NEW MEXICO
QUICK AND EASY GUIDE TO LABOR & EMPLOYMENT LAW

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Disclaimer: These materials do not constitute legal advice and should not be substituted for the advice of legal counsel.

At-Will Employment

The general rule in New Mexico is that employers and employees may terminate the employment relationship for any reason and at any time, as long as the reason is not otherwise unlawful. This remains true even when there is an employment contract, as long as the contract is for an indefinite period unless the contract is supported by consideration beyond the performance duties and payment of wages or there is an express contractual provision stating otherwise. *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 749 P.2d 1105 (N.M. 1988).

New Mexico courts have recognized two exceptions to the general rule of at-will employment: wrongful discharge in violation of public policy (retaliatory discharge) and an implied contract term that restricts the employer's power to discharge. *Id.*

Anti-Discrimination Law

The New Mexico Human Rights Act (NMHRA), which applies to employers with four or more employees, prohibits discrimination based on race, age, religion, color, national origin, ancestry, sex, sexual orientation, gender, gender identity, pregnancy, childbirth or condition related to pregnancy or childbirth, physical or mental disability, or serious medical condition. If the employer has 50 or more employees, it is also prohibited from discrimination on the basis of spousal affiliation. N.M. Stat. § 28-1-7.

Fair Pay for Women

The Arizona Fair Pay for Women Act prohibits employers from discriminating between employees on the basis of sex in rates of pay. N.M. Stat. § 28-23-3.

Right-to-Work Laws

New Mexico is not a right-to-work state. Union membership may, therefore, be a condition of employment.

Immigration Verification

New Mexico places no additional employment verification procedures on employers beyond Federal I-9 compliance. There is no requirement to use E-Verify under New Mexico state laws.

Drug Testing

New Mexico does not have a drug-testing statute generally regulating employer drug testing of employees or applicants. However, there are drug- and alcohol-testing laws for motor carriers. Health care providers are also required to conduct drug and alcohol testing of employees who provide direct care in a New Mexico state health facility, for both pre-employment and during employment. N.M. Stat. § 9-7-18.

It is unlawful to take adverse employment action against an applicant or an employee based on conduct allowed under the Lynn and Erin Compassionate Use Act (medical marijuana use). N.M. Stat. § 26-2B-9. There is a carve-out if the failure to take adverse action would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations. *Id.* However, a federal New Mexico court held that an employer is not required to accommodate an employee's use of medical cannabis. *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225 (D.N.M. 2016). Despite the law, the *Garcia* case creates inconsistencies. As the courts have not yet reconciled these inconsistencies, we recommend companies seek advice from a labor and employment attorney regarding their specific circumstances.

In addition, recreational marijuana use is legal in New Mexico, but the Cannabis Regulation Act does not require employers to allow or accommodate marijuana use in the workplace. Further, the Act specifically allows the employer to adopt a written zero-tolerance policy regarding the use of cannabis and permits the discipline or termination of an employee based on a positive drug test for cannabis. N.M. Stat. § 26-2C-34.

Jury Duty Leave
It is unlawful for an employer to deprive an employee of employment or threaten or otherwise coerce the employee because the employee receives a summons for jury service, responds to the summons, serves as a juror, or attends court for prospective jury service. In addition, it is unlawful for an employer to require or request an employee to use annual, vacation, or sick leave for time spent responding to a summons for jury duty. No New Mexico state law requires the employer to pay wages while an employee is on jury duty. N.M. Stat. § 38-5-18.

Voting Leave
On election days, employees may leave work for two hours for the purpose of voting between the time of opening and the time of closing the polls. The voter shall not be liable for any penalty for such absence; however, the employer may specify the hours during this period in which the voter may be absent. N.M. Stat. § 1-12-42.

Parental Leave
It is an unlawful discriminatory practice for any employer to require an employee with a need arising from pregnancy, childbirth, or a condition related to pregnancy or childbirth to take paid or unpaid leave if another reasonable accommodation can be provided, unless the employee voluntarily requests to be placed on leave or the employee is placed on leave pursuant to federal law. It is also unlawful for any employer to refuse or fail to make reasonable accommodations for an employee or job applicant with a need arising from pregnancy, childbirth, or a condition related to pregnancy or childbirth. N.M. Stat. § 28-1-7.

Caregiver Leave
New Mexico has a Caregiver Leave Act, which applies to employers with one or more employees. N.M. Stat. § 50-16-1.

An employer that provides eligible employees with sick leave for an eligible employee's own illness or injury, or to receive health care shall permit its eligible employees to use accrued sick leave to care for their family members in accordance with the same terms and procedures that the employer imposes for any other use of sick leave by eligible employees. N.M. Stat. § 50-16-3.

The Caregiver Leave Act is separate from the FMLA, which allows eligible employees to take unpaid leave for certain reasons.

Sick Leave
The New Mexico Health Workplaces Act requires that, for every 30 hours worked, employees must accrue a minimum of one hour of earned sick leave. Employers may choose a higher accrual rate or elect to grant employees the full 64 hours of earned sick leave for the upcoming year on January 1 of each year or, for employees whose employment begins after January 1 of a given year, a *pro rata* of the 64 hours for use in the remainder of that year. Such employees shall not be entitled to use more than 64 hours of earned sick leave per 12-month period, unless the employer selects a higher limit. "Employer" is defined as employing one or more employees at one time.

Employees may use earned sick leave for: (1) the employee's mental or physical illness, injury, or health condition; medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; or preventive medical care; (2) for the care of family members of the employee for: mental or physical illness, injury or health condition; medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; or preventive medical care; (3) for meetings at the employee's child's school or place of care related to the child's health or disability; or (4) for absence necessary to domestic abuse, sexual assault or stalking suffered by the employee or a family member of the employee; provided that the leave is for the employee to: obtain medical or psychological treatment or other counseling, relocate, prepare for or participate in legal proceedings, or to obtain services or assist a family member of the employee with any of the foregoing activities. N.M. Stat. § 50-17-1 *et seq.*

Domestic Abuse Leave
The State of New Mexico requires employers to grant an employee intermittent paid or unpaid domestic abuse leave without interfering with, restraining, or denying exercise of rights under the Promoting Financial Independence for Victims of Domestic Abuse Act or attempting to do so. Employees may take up to 14 days of leave in any calendar year. Retaliation against an employee for using domestic abuse leave is prohibited. Employees may use accrued sick leave or other available paid time off, compensatory time or unpaid leave time consistent with the employer's policies. N.M. Stat. § 50-4A-1 *et seq.*

Military Leave
Non-temporary employees may take leave to serve in the U.S. Armed Forces, an organized reserve, or the National Guard of any state in the U.S. Covered employees must give notice of their obligation or intent to perform service, unless such notice is precluded by military necessity, or is otherwise impossible, or unreasonable. N.M. Stat. § 28-15-1.

Volunteer Emergency Responder Job Protection Act
An employee may not be terminated, demoted, or discriminated against because the employee, when serving as a volunteer emergency responder, is absent from work in order to respond to an emergency or disaster. The employer may charge against the employee's pay for time the employee is absent while serving as a volunteer emergency responder. N.M. Stat. § 12-10C-3.

Smoking Laws
It is unlawful for an employer to require, as a condition of employment, that any employee or applicant for employment abstain from using tobacco products during nonworking hours, provided the individual complies with applicable laws or policies regulating smoking on the premises of the employer during work hours. N.M. Stat 50-11-3.

It is also unlawful for an employer to refuse to hire or to discharge any individual, or otherwise disadvantage any individual, with respect to compensation, terms, conditions, or privileges of employment because the individual is a smoker or nonsmoker, provided that the individual complies with applicable laws or policies regulating smoking on the premises of the employer during working hours. N.M. Stat 50-11-3.

Break Time to Express Milk
As a provision of the NMHRA, employers must provide a space for an employee to express breast milk that is clean and private. It must be near the employee's workspace and not a bathroom. The employer shall also provide flexible break times to express milk. N.M. Stat. § 28-20-2.

Meal and Rest Breaks
The State of New Mexico has no law requiring meal breaks or rest periods. However, any break that is less than 30 minutes long must be paid.

Minimum Wage, Overtime, and Wage Recordkeeping
As of January 1, 2023, the minimum wage in New Mexico is $12.00 per hour. Tipped employees must earn $3.00 per hour. N.M. Stat. § 50-4-22.

Some cities and counties in New Mexico have minimum wage requirements higher than the state minimum wage. Employers should check local and county laws to determine the minimum wage applicable to their location in New Mexico.

