



# INVESTIGATIONS MANUAL LABOR RELATIONS DIVISION

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## **INTRODUCTION: LRD’S ROLE IN WAGE CLAIMS**

New Mexico’s wage payment laws provide that the Director of the Labor Relations Division must investigate and enforce alleged violations of New Mexico’s wage payment laws.<sup>1</sup> As an investigator, you carry out this duty on behalf of the Director and the State of New Mexico. Your responsibility is to decide whether a wage claim assigned to you is “just and valid.”<sup>2</sup> To do this, you should pursue all evidence in documents and testimony that may lead to the truth. If your investigation leads you to believe that a wage claim is “just and valid,” then your responsibility is to cooperate with the employee in the enforcement of the claim against the employer.<sup>3</sup> If you determine that a wage claim is not “just and valid,” then you should close the wage claim with a decision letter that explains the facts and law underlying your decision.

Sections I and II of the Investigations Manual provide you with information about the laws LRD enforces. Section I explains the relevant laws, and Section II explains the exemptions that apply to those laws. Both sections tell you how to apply the facts you gather during the investigation to the relevant laws, in order to decide whether a wage claim is “just and valid.”

Sections III and IV of the Investigations Manual provides you with information about the process LRD uses to investigate wage claims. This will help you understand how to look for and find all evidence you need to decide whether a wage claim is “just and valid,” how to handle case files and confidential information, how to take enforcement action, and how to properly close cases when appropriate.

### **Interpretive Note: References to persuasive FLSA authority in Investigations Manual**

The New Mexico Minimum Wage Act (“MWA”), passed in 1955, is a New Mexico state law that sets minimum wages for covered employees working in New Mexico. The Fair Labor Standards Act (“FLSA”), passed in 1938, is a federal law that sets minimum wages for covered employees engaged in or providing goods for interstate commerce. In some areas, the MWA is similar to the FLSA. In other areas, it is not.

For a variety of reasons, there are many more sources of law interpreting the FLSA than the MWA. The federal agency that enforces the FLSA, the Wage and Hour Division of the U.S. Department of Labor, has promulgated regulations explaining how the FLSA applies to nearly every factual scenario that may arise in a wage payment dispute. District court and appellate decisions in FLSA lawsuits are also a robust source of information about how to interpret and apply the FLSA. By contrast, there is only a small body of case law interpreting the MWA, and New Mexico regulations interpreting the MWA are silent on many issues. As a result, there is relatively little state-level guidance or precedent available to LRD to interpret the MWA in LRD enforcement actions.

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<sup>1</sup> NMSA 1978 §§ 50-1-3, 50-4-8(A), 50-4-26.

<sup>2</sup> NMSA 1978 § 50-4-8(A).

<sup>3</sup> *Id.*

However, New Mexico regulations interpreting the MWA grant the LRD discretion to use FLSA precedents to interpret the MWA. In 11.1.4.118 NMAC, “Consideration of Federal Fair Labor Standards Act,” New Mexico regulations provide: “In making a decision, the LRD may rely upon definitions used within and decisions relating to the FLSA, 29 U.S.C. 201 *et seq.*”

The legal authority for this regulation stems from several New Mexico appellate decisions, which hold that FLSA regulations and precedents may be used as persuasive authority to interpret requirements of the MWA that are similar or identical to the FLSA.<sup>4</sup> However, when a provision of the FLSA has no counterpart in the MWA, or when the language of the two statutes differs on a particular issue, it is not appropriate to use federal precedent to interpret the MWA.<sup>5</sup>

Consistent with the authorities outlined in this section, LRD uses FLSA regulations and other FLSA precedents to interpret several provisions of the MWA or Wage Payment Act (“WPA”) in this Manual. However, whenever LRD uses a FLSA regulation or other precedent to interpret the MWA or the WPA, the relevant section of the Manual justifies the need to do so by explaining:

- There is no New Mexico regulation or precedent interpreting the relevant MWA or WPA provision; and
- The FLSA provision LRD will use to interpret the MWA or WPA provision is similar or identical to that MWA or WPA provision; or
- It is the subject of legitimate dispute as to whether a FLSA provision is similar to a MWA or WPA provision, and thus in lieu of silence on the issue, LRD will proactively adopt the FLSA regulation or other precedent to interpret the MWA or WPA.

By setting forth the circumstances under which LRD will apply FLSA regulations or precedent to particular factual scenarios, it is not LRD’s intention to create new law or precedent under the MWA or WPA. This Investigations Manual, while outlining practices to guide LRD employees in making enforcement decisions, does not by virtue of its application create binding rules outside of the lawful rulemaking process. A “rule” is any standard “that explicitly or implicitly implement[s] or interpret[s] a federal or state legal mandate ... purporting to affect ... persons served by the agency.”<sup>6</sup> Thus the circumstances established in this Manual for determining when

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<sup>4</sup> See *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 13, 101 N.M. 785, 788, 689 P.2d 934, 937 (standing for the proposition that where a provision of a New Mexico wage law and the FLSA are similar, New Mexico courts may turn to FLSA case law as persuasive authority to augment an understanding of the New Mexico wage law provision); *Sinclair v. Elderhostel, Inc.*, 2012-NMCA-100, ¶ 14, 287 P.3d 978, 981 (“there is nothing in the MWA or our case law that would preclude our interpreting the MWA as being consistent with the FLSA”); *N.M. Dep’t of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 20, 125 N.M. 779, 784, 965 P.2d 363, 368 (in reference to the MWA and the FLSA, “[w]hen two statutes cover the same subject matter, we attempt to harmonize and construe them together in a way that facilitates their operation and the achievement of their goals”).

<sup>5</sup> See, e.g., *N.M. Dep’t of Labor v. Echostar Comm’s Corp.*, 2006-NMCA-047, ¶ 12, 139 N.M. 493, 496–97, 134 P.3d 780, 783–84; *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 9, 355 P.3d 845, 848.

<sup>6</sup> NMSA 1978 § 14-4-2(F).

LRD will apply FLSA regulations so they do not run afoul of NMSA 1978 § 14-4-3 by establishing “rules” without engagement in the rulemaking process. Accordingly, LRD’s failure to abide by FLSA precedent cannot create a justiciable cause of action under the law.

Notwithstanding that this Investigations Manual contemplates your performance of certain directions which are not mandated by rules, you are nevertheless expected to follow those directions by way of good public policy. Reliance on FLSA regulations or precedent in some instances, though not required as a matter of law, enables LRD Labor Law Administrators and members of the public to understand how LRD will respond to particular factual scenarios. This also provides employers with a rational basis for actions against them and ensures consistency in LRD’s enforcement interpretations and actions statewide.

LRD will periodically update this Investigations Manual to reflect any changes to the MWA, WPA, or New Mexico case law interpreting either.

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<b>Appendix 50</b>	<b>Lien Claim</b>
<b>Appendix 51</b>	<b>Lien Notice</b>
<b>Appendix 52</b>	<b>Request for Information for Lien</b>
<b>Appendix 53</b>	<b>Request for Authorization of Payment from Surety Bond</b>

## **Appendix 54      Examples**

## **I. WAGE PAYMENT REQUIREMENTS**

Section I contains the legal requirements concerning wage payment and recordkeeping that apply to all covered employment relationships in New Mexico.

### **A. THE WAGE PAYMENT ACT (WPA)**

The Wage Payment Act (WPA) appears at Sections 50-4-1 through 50-4-12 of the New Mexico wage payment laws.<sup>7</sup> Generally, the WPA requires employers to pay employees all “wages” as that term is broadly defined in the WPA in a timely fashion, and to maintain time and pay records. It also prohibits unauthorized or unlawful deductions from wages.

#### **1. Defining “wages”**

The WPA defines “wages” as “all amounts at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, commission basis or other method of calculating such amount.”<sup>8</sup> Section 50-4-2(B) states, “an employer shall pay wages in full, less lawful deductions and less payroll deductions authorized by the employer and employee.”

In plain language, these two provisions require an employer to pay the wage set through an established practice, agreement, or understanding between the employer and employee—which is usually the wage rate offered to and accepted by the employee before the work was performed.

Almost all employees in New Mexico are covered by the WPA. Generally, it does not matter how their wages are calculated or what jobs they perform. Employees paid on commission are covered by the WPA, as are salespeople and others who may be exempt from the MWA. There is only **one exception** to the WPA. It is “employers of livestock and agricultural labor.” The meaning of the exception is discussed in Section II.D.2 (“Exemption to the definition of ‘employee’ in the WPA”).

Sometimes, there are disagreements about what the agreed wage rate actually was. If there is a dispute, you will have to dig a little deeper to decide what the agreed wage rate was, based on all the available evidence. For example:

- Can either the employer or employee describe a conversation about the wage rate? What do they each say? Is there a way to reconcile their stories?
- Were there any witnesses to their conversation? What do they say?
- Did the employer actually pay the employee the new wage rate?
- Has the employer produced paystubs or payroll records that reflect a particular rate? If these records reflect the employer’s position, what is the employee’s explanation?

You may uncover other facts by interviewing the employer, employee, and witnesses, as well as reviewing employment records, to help you decide what the pay agreement was. It is important

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<sup>7</sup> NMSA 1978 §§ 50-4-1 – 50-4-12.

<sup>8</sup> NMSA 1978 § 50-4-1(B).

to remember that an employee does not have the burden to produce records, and thus the employee's credible testimony alone may be enough to prove a case.<sup>9</sup>

The wage rate can change. An employer may increase or reduce an employee's agreed wage rate. However, the employer must inform the employee of the change before the employee performs work. If the employee continues to perform work after being informed of the change, and accepts the new wage rate without question, then LRD generally assumes the employee has accepted the change. However, if the employee claims he/she was not informed of the change or did not accept it, you will have to investigate to decide whether the employee and the employer actually reached a new agreement on the wage rate.

## **2. Vacation pay**

Accrued vacation pay is included in the WPA's definition of "wages."<sup>10</sup> Therefore, employees must be permitted to use their vacation pay during their employment, subject to any employer policies on notice, etc. Furthermore, any remaining vacation pay earned under an employer's vacation pay policy must be paid out upon termination of employment, just as any other form of wages must be paid.

## **3. Minimum wages in local jurisdictions**

Five counties and municipalities in New Mexico have minimum wages that are higher than the New Mexico state rate. Under the WPA, the wage paid cannot be lower than the local minimum wage rate applicable in the jurisdiction. It may be higher than the local minimum wage rate, but it cannot be lower.<sup>11</sup>

### **a. Local minimum wage rates**

Albuquerque, Bernalillo County, Las Cruces, the City of Santa Fe, and Santa Fe County have local minimum wage rates. Local wage rates can be found on the DWS website. County minimum wages apply only to the unincorporated areas of that county. For example, although parts of Española are in Santa Fe County, that county ordinance does not apply in Española because Española is an incorporated city. On the other hand, work performed in Eldorado is covered by the Santa Fe County minimum wage, because Eldorado is not incorporated. Coverage for work performed on tribal lands is discussed in Section II.E ("LRD's territorial jurisdiction").

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<sup>9</sup> 11.1.4.115 NMAC, "Employer Records": "[I]f 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."

<sup>10</sup> *Wolf v. Sam's Town Furniture, Inc.*, 1995-NMCA-114, ¶ 1, 120 N.M. 603, 604, 904 P.2d 52, 53.

<sup>11</sup> NMSA 1978 § 50-4-29 (any laws relating to minimum wages that are more favorable than the laws provided for in the MWA shall take precedence over the MWA).

The local wage rates are indexed to inflation, which means they increase annually proportional to the cost of living increase. All of the minimum wage changes are effective January 1 of the relevant year, except for the Santa Fe City and Santa Fe county minimum wages. These minimum wages go up on March 1 each year.

b. Covered employers

When an employee has performed work in a jurisdiction covered by a local minimum wage ordinance, you should determine whether the employer is covered by that ordinance. To do this, find out whether the business is required to obtain a business registration from that city or county.<sup>12</sup> You may obtain this information by calling the relevant local office:

<b>Jurisdiction</b>	<b>Relevant local office</b>	<b>Phone number</b>
Santa Fe City	Business Ombudsman Office	(505) 955-6912
Santa Fe County	Land Use Office	(505) 986-6360
Albuquerque	Business Registration Section	(505) 924-3890
Bernalillo County	Permitting Center	(505) 314-0350
Las Cruces	Community Development	(575) 528-3059

The standard under each ordinance is whether the employer is required to register, not whether the employer has actually registered. The relevant city or county is responsible for making this determination, not LRD. If the relevant city or county tells you the employer is not required to register, then you should assume the employer is not covered by a local minimum wage rate, and continue investigating the case under the WPA and/or MWA without regard to the local minimum wage rate.

c. Exemptions to local minimum wage rates

Several local jurisdictions adopt some or all of the exceptions to the definition of “employee” in the MWA. Below is a list of the exemptions that apply in each local jurisdiction and the corresponding MWA exemption. (These MWA exemptions are discussed in Section II.D.3.) In applying the MWA exemptions to a local ordinance, you should assume that the local exemption and the corresponding MWA exemption are identical. Remember, however, that an employee exempt under the MWA is usually covered under the WPA.

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<sup>12</sup> Santa Fe Ord. No. 2007-43, § 28-1.5(A)(4); Santa Fe County Ord. No. 2014-1, § 3(E); Albuquerque Ord. No. 12-2006, ROA § 13-12-2; Bernalillo County Ord. No. 2013-12, § 2-219; Las Cruces Ord. No. 2726, § 14-61.

Some jurisdictions contain additional exemptions that do not appear in the MWA. Below the chart, you will find information about what these additional exemptions mean and/or which local office to contact to ask whether the exemption applies.

If your investigation into the facts leads you to believe that an exemption to the definition of “employee” applies, then you should assume that the employee is **not** covered by a local minimum wage rate, and continue investigating the case under the WPA and/or the MWA without regard to the local minimum wage rate.

Jurisdiction	Exemptions
<b>Albuquerque<sup>13</sup></b>	<ul style="list-style-type: none"> <li>• NMSA 1978 § 50-4-21(c)(3), Government employees <b>except that</b> City of Albuquerque employees are covered</li> <li>• NMSA 1978 § 50-4-21(c)(4), Certain workers in charities</li> <li>• NMSA 1978 § 50-4-21(c)(5), Sales and special forms of compensation</li> <li>• NMSA 1978 § 50-4-21(c)(7), Registered apprentices and learners otherwise provided by law</li> <li>• NMSA 1978 § 50-4-23, Persons with a disability</li> <li>• NMSA 1978 § 50-4-21(c)(12), Certain agricultural employees</li> <li>• Local intern exemption (discussed below)</li> </ul>
<b>Bernalillo County<sup>14</sup></b>	<ul style="list-style-type: none"> <li>• NMSA 1978 § 50-4-21(c)(3), Government employees <b>except that</b> Bernalillo County employees are covered</li> <li>• NMSA 1978 § 50-4-21(c)(4), Certain workers in charities</li> <li>• NMSA 1978 § 50-4-21(c)(5), Sales and special forms of compensation</li> <li>• NMSA 1978 § 50-4-21(c)(7), Registered apprentices and learners otherwise provided by law</li> <li>• NMSA 1978 § 50-4-23, Persons with a disability</li> <li>• NMSA 1978 § 50-4-21(c)(12), Certain agricultural employees</li> <li>• Local intern exemption (discussed below)</li> </ul>

<sup>13</sup> The Albuquerque Minimum Wage Ordinance is at Chapter 13, Article 12 of the Albuquerque Code of Ordinances, *available at* [http://www.amlegal.com/codes/client/albuquerque\\_nm/](http://www.amlegal.com/codes/client/albuquerque_nm/).

<sup>14</sup> The Bernalillo County Minimum Wage Ordinance is at Chapter 2, Article III, Division 6 of the Bernalillo County Code of Ordinances, *available at* [https://library.municode.com/nm/bernalillo\\_county](https://library.municode.com/nm/bernalillo_county).

	<ul style="list-style-type: none"> <li>• “[a]ny person employed by a parent, spouse or a sibling”</li> <li>• “[a]ny person performing babysitting services in the employer’s home on a casual basis”</li> <li>• “[a]ny employee under the age of 16”</li> </ul>
<b>Las Cruces<sup>15</sup></b>	<ul style="list-style-type: none"> <li>• NMSA 1978 § 50-4-21(c)(2), Certain high-level employees</li> <li>• NMSA 1978 § 50-4-21(c)(4), Certain workers in charities</li> <li>• NMSA 1978 § 50-4-21(c)(6), (c)(8), and (c)(9), The “18 and Under” Exemptions</li> <li>• NMSA 1978 § 50-4-21(c)(7) Registered apprentices and learners otherwise provided by law</li> <li>• NMSA 1978 § 50-4-21(c)(10) G.I. Bill trainees</li> <li>• Certain city contractors (discussed below)</li> </ul>
<b>City of Santa Fe<sup>16</sup></b>	<ul style="list-style-type: none"> <li>• Certain city contractors (discussed below)</li> <li>• Certain businesses receiving grants or subsidies from the City of Santa Fe (discussed below)</li> <li>• “any person who is related by blood or by marriage to any person who may have or possess any ownership interest in the business that employs them”</li> <li>• Local intern exemption (discussed below)</li> <li>• “[n]onprofit organizations whose primary source of funds is from Medicaid waivers”</li> <li>• “persons working for a business in connection with a court-ordered community service program such as teen court”</li> <li>• Persons “who are in an apprenticeship program in a 501C(3) organization (such as the Santa Fe Opera)”</li> </ul>
<b>Santa Fe County<sup>17</sup></b>	<ul style="list-style-type: none"> <li>• NMSA 1978 § 50-4-21(c)(3), Government employees <b>except that</b> Santa Fe County employees are covered</li> </ul>

<sup>15</sup> The Las Cruces Minimum Wage Ordinance is at Chapter 14, Article III of the Las Cruces Municipal Code, *available at*

[https://library.municode.com/nm/las\\_cruces/codes/code\\_of\\_ordinances](https://library.municode.com/nm/las_cruces/codes/code_of_ordinances).

<sup>16</sup> The City of Santa Fe Living Wage Ordinance is at Chapter 28 of the Santa Fe City Code, *available at* <http://clerkshq.com/default.aspx?clientsite=Santafe-nm>.

<sup>17</sup> The Santa Fe County Living Wage Ordinance is at Title XI, Chapter 118 of the Santa Fe County Code of Ordinances, *available at* <http://z2codes.franklinlegal.net/franklin/Z2Browser2.html?showset=santafecountyset>.

	<ul style="list-style-type: none"> <li>• NMSA 1978 § 50-4-21(c)(4) Certain workers in charities</li> <li>• NMSA 1978 § 50-4-21(c)(7), Registered apprentices and learners otherwise provided by law</li> <li>• NMSA 1978 § 50-4-21(c)(10), G.I. Bill trainees</li> <li>• NMSA 1978 § 50-4-21(c)(11), Seasonal employees with certificate from LRD, <b>only if</b> the employee works in an educational, charitable, or religious youth camp or retreat where room and board is provided to the employee, or if a day camp, where board only is provided</li> <li>• “[a]ny employee that is the parent, spouse, child or other member of the employer’s immediate family; for purposes of this subsection, the employer shall include the principal stockholder of a family corporation”</li> <li>• Local intern exemption (discussed below)</li> <li>• “[p]ersons working for a business in connection with a court-ordered community service program”</li> </ul>
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*(1) Certain city contractors or businesses receiving grants or subsidies from the city*

The City of Santa Fe and the City of Las Cruces provide for exemptions for certain city contractors and/or businesses receiving grants or subsidies from the city. LRD is not responsible for interpreting these exemptions; our role is limited to applying them in order to carry out our enforcement duty under the WPA/MWA. To find out whether businesses are covered under these provisions, you should call the local government to inquire as to whether the contractor or grantee is exempt.

The City of Santa Fe (Finance Department): (505) 955-6745

The City of Las Cruces (Public Works Department-Contract Administration): (575) 528-3333

*(2) Local intern exemption*

The local intern exemption appears in the local minimum wage ordinances of the City of Santa Fe, Santa Fe County, Albuquerque, and Bernalillo County. These exemptions are similar, as discussed below.

Santa Fe County exempts “[i]nterns working for a business for academic credit in connection with a course of study at an accredited school, college or university.” To qualify for the exemption, the intern must be:

- working for a business for academic credit;
- in connection with a course of study at an accredited school, college, or university

The City of Santa Fe, the City of Albuquerque, and Bernalillo County exempt interns working for an employer for academic credit in connection with a course of study at an accredited school, college, or university pursuant to a work-study program while attending that school, college, or university. This is almost the same as the Santa Fe County exemption but they add the additional requirement that the intern be working pursuant to a **work-study program** while attending school.

d. Local enforcement agencies

Some sections of this Manual instruct you to provide referral information to employees to contact local minimum wage enforcement offices under certain circumstances. The phone numbers for the relevant enforcement offices are below.

<b>Jurisdiction</b>	<b>Relevant local office</b>	<b>Phone number</b>
Santa Fe City	Office of the City Manager	(505) 955-6848
Santa Fe County	Code Enforcement Office	(505) 986-6225
Albuquerque	Office of the City Attorney	(505) 768-4500
Bernalillo County	Office of the County Attorney	(505) 314-0180
Las Cruces	Office of the City Attorney	(575) 541-2128

#### **4. Public works wages**

The New Mexico Public Works Minimum Wage Act (PWMWA) provides for higher wages and special enforcement methods for public works projects, such as repairs on public schools or the construction of public roads. While the PWMWA provides its own rights and remedies for employees, it does not interfere with rights employees also have under New Mexico's other wage and hour laws.

Under the WPA, the hourly wage paid cannot be lower than the agreed-upon wage rate applicable under the PWMWA to the work that was performed. This agreed-upon rate is known generally as the "prevailing wage." Employees who were not paid the agreed-upon wage that was required by the PWMWA can recover the amount they should have received at that wage under the WPA. If you have a claim that appears to be a Public Works matter, consult with management to ensure that you proceed with the resources necessary to determine the applicable prevailing wage.

#### **5. How wages must be paid**

The WPA contains specific requirements concerning how employers must pay wages to employees:

Wages shall be paid in lawful money of the United States or in checks, payroll vouchers or drafts on banks, convertible into cash on demand at full face value or, with the voluntary authorization of the employer, employee and financial institution, by deposit to the account of the employee in any bank, savings and loan association, credit union or other financial institution authorized by the United States or one of the several states to receive deposits in the United States[.]<sup>18</sup>

This law only permits three forms of wage payment:

1. Cash in U.S. dollars.
2. Checks, payroll vouchers, or bank drafts, as long as the instrument is convertible to cash on demand at full face value.
3. With the employee's authorization, direct deposit to the employee's bank account.

By limiting lawful payment methods to the above three, this law prohibits several forms of wage payment, including:

- Payroll cards, such as a prepaid debit card onto which the employee's wages are deposited electronically and held in the employer's or payroll card vendor's bank account, if the employee has to pay any fees to collect the cash wage.
- A check drawn on an account with insufficient funds.
- Company scrip, i.e. company money redeemable for goods or services at a company store.

## **6. When wages must be paid**

The WPA contains deadlines for payment of wages to employees.<sup>19</sup> It is important to know how to pinpoint the date that a particular wage payment is due. This is because it is a violation of the wage payment laws to pay an employee late. In these situations, damages to the employee or even criminal fines and penalties may be owed.

### **a. During employment**

Section 50-4-2 requires that employees receive all compensation due on the regular payday set by the employer. An employer generally can decide what the regular paydays will be. However, Section 50-4-2 requires that paydays be no less than semi-monthly, i.e. twice a month, on the following schedule, with certain exceptions spelled out in this section:

- Pay for the 1<sup>st</sup> through 15<sup>th</sup> days of the month: paid on or before the 25<sup>th</sup> of the month.
- Pay for the 16<sup>th</sup> through the last day of the month: paid by the 10<sup>th</sup> day of the next month.

The employer is free to pay employees more often, or on a shorter timetable, than this schedule. The employer is also free to set a smaller timeframe in terms of the number of work days or weeks covered by each payday. Whatever arrangement the employer makes, however, the

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<sup>18</sup> NMSA 1978 § 50-4-2(B).

<sup>19</sup> NMSA 1978 § 50-4-2.

employer is required by law to honor it. Section 50-4-2 considers the wage payment to be late if the agreed-upon payday is not honored, or if all covered work time is not compensated on the payday.

There are **three sets of circumstances** where the timetable for wage payment described above can be a little more lenient. Under each of these three situations, however, the employer must honor whatever arrangement the employer actually makes in terms of the workweek and payday.

1. When the employer's payroll system performs "computation of earnings and of amounts due, preparation of payrolls and issuance of paychecks [] at a central location outside New Mexico."<sup>20</sup> In this situation, the employer must pay employees at least twice a month on the following schedule:
  - Pay for the 1<sup>st</sup> through 15<sup>th</sup> days of the month: paid on or before the last day of the month.
  - Pay for the 16<sup>th</sup> through the last day of the month: paid by the 15<sup>th</sup> day of the next month.
2. When "the labor or service to be rendered to an employer is recompensed on a task, piece or commission basis or other method of calculating the amount of wages to be paid, other than a definite and fixed amount in cash."<sup>21</sup> In this situation, the employer may pay the employee once a month if:
  - There is a written agreement that the employee and employer entered into at the time of hiring, and
  - The employee is paid on or before the 10<sup>th</sup> day of the next month for all work performed in the previous month.

Note that this exception only applies to employees who are NOT paid a conventional hourly, daily, or weekly rate for their work. Rather, it applies when the method of payment requires some kind of calculation based on criteria *other than work time*, which may include commission sales or payments by the piece. (Methods for actually calculating wages owed to commission or piece rate workers will be discussed in a separate section.)

3. Professional, administrative, or executive employees or employees employed in the capacity of outside salesmen, as those terms are defined in the Fair Labor Standards Act, may be paid once per month.<sup>22</sup>

Note that none of the above are considered exceptions to the wage payment requirements. They simply set unique deadlines for payment of wages in specifically enumerated circumstances that are a little more lenient than the general rule on semi-monthly payment.

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<sup>20</sup> NMSA 1978 § 50-4-2(A).

<sup>21</sup> NMSA 1978 § 50-4-2(B).

<sup>22</sup> NMSA 1978 § 50-4-2(C).

The wage payment requirements still apply if work has been suspended as the result of a labor dispute.<sup>23</sup> The wages earned and unpaid, together with any deposit or guaranty held by the employer, are due at the next payday.

b. When an employee quits or resigns

When an employee quits or resigns his employment, all wages and compensation are due at “the next succeeding payday” under the timetables described above.<sup>24</sup> However, the employer may “make immediate payment at the time of quitting” if the employer chooses.

Note that if an employee quits because the employer has failed or refused to pay wages on time, or has violated the New Mexico wage payment laws, then there may be a “constructive discharge” that requires the employer to pay wages on a shorter timetable, as well as damages. This is discussed in the next section.

c. Upon termination or constructive discharge—WPA final pay damages

Under most circumstances, employers must pay final wages that are of “a fixed and definite amount” to employees within five days after they are fired, laid off, or terminated from their jobs.<sup>25</sup> Hourly wages, salaries, day rates, and accrued, unused vacation pay are “fixed and definite” amounts that must be paid within five days of discharge.<sup>26</sup>

The only exception to the rule that wages are payable within five days of discharge is when the employee is compensated based on a “task, piece, commission basis or other method of calculation.” In that situation only, wages are due within ten days of discharge.<sup>27</sup>

When a terminated employee is not paid on time per the above requirements, “the wages and compensation of the employee shall continue from the date of discharge until paid at the same rate the employee received at the time of discharge ... provided ... that the employee shall not be entitled to recover any wages or compensation for any period subsequent to the sixtieth day after the date of discharge.”<sup>28</sup> These damages are referenced herein as “WPA final pay damages.” In other words, 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

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<sup>23</sup> NMSA 1978 § 50-4-6. This provision would typically apply when employees have gone on strike or the workplace is being picketed. See *Romero v. Journeymen Barbers, Hair Dressers, Cosmetologists & Proprietors Int'l Union of Am., Local Union No. 501, A.F. of L.-C. I.O.*, 1958-NMSC-007, ¶ 6, 63 N.M. 443, 445. 321 P.2d 628, 629.

<sup>24</sup> NMSA 1978 § 50-4-5.

<sup>25</sup> NMSA 1978 § 50-4-4(A).

<sup>26</sup> *Wolf v. Sam's Town Furniture, Inc.*, 1995-NMCA-114, ¶ 1, 120 N.M. 603, 604, 904 P.2d 52, 53.

<sup>27</sup> NMSA 1978 § 50-4-4(B).

<sup>28</sup> NMSA 1978 § 50-4-4(C).

regular weekly rate of pay calculated from the day they were terminated until the day it is paid, up to a maximum of sixty days from the day the employee was discharged.

You should examine payroll records and other relevant evidence to verify whether final wages were paid to the employee within the required period.

If an employer misses the WPA's relevant five- or ten-day deadlines for paying wages due, the employer is liable for WPA final pay damages only if each of the following three factors are met.

**Factor 1: The employee was discharged.** Final pay damages only apply when an employee is discharged. Sometimes, this will be obvious. An employee is protected by the final payment law no matter what the employer's reason was for terminating employment—it does not matter if the employee was laid off or fired for misconduct or for some other reason. In some cases, an employee may be owed final pay damages even if the employee quit if the employee was “constructively discharged.” Constructive discharge means a termination of employment brought about by making the employee's “working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign.”<sup>29</sup> For example, an employer can cause a constructive discharge by breaching the employee's contract of employment in some manner short of termination, like failing to pay wages in accordance with the agreement or understanding of the parties at the time of hire, or violating the MWA. If the employee demonstrates that the reason for leaving employment was because the employer failed to pay wages in accordance with the employment agreement, or failed to pay minimum or overtime wages as required by law, constructive discharge is established and this factor is met.

**Factor 2: The employee made a demand for payment of wages within a reasonable time, and the employer refused to pay.** To claim final pay damages, the employee must claim that she demanded the wages “within a reasonable time upon his employer at the place designated for payment and payment was refused.”<sup>30</sup> There is no case law interpreting the phrase “reasonable time.” Viewing the statutory scheme as a whole, LRD will assume the employee acted within a “reasonable time” if the employee demanded wages within sixty days of termination or constructive discharge. The employee's verbal statement that she requested her wages upon or after termination is sufficient to meet this factor, but you should collect any available evidence of the demand, such as letters, text messages, emails, and admissions of the employer. You should also confirm that the employer refused to pay when the employee made the demand. An employer's promise or commitment to pay at some future date is a refusal, because the legal violation is the failure to pay on time.

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<sup>29</sup> *Gormley v. Coca-Cola Enterprises*, 2005-NMSC-003, ¶ 10, 137 N.M. 192, 194–95, 109 P.3d 280, 282–83. See also *Molenda v. Thomsen*, 1989-NMSC-022, ¶ 6, 108 N.M. 380, 381, 772 P.2d 1303, 1304 (“Good cause is established when an individual faces compelling and necessitous circumstances of such magnitude that there is no alternative to leaving gainful employment. Good cause is an objective measure of real, substantial and reasonable circumstances which would cause the average able and qualified worker to quit gainful employment.” (citations omitted)).

<sup>30</sup> NMSA 1978 § 50-4-4(C).

**Factor 3: The employer has not provided written notice of the amount conceded to be due or paid the amount conceded to be due.**<sup>31</sup> If the prior two factors are met, an employer may avoid final pay damages only by meeting both of the following strict requirements:

- Giving the employee written notice stating the exact amount of wages the employer concedes are due. A payroll check paying the amount conceded to be due is not sufficient to meet the “written notice” element. The employer must give the employee separate written notice identifying the amount conceded to be due.
- Paying all wages conceded to be due within five days of discharge (or ten days if wages due are calculated based on a commission, task, or piece rate).

If the employer complies with both (a) and (b), above, then the employer will not be liable for final pay damages even if the employer is later found to owe the employee additional wages.<sup>32</sup> The employee’s acceptance of the amount conceded to be due does not waive the employee’s claim for the rest of the wages the employee is claiming.<sup>33</sup>

For further discussion, see Section I.D, “Calculating wages and damages under WPA and MWA.”

## **7. Deductions from wages**

### **a. Deductions generally**

The WPA contains the following provisions on the topic of deductions:

[A]n employer shall pay wages in full, less lawful deductions and less payroll deductions authorized by the employer and employee. Wages shall be paid ... without any reduction or deduction, except as may be specifically stated in a written contract of hiring entered into at the time of hiring.<sup>34</sup>

The WPA permits “lawful deductions” and deductions authorized by both the employer and the employee at the time of hiring. Deductions or reductions from paychecks are therefore prohibited except for:

1. Lawful deductions may include:
  - State and federal tax deductions lawfully taken and remitted in full to the appropriate government agency.
  - Court-ordered deductions, such as child support or wage garnishments for unpaid debts.
  - Wage overpayments, under certain circumstances.<sup>35</sup>

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<sup>31</sup> NMSA 1978 § 50-4-7.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> NMSA 1978 § 50-4-2(B).

<sup>35</sup> See subsection I.A.7.c.(1) below.

- The “reasonable value of . . . food, utilities, supplies or housing [provided] to an employee who is engaged in agriculture.”<sup>36</sup>
- 2. Payroll deductions authorized by the employer and employee in a written contract of hiring **at the time of hiring**. These types of deductions may be for employee benefits, such as insurance premiums or retirement contributions, or they may be primarily for the benefit of the employer, such as an agreement that an employee pays the deductible if the employee is determined to be at fault in an accident with a company vehicle. However, as is discussed further below, authorized deductions in writing at the time of hiring that primarily benefit the employer must not drop the employee’s net take-home pay below minimum wage.

Some common *unlawful* payroll deductions include, but are not limited to:

- (a) Deductions for tax purposes that are not remitted to the appropriate government agency (should you learn about such a violation during your investigation, you should collect evidence of the unlawful deductions and/or allegation and report the issue to the relevant state or federal government agency); and
- (b) Recouping a wage overpayment, if the employee did not give the employer written permission.<sup>37</sup>

When investigating an alleged deduction that does not concern standard tax deductions, you should request evidence of the court order or written agreement at the time of hire. If there is no evidence of this, the deduction is probably not lawful unless it falls within one of the two exceptions described in “Deductions authorized by statute or regulation,” below.

b. Kick-backs are deductions

A “kick-back” is a situation in which an employer pays wages to the employee but then requires the employee to pay back money to the employer or a third party for the benefit of the employer. Whereas the deductions described in the previous section are taken by the employer before wages are paid, a kick-back is a deduction taken after wages are paid. Kick-backs are subject to the same principles described in this section: they are prohibited as deductions unless they fall within one of the categories of authorized, lawful deductions.

c. Deductions authorized by statute or regulation

There are two deductions specifically authorized by law in the New Mexico wage statutes which do not require written agreement at the time of hire.

(1) *Wage advances or overpayments*

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<sup>36</sup> See subsection I.A.7.c.(2) below.

<sup>37</sup> See subsection I.A.7.c.(1) for a discussion of the regulations on overpayments.

Under the WPA, an employer may deduct a wage advance or a wage overpayment from an employee's wages only if certain conditions are met, as follows:

A written authorization is needed for an employer to deduct an advance or overpayment of wages, however, the employer must pay at least minimum wages times the hours worked to the employee.<sup>38</sup>

The law defines the "written authorization" for wage advances or overpayments as follows:

[A] document an employee signs at the time of hiring or prior to the taking of a particular deduction, giving the employer permission to deduct certain items from the employee's pay.<sup>39</sup>

Therefore, in order to deduct an advance or overpayment, the employer must obtain a written authorization from the employee before taking the deduction from the employee's pay. If there is no written authorization, the deduction is not lawful.

*(2) Reasonable value of food, utilities, supplies, or housing provided to employees in agriculture under MWA*

NMSA 1978 Section 50-4-22(B) of the MWA provides: "An employer furnishing food, utilities, supplies or housing to an employee who is engaged in agriculture may deduct the reasonable value of such furnished items from any wages due to the employee." You should apply the standard dictionary definitions of the terms "food, utilities, supplies, or housing." Thus, deductions for things like transportation to the job site and uniforms are not permissible under this exception.

Because the term "reasonable value" appears in the parallel FLSA statute concerning deductions for these items, and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy, apply FLSA regulations in this instance concerning "reasonable value" to determine whether the amount of any deduction for "food, utilities, supplies, or housing" is reasonable. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

The relevant FLSA regulations provide as follows:

Standards applicable to any deducted food, utilities, supplies, or housing:

- The cost is not more than the actual cost to the employer.<sup>40</sup>
- The cost does not include any profit to the employer or any affiliated person.<sup>41</sup>
- The employee has actually and voluntarily received the benefit, without coercion.<sup>42</sup>

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<sup>38</sup> 11.1.4.7(R) NMAC.

<sup>39</sup> *Id.*

<sup>40</sup> 29 C.F.R. § 531.3(a).

<sup>41</sup> 29 C.F.R. § 531.3(b).

<sup>42</sup> 29 C.F.R. § 531.30.

- The benefit has not been furnished in violation of any federal, state, or local law (such as employee housing which violates federal, state, or local safety and health standards).<sup>43</sup>

Additional standards apply to lodging. The cost may be deducted only if it is no more than

the cost of operation and maintenance including adequate depreciation plus a reasonable allowance (not more than 5 1/2 percent) for interest on the depreciated amount of capital invested by the employer: *Provided*, That if the total so computed is more than the fair rental value (or the fair price of the commodities or facilities offered for sale), the fair rental value (or the fair price of the commodities or facilities offered for sale) shall be the reasonable cost. The cost of operation and maintenance, the rate of depreciation, and the depreciated amount of capital invested by the employer shall be those arrived at under good accounting practices. As used in this paragraph, the term “good accounting practices” does not include accounting practices which have been rejected by the Internal Revenue Service for tax purposes, and the term “depreciation” includes obsolescence.<sup>44</sup>

Additional standards applicable to supplies:

- The item is not deductible from wages if it is not furnished primarily for the benefit or convenience of the employer.<sup>45</sup>
- Supplies primarily for the benefit or convenience of the employer include the following:
  - Tools of the trade.<sup>46</sup>
  - Uniforms.<sup>47</sup>
  - Safety equipment.<sup>48</sup>
  - Benefits the employer is required by law to provide to the employee, such as workers’ compensation benefits.<sup>49</sup>

## **B. NEW MEXICO MINIMUM WAGE ACT**

The Minimum Wage Act (MWA) appears at NMSA 1978 Sections 50-4-19 through 50-4-30. The purpose of the MWA is “(1) to establish minimum wage and overtime compensation standards for all workers at levels consistent with their health, efficiency and general well-being, and (2) to safeguard existing minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers against the unfair competition of wage and hours standards which do not provide adequate standards of

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<sup>43</sup> 29 C.F.R. § 531.31.

<sup>44</sup> 29 C.F.R. § 531.3(c).

<sup>45</sup> 29 C.F.R. § 531.3(d)(1).

<sup>46</sup> 29 C.F.R. § 531.3(d)(2)(i).

<sup>47</sup> 29 C.F.R. § 531.3(d)(2)(iii).

<sup>48</sup> 29 C.F.R. § 531.32(c).

<sup>49</sup> *Id.*

living.”<sup>50</sup> Essentially, the MWA establishes a floor for hourly and overtime wages in order to ensure a productive and healthy work environment for all workers.

## **1. Minimum wage for non-tipped employees**

Section 50-4-22(A) of the MWA provides that the minimum wage for covered employment relationships is \$7.50 per hour.<sup>51</sup> As discussed above, a higher local minimum wage rate may apply to covered employment in a local jurisdiction. Several job categories are partially or fully exempt from the definition of “employee” under the MWA. These MWA exemptions are discussed in Section II.D.3 (“Exemptions to the definition of ‘employee’ under the MWA”).

## **2. Deductions**

Deductions cannot bring take-home pay below the minimum wage, unless they 1) are lawful or 2) are agreed to by both the employer and the employee and are primarily for the benefit of the employee. This standard adopts the rationale from the FLSA for allowing such deductions to bring wages below the minimum wage: they are payments for the benefit of the employee, so can also be considered “wages.”<sup>52</sup> See Interpretive Note: References to persuasive FLSA authority in Investigations Manual. If mutually authorized deductions are primarily for the benefit of the employer, such an agreement, while permissible under the WPA, will be curbed by Section 50-4-22(A) of the MWA and cannot bring the employee’s pay below minimum wage.

1. “Lawful deductions” may drop net take-home pay below minimum wage. These may include:
  - State and federal tax deductions lawfully taken and remitted in full to the appropriate government agency.<sup>53</sup>
  - Court-ordered deductions, such as child support or wage garnishments for unpaid debts.<sup>54</sup>
  - Wage overpayments, under certain circumstances.<sup>55</sup>
  - The reasonable value of food, utilities, supplies, or housing provided to an employee who is engaged in agriculture.<sup>56</sup>
2. Payroll deductions authorized by the employer and employee in a written contract of hiring at the time of hiring and which are primarily for the employee’s benefit may drop an employee’s net take-home pay below minimum wage for the pay period.<sup>57</sup> These may include deductions for:
  - Insurance premiums

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<sup>50</sup> NMSA 1978 § 50-4-19.

<sup>51</sup> NMSA 1978 § 50-4-22(A).

<sup>52</sup> 29 C.F.R. § 531.38 (taxes remitted to the appropriate government agency are permissible deductions under the FLSA); 29 C.F.R. § 531.40 (listing mutually authorized deductions that are permissible under the FLSA).

<sup>53</sup> See 29 C.F.R. § 531.38.

<sup>54</sup> See 29 C.F.R. § 531.39.

<sup>55</sup> See subsection I.A.7.c.(1) above.

<sup>56</sup> See subsection I.A.7.c.(2) above.

<sup>57</sup> See 29 C.F.R. § 531.40.

- Retirement contributions
- Health savings accounts
- Meals, lodging, or other benefits provided to the employee, as long as the amount of the deduction is (a) the reasonable value of the benefit provided and (b) primarily for the benefit and convenience of the employee rather than the employer.<sup>58</sup>

Payroll deductions that are primarily for the employer's benefit may not drop an employee's net take-home pay below minimum wage. These include deductions for:

- The breakage or loss of equipment or tools;
- Theft;<sup>59</sup>
- Deductibles for insurance premiums for vehicle damage attributed to the fault of the employee;
- The cost of uniforms, tools, or work-related equipment provided by the employer, including safety equipment that the government requires employers to provide;<sup>60</sup>
- Rent charged for housing at a profit to the employer;<sup>61</sup>
- A form of discipline of the employee, for example for lateness.

The FLSA and the MWA cap such deductions to protect an employee's net take-home pay from falling below minimum wage. Employees cannot waive their right to be paid the minimum wage.

### **3. Minimum wage for tipped employees**

NMSA 1978 Section 50-4-22(C) states: "An employee who customarily and regularly receives more than thirty dollars (\$30.00) a month in tips shall be paid a minimum hourly wage of two dollars thirteen cents (\$2.13). The employer may consider tips as part of wages, but the tips combined with the employer's cash wage shall not equal less than the minimum wage rate [\$7.50]. All tips received by such employees shall be retained by the employee, except that nothing in this section shall prohibit the pooling of tips among employees."

The Albuquerque, Santa Fe County, and Las Cruces minimum wage ordinances provide for a higher minimum wage for tipped employees.

#### **a. Tipped employee defined**

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<sup>58</sup> For more information about how these terms are defined, see subsection I.A.7.c.(2) above.

<sup>59</sup> *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, 464 F.2d 1196, 1197 (5th Cir. 1972) (an agreement with an employee to deduct from the employee's pay for any shortages in the cash register cannot bring the employee's pay below minimum wage).

<sup>60</sup> *Walling v. New Orleans Private Patrol Service, Inc.*, 57 F. Supp. 143, 148–49 (E.D. La. 1944) (an employer may not deduct from an employee's wages any amounts for uniforms that would deprive the employee of the minimum wage); *see also Shultz v. Hinojosa*, 432 F.2d 259, 266–67 (5th Cir. 1970) (an employer violates the FLSA by deducting from the minimum wage paid to its butchers the cost of furnishing the butchers with tools necessary for the job).

<sup>61</sup> *Walling v. Peavy-Wilson Lumber Co.*, 49 F. Supp. 846, 865 (W.D. La. 1943) (an employer can deduct only the housing's actual cost).

The service sector of the economy has many tipped employees. They include waiters and waitresses, bartenders, bellhops, skycaps and redcaps, hairdressers and barbers, nail salon workers, exotic dancers, and various others. An employee who receives tips may be considered a “tipped employee” if she “customarily and regularly receives more than thirty dollars (\$30.00) a month in tips.”<sup>62</sup> There is no state case law interpreting the phrase “customarily and regularly.” Because the FLSA also uses the phrase “customarily and regularly receives more than \$30 a month in tips” to identify employees who may be paid a lower tipped minimum wage, and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy in this instance, apply FLSA regulations defining this term.<sup>63</sup> See Interpretive Note: References to persuasive FLSA authority in Investigations Manual. Under FLSA regulations, “customarily and regularly” means “a frequency which must be greater than occasional, but which may be less than constant.”<sup>64</sup> For example, a waiter or waitress plainly falls within this definition, but not someone who gets tips only at Christmas or New Year’s.<sup>65</sup>

b. Tip defined

Because the FLSA uses the word “tip,” and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy in this instance, apply FLSA regulations defining the word “tip.” See Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

FLSA regulations define “tip” as “a sum presented by a customer as a gift or gratuity in recognition of some service . . . . It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity.”<sup>66</sup>

The FLSA regulations also explain that a mandatory service charge is not a “tip.”

(a) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer’s establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

(b) As stated above, service charges and other similar sums which become part of the employer’s gross receipts are not tips for the purposes of the Act. Where such sums are distributed by the employer to its employees, however, they may be used in their entirety to satisfy the monetary requirements of the Act.<sup>67</sup>

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<sup>62</sup> NMSA 1978 § 50-4-22(C).

<sup>63</sup> 29 U.S.C. § 203(t).

<sup>64</sup> 29 C.F.R. § 531.57.

<sup>65</sup> *Id.*

<sup>66</sup> 29 C.F.R. § 531.52.

<sup>67</sup> 29 C.F.R. § 531.55.

To be considered a “service charge” that may be used to pay wages to employees instead of remitted to employees as tips, the service charge must become part of the employer’s gross receipts. If an employer requires customers to pay a compulsory service charge, but does not include the amounts in its gross receipts or characterize the amounts as revenue or wages on its taxes, then the amounts are tips and not service charges.<sup>68</sup>

c. Limited circumstances when an employer may pay the tipped minimum wage

An employer who takes advantage of the tipped minimum wage provision must pay \$2.13 out of its own pocket to the employee, and may consider tips received by the employee—whether directly from customers or through a legitimate tip pool—toward the \$7.50 minimum wage. Thus, if the employee receives at least \$5.37 in tips per hour worked, the employer is deemed to have paid the employee the minimum wage of \$7.50. If the employee does not receive at least \$5.37 per hour in tips, then the employer must pay an additional amount, on top of the \$2.13, out of its own pocket, in order to raise the employee’s compensation up to \$7.50 per hour.

Unlike the FLSA, the MWA does not require employers to maintain payroll records containing the amount of tips the employee has reported. However, even though LRD does not enforce any recordkeeping requirements concerning the amount of employee tips, employers who comply with the FLSA should have payroll records reflecting employee tip earnings. You are entitled to review these records under the Director’s authority to inspect payroll records. If these records are accurate, they are a good way to identify whether a tipped employee is receiving at least \$5.37 per hour. However, if records are falsified, then you may have to rely on other evidence, such as employee records of tips received or employee estimates.

You can determine whether tipped workers are being paid lawfully by investigating whether the amount of tips reported for employees in payroll records is accurate. For example, some employers simply multiply work hours by \$5.37 (or the corresponding differential between the full local and tipped minimum wage rate), and report this number as tips received by the employee. This may suggest that the employer failed to accurately record tips received. The employee may have received more or less tips than the amount reported. In such cases, you should identify other information, such as employee or witness testimony, to determine the amount of tips the employee earned weekly, per LRD regulations.

d. Permissible and impermissible tip pool arrangements

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<sup>68</sup> *Id.*; see also *Chan v. Sung Yue Tung Corp.*, No. 03-6048, 2007 WL 313483, at \*15 (S.D.N.Y. Feb. 1, 2007) (rejecting service charge offset defense where money paid to employees was not characterized as wages on tax forms); *Reich v. Priba Corp.*, 890 F. Supp. 586, 594–95 (N.D. Tex. 1995) (where employer only included 20% of the mandatory service charge in its gross receipts and 80% was paid directly to employees without booking it as revenue, the 80% was considered a tip, not wages that satisfied the minimum wage obligation); *Reich v. ABC/York-Estes Corp.*, No. 91-6265, 1997 WL 264379, at \*4–6 (N.D. Ill. May 12, 1997) (alleged service charges must be recorded in gross receipts to be considered wages that satisfy minimum wage obligation).

Tip pooling is permitted under the MWA, which provides “All tips received by such employees shall be retained by the employee, except that nothing in this section shall prohibit the pooling of tips among employees.”<sup>69</sup>

There is no state case law analyzing what the words “receive” and “retain” means in the MWA. However, under the FLSA tipped employees shall “retain” their tips. The parallel FLSA provision provides as follows: “The [tipped minimum wage] shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.”<sup>70</sup>

The FLSA and the MWA are similar in the following respects:

- (1) They protect an employee’s right to retain all tips received, unless there is a valid tip pool.
- (2) By permitting tip pooling only among employees, they prohibit employers from taking or sharing in any employee tips.

Because the two laws use the terms “receive” and “retain” in similar ways, and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy in this instance, apply FLSA case law concerning what it means to “receive” and “retain” tips. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.<sup>71</sup>

For an employee to “receive” a tip means that the employee actually retains the money. This comes up where employees participate in a tip pool or tip sharing arrangement, under which they give some of their tips to other employees. In this situation, only the tips actually retained by the employee are counted as tips the employee received.<sup>72</sup>

FLSA regulations concerning what it means to “receive” and “retain” tips in the context of a tip pool state:

Where employees practice tip splitting, as where waiters give a portion of their tips to the busboys, both the amounts retained by the waiters and those given the busboys are considered tips of the individuals who retain them[.] Similarly, where an accounting is made to an employer for his information only or in furtherance of a pooling

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<sup>69</sup> NMSA 1978 § 50-4-22(C).

<sup>70</sup> 29 U.S.C. § 203.

<sup>71</sup> The tip retention provisions of the MWA and the FLSA differ in two respects, neither of which is relevant to the definition of “receive” and “retain”: (1) The FLSA, unlike the MWA, requires the employer to notify an employee of his intent to claim a credit against his full minimum wage obligation; and (2) The FLSA, unlike the MWA, only permits the pooling of tips among employees who “customarily and regularly receive tips.” The MWA only permits the pooling of tips among “employees,” but contains no restriction in terms of which employees may participate in the tip pool. LRD will not apply these two stricter FLSA standards to the MWA.

<sup>72</sup> 29 C.F.R. § 531.54.

arrangement whereby the employer redistributes the tips to the employees upon some basis to which they have mutually agreed among themselves, the amounts received and retained by each individual as his own are counted as his tips for purposes of the Act. [The Act] does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.<sup>73</sup>

e. Employer may not take employee tips

It is a violation of the MWA for an employer to take any portion of employees' tips, whether through a tip-out scheme or through a tip pool. This is unlawful because only "employees" may share in a tip pool under the MWA.<sup>74</sup> Anyone who is an "employer," as that term is defined in the MWA, may not take or receive any portion of a tipped employee's tips. It is impermissible for an employer to collect tips to meet payroll.

f. Dual jobs

The MWA and its implementing regulations do not address how employees are to be compensated when their job responsibilities include tipped and non-tipped work, i.e. "dual jobs." Because the FLSA and the MWA both provide for a \$2.13 tipped minimum wage for employees who "customarily and regularly receive tips," and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy in this instance, apply FLSA regulations on this issue. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

FLSA regulations provide that when an employee has two jobs for the same employer, one tipped and one not, the employer cannot pay the tipped minimum wage for the non-tipped job. However, if the non-tipped work is incidental to the tipped job, the employee may be considered a tipped employee for all of the work hours. As the FLSA regulations explain:

In some situations an employee is employed in a dual job, as for example, where a maintenance man in a hotel also serves as a waiter. In such a situation the employee, if he customarily and regularly receives at least \$30 a month in tips for his work as a waiter, is a tipped employee only with respect to his employment as a waiter. He is employed in two occupations, and no tip credit can be taken for his hours of employment in his occupation of maintenance man. Such a situation is distinguishable from that of a waitress who spends part of her time cleaning and setting tables, toasting bread, making coffee and occasionally washing dishes or glasses. It is likewise distinguishable from the counterman who also prepares his own short orders or who, as part of a group of countermen, takes a turn as a short order

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<sup>73</sup> *Id.*

<sup>74</sup> NMSA 1978 § 50-4-22(C).

cook for the group. Such related duties in an occupation that is a tipped occupation need not by themselves be directed toward producing tips.<sup>75</sup>

g. Remedies in tip cases

As discussed in detail in the previous sections, the MWA states that the following are prerequisites for paying an employee \$2.13 per hour rather than the full minimum wage of \$7.50 per hour:

- The employee must “customarily and regularly” receive at least \$30 a month in tips.
- The employer must pay the employee a cash wage of \$2.13 per hour.
- The cash wage plus the tips the employee retained must equal at least \$7.50 per hour.
- If the employee was required to participate in a tip pool or “tip-out” system, all of the tips must be paid to other employees as tips, and the employer must not retain any of the tip pool or tip-out amounts for any purpose, including but not limited to making payroll.

If your investigation reveals violations of any of the above prerequisites in any pay period, then the employee is no longer a tipped employee for that workweek, but rather a regular employee who is entitled to the full minimum wage for that workweek.<sup>76</sup> Back wages must be calculated by subtracting the minimum wage the employer actually paid the employee from the full minimum wage of \$7.50 (or any applicable local minimum wage rate) times the number of hours worked in that workweek.<sup>77</sup> For example, if the employer paid the employee \$2.13 per hour, then back wages are \$5.37 multiplied by the total hours worked in the workweek. This applies in any of the following circumstances (any one of these is enough):

- The employee did not receive at least \$2.13 per hour in wages from the employer, excluding tips.
- The employer took unlawful deductions in a work week that reduced the cash wage rate below \$2.13 per hour.
- The employee did not earn enough tips in a work week to bring her total gross pay up to at least \$7.50 per hour (or the relevant full local minimum wage rate) (to calculate this, divide total gross pay by the number of hours worked in the workweek).
- The employee did not customarily and regularly receive at least \$30 a month in tips.
- The employer required the employee to “tip-out” a portion of the employee’s tips to any employer (i.e. owner, supervisor, etc.) or other non-employee.
- The employer or any non-employee collected a share from the tip pool.

**Example:** Waitresses are required to “tip out” 2% of their gross sales to the house each shift. The employer pays some of this money as a tip-out to food runners. The rest becomes part of the employer’s gross receipts. The employer claims that it ultimately used this money to cover payroll expenses for cooks and dishwashers. Was the employer’s action lawful?

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<sup>75</sup> 29 C.F.R. § 531.56(e).

<sup>76</sup> NMSA 1978 § 50-4-22(C).

<sup>77</sup> NMSA 1978 § 50-4-22(C).

The employer's practice was unlawful, for two reasons:

- (1) The employer kept a share of the tip pool and
- (2) The employer did not distribute money from the tip-out to cooks and dishwashers *as tips*. Instead, the employer used the money to cover payroll. The cooks and dishwashers received no tips.

Either one of these problems, standing alone, is a violation. The waitresses who paid the 2% tip-out have a right to receive the difference between the full minimum wage of \$7.50 (or the applicable local rate) and the wage rate the employer actually paid (typically \$2.13). In this situation, interest and statutory damages equal to the amount of the wage underpayment calculated would also apply under the MWA.

h. Additional prerequisites under local minimum wage rates

The FLSA and several of the local minimum wage ordinances contain additional prerequisites that do not appear in the MWA concerning notice to the employee and records the employer must maintain in order to justify paying a lower tipped minimum wage. Since these notice and documentation prerequisites do not fall within the WPA's definition of "wages," LRD cannot enforce them. This means that an employer could, theoretically, be in compliance with the MWA tipped employee requirements, but not in compliance with stricter FLSA or local requirements. If you determine that a tipped employee has not experienced a violation of the MWA, but may be covered by the FLSA or a local minimum wage ordinance, then you are encouraged to provide the employee with contact information for the U.S. Department of Labor and the relevant local jurisdiction in your decision letter. If you are not sure whether a local jurisdiction might offer greater protections, consider including the following language in the decision letter:

*Although LRD has determined that the employer has not violated the tipped employee requirements of NMSA 1978 § 50-4-22(C), LRD has not made any determination about whether the employer has complied with the tipped employee requirements of the Fair Labor Standards Act or [the local ordinance]. [Employee] may file a claim with either of these agencies to determine compliance with these laws. The Albuquerque Regional Office of the Wage and Hour Division of the U.S. Department of Labor, which enforces the Fair Labor Standards Act, may be reached at [contact information]. The local enforcement office for [the local ordinance] may be reached at [contact information].*

#### **4. Overtime**

Section 50-4-22(D) of the MWA provides for time-and-a-half overtime wages for hours over 40. It reads:

An employee shall not be required to work more than 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.

There are certain limited categories of employees who are covered by the minimum wage provisions of the MWA, but not the overtime provisions. These exceptions will be discussed in a

separate section. For now, it is important to understand that it is NOT relevant for overtime eligibility that an employee is paid a salary or a daily rate. Employees paid like this are still entitled to an overtime premium for hours over 40, unless they fall under a job-specific exemption.

a. Identifying the workweek

To identify any violations of the overtime law, the first step is pinpointing what the “workweek” was for the employees. This is because overtime begins to accrue once an employee works more than 40 hours in the set workweek.

A workweek is any seven consecutive 24-hour periods, starting with the same calendar day each week, beginning at any hour on any day, so long as it is fixed and regularly recurring. An employer may establish different workweeks for different employees, but once an employee’s workweek is established, it remains fixed regardless of his working schedule. An employee’s workweek may be changed only if the change is intended to be permanent and the change is not designed to evade overtime obligations.<sup>78</sup>

Normally, employees and employers know and agree on what the workweek is. However, if there are disputes, you may have to make a determination based on all the available evidence. You should not necessarily take the employer’s or employee’s word for it. If there is no evidence explaining what the workweek was, for enforcement purposes you may use the calendar week, from 12:01 a.m. Sunday to midnight Saturday, with each workday ending at midnight.

**Example:** An employee’s set workweek is Monday to Sunday. The employee works the following schedule in a two-week period:

Monday: off  
Tuesday: off  
Wednesday: 8 hours  
Thursday: 8 hours  
Friday: 8 hours  
Saturday: 8 hours  
Sunday: 8 hours  
Monday: 8 hours  
Tuesday: 8 hours  
Wednesday: 8 hours  
Thursday: 8 hours  
Friday: 8 hours  
Saturday: off  
Sunday: off

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<sup>78</sup> See *Sinclair v. Elderhostel, Inc.*, 2012-NMCA-100, ¶ 18, 287 P.3d 978, 982.

This employee has not worked overtime because her hours were within 40 each of the two workweeks. Monday begins a new workweek, and even though this employee has worked 10 consecutive 8-hour days, no overtime is due.

Remember, however, that the employer cannot manipulate or change the workweek for overtime purposes. The workweek must remain the same each week. If an employer has manipulated the workweek, then you should select a single set workweek and calculate overtime due accordingly.

b. Overtime is calculated based on the 40-hour workweek

An employer cannot evade overtime obligations by calculating overtime due on an 80-hour schedule. Averaging work hours between two weeks is not allowed. Overtime is always calculated based on the 40-hour workweek as defined above.

**Example:** An employee's set workweek is Monday to Sunday. The employee works the following schedule in a two-week period:

Monday: off  
Tuesday: off  
Wednesday: 10 hours  
Thursday: 9 hours  
Friday: 11 hours  
Saturday: 9 hours  
Sunday: 8 hours  
Monday: 6 hours  
Tuesday: 5 hours  
Wednesday: 8 hours  
Thursday: 4 hours  
Friday: off  
Saturday: off  
Sunday: off

The employee has worked 70 hours total during this two-week period. However, the employee has worked 7 hours of overtime in the first workweek. The employee must be paid one and one-half times her regular rate of pay for these 7 hours.

c. Relationship between the payday and the workweek

The workweek can, but does not have to, overlap with the time period covered by payday. For example, an employer may set a once-weekly payday schedule under which an employee is paid for all the previous week's work on payday. Or, the employer may set a biweekly pay schedule, under which payday covers two weeks of work.

However, if an employer uses the semi-monthly schedule in Section 50-4-2, which is explained in the "when wages must be paid" section at the beginning, then payday can cover 15 or 16 days each pay period. This means that more than two weeks will always be included in payday. Therefore, the number of hours listed on the paystub or payroll records won't tell you anything

concrete about whether or how much overtime was actually worked. To determine whether employees worked overtime when the payday is semi-monthly, you will need to see the actual time records.

**Example:** Maria’s workweek is Monday to Sunday. Her paystub for the pay period from January 1-16 shows that she worked and was paid for 98 hours. Her paystub for the pay period from January 17-31 shows that she worked and was paid for 80 hours. She was not paid one and one-half times her regular rate of pay for any overtime on either paystub. Is there a violation?

Time records show Maria worked the following schedule in the month of January 2017:

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
26 8 hours	27 8 hours	28 8 hours	29 8 hours	30 off	31 off	01 8 hours
02 8 hours	03 8 hours	04 8 hours	05 8 hours	06 8 hours	07 off	08 off
09 8 hours	10 8 hours	11 8 hours	12 8 hours	13 8 hours	14 off	15 off
16 10 hours	17 10 hours	18 10 hours	19 10 hours	20 10 hours	21 off	22 off
23 8 hours	24 8 hours	25 8 hours	26 8 hours	27 8 hours	28 off	29 off
30 off	31 off	01 8 hours	02 8 hours	03 8 hours	04 off	05 off

Pay period 1: Maria did work 98 hours in the pay period from January 1 to January 16. However, overtime is not owed in this pay period, because Maria did not work more than 40 hours in any workweek between January 1 to January 16. The pay period here covers four workweeks—including the last day of the workweek from December 26 through January 1 and the first day of the workweek from January 16 through January 22.

Pay period 2: Maria did work 80 hours in the pay period from January 17 to January 31. However, overtime is owed in this pay period, because Maria worked 10 hours of overtime in the first workweek of that pay period. The first day of the workweek was included in pay period 1, and the last six days, including the overtime day of January 20, were covered by the second pay period. Therefore, Maria should have been paid one and one-half times her regular rate of pay in pay period 2 for the ten hours of overtime worked on Friday, January 20.

d. Regular hourly rate of pay

When investigating a wage claim for an overtime-eligible employee, you should identify the “regular hourly rate of pay” in order to calculate overtime wages owed. Sometimes, it is easy to identify the regular hourly rate of pay because there is an agreed-upon rate, as discussed above. However, in other situations it will be necessary to calculate the regular hourly rate. This may happen when the employee is paid a day rate or a weekly rate instead of an hourly rate, or when there are bonuses that factor into the regular rate.

To calculate the regular hourly rate, add up the total compensation for the week—including any daily pay, bonuses, incentive compensation, or other forms of compensation—and divide by 40. The regular hourly rate for overtime purposes cannot be lower than the minimum wage applicable in the jurisdiction.

e. Calculating overtime due for tipped employees

Overtime for tipped employees is calculated by multiplying the regular hourly rate of pay, i.e. the base rate the employer pays the employee, times 1.5. If the employer pays \$2.13 per hour, this is \$3.20. If the employer pays \$5.50 per hour, this is \$8.25.

f. Calculating overtime due for salaried employees

The general rule under the MWA is that employers must pay one and one-half times the regular hourly rate for all hours worked more than 40. Unless an applicable exemption applies, paying a fixed salary for a regular workweek that is longer than 40 hours does not satisfy this requirement. Such an employee must receive additional overtime compensation for each overtime hour. An employer who has paid employees covered by the MWA’s overtime requirements a salary with no overtime premium has violated the MWA. To determine the required overtime pay rate, first calculate the regular hourly rate for a salaried employee. (The regular hourly rate, of course, cannot be less than the minimum wage.) Divide the weekly salary by 40, and the result is the regular hourly rate. To calculate the overtime rate, multiply this regular hourly rate by 1.5.<sup>79</sup>

Take, for example, an employee who receives a fixed weekly salary of \$500 and works a 60-hour workweek. His regular hourly rate is obtained by dividing the \$500 straight-time salary by 40 hours, which results in a regular rate of \$12.50. One and one-half times this hourly rate is \$18.75. That is his required overtime pay rate. \$18.75 multiplied by 20, the number of overtime hours he worked, equals \$375 in overtime compensation due. This employee should have been paid \$375 in addition to the straight-time salary he received.

There is only one exception to this method of calculating overtime for salaried employees. The last sentence of Section 50-4-22(D) allows another method, called a “fluctuating workweek” for “an employee who is paid a fixed salary for fluctuating hours and who is employed by an employer a majority of whose business in New Mexico consists of providing investigative

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<sup>79</sup> *N.M. Dep’t of Labor v. Echostar Comm’s Corp.*, 2006-NMCA-047, ¶ 17, 139 N.M. 493, 497–98, 134 P.3d 780, 784–85 (to calculate overtime for an overtime-eligible employee under the MWA, including those paid by salary, the regular rate of pay is calculated by dividing the fixed weekly salary amount by forty hours. Any hours worked in excess of 40 hours for the week must be paid at one and one-half times the resulting regular rate of pay).

services to the federal government.” The fluctuating workweek method comes from the FLSA. Under this method, an overtime-eligible employee is paid a fixed salary for fluctuating hours, and receives only a half-time premium for hours worked in excess of 40. This method is sometimes known as “diminishing overtime,” because the regular rate of pay decreases under this method the more hours an employee works.

For example, imagine an employee who earns a weekly salary of \$400 a week. One week, the employee works 40 hours, the next 50 hours, and the next 60 hours. The first week, the employee earns \$400, and nothing for overtime because no overtime was worked. The second week, the employee earns \$400, plus overtime calculated at  $\$400/50 \text{ hours}/2$ , or \$4.00 for each of the 10 overtime hours. The third week, the employee earns \$400, plus overtime calculated at  $\$400/60 \text{ hours}/2$ , or \$3.33 for each of the 20 overtime hours. The overtime rate diminishes the more overtime the employee works. In almost all circumstances, this method of calculating overtime is illegal in New Mexico.<sup>80</sup>

g. Exemptions to overtime for certain employees

Three categories of employees are wholly or partially exempt from the overtime requirements of the MWA, as provided in NMSA 1978 Section 50-4-24. These exemptions are discussed in the subsections below. Note that there are many more categories of workers exempt from the definition of “employee” under the MWA altogether.<sup>81</sup> By virtue of their exclusion from the definition of “employee,” these workers are also exempt from the overtime requirements of the MWA.

*(1) Cotton ginning*

NMSA 1978 Section 50-4-24(A) exempts from the obligation to pay overtime wages: “An employer of workers engaged in the ginning of cotton for market, in a place of employment located within a county where cotton is grown in commercial quantities . . . if each employee is employed for a period of not more than fourteen weeks in the aggregate in a calendar year.”

To qualify for this exemption, the employer must meet all of the following criteria:

- Employing workers who are engaged in the ginning of cotton for market
- Located within a county where cotton is grown in commercial quantities (currently, these counties are Chaves, Doña Ana, Eddy, and Lea).<sup>82</sup> Keep in mind that the counties where cotton is grown in commercial quantities varies year to year. To get the most up-to-date information, you should consult the latest version of the New Mexico Agricultural

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<sup>80</sup> *Id.* (holding the “fluctuating workweek” method for calculating overtime under the FLSA is not lawful under the MWA, except as expressly permitted for investigators working for the federal government).

<sup>81</sup> The exemptions to the definition of employee in the MWA are discussed in Section II.D.3.

<sup>82</sup> NASS, 2016 New Mexico Agricultural Statistics at 51 (U.S.D.A. 2016) available at [https://www.nass.usda.gov/Statistics\\_by\\_State/New\\_Mexico/Publications/Annual\\_Statistical\\_Bulletin/2016/2016\\_NM\\_Ag\\_Statistics.pdf](https://www.nass.usda.gov/Statistics_by_State/New_Mexico/Publications/Annual_Statistical_Bulletin/2016/2016_NM_Ag_Statistics.pdf).

Statistics published by the United States Department of Agriculture's National Agricultural Statistics Service (NASS).

- The employer does not employ any employee for more than fourteen weeks total each calendar year.

If any of these requirements is not met as to any employee, then the entire workforce is not exempt and overtime must be paid.

### *(2) Agriculture*

NMSA 1978 Section 50-4-24(B) states: "An employer of workers engaged in agriculture is exempt from the overtime provisions set forth in Subsection D of Section 50-4-22 NMSA 1978. As used in this subsection, 'agriculture' has the meaning used in Section 203 of the federal Fair Labor Standards Act of 1938."

The definition of "agriculture" appears in Section II.D.2.b ("Agriculture and farm labor exemptions"). All workers engaged in agriculture of any kind are exempt from overtime under the MWA.

### *(3) Airline employees, under specific circumstances*

NMSA 1978 Section 50-4-24(C) states:

An employer is exempt from the overtime provisions set forth in Subsection D of Section 50-4-22 NMSA 1978 if the hours worked in excess of forty hours in a week of seven days are:

(1) worked by an 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;

(2) not required by the employer; and

(3) arranged through a voluntary agreement among employees to trade scheduled work shifts; provided that the agreement shall:

(a) be in writing;

(b) be signed by the employees involved in the agreement;

(c) include a requirement that an employee who trades a scheduled work shift is responsible for working the shift so agreed to as part of the employee's regular work schedule; and

(d) not require an employee to work more than: 1) thirteen consecutive days; 2) sixteen hours in a single work day; 3) sixty hours within a single work week; or 4) can be required as provided in a collective bargaining agreement to which the employee is subject.

This exemption only applies to airline employees who voluntarily trade shifts and end up working overtime as a result. All of the above criteria must be met for the exemption to apply.

## **5. Daily maximum hours**

Section 50-4-30 prohibits requiring any employee other than a fireman, law enforcement officer, or farm or ranch hand whose duties require them to work longer hours, or employees primarily on stand-by to work more than sixteen hours in any twenty-four hour day except in emergency situations.<sup>83</sup> Any employer violating this is guilty of a misdemeanor.<sup>84</sup> See Section I.I, “Criminal enforcement for violations of the WPA and the MWA,” for more information on referring wage law violations to District Attorneys for criminal prosecution.

## **6. Injunctive relief available for violations of the MWA**

Section 50-4-26(F) allows a court to order appropriate injunctive relief against an employer for violating any provision of the MWA. Injunctive relief is a separate remedy in addition to any pecuniary damages provided under the MWA. Section 50-4-26(F) provides examples of injunctive relief that LRD can ask for, such as an order that the employer cease and desist the unlawful wage practices and post a notice describing the violations found by the court and the cease and desist order. The examples of injunctive relief provided in Section 50-4-26(F) are not exhaustive. For example, if the employer has previously demonstrated a refusal to post the summary of the MWA required by NMSA 1978 § 50-4-25, you can ask the court to order the employer to post the summary. If you have questions about this legal procedure, ask your supervisor to contact the Legal Department for advice.

## **C. MAXIMUM HOURS OF WORK IN RESTAURANTS AND HOTELS**

New Mexico’s wage statutes at Section 50-4-13 through 50-4-18 address maximum hours of work and recordkeeping requirements in restaurants and hotels. Some provisions in this group of statutes are obsolete due to the subsequent enactment of superseding provisions in New Mexico’s wage statutes.

All the provisions in this group of statutes apply to all employees working in hotels and restaurants. Although these laws state that they only apply to “male employee[s],” LRD will apply them to all employees, regardless of gender, because gender classifications are not lawful in this situation.<sup>85</sup>

### **1. Daily and weekly maximum hours and emergency cases**

Sections 50-4-13 and 50-4-14 provide that any restaurant or hotel employer within the state cannot require employees to work more than ten hours in any twenty-four hour day except in

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<sup>83</sup> NMSA 1978 § 50-4-30(A).

<sup>84</sup> NMSA 1978 § 50-4-30(B).

<sup>85</sup> See FISCAL IMPACT REPORT FOR H.B. 176, at 2, 49th Leg., 1st Sess. (N.M. 2009), *available at*: <https://www.nmlegis.gov/Sessions/09%20Regular/firs/HB0176.pdf>.

emergencies. Restaurant or hotel employees cannot be required to work more than 70 hours in any one seven-day week except in emergencies.

## **2. Uniform time for beginning work**

Section 50-4-15 provides that the beginning of each workday must be uniform and in conformity with the agreed upon terms of employment. Moreover, in case of any change by the employer in the time of the beginning of the workday, the employer must notify affected employees of such change during such employees' previous working day.

## **3. Time records**

Section 50-4-16 provides that it is the employer's responsibility to maintain accurate time records of employees' work. Such records must be available for inspection at all reasonable hours.

## **4. Failure to comply**

Section 50-4-17 provides that any employer who makes any false time record entries or fails to comply with any provisions of Sections 50-4-13 through 50-4-18 shall be guilty of a misdemeanor. See Section I.I, "Criminal enforcement for violations of the WPA and the MWA," for more information on referring wage law violations to District Attorneys for criminal prosecution.

# **D. CALCULATING WAGES AND DAMAGES UNDER WPA AND MWA**

There are two categories of liquidated damages that you will encounter in your work. These are:

1. **MWA damages**, which apply to MWA claims, including both minimum wage and overtime violations.
2. **WPA final pay damages**, which apply to WPA claims when a worker has not received a final wage payment within 5 or 10 days of termination.

These forms of damages will be discussed separately, and then applied together in two examples at the end of this section.

## **1. Understanding the difference between damages and penalties**

It is important to understand that, from a legal perspective, MWA damages and final pay damages are not a penalty. Although these forms of damages may have deterrent value, their purpose is to compensate employees for experiencing violations. Legally, the term "penalty" only applies to sums of money collected for the state.<sup>86</sup> That is not the case here—any money collected is provided to the employee to whom it is owed. It is therefore not appropriate to refer

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<sup>86</sup> *Denison v. Tocker*, 1951-NMSC-022, ¶ 13, 55 N.M. 184, 188, 229 P.2d 285, 287 (the term "damages" refers to "compensation [for] the injured individual. It is for a penalty if it seeks to obtain a sum of money for the state").

to either form of damages as a “penalty” when describing them to employers, employees, and judges.

LRD does have the power to investigate and refer some wage claims to the District Attorney for civil or criminal prosecution. If a criminal prosecution is successful, it can result in the application of fines and penalties. However, the fines and penalties available in a criminal proceeding are completely separate from MWA damages or final pay damages.

## **2. Time period for calculation of wages and damages**

Several provisions of the wage statutes address the time periods applicable to wage claims. LRD regulations provide:

A wage claimant must file a wage claim with the LRD against an employer within three years of that employer’s last violation of the wage and hour laws as to the wage claimant. As long as any portion of the wage claim falls within the three-year time limit, the LRD will investigate the claim as far back as the beginning of the continued course of conduct as to the wage claimant or, in the case of a directed investigation, as far back as the course of conduct actually began as to any employee.<sup>87</sup>

This regulation derives from two statutes:

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.

50-4-32. Continuing course of conduct.

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.

Section 37-1-5 contains the general rule that a wage claim must be filed within three years after a violation last occurs. Section 50-4-32 is an exception to this general rule. It applies if the wage payment violations occurred as part of a “continuing course of conduct.” If so, then the three-year statute of limitations in Section 37-1-5 has not passed. The phrase “continuing course of conduct” means the statute of limitations is tolled from the date an initial wage violation occurs and continues until the violation ends.<sup>88</sup> For example, if the employer paid an employee a flat

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<sup>87</sup> 11.1.4.102 NMAC, “Deadline for Filing a Wage Claim.”

<sup>88</sup> See *State v. Tafoya*, 2010-NMCA-010, ¶¶ 19, 30, 147 N.M. 602, 609, 612, 227 P.3d 92, 99, 102 (a defendant may be charged “a single count for an ongoing pattern of conduct” when “[a] defendant's distinguishable charges may be based on various distinct incidents or may be based on a general allegation of wrongful conduct that continually occurred.”); *Watts v. Chittenden*,

salary no matter how many overtime hours she worked throughout an employee's six-year employment, then the "continuing course of conduct" likely applies. However, if the same employee has claims for wage nonpayment that occasionally occurred a couple times a year over six years of employment, it may be more difficult to establish a "continuing course," or a continually occurring wrongful course of action, that ties these incidents together enough to permit tolling the statute of limitations.

Because of the "continuing course of conduct" provision, you should not assume that your investigation only goes back three years from the date the employee files a wage claim. Rather, any investigation concerning alleged wage underpayment outside of that three-year period should include an analysis of whether the employer engaged in a "continuing course of conduct."

To make this determination, you should identify when the violations at issue in the wage claim began. If the employer has used the same unlawful pay practice throughout the employee's employment, then there has been a continuing course of conduct that justifies tolling the statute of limitations.

The statute of limitations is also tolled while LRD is investigating an employer.<sup>89</sup>

### **3. WPA final pay damages**

Section 50-4-4(C) provides as follows:

[If final pay damages are owed] the wages and compensation of the employee shall continue from the date of discharge until paid at the same rate the employee received at the time of discharge...provided further that the employee shall not be entitled to recover any wages or compensation for any period subsequent to the sixtieth day after the date of discharge.

You should calculate final pay damages using the following steps:

1. Determine the regular hourly rate of pay at the time of discharge
2. Determine the number of hours the employee worked each week at the time of discharge
3. Identify the relevant time period final pay damages are owed (five days after discharge until the employee received all wages conceded to be due, up to a maximum of 60 days)

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301 Conn. 575, 585, 22 A.3d 1214, 1220 (Conn. 2011) (holding that a "continuing course of conduct" by a defendant tolls the statute of limitations on a tort and requiring "that the defendant must have committed an initial wrong upon the plaintiff [and] there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto"); *Feltmeier v. Feltmeier*, 207 Ill.2d 263, 279, 798 N.E.2d 75, 86 (Ill. 2003) ("[a] continuing tort, therefore, does not involve tolling the statute of limitations because of delayed or continuing injuries, but instead involves viewing the defendant's conduct as a continuous whole for prescriptive purposes").

<sup>89</sup> NMSA 1978 § 37-1-5.

4. Calculate the wages the employee would have been paid, if he had continued working the same weekly schedule at the same regular hourly rate of pay. Do this by multiplying the regular hourly rate of pay by the number of hours in the weekly schedule, times the number of weeks (or partial weeks) in the time period final pay damages are owed.

You should use all relevant and credible facts provided during the investigation by the employer and employee to determine the regular hourly rate of pay and weekly hours worked.

Note that the regular hourly rate of pay cannot be less than the minimum wage applicable under the MWA or WPA (i.e. a local wage rate). Therefore, if the employee's actual hourly rate of pay was lower than the legal minimum, you should use the legal minimum instead. Similarly, if the employee's weekly schedule included overtime hours that were not compensated at one and one-half times the minimum wage, then you should include proper overtime wages in your calculation of final pay damages due.

If the employee's schedule was typically erratic or variable, you should determine the regular weekly schedule the employee worked "at the time of discharge" using the weekly schedule the employee worked in the 60-day period prior to discharge. If the employee usually worked between 20 to 40 hours a week, use a 60-day average to determine the regular weekly schedule for purposes of calculating final pay damages. Or, if an employee worked overtime in the week prior to discharge, but the employee confirms that he or she did not usually work overtime, then the overtime hours should not be included in averaging the employee's pay and/or weekly hours.

In very limited circumstances, an employee and an employer may be "joint adventurers" and part of the employee's compensation not recoverable under the WPA.<sup>90</sup> They are "joint adventurers" only if the employee and employer agreed at the time of hiring that the employee will have an interest in the business as part of his wages or compensation. The employee is still an employee and is still protected by the WPA, but his final pay damages are limited to the wages he was owed. They do not include any promised return on or cashing out of his interest in the business.

Take, for example, an employee hired to cook at a restaurant. A week after his hiring, the restaurant owner asked him to invest in the restaurant. The employee gave the owner \$10,000 as an investment in the restaurant. The employee and the employer were not joint adventurers, because this agreement was not made at the time of hiring and also because the interest in the business was not part of the employee's wages or compensation. It was a separate transaction, unrelated to the employee's work cooking at the restaurant. A few months later, the owner closed the restaurant and did not pay the employee his final month's pay. The employee is entitled to the full final pay damages.

Compare this to a cook who, when he was hired, agreed to be paid half of his hourly pay in a paycheck every week and half as an investment in partial ownership of the restaurant. After being fired and not paid, he is entitled to final pay damages based just on the amount of his

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<sup>90</sup> NMSA 1978 § 50-4-3.

paycheck every week. He is not entitled to damages based on the other half of his compensation, which was an ownership stake in the restaurant.

#### **4. MWA damages and interest**

MWA damages and interest must be calculated when an employer has failed to pay minimum wage or overtime compensation. NMSA 1978 § 50-4-26(C) states

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.

There are four provisions of Section 50-4-22 that lead to an interest and statutory damages award, should an employer violate any one of them:

- (A) An employer shall pay the minimum wage rate of \$7.50 an hour (or the rate in the jurisdiction if higher);
- (B) An employer may deduct the reasonable value of food, utilities, supplies, or housing furnished to an employee engaged in agriculture;
- (C) Employers of tipped employees must pay a cash wage of at least \$2.13 per hour. If the employee's tips plus the cash wage do not equal at least \$7.50 per hour, the employer must make up the difference. Tipped employees have a right to keep all their tips.
- (D) An employee shall not be required to work more than 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.

We will refer to damages and interest owed using the shorthand "MWA damages." MWA damages only apply when the employer has violated one of the above four provisions of the MWA.

Interest is calculated only on the base wage amount under the MWA. The relevant interest rate is 8.75%.<sup>91</sup> Therefore, if a MWA underpayment is \$100, interest owed is \$8.75. Interest is not calculated on WPA wages owed or on any damages owed under either law.

To determine whether MWA damages are owed, you will have to determine whether there was an MWA violation. Cases usually arise under one or more of three possible scenarios, each of which requires a different calculation methodology:

- (1) The case arises purely under the MWA. This may be because the case is only about payment of wages at less than \$7.50 or failure to pay overtime at one and one-half times the regular rate of pay. In cases arising purely under the MWA like this, calculating MWA damages simply means multiplying the back wage amount by two, and then adding it to the back wage amount, to arrive at the total damages number, aka treble damages.

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<sup>91</sup> NMSA 1978 § 56-8-4(A).

- (2) The case solely arises under the WPA. The employee was always paid at least \$7.50, and there are no overtime violations. In this type of case, no MWA damages are available at all, because there is no MWA violation.
- (3) The case arises partially under the MWA and partially under the WPA. In this case, the math is more complex. Wages can be calculated at the promised rate under WPA, but the additional MWA damages amount can only be calculated on the portion of the claim that violates the MWA. This may be either \$7.50 multiplied by straight time hours, or the regular hourly rate of pay multiplied by overtime hours, or both. This type of scenario occurs when an employer who normally pays an employee a higher wage rate—say, \$20 per hour—misses payday or refuses to pay wages at all. Once the wage payment is late under the WPA, there is also an MWA violation because the employee has been paid less than \$7.50—nothing, in fact—for that pay period. In this example, if no overtime was worked, back wages under the WPA are calculated at the \$20 rate, but the additional amount of MWA damages is calculated at only \$7.50 per hour. If overtime was worked, the \$20 rate is used to calculate MWA damages. The law behind this is explained in more detail below.

a. Calculating MWA Damages for OVERTIME Workweeks

When there is a wage agreement under Sections 50-4-1 and 50-4-2 in an overtime week, the full regular hourly rate is used to calculate back wages and overtime wages owed, even if the regular hourly rate is higher than \$7.50. If the regular rate of pay was \$14, then the overtime rate was \$21, and MWA damages are calculated on the full amount of the underpayment. Week 2 in the “Javier” example, below, illustrates how this works.

b. Calculating MWA Damages for NON-OVERTIME Workweeks

In non-overtime workweeks—workweeks in which an employee works fewer than 40 hours—an employee may recover MWA damages only if his total compensation for the workweek divided by total hours worked is less than \$7.50. This is because MWA damages are only available in a non-overtime workweek if the employee was paid less than the minimum wage rate of \$7.50 an hour (or less than the cash wage of at least \$2.13 per hour for tipped employees).<sup>92</sup>

If the employee was paid less than \$7.50 in a non-overtime workweek, MWA damages must be calculated using the \$7.50 rate, not any promised rate. This commonly occurs in two scenarios: 1) where the employee’s regular hourly rate was less than \$7.50 for work time (as in Carolyn’s situation, below), or 2) where there was a higher agreed-upon wage rate, but the employee

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<sup>92</sup> NMSA 1978 § 50-4-26(C) (“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.”) (emphasis added). In a non-overtime workweek, Section 50-4-22 NMSA 1978 only requires that the employee receive a minimum wage of at least \$7.50 per hour, or \$2.13 per hour for tipped employees.

received no compensation, or much less than what was promised (as in week 3 of the “Javier” example, below).

An employee is not entitled to ANY MWA damages under the MWA if total earnings for the workweek equal or exceed \$7.50. An example of this is in week 1 of the “Javier” example, below. Although there is an enforceable violation of the WPA for failure to pay the agreed-upon wage, MWA damages are not available because there is no MWA violation. WPA back wages may be calculated and claimed from the employer, but no MWA damages will apply.

It is always important to understand and investigate the unique facts of a case when assessing wage claims that raise possible violations of both Section 50-4-2 and the MWA. It may be that an employee was promised and paid a higher promised wage rate for some hours in the week, and no wages at all for the rest of the hours that week. In this situation, there is a violation of the MWA for the hours that were completely unpaid. For example, if an employee is paid for 32 hours at \$10.00 per hour and is paid nothing at all for 8 additional hours worked in the same workweek, there is an MWA violation for the 8 hours of unpaid work. Back wages and MWA damages may be calculated accordingly.

## **5. Examples: Applying the WPA and MWA**

The following are some examples to help you understand how to determine wages owed under the New Mexico MWA, the WPA, and local minimum wage laws.

### **a. WPA and MWA wage payment and timely pay requirements**

#### **Gustavo**

Elmer hired Gustavo on October 1 and told him that he would pay him \$16.00 per hour. Gustavo agreed to this rate and performed the work, and Elmer paid him. On November 1, Elmer told Gustavo that he would pay him a 10% premium for his work in November, but only if Gustavo would agree to accept payment in December instead of semi-monthly. Gustavo accepted this offer. Gustavo worked 117.58 hours in November. He then continued working for four days in December, a total of 33 hours. He quit when Elmer paid him \$1,400 for his work for the month of November, much less than he believed he was owed.

#### ***What is Gustavo’s enforceable hourly rate?***

The WPA protects Gustavo’s right to be paid the agreed-upon wage rate. In November, his hourly rate was \$17.60, which is calculated by multiplying \$16.00 by 10%. 10% of \$16.00 is \$1.60. \$16.00 + \$1.60 is \$17.60.

However, there was no agreement to receive the 10% premium for the December work. Therefore, Gustavo’s regular hourly rate for the December work was \$16.00.

*November:* 117.58 hours worked (times) \$17.60 (equals) \$2,069.41

*December:* 33 hours worked (times) \$16.00 (equals) \$528

*Total owed:* \$2,597.41

*Minus wages paid: \$1,400*  
*Total owed: \$1191.41*

Note that the employer's request that Gustavo voluntarily accept late payment of wages was illegal under the WPA. An employee cannot consent to late payment of wages outside the wage payment schedule set under the WPA. However, there are no damages available under the WPA for this illegal late-pay agreement under these facts, other than the actual wages owed under the WPA.

### **Victor**

Victor worked as a janitor at Big Box Store in Albuquerque five days a week, eight hours a day, for \$60 per day. After working for 20 weeks in 2017, he was fired and did not receive any wages for his last week of work.

#### ***What is Victor's enforceable hourly rate?***

Victor's regular hourly rate was \$7.50—\$60 (divided by) eight hours. This complies with the MWA. However, Victor worked in Albuquerque. The lowest hourly wage rate he could lawfully be paid in that jurisdiction in 2017 was \$8.80. The Big Box Store's arrangement to pay him \$60 a day for eight hours of work was illegal in that jurisdiction. Therefore, under the definition of "wages" in Section 50-4-1, Victor should have been paid \$8.80 (times) 8 hours for each day of work, a total of \$70.40 per day. This is the lowest lawful agreed-upon rate in Albuquerque.

*Pay Victor received: 19 weeks (times) 5 days (times) \$60 per day (equals) \$5,700*  
*Pay Victor should have received: 20 weeks (times) 5 days (times) \$70.40 per day (equals) \$7040*  
*Difference: \$7,040 (minus) \$5,700 (equals) \$1,340.*

### **Carolyn**

Carolyn was paid \$60 per day for her work cleaning hotel rooms in Taos in 2017. She worked 10 hours a day, four days a week.

#### ***What is Carolyn's enforceable hourly rate?***

Carolyn's hourly rate was \$6.00 per hour. This violates the MWA. Since Carolyn's regular hourly rate was unlawfully low, you must calculate the difference between the amount she was paid and the amount she is owed.

*Pay Carolyn received each week: \$6.00 (times) 10 hours (times) four days (equals) \$240*  
*Pay Carolyn should have received each week: \$7.50 (times) 10 hours (times) four days (equals) \$300.*  
*Difference: \$60.00*

***Now, imagine Carolyn worked in Santa Fe. What is her enforceable hourly rate?***

In Santa Fe, the \$6.00 per hour rate is a violation not only of the MWA, but also the WPA, in that she received less than the rate set by Santa Fe's minimum wage ordinance. (This is a WPA violation because LRD's duty to enforce local minimum wage rates derives from the WPA.)

*Pay Carolyn received each week:* \$6.00 (times) 10 hours (times) four days (equals) \$240

*Pay Carolyn should have received each week:* \$11.09 (times) 10 hours (times) four days (equals) \$443.60.

*Difference:* \$203.60

b. Calculating overtime due

**Carolyn**

Carolyn was paid \$60 per day for her work cleaning hotel rooms in Taos in 2017. She worked 10 hours a day, six days a week.

***What is Carolyn's regular hourly rate and overtime rate?***

Carolyn's regular rate of pay is \$6.00 per hour. This violates the MWA in two ways. First, as discussed above, it violates the minimum wage provisions. Second, it violates the requirement that employees earn one and one-half times the regular rate of pay for hours over 40. Starting on Carolyn's fifth day of work, she should have been paid overtime for each work hour.

What is Carolyn's overtime rate? To determine this, we must first determine the regular rate of pay. Since her \$6.00 hourly rate was illegally low, the regular hourly rate is assumed to be \$7.50. Her overtime rate, then, is \$7.50 (times) 1.5, which is \$11.25 per hour.

**Javier and Juan**

Juan hired Javier to do construction work at a rate of \$14.00 per hour. Javier worked for Juan for three weeks. Juan's workweek was Sunday through Saturday. The first week, Javier worked a total of 25 hours. The second week he worked a total of 43 hours. The third week he worked a total of 32 hours. He received only one payment for his work—a cash payment of \$300.00 for his first week of work.

***What is Javier's regular hourly rate and overtime rate?***

The WPA protects Javier's right to be paid the agreed wage rate of \$14.00 per hour. Javier's overtime rate is therefore \$14.00 (times) 1.5 (equals) \$21.00.

*Week 1:* 25 straight-time hours @ \$14.00 (equals) \$350.00 (minus) \$300 paid (equals) \$50.00

*Week 2:* 40 straight-time hours @ \$14.00 (equals) \$560.00 (plus) 3 overtime hours @ \$21.00 (equals) \$623.00

*Week 3:* 32 straight-time hours @ \$14.00 (equals) \$448.00

c. Calculating MWA damages

**Javier and Juan**

In the previous section, we calculated the amount of wages Juan owes Javier. The method for determining whether MWA damages are owed and how much is as follows:

*Week 1—Non-overtime workweek*

This is a non-overtime workweek because Javier only worked 25 hours. He was also paid \$300 for this work, \$50 less than he was owed.

<b>Promised hourly rate of pay:</b>	\$14.00
<b>Total hours in workweek:</b>	25
<b>Straight time due @ \$14.00:</b>	\$350
<b>Wage paid:</b>	\$300
<b>Total unpaid wages due:</b>	\$50

**Was there an MWA \$7.50 violation?** No. \$300.00 (divided by) 25 hours worked (equals) \$12.00 per hour paid. Therefore, MWA damages cannot be calculated at all.

**Was there an MWA overtime violation?** No.

Since the total earnings Javier received for this workweek divided by compensable hours is more than \$7.50, Javier cannot recover MWA damages for this week.

*Week 2—Overtime workweek*

This is an overtime workweek because Javier worked 43 hours. He was not paid at all for 40 hours of straight-time and 3 hours of overtime. Both minimum wage and overtime violations exist. Because this is an overtime workweek, Javier may recover MWA damages based on the agreed-upon regular hourly wage rate for straight-time and overtime hours worked.

<b>Promised hourly rate of pay:</b>	\$14.00
<b>Total hours in workweek:</b>	43
<b>Straight time due @ \$14.00:</b>	\$560.00
<b>Overtime due @ \$21.00:</b>	\$63.00
<b>Total unpaid wages due:</b>	\$623.00

**Was there an MWA \$7.50 violation?** Yes. Therefore, MWA damages must be calculated.

**Was there an MWA overtime violation?** Yes. Therefore, MWA damages must be calculated using the agreed-upon hourly rate.

**MWA damages:** \$623.00 x 2 (equals) \$1,246.00

**Interest on unpaid wages:** \$623.00 x 8.75% (equals) \$54.51

**Total liquidated damages and interest owed for Week 2:** \$1,246.00 + \$54.51 = \$1300.51

*Week 3—Non-overtime workweek*

This is a non-overtime workweek because Javier worked 31.5 hours. He was paid no wages for this work. Because this is a non-overtime workweek, Javier can recover the entire promised wage debt under the WPA, but can only recover MWA damages based on the minimum wage rate of \$7.50. This is because the MWA only requires an employer to pay MWA damages for

violations of (a) the requirement to pay at least \$7.50 per hour or (b) the requirement to pay a tipped employee at least \$2.13 per hour or (c) the requirement to pay one and one-half times the regular hourly rate of pay for hours over 40.<sup>93</sup>

**Promised hourly rate of pay:** \$14.00  
**Total hours in workweek:** 31.5  
**Straight time due @ \$14.00:** \$441.00  
**Total unpaid wages due:** \$441.00

**Was there an MWA \$7.50 violation?** Yes.

**Was there an MWA overtime violation?** No. Therefore, MWA damages must be calculated using the \$7.50 rate.

**MWA damages:** 31.5 hours x \$7.50 x 2 = \$472.50

**Interest on unpaid wages:** \$236.25 x 8.75% = \$20.67

**Total liquidated damages and interest owed for Week 3:** \$472.50 + \$20.67 = \$493.17

d. Calculating final pay damages

**Javier and Juan**

Javier's workweek was Sunday through Saturday. Juan promised to pay Javier once a week on Sundays. Javier's first day of work was 8/17/17. On 8/20/17, the Sunday following his first workweek, Juan only partially paid Javier for the hours Javier worked his first week. On 8/20/17, Javier questioned Juan about underpaying him for the hours worked his first week and questioned whether to continue employment with Juan. However, Juan made verbal assurances to Javier that he would make up for the shortfall in Javier's next paycheck. Reluctantly, Javier agreed to continue working. On 8/27/17, Juan failed altogether to issue Javier a paycheck but once again made verbal assurances to Javier that he would make up for the non-payment in Javier's next paycheck. Again, Javier reluctantly agreed to continue working. However, at the end of his third week of employment, Javier demanded payment for the previous three weeks of work and Juan refused, saying he didn't have the money. So Javier quit and filed a wage claim with LRD. Javier's final date of employment was 9/1/17.

Javier was constructively discharged, because Juan breached their employment agreement, and it would be intolerable and unreasonable for Javier to keep working for no pay. Therefore, Juan owes Javier final pay damages, in addition to the MWA damages described above.

To calculate the final pay damages, you must first establish the hourly rate and schedule to be used in the calculation of these final pay damages. As discussed above, you should base the calculation of these damages on the hourly rate and schedule the employee was working at the time of discharge and/or in the 60-day period prior to discharge. You should also consider all relevant facts provided by the employer or employee during the investigation regarding the rate of pay and/or weekly hours worked.

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<sup>93</sup> NMSA 1978 § 50-4-26(C).

For this example, we know the following about Javier's hourly rate and schedule at the time of discharge:

- (1) the agreed upon hourly wage was \$14.00 per hour,
- (2) he worked 25 hours his first week,
- (3) he worked 43 hours his second week,
- (4) he worked 31.5 hours his third and final week,
- (5) it was not unusual for the number of days per week Javier worked to vary from week to week, and
- (6) it was not unusual for the number of hours per day that Javier worked to vary.

Considering all the relevant facts in this case, including the irregularity in the number of days worked every week and number of hours worked, it is justifiable to use an average of Javier's hours worked per day and an average of days worked per week as the basis as Javier's wages at the time of discharge to calculate the final damages owed for the 60-day period.

**Calculation of average hours worked per day:**

$$\frac{99.5 \text{ (total number of hours worked during employment period)}}{12 \text{ (total number of days worked during employment period)}} = \text{average of 8.29 hours per day}$$

**Calculation of average number of days worked per week:**

$$\begin{aligned} 3 &= \text{Total days worked in Week 1} \\ 5 &= \text{Total days worked in Week 2} \\ + 4 &= \text{Total days worked in Week 3} \\ \hline 12 \div 3 &= \text{average of 4 days per week} \end{aligned}$$

Based on the above facts and methodology, at the time of discharge Javier's hourly rate was \$14.00 per hour and his schedule included an average 8.29 hours per day and an average of 4 days per week.

The final pay damages are calculated as follows:

Rate employee received at time of discharge = 4 days/week @ 8.29 hours/day x \$14.00/ hour  
 Relevant 60-day period after the date of discharge = September 2, 2017, through October 31, 2017

Workweek 8/27/17 – 9/2/17 = None  
 Workweek 9/3/17 – 9/9/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 9/10/17 – 9/16/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 9/17/17 – 9/23/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 9/24/17 – 9/30/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 10/1/17 – 10/7/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 10/8/17 – 10/14/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
 Workweek 10/15/17 – 10/21/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24

Workweek 10/22/17 – 10/28/17 = 4 days @ 8.29 hours/day x \$14.00/hour . . . . . \$464.24  
Workweek 10/29/17 – 11/4/17 = 2 days @ \$8.29 hours/day x \$14.00/hour..+ \$232.12  
**Total final pay damages owed for violation of NMSA § 1978 50-4-4(C) . . . . . \$3,946.04**

### **Diane**

Diane worked as a line cook at ABC Cafe in Roswell, New Mexico in 2017. Her workweek was Sunday through Saturday. She worked four days a week for \$60.00 a day. She worked 10 hours a day. She was fired on March 5, 2017, when she accidentally broke an expensive piece of equipment. On March 7, Diane made a demand for payment of her final wages. However, her employer refused to pay her last two weeks of work, explaining that Diane owed the employer money to pay for the broken equipment. Diane filed a wage claim with LRD. It has been more than 60 days since Diane's date of discharge.

After reviewing initial case information provided by Diane and ABC Cafe, you confirm that Diane was fired from her job and ABC Cafe failed altogether to pay her final wages. Thus, ABC Cafe owes Diane final pay damages, in addition to the underlying unpaid wages and MWA damages.

*What is Diane's enforceable hourly rate?*

Diane's hourly rate was \$6.00 per hour: \$60 per day (times) 4 days (equals) \$240 (divided by) 40 hours (equals) \$6.00 per hour. This violates the MWA. Since Diane's regular hourly rate was unlawfully low, you must calculate her unpaid wages owed at the state minimum wage rate of \$7.50 an hour.

Pay Diane received each week:

\$6.00 per hour (times) 10 hours (times) 4 days (equals) \$240.00

Pay Diane should have received each week, including during her final two weeks:

\$7.50 per hour (times) 10 hours (times) four days (equals) \$300.00

ABC Cafe failed to pay Diane her final two weeks and underpaid her throughout her entire period of employment. In this case, calculating all relevant wages owed throughout Diane's entire employment period with ABC Cafe would require you to gather and examine other pieces of evidence not provided in this fact pattern. However, for the sake of simplification and sticking to this example's purpose of demonstrating the calculation of final pay damages, we do not take up calculation of all relevant wages owed throughout Diane's entire employment period with ABC Cafe.

*Calculating Diane's MWA damages:*

MWA damages would be due for Diane's final two weeks and for all weeks throughout Diane's employment within the relevant statute of limitations period where ABC Cafe paid Diane unlawfully low wages.

*Calculating Diane's final pay damages:*

It is important to remember that if someone's rate at time of discharge is less than the applicable minimum wage rate in the jurisdiction, final pay damages should be calculated at the applicable minimum wage rate of the respective jurisdiction. Since Diane worked for ABC Cafe in Roswell, the applicable minimum wage rate is \$7.50 an hour. In this case, because Diane's regular hourly rate was unlawfully low you must calculate her final pay damages at the state minimum wage rate of \$7.50. In addition, we know that Diane's schedule at the time of discharge included working four days a week at 10 hours a day.

Diane's final pay damages are calculated as follows:

Rate employee received at time of discharge = 4 days/week @ 10 hours/day x \$7.50/ hour  
 Relevant 60-day period after the date of discharge = March 6, 2017, through May 4, 2017

Workweek 3/5/17 – 3/11/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 3/12/17 – 3/18/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 3/19/17 – 3/25/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 3/26/17 – 4/1/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 4/2/17 – 4/8/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 4/9/17 – 4/15/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 4/16/17 – 4/22/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 4/23/17 – 4/29/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	\$300.00
Workweek 4/30/17 – 5/6/17 = 4 days/week @ 10 hours/day x \$7.50/ hour . . . . .	<u>+ \$300.00</u>
<b>Total final pay damages owed for violation of NMSA § 1978 50-4-4(C) . . . . .</b>	<b>\$2,700.00</b>

## E. HOURS OF WORK: WHAT IS COMPENSABLE WORK TIME?

An employee must be paid in compliance with the WPA and the MWA for all hours worked. However, in some cases you will need to decide how many hours are compensable work time. Under the broad meaning of “employ” in the WPA and the MWA, compensable work time is all time that an employer “suffers or permits” an employee to work, whether or not the employee is required to do so. (For more information about the concept of “suffer or permit to work,” see Section II.B.)

In the FLSA context, the United States Supreme Court has defined the term “work” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.”<sup>94</sup>

The MWA and WPA do not define the word “work,” and there is no state case law or regulation defining this term or delineating what is compensable work time. Because the FLSA, MWA, and WPA each define the term “employ” as “suffer or permit to work,” and because there are no New Mexico regulations or precedent in the MWA or WPA context, LRD will, as a matter of policy in this instance assume the concept of “work” means the same thing under the FLSA, MWA, and the WPA, and will apply FLSA regulations and appellate case law defining the concepts of “work” and compensable work time as outlined in this Investigations Manual. *See*

<sup>94</sup> *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 598 (1944).

Interpretive Note: References to persuasive FLSA authority in Investigations Manual. For this reason, the sections below discuss FLSA regulations and appellate case law on the topics of “work” and compensable work time that LRD will apply in its enforcement activities.

### **1. Work not requested but “suffered or permitted”**

Under the broad definition of “suffer or permit to work” in the MWA and WPA, work not requested but suffered or permitted is work time.<sup>95</sup> For example, an employee may voluntarily continue to work after the end of the shift. He may desire to finish an assigned task, or he may wish to correct errors and prepare time reports or other records. The reason is immaterial.<sup>96</sup> The employer knows or has reason to believe that he is continuing to work and the time is working time.<sup>97</sup> An employer has a “reason to believe,” or constructive knowledge, that an employee is performing compensable work when the employer should have discovered it through the exercise of reasonable diligence.<sup>98</sup> Once an employer knows or has reason to know that an employee is working overtime, it cannot deny compensation even if the employee fails to claim overtime hours.<sup>99</sup>

### **2. Wait time**

Whether waiting time is compensable depends on whether the employee was “engaged to wait” versus “waiting to be engaged.”<sup>100</sup> An employee who is “engaged to wait” is entitled to wages for that time. An employee “waiting to be engaged” is not. For the policy reasons outlined above, LRD applies FLSA case law and regulations defining these concepts.

The FLSA regulations define time an employee is “on duty” and therefore “engaged to wait” as follows:

A stenographer who reads a book while waiting for dictation, a messenger who works a crossword puzzle while awaiting assignments, fireman who plays checkers while waiting for alarms and a factory worker who talks to his fellow employees while waiting for machinery to be repaired are all working during their periods of inactivity. The rule also applies to employees who work away from the plant. For example, a repair man is working while he waits for his employer’s customer to get the premises in readiness. The time is worktime even though the employee is allowed to leave the premises or the job site during such periods of inactivity. The periods during which these occur are unpredictable. They are usually of short duration. In either event the employee is unable to use the time effectively for his own purposes. It belongs to and

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<sup>95</sup> See 29 C.F.R. § 785.11 (interpreting identical FLSA provision).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Craig v. Bridges Bros. Trucking*, 823 F.3d 382, 388–89 (6th Cir. 2016).

<sup>99</sup> *Holzappel v. Town of Newburgh, N.Y.*, 145 F.3d 516, 524 (2d Cir. 1998).

<sup>100</sup> 29 C.F.R. § 785.14.

is controlled by the employer. In all of these cases waiting is an integral part of the job. The employee is engaged to wait.<sup>101</sup>

The FLSA regulations define time an employee is “off duty” and therefore “waiting to be engaged” as follows:

(a) General. Periods during which an employee is completely relieved from duty and which are long enough to enable him to use the time effectively for his own purposes are not hours worked. He is not completely relieved from duty and cannot use the time effectively for his own purposes unless he is definitely told in advance that he may leave the job and that he will not have to commence work until a definitely specified hour has arrived. Whether the time is long enough to enable him to use the time effectively for his own purposes depends upon all of the facts and circumstances of the case.

(b) Truck drivers; specific examples. A truck driver who has to wait at or near the job site for goods to be loaded is working during the loading period. If the driver reaches his destination and while awaiting the return trip is required to take care of his employer's property, he is also working while waiting. In both cases the employee is engaged to wait. Waiting is an integral part of the job. On the other hand, for example, if the truck driver is sent from Washington, DC to New York City, leaving at 6 a.m. and arriving at 12 noon, and is completely and specifically relieved from all duty until 6 p.m. when he again goes on duty for the return trip the idle time is not working time. He is waiting to be engaged.<sup>102</sup>

### 3. On-call time

FLSA regulations differentiate between compensable on-call time and non-compensable on-call time as follows:

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while “on call”. An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.<sup>103</sup>

**Example:** A Santa Fe car wash owner required his workers to clock in and then clock out when there were no cars to wash, but required them to stay on the premises even when they were clocked out. The workers must be compensated for the time they are required to wait for cars to enter the car wash.

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<sup>101</sup> 29 C.F.R. § 785.15.

<sup>102</sup> 29 C.F.R. § 785.16.

<sup>103</sup> 29 C.F.R. § 785.17.

#### 4. Travel time

Whether or not travel time is compensable working time depends on the kind of travel involved and the start and end points of the travel.<sup>104</sup>

a. Travel from job site to job site

Travel during the work day from job site to job site is generally compensable work time. As the FLSA regulations explain:

Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.<sup>105</sup>

b. Travel from home to work

Normal travel from home to work is not work time. As the FLSA regulations explain:

An employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment. This is true whether he works at a fixed location or at different job sites. Normal travel from home to work is not worktime.<sup>106</sup>

The New Mexico Court of Appeals recently affirmed that under the MWA, travel from workers' "homes to one job site and back each day" is not compensable time, absent an agreement to the contrary.<sup>107</sup>

c. Travel to job site from location other than home

The FLSA and state law diverge on the issue of travel to a job site from a non-home location. Under the FLSA, there is an exclusion in the federal Portal-to-Portal Act for time spent "traveling to and from the actual place of performance of the principal activity" at the beginning

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<sup>104</sup> 29 C.F.R. § 785.33.

<sup>105</sup> 29 C.F.R. § 785.38.

<sup>106</sup> 29 C.F.R. § 785.35.

<sup>107</sup> *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶¶ 6, 14, 16, 355 P.3d 845, 847, 849–50.

and end of the workday.<sup>108</sup> The MWA does not have such exclusions.<sup>109</sup> Therefore, time that would be excluded under the Portal-to-Portal Act under the FLSA is covered under the MWA and the WPA. Therefore, you must apply the WPA and MWA. There is no state-level exclusion on this issue.

This issue frequently arises in the agricultural worker or oilfield worker contexts. Often workers must meet at a central location to be driven to the job site. Sometimes, the job site is several hours away from the central location. Under the FLSA, this travel time would be excluded under the Portal-to-Portal Act. Under the MWA, it is compensable work time, considered travel from job site to job site, which is discussed above.

d. Home to work in emergency situations

An emergency call outside of normal work hours may or may not be work time, depending on the work location. As the FLSA regulations explain:

There may be instances when travel from home to work is [compensable time]. For example, if an employee who has gone home after completing his day's work is subsequently called out at night to travel a substantial distance to perform an emergency job for one of his employer's customers all time spent on such travel is working time.<sup>110</sup>

Therefore, an emergency call to report somewhere other than the regular place of business is compensable time. The FLSA regulations go on to state that the law is unclear on whether an emergency call to report to the regular place of business is work time. For purposes of LRD enforcement, an emergency call to report to the regular place of business will be considered non-compensable home-to-work travel absent additional facts indicating that the employer agreed to pay for that time.

e. Home to work on special one-day assignment in another city

A special assignment to a work location away from the regular place of business is generally compensable time, except for travel to the airport or train station, and except for meal times. As the FLSA regulations explain:

A problem arises when an employee who regularly works at a fixed location in one city is given a special 1-day work assignment in another city. For example, an employee who works in Washington, DC, with regular working hours from 9 a.m. to 5 p.m. may be given a special assignment in New York City, with instructions to leave Washington at 8 a.m. He arrives in New York at 12 noon, ready for work. The special assignment is completed at 3 p.m., and the employee arrives back in

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<sup>108</sup> 29 U.S.C. § 254(a)(1).

<sup>109</sup> *Segura*, 2015-NMCA-085, ¶ 9, 355 P.3d at 848 (“[T]he exclusions in the Portal-to-Portal Act are completely absent from the MWA. There being no analogue in the MWA, the interpretations of the Portal-to-Portal Act in case law are unhelpful.”).

<sup>110</sup> 29 C.F.R. § 785.36.

Washington at 7 p.m. Such travel cannot be regarded as ordinary home-to-work travel occasioned merely by the fact of employment. It was performed for the employer's benefit and at his special request to meet the needs of the particular and unusual assignment. It would thus qualify as an integral part of the "principal" activity which the employee was hired to perform on the workday in question; it is like travel involved in an emergency call (described in § 785.36), or like travel that is all in the day's work (see § 785.38). All the time involved, however, need not be counted. Since, except for the special assignment, the employee would have had to report to his regular work site, the travel between his home and the railroad depot may be deducted, it being in the "home-to-work" category. Also, of course, the usual meal time would be deductible.<sup>111</sup>

f. Summary of tips for investigating travel time cases

When analyzing a travel time case, ask:

- Was the employee instructed to report to a set meeting point in order to travel to the job site?
- Was the travel from home to work an emergency, or simply an ordinary commute?
- Was the travel between job site to job site?
- Was there an agreement between the employer and employee that the employee would be compensated for ordinary travel time from home to work?

If the answer is "yes" to any of the above, then the travel time is likely compensable work time.

## **5. Preparatory and concluding activities**

The FLSA and state law diverge on the issue of preparatory and concluding activities, such as time spent changing into or out of a uniform, washing up, or waiting in line for a security screening at the end of the shift. Under the FLSA, the federal Portal-to-Portal Act excludes tasks like these because they are not considered principal work activities.<sup>112</sup> The MWA does not have such exclusions.<sup>113</sup> Therefore, preparatory and concluding activities that would be excluded under the Portal-to-Portal Act under FLSA are covered under the MWA and the WPA.

This issue frequently arises in jobs that:

- Require workers to spend time at work putting on a uniform or protective gear,
- Involve messy or hazardous work, requiring the worker to wash or change clothes before leaving for the day,

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<sup>111</sup> 29 C.F.R. § 785.37.

<sup>112</sup> 29 C.F.R. § 785.34.

<sup>113</sup> *Segura*, 2015-NMCA-085, ¶ 9, 355 P.3d at 848 ("[T]he exclusions in the Portal-to-Portal Act are completely absent from the MWA. There being no analogue in the MWA, the interpretations of the Portal-to-Portal Act in case law are unhelpful.").

- Require workers to undergo loss-prevention bag checks before they can leave the premises, or
- Require workers to wait on-site to settle up at the end of a shift, such as a cashier waiting for her drawer to be counted or a waiter waiting to turn in cash and reconcile tips.

When analyzing a case involving preparatory or concluding activities, consider whether the worker had a choice to engage in the activities on the work premises or not. A worker who could have put on his uniform at home is not engaged in compensable work time just because he chose to do so at work. However, a worker who must leave his uniform at work does not have a choice, just as a worker who must stand in line for a bag check at the conclusion of the shift has no choice but to wait on the premises.

## 6. Short breaks

Short breaks are compensable work time. As the FLSA regulations explain:

Rest periods of short duration, running from 5 minutes to about 20 minutes, are common in industry. They promote the efficiency of the employee and are customarily paid for as working time. They must be counted as hours worked. Compensable time of rest periods may not be offset against other working time such as compensable waiting time or on-call time.<sup>114</sup>

## 7. Meal periods

Meal periods are not compensable work time, as long as the employee spends the meal period engaged in activities that are predominantly for his own benefit, rather than activities that are predominantly for the benefit of his employer.<sup>115</sup> Factors relevant to this are:

- Whether the employee is called back to work before the meal time is complete.
- Whether the employee is free to engage in personal pursuits during the meal period.
- Whether the employee is required to remain on duty during the meal period, or whether he is simply on call.

When analyzing a case involving meal periods, consider whether the employee is completely free from duty. If a worker is mostly free from duty but experiences interruptions to return to

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<sup>114</sup> 29 C.F.R. § 785.18; *see also* *Sec'y U.S. Dep't of Labor v. Am. Future Sys., Inc.*, 873 F.3d 420, 428 (3d Cir. 2017) (upholding the break time regulation because it furthered the statutory purpose of maintaining “the minimum standard of living necessary for health, efficiency, and general well-being of workers”) (quoting 29 U.S.C. § 202(a)).

<sup>115</sup> *Lamon v. City of Shawnee, Kansas*, 972 F.2d 1145, 1155–56 (10th Cir. 1992); *Henson v. Pulaski County Sheriff Dep't*, 6 F.3d 531, 534 (8th Cir. 1993); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 64 (2d Cir. 1997); *Alexander v. City of Chicago*, 994 F.2d 333, 337 (7th Cir. 1993); *Havrilla v. United States*, 125 Fed. Cl. 454, 464 (2016); *Roy v. Cnty. of Lexington, S.C.*, 141 F.3d 533, 544–45 (4th Cir. 1998); *Bernard v. IBP, Inc.*, 154 F.3d 259, 264–66 (5th Cir. 1998); *Hill v. United States*, 751 F.2d 810, 814 (6th Cir. 1984).

duty, that particular meal period is compensable work time. This commonly arises in the following situations:

- A receptionist required to answer phone calls during the meal break.
- A restaurant worker taking a meal break in between busy periods, but still required to attend to customers who may arrive.

## **8. Sleep time**

Under certain conditions an employee is considered to be working even though some of his time is spent sleeping or in certain other activities.<sup>116</sup> This depends on the length of the shift, as explained below.

### **a. Less than 24-hour duty**

The FLSA regulations on sleep time are derived from the concepts of being “engaged to wait” versus “waiting to be engaged,” which are discussed above. As the FLSA regulations explain:

An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. It makes no difference that she is furnished facilities for sleeping. Her time is given to her employer. She is required to be on duty and the time is worktime.<sup>117</sup>

### **b. Duty of 24 hours or more**

The FLSA regulations provide for reaching an agreement to exclude sleep time when the shift is longer than 24 hours, as provided below:<sup>118</sup>

(a) General. Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night's sleep. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch periods constitute hours worked.

(b) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep, the entire period must be counted. For enforcement purposes, the Divisions have adopted the rule that if the

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<sup>116</sup> 29 C.F.R. § 785.20.

<sup>117</sup> 29 C.F.R. § 785.21.

<sup>118</sup> 29 C.F.R. § 785.22 (citations omitted).

employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time.

c. Employee residing on employer's premises or working at home

The FLSA regulations provide for certain exclusions from compensable work time when an employee resides on the employer's premises or works from home, as follows:<sup>119</sup>

An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own. It is, of course, difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted. This rule would apply, for example, to the pumper of a stripper well who resides on the premises of his employer and also to a telephone operator who has the switchboard in her own home.

## **9. Training time**

Training time generally is compensable work time. As the FLSA regulations explain:

The training is directly related to the employee's job if it is designed to make the employee handle his job more effectively as distinguished from training him for another job, or to a new or additional skill. For example, a stenographer who is given a course in stenography is engaged in an activity to make her a better stenographer. Time spent in such a course given by the employer or under his auspices is hours worked. However, if the stenographer takes a course in bookkeeping, it may not be directly related to her job. Thus, the time she spends voluntarily in taking such a bookkeeping course, outside of regular working hours, need not be counted as working time. Where a training course is instituted for the bona fide purpose of preparing for advancement through upgrading the employee to a higher skill, and is not intended to make the employee more efficient in his present job, the training is not considered directly related to the employee's job even though the course incidentally improves his skill in doing his regular work.<sup>120</sup>

There are two limited exceptions to this rule.

a. Independent training

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<sup>119</sup> 29 C.F.R. § 785.23.

<sup>120</sup> 29 C.F.R. § 785.29.

If an employee on his own initiative attends an independent school, college, or independent trade school after hours, the time is not hours worked for his employer even if the courses are related to his job.<sup>121</sup>

b. Training programs, lectures, and meetings

Attendance at lectures, meetings, training programs, and similar activities need not be counted as working time if the following four criteria are met:

- (a) Attendance is outside of the employee's regular working hours;
- (b) Attendance is in fact voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee's job; and
- (d) The employee does not perform any productive work during such attendance.<sup>122</sup>

Attendance is not voluntary if it is required by the employer. It is not voluntary in fact if the employee is given to understand or led to believe that his present working conditions or the continuance of his employment would be adversely affected by nonattendance.<sup>123</sup>

The FLSA regulations also note a second possible exception in this area:<sup>124</sup>

There are some special situations where the time spent in attending lectures, training sessions and courses of instruction is not regarded as hours worked. For example, an employer may establish for the benefit of his employees a program of instruction which corresponds to courses offered by independent bona fide institutions of learning. Voluntary attendance by an employee at such courses outside of working hours would not be hours worked even if they are directly related to his job, or paid for by the employer.

## **10. Try-out time (skills-testing/interviews vs. work)**

In some situations, an employer may wish to have a prospective employee exhibit his skills, such as typing, shorthand, cooking, or operation of machinery, before employment. If this "skills testing" is done in a mock environment solely for the purpose of demonstrating an aptitude or skill, then this is generally not compensable time. However, if the skills are tested by performing the every-day work duties of the employer, and the employer's business operations are benefitted by the performance, then the employer has actually "suffer[ed] or permit[ed]" work for which the employer receives a benefit in the business operation, and which is compensable.

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<sup>121</sup> 29 C.F.R. § 785.30.

<sup>122</sup> 29 C.F.R. § 785.27.

<sup>123</sup> 29 C.F.R. § 785.28.

<sup>124</sup> 29 C.F.R. § 785.31.

To evaluate whether the try-out time constituted non-compensable “skills testing” for interview purposes or compensable “work,” consider:

1. Whether the time is, in fact, training as opposed to an interview or test.
  - Training is generally compensable work-time.
2. Whether the employee is working and producing useful work alongside other employees, versus an interviewee who produces no productive work for the employer and simply demonstrates some skills in a mock environment.
  - For example, a sushi chef working the lunch shift cooking meals for customers is performing compensable work as an employee, irrespective of how the employer chooses to characterize the relationship, whereas a sushi chef who makes a variety of sushi rolls that will not be served to customers, solely to demonstrate to the employer his aptitude for the job, has likely only performed skills testing in an interview setting.

## **F. REQUIRED RECORDS**

### **1. Written wage receipt**

Each pay period, the wage laws require an employer to provide an employee a written wage receipt, as follows:

An employer shall provide an employee with a written receipt that identifies the employer and sets forth the employee's gross pay, the number of hours worked by the employee, the total wages and benefits earned by the employee and an itemized listing of all deductions withheld from the employee's gross pay.<sup>125</sup>

To determine compliance with this provision, be sure the following criteria are met:

- The employer has provided the employee a wage receipt with each wage payment.
- The wage receipt contains:
  - The number of hours worked by the employee that pay period
  - The total wages earned by the employee that pay period
  - The total benefits earned by the employee that pay period
  - An itemized listing of all deductions withheld from the employee’s gross pay that pay period
- The information on the wage receipt is accurate (i.e. the hours printed reflect hours actually worked, wages paid reflect wages actually paid)

### **2. Time and pay records**

New Mexico’s wage statutes and other laws the Department of Workforce Solutions enforces require employers to maintain accurate time records of employees’ work.

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<sup>125</sup> NMSA 1978 § 50-4-2(B).

NMSA 1978 Section 50-4-9(A) states: “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.” NMSA 1978 Section 50-4-16 states:

Every employer to whom this act applies shall be required to keep a time record showing the number of hours each make employee worked each day.

Such record shall be open at all reasonable hours to the inspection of the state labor commissioner [director of the labor and industrial division], his agents or agent, record of which is required to be kept as herein provided for.<sup>126</sup>

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<sup>126</sup> New Mexico’s wage and hour statutes are not alone in requiring employers to maintain accurate payroll records. For example, Section 11.3.400.401 NMAC, a regulation promulgated to administer New Mexico’s Unemployment Compensation Law, provides:

Each employing unit shall keep true and accurate employment and payroll records which shall include, with reference to the employing unit the name and correct address of such employing unit, and the name and correct address of each branch or division or establishment operated, owned or maintained by such employing unit at different locations in New Mexico, all disbursements for services rendered to the employing unit; and with reference to each and every individual performing services for it, the following information:

- (1) the individual’s name, address and social security number;
- (2) the dates on which the individual performed services for such employing unit, including beginning and ending dates, and the state or states in which such services were performed;
- (3) the total amount of wages paid to the individual for each separate payroll period, date of payment of said wages, and amounts or remuneration paid to the individual for each separate payroll period other than “wages”, as defined in the Unemployment Compensation Law;
- (4) whether, during any payroll period, the individual worked less than full time, and, if so, the hours and dates worked;
- (5) the reasons for separation of the individual.

Subsection (F) of this regulation states that the above records “shall be preserved for a period of at least four years in addition to the current calendar year.”

Even apart from the wage statutes, all New Mexico employers are therefore required to maintain payroll records for at least four years, excluding the current calendar year.

### 3. Determining work time when records are inaccurate or nonexistent

It is the employer's responsibility to keep true and accurate records of hours worked and wages paid to each employee.<sup>127</sup> Pursuant to regulation, if the employer fails to maintain accurate time records, the wage claimant's credible testimony or other credible evidence concerning his hours worked is used to calculate wages due.<sup>128</sup>

The United States Supreme Court's decision in *Anderson v. Mt. Clemens Pottery Co.* is the foundational FLSA case on how to calculate work hours when the employer has not maintained accurate records.<sup>129</sup> It explains the policy rationale behind relying on employee estimates. The relevant passages are quoted below to illustrate why it is important, from an enforcement perspective, to use employee estimates when the employer has failed to comply with the legal obligation to keep employment records.

When the employer has kept proper and accurate records the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

The employer cannot be heard to complain that the damages lack the exactness and precision of measurement that would be possible had he kept records in accordance with the requirements of [the FLSA]. And

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<sup>127</sup> NMSA 1978 §§ 50-4-9(A), 50-4-16.

<sup>128</sup> 11.1.4.115 NMAC; *see also* *N.M. Dep't of Labor v. A.C. Electric, Inc.*, 1998-NMCA-141, ¶ 18, 125 N.M. 779, 783, 965 P.2d 363, 367 (noting that the remedial nature of the FLSA and recordkeeping demands it places on employers weigh against making burden of proof an impossible hurdle for employees).

<sup>129</sup> *State ex rel. State Labor Comm'r v. Goodwill Indus.*, 1970-NMSC-163, ¶ 5, 82 N.M. 215, 217, 478 P.2d 543, 545.

even where the lack of accurate records grows out of a bona fide mistake as to whether certain activities or non-activities constitute work, the employer, having received the benefits of such work, cannot object to the payment for the work on the most accurate basis possible under the circumstances. Nor is such a result to be condemned by the rule that precludes the recovery of uncertain and speculative damages. That rule applies only to situations where the fact of damage is itself uncertain. But here we are assuming that the employee has proved that he has performed work and has not been paid in accordance with the statute. The damage is therefore certain. The uncertainty lies only in the amount of damages arising from the statutory violation by the employer. In such a case “it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.” It is enough under these circumstances if there is a basis for a reasonable inference as to the extent of the damages.<sup>130</sup>

Based on this rationale and case law applying it to workers’ burdens under the MWA, LRD relies on this framework in those situations where the best available evidence of how much a wage claimant is owed consists of the wage claimant’s credible recollection of the hours worked and wages paid or unpaid.<sup>131</sup> That said, you should always make reasonable inquiry of wage claimants and other sources as to the existence of alternate forms of proof related to the subject of damage calculation or hours worked.

## G. CASES INVOLVING CHECKS RETURNED FOR LACK OF FUNDS

When investigating a wage claim you may come across a situation where the wage claimant claims he/she went unpaid due to a bad or bounced paycheck—also known in the banking industry as a non-sufficient funds (NSF) check—issued to him/her by the employer. This section explains how to verify the wage claimant’s claim that the check was NSF.

As used in this section, the employer who wrote the check is the **drawer**, the bank from which the employer’s check is issued is the **drawee** bank, and the wage claimant who is paid in check form is the **payee**.

The distinction between a “bounced” check and a “bad” check is important because the marks on the check that indicate how the bank handled it will differ. Generally, with a bounced check, the notation on the check itself is enough for you to confirm that the wage claimant was not paid. With an alleged bad check, however, you may need to take additional steps to verify with the bank and the employer whether the check has insufficient funds.

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<sup>130</sup> *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946) (citations omitted).

<sup>131</sup> *See Goodwill Indus.*, 1970-NMSC-163, ¶ 5, 82 N.M. at 217, 478 P.2d at 545 (shifting the burden to the employer to negate an employer-employee relationship once a plaintiff establishes that work was performed for the employer). *See also A.C. Electric, Inc.*, 1998-NMCA-141, ¶ 18, 125 N.M. at 783, 965 P.2d at 367.

**Bounced checks:** A “bounced” check means a payroll or personal check issued by an employer to a worker where the worker deposits the check into his or her own bank account for processing and the check bounces because the issuer doesn’t have enough money in his or her account to cover the check by the time it clears. A payee who deposits a check into his own bank account for processing will incur a marginal fee (between \$20 and \$40) from his banking institution when a check bounces due to insufficient funds. After processing, the bank returns the bounced check to the payee.

Most banks will return the bounced check back to the payee, i.e. the worker, after processing. In addition, most banks will provide a mark on the front or back of the check indicating the check was returned due to non-sufficient funds. This mark by the bank is sufficient to verify the check did not clear and is void due to insufficient funds. When the worker provides you a check with this mark, you do not need to request any more information from the worker to prove that the check bounced.

If a worker receives and deposits a check from his employer and it bounces, he will owe a fee to his bank for returning the check, in addition to having the problem of recovering the original wages due. LRD should consider any such bank fee the worker incurs to be a violation of the WPA provision concerning deductions (see Section I.A.7). When rendering a decision in favor of a wage claimant, you should include a separate amount in damages to account for the bank fee incurred by the wage claimant because of the employer’s bounced check. To verify the amount of the fee, ask the wage claimant to obtain a copy of the bank record containing the fee.

**Bad checks:** A “bad” check means

- a payroll or personal check issued by an employer to a worker
- where the worker attempts to cash the check at the drawee bank but
- is unable to cash it because he or she is told by the drawee bank that the check cannot be honored because the drawer’s account has insufficient funds or does not exist.

A worker who attempts to cash an NSF check directly with the employer’s drawee bank will not incur any fee. Instead, in many cases the drawee bank will merely point out to the payee that the drawer’s account has insufficient funds and return the NSF check to the payee without any processing. Since the bank does not process the “bad” check, it often does not have any special marks from the bank confirming it is void due to insufficient funds.

When the wage claimant claims he was paid with a bad check, you should obtain further information from the wage claimant and/or drawee bank to establish the check is bad and no longer payable. You should be able to call the drawee bank to confirm that the check is bad. Document in the case file the evidence you considered to confirm the void and insufficient funds status of the check.

**Example:** Julian is employed by Karl as a laborer for Karl’s sole proprietorship home repair business known as Karl’s Construction. Julian agrees to a specified hourly rate and a biweekly pay schedule. Karl pays Julian in cash following Julian’s first pay period on the job. After Julian’s second pay period, Karl pays Julian with a personal check drawn from Karl’s personal checking account with ABC Bank. Because Julian does not have a bank account of his own to

deposit Karl's personal check, he opts to visit ABC Bank to cash the personal check issued to him by Karl. The teller at ABC Bank notifies Julian they cannot honor Karl's personal check because insufficient funds are available in Karl's account. The teller returns the check to Julian and explains that he should consult with Karl about the account's insolvency and the gridlock that will continue until the account has sufficient funds. Karl tells Julian the account should have sufficient funds by the end of the next pay period. Subsequently, Julian visits ABC Bank after his third pay period and the teller explains that Karl closed the account several days ago. The teller returns the check to Julian without any special marking indicating its NSF status. Julian calls and text messages Karl but Karl does not answer or return Julian's inquiries regarding the bad check and unpaid wages. Julian files a wage claim with LRD a month later and submits a copy of the bad check. Because there is no special marking on the check attesting to its dishonored status, you explain to Julian that you will need more proof to verify the check is indeed a bad check. Consequently, you call the drawee bank to request information and/or a written statement that confirms the account on which the check was drawn is closed and therefore the check is void. You place a copy of the letter from the drawee bank and copies of the front and back of the bad check in the wage claim file.

## **H. PROTECTIONS FOR WORKERS WHO ASSERT WAGE CLAIMS**

The MWA and WPA contain protections for wage claimants who assert wage claims that are designed to encourage wage claimants to come forward to report violations to LRD.

### **1. Unlawful retaliation under the MWA**

NMSA 1978 Section 50-4-26.1 prohibits employers from retaliating against employees, as follows:

It is a violation of the Minimum Wage Act for an employer or any other person to discharge, demote, deny promotion to or in any other way discriminate against a person in the terms or conditions of employment in retaliation for the person asserting a claim or right pursuant to the Minimum Wage Act or assisting another person to do so or for informing another person about employment rights or other rights provided by law.

The MWA protects a broad range of activities, including:

- Discussing possible violations of the MWA with the employer, whether mistakenly or not
- Calling LRD
- Filing a claim with LRD
- Filing a private lawsuit
- Discussing rights under the MWA with another employee
- Helping another worker file a claim under the MWA
- Helping another worker discuss possible violations of the MWA with the employer

The employee is protected regardless of whether he/she mentions the MWA or legal protections. For example, an employee discussing concerns about unpaid off-the-clock work, tip

misappropriation, or late paychecks is covered even if the employee does not state, or is unaware, that the law prohibits these practices. The employee is also protected if the employee asserts that a particular action violates the law but is mistaken.

It is unlawful for the employer to take the following actions against an employee for exercising any of the above protected rights:

- Fire the employee
- Demote the employee
- Deny promotion to the employee
- Reduce the employee's hours
- Assign the employee to lesser duties, a worse work schedule, or any other employment action that a reasonable person would view as less favorable

It is unlawful for an employer to take action against an employee whom the employer *believes* has engaged in any protected activity, even if the employee actually hasn't. For example, an employer may suspect Employee A and Employee B of filing wage claims with LRD, when in fact only Employee B filed a claim. If the employer fires both Employee A and Employee B, Employee A has a retaliation claim even though she didn't actually engage in protected activity. This is because the employer's intent was to fire Employee A for engaging in protected activity.

The above is a non-exhaustive list of possible protected activities and retaliatory actions. This means other actions not listed may fall within these categories. You should evaluate the facts of every case to determine whether an employee may have experienced retaliation for engaging in protected activity.

Courts in New Mexico analyze claims of discrimination using a three-part burden-shifting framework.<sup>132</sup> This is the same standard used to analyze retaliation claims in the FLSA context.<sup>133</sup>

First, the wage claimant must make out a "prima facie" case of retaliation. This means the claimant must allege that he/she engaged in protected activity, experienced adverse action by the employer afterwards, and that there was a "causal connection" between his/her protected activity and the employer's adverse action. The causal connection may be either direct or circumstantial.

A "direct" causal connection is a direct statement by the employer or supervisor that the adverse action was taken because the employee engaged in protected activity. For example, "I'm so angry about that wage claim you filed. If you don't like how we do things here, then you can get out of here."

A "circumstantial" causal connection can be something that gives you good reason to believe the employer's motive was retaliatory, such as a very close proximity in time between the protected activity and adverse employment action. For example, the employer fired the employee, without

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<sup>132</sup> *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 27, 130 N.M. 238, 247, 22 P.3d 1188, 1197.

<sup>133</sup> *Pacheco v. Whiting Farms, Inc.*, 365 F.3d 1199, 1206–07 (10th Cir. 2004).

giving a reason, the same week the employee asked why the employer did not pay overtime wages.

Then, the burden shifts to the employer to offer a “legitimate non-retaliatory reason” for the adverse employment action. For example, when you ask the employer his reasons, the employer may have no explanation at all, or may admit the retaliatory motive. If this happens, then there is no further proof necessary to establish the retaliation claim.

Finally, if the employer offers a legitimate non-retaliatory reason, then the burden shifts back to the employee to prove that the employer’s reason was a pretext. For example, if the employer claims that he fired the employee for arriving to work five minutes late, but not because the employee asked about overtime, the employer’s reason may be a “pretext” if the evidence shows that several other workers also arrived to work five minutes late that week.

## **2. Undocumented workers**

NMSA 1978 Section 50-4-8 states, “It shall not be a defense to any action brought pursuant to this section that the plaintiff or complainant is an undocumented worker. It is not intended by this section to create any right to collect unemployment compensation nor to mandate any wage rate.”

It is irrelevant in any wage claim whether the wage claimant is an undocumented worker. Undocumented workers have exactly the same right to receive wages in compliance with the WPA and the MWA as any other worker.

During your investigation, you should not seek any information relevant to immigration status, such as employee tax returns, green cards, social security cards, passports, or other similar documents.

If an employer raises this issue, you should inform the employer it is irrelevant. If an employer threatens to report the employee to immigration due to his immigration status, you should send the employer a letter explaining that any such action violates the anti-retaliation provisions of the statute. A form letter for this purpose appears at Appendix 16.

## **I. CRIMINAL ENFORCEMENT FOR VIOLATIONS OF THE WPA AND THE MWA**

Although most of LRD’s enforcement activities take place through administrative decisions and civil lawsuits, the New Mexico wage laws provide for criminal liability for violations of the WPA or the MWA.

An employer can be subject to criminal prosecution for violating any provision of the WPA. Section 50-4-10 outlines criminal penalties that can be enforced under the WPA. Once convicted of a violation, an employer is guilty of a misdemeanor and will be sentenced according to state law.<sup>134</sup> If convicted a second time, the employer is once again guilty of a misdemeanor, but also

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<sup>134</sup> NMSA 1978 § 50-4-10(A).

will be fined “no less than two hundred fifty dollars (\$250) and not more than one thousand dollars (\$1,000) for each offense for which the person is convicted, which fine shall not be suspended, deferred or taken under advisement.”<sup>135</sup> Additionally, “[e]ach occurrence of a violation for which a person is convicted is a separate offense. Multiple violations arising from transactions with the same person or multiple violations arising from transactions with different people shall be considered separate occurrences.”<sup>136</sup> If the violating employer is a corporation, the fine will be assessed against that corporation.<sup>137</sup>

Employers can be subject to criminal prosecution for violating any provision of the MWA. Section 50-4-26(A) provides that an employer who violates any of the provisions is guilty of a misdemeanor and shall be sentenced pursuant to the provisions of Section 31-19-1 NMSA 1978 (which provides for fines and jail time).

LRD investigates violations of the wage laws, and may refer criminal acts to a district attorney to further investigate and prosecute.<sup>138</sup>

LRD’s case files and investigations may form the basis of criminal prosecutions. When you find potential criminal liability, consult with your supervisor, who may refer the matter to a district attorney for criminal prosecution. (See template letter at Appendix 33 and additional discussion of the process to follow at Section IV.R, “Employer owes more than \$10,000: Referring to DA or Legal Department.”)

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<sup>135</sup> NMSA 1978 § 50-4-10(B).

<sup>136</sup> NMSA 1978 § 50-4-10(C).

<sup>137</sup> NMSA 1978 § 50-4-10(D).

<sup>138</sup> NMSA 1978 § 50-4-8(B).

## II. THE EMPLOYMENT RELATIONSHIP

For New Mexico's wage laws to apply, there must be an employer-employee relationship. This requires an "employer" who "employs" an "employee." The terms "employ," "employer," and "employee" are defined broadly in the wage laws, as explained below.

### A. DEFINITION OF "EMPLOYER"

The New Mexico wage laws define the term "employer" as follows:

- **"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 person in this state<sup>139</sup>
- **"employer"** includes any individual, partnership, association, corporation, business trust, legal representative or any organized group of persons employing one or more employees at any one time<sup>140</sup>

The FLSA definition is as follows:

- **"Employer"** includes any person acting directly or indirectly in the interest of an employer in relation to an employee<sup>141</sup>

These definitions are similar in that all three reference either a "person" or an "individual" as someone who could qualify as an employer. This means a human being can be an employer under any of the three statutes. However, the definitions are dissimilar in that the New Mexico wage laws enumerate business entities that might also constitute employers. There is no legislative history or judicial interpretation that explains why the New Mexico Legislature adopted a unique definition of "employer" several years after the FLSA was passed rather than adopting the FLSA definition. Although the language of the two laws is different, there do not appear to be substantive legal differences in terms of which people or entities may be considered "employers" under either law. Recognizing that the New Mexico wage laws do enumerate individual employers as one type of employer among many, LRD will hold individual employers liable for wage violations in appropriate circumstances. To determine the appropriate circumstances, LRD will apply the four-factor economic reality test discussed below, and ultimately determine whether holding an individual employer liable will serve the remedial purposes of the New Mexico wage laws, as discussed below.

### B. DEFINITION OF "EMPLOY" IN THE WAGE LAWS: "SUFFER OR PERMIT TO WORK"

The term "employ" is defined in the MWA and regulations interpreting the WPA as follows:

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<sup>139</sup> NMSA 1978 § 50-4-1(A).

<sup>140</sup> NMSA 1978 § 50-4-21(B).

<sup>141</sup> 29 U.S.C. § 203(d).

- “**employ**” includes suffer or permit to work<sup>142</sup>

This definition is identical to the FLSA definition:

- “**Employ**” includes to suffer or permit to work<sup>143</sup>

Because these definitions are identical, and in the absence of any New Mexico case law to the contrary, LRD relies on FLSA case law and regulations to interpret the phrase “suffer or permit to work.” This is consistent with New Mexico Court of Appeals decisions providing that since these definitions are identical, FLSA decisions concerning the definition of the term “employ” are persuasive authority when interpreting the MWA. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

“Suffer or permit to work” means knowing or having reason to know that work is being performed.<sup>144</sup> The United States Supreme Court has held that the phrase “suffer or permit to work” is “the broadest definition [of employ] that has ever been included in any one act,” and that a “broader or more comprehensive coverage of employees within the stated categories would be difficult to frame.”<sup>145</sup> The Tenth Circuit Court of Appeals has held in the FLSA context that “[t]he ‘striking breadth’ of [the term ‘employ’] ‘stretches the meaning of ‘employee’ to cover some parties who might not qualify as such under a strict application of traditional agency principles.’”<sup>146</sup> The purpose of such a broad definition is “to prevent the circumvention of the [FLSA] or any of its provisions through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.”<sup>147</sup> The Supreme Court and Courts of Appeals have several times since reaffirmed the holding that “suffer or permit to work” is the broadest possible definition of the term “employ.”<sup>148</sup>

## C. ECONOMIC REALITY TEST

Federal courts apply the “economic reality test” to determine whether an employment relationship exists under the FLSA, i.e. whether an employer has “suffered or permitted” the work of an employee. The New Mexico Court of Appeals in *Garcia v. Am. Furniture Co.*

<sup>142</sup> NMSA 1978 § 50-4-21(A); 11.1.4.7(D) NMAC.

<sup>143</sup> 29 U.S.C. § 203(g).

<sup>144</sup> *See, e.g., Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969).

<sup>145</sup> *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945).

<sup>146</sup> *Johnson v. Unified Gov’t of Wyandotte Cnty./Kan. City, Kan.*, 371 F.3d 723, 729 (10th Cir. 2004) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992)).

<sup>147</sup> S. 2475, 75th Cong. § 6(a) (as reported by Senate May 24, 1937); *see also Walling v. American Needlecrafts, Inc.*, 139 F.2d 60, 64 (6th Cir. 1943) (noting why the background and legislative history of the FLSA’s statutory definition of “employ” affords persuasive evidence that Congress meant to include employment relationships that were not within the traditional common-law definitions of employee).

<sup>148</sup> *See, e.g., Nationwide Mut. Ins. Co.*, 503 U.S. at 326; *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947); *Hart v. Rick’s Cabaret Int’l, Inc.*, 967 F. Supp. 2d 901, 911 (S.D.N.Y. 2013); *Real v. Driscoll Strawberry Assocs.*, 603 F.2d 748, 754 (9th Cir. 1979).

adopted the FLSA “economic reality” test to determine whether an employment relationship exists under New Mexico wage laws.<sup>149</sup> Neither that case nor any New Mexico appeals court has ruled on a dispute over whether economic reality factors should be used to determine “employer” status. However, the New Mexico Court of Appeals adopted the economic reality test in *Garcia* because the definition of “employ” is almost identical in both New Mexico and federal law: “[to] suffer or permit to work.” The definitions of “employee” and “employer” in the New Mexico wage laws both turn on whether work was suffered or permitted. Therefore, absent any guidance to the contrary from New Mexico appellate courts, it is appropriate to use the FLSA economic reality test to determine whether a worker’s work was “suffered or permitted” and whether a particular person or business entity “suffered or permitted” work. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

Courts have developed several different “economic reality” tests to decide whether there is an employment relationship between two or more parties. This Manual discusses three common versions of the economic reality test, which are used to:

1. Decide whether a worker is an employee or independent contractor.
2. Identify corporate and individual employers.
3. Identify the employer or joint employer in contracting relationships.

Each of these three tests requires analyzing different sets of factors to reach a conclusion about the economic reality of the working relationship. The factors of each test are discussed in separate sections below. Although the relevant factors are different, many of the same principles of interpretation apply. Overall, the idea underlying each of the economic reality tests is to look at the facts and realities on the ground, and not to blindly accept technical concepts, contracts, subjective intents, or labels given by putative employers to their workers.<sup>150</sup> This means, for example, you should not accept without question the tax classification of a worker as a 1099 independent contractor, or a statement in a contract that a worker is an independent contractor, or even the worker’s or employer’s belief that the worker was an independent contractor, as evidence of independent contractor status. Instead, the focus is on the actual, objective economic relationship between the parties.<sup>151</sup> As a general rule, the more economically dependent workers are on their employers, and the clearer it is that they are not in business for themselves, the more likely a worker is an employee. As a general rule, the more a person or entity has the power, as a matter of economic reality, to set worker pay, hours, and other working conditions, the more likely that person or entity is responsible as an employer for paying wages owed under the New Mexico wage laws. General rules aside, the economic reality test should always be viewed through the lens of the remedial purpose of the New Mexico wage laws: to establish and

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<sup>149</sup> *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 17, 101 N.M. 785, 789, 689 P.2d 934, 938 (“In determining whether a person is an employee under the Minimum Wage Act ‘the ultimate issue is whether as a matter of “economic reality” the particular worker is an employee,” quoting *Weisel v. Sing. Joint Venture, Inc.*, 602 F.2d 1185, 1189 (5th Cir. 1979)).

<sup>150</sup> *Goldberg v. Whitaker House Coop.*, 366 U.S. 28, 33 (1961); *Real*, 603 F.2d at 755 (“Economic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA”).

<sup>151</sup> *Id.*

safeguard “minimum wage and overtime compensation standards which are adequate to maintain the health, efficiency and general well-being of workers.”<sup>152</sup> The sections below describe the factors that you should consider in determining the economic reality of the working relationship.

### **1. Economic reality test to identify individual and corporate employers**

Under the economic reality test, an individual person is personally responsible as an “employer” for paying employees’ unpaid wages and damages if that person personally exercises sufficient control over employees and their working conditions. Because there are no New Mexico regulations or precedent in the MWA or WPA context outlining specific economic reality factors to apply in determining who an employer is, LRD will as a matter of policy apply generally accepted economic reality factors present in FLSA decisions. The four generally accepted economic reality factors to determine whether a person is liable for unpaid wages are whether the alleged employer:<sup>153</sup>

- (1) had the power to hire and fire employees,
- (2) supervised and controlled employee work schedules and conditions of employment,
- (3) determined the rate and method of payment, and/or
- (4) maintained employment records.

As with all of the economic reality tests, this is a “totality of circumstances” test.<sup>154</sup> This means a person may be an “employer” even if all of the factors are not met.<sup>155</sup> The “overarching concern is whether the alleged employer possessed the power to control the workers in question.”<sup>156</sup> This “does not require continuous monitoring of employees, looking over their shoulders at all times, or any sort of absolute control of one’s employees. Control may be restricted, or exercised only occasionally[.]”<sup>157</sup> Under the economic reality test, any business entity through which the individual employer operated to employ the workers is also jointly liable for wages.

Individual liability in the wage laws ensures employees actually get paid wages owed, and prevents employers from hiding behind the corporate form to escape their wage liability. For example, an owner of a corporation can close down the corporation, take all financial assets out of it, or declare corporate bankruptcy. This makes it near-impossible for employees to collect owed wages from the corporation. By providing that individual employers are liable for unpaid wages, the legislature has ensured that people who hire, supervise, and set the wages of employees can be held legally responsible for paying wages along with any business entity they are associated with.

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<sup>152</sup> NMSA 1978 § 50-4-19.

<sup>153</sup> See, e.g., *Gray v. Powers*, 673 F.3d 352, 355 (5th Cir. 2012); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999) (citing *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984)).

<sup>154</sup> *Herman*, 172 F.3d at 139.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

However, even if the economic reality factors are met as to a particular individual, it does not always serve the remedial purposes of the New Mexico wage laws to name an individual employer in your decision letter or court filings. The factors you should consider to determine whether to name an individually liable employer are discussed in subsection (b), below.

a. Case examples

There are hundreds of FLSA cases across the country applying the four-factor economic reality test to decide whether or not an individual is a legal employer responsible for paying wages to employees. To help you understand how to apply the four factors, two local cases are described below.

***Perez v. ZL Rest. Corp.*, 81 F. Supp. 3d 1062 (D.N.M. 2014):** Two restaurant employees sued the individual owner of the restaurant for back wages. The judge decided that the owner was individually liable as an employer under the economic reality test for the following reasons:

- *1<sup>st</sup> and 2<sup>nd</sup> factors: power to hire and fire and supervision and control.* “As the sole owner and operator of the restaurant, all managerial authority resided with [the owner]; he appears to have had exclusive control over personnel decisions and scheduling, evinced by the fact that he called the restaurant when he was not physically present to provide instructions, rather than delegating this responsibility.”<sup>158</sup>
- *3<sup>rd</sup> factor (determined the rate and method of payment).* The owner “was responsible for setting the amount and manner in which the Employees were paid, including the decision to set a fixed monthly salary, irrespective of the hours the Employees worked.”<sup>159</sup>
- *4<sup>th</sup> factor (maintained employment records).* The employer did not maintain any employment or payroll records. However, “although [the owner] evidently kept poor employment records, this fact does not alter the overall economic reality presented by the facts of this case: [the owner] employed [Employees] during the period in question.”<sup>160</sup>

***Solis v. Supporting Hands, LLC*, No. 11-406, 2013 WL 1897822 (D.N.M. Apr. 30, 2013):** The owner of Supporting Hands, LLC, which owned, operated, and managed nursing and rehabilitation institutions, was sued for back wages, involving claims that time records were altered and overtime not paid at time and one-half when employees worked second jobs. The judge relied on the following “economic reality” facts to decide that the owner was individually liable as an employer under the economic reality test:

- changed the employees’ time records, in violation of law
- offered to employ his employees in second jobs to avoid overtime compensation,
- decided, when he loaned employees money, to deduct those sums from their paychecks,

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<sup>158</sup> *Perez*, at 1071.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

- was directly involved in decision-making on Supporting Hands' behalf affecting employee compensation.

b. When to hold a corporation or individual liable as an employer in a decision letter

In your investigations, consider the context of the employment relationship to decide whether it is necessary to bring enforcement action against an individually liable employer. The decision to hold any person or company liable as an employer turns on the remedial purpose of the MWA or WPA, which is to ensure employees receive the wages they are owed. Therefore, it is not necessary to systematically name an individual employer by virtue of their meeting the economic realities test. In many instances naming an individual will not materially advance the remedial purpose of the MWA or WPA.

In situations where you have applied the economic reality test and found multiple employers, and at least one of them is a limited liability entity, you should consider whether a decision to name a particular person is likely to serve the remedial purpose of the statute: namely, to ultimately collect wages owed. For example, if the employee worked for a limited liability employer that was fairly substantial in size and in organizational structure, chances are the only individuals who would meet the economic reality test for individual liability are front-line supervisors or low/mid-level managers, since these are typically the people who exercise control over wages, working conditions, and other economic reality factors in such businesses. However, supervisors and low/mid-level managers are unlikely to have the financial resources to pay wages owed, and thus collection efforts would be generally futile. Additionally, these individuals do not have sufficient influence nor possess unilateral ability to shut down the business; take its assets; or declare bankruptcy; all of which, if possessed, would make collection of wages owed impossible. Where such risks are not apparent, and collection from the business entity alone is viable, electing to name these individuals would not serve the remedial purposes of the New Mexico wage laws.

In contrast, in a smaller company (or where there is no identifiable business entity), the only way to collect wages owed to the claimant may be to hold liable the individual owner or manager who exercised control over the economic reality factors. In a small limited liability entity, sole proprietorship, or partnership, it is important to identify the person who, as a matter of economic reality, exercised control over employee wages and working conditions, and to hold that person responsible for wages owed to employees. Generally speaking, an employee is at a greater risk of not recouping funds from a smaller business entity, sole proprietorship, or partnership unless the individual employers are named in the enforcement action.

This common sense approach to individual liability decisions in investigations into limited liability entities should by no means be construed as a blanket exception to individual liability. Rather, questions of individual liability should be considered and analyzed case-by-case. In situations where it is unusually difficult to determine whether or not an individual should be named, you are encouraged to consult with the Director, who may in turn consult with the Office of General Counsel to ensure consistency of application.

Your decision letters should lay out how any individually named employer meets the four-factor economic reality test for individual liability. If you pursue enforcement action in Metropolitan or

Magistrate Court, you should attach the form Memorandum of Law in Support of Finding of Individual Liability to your complaint, after first consulting with LRD Management who will defer to DWS Office of General Counsel for guidance on the continued legal validity of the memorandum and the strategic value of utilizing the memorandum in the particular instance (Appendix 41).

## **2. Joint employment**

The New Mexico wage laws use the words “every” and “any” to describe the people and entities that may be liable for a violation of the law. These broad terms indicate that an employee may have more than one employer. This is commonly called “joint employment.” Sometimes, there will be no dispute that an employee is working for two or more joint employers in a single job. For example, an individual owner of a corporate entity and the corporate entity itself may be joint employers of one employee in the same job. Both the individual and the corporation are each fully responsible for paying the employee in compliance with the New Mexico wage laws, although you may not always pursue a claim against both as outlined in the section above. In other cases, an employee may work for two different employers, and there may be a dispute about whether the two employers are “joint” employers versus operating separately. Joint employment typically arises in two forms: horizontal joint employment and vertical joint employment. These are discussed in the subsections below.

### **a. Horizontal joint employment**

The U.S. Department of Labor Field Operations Handbook contains an explanation of horizontal joint employment that is helpful as a guide in navigating this issue in the MWA context:<sup>161</sup>

In horizontal joint employment cases, the employee is employed by two or more employers, and the issue is whether these employers, because of their association with each other or other considerations, jointly employ the employee. The focus in a horizontal joint employment case is the relationship between the possible joint employers.

The FLSA regulation provides that a single worker may be “an employee to two or more employers at the same time.”<sup>162</sup> In such cases, the employee’s work for the joint employers during the workweek is considered as one employment, the hours worked for each employer are aggregated to determine the employee’s total hours worked for overtime purposes, and the joint employers are responsible, both individually and jointly, for FLSA compliance, including paying overtime compensation for all hours worked over 40 during the workweek. An employee has joint employers where the employee performs work which simultaneously benefits two or more employers or works for two or more employers at different times during the workweek and one of the following is present:

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<sup>161</sup> Section 10f03, *available at* <https://www.dol.gov/whd/FOH/index.htm>.

<sup>162</sup> 29 C.F.R. § 791.2(a).

- (1) There is an arrangement between the employers to share the employee's services (e.g., to interchange employees)
- (2) One employer is acting directly or indirectly in the interest of the other employer in relation to the employee
- (3) The employers are not completely disassociated with respect to the employment of a particular employee and share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer

**Facts to consider when assessing the relationship or degree of association between the possible joint employers**

The focus in most horizontal joint employment cases is the degree of association between the possible joint employers with respect to the employee.<sup>163</sup> In other words, the third scenario described above is the most common. Particular facts to consider when analyzing the degree of association between, and sharing of control by, the possible joint employers include:

- (1) Do the possible joint employers share some common ownership (i.e., one owns the other or they have the same owner)?
- (2) Do the possible joint employers share control over operations (i.e., hiring, firing, payroll, advertising, overhead costs)?
- (3) Are the possible joint employers' operations inter-mingled (i.e., is there one administrative operation for both employers, or the same person schedules and pays the employees no matter which employer they work for)?
- (4) Do the possible joint employers have any overlapping officers, directors, executives, or managers?
- (5) Does one possible joint employer supervise the work of the other?
- (6) Do the possible joint employers share supervisory authority for the employee?
- (7) Do the possible joint employers treat the employees as a pool of employees available to both of them?
- (8) Do the possible joint employers share clients or customers?
- (9) Are there any agreements between the possible joint employers?

These facts have been used by the U.S. Department of Labor and courts in horizontal joint employment cases, but they are not an all-inclusive list of evidence that is relevant to the analysis. Moreover, not all or even most of these facts need to be present for joint employment to exist. Horizontal joint employment exists when there is sufficient evidence that the two employers use the workers and their businesses for their mutual benefit. In many cases, the possible joint employers are separate legal entities and employ the employee at different locations; horizontal joint employment may exist in such situations.

If the employee's work for the two or more employers during the workweek is considered as one employment, then the employee's hours worked for all of the joint employers must be combined. The joint employers are responsible, both individually and jointly, for compliance with the

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<sup>163</sup> *Id.*

MWA, including paying at least the equivalent of minimum wage for all hours worked and paying overtime for all hours worked over 40 during a workweek.

For example, an employee may work for a total of 60 hours a week in two different locations of a restaurant business, each of which is separately incorporated, but under common control of the same owner. If there is a joint employment relationship, then the employee would be entitled to overtime for the 60 total hours of work. If there is no joint employment relationship, then the hours worked for each business would be tracked and paid separately.

If the employers act entirely independently of each other and are completely disassociated with respect to an employee who works for both of them, each employer may disregard all work performed by the employee for the other when determining its own responsibilities under the MWA.

b. Vertical joint employment

The U.S. Department of Labor Field Operations Handbook contains an explanation of vertical joint employment that is helpful in the MWA context, and is excerpted below:<sup>164</sup>

i. Intermediary employer

The term “intermediary employer” refers to an employer, such as a staffing agency, subcontractor, or FLC, who provides labor or workers to another employer.

ii. Possible joint employer

The term “possible joint employer” refers generally to the other entity that contracts with the intermediary employer to obtain labor, such as the end-employer, higher-tier contractor, client of the staffing agency, grower, or agricultural association.

*(1) Consider first whether an employment relationship exists between the intermediary employer and the possible joint employer*

The existence of a vertical joint employment relationship depends, as an initial matter, on whether the intermediary employer itself is an independent contractor or an employee of the possible joint employer. Where the intermediary employer is itself (or himself or herself if the intermediary is an individual) an employee of the possible joint employer, no joint employment inquiry is necessary or appropriate because the possible joint employer is the one employer of both the intermediary employer and the workers. Where the intermediary employer is not an employee (but is an independent contractor) of the possible joint employer or the question is a close one, a vertical joint employment analysis may be necessary. In the absence of clear, relevant New Mexico authority on this matter, and to ensure consistent policy on this issue, you should rely on the basic four-part economic reality analysis articulated earlier in the Manual, to determine who the employer is.

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<sup>164</sup> Section 10f04.

*(2) Focus on the nature of the relationship between the worker and the possible joint employer*

When assessing a possible vertical joint employment relationship, the focus is on whether the employee of the intermediary employer is also employed by the possible joint employer. This analysis is simply an employment relationship analysis, and you should examine, as matter of economic reality, the degree of the employee's economic dependence on the possible joint employer. As discussed below, the joint employment regulation provides seven economic realities factors to apply in vertical joint employment cases.

*(3) Joint employment economic realities factors*

Absent specific New Mexico authority on the vertical joint employment scenario, and to ensure a robust policy with respect to this somewhat complex issue, you should look to seven economic realities factors to determine who the vertical joint employer is.<sup>165</sup> These factors should not be applied as a checklist, and no single factor determines the outcome. Additional evidence relevant to the economic realities may be considered. The weight given to each factor individually and in total depends on all of the facts and circumstances of the case. The factors themselves are not the analysis; instead, they are guides to answering the ultimate question of economic dependency.

The seven factors are:

**1. Directing, controlling, or supervising the work performed**

This factor examines whether the possible joint employer has the power, either alone or through control of the intermediary employer, to direct, control, or supervise the employee or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties). To the extent that the work performed by the employee is controlled or supervised by the possible joint employer beyond reasonable oversight to ensure contract performance, such control suggests that the employee is economically dependent on the possible joint employer. The possible joint employer's control can be indirect (i.e., exercised through the intermediary) and still be sufficient to indicate economic dependence by the employee. Additionally, the possible joint employer need not exercise more control than, or the same control as, the intermediary to exercise sufficient control to indicate economic dependence by the

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<sup>165</sup> The Field Operations Handbook applies the federal Migrant and Seasonal Protection Act (MSPA) regulations defining vertical joint employment, noting that "The MSPA defines 'employ' in exactly the same way as the FLSA, using the suffer or permit standard, and the scope of employment relationships under the MSPA is the same as it is under the FLSA." Section 10f01. References to the MSPA are omitted here to avoid confusion. The seven-factor test set forth in the FOH derives from the U.S. Supreme Court's decision concerning FLSA joint employment in *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947), and has been adopted by circuit courts in the FLSA context. See, e.g., *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 71 (2d Cir. 2003). As the definition of "employ" is identical under New Mexico law and the FLSA, this is the appropriate test to analyze vertical employment relationships under the New Mexico wage payment laws.

employee. Where the possible joint employer's control or supervision is less because the employee's work is routine or occurs off-site, the lack of control or supervision may not necessarily be indicative of a lack of economic dependency on the possible joint employer.

## **2. Controlling employment conditions**

This factor explores whether the possible joint employer has the power, either alone or in addition to the intermediary employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rate or method of payment for the employee. To the extent that the possible joint employer has the power to hire or fire the employee, modify employment conditions, or determine the rate or method of pay, such control suggests that the employee is economically dependent on the possible joint employer. Again, the possible joint employer may exercise such control indirectly and need not exclusively exercise such control for there to be an indication of joint employment.

## **3. Permanency and duration of relationship**

This factor looks at the degree of permanency and duration of the relationship of the parties, in the context of the particular work performed. An indefinite, permanent, full-time, or long-term relationship by the employee with the possible joint employer suggests economic dependence. This factor should be considered in the context of the particular industry at issue. For example, if the work in the industry is by its nature seasonal, intermittent, or part-time, such industry practice should be considered when analyzing the permanency and duration of the employee's relationship with the possible joint employer.

## **4. Repetitive and rote nature of work**

This factor examines the extent to which the services rendered by the employee are repetitive, rote tasks requiring skills which are acquired with relatively little training. To the extent that the employee's work for the possible joint employer is repetitive and rote or involves skills requiring little training, that evidence indicates that the employee is economically dependent on the possible joint employer.

## **5. Integral to business**

This factor explores whether the activities performed by the employee are an integral part of the possible joint employer's overall business operation. If the employee's work is an integral part of the possible joint employer's business, that evidence suggests that the employee is economically dependent on the possible joint employer. An employee's work does not have to be important to be integral to the business, and the employee's work can be integral even if there are many others who do the same work. An employee's work can be integral if the employee plays a role in producing a good or providing a service that the potential joint employer is in business to produce or provide. Whether the work is integral to the grower's business has long been a hallmark of determining whether an employment relationship exists.

## **6. Work performed on premises**

This factor looks at whether the work is performed on the possible joint employer's premises. The employee's performance of the work on premises owned or controlled by the possible joint employer indicates that the employee is economically dependent on the possible joint employer. The possible joint employer's leasing as opposed to owning the premises where the work is performed is immaterial because the possible joint employer, as the lessor, controls the premises. Also, if the employee works on the premises of customers or clients of the possible joint employer, that evidence suggests that the possible joint employer controls where the work is performed and that the employee is economically dependent on the possible joint employer.

## **7. Performing administrative functions commonly performed by employers**

This factor explores whether the possible joint employer undertakes any responsibilities in relation to the employee which are commonly performed by employers, such as preparing or making payroll records, preparing or issuing pay checks, paying Federal Insurance Contributions Act (FICA) taxes, providing workers' compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools, equipment, or materials required for the job (taking into account the amount of investment). To the extent that the possible joint employer performs any of the above or similar administrative functions for the employee, that evidence suggests economic dependence by the employee on the possible joint employer.

As mentioned above, not all of the factors need to be met for there to be vertical joint employment. In particular, there may be little evidence in a case that the possible joint employer undertakes responsibilities in relation to the workers that are commonly performed by employers. After all, the possible joint employer engages the intermediary employer to perform those responsibilities for it. Any lack of evidence on this factor should not preclude a finding of joint employment where the facts taken as a whole indicate that the workers are economically dependent on the possible joint employer.

### *(4) When the analysis indicates vertical joint employment*

If you determine that the employee is economically dependent on both the intermediary employer and the possible joint employer(s), then joint employment exists. You should find the joint employers responsible, both individually and jointly, for compliance with the MWA and WPA, including paying at least the equivalent of minimum wage for all hours worked and paying overtime for all hours worked over 40 during a workweek under the MWA and paying the promised wage under the WPA.

### *(5) When the analysis does not indicate vertical joint employment*

If the analysis shows that the employee is not economically dependent on both the intermediary employer and the possible joint employer, then vertical joint employment does not exist. As such, only the intermediary is liable for compliance with the MWA and WPA, as those laws relate to the employee.

## D. DEFINITION OF “EMPLOYEE” AND EXEMPTIONS

An “employee” covered by the New Mexico wage laws is a person whom an “employer” “employs,” i.e. suffers or permits to work.<sup>166</sup> Exemptions to the definition of “employee” based on the economic reality test are discussed in Section II.C. Exemptions in the relevant statutes are discussed in Sections II.D.2 and II.D.3.

### 1. Employees vs. independent contractors

Employers sometimes improperly classify their workers as independent contractors, and workers sometimes inaccurately believe themselves to be independent contractors. So, you may need to decide whether the employer’s classification of an employee as an independent contractor was proper.

#### a. Construction workers presumed to be employees.

The New Mexico Construction Industries Licensing Act (“CILA”) creates a “rebuttable presumption” of employee status for a person providing labor or services to a construction contractor.<sup>167</sup> This means the law assumes people working on construction jobs for a contractor are employees.<sup>168</sup> LRD is responsible for enforcing this standard.<sup>169</sup> Because the CILA creates a rebuttable presumption of employee status for workers providing labor or services to a contractor, you should analyze whether the worker is an employee or an independent contractor **only if** the employer disputes a worker’s status as an employee. Otherwise, you should assume that a construction worker is an employee.

#### *(1) CILA definition of “employee”*

If the alleged employer disputes a construction worker’s status as an employee, then you should apply the six-factor CILA test to analyze that claim. Under the CILA, a worker providing labor or services to the contractor is an employee and **not** an independent contractor unless **all** of the following six factors are met:<sup>170</sup>

- (1) The worker is free from direction and control over how he does the job;
- (2) The worker is responsible for obtaining business registrations or licenses required by state law or local ordinance;
  - Note that “an individual who works only for wages” is **NOT** responsible for obtaining a license under the CILA.<sup>171</sup>
- (3) The worker provides his own tools or equipment;
- (4) The worker has the authority to hire and fire employees to perform the labor or services;

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<sup>166</sup> NMSA 1978 § 50-4-21; 11.1.4.7(D) NMAC.

<sup>167</sup> NMSA 1978 § 60-13-3.1.

<sup>168</sup> *Id.*

<sup>169</sup> NMSA 1978 § 60-13-3.1(B).

<sup>170</sup> NMSA 1978 § 60-13-3.1(A).

<sup>171</sup> NMSA 1978 § 60-13-3(D)(13).

- (5) Payment is made upon completion of specific portions of a project or is made on the basis of a periodic retainer
- Note that this factor is **NOT** met if a worker is paid on the basis of time worked, i.e. an hourly, daily, or weekly rate.
- (6) The worker has his own independently established business. A person is engaged in an independently established business when four or more of the following circumstances exist:
- (a) labor or services are primarily performed at a location separate from the person's residence or in a specific portion of the residence that is set aside for performing labor or services;
  - (b) commercial advertising or business cards are purchased by the person, or the person is a member of a trade or professional association;
  - (c) telephone or email listings used for the labor or services are different from the person's personal listings;
  - (d) labor or services are performed only pursuant to a written contract;
  - (e) labor or services are performed for two or more persons within a period of one year;
  - or
  - (f) the person assumes financial responsibility for errors and omissions in labor or services as evidenced by insurance, performance bonds and warranties relating to the labor or services being provided.

If the wage claim reaches the decision letter phase, you must document your findings on each of these factors in the decision letter. If any single factor is not met, then the worker is an employee, not an independent contractor.

*(2) CILA definition of "contractor"*

The CILA covers work performed by a contractor constructing, altering, repairing, installing, or demolishing any of the following:

- (1) road, highway, bridge, parking area or related project;
- (2) building, stadium or other structure;
- (3) airport, subway or similar facility;
- (4) park, trail, bridle path, athletic field, golf course or similar facility;
- (5) dam, reservoir, canal, ditch or similar facility;
- (6) sewerage or water treatment facility, power generating plant, pump station, natural gas compressing station or similar facility;
- (7) sewerage, water, gas or other pipeline;
- (8) transmission line;
- (9) radio, television or other tower;
- (10) water, oil or other storage tank;
- (11) shaft, tunnel or mining appurtenance;
- (12) leveling or clearing land;
- (13) excavating earth;
- (14) air conditioning, conduit, heating or other similar mechanical works;

- (15) electrical wiring, plumbing or plumbing fixture, consumers' gas piping, gas appliances or water conditioners; or
- (16) similar work, structures or installations which are covered by applicable codes adopted under the provisions of the Construction Industries Licensing Act.

A covered contractor includes a subcontractors, specialty contractor, or construction manager who coordinates and manages the building process.<sup>172</sup> For purposes of deciding whether a contractor is covered by the CILA, it **does not** matter whether or not the contractor is licensed or not. The relevant question is whether the contractor is supposed to be licensed. Any contractor performing the above duties is supposed to be licensed under CILA, and so the "employee" test applies to people working for that contractor.

### *(3) Exemptions to CILA definition of "contractor"*

The CILA lists eighteen exceptions to the definition of a "contractor."<sup>173</sup> If you decide that an employer is not a "contractor" within the meaning of the CILA because one of these exemptions applies, then you should use the economic reality test described in the next section to decide whether the worker was an employee or independent contractor. Before deciding that one of these exemptions applies, you must consult with the Legal Department to find the full definition and discuss how to apply the exemption to the facts of the case.

- (1) any person who merely provides materials or supplies at the site without using them;
- (2) any person drilling petroleum, gas or water wells, under some circumstances;
- (3) a public utility or rural electric cooperative, under some circumstances;
- (4) a utility department of any municipality or local public body, under some circumstances;
- (5) any railroad company;
- (6) a telephone or telegraph company or rural electric cooperative, under some circumstances;
- (7) a pipeline company that installs, alters or repairs electrical equipment and devices for the operation of signals or the transmission of intelligence, under some circumstances;
- (8) any mining company, gas company or oil company that installs, alters or repairs its facilities, under some circumstances;
- (9) a radio or television broadcaster who installs, alters or repairs electrical equipment used for radio or television broadcasting;

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<sup>172</sup> NMSA 1978 § 60-13-3(B) and (C).

<sup>173</sup> NMSA 1978 § 60-13-3(D).

(10), (11), and (12) an individual who makes installations, alterations, repairs or improvements to a single-family home, farm, or ranch he owns and occupies, or a storage building on the property, as long as he is not engaging in commercial construction;

(13) an individual who works only for wages;

(14) an individual who performs casual, minor or inconsequential handyman repairs that do not exceed seven thousand two hundred dollars (\$7,200) compensation a year, if: (a) the work is not part of a larger operation; (b) the individual does not advertise or maintain a sign, card or other device which would indicate to the public that he is qualified to engage in the business of contracting; and (c) the individual files a form with the Construction Industries Licensing Division annually stating he is not a contractor within the meaning of the CILA;

(15) any person, firm or corporation that installs fuel containers, appliances, furnaces and other appurtenant apparatus as an incident to its primary business of distributing liquefied petroleum fuel;

(16) a cable television or community antenna television company that constructs, installs, alters or repairs facilities, equipment, cables or lines for the provision of television service or the carriage and transmission of television or radio broadcast signals;

(17) any weatherization project not exceeding two thousand dollars (\$2,000) that has been approved and is administered by a federal or state agency; or

(18) a person who performs work consisting of short-term depreciable improvements to commercial property to provide needed repairs and maintenance for items not covered by building codes adopted by the construction industry commission if the total amount paid the person for the work on a single undertaking, including materials, services and wages of those who work for him, does not exceed the sum of five thousand dollars (\$5,000).

#### *(4) Misclassification penalties under CILA and duty to coordinate with CID*

The CILA provides for penalties for contractors who misclassify employees as independent contractors:

A contractor who intentionally and willfully reports to a state agency or other client that an employee is an independent contractor or who, for the purposes of a program administered by a state agency, intentionally and willfully treats or otherwise lists an employee as an independent contractor when the employee's status does not meet the standards indicative of an independent contractor . . . is guilty of a misdemeanor and shall be punished by a fine of not more than five thousand dollars (\$5,000) or by imprisonment for a definite term not to exceed six months or both.<sup>174</sup>

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<sup>174</sup> NMSA 1978 § 60-13-3.1(C).

If you determine that construction workers have been misclassified as independent contractors under the CILA test, you should inform LRD management, who provide this information to the Unemployment Insurance Division and the Office of General Counsel. They will determine whether to pursue enforcement action for misclassifying these employees and failing to pay appropriate unemployment insurance premiums. They may also inform the construction industries division of the regulation and licensing department (“CID”) of the misclassification, so that CID can determine whether to take enforcement action against the contractor under the statutes it enforces.

b. Economic reality test for non-construction workers

There are no MWA or WPA cases or regulations that explain how to determine whether a worker other than a construction worker is an employee or an independent contractor. Because the question turns on the definition of “employ,” and because the definitions of “employ” are identical under the FLSA and the MWA, LRD will apply the six-factor economic reality test developed in FLSA case law to distinguish between employees and independent contractors outside of the construction context.<sup>175</sup> See Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

Under the economic reality test, “the focal point in deciding whether an individual is an employee is whether the individual is economically dependent on the business to which he renders service or is, as a matter of economic fact, in business for himself.”<sup>176</sup> There are six factors to consider:

**(1) The amount of control exercised by the employer over the worker.**

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<sup>175</sup> In *Garcia v. Am. Furniture Co.*, the New Mexico Court of Appeals adopted the economic reality test to “determin[e] whether a person is an employee under the Minimum Wage Act.” 1984-NMCA-090, ¶ 17, 101 N.M. 785, 789, 689 P.2d 934, 938. To determine the economic reality of the working relationship, the fact finder must consider the total employment situation. *Id.* The Court of Appeals adopted the economic reality test from federal Fair Labor Standards Act case law because “[t]he definition of employ is almost identical. Accordingly, it is appropriate to look to decisions of federal courts determining the meaning of ‘employ’ in the federal statute, and to consider those federal decisions as persuasive authority in deciding the meaning of ‘employ’ in the New Mexico statute.” *Id.* at ¶ 13, 101 N.M. at 788, 689 P.2d at 937. Several Tenth Circuit appellate decisions apply the six-factor economic reality test discussed in this section to analyze an employer’s defense that workers were independent contractors. These include *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440–41 (10th Cir. 1998); *Doty v. Elias*, 733 F.2d 720, 722–23 (10th Cir. 1984); and *Dole v. Snell*, 875 F.2d 802, 804–05 (10th Cir. 1989). There are also many Tenth Circuit district court decisions applying this test, some of which are described in this section. One of these district court decisions, *Casias v. Distribution Mgmt. Corp.*, relies on the New Mexico Court of Appeals’ adoption of the economic reality test in *Garcia* to apply the six-factor independent contractor vs. employee economic reality test to Minimum Wage Act claims. No. 11-874, 2014 WL 12710236, at \*10 (D.N.M. Mar. 31, 2014).

<sup>176</sup> *Doty*, 733 F.2d at 722–23 (10th Cir. 1984) (citations omitted).

- This may include whether the alleged employer has the power to hire and fire the worker, supervises and controls the worker's work schedule or conditions of employment, determines the worker's rate and method of payment, and/or maintains employment records.
- The more control the employer has over these matters, the more the worker is probably an employee.
- The fact that an employee may have input into his schedule or hours should be viewed in light of whether or not the alleged employer has decision-making over the hours and schedule the worker actually works.

**(2) How much the employee's opportunity for profit and loss is determined by the employer.**

- Employees are workers whose ability to make a living depends on the employer's decisions about how much to pay and how many work hours to assign.
- On the other hand, independent contractors are workers with economic independence who are in business for themselves.
- An independent contractor has the ability to make a profit (or sustain a loss) based on his or her own decisions alone; i.e. the ability to take on work at a rate and on a timeline the worker freely chooses.

**(3) The relative investments of the worker and employer.**

- Employees work in a business where the employer (not the worker) has made significant investments in the business.
- Workers who don't have their own independent businesses are rarely independent contractors.
- Sometimes, the worker has bought tools or equipment that he or she uses to perform the work. When this happens, consider the relative investments between the parties. i.e. the cost of the worker's tools versus the alleged employer's investment in the overall operation.

**(4) The degree of skill required to perform the work.**

- A worker's lack of specialized skills is often a sign of employee status.
- If the worker is in open market competition with others this would suggest an independent contractor status.
- At the same time, a worker's specialized skills do not prove independent contractor status, especially if the worker does not use those skills in any independent way, such as by operating a business.

**(5) The permanency of the employment relationship.**

- Independent contractors usually make time-limited contracts for specific work, whereas employees' relationships to the employer may have no definite end-point.
- However, the lack of permanence can sometimes be because of how a particular industry works, such as seasonal retail employees or summer employment.

- If the job is for a limited period of time, ask questions to understand why this is so.

**(6) The extent to which the work is an integral part of the alleged employer's business.**

- If the work performed by a worker is integral to the employer's business, it more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself.
- For example, a construction laborer is an integral part of a construction business. A restaurant dishwasher is an integral part of a restaurant. On the other hand, a plumber who comes in for a couple of hours to fix the restaurant toilets is not an integral part of the restaurant business.

When applying the six-factor economic reality test, you should use the “totality of the circumstances” approach. This means that you should focus on the entire employment situation. Some factors may point to one conclusion, and some factors to the opposite conclusion. You should consider all of the facts and context, keeping in mind that the ultimate test is **whether the individual is economically dependent on the business to which he renders service, or is, as a matter of economic fact, in business for himself**. All of the factors should be viewed through this lens.

Factors that are **not relevant** to the economic reality analysis:

- The employer's or employee's classification of the worker as an independent contractor for tax or unemployment insurance purposes.
- Whether the employer provided the worker a form 1099 or a W-2.
- Whether the employer is an individual or a corporation. Both individuals and corporations may be liable for violations of New Mexico wage laws. (*See* Section II.A.)

These factors are not relevant because the employer's classification of an employee does not reveal anything about the economic reality of the working relationship. Also, if employers' classifications were final, then employers could simply classify employees as independent contractors in order to avoid the legal obligations associated with an employment relationship. This would undermine the remedial purpose of the New Mexico wage laws.

The following case examples will help you understand how judges have applied the economic reality test in a variety of factual scenarios, and help you understand how to apply the economic reality test to the facts you learn in investigations. Again, LRD uses these case examples in the absence of any cases on this issue from state courts. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

**Pipe welders:**<sup>177</sup> A group of pipe welders sued a general contractor for back wages. The general contractor claimed the pipe welders were independent contractors rather than employees. The appellate judge decided that the workers were the general contractor's employees under the economic reality test for the following reasons:

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<sup>177</sup> *See Baker v. Flint Eng'g & Constr. Co.*, 137 F.3d 1436 (10th Cir. 1998).

- *Factor 1: Control.* The general contractor did not closely supervise the welders. For example, the contractor did not tell the welders how to complete a particular weld. However, the general contractor's foremen told the pipe welders when to report to work, when to take breaks, on which sections of the project they would be working, and when their workdays ended. The pipe welders could not perform their work on their own schedules. Furthermore, the pipe welders worked on only one project at a time and did not work for other companies while a project was ongoing.
- *Factor 2: Opportunity for profit or loss.* The pipe welders did not have an opportunity for profit or loss consistent with being independent businessmen, even though they did have the freedom to increase their incomes by reducing the costs of the welding supplies they purchased and used. However, this did not enable the pipe welders to experience profits or losses at the same level as an independent businessperson. Furthermore, the pipe welders could not make their own bids on pipeline construction projects or set their own rates, hours or schedules. Instead, the general contractor decided the sequence and number of welds assigned to pipe welders throughout the duration of a project. There was also no risk of loss on the workers' part because if one of their welds was inadequate, the general contractor rather than the welder was responsible for the costs associated with fixing the work.
- *Factor 3: Investment in the business.* The pipe welders did make significant investments in their jobs: they provided their own welding equipment and supplies, which they mounted on personal flat-bed pickup trucks referred to as "welding rigs." Each welding rig cost a worker between \$35,000 and \$40,000. However, the pipe welders' significant investment was small when compared to the general contractor's investment in the overall business. The general contractor routinely had hundreds of thousands of dollars of equipment at each work site. Compared to the general contractor's investment in the overall business, the pipe welders' investments were not so significant as to indicate they were independent contractors.
- *Factor 4: Degree of skill.* The pipe welders were highly skilled but they did not exercise those skills in any independent fashion in their employment with the general contractor, nor was any independent judgment or initiative expected of them by the general contractor. Welding specifications and quality standards were prearranged prior to commencement of a project. Although the pipe welders were not told by the general contractor how to complete a particular weld, the general contractor foremen did tell them when and where to weld and workers had no authority to override those instructions.
- *Factor 5: Permanency.* The pipe welders rarely worked for the general contractor more than two months at any one time, and rarely for more than three months during any twelve-month period. Yet, the majority of other workers employed by the general contractor worked for the same duration as the pipe welders and were nevertheless treated as employees. Thus, although the pipe welders exhibited characteristics generally typical of independent contractors—such as the short duration of their employment relationship and their frequent relocation to find employment—this was due to natural characteristics of the industry rather than any independent choice or decision on the part of the pipe welders.
- *Factor 6: Integral part of business.* The work performed by the pipe welders was a necessary component of the general contractor's business. Although the pipe welders did

not remain on the job site from start to finish, their work was an integral part of the general contractor's oil and gas pipeline assembly work.

### **Cake Decorators<sup>178</sup>**

Cake decorators sued a bakery for back wages owed. The bakery owners claimed the cake decorators were independent contractors rather than employees. The appellate judge decided the cake decorators were employees of the bakery under the economic reality test for the following reasons:

- *Factor 1: Control.* The decorators had flexibility to choose among which of the bakery's cake orders and designs to fill, and they worked without direct supervision. However, this factor weighed in favor of employee status because the owners had strict production and quality demands, and any cakes deemed unsatisfactory by the owner were rejected.
- *Factor 2: Opportunity for profit or loss.* The decorators did not share in the profits of the bakery. Although the decorators were paid per cake, they had no input whatsoever into the amount they would be paid for each cake, except on the rare occasion when an unusual cake was involved. As time went on, the prices of the cakes changed, but the amount received by the decorators did not, and decorators had no power to command a higher price. The decorators also did not undertake any risks usually associated with an independent businessperson.
- *Factor 3: Investment in the business.* The cake decorators were required to purchase some of their own equipment, including pastry bags, couplers, and air brush, books, spatulas, aprons, and towels, which cost approximately \$400 per year. The decorators had no other investments in the bakery. The bakery supplied everything else and paid all the operating expenses of the business, which covered eight retail outlets as well as the bakery. The relative investment of the decorators in their own tools compared with the bakery's investments did not qualify as a significant investment in the business.
- *Factor 4: Degree of skill.* The bakery did not require the decorators to have any specialized skills or prior experience when they began employment. Many cake decorators had no experience in cake decorating when they started and only some of the decorators had taken a class.
- *Factor 5: Permanency.* The cake decorators were much more like employees than independent contractors because decorators worked for the bakery for many years and expected to work there indefinitely.
- *Factor 6: Integral part of business.* The work performed by the decorators was integral to the bakery's business of selling custom-decorated cakes.

### **Waiters<sup>179</sup>**

Former waiters and waitresses sued a restaurant for back wages. The restaurant owner claimed the waitstaff were independent contractors rather than employees. The appellate judge decided

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<sup>178</sup> *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

<sup>179</sup> *Doty v. Elias*, 733 F.2d 720 (10th Cir. 1984).

the workers were employees of the restaurant under the economic reality test for the following reasons:

- *Factor 1: Control.* The wait staff did not have rigid work schedules and had some flexibility to decide their own hours of work. However, a relatively flexible work schedule alone does not make a worker an independent contractor rather than an employee. Moreover, the wait staff could only wait tables during the restaurant's business hours, which set practical limits on the hours the wait staff could work. The owner had the power to fire the wait staff at will.
- *Factors 2 and 3: Opportunity for profit or loss and investment in the business.* These factors were analyzed together. The wait staff neither invested in the restaurant nor shared in its profits or losses. The wait staff's ability to keep all of the tips they received was not consistent with the characteristics of being independent businessperson.
- *Factor 4: Degree of skill.* Wait staff positions did not require any specialized skills.
- *Factors 5 and 6: Permanency and integral part of business.* No finding was made regarding the final two factors because the first four were conclusive. In consideration of the total employment situation, including whether the wait staff was economically dependent on the business to which they rendered service, or were, as a matter of economic fact, in business for themselves, the record clearly demonstrated the waiters and waitresses were economically dependent on the restaurant's business.

### **Janitors<sup>180</sup>**

A group of workers sued Ideal Cleaning for back wages. The workers were employed by Ideal Cleaning to clean floors and bathrooms at various New Mexico supermarket and retail establishments. Ideal Cleaning claimed the workers were independent contractors rather than employees. The district court judge decided the workers were employees under the economic reality test because:

- *Factor 1: Control.* Ideal Cleaning assigned workers to particular stores, gave them specific start and stop times, and required them to clean, sweep, mop, and buff floors. Workers had autonomy over the pace of their work and the amount of time it took to do it, but had to complete all janitorial duties between the hours of 11:30 p.m. and 6:00 a.m. When a worker failed to perform a given duty to Ideal Cleaning's standards, pay was docked. Although workers had infrequent personal contact with Ideal Cleaning's managers, an employer does not need to look over his workers' shoulders every day in order to exercise the supervision or control required for a finding of employee status.
- *Factors 2 and 3: Opportunity for profit or loss and investment in the business.* Ideal Cleaning workers worked seven days per week and earned a flat per day rate. The workers did not have the ability to bid at different flat rates depending on the size of the janitorial work or the number of hours worked. There was no incentive for them to work more efficiently in order to increase their opportunity for profit consistent with the characteristics of being independent businessmen. In addition, the fact that a limited number of workers owned their own buffers did not indicate independent contractor

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<sup>180</sup> *Allende v. Ideal Cleaning Serv., Inc.*, No. 08-285, 2009 WL 10668692 (D.N.M. May 12, 2009).

status because the fact workers supply their own tools or equipment does not preclude a finding of employee status. Here, only a limited number of Ideal Cleaning workers owned their own buffers and Ideal Cleaning or the retail establishments provided all other cleaning equipment and supplies. Workers were not expected to own their own buffers and workers who owned their own buffers were not paid more than those who didn't. Moreover, a worker's investment in a buffer was disproportionately small when compared to Ideal Cleaning's investment in the overall business. Ideal Cleaning enjoyed an estimated annual profit of \$1 million.

- *Factor 4: Degree of skill.* The degree of skill required for these jobs was not high. While most workers did have floor cleaning skills at the time they were hired, no formal training, certification, or education was required of the company's workers. Some workers learned on the job or through friends.
- *Factor 5: Permanency.* The fact the workers sometimes changed from one cleaning company to another to work for a higher wage did not make the worker an independent contractor. This alone is no different than any standard employee who changes jobs to pursue a better salary. Moreover, sometimes the workers simply changed from one cleaning company to another due to a retail establishment's choice to award the janitorial contract to a different cleaning company. It was commonplace for a new cleaning company to keep and employ workers of an outgoing cleaning company. Here, the lack of permanence was due to natural characteristics in the industry, and not the express choice usually exhibited by one who intentionally chooses to be in business for oneself.
- *Factor 6: Integral part of business.* The janitorial work performed by the workers was integral to, and made up the core of Ideal Cleaning's business. Ideal Cleaning did not provide any services other than the cleaning/janitorial services carried out by the workers.

c. When to investigate whether a claimant is an employee or independent contractor

The situations that trigger the need for you to investigate the economic reality of an employer-employee relationship are generally as follows:

- The worker is not a construction worker, and
- The employer has claimed as a defense that the employee was an independent contractor, or
- Facts you learn from the employee lead you to believe that the employee may have been an independent businessperson and not an employee.

This is consistent with the guidance in Section IV.E, which states that an LLA must never close a case for lack of jurisdiction without writing a closure letter explaining the facts and law underlying that conclusion.

However, this does not mean that you need to investigate the employee/independent contractor issue in every case. Often, there will be no reason to doubt that there was an employment relationship. In these cases, there is no need to analyze the independent contractor issue or include it in the decision letter.

## **2. Exemption to the definition of “employee” in the WPA**

There is only one exemption to the definition of “employee” under the WPA: those who perform “livestock and agricultural labor.” The statute reads as follows:

Whenever used in this act, "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 person in this state, except employers of livestock and agricultural labor.<sup>181</sup>

This exemption means these workers are not covered by the WPA, which protects the right to be paid an agreed-upon wage, to be paid on time and within certain time periods, to receive a paystub, to obtain a final paycheck within five days, and other protections that appear in the agreed wage law.

Prior to June 14, 2019, the WPA also exempted workers who performed domestic labor in private homes. Such work performed prior to that date, therefore, was not protected by the rights contained in the WPA.

The domestic service exemption (which applies only to work performed before June 14, 2019) and the agricultural exemption are discussed below.

a. Domestic service exemption

Domestic service is not exempted from the WPA, and it is not exempted from the MWA. However, prior to June 14, 2019, both the WPA and the MWA exempted from the definition of employee workers who performed domestic service or labor in private homes. The relevant laws stated:

“[E]mployer” includes every person . . . **except employers of domestic labor in private homes.**<sup>182</sup>

“[E]mployee” includes an individual employed by an employer, but **shall not include . . . an individual employed in domestic service in or about a private home.**<sup>183</sup>

Because you may receive wage claims from people who performed domestic work prior to June 14, 2019, when this exemption was still in the law, the scope of this exemption is described below.

*(1) Definition of “domestic service”*

The terms “domestic service” and “domestic labor” were not defined in the MWA or WPA, and there is no state case law or regulation defining these terms, either. Because the FLSA also uses the term “domestic service,” and because there are no regulations or precedent under the New Mexico wage laws, LRD will, as a matter of policy in this instance, apply the FLSA definition of

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<sup>181</sup> NMSA 1978 § 50-4-1(A) (amended 2019).

<sup>182</sup> *Id.*

<sup>183</sup> NMSA 1978 § 50-4-21(C) (amended 2019).

this term to wage claims by domestic workers for work performed prior to June 14, 2019. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

The FLSA defines “domestic service” as follows:

The term domestic service employment means services of a household nature performed by an employee in or about a private home (permanent or temporary). The term includes services performed by employees such as companions, babysitters, cooks, waiters, butlers, valets, maids, housekeepers, nannies, nurses, janitors, laundresses, caretakers, handymen, gardeners, home health aides, personal care aides, and chauffeurs of automobiles for family use. This listing is illustrative and not exhaustive.<sup>184</sup>

The LRD applies this definition to the New Mexico wage laws’ definition of “domestic service” and “domestic labor” for several reasons. First, the terms “domestic service” were identical in both laws.<sup>185</sup> Second, exemptions to New Mexico’s wage statutes must be strictly construed and unjust or absurd interpretations must be avoided.<sup>186</sup> It is therefore appropriate to restrict the exemption for “domestic service” to “services of a household nature,” as the FLSA definition does. This ensures that employees were not subject to this exemption when they worked for a business that happened to be conducted out of the employer’s home, but had nothing to do with “services of a household nature.”

*(2) No exemption for non-domestic work performed inside the home*

Since the domestic service exemption only covered “services of a household nature,” many jobs performed inside the home were not exempt. For example, carpenters, plumbers, and electricians are workers whose primary duty includes work in or about a private home but who were not exempt from coverage as “domestic service” workers because their work does not involve “services of a household nature.” Similarly, employees working out of an employer’s home office were not exempt when their jobs did not involve “services of a household nature.” In analyzing this, remember that an employer asserting an exemption must prove that the exemption “unmistakably” includes the employee whom the employer claims to be exempt from coverage under New Mexico’s wage laws.<sup>187</sup> This is not the case with these occupations.

*(3) No exemption for caregiving tasks outside of the home*

Since the domestic service exemption only covered domestic labor in “private homes,” it **did not** cover workers who performed services **outside** of the private home that would be exempt if

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<sup>184</sup> 29 C.F.R. § 552.3.

<sup>185</sup> *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 9, 355 P.3d 845, 848 (federal law is persuasive authority in interpreting the MWA where the MWA and the FLSA have similar provisions).

<sup>186</sup> *Rivera v. McCoy Corp.*, 240 F. Supp. 3d 1150, 1155 (D.N.M. 2017).

<sup>187</sup> *Casias v. Distribution Mgmt. Corp.*, No. 11-874, 2013 WL 12091857, at \*5 (D.N.M. Mar. 27, 2013) (citing *State ex rel. State Labor Comm’r v. Goodwill Indus.*, 82 N.M. 215, 217, 478 P.2d 543, 545).

performed in the private home. For example, caregivers in a nursing home or senior center were not exempt, because they did not work in a private home. Babysitters working outside of the home were covered. Similarly, workers who transported the elderly from their homes to locations away from the home, using their own cars or company cars, were not exempt, either.

If a wage claimant performed some work in the private home and some work away from the private home, you should determine whether the exemption applied by identifying the worker's primary duty. "Primary duty" means the principal, main, major, or most important duty that the worker performs.<sup>188</sup> Determination of a worker's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the worker's job as a whole.

This commonly arises in the context of services that transport the elderly to social activities or to perform errands. Employees of these companies often spend some time in the private home every day to help the client get ready to leave home, settle back into home, and may even carry the client to and from the home and car. However, the worker's primary duty—in this case, the service for which the worker was hired—is transportation, and this occurs outside of the private home. Therefore, these workers were not exempt, and all work time—including the time inside the private home—must be compensated.

#### *(4) How and when to close a wage claim involving exempt domestic service*

For domestic work performed prior to June 14, 2019, the FLSA, unlike the New Mexico wage laws, covered most domestic service workers in private homes.<sup>189</sup> Therefore, domestic workers who may have been exempt under the New Mexico wage payment laws can file wage claims with the federal Department of Labor's Wage and Hour Division. After the initial interview, you may close a case on the basis of this exemption using the Closure Letter. This process is discussed in Section IV.E.

Domestic work performed on or after June 14, 2019, is covered by both the WPA and the MWA and should be investigated as any other wage claim.

#### **b. Agriculture and farm labor exemptions**

The WPA does not apply to "employers of livestock and agricultural labor."<sup>190</sup> The MWA and WPA do not define this term, and there is no state case law or regulation defining this term, either. Because the MWA expressly adopts the definition of "livestock and agriculture" that is used in the Fair Labor Standards Act, and because there are no regulations or precedent under the New Mexico wage laws, LRD will, as a matter of policy in this instance, apply FLSA regulations

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<sup>188</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #17B: Exemption for Executive Employees under the Fair Labor Standards Act (FLSA), *available at* [https://www.dol.gov/whd/overtime/fs17b\\_executive.pdf](https://www.dol.gov/whd/overtime/fs17b_executive.pdf).

<sup>189</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet: Application of the Fair Labor Standards Act to Domestic Service, Final Rule, *available at* <https://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm>.

<sup>190</sup> NMSA 1978 § 50-4-1(A).

defining this term. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual. The FLSA definition of “livestock and agriculture” is as follows:

[F]arming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.<sup>191</sup>

If work falls within this definition, then the worker is not covered under the WPA. **However, the worker may be covered by the MWA.** For more information about this, please see the discussion of the more limited MWA agriculture exemptions.

### 3. Exemptions to the definition of “employee” under the MWA

The following are exemptions to the definition of “employee” in the MWA. They are numbered below in the order they appear in the MWA. Workers in these categories are not covered by the MWA. However, they are covered by the WPA unless specifically excluded. Those exclusions appear in Section II.D.2.

#### a. Domestic service (For claims arising prior to June 14, 2019)

Prior to June 14, 2019, the MWA also exempted “an individual employed in domestic service in or about a private home.” This was functionally identical to the WPA exemption that existed for domestic labor. Please see the discussion of this exemption in the WPA section, above.

#### b. Certain high-level employees

Section 50-4-21(C)(1) exempts from MWA coverage “an individual employed in a bona fide executive, administrative or professional capacity and forepersons, superintendents and supervisors.”

##### *(1) Bona fide executive, administrative, or professional employees*

The MWA does not define the terms “executive,” “administrative,” or “professional,” but New Mexico courts have in certain factual scenarios applied the identical FLSA definitions of these terms.<sup>192</sup> Since the terms are identical, and because there are no regulations or clear precedent

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<sup>191</sup> 29 U.S.C. § 203(f).

<sup>192</sup> *See Valentine v. Bank of Albuquerque*, 1985-NMSC-033, ¶¶ 4–12, 102 N.M. 489, 490–91, 697 P.2d 489, 490–91 (relying on federal regulations defining “administrative employee” in its analysis under both the FLSA and the MWA); *see also Williams v. Mann*, 2017-NMCA-012, ¶ 30, 388 P.3d 295, 305; 11.1.4.118 NMAC (“In making a decision, the LRD may rely upon definitions used within and decisions relating to the FLSA, 29 U.S.C. 201 *et seq.*”); *Segura v. J.W. Drilling, Inc.*, 2015-NMCA-085, ¶ 9, 355 P.3d 845, 848 (referring to federal law as

under the New Mexico wage laws, LRD will, as a matter of policy in this instance, apply FLSA regulations defining these exemptions. *See* Interpretive Note: References to persuasive FLSA authority in Investigations Manual.

**Salary basis test:** Under all three exemptions, the first requirement is that the worker must be compensated a) on a salary basis b) at a rate not less than \$455 per week.<sup>193</sup> These are threshold requirements that **must be satisfied under all three exemptions**. If it is not, the worker is covered by the MWA and not exempt. Therefore, this is a good place to begin your analysis. If the worker has not been paid a salary at least \$455 per week, then you must calculate any minimum wage or overtime wages owed to the worker.

**What is a salary?** Under the FLSA regulations,<sup>194</sup> “salary basis” means a worker regularly receives a predetermined amount of compensation each pay period on a weekly, or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee’s work. Except in certain specific circumstances listed below, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked. However, exempt employees do not need to be paid for any workweek in which they perform no work. If the employer makes deductions from an employee’s predetermined salary, i.e., because of the operating requirements of the business, that employee is not paid on a “salary basis.” If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

**When can an employer make deductions from an exempt worker’s pay?** Deductions from an exempt worker’s salary are permissible only in the following instances:<sup>195</sup>

1. When the worker is absent for personal reasons *other than sickness or disability*;
2. for absences of one or more full days due to sickness or disability *if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness*;
3. to offset amounts received as jury or witness fees, or for military pay;
4. for penalties imposed in good faith for infractions of safety rules of major significance; or

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persuasive authority in interpreting the MWA where the MWA and the FLSA have similar provisions); *Garcia v. Am. Furniture Co.*, 1984-NMCA-090, ¶ 13, 101 N.M. 785, 788, 689 P.2d 934, 937 (holding that because definitions in the MWA “are similar to definitions in the [FLSA] . . . it is appropriate to look to decisions of federal courts determining the meaning of ‘employ’ in the federal statute, and to consider those federal decisions as persuasive authority in deciding the meaning of ‘employ’ in the New Mexico statute”).

<sup>193</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions under the Fair Labor Standards Act (FLSA), *available at* [https://www.dol.gov/whd/overtime/fs17g\\_salary.pdf](https://www.dol.gov/whd/overtime/fs17g_salary.pdf). The salary rate is set in 29 C.F.R. § 541.600, which was amended in 2016 to increase the rate to more than \$455. The increase was preliminarily enjoined by *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), so the rate currently in force is \$455.

<sup>194</sup> 29 C.F.R. § 541.602. This “salary basis” definition was not affected by the 2016 amendments to the regulations nor the *Nevada* preliminary injunction.

<sup>195</sup> U.S. Department of Labor, Fact Sheet #17G.

5. for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rules infractions.

Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical leave Act.<sup>196</sup>

**What happens if an employer makes an improper deduction?** The employer will lose the exemption if it has an “actual practice” of making improper deductions from salary. Factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to:

1. the number of improper deductions, particularly as compared to the number of worker infractions warranting deductions;
2. the time period during which the employer made improper deductions;
3. the number and geographic location of both the workers whose salary was deducted and the managers responsible; and
4. whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

If an “actual practice” is found, the exemption is lost during the time period of the deductions for employees in the same job classification working for the same managers responsible for the improper deductions.

**Safe harbor:** If an employer (1) has a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimburses for any improper deductions, and (3) makes a good faith commitment to comply in the future, the employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing the improper deductions after receiving employee complaints.

*(a) Executive exemption*

The executive exemption in the MWA is functionally similar to the executive exemption in the FLSA.<sup>197</sup> Since the exemptions are functionally similar, and because there are no regulations or precedent under the New Mexico wage laws governing this exemption, LRD will, as a matter of policy in this instance, turn to FLSA precedent to augment an understanding of this exemption under the MWA. All of the following requirements in federal regulations under the FLSA must be met in order for the executive exemption to apply to a worker,<sup>198</sup> and the same apply under the MWA:

1. the worker must be compensated on a salary basis at a rate not less than \$455 per week;

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<sup>196</sup> *Id.*

<sup>197</sup> *Williams*, 2017-NMCA-012, ¶¶ 28–30, 388 P. 3d at 305; *see Valentine*, 1985-NMSC-033, ¶ 4, 102 N.M. at 490, 697 P.2d at 490.

<sup>198</sup> U.S. Department of Labor, Fact Sheet #17B.

2. the worker's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
3. the worker must customarily and regularly direct the work of at least two or more other full-time workers or their equivalent; **and**
4. the worker must have the authority to hire or fire other workers, or the worker's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other workers must be given particular weight.

All four requirements must be met in order for the administrative exemption to apply, and the following definitions will aid in a proper analysis of these requirements:

**Primary duty** means the principal, main, major or most important duty that the worker performs. Determination of a worker's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the worker's job as a whole.<sup>199</sup>

**Management** generally includes, but is not limited to, activities such as interviewing, selecting and training of workers; setting and adjusting their rates of pay and hours of work; directing the work of other workers; maintaining production or sales records for use in supervision or control; appraising workers' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining other workers; planning the work; determining the techniques to be used; apportioning of work; determining the types of materials, supplies machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the workers or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.<sup>200</sup>

**Department or subdivision** distinguishes between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.<sup>201</sup>

**Customarily and regularly** means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.<sup>202</sup>

**Two or more** means two full-time workers or their equivalent. For example one full-time and two half-time workers are equivalent to two full-time employees.<sup>203</sup>

**Particular weight:** Factors to be considered in determining whether a worker's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the worker's job duties to make such recommendations, and the frequency with which such recommendations are

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<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

made, requested and relied upon. Generally, an executive's recommendations must pertain to workers whom the executive customarily and regularly directs. It does not include occasional suggestions.<sup>204</sup>

**Example:**

Sandra earns a salary of \$600 per week in a convenience store and her job title is "manager." Her company considers her to be an exempt executive. She supervises the 10 other workers including assigning job tasks and work schedules. She sets her own schedule, but she must work however many hours it takes to properly manage the store. This usually entails 60 hours per week. Sandra reports directly to a regional manager in her company.

From time to time, the regional manager will contact Sandra about the job performance of employees or to ask questions regarding Sandra's quarterly evaluations of the employees she supervises. When the regional manager decides to terminate the employment of an underperforming employee, the responsibility of actually firing the employee falls on Sandra. However, the regional manager makes the decision to fire employees without input from Sandra. The regional manager also conducts interviews for the purpose of new hires and internal promotions. The regional manager does not consult Sandra on new hires, and he only consults Sandra's written quarterly employee evaluations when making decision on promotions. Is Sandra properly classified as an exempt executive by her company?

**Probably not.** In order to be an exempt executive a worker must meet all of the requirements. While Sandra nearly meets all of the requirements, she does not have the authority to hire and fire workers, and it appears that her supervisor, the regional manager, does not give "particular weight" to or even ask for Sandra's suggestions regarding hiring, firing, or promotions. Of course, analyses of this exemption are fact-specific depending on the case. So, if the written evaluations had a space for Sandra to make hiring, firing, or promotional suggestions, the analysis would change and we would need to know the extent to which the regional manager relied upon Sandra's recommendations. In that case the analysis would likely turn on the "particular weight" factor.

*(b) Administrative exemption*

New Mexico courts have adopted and used the federal definition of "administrative" contained within federal regulations promulgated under the FLSA.<sup>205</sup> Therefore, under the MWA, the administrative exemption applies to a worker when three requirements are met:<sup>206</sup>

1. The employee must be compensated on a salary or fee basis at a rate of not less than \$455 per week exclusive of board, lodging or other facilities,

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<sup>204</sup> *Id.*

<sup>205</sup> *Valentine*, 1985-NMSC-033, ¶¶ 4–12, 102 N.M. at 490–91, 697 P.2d at 490–91; *Williams*, 2017-NMCA-012, ¶¶ 28–30, 388 P.3d at 305.

<sup>206</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #17C: Exemption for Administrative Employees under the Fair Labor Standards Act (FLSA), *available at* [https://www.dol.gov/whd/overtime/fs17c\\_administrative.pdf](https://www.dol.gov/whd/overtime/fs17c_administrative.pdf).

2. The worker's primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, **and**
3. The worker's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

All three requirements must be met in order for the administrative exemption to apply, and the following definitions will aid in a proper analysis of these requirements:

**Primary duty** means the principal, main, major or most important duty that the worker performs. Determination of a worker's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the worker's job as a whole.<sup>207</sup>

**Directly related to management or general business operations** means that an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.<sup>208</sup>

**Discretion and independent judgment** generally involves the comparison and evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the worker's particular employment situation, and implies that the worker has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the worker has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the worker performs work that affects business operation to a substantial degree; whether the worker has authority to commit the employer in matters that have significant financial impact; whether the worker has authority to waive or deviate from established policies and procedures without prior approval. The fact that a worker's decisions are revised or reversed after review does not mean that the worker is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.<sup>209</sup>

**Matters of significance** refers to the level of importance or consequence of the work performed. A worker does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will suffer financial losses if the worker fails to perform the job properly. Similarly, a worker who operates very expensive equipment does not

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the worker's duties may cause serious financial loss to the employer.<sup>210</sup>

**Example:**

Melissa worked at a dentist's office and earned a salary of \$550 per week. Her title was "administrative assistant." Her job duties included whatever duties her employer assigned to her. Those duties included purchasing dental equipment at her employer's direction, arranging for the placement of paid advertisements in the telephone book, setting up an LLC, and phone service. Melissa also maintained office equipment, for example loading paper and ink cartridges into the printers and copiers. Melissa was also responsible for setting appointments and routine data entry into the office's appointment software. When Melissa was not performing a specific task for her employer, she sat at the receptionist desk and answered phones or greeted customers. Melissa's daily tasks changed depending on what her employer asked her to do, and she rarely made any decisions about how or when to carry out these tasks.

Melissa routinely worked more than 40 hours per week, but her employer did not pay her overtime for hours worked in excess of 40. Melissa makes a claim against her employer for back overtime pay.

**Is Melissa an exempt administrator? Probably not.** Melissa performed mostly clerical tasks and did not exercise discretion on how these tasks were carried out. Some of these tasks like setting appointments were related to the operation of the business; however, business operations were not her primary duty. A worker who primarily performs the type of clerical tasks performed by Melissa is not an administrator even though she was given the title of "administrative assistant."

Now imagine the following scenario:

As the dental practice grew, Melissa took on additional responsibilities including processing insurance claims, independently addressing problems with insurance claims, executing contracts with insurance companies at the direction of her supervisor, researching dentist management software and assisting her supervisor during negotiations over software license agreements. She also independently managed patient accounts, developed business plans, handled payroll for office employees, acted as a signatory on financial accounts, arranged for the payment of bills and invoices to suppliers, and maintained employee personnel files. Although Melissa's employer exercised final authority over her decisions and assigned her job responsibilities, Melissa was free to execute these job responsibilities in any way that she pleased. She had broad discretion and independence in the manner by which she completed her job responsibilities.

**Did Melissa's job change enough to make her an exempt administrator? Probably.** Even though Melissa's decisions were subject to approval by her employer, Melissa used discretion in making decisions related to the operation of the dentist office. Although her employer assigned

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<sup>210</sup> *Id.*

her job duties, Melissa could achieve those tasks in any manner she wanted and had independence in how she fulfilled these assigned duties.

In analyzing facts under the administrative exemption, and assuming the first two factors are met (salary basis and performance of office work directly related to the management or general business operations of the employer), “what informs the inquiry is the amount of independence and discretion the employee is afforded in the course of achieving a result.”<sup>211</sup> This is often the most difficult factor to assess, and will be informed by your detailed interview with the claimant, the employer, and other witnesses who interacted with the claimant.

*(c) Professional exemption*

Like the executive and administrative exemptions, federal regulations provide guidance on the parameters of the professional exemption. Since the exemptions are functionally similar under the MWA and FLSA, and because there are no regulations or precedent under the New Mexico wage laws governing this exemption, LRD will, as a matter of policy in this instance, turn to FLSA precedent to augment an understanding of this exemption under the MWA. In order for the professional exemption to apply, all of the following requirements must be met:<sup>212</sup>

1. The worker must be compensated on a salary or fee basis at a rate not less than \$455 per week;
2. The worker’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
3. The advanced knowledge must be in a field of science or learning; **and**
4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

All four requirements must be met for the professional exemption to apply, and the following definitions will aid in a proper analysis of these requirements:

**Primary duty** means the principal, main, major or most important duty that the worker performs. Determination of a worker’s primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the worker’s job as a whole.<sup>213</sup>

**Work requiring advanced knowledge** means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual, mechanical, or physical work. A professional employee generally uses the advanced knowledge

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<sup>211</sup> *Williams*, 2017-NMCA-012, ¶ 36, 388 P.3d at 306.

<sup>212</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #17D: Exemption for Professional Employees under the Fair Labor Standards Act (FLSA), *available at* [https://www.dol.gov/whd/overtime/fs17d\\_professional.pdf](https://www.dol.gov/whd/overtime/fs17d_professional.pdf).

<sup>213</sup> *Id.*

to analyze, interpret, or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.<sup>214</sup>

**Field of science or learning** includes law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical, and biological sciences, pharmacy, and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but it is not in a field of science or learning.<sup>215</sup>

#### **Customarily acquired by a prolonged course of specialized intellectual instruction**

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word “customarily” means the exemption may be available to employees in such profession who have substantially the same knowledge level and perform substantially the same work as degreed employees, but who attain the advanced knowledge through a combination of work experience and instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.<sup>216</sup>

#### **Example:**

The field of exempt professionals is growing as knowledge in certain fields grows and more degrees are offered in new specialties by institutions of higher learning. Therefore, be careful to analyze the professional exemption based on the four requirements outlined in this section. However, the following are traditional examples of exempt learned professionals:

1. doctors
2. dentists
3. some registered nurses (discussed below)
4. pharmacists
5. clergies
6. accountants
7. architects
8. scientists
9. teachers
10. lawyers
11. engineers
12. actuaries
13. archeologists

**Registered nurses** who are paid on an hourly basis should receive overtime pay. However, registered nurses who are registered by the appropriate state examining board generally meet the

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

duties requirements for the learned professional exemption, and if paid on a salary basis of at least \$455 per week, may be classified as exempt.<sup>217</sup>

**Other healthcare employees:** Licensed practical nurses and other similar healthcare employees, however, generally do not qualify as exempt learned professionals, regardless of work experience and training, because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations. They are entitled to overtime pay.<sup>218</sup>

### **Who is not an exempt professional?**

Federal regulations provide guidance on who is not an exempt profession. These jobs include non-management workers such as:<sup>219</sup>

- carpenters
- electricians
- mechanics
- plumbers
- iron workers
- craftsmen
- operating engineers
- longshoremen
- construction workers

Federal regulations also specify that the additional following jobs are not exempt:<sup>220</sup>

- police officers
- detectives
- deputy sheriffs
- state troopers
- highway patrol officers
- investigators
- inspectors
- correctional officers
- parole or probation officers
- park rangers
- fire fighters
- paramedics
- emergency medical technicians
- ambulance personnel

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<sup>217</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #17N: Nurses and the Part 541 Exemptions under the Fair Labor Standards Act (FLSA), *available at* [https://www.dol.gov/whd/overtime/fs17n\\_nurses.pdf](https://www.dol.gov/whd/overtime/fs17n_nurses.pdf).

<sup>218</sup> *Id.*

<sup>219</sup> 29 C.F.R. § 541.3(a).

<sup>220</sup> 29 C.F.R. § 541.3(b)(1).

- rescue workers
- hazardous materials workers
- similar employees regardless of rank or pay level who perform such work as preventing, controlling, or extinguishing fires of any type
- rescuing fire, crime, or accident victims
- preventing or detecting crimes
- conducting investigations or inspections for violations of law
- performing surveillance
- pursuing, restraining, or apprehending suspects
- detaining or supervising suspected and convicted criminals, including those on probation or parole
- interviewing witnesses
- interrogating and fingerprinting suspects
- preparing investigative reports and similar work

None of these lists are exhaustive, and there are many, many jobs that do not appear on either one. To determine whether a particular job is exempt, you should first apply the salary basis test. If the test is met, then you should apply the factors of the relevant exemption to determine whether it applies. Remember that the burden is on the employer to “unmistakably” prove that all elements of an exemption are met, and the exemptions are to be construed narrowly.

*(2) Forepersons, superintendents, and supervisors*

Section 50-4-21(C)(1) also exempts “forepersons, superintendents and supervisors” from the definition of “employee” in the MWA. This exemption does not appear in the FLSA; however, New Mexico regulations provide guidance on this exemption. Section 11.1.4.7 NMAC provides as follows:

Forepersons, superintendents and supervisors,” as used in Section 50-4-1(C)(2) of the Minimum Wage Act means an employee who meets all of the following requirements:

- (1) their primary duty is to perform non-manual work related to management of the business;
- (2) they are to exercise discretion;
- (3) they regularly assist executives or perform specialized work or special assignments; and
- (4) they perform less than 20 percent manual work.

Under this exemption, “discretion” has the same meaning that appears in the FLSA exemptions. An employee who spends at least 20% of his or her time performing the same tasks as non-exempt employees is not exempt and must be paid in compliance with the MWA.

**Example:**

An employer promotes one of his workers to “supervisor” and tells him to set the schedules for the company’s other workers who perform manual work. The employer often asks the supervisor for his input in hiring, firing, and promotional decisions, but the employer does not always rely on these recommendations. Other than making these recommendations and setting schedules, the supervisor performs the same daily tasks as the other employees. His “supervisor” duties constitute less than 10% of his weekly working time. Is the supervisor exempt from the protections of the MWA?

No. He is not a supervisor for purposes of the MWA, because his primary duty is not managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise. Here at least 90% of the supervisor’s primary duties are the same as the manual work duties of the other employees. For the exemption to apply, a worker must meet all of the requirements outlined in 11.1.4.7 NMAC. Just because the employer gave the supervisor some nominal supervisory authority, does not mean that he is exempt. If this were the case, an employer could grant minimal supervisory authority in order to avoid paying minimum wages or overtime.<sup>221</sup>

c. Government employees

The MWA exempts from the definition of “employee” “an individual employed by the United States, the state or any political subdivision of the state; provided, however, that for the purposes of Subsection A of Section 50-4-22 NMSA 1978, ‘employee’ includes an individual employed by the state or any political subdivision of the state.”<sup>222</sup>

This exemption means that state and local government employees are protected by the minimum wage provisions of the MWA, not the overtime provisions. Federal employees are excluded entirely.

d. Certain workers in charities

Section 50-4-21(C)(3) exempts

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. The employer-employee relationship shall not be deemed to exist with respect to an individual being served for purposes of rehabilitation by a charitable or nonprofit organization, notwithstanding the payment to the individual of a stipend based upon the value of the work performed by the individual.

This statute exempts two categories of nonprofit workers:

- (1) Volunteers
- (2) Those the nonprofit serves for the purpose of rehabilitation

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<sup>221</sup> See *Rivera v. McCoy Corp.*, 240 F. Supp. 3d 1150, 1156 (D.N.M. 2017).

<sup>222</sup> NMSA 1978 § 50-4-21(C)(2).

In order to evaluate a claim involving this exemption you must first determine whether the alleged employer is an educational, charitable, religious, or nonprofit organization. This information is available on the Secretary of State's website. If it is such an organization, then you must decide whether any either of the two exemptions applies:

*(1) Whether the worker was a volunteer*

According to the U.S. Department of Labor, people volunteering work to religious, charitable, civic, humanitarian, or similar nonprofit organizations are not employees where they volunteer freely out of their own public service, religious, or humanitarian objectives, and without contemplation of receipt of compensation.<sup>223</sup> Typically, volunteers serve on a part-time basis and do not displace regular employed workers or perform work that would otherwise be performed by regular employees. It is generally not lawful for a nonprofit to accept the unpaid labor of a volunteer in commercial activities run by the nonprofit, such as a gift shop.

Paid employees of a nonprofit organization cannot volunteer to provide the same services to the organization that they typically perform for pay. In other words, a nonprofit cannot avoid the obligation to pay overtime wages to employees by deeming overtime hours worked to be "volunteer" time.

*(2) Served for purposes of rehabilitation*

Rehabilitation means "the process of restoring an individual . . . to a useful and constructive place in society through some form of vocational, correctional, or therapeutic retraining or through relief, financial aid or other reconstructive measure."<sup>224</sup> Therefore, an "individual being served for purposes of rehabilitation by a charitable or nonprofit organization" is receiving services to restore him to a prior level of ability that has been lost. For example, a person receiving addiction recovery services or recuperating from an injury may be "served for purposes of rehabilitation." Typically, rehabilitation services are time-limited. Therefore, you should take a skeptical view towards any claim of exemption involving a work relationship of indefinite duration. Likewise, you should determine whether the individual is actually receiving services from the nonprofit organization.

Note that rehabilitation is not the same thing as "habilitation." To habilitate means "to qualify oneself."<sup>225</sup> Habilitation increases or empowers an individual's ability to a level that has not previously been attained. Therefore, nonprofit organizations that serve and receive work from those with congenital disabilities, for example, are not engaged in rehabilitation services.

e. Sales and special forms of compensation

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<sup>223</sup> U.S. Department of Labor, Wage and Hour Division Fact Sheet #14A: Non-profit Organizations and the Fair Labor Standards Act (FLSA), *available at* <https://www.dol.gov/whd/regs/compliance/whdfs14a.pdf>.

<sup>224</sup> WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1914 (1993).

<sup>225</sup> *Id.* at 1017.

Section 50-4-21(C)(4) of the MWA exempts “salespersons or employees compensated upon piecework, flat rate schedules or commission basis” from the definition of “employee.”

*(1) Salespersons*

Salespersons are exempt under the MWA. There is no case law interpreting this exemption. The closest analog to this “salesperson” exemption in the FLSA is the exemption for an “employee employed . . . in the capacity of outside salesman.”<sup>226</sup> FLSA regulations define this term as follows:<sup>227</sup>

any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

The MWA exemption appears to be broader in that it lacks the term “outside.” Therefore, to interpret the MWA exemption, LRD will apply only factor (1) above, without regard to factor (2), which addresses the “outside” portion of the FLSA exemption that does not exist in the MWA.

The FLSA regulations interpret the two subfactors of factor (1) as follows:<sup>228</sup>

Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that “sale” or “sell” includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

Exempt [] sales work includes not only the sales of commodities, but also “obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.” Obtaining orders for “the use of facilities” includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

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<sup>226</sup> 29 U.S.C. § 213(a)(1).

<sup>227</sup> 29 C.F.R. § 541.500(a).

<sup>228</sup> 29 C.F.R. § 541.501.

The word “services” extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

Any employee whose primary duty falls within the above criteria is exempt from the MWA.

(2) *Piece rate*

The terms “piece rate” or “piecework” refer to a set amount paid for each unit produced or task completed.<sup>229</sup> The MWA exempts employees compensated upon piecework from coverage. However, just because someone is paid on a piecework basis does not mean that the individual is exempt from the MWA; there are limits to this exemption. Because there are no regulations or precedent under the New Mexico wage laws governing this term, LRD will, as a matter of policy in this instance, turn to FLSA precedent to augment an understanding of this term under the MWA. For example, in two separate federal decisions, courts have ruled that requiring piece rate employees to remain on the job, when there is no work available, alters the piece-rate analysis.<sup>230</sup> If a piece-rate worker is required to wait at the jobsite until piece rate jobs become available, then that worker is likely not exempt. This is because the wait time confers a benefit to the employer, because the employer will have workers available to perform work when a customer or job arrives. The burden is on the employer to prove the exemption, so if you discover that there was uncompensated wait time, the exemption does not apply.

**Example:**

Don works for a car dealership in the service department. Don’s job was to paint damaged vehicles after the body work was completed. Employer paid Don a set amount for each painting job, no matter how long the job might take him. This piece rate was, however, commensurate with the size and difficulty of each job. For example, his piece rate was higher if he had to paint a whole car rather than a front quarter panel, or if he had to paint a large truck versus a compact car.

At times, work would be slow and there were no painting jobs available for Don. However, the employer required Don to remain in the shop during these times so that he would be available and able to immediately start on a new job once one came through the door. Is Don an exempt piece-rate employee?

Probably not. Since the employer requires Don to wait in the shop for new jobs when no jobs are currently available, his wait time benefits the employer in that the employer has someone ready to begin a new job when one arrives. Since Don’s wait time confers a benefit on the employer he should be paid for this wait time, and he not a true piece-rate employee that is exempt from the MWA.

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<sup>229</sup> *Casias v. Distribution Mgmt. Corp.*, No. 11-874, 2013 WL 12091857, at \*5 (D.N.M. Mar. 27, 2013).

<sup>230</sup> *Id.* at \*6; *Olivo v. Crawford Chevrolet, Inc.*, 799 F. Supp. 2d 1237, 1242 (D.N.M. 2011).

**Note: agricultural workers.** This exemption does not apply to agricultural workers paid on a piece rate. NMSA 1978 Section 50-4-21(C)(11)(c) contains a more limited exemption for certain agricultural workers paid on a piece rate, which demonstrates a legislative intent to include other agricultural workers paid on a piece rate into the protections of the MWA.

### (3) *Commission*

Commission is not defined in the MWA or the FLSA; however, the Black’s Law Dictionary definition is a “fee paid to an agent or employee for a particular transaction, usu[ally] as a percentage of the money received from the transaction.”<sup>231</sup>

Additionally, federal regulations offer guidance on what does **not** constitute a commission:

A commission rate is not bona fide if the formula for computing the commissions is such that the employee, in fact, always or almost always earns the same fixed amount of compensation for each workweek . . . . Another example of a commission plan which would not be considered as bona fide is one in which the employee receives a regular payment constituting nearly his entire earnings which is expressed in terms of a percentage of the sales which the establishment or department can always be expected to make with only a slight addition to his wages based upon a greatly reduced percentage applied to the sales above the expected quota.<sup>232</sup>

### **What is the difference between a piece rate and a commission?**

In a 2016 decision the United States District Court for the District of Kansas gave a concise explanation of the difference between piece rates and commissions. The court explained that

In a piece-rate system a worker is paid by the item produced by him: so much per scarf, for example, if his job is to make scarves. In a commission system, he is paid by the sale—so if he works for a shoe store he’s paid a specified amount per pair of shoes that he sells. Thus the scarf worker is paid for making scarves even if they haven’t been sold—that is, even if he’s producing for inventory—while the shoe salesman is paid only when he makes a sale.<sup>233</sup>

The court further stated that an important consideration in differentiating between the two is that “commission-compensated work involves irregular hours of work.”<sup>234</sup> The court concluded that “[s]imply put, a commission system pays employees upon a sale, at a rate that is related to the price of the sale, and for work involving irregular hours.”<sup>235</sup>

**Why does this distinction matter?** This distinction matters if a case involves wait time. If the worker is paid on a commission basis, then the wait time analysis does not apply. Remember that one feature of commission pay is that the worker will have irregular hours of work. However, if

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<sup>231</sup> BLACK’S LAW DICTIONARY 226 (Abr. 8th ed. 2005).

<sup>232</sup> 29 C.F.R. § 779.416(c).

<sup>233</sup> *Matrai v. DirecTV, LLC*, 168 F. Supp. 3d 1347, 1364 (D. Kan. 2016).

<sup>234</sup> *Id.*

<sup>235</sup> *Id.*

the worker is paid by piece rate, then a worker who is “engaged to wait” during downtime is not exempt from the MWA.

(4) *Flat rate schedules*

A “flat rate schedule,” as used in the MWA, has “a meaning in the automobile repair field. That is the only technical meaning known. It is not known whether this is the only field where a flat rate schedule is used.”<sup>236</sup> Under a flat rate schedule compensation system, different tasks are assigned different labor hours based on estimates of how long a particular service or repair should take. That number is then multiplied by a “flat rate” that is assigned to each employee based on certifications and experience.<sup>237</sup> If a claimant in the automobile industry is paid under this system, then the claimant is exempt from the protections of the MWA.

The federal cases discussing flat rate compensation systems analyze whether the flat rate schedule is more properly considered a “piece-rate” or “commission.” The lesson to draw from these cases is that a “flat rate schedule” is another way of referring to a commission system or a piece rate system.

It is only necessary to decide whether a flat-rate pay system is more like a commission or a piece rate if there were long periods of downtime where the worker was waiting for a job. In this case, the worker may be covered by the MWA because he was “engaged to wait,” as discussed in the piece rate section above. A flat-rate schedule system is considered a piece rate if wages paid to flat-rate employees are proportional to the charges passed on to customers.<sup>238</sup>

f. The “18 and under” exemptions

Section 50-4-21(C)(5) exempts “students regularly enrolled in primary or secondary schools working after school hours or on vacation” from the MWA definition of “employee.”

Section 50-4-21(C)(7) exempts “persons eighteen years of age or under who are not students in a primary, secondary, vocational or training school” from the MWA definition of “employee.”

Section 50-4-21(C)(8) exempts “persons eighteen years of age or under who are not graduates of a secondary school.”

The effect of these three exemptions is that no one under nineteen years of age is considered an employee under the MWA, under any circumstances. However, note that other legal requirements apply to the employment of children under the age of 16.<sup>239</sup>

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<sup>236</sup> *Burch v. Foy*, 1957-NMSC-017, ¶ 4, 62 N.M. 219, 222, 308 P.2d 199, 201.

<sup>237</sup> *Wilks v. Pep Boys*, No. 02-837, 2006 WL 2821700, at \*16 (M.D. Tenn. Sept. 26, 2006); *Herrera v. TBC Corp.*, 18 F. Supp. 3d 739, 740–41 (E.D. Va. 2014).

<sup>238</sup> *Wilks*, 2006 WL 2821700, at \*15; *Huntley v. Bonner's, Inc.*, No. 02-1004, 2003 WL 24133000, at \*3 (W.D. Wash. Aug. 14, 2003).

<sup>239</sup> 11.1.4.9 NMAC; NMSA 1978 § 50-6-4.

g. Registered apprentices and learners otherwise provided by law

Section 50-4-21(C)(6) exempts “registered apprentices and learners otherwise provided by law.” This exemption applies to apprenticeships registered under NMSA 1978 Section 50-7-1 *et seq.* Under this provision, an apprentice is “a person at least sixteen years old who is covered by a written agreement with an employer, or with an association of employers or employees acting as agent for an employer, and approved by the state apprenticeship council, which apprentice agreement provides for not less than two thousand hours required for any given trade by reasonably continuous employment for such person, for his participation in an approved schedule of work experience through employment and for at least one hundred forty-four hours per year of related supplemental instruction.”<sup>240</sup> Section 11.2.3 NMAC governs these apprenticeships.

h. G.I. bill trainees

Section 50-4-21(C)(9) exempts “G.I. bill trainees while under training” from the definition of “employee” in the MWA.

A G.I. bill trainee is enrolled in an apprenticeship or on-the-job training (“OTJ”) program that is approved by the Veterans Administration (VA). Employers generally pay a reduced OTJ/apprenticeship wage that begins at 50% of a fully trained employee and increases to at least 85% of a fully trained employee toward the end of the training.<sup>241</sup>

Both the worksite and the job must be approved by the VA or the New Mexico Department of Veterans Services (“NMDVS”).

When an apprenticeship or OTJ program is approved, the employer signs a contract with either the VA or the NMDVS that, among other things, sets the wage to be paid to the trainee. To ensure the apprenticeship or OTJ program is approved, you can contact the VA or the NMDVS. The VA approves programs offered by agencies of the federal government, as well as programs related to interstate commerce carriers and railroads. The NMDVS approves non-federal programs within New Mexico.<sup>242</sup>

In order to certify that a program is approved you should contact the approving agency.

Contacts:

- VA: (888) 442-4551
- NMDVS: (505) 383-2418

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<sup>240</sup> NMSA 1978 § 50-7-2.

<sup>241</sup> See Veterans Benefit Admin., *Understanding On-The-Job Training and Apprenticeship Approval: An Informational Guide for Employers and Sponsors*, First Edition 1 (Nov. 2015).

<sup>242</sup> *Id.* at 1.

Remember that because approved programs contractually set wages to be paid to trainees and apprentices, these wages are promised wages. LRD should enforce promised wages pursuant to the WPA.<sup>243</sup>

Lastly, apprenticeship programs should be registered with the U.S. Department of Labor, Office of Apprenticeship, or the New Mexico Department of Workforce Solutions.

i. Certain seasonal employees

Section 50-4-21(C)(10) exempts certain seasonal employees if their employer holds a certificate issued by the DWS to exempt certain employees. That provision exempts:

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

- (a) whether such employment shall be at an educational, charitable or religious youth camp or retreat;
- (b) that such employment will be of a temporary nature;
- (c) that the individual will be furnished room and board in connection with such employment, or if the camp or retreat is a day camp or retreat, the individual will be furnished board in connection with such employment;
- (d) the purposes for which the camp or retreat is operated;
- (e) the job classifications for the positions to be exempted; and
- (f) any other factors that the director deems necessary to consider.

To qualify for this exemption, the employer must hold a valid certificate issued by the Director of the LRD. This form is located on the DWS website under the LRD tab.

j. Certain agricultural employees

Section 50-4-21(C)(11) contains several exemptions to MWA coverage for certain employees in agriculture.

*(1) 500 man-days exemption*

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<sup>243</sup> NMSA 1978 §§ 50-4-1 – 50-4-12.

Section 50-4-21(C)(11)(a) exempts an employee in agriculture “if the employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.”

The 500 man-days exemption exempts a worker whose employer did not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year. Federal law mirrors New Mexico law, and the regulations governing federal law explain that a “man-day” is defined as any day in which an agricultural laborer worked one hour or more, and “500 man-days is approximately the equivalent of seven employees employed full-time in a calendar quarter.”<sup>244</sup> However, “a farmer who hires temporary or part-time employees during part of the year, such as the harvesting season, may exceed the man-day test even though he may have only two or three full-time employees.”<sup>245</sup> Thus, this exemption only applies to small farms with few workers.

Important facts for this analysis include:

- How many workers did the farm hire in any calendar quarter of the preceding calendar year?
- How many days in any quarter of the preceding calendar year did the farm hire labor for at least one hour i.e., how many man-days of labor did the farm hire in any quarter of the preceding calendar year?

*(2) Immediate family exemption*

Section 50-4-21(C)(11)(b) exempts employees in agriculture “if the employee is the parent, spouse, child or other member of the employer’s immediate family; for the purpose of this subsection, the employer shall include the principal stockholder of a family corporation.”

To determine whether this exemption applies, you must first identify the principal stockholder of the family corporation, and then determine whether the claimant is an exempt family member of that person.

*(3) Limited hand-harvest laborer exemption*

Section 50-4-21(C)(11)(c) exempts employees in agriculture “if the employee: 1) is employed as a hand-harvest laborer and is paid on a piece-rate basis in an operation that has been, and is customarily and generally recognized as having been, paid on a piece-rate basis in the region of employment; 2) commutes daily from the employee's permanent residence to the farm on which the employee is so employed; and 3) has been employed in agriculture less than thirteen weeks during the preceding calendar year.”

This is commonly known as the “limited hand-harvest laborer exemption,” and a worker only falls under this exemption if **all** of the following apply:

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<sup>244</sup> 29 C.F.R. § 780.305(a).

<sup>245</sup> *Id.*

The worker must:

1. be employed as a hand-harvest laborer (picking the crops);
2. paid on a piece-rate basis in an operation that is customarily paid on a piece-rate basis;
3. commute daily from the worker's permanent residence to the farm on which the worker is employed; **and**
4. have been employed in agriculture less than 13 weeks during the preceding calendar year.

In order to fall under this category, a worker must meet the requirements of (1) through (4) above. Again, federal law mirrors New Mexico law, and the regulations governing the federal law emphasize that if the individual worker has been employed in agriculture for 13 weeks or more during the preceding calendar year, the minimum wage exemption does not apply to that individual.<sup>246</sup> In determining the 13-week period, agricultural work for all employers within the preceding calendar year is counted, not just work for the current employer.<sup>247</sup> If the employer claims the minimum wage exemption, he is responsible for obtaining a statement from the employee showing the number of weeks she was employed in agriculture during the preceding calendar year.<sup>248</sup> The vast majority of New Mexico's agricultural workers do not fall into this very limited exemption as most agricultural workers work more than 13 weeks per year in agriculture.

Important facts for this analysis include:

- Did the worker pick crops for the employer?
- Was the worker paid on a piece rate basis?
- Did the worker commute daily to the farm?
- How many weeks was the worker employed in agriculture in the preceding calendar year?

#### *(4) Child hand-harvest laborers*

Section 50-4-21(C)(11)(d) exempts employees in agriculture "if the employee, other than an employee described in Subparagraph (c) of this paragraph: 1) is sixteen years of age or under and is employed as a hand-harvest laborer, is paid on a piece-rate basis in an operation that has been, and is generally recognized as having been, paid on a piece-rate basis in the region of employment; 2) is employed on the same farm as the employee's parent or person standing in the place of the parent; and 3) is paid at the same piece-rate as employees over age sixteen are paid on the same farm."

If the worker meets all of these criteria, the worker is exempt from coverage by the MWA.

#### *(5) Dairy and livestock workers*

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<sup>246</sup> 29 C.F.R. § 780.316(a).

<sup>247</sup> 29 C.F.R. § 780.316(c).

<sup>248</sup> 29 C.F.R. § 780.316(e).

Section 50-4-21(C)(11)(e) exempts employees in agriculture “if the employee is principally engaged in the range production of livestock or in milk production.”

Because there are no regulations or precedent under the New Mexico wage laws governing this definitions within this exemption, LRD will, as a matter of policy in this instance, turn to FLSA regulations to augment an understanding of this exemption under the MWA. “Production of livestock” means “actively taking care of the animals or standing by in readiness for that purpose.”<sup>249</sup> Examples of work that does not fall under this definition include “terracing, reseeding, haying, and constructing dams, wells, and irrigation ditches.”<sup>250</sup> For a worker to fall within the “range production of livestock” exemption, the worker must meet the definitions of “principally engaged,” “range,” and “production of livestock.”<sup>251</sup> This exemption also exists at the federal level. In the ordinary case, a worker is “principally engaged” in the range production of livestock if greater than fifty percent of that worker’s primary duties are dedicated to the range production of livestock.<sup>252</sup> “Range” production means that the worker is producing livestock on “land that is not cultivated.”<sup>253</sup> Range production takes place on “land that produces native forage for animal consumption, and includes land that is revegetated naturally or artificially to provide a forage cover that is managed like range vegetation.”<sup>254</sup> This is “most typically conducted over wide expanses of land, such as thousands of acres.”<sup>255</sup> This means the work takes place away from the administrative headquarters of a ranch and requires the worker’s “constant attendance on the range, on a standby basis, for such periods of time so as to make the computation of hours worked extremely difficult.”<sup>256</sup> An example of when this exemption does not apply is a feed lot operation or “any area where the stock involved would be near headquarters.”<sup>257</sup>

Important facts for this analysis include:

- What were the worker’s job duties and how much of work time was devoted to each?
- Where was the work performed?
- Where is the ranch headquarters located?
- Did the animals feed on forage, cultivated crops, or was food brought to the animals?

Workers engaged in milk production are also exempt from the MWA. To be exempt, the worker must be “principally engaged” in milk production and the same definition of “principally engaged” used in the livestock production context applies to the milk production context. For example, administrative duties on a ranch, time spent repairing farm roads, or time spent transporting milk, would not count toward the greater than fifty percent requirement for the

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<sup>249</sup> 29 C.F.R. § 780.327.

<sup>250</sup> *Id.*

<sup>251</sup> 29 C.F.R. § 780.324.

<sup>252</sup> 29 C.F.R. § 780.325.

<sup>253</sup> 29 C.F.R. § 780.326.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*

<sup>256</sup> 29 C.F.R. § 780.329.

<sup>257</sup> *Id.*

definition of “principally engaged.” This exemption also does not apply to workers who are truck drivers on the farm or those who are engaged in occupational duties that do not relate to livestock production or milk production. For example, a truck driver whose sole job is to transport milk is not exempt.

k. Packing and handling exemption

Section 504-21(C)(12) exempts “an employee engaged in the handling, drying, packing, packaging, processing, freezing or canning of any agricultural or horticultural commodity in its unmanufactured state” from the definition of “employee.” This exemption, like the dairy exemption, is unique to New Mexico and does not exist in the FLSA.

Because there are no regulations or precedent under the New Mexico wage laws governing this exemption, LRD will, as a matter of policy in this instance, turn to FLSA regulations and precedent to augment an understanding of this exemption under the MWA. “Agricultural or horticultural commodity” is any unmanufactured product produced by “agriculture” as that term is defined in the FLSA.<sup>258</sup> Horticulture is “the science of growing fruits, vegetables, flowers or ornamental plants,” and “is recognized as a segment or division of agriculture.”<sup>259</sup>

An agricultural or horticultural commodity is no longer in its “unmanufactured state” when it is altered by processing or mixing with other ingredients to render a different product that is sold to buyers.<sup>260</sup> For example, when alfalfa is dried and mixed with other ingredients to make livestock feed, then sold to buyers, it ceases to be in its “unmanufactured state.”

**Example:**

John works at a plant that processes onions and chile and also makes salsa. There are two main divisions of the business. One receives onions and chile directly from the fields for the purposes of grading, sorting, and packing these products to be sold or to be used in the salsa-making operation. The other division receives crates of chile, onions, tomatoes, salt, and other ingredients for use in making and canning salsa. Most of the chile and onions come from the other division of the business; however, the tomatoes and other ingredients come from various wholesale suppliers. John works 40 hours a week and splits his time between the two divisions of the company 50/50. Is John covered by the MWA?

Yes, and no. When John works in the salsa side of the business, he is not working with an agricultural commodity in its unmanufactured state, since he is engaged in the cooking and mixing of ingredients to make salsa. By cooking and mixing the ingredients John is “manufacturing” salsa and the commodities are no longer in their unmanufactured state. However, when John works sorting and packing chile and onions, they are in their unmanufactured state and John is exempt from MWA coverage.

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<sup>258</sup> See 29 U.S.C. § 203(f).

<sup>259</sup> *Fla. Gladiolus Growers Ass’n v. United States*, 106 F. Supp. 525, 526 (S.D. Fla. 1952).

<sup>260</sup> Rev. Rul. 56-53 (IRS RRU), 1956-1 C.B. 456, 1956 WL 11127; *see also* TAM 8206047 (IRS TAM), 1980 WL 138182 (summarizing Rev. Rul. 56-53 and relying upon its rationale).

#### 1. Group home employees residing on the premises

Section 50-4-21(C)(13) exempts “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.” This exemption is unique to New Mexico and does not exist in the FLSA.

To fall under this exemption, an employee must:

- be employed by a charitable, religious, or nonprofit organization operating a group home for persons who have a mental, emotional, or developmental disability; and
- reside on the premises of the group home where he works.

Both elements must be met for the exemption to apply.

The purpose of Section 50-4-21(C)(13) is to acknowledge that a different employment relationship exists when a person resides and works in a group home serving people with disabilities. This relationship will consider atypical payments made to the group home staff/resident, such as room and board. This relationship will also consider differentiation of assigned tasks. At times the group home staff/resident may carry out certain active roles—such as direct supervision, preparing meals, and doing laundry for other residents. At other times the group home staff/resident’s role could be mere presence, perhaps even while asleep, and may or may not be triggered into a more active role as needed based on the circumstances of the home.

#### 4. **No exemption for persons with a disability**

Section 50-4-23 of the MWA contains a provision giving the Director the authority to write regulations providing for the employment under special certificates of certain individuals with physical or mental disabilities at rates lower than the minimum wage. The Director may write these regulations “to the extent necessary in order to prevent curtailment of opportunities for employment.”<sup>261</sup>

The Director has not issued regulations providing for the employment under special certificates of any individuals with disabilities. There is no process for obtaining a special certificate, nor any criteria by which to evaluate an application for a special certificate. Therefore, no employer in New Mexico may pay any employee less than the full minimum wage under this provision of law.

Some employers may have obtained a certificate issued by the U.S. Department of Labor to employ individuals with disabilities at a rate less than the federal minimum wage of \$7.25 required under the FLSA. This federal certification **does not exempt** an employer of a disabled employee in New Mexico from the obligation to pay the minimum wage of \$7.50 under the MWA, or any higher local minimum wage that may be applicable under the WPA.

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<sup>261</sup> NMSA 1978 § 50-4-23(A).

## **E. LRD's territorial jurisdiction**

### **1. Only work performed in the state of New Mexico**

The LRD only has jurisdiction over work performed within the State of New Mexico and is limited to the enforcement of the laws of the State of New Mexico.<sup>262</sup> If you find that a wage claimant performed some work in New Mexico and some in another state, LRD has jurisdiction over a portion of the wage claim: for the time periods the employee worked in New Mexico. You may lawfully investigate and take enforcement action for that portion of the wage claim.

When a case involves work performed both in and outside of New Mexico, you should contact the wage claimant to explain the limits on LRD's jurisdiction and ensure the wage claimant is aware of the available options for pursuing the entire wage claim. Inform the wage claimant:

- You can investigate the portions of the wage claim that arose in New Mexico only.
- The wage claimant may file a wage claim in the other state for work performed in that state. In that case, there would be two investigations for the work performed in each of the two states. Give the wage claimant contact information for the LRD's counterpart agency in that state, if one exists.
- The wage claimant may file a wage claim at the Wage and Hour Division (WHD) of the U.S. Department of Labor. If the WHD has jurisdiction, WHD may be able to investigate the entire claim all at once. If this happens, LRD may work with WHD to determine whether additional wages are owed for the New Mexico work under state law.

Each case is different, so there is no best course of action that applies to all cases. Explain the options to the wage claimant, and find out his/her preferred course of action. If the wage claimant files a claim with WHD, you may temporarily stop your investigation until you find out whether WHD will take enforcement action in the case. If so, you should collaborate with WHD if there are additional wages owed under New Mexico law. If there are no additional claims under New Mexico law, then you may close the case once you learn that WHD is taking enforcement action. If WHD does not take enforcement action, you should resume your investigation for the New Mexico portion of the claims.

### **2. No jurisdiction on tribal lands**

Tribes enjoy inherent sovereignty over their lands and people pre-dating any act of congress.<sup>263</sup> However, in early U.S. history the United States Supreme Court articulated a doctrine that recognizes the federal government as having a trust responsibility over tribes; part of which responsibility is to hold tribal lands in trust for tribes.<sup>264</sup> Subsequently the United States Supreme Court interpreted the Indian Commerce Clause of the United States Constitution (Article I,

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<sup>262</sup> NMSA 1978 § 50-4-1(A); 11.1.4.101 NMAC.

<sup>263</sup> *Talton v. Mayes*, 163 U.S. 376 (1896).

<sup>264</sup> *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *see also Worcester v. Georgia*, 31 U.S. 515 (1832); *United States v. Mitchell*, 463 U.S. 206 (1983).

Section 8) to grant plenary power to Congress to control Indian affairs.<sup>265</sup> Under its plenary power Congress may define the scope of tribal powers, even in effect to overrule a decision of the Supreme Court limiting “inherent” tribal authority.<sup>266</sup>

Owing to the trust responsibility of the federal government over tribes and their land, states are almost exclusively preempted from exercising power over tribes or their tribal lands.<sup>267</sup>

For a state to exercise jurisdiction on land held in trust for the tribes by the U.S. government, there must either be an express waiver of sovereign immunity by the tribe<sup>268</sup> or an act of Congress.<sup>269</sup> Neither the MWA nor the WPA constitute a waiver of sovereign immunity by a tribe for LRD to enforce wage laws on tribal land, nor do they constitute an act of Congress granting LRD jurisdiction to enforce the MWA or WPA on tribal land. No other law provides LRD with a tribal waiver or an act of Congress to enforce wage laws on tribal land.

Whether or not land constitutes “Indian Country” for jurisdictional purposes can be a very complex question. If a claimant maintains the claim has arisen on tribal land and you have no evidence to the contrary you should deny the claim. If there is some confusion as to whether or not the claim arose on tribal land, please refer the matter to LRD management and they will seek guidance from DWS’ Office of General Counsel before denying the claim.

#### **F. FLSA exemptions that do not exist under the MWA**

Some common FLSA exemptions do not exist under the MWA. These include the Motor Carrier Exemption, the Portal-to-Portal Act, and the FLSA requirement that a covered employer must have at least \$500,000 in gross revenue per year. This Investigations Manual generally only discusses the exemptions that apply to the New Mexico wage payment laws, and does not address exemptions that are not applicable in New Mexico. If an employer asserts that a particular FLSA exemption applies, you should ask LRD Management about it. LRD management can confirm whether an exemption applies or obtain confirmation from DWS’ Office of General Counsel.

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<sup>265</sup> *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *see also United States v. Wheeler*, 435 U.S. 313 (1978).

<sup>266</sup> *United States v. Lara*, 541 U.S. 193 (2004).

<sup>267</sup> *Williams v. Lee*, 358 U.S. 217 (1959).

<sup>268</sup> *Santa Clara Pueblo*, 436 U.S. 49.

<sup>269</sup> *Lara*, 541 U.S. 193.

### **III. NONDISCRIMINATION AND LANGUAGE ACCESS**

LRD will ensure equal and meaningful access for all individuals who report wage violations or interact with an investigation, regardless of language ability. Consistent with this commitment, language access services will be made available free of charge to those with limited English proficiency.

A limited English proficient (LEP) person is one who does not speak English as his/her primary language and who has a limited ability to read, speak, write, or understand English. LRD employees have an obligation to provide LEP persons with meaningful access to LRD's services throughout all stages of the wage claim process. Keep in mind that many LEP persons can understand and engage in some common conversational English situations, but cannot understand or participate in a conversation on an unfamiliar topic, like the wage claim process, without an interpreter or without other language assistance services. LRD provides the following language access services free of charge to LEP individuals.

#### **A. In-house bilingual staff**

Bilingual staff members can provide language assistance services between LRD staff and LEP individuals, including wage claimants, witnesses, or employers. Bilingual LRD staff can also provide sight translation of documents that contain vital information by reading forms or letters aloud in Spanish. If you do not speak Spanish, please ensure that you know the names and phone numbers of the bilingual staff members in your office who can provide language assistance to Spanish-speaking wage claimants, witnesses, and/or employers during investigations.

#### **B. Telephonic interpretation**

LRD also uses a telephonic interpretation service to accommodate LEP individuals' oral language service needs. You should use the telephonic interpretation service when an in-house bilingual staff member who speaks an LEP customer's preferred language is not available. You can also read documents containing vital information to the telephonic interpreters so they can render the information in the documents orally into an LEP customer's preferred language. A card with the telephone number and access codes for the telephonic interpretation service will be distributed to all LRD staff. You should keep this card in an easily-accessible place in your workspace so that you can quickly contact the telephonic interpretation service without unnecessary delay when an LEP person calls you.

#### **C. Claim form notification of need for interpretation**

Wage claimants indicate their language preference on the wage claim form. During your investigation, always verify whether the wage claimant has expressed a language preference on the wage claim form before contacting them. If so, seek out an in-house bilingual staff member, or call the agency's telephonic interpreter service before calling the wage claimant.

##### **1. Spanish-language forms and letters**

The LRD has translated into Spanish all standardized portions of written materials provided to the parties or made available to the public.<sup>270</sup> Spanish-language versions of these documents appear after the relevant English-language versions in the Appendices to this Investigations Manual.

Forms and procedural materials translated into Spanish include:

- a. Wage claim form
- b. Form letters
- c. Standardized portions of Administrative Decisions
- d. Notices
- e. Brochures
- f. Informational materials

For people who have indicated a preference for Spanish on the wage claim form, you should send all standardized forms and letters to the wage claimant in Spanish.

However, because custom portions of Spanish language form letters, notices, or Administrative Decisions are not translated into Spanish, LRD must still include the multilingual Babel notice in Spanish (see next section) at the beginning of every written correspondence sent to parties who indicate Spanish is their preferred language.

#### **D. Multilingual notice**

The multilingual notice contains the following statement in English, Spanish, German, Navajo, French, Mandarin, Tagalog, Vietnamese, Italian, Japanese, Hebrew, Arabic, Russian, Portuguese, Korean, Polish, Greek, Thai, Hungarian, and Gujarati:<sup>271</sup>

*You have the right to an interpreter at no cost to you. To discuss your case with someone in your language, please visit any Labor Relations Division office or call 505-841-4400 and indicate the language you speak.*

The multilingual notice containing each of these languages is at Appendix 1.

There are two uses for the multilingual notice:

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<sup>270</sup> 11.1.4.122 NMAC, “Language Access”: “The LRD shall translate into Spanish all standardized portions of written materials provided to the parties or made available to the public, including the claim form, form letters, standardized portions of administrative decisions, notices, brochures, and informational materials.”

<sup>271</sup> *Id.*: “The multilingual notice shall include the top five written languages spoken in each county in New Mexico, set forth in the language access plans of the New Mexico state courts.” In the event of population changes resulting in language usage changes, LRD’s multilingual notice may also change.

- The complete multilingual notice at Appendix 1, containing all of the languages, must appear on the LRD web page and at the front desk of all LRD and Workforce Connection offices.<sup>272</sup>
- When you send a letter or email to a wage claimant who has listed a language preference other than English, the notice in only the wage claimant's preferred language must be placed at the beginning of the letter, after the heading and before the English-language text.<sup>273</sup> There is no need to include all the languages in the multilingual notice in the letter.

When LEP customers are not able to self-identify their language need, other options are available, such as making use of the “iSpeak” card. The iSpeak card should be placed readily available to staff to aid them in allowing the LEP customer to self-identify their preferred language.<sup>274</sup>

## **E. Assistance in completing the wage claim form**

If any individual requests assistance in filling out a wage claim form, the LRD will assist them to complete the wage claim form in person or by telephone.<sup>275</sup> Use an in-house bilingual staff member or the telephonic interpretation service to help an LEP wage claimant fill out the wage claim form. Make sure to indicate the wage claimant's preferred language on the wage claim form. Additionally, if you are interacting with a Spanish speaking LEP person, provide him or her with a Spanish language wage claim form. If bilingual Spanish-speaking staff are not available, then the telephonic interpretation service should be contacted.

To make sure we are providing quality customer service and meaningful access to all customers at this early phase, LRD employees should ensure that all resources are being used to break down any language barriers that are present for participants and staff. Under the law, all individuals, including those who are LEP, are entitled to meaningful access to all of DWS' programs, services, and activities.

To ensure equal and meaningful access, follow these steps when interacting with LEP individuals:

- Determine whether the LEP individual's language preference is Spanish or another language. If Spanish, contact in-house bilingual staff to interpret. If in-house bilingual

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<sup>272</sup> *Id.*: “The notice shall appear on the LRD website and at the front desk of all LRD offices.”

<sup>273</sup> *Id.*: “It shall also be printed in the claimant's preferred language on all documents sent to parties who select a preferred language other than English.”

<sup>274</sup> Note that if a claimant needs a language that is not on the multilingual notice, you can also use an iSpeak card produced by the U.S. Census bureau, which contains many more languages.

<sup>275</sup> 11.1.4.100 NMAC, “Filing of a Wage Claim”: “A claimant may complete the wage claim form themselves or have a LRD employee assist in completing the form based on the claimant's statements in-person or by telephone.”

staff are not available, then call the Department's interpreter service. **Never** tell a wage claimant to call or come back later if in-house bilingual staff member is not available.

- If the LEP individual's preferred language is a language other than Spanish, call the Department's interpreter service.

#### **F. Interpreting letters**

If a wage claimant calls for help understanding a letter, find an in-house bilingual staff member or call the department's interpreter service, as appropriate. If you are the LLA on the case, find LRD's copy of the letter in question so that it can be fully interpreted for the wage claimant. If using an in-house bilingual staff member, give them the letter to sight translate the document. If using the department's interpreter service, read the letter line-by-line so that the interpreter can orally render the information in the LEP customer's preferred language. Answer any questions the wage claimant may have.

#### **G. When wage claimants do not self-identify a need for interpretation**

Some LEP individuals will not request interpretation. This may happen because the LEP person does not know that free interpretation services are available. Or, the LEP person may not recognize the level of English proficiency or communication skills needed to understand a wage claim proceeding.

LRD employees are encouraged to offer interpretation services at any point where an individual's limited English proficiency becomes apparent even though the individual did not previously request an interpreter. If you believe that an interpreter would help you communicate with a wage claimant, then offer one. Always mention to the LEP customer that language assistance services are free of charge.

In a case where the LRD has made all reasonable efforts to provide oral interpretation to a LEP person but such services are not available at the time of an essential case proceeding, the proceeding will be postponed and continued until a date when appropriate language assistance services can be provided. Occasions such as this should be extremely rare and should be avoided by ensuring all staff are properly trained in what language assistance services are available as well as how to access them properly.

#### **IV. WAGE CLAIM INVESTIGATION PROCESS**

The purpose of Section IV of the Investigations Manual is to provide you with information about the process LRD uses to investigate wage claims. This will help you understand how to look for and find all evidence you need to decide whether a wage claim is “just and valid,” how to take the most appropriate enforcement action under the circumstances, and how to properly close wage claim cases.

This Section also guides you as you interact with wage claimants before, throughout, and after the investigation process.

##### **A. INTERACTIONS WITH MEMBERS OF THE PUBLIC**

Individuals may visit or call a local LRD office for a range of reasons. These may include:

- To inquire about the wage claim process.
- Help filling out a wage claim form.
- To find out about the status of a case.
- To request assistance reading or understanding an English-language letter.
- To report information about his/her case.
- To speak with an LLA.

Whenever a member of the public contacts LRD for any reason, you should make every effort to meet the person’s needs.

##### **B. THE WAGE CLAIM FORM**

###### **1. How a wage claim is initiated**

Usually, LRD opens an investigation into a wage claim when an individual submits a wage claim form. LRD accepts the wage claim form via in-person submission, by mail or fax to any Labor Relations Division or Workforce Connection office, or by email to [wage.claimssubmiss@state.nm.us](mailto:wage.claimssubmiss@state.nm.us).

Individuals may also call LRD asking for information about filing a wage claim. If you answer the call, explain the following to the individual:

- LRD investigates wage claims for work performed inside the state of New Mexico.
- An individual should file a wage claim form, unless the individual is concerned about retaliation (see “Initiating a wage investigation without a wage claim form,” below).

- The individual can fill out the wage claim form, **or** LRD staff can complete it for the individual based on the individual's statements, then send it to them to sign and return. Ask the individual which option they prefer.
- If the individual wants to fill out the wage claim form unassisted, explain that you can email or mail the blank wage claim form to the individual, or they can find the blank wage claim form online or in any LRD or Workforce Connection office. Help the employee figure out the easiest way to get the wage claim form.
- If the individual wants your help to fill out the wage claim form, follow the steps in Section IV.B.3 for filling out the wage claim form. Mail, email, or fax the completed wage claim form to the employee and make sure the individual understands that they must **sign and submit** the wage claim form to LRD in order to begin the wage claim process.
- Follow the guidelines in Section III, "Nondiscrimination and Language Access," for any employee who may need language assistance.

While some claimants require assistance over the phone and others in person, some claimants may submit a thorough and completed form online or by letter. Your job as an investigator and an LRD staff member is to provide quality customer service and claimant assistance throughout the wage claim process.

In the event that a claimant submits his or her claim in person, you should make every effort to conduct an interview immediately. Refer to Section IV.C for interview processes and tips and to Section III, Nondiscrimination and Language Access, for guidance on interacting with and interviewing a person who is not English proficient.

## **2. Log the claim and update information**

Immediately upon LRD receiving an initial claim, whether by phone, email, mail, fax, or in person, LRD must log the claim into the LRD system.

Even if the claim form is not complete, log the information into the system so as to record the contact. Be sure to obtain at least the minimum information necessary to be able to follow up. In general, this includes at least a phone number and mailing address.

LRD tracks claim status and activities throughout the investigation, as well as all contact with claimants, employers, and witnesses. As you gather or receive information, document all activity into the LRD system including, but not limited to: the date on which the claim was made, employee name, address, phone number and email (if applicable), the employee's preferred language, employer name and Federal Employer Identification Number (FEIN), if known, amount claimed, and the city and county in which the work took place.

## **3. Filling out and submitting the wage claim form**

Some individuals need help filling out the wage claim form. This may occur for a variety of reasons, including literacy challenges, confusion about the questions on the form, a disability, or language differences. LRD staff should offer to complete the wage claim form for any individual who contacts LRD for assistance.<sup>276</sup> If an individual wants your help, obtain a blank copy of the wage claim form and read each question to the individual. Fill in the answers as provided by the individual. Answer any questions the individual may have about the questions as you go through them. Then, make sure the individual signs the wage claim form. If the individual is answering questions over the telephone, have them come into the office to sign the form or fax, mail, or email the form to them and have them fax, mail, or email it back to the LRD office. Follow the guidelines in Section III, “Nondiscrimination and Language Access,” for any individual who may need language assistance.

Some individuals may submit documents along with the wage claim form. Individuals are permitted to do this, but are not required to. Be sure the documents the individual submits are copies, not originals. If they are originals, make a copy for the individual and return the originals. Do not charge the individual to make copies.<sup>277</sup>

#### **4. Review of initial wage claim information**

When the LRD receives the wage claim form, the LRD will do the following to ensure the wage claim form is complete:<sup>278</sup>

1. Make sure the wage claim form is signed. If it is not, the LRD will call the wage claimant to arrange for the wage claimant to come in to a LRD or Workforce Connection office to sign the wage claim form. If the wage claimant prefers, the LRD will mail, fax or email the unsigned wage claim form to the wage claimant so that they can sign and return it. If you are unable to reach the claimant to sign the form, follow the procedures in Section IV.D before closing the claim.
2. NOTE: Questions 24 and 25 on the wage claim form concern the number of hours worked and the amount of wages owed. Some wage claimants may not have this information. This may happen for many reasons. For example, time and pay records may be in the possession of their employer, or the wage claimant’s own records are too

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<sup>276</sup> *See id.*: “A claimant may complete the wage claim form themselves or have a LRD employee assist in completing the form based on the claimant’s statements in-person or by telephone. If the LRD provides assistance in completing the form by telephone, the LRD shall mail or email the unsigned form to the claimant to be reviewed, approved, signed, and submitted to the LRD for filing.”

<sup>277</sup> *See id.*: “The wage claimant may provide any additional information and documentation supporting the claim, but is not required to do so.”

<sup>278</sup> *See id.*: “The claim form is to be completed by answering the questions in the form as completely as possible, and is to be signed and dated by the employee making the wage claim. . . . Upon receipt of the completed claim form, the LRD will assign a claim number and open a file.”

complex to boil down to a single line on a wage claim form. Similarly, the amount of wages owed in a minimum wage or overtime case may require information about wage and hour laws' requirements that the wage claimant does not have. If answers to these questions are not completed, LRD may contact the wage claimant for more information, but should leave them blank if it is not possible or reasonable to answer these questions on the wage claim form. Rather, LRD will proceed with making a case assignment to a LLA, who may obtain estimates from the wage claimant on these topics through the initial interview or at a later time during the investigation.

## **5. Initiating a wage investigation without a wage claim form**

Although LRD typically opens an investigation after a wage claimant submits a wage claim form, this is not the exclusive procedure. Under some circumstances, LRD can open a wage investigation without a wage claim being filed. For example, an individual may contact LRD to report a wage and hour violation but prefer not to provide their name due to fear of retaliation or other concerns.

An individual may report a wage and hour violation on his or her own behalf or for someone else without formally filing a wage claim. If the individual elects not to file a wage claim, log the contact as a potential directed investigation and refer the matter directly to an LLA or LRD management, who will collect the necessary information and determine whether the information warrants initiating a directed investigation. See the Directed Investigations section, Section IV.F, for more information about this procedure.

## **6. Case assignments**

The LRD assigns tasks and cases based on complexity and in order to optimize workflow. In general, LLAs work with administrative staff to manage and log intakes and schedule and conduct claimant interviews on an as-needed basis. For more complex claims, or for those connected to multiple investigations or to a Directed Investigation, LRD management will assign cases based on experience and in an effort to ensure that one LLA handles all claims associated with a single employer.

# **C. INTERVIEW**

## **1. Scheduling the interview**

Assuming you or another investigator are not able to interview the claimant immediately upon their submitting a claim in person, schedule an interview. The interview is an essential investigative tool that will help you determine jurisdiction, calculate damages, learn about the employer, and establish whether the claim might also justify a directed investigation.

Work to schedule an interview, in person or over the phone. In either circumstance, if the claimant stated a language preference other than English, ensure that you have secured the resources necessary and as outlined in Section III.

## **2. If you are unable to schedule an interview**

Attempt to contact the claimant at least two (2) times over the course of three (3) weeks. Your contact attempts should include different manner of contact, such as a phone call, email, or letter. Additionally, attempt to call at different times of day, including after 5:30pm if possible, to accommodate traditional working schedules. Log what attempts you make.

If LRD has not been able to contact the claimant and has not received a response from the claimant within ten (10) days of the second contact attempt, you may close the case and send a closure letter, *see* Appendices 5–6, to the claimant advising that person of the closure. That letter must inform the claimant of the date on which the statute of limitations will expire for his or her claim and advise the individual of his or her right to reopen the claim any time before the expiration of the limitations period. Remember when calculating the statute of limitations that it has been tolled while LRD has been investigating the employer. In some cases, you may have sufficient information to move forward without an interview. If that is the case, consult with LRD management to proceed.

Review the claim for indicators that it might be suited to a directed investigation, even in the event that the individual does not get back to LRD. Such indicators include evidence of systemic violations of the wage and hour laws, generally indicated by multiple potential claimants. Those factors are outlined in Section IV.F and, if present, should generate a referral for directed investigation consideration, pursuant to that Section.

## **3. Conducting the interview**

While the wage claim form provides basic information about the wage claim, proper investigation will almost always require an interview with the wage claimant. You may interview a wage claimant in person or over the telephone. Although interviewing a wage claimant will often be a crucial part of your investigation, a delay in the wage claimant's response to your request for an interview should not stall the other parts of your investigation.

If the wage claimant stated a language preference other than English and you are not fluent in that language, arrange for interpretation services. See Section III for more details about providing language assistance services. To ensure equal access to LRD's services, you cannot allow a language barrier between you and a wage claimant to interfere with your investigation. For example, if as part of your investigation you would contact the wage claimant if he spoke English fluently, you may not avoid contacting the wage claimant because of the additional steps required due to his limited English proficiency.

If the wage claimant wants to have someone else with them for the interview, or at any other time in the wage claim process, you should allow them to be accompanied by that person. Most employees have not been through this process before. They may worry they will forget something important or say something incorrectly. If having someone they know and trust with them will improve their ability to explain their wage claim to you, then your investigation can be more efficient and effective. While you should generally defer to the claimant's stated

preferences, ultimately, whether to allow the other individual to be present in the interview should be based on your best professional judgment. If you determine to do so, record the fact that another was present in the LRD system and include that person's identifying information.

If you become concerned that the person with the wage claimant is coercing them or exercising undue pressure, try to speak with the wage claimant alone about this concern. The wage claimant should determine whether or not to have someone with them. If you believe the wage claimant is being pressured into making an untrue statement, you as the LLA will need to determine the reliability of the interview information. It is also in your discretion to tactfully ask the other person to leave the interview.

A good way to start an interview is to explain your role and give an overview of the wage claim process. Try to speak in everyday language and avoid using technical or legal terminology. Be clear with the wage claimant what your goals are for the interview. The wage claimant may be able to contribute more to your understanding and analysis of his/her work situation if you have explained the purpose of the questions you are asking.

The wage claim form provides important information, but it can mislead you into thinking you adequately understand the wage claimant's situation. For example, a wage claimant may file a wage claim because they didn't receive a final paycheck, but not mention on the wage claim form that the reason for the firing was that the employee made a complaint about improper wage payment. Try to avoid assuming you completely understand the work situation, and listen for other issues or understandings from the wage claimant.

One way to do this, at some points in your interview, is to ask open questions that invite the wage claimant to talk broadly. Compare an open question such as "What happened next?" with a more closed, direct question such as "How much were you paid?" During the interview, you will want to use varying types of questions.

If the interview lasts longer than a few minutes, it may be helpful to close the conversation with a summary of the next steps in the process. Ask the wage claimant if there is anything else they wanted to tell you. Summarize anything you are expecting next from the wage claimant (for example, that they will bring you certain documents).

#### **4. Questions to ask of all wage claimants**

The wage claim form may not provide you with all the information you need in assessing an individual's claim. The purpose of the investigatory interview is to collect as much information as possible at the outset of the investigation in order to assess, understand, and ultimately enforce the claim. Similarly, if there are reasons LRD cannot, by law, assist the claimant, it is essential to make that determination as soon as possible and to advise the claimant of as much.

##### **a. Jurisdiction and closure as a matter of law**

LRD has jurisdiction over claims for work performed within New Mexico and which arose within three years prior to the claimant's submission of the wage claim. The Division does not have authority to investigate or enforce claims that fall outside of those parameters. If, during your interview, or at any time, you learn that the claim is not subject to LRD jurisdiction, follow the procedures identified in Section IV.D to close the claim.

### *(1) Location of Work*

During the interview, ask where the claimant performed work for this employer. If the claimant worked exclusively outside of New Mexico, advise the claimant that LRD has the power to investigate claims only for work inside the state and refer the individual to the labor department for the state in which the claimant worked. Log this information and note the conversation in LRD's database and close the claim.

If the claimant performed some work in New Mexico and some outside of New Mexico, advise the claimant that LRD has the power to investigate claims only for work inside the state and try to obtain as much information as possible regarding the number of hours worked in versus outside of New Mexico. It will be the New Mexico hours for which LRD requests information from the employer and ultimately calculates unpaid/underpaid wages and damages.

### *(2) Three Year Statute of Limitations Period*

Ask the claimant when, approximately, the wage violation occurred. It is helpful to establish a range or timeframe within which the violation took place. If the violation, or any part of the violation, took place within the three years prior to the claimant's submission, proceed with the interview and note the timeframe for use when requesting and examining employer records.

If the violation took place, in its entirety, more than three years prior the date of submission, first attempt to determine whether the claim is a "Reinvestigation" pursuant to a legal settlement LRD reached with a class of wage claimants. Refer to Section IV.D.6 for the criteria used to determine if a claimant is asking to reinvestigate a claim that may have been improperly closed prior to 2017. If the case qualifies for reinvestigation, log this information and continue with the investigation.

If the claim does not meet the limited criteria for a reinvestigation and fell outside of the three-year statute of limitations, advise the claimant that LRD only has jurisdiction for claims arising within last three years and that LRD will have to close the claim. Log this information, note the conversation in LRD's system, and close the claim.

### *(3) Other Jurisdictional Elements and Exemptions*

Other cases may not be subject to LRD's jurisdiction based on exemptions to the definition of "employee" under either the Wage Payment Act or the Minimum Wage Act. Refer to Sections II.D.2 and II.D.3 for an explanation of those workers who do not qualify as an "employee" under the WPA and MWA. If an individual does not qualify as an "employee" under

*either act*, follow the procedures identified in Section IV.D, and close the claim. If an individual qualifies as an “employee” under one law but not the other, continue your investigation under the relevant statute.

b. Employer and supervisor

During the initial interview, try to obtain additional information about corporate entities, supervisors, and other people responsible for wage payment compliance. The purpose of this is to ensure that you are sending the First Letter to all entities and individuals who may be liable for wages so that they have an opportunity to provide information relevant to the wage claim and be made aware of their potential liability for wages owed.

*(1) Preliminary inquiry*

There are a few preliminary steps you should take to determine who the potential employers are:

1. Look to the answers to the questions on the wage claim form. The wage claimant may have listed the business entity name, supervisors, or business owners on the form.
2. Ask the wage claimant some questions like the following:
  - a. What was the name of the company you worked for?
  - b. Do you have any pay receipts or a W-2 that identify employer names?
  - c. Do you know where the business was located?
  - d. Describe the size of the business. Is it small, state-wide, multi-state, or multi-national? Who were your supervisors and who were the owners?

Try to get a sense for the size of the business; who the supervisors and owners were; and whether the same people supervising the wage claimant were also the owners.

- e. Who made the hiring and firing decisions?

*(2) Evaluating if Owners, Officers, Bosses and Other Individuals are “Employers:”  
Economic reality test*

If your basic preliminary questions above have yielded some individual names, you should ask the wage claimant the following questions that will help you evaluate which of these individuals may be an employer under the economic reality test:

1. Did the individual have the power to hire and fire employees?
2. Did the individual supervise and control employee work schedules and conditions of employment?

3. Did the individual determine the rate and method of payment?
4. Did the individual maintain employment records?

If the answer to most of the questions under the economic reality test is yes, then the individual may fit the statutory definition of “employer.” At the outset of an investigation, LRD sends the First Letter to all possible employers, both individual and corporate. Sending the First Letter is not a determination that the individual or corporation is or will be liable. The determination of liability will be made before the issuance of the administrative decision and, in situations where it is difficult to determine whether an individual should be named, in consultation with Management and/or Legal. See Section II.C.1.b.

In other cases, the wage claimant may have been working for two different employers, but they are both jointly liable for the same wage payment violations. For example, one employer may have contracted with another to hire and supervise the wage claimant. Or two employers in business together may hire the wage claimant to work part of the time at one location and part of the time at another location. See Section II.C.2 for more information about “vertical” and “horizontal” joint employment situations like this.

### *(3) Verifying Employer Identifiers*

You should make every effort to identify, and log into LRD’s system, an employer by its registered business name, its “Doing Business As” (DBA) name, as well as, if possible, by its Federal Employer Identification Number (FEIN). This will assist LRD in determining whether the claim is connected to others or to an employer already subject to Directed Investigation, and will similarly allow LRD to further its investigation by cross-checking information with agency records.

To accurately identify and log a business name, refer to DWS systems and conduct an internet search, which may include reference to the New Mexico Secretary of State’s website, social media, and Google. Similarly, always refer to the LRD system, which may already have reference to the employer at issue. For additional help identifying an FEIN, consult with LRD management.

#### *c. Documents*

If the wage claimant indicated on the wage claim form that he or she had pay stubs, but has not provided them yet, ask for them. Ask if they have any other documents related to the work, such as records they created of the work performed or pay received, or text messages between them and employer. Ask for any documents showing the employee made a demand for wages, if they did not receive their final pay. If the wage claimant brings in original documents, make copies and leave the originals with them for safekeeping. While it is the employer’s, and not the employee’s responsibility to maintain records, getting any available documents from the employee is a helpful way to jumpstart an efficient and effective investigation.

d. Type of work performed

Certain types of work are exempted from the protections of New Mexico’s wage and hour laws.<sup>279</sup> If an exemption possibly applies, you will need additional details. For example, a wage claimant who tells you they worked as a supervisor may be exempt from the MWA. To make this determination, you will need additional information about how the wage claimant was paid, how much they were paid, their primary duties, and the nature of their supervisory work. See “Certain high-level employees” in Section II.D.3 for more information about this legal issue. In general, as you evaluate the wage claim, you should regularly review the relevant portions of the legal sections of the Investigations Manual. This review will also suggest additional facts you will want to obtain from the wage claimant. If you determine that the employee is exempt under both wage statutes, refer to the procedures in Section IV.D to close the case.

In construction cases, the type of work performed matters because there may be steps you can take now to protect LRD’s ability to collect on a judgment later. You may be able to file a prejudgment lien or stop notice. See Section IV.Q.12.a, “Pre-judgment collections procedures applicable to construction work,” for information about how to do this. The deadlines in those processes are very short, and differ based on the amount owed, when the work ended, and whether the wage claimant worked on a residential property versus a commercial property. For purposes of the interview, find out:

1. if the work on the site has been completed and if so, when;
2. when the wage claimant started working there; and
3. what type of property it was (residential or commercial).

Section IV.Q.12 explains how you can use this information to protect LRD’s right to collect on a judgment.

e. Amount claimed

The amount of money owed to a wage claimant is a legal issue that you must decide on LRD’s behalf, based on your investigation and knowledge of wage and hour laws. Therefore, regardless of the amount the employee claims, you must do an independent analysis of the facts underlying the wage claim to decide whether the employer owes the wage claimant any wages and, if so, the amount. The wage claimant’s statement on the wage claim form of the amount owed may be inaccurate due to the wage claimant’s lack of knowledge about the wage and hour laws, mathematical errors, or because the employee does not have access to the accurate time and pay records (if such records exist).

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<sup>279</sup> See “Exemption to the definition of ‘employee’ in the WPA” and “Exemptions to the definition of ‘employee’ under the MWA” in Section II of this Manual.

During the interview with the wage claimant, you should ask questions that will allow you to develop an estimate of wages owed, if any, and the location of any records that may substantiate the wage claimant's statements. Appropriate topics for the interview include:

1. The wage claimant's usual work schedule and any changes over time
2. The wage claimant's rate of pay and any changes over time
3. The employer's pay schedule and pay day
4. The dates the wage claimant performed unpaid work
5. The dates the WPA required the employer to pay wages for work performed
6. How the employer tracked the wage claimant's work time (sign-in sheet, time clock, etc.)
7. How the wage claimant was paid (cash, check, combination, etc.)
8. Any other facts relevant to the wage claim

## **5. Questions raised by the wage claim form**

You can use the wage claim form to help identify interview questions for the wage claimant. Following are some examples of specific items on the form that should prompt you to ask additional questions:

**Question 17: The wage claimant still works for the employer.** If the wage claimant indicates that they are worried about being retaliated against, you should explain the New Mexico wage and hour laws' anti-retaliation protections. If you have good cause to believe that the wage claimant, or any person providing information about the employer's conduct, is in danger of being retaliated against for providing the information, that person's identity should be kept confidential. Seek permission to pursue the investigation without revealing the wage claimant's name to the employer by communicating with the Director. See Section IV.F for more information about how an investigation should be pursued when the wage claimant's name is confidential.

**Question 19: Hours worked per week.** Whenever a wage claimant writes a number over 40 in response to this question, screen the wage claimant for possible overtime violations. The MWA requires payment of time-and-a-half for hours over 40.<sup>280</sup> Employees paid a salary or a daily rate are still entitled to overtime, unless they fall under a job-specific exemption. If the wage claimant stated that the hours varied, review the changes in their work schedule. If the hours varied week to week, the wage claimant may have been owed overtime some weeks but not others, and you will have to go through more details of when the wage claimant worked and when pay was received.

**Question 20: Rate of pay.** Check if the city or county where the employee worked is one that has a local wage rate.<sup>281</sup> If the employee put his/her rate of pay as anything other than by the hour, do the calculations to determine the hourly pay rate.<sup>282</sup> If you are unsure about a possible

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<sup>280</sup> Overtime is discussed in Section I.B.4 of the Manual.

<sup>281</sup> Minimum wages in local jurisdictions are discussed in Section I.A.3 of the Manual.

<sup>282</sup> Examples of how to determine hourly pay rate are in Section I.B.4.d of the Manual.

minimum wage violation, ask for more information. If the wage claimant was paid at a certain rate but received additional compensation from tips or bonuses, for example, you will need more details about what amount the employee actually took home and how that amount was determined.

**Question 23: Dates of alleged wage violations.** If the information on the wage claim form indicates that no portion of the wage claim falls within LRD’s three-year time limitation, review the information with the wage claimant. Be sure the entirety of the employer’s complained-of conduct occurred more than three years ago. If the wage claimant marked on the wage claim form that they tried to file the wage claim with LRD before, investigate that attempt and evaluate his/her right to have the prior wage claim reinvestigated, as described under “Question 28,” below.

**Question 26: Demand for wages.** Ask the wage claimant for more details about this issue. Obtain all information about when and how demand or request for wages owed was made. If the wage claimant did not make a demand for wages, find out why not. The demand for payment of wages owed is relevant for calculating final pay damages (*see* Section I.D.3).

**Question 28: The wage claimant tried to file the wage claim before.** This question screens claimants for eligibility for a re-investigation of their claims pursuant to a condition in a legal settlement LRD reached with a class of wage claimants.<sup>283</sup> LRD is required to track claimants’ answers to this question and to screen people who check “yes” to make sure they are eligible.

In order to screen people who check “yes,” you must decide if they fall within the time limitations of the settlement and check the old case file, when possible. Generally, people who check “yes” will fall into three categories:

1. **People who were unable to file claims:** In the past, LRD told some wage claimants by telephone or in-person that they were ineligible to file wage claims. LRD generally does not have records of these conversations. These people are eligible to file wage claims as long as a) the wage claimant says in your interview that they spoke with LRD sometime on or after July 1, 2014, and b) the wage claimant says that the last wage payment problem was on or after January 17, 2014.
2. **People whose claim forms were rejected:** Some people submitted wage claim forms to LRD, but their claim forms were returned to them by mail without an investigation and without being assigned a claim number. LRD may or may not have records reflecting that the wage claim form was returned by mail. Even if LRD does not have documents or any records of these claim forms, these people are eligible to re-file their wage claims as long as a) the

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<sup>283</sup> The employers in such wage claims are deemed to have been under investigation by LRD since January 17, 2017, the date of the filing of the complaint in *Olivas v. Bussey*, No. D-101-CV-2017-00139 (N.M. Dist. Ct. filed Jan. 17, 2017). *Olivas*, (N.M. Dist. Ct. Mar. 9, 2018) (order granting final approval of settlement); Settlement Agmt. ¶ 18 (Dec. 19, 2017). Therefore, pursuant to court order, the wage claims are time-barred per NMSA 1978 § 37-1-5 only if the date of the last alleged violation of the wage statutes was before January 17, 2014.

wage claimant says that they tried to file the wage claim form with LRD sometime on or after July 1, 2014, and b) the wage claimant says that the last wage payment problem was on or after January 17, 2014.

3. **People whose cases were not fully considered:** Some people successfully submitted wage claim forms to LRD, and LRD began an investigation. LRD is likely to have records of these cases because LRD nearly always assigned a case number at this point. However, LRD closed some cases without a decision about whether the employee was owed wages, or LRD made a decision about the employee's case without full consideration. Examples include closing a case when the employee did not respond to the Second Letter, closing a case based on an incorrect jurisdictional limitation, or closing a case based on a mistaken decision about the employee's status as an independent contractor. Ask the wage claimant for all information they have about the prior claim, and try to find the old case file to determine whether the old case was correctly decided. These people are eligible to re-file their wage claims as long as a) LRD's records show that the wage claimant filed the old claim form on or after July 1, 2014 and b) LRD's records of the prior claim show that the claimant's last wage payment problem was on or after January 17, 2014.

When interviewing the claimant, obtain all details you may need to decide whether the wage claim falls within the time periods outlined above. If so, proceed with the re-investigation of the wage claim. If not, send the claimant the Closure letter (Appendices 5 and 6), using the template for "Not part of the class for re-investigation." That you asked and determined whether or not the claimant falls into the re-investigation category must similarly be logged into the LRD system.

**Question 29: Other employees are impacted.** While being mindful of the wage claimant's privacy and concerns about confidentiality or retaliation, you should discuss with the wage claimant whether other affected employees can help as you investigate the wage claim. At this stage of your investigation, you still do not know what facts will be in dispute because you have not communicated with the employer. There may be no reason to ever involve other employees. But usually some follow-up questions about how this problem is also affecting other employees will be necessary for you to understand the wage claimant's situation and to start evaluating whether to recommend a Directed Investigation of this employer. If you have reason to believe this employer may be routinely violating employees' rights under wage and hour laws, follow the additional procedures detailed in Section IV.F for communication with the Director.

**Question 30: The wage claimant believes he or she has experienced retaliation:** Obtain a detailed timeline of the events leading up to or surrounding the alleged retaliation. See Section IV.G for more information about screening retaliation claims and next steps.

## **6. Documenting initial interview in the LRD system**

You should document the date of the interview in the LRD system and update any claimant or employer identifiers as needed. Detailed notes of the interview should be maintained in the wage claim file.

## **D. INITIAL CLOSURE OF CERTAIN WAGE CLAIMS**

After interviewing the wage claimant, you will normally proceed to sending the First Letter. However, in certain circumstances, you may be unable to proceed with the investigation. There are usually seven types of situations where this may arise:

- **Wage claimant request:** The wage claimant requested closure of the case.
- **Paid in full:** The wage claimant requested that you close the wage claim because they were paid in full.
- **No response from wage claimant:** You have been unable to interview the wage claimant because the wage claimant has not responded to your calls and/or emails, and LRD determined that it would not be able to move forward with the investigation without claimant contact.<sup>284</sup> In this scenario, you may still consider referring the employer for a Directed Investigation, depending on the claim form and whether there are indicators for a Directed Investigation.
- **Impossible to identify employer:** It is impossible to identify the wage claimant's employer from the information the wage claimant has provided or from publicly available information.<sup>285</sup>
- **No jurisdiction:** The wage claimant's own statements during the interview and investigation make it clear that the wage claimant was exempt from the protections of wage and hour laws.
- **Outside of three-year time period:** No portion of the wage claim falls within the three-year filing deadline for LRD investigations.
- **Not part of the class entitled to a re-investigation:** The claimant tried to file for a re-investigation of their claim, but did not meet any of the requirements in the Settlement Agreement to be a member of the class.

If you determine that one of these situations applies, you should write a Closure Letter to the wage claimant (see Appendices 5 and 6).<sup>286</sup> The Closure Letter contains template language for each of the above situations. You should only use the template that applies to the wage claimant's situation and complete the template as fully as possible.

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<sup>284</sup> See 11.1.4.100, "Filing of a Wage Claim": "Upon receipt of the completed claim form, the LRD will assign a claim number and open a file. The form will be assigned to an employee of the LRD who will: (1) review the claim form to determine whether the LRD has jurisdiction over the claim; (2) determine if more information from the claimant is needed; (3) determine if the form needs to be referred for consideration as to whether a directed investigation is appropriate; and (4) interview the wage claimant, if necessary, to clarify any discrepancies, omissions, or errors in the wage claim, and obtain additional information regarding the claim."

<sup>285</sup> 11.1.4.103, "Initial Closure of Certain Wage Claims": "The LRD may close any wage claim file after the initial screening with no further investigation if the LRD determines that it does not have jurisdiction, it is impossible to identify claimant's alleged employer, or if no portion of the claim falls within a three-year time period."

<sup>286</sup> *Id.*: "Upon closure, the LRD will send the claimant a letter that sets forth the material facts, statutes, or regulations on which the closure is based."

### **1. Claimant request and paid in full**

If the wage claimant tells you that they want to close the case, you will choose the “Claimant Request” or “Claimant Request/Paid in Full” reason on the Closure Letter (Appendices 5 and 6) based on whether or not the wage claimant was paid.

### **2. No response from wage claimant**

You may use the “No Response from Claimant” Closure Letter template if the wage claimant fails to respond to your emails and/or letters requesting an interview, and you have completed the following steps:

- Telephone the wage claimant at least twice on different dates and at different times of day, leaving a voicemail if possible, and calling after normal business hours if possible.
- Record the dates of all attempts to telephone the wage claimant and voicemails in the case file.
- Send the wage claimant a letter or email stating that the case will be closed if the wage claimant does not contact LRD within 14 days of mail date.

If there is no response to that letter or email, you may send the Closure Letter using the “No Response from Claimant” template and close the file. If other factors exist, based on the claim form or other information from the claimant, to indicate a Directed Investigation, follow the procedure in Sections IV.F.1-2 to refer the claim for Directed Investigation.

### **3. Impossible to identify employer**

In some cases, you may not be able to get enough information to identify the wage claimant’s employer, and have to close the case at this stage in your investigation. The following is one example, but not exclusive, as to what constitutes it being impossible to identify an employer. The wage claimant could tell you the following: a van pulled up to the corner where the wage claimant and other individuals were gathered; the driver offered work cleaning out the inside of an abandoned home, returned the wage claimant back to that corner at the end of the day, and promised the wage claimant the same work the next day and that the wage claimant would be paid for all the work the next day; and the van never showed up the next day. If the wage claimant is unable to refer you to other employees or get you additional information that may help, you cannot identify the employer and would close the case using the “Impossible to Identify Employer” Closure Letter template. You should include a brief explanation of the steps you took to identify the employer to articulate why doing so was “impossible” under 11.1.4.103 NMAC, before closing the case.

Note that a Closure Letter is not appropriate when the First Letter mailing is returned undeliverable. In this situation, it may be possible to *identify* the employer. If this happens, you should follow the steps discussed in Section IV.C.4.b for locating a correct address for the employer, and proceed with the investigation and resolution of the case, if possible.

#### **4. No jurisdiction**

If the initial screening interview makes it clear that the wage claimant is covered by an exemption to the WPA or MWA, and that LRD does not have jurisdiction, you may use the “No Jurisdiction” Closure Letter template to close the case.

For example, if the wage claimant lived and worked in the employer’s home and his/her work was to clean the home and care for the employer’s children, you could determine based on the interview alone that his/her primary duty was domestic services in a private home and they were an exempt domestic service worker under the WPA and MWA.

See Section II.D to review the criteria for each of the exemptions to the WPA and MWA.

You may also use the No Jurisdiction Closure Letter template to close a case when the wage claimant is claiming compensation that does not relate to earnings for work performed. Common examples of this are severance pay or discretionary bonuses. To assess these wage claims, you should confirm that the compensation is not calculated based on work performed.

Closure is only appropriate when there is no jurisdiction and/or no legal wage claim under BOTH the WPA and MWA. A few examples of what these terms mean are provided in Appendix 54.

#### **5. Outside of three-year time period**

When the wage claim arises outside of the three-year time period for filing wage claims, you may close the case using the appropriate Closure Letter template. Simply fill in the last date of work and date the wage claim was filed.

#### **6. Not part of the class eligible for a re-investigation**

This closure reason relates to the legal settlement that allows some wage claimants to request a re-investigation of their claims (Question 28 on the wage claim form). A claimant may only obtain a re-investigation of their claim if (1) they were previously turned away from filing a wage claim, for any reason; (2) their wage claim was only partially resolved or otherwise limited pursuant to LRD’s \$10,000 cap policy or one-year policy; (3) their wage claim was dismissed on incorrect jurisdictional grounds; or (4) their wage claim was dismissed or decided in favor of the employer because the claimant or employer had, at some point, been non-responsive or because the employer failed to produce records. If a prior wage claim does not fall within any of these categories, then you should send the wage claimant a Closure Letter explaining why this is the case. You should include enough detail to enable anyone reviewing the Closure Letter to understand what the wage claim was about and why it does not fall within any of these categories.

Wage claimants are also only eligible for a re-investigation if the original wage claim (or last contact with LRD, in the case of those not permitted to file) falls within certain time period

requirements: if the date of the last alleged wage payment violation was on or after January 17, 2014, and if the claimant contacted LRD for assistance on or after July 1, 2014. Therefore, when the date of the last alleged wage payment violation was before January 17, 2014, or the date of the claimant's prior request for assistance from LRD was before July 1, 2014, you may close the case using the appropriate section of the Closure Letter template. Fill in the last date of work and the date of the prior attempt to file the claim and/or seek LRD assistance. If, however, that claimant does not meet any of the conditions of the class as outlined in the settlement agreement, then they are not eligible for re-investigation.

Note that anyone can file a wage claim requesting a re-investigation. LRD staff should screen wage claims for eligibility after the wage claimant has filed the claim form, not before. No one should be turned away without being given an opportunity to file a claim form.

### **7. Review prior to sending Closure Letter**

You may be asked to submit the Closure Letter to LRD management review prior to sending it to the wage claimant. LRD management may ask you to include more information justifying the closure. Upon issuance of the letter to the wage claimant by U.S. mail or email, you should update the LRD system and the case file.

### **8. Documenting initial closures in the LRD database**

If you are closing the matter early in the investigation, for example before reaching a settlement or an administrative decision, document your reason for closing the case in the LRD system using one of the following as the reason:

- Wage Claimant request
- Paid in full (Under "Amount" write the amount of the wage payment. Call the wage claimant if you do not know the amount.)
- No response from wage claimant
- Impossible to identify employer
- No jurisdiction (no work performed in New Mexico, WPA exemption, MWA exemption)
- Outside of 3-year time period
- Not part of the class eligible for a re-investigation

It is important to use exactly these phrases when closing a case at this phase. If none of these categories applies, contact LRD management to determine how to document your reason for case closure. Once you have sent a closure letter and documented your reason for closure, close the case in the LRD system.

## **E. INVESTIGATION PROCEDURE FOR INDIVIDUAL WAGE CLAIMS**

Follow the procedures described in this section to investigate a wage claim on behalf of the individual wage claimant(s) who filed it.<sup>287</sup>

## **1. First Letter**

After interviewing the claimant, LRD sends the First Letter to all possible employers, both individual and corporate. Sending the First Letter is not a determination that the individual or corporation is or will be liable. Rather, it just means the issue is being investigated. This step provides all involved an opportunity to respond to the claim and to participate in any resolution of the claim and provides LRD more information about their roles. This also enables LRD to find out whether there were other people or entities not initially identified by the wage claimant who exercised sufficient control to be liable for wage obligations. At the end of the investigation, enforcing the wage claim against a particular individual employer or against a particular business entity employer may not be necessary to serve the remedial purpose of the MWA or WPA, which is to ensure employees receive the wages they are owed. Section IV.N contains guidance about how to decide which employers to name in the Administrative Decision.

The First Letter to the employer is both the first notification the employer receives of the wage claim against it and a request for records to further LRD's investigation. Draft and send a First Letter within ten (10) days after you complete the screening and triage with the wage claimant. Enclose any supporting documentation received from the wage claimant and a blank Employer Response Form (Appendix 17). When requested, forward the draft letter to LRD management for review and approval prior to issuing it to the employer.

If your investigation reveals other possible employers who meet most of the economic reality or joint employment factors, but who the wage claimant did not initially identify, you should consider sending those individuals the First Letter as soon as practicable.

The employer has ten (10) business days from the date of receipt of the First Letter to provide a complete response.<sup>288</sup>

Log the date you sent the letter and due date for the employer's response in the LRD system.

### **a. Verifying employer address**

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<sup>287</sup> See 11.1.4.100 NMAC, "Filing of a Wage Claim:" "If a directed investigation is not warranted, the LