noted the following:

- “[o]ur cases recognize that the [MWA] is a statute with a **remedial purpose** and that it **must be construed liberally to accomplish that purpose.**”
- “The Act itself declares that its policy is ‘to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency and general well-being’ and to **protect ‘workers against the unfair competition of wage and hours standards which do not provide adequate standards of living.’**”(citing NMSA § 50-4-19).

NM Wage Statutes & FLSA

New Mexico courts look to federal case law and regulations implementing the FLSA to interpret the MWA.

- *Armijo v. Wal-Mart Stores, Inc.*, 142 N.M. 557, 572 (2007)
- *New Mexico Department of Labor v. A.C. Electric*, 125 N.M. 779, 784 (N.M.App. 1998).

New Mexico Administrative Code, §11.1.4.115 provides authority that the FLSA and related federal law can be relied upon as guidance when interpreting New Mexico's wage statutes.

NM Wage Statutes & FLSA

- **Definitions**

- Both include “suffer and permit” to work:

- >> Work not requested but **suffered or permitted** is work time.

For example, an employee may voluntarily continue to work at the end of the shift. He may be a car wash worker who is not paid for the time made to wait for the next car; a hotel housekeeper may desire/be required to finish an assigned task, such as folding towels, or a field worker waiting for the sun to come up.

The reason is immaterial. The employer knows or has reason to believe that she is continuing to work and the time is working time.

Minimum wages across NM

“A floor under wages and a ceiling over hours.”

Federal Minimum Wage: \$7.25

NM Minimum Wage: \$10.50 as of Jan. 1, 2021

Santa Fe Living Wage (2003): \$12.32*

Santa Fe County Wage (2014): \$12.32

>Both increase in March according to CPI

Las Cruces Minimum Wage (2014): \$10.50

Albuquerque Minimum Wage (2006): \$10.50

Bernalillo County (2013): \$10.50

* Minimum wage ordinance enacted by City of Santa Fe is within the power of the city to enact and is constitutional. *New Mexicans for Free Enter. v. City of Santa Fe*, [2006-NMCA-007](#), [138 N.M. 785](#), [126 P.3d 1149](#).

Minimum wages across the country

Currently, 29 states and D.C. have minimum wages above the [federal minimum wage](#) of \$7.25 per hour.

Washington, DC is the territory with the highest at \$15.

California is the state with the highest minimum wage at \$14, with Massachusetts and Washington just behind it.

NM is on par with Illinois (\$11), Minnesota (\$10.08) and Missouri (\$10.30).

Bottom of the barrel:

Five states **have not** adopted a state minimum wage: Alabama, Louisiana, Mississippi, South Carolina and Tennessee.

Two states, Georgia and Wyoming, have a minimum wage below \$7.25 per hour.

In all seven of these states, the federal minimum wage of \$7.25 per hour applies.

Workers excluded from MWA

NMSA 1978 §§ 50-4-21

C. "employee" includes an individual employed by an employer, but **shall not include (this is a sampling):**

1. bona fide executive;
2. sales person, worker engaged in piecework, flat rate or commission;
3. an individual engaged in the activities of an educational, charitable, religious or nonprofit organization where the employer-employee relationship does not, in fact, exist or where the services rendered to such organizations are on a voluntary basis;
4. registered apprentices;
5. G.I. bill trainees while under training;
6. seasonal employees of an employer obtaining and holding a valid certificate issued annually by the director of the LRD of the DWS;
7. any employee employed in agriculture (with some important exceptions)* but includes milk production;
8. an employee engaged in the handling, drying, packing, packaging, processing, freezing or canning of any agricultural or horticultural commodity in its unmanufactured state (i.e. **chile & pecans**);
9. employees of charitable, religious or nonprofit organizations who reside on the premises of group homes operated by such charitable, religious or nonprofit organizations for persons who have a mental, emotional or developmental disability.

* If you come across someone who you think is an agricultural worker, for example, someone who works on a ranch, don't just assume they are an AG worker. We can walk through the formula together.

Overtime statute: NMSA §50-4-22. Minimum wages (e)

E. An employee shall not be required to work more than (40) forty hours in any week of seven days, *unless the employee is paid one and one-half times the employee's regular hourly rate of pay for all hours worked in excess of forty hours.*

The math:

State minimum wage

$$\$10.50 + (10.50/2=\$5.25) = \$15.75$$

City & County of Santa Fe

$$\$12.32 + (12.32/2=\$6.16) = \$18.48$$

Overtime exclusions

Workers who engage in:

- a. cotton ginning,
- b. agriculture and "agriculture" has the meaning used in Section 203 of the federal Fair Labor Standards Act of 1938,
- c. employee of an air carrier providing scheduled passenger air transportation subject to Subchapter II of the federal Railway Labor Act or the air carrier's subsidiary that is subject to Subchapter II of the federal Railway Labor Act.

NM Wage Payment Act

The WPA appears at Sections 50-4-1 through 50-4-12 of the New Mexico wage payment laws.

Generally, the WPA requires employers to pay employees all “wages” (as that term is broadly defined in the WPA) at the promised rate in a timely fashion, and to maintain time and pay records. It also prohibits unauthorized or unlawful deductions from wages.

No counterpart in the FLSA.

The Wage Payment Act

“WPA Final Pay damages”:

Section 50-4-4 provides under most circumstances, the WPA requires employers must pay *final wages* that are of “a fixed and definite amount” to employees within five (5) days after they are fired, laid off, or terminated from their jobs.

Once the time for a terminated employee to be paid has passed, and payment has still not been made, and provided the employee made a demand* for payment within a reasonable time that the employer refused, **the employee is entitled to damages in the amount of their wages and compensation calculated from the day they were terminated until the day it is paid**, and those damages are capped at sixty days from the day the employee was discharged.

*A “demand” can include a note, an email or a text asking for her wages.

Minimum Wage Act Cases in Court

MWA vs. FLSA

MWA

- Full back wages + Interest
- 200% of the back wage amount (nondiscretionary)
- 3 year Statute of Limitations*
- Expedited hearing
- Injunctive relief
- Attorney's Fees & Costs
- No exhaustion of administrative remedies

FLSA

- Full back wages + Interest
- 100% of back wage amount (if employer cannot show that his violations were done in good faith)
- 2 year Statute of Limitations and 3 years if you can prove "willfulness."
- Attorney's Fees & Costs

MWA damages

NMSA 50-4-26 (C)

Enforcement; penalties; employees' remedies.

- C. In addition to penalties provided pursuant to this section, an employer who violates any provision of Section [50-4-22](#) NMSA 1978 shall be liable to the employees affected in the **amount of their unpaid or underpaid minimum wages plus interest, and in an additional amount equal to twice the unpaid or underpaid wages.**

Statute of Limitations

NMSA 1978 § 37-1-5

Actions for wage and hour violations.

- A civil action to enforce any provision of Chapter [50](#), Article [4](#) NMSA 1978 shall be commenced **within three years after a violation last occurs.**

The three-year period shall be tolled during a labor relations division of the workforce solutions department investigation of an employer, but such an investigation shall not be deemed a prerequisite to a person bringing a civil action, nor shall it operate to bar a civil action brought pursuant to Chapter [50](#), Article [4](#) NMSA 1978.

Continuing course- NMSA § 50-4-32

- A civil action to enforce any provision of Chapter 50, Article 4 NMSA 1978 may encompass all violations that occurred as part of a continuing course of conduct **regardless of the date on which they occurred.**

Mirrors Arizona statute:

A.R.S. § 23-364(H) of the Arizona Revised Statutes provides that “[a] civil action to enforce this article . . . may encompass all violations that occurred as a part of a continuing course of employer conduct regardless of their date.”

Reyes v. Garcia LaFarga, No. CV-11-1998-PHX-SMM (D. Ariz. 2013) (noting that, “[i]n the absence of mandatory authority, the Court ruled that the plain language of the Act unambiguously includes violations that were a part of a continuing course of conduct, independent of the statute of limitations” and allowing a claim dating back to March 2007)

Practice pointer: Expedited hearing

NMSA 50-4-26 (G)

Enforcement; penalties; employees' remedies.

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

Injunctive Relief

NMSA 50-4-26 (F)

Enforcement; penalties; employees' remedies.

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

Practice pointer: no filing fee

NMSA 50-4-26 (E)

Enforcement; penalties; employees' remedies.

E. The court in any action brought under Subsection D of this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs of the action and reasonable attorney fees to be paid by the defendant. **In any proceedings brought pursuant to the provisions of this section, the employee shall not be required to pay any filing fee or other court costs necessarily incurred in such proceedings.**

Employer's duty to maintain records

NMSA § 50-4-9(A).

Records, subpoenas, etc.

- A. Every employer shall keep a true and accurate record of hours worked and wages paid to each employee. The employer shall keep such records on file *for at least one year* after the entry of the record.

Employer's records – cont.

Employers are required to maintain workers' records for four (4) years, under state Unemployment Insurance laws.

NMAC 11.1.4.115, Burden shifting regulation

It is the employer's burden to maintain true and accurate time and pay records for all employees. Therefore, upon a finding by the LRD of an employment relationship, if the employer has not maintained and produced to the LRD the wage and hour records required by law, or if the LRD determines that *employer records are inaccurate or incomplete*, the LRD will calculate the wages due to the wage claimant based on employee records or the employee's credible recollection of the hours worked and wages paid or unpaid.

10th Circuit & beyond: employer's records

- In *Donovan v. Simmons Petrol. Corp.*, 725 F.2d 83 (10th Cir. 1983), the Tenth Circuit recognized the employers' duty under the Fair Labor Standards Act (FLSA) (after which the MWA is modeled) to keep accurate records in discussing the shift of the burden to prove damages between the employee and the employer:

The employee bears the burden of proving he performed work for which he was not properly compensated. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687 (1946). However, employers have a duty to keep accurate records.

- *Donovan*, 725 F.2d at 85-86. *See also Dole v. Alamo Foundation*, 915 F.2d 349, 351 (8th Cir. 1990) (where employer has not kept adequate records of wages and hours, employees generally may not be denied recovery of back wages on the ground that the precise extent of their uncompensated work cannot be proved). The employees "are to be awarded compensation on the most accurate basis possible." *Id.* (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)).

FLSA, MWA, and WPA Exemptions

FLSA

29 USC §213 (a) – List of workers exempt from FLSA minimum wage and overtime requirements.

MWA

NMSA 50-4-21(C) – List of workers exempt from MWA definition of employee.

NMSA 50-4-24 – List of workers exempt only from MWA overtime provisions.

WPA

NMSA 50-4-1 – exempts only two types of workers from the WPA, (1) domestic workers in private home and (2) livestock and agricultural workers.

The FLSA

Common Violations

- Failure to pay OT or MW
- Misclassification
- Auto-deductions
 - 29 C.F.R. § 785.19
- Off-the-clock work
 - 29 C.F.R. § 790.8
- On-call time
 - 29 C.F.R. § 785.17
- Travel time
 - 29 C.F.R. § 785.38

Pregnant Worker Accommodation Act

- The Pregnant Worker Accommodation Act (“PWA”) was passed in 2020 and expanded the list of persons protected from employment discrimination (among other types of discrimination) under the New Mexico Human Rights Act, §28-1-1 et seq., to include those experiencing “pregnancy, childbirth or conditions related to pregnancy or childbirth.”
- As with other laws prohibiting discrimination, the PWA is enforced through the New Mexico Human Rights Bureau.

Pregnant Worker Accommodation Act, con't.

- In requesting a reasonable accommodation under the PWA, it is not required that the individual obtain certification from their treating physician that they have a “serious medical condition” nor that they prove that they have a disability.
- The employer must provide the requested reasonable accommodation unless providing such accommodation will place an undue burden on the employer.

Pregnant Worker Accommodation Act, con't.

- The PWA is beautiful in its simplicity. Pregnancy and childbirth are typically neither serious medical conditions nor disabilities, which is why existing laws, e.g., the ADA and FMLA, were not a good fit.
- The PWA seeks to address the minor issues that arise from the physical changes that come with pregnancy, for example swollen ankles and an increased need to use the bathroom, by requiring employers to make simple accommodations for those experiencing those changes.
- As an example, the pregnant person experiencing swollen ankles may seek an accommodation of a footstool, provided to elevate the feet. Very simple.

Pregnant Worker Accommodation Act, con't.

- The PWA will also augment existing laws relating to the accommodation of lactating employees in the workplace, e.g., §28-20-2-Use of a Breast Pump in the Workplace.
- Finally, the PWA prohibits employer retaliation against those seeking to have an accommodation, nor may an employer force an employee to take paid or unpaid leave in lieu of a requested accommodation.

An Opportunity for the Private Bar

- Rewarding cases working with N.M. low-wage workers.
- Attorneys' fees.
- Chance to partner with local nonprofits focused on workers' rights.
- Potential to create state case law.

Questions?

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