Hourly employees are entitled to overtime pay for all hours worked over 40 in a seven-day workweek. N.M. Stat. § 50-4-22.

The State of New Mexico requires every employer to 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. N.M. Stat. § 50-4-9.

Final Payments

If an employee quits or resigns, the State of New Mexico requires the employer to issue a final paycheck on the succeeding payday, if the employee does not have a written employment contract for a definite period. N.M. Stat. § 50-4-5. When an employee is discharged, unpaid wages become due immediately if demanded and must be paid no later than five days after discharge, for fixed or definite amounts. N.M. Stat. § 50-4-4. All other wages of discharged employees shall be made within ten days of discharge. N.M. Stat. § 50-4-4.

Unemployment Insurance

Unemployment insurance benefits provide temporary income to individuals who have lost work through no fault of their own. An unemployed individual shall be eligible to receive benefits only if it is determined that the individual is able to perform, available for, and actively seeking work. Unemployment insurance benefits are financed through employer payroll taxes; nothing is deducted from the employee's wages to pay for this coverage. Unemployment benefits are administered by the New Mexico Department of Workforce Solutions. Additional information regarding the benefits may be accessed at www.dws.state.nm.us/en-us/Unemployment.

Workers' Compensation

Every employer except as provided in N.M. Stat. § 52-1-6, shall become liable to and shall pay to any such worker injured by accident arising out of and in the course of his employment and, in case of their death being occasioned thereby, to such person as may be authorized by the director or appointed by a court to receive the same for the benefit of their dependents. Compensation shall be in the manner and amount at the times required in the Workers' Compensation Act. N.M. Stat. § 52-1-2.

Child Labor

No child under 14 years of age shall be employed or permitted to labor at any gainful occupation unless otherwise provided for in the Child Labor Act. N.M. Stat. § 50-6-1.

A child over the age of 14 years and under the age of 16 years shall not be employed or permitted to labor at any gainful occupation without procuring and filing a work permit as otherwise provided for in the Child Labor Act. N.M. Stat. § 50-6-2.

Children over the age of 14 and under the age of 16 years shall not be employed or permitted to labor at any gainful occupation for more than 40 hours in any one week nor more than eight hours in any one day when school is not in session, unless otherwise provided for in the Child Labor Act. N.M. Stat. § 50-6-3. During the calendared school year, children between the ages of 14 and 16 may not work before 7:00 a.m., after 7:00 p.m., during school hours (except for work experience and career exploration programs), not more than three hours per school day, or more than 18 hours per week during school weeks. *Id.*

Gun Laws

New Mexico does not currently have laws restricting the right of employers to prohibit employees from carrying guns at work or possessing guns in employee vehicles on employer property.

Additional Laws and Regulations

Human Immunodeficiency Virus Test

No person may require an individual to disclose the results of a human immunodeficiency virus-related test as a condition of hiring, promotion, or continued employment, unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification on the job in question. N.M. Stat. § 28-10A-1.

References

When requested to provide a reference for a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee's job performance. The immunity shall not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose, or violated any civil rights of the former employee. N.M. Stat. § 50-12-1.

Social Media
It is unlawful for an employer to request or require a prospective employee to provide a password to gain access to the prospective employee's account or profile on a social networking website or to demand access in any manner to a prospective employee's account or profile on a social networking website. N.M. Stat. § 50-4-34. An employer is not prohibited from having policies regarding workplace internet use, social networking site use, and electronic mail use. *Id.* Further, employers may monitor the usage of electronic equipment that is issued by the employer to an employee, as well as of the employee's use of the employer's e-mail system, without requesting the employee's permission or requesting the employee's password, so long as the employer has a provision in the employee handbook stating that the employee should have no expectation of privacy in anything the employee does on the employer's systems. Employers who are evaluating job candidates are prohibited from requiring a job candidate to disclose the candidate's social media username and password to permit the employer to log onto the social media account. *Id.*

Ban the Box
Employers may not inquire about a job applicant's criminal history or conviction on a job application. N.M. Stat. § 28-2-3.1. An employer may consider an applicant's conviction after review of the application and in discussion with the applicant. *Id.* The employer may notify the public or an applicant that the law or the employer's policy would disqualify an applicant with a certain criminal record from particular job positions. *Id.*

Mini-WARN Act
New Mexico does not have a mini-WARN Act or similar notice requirements for group layoffs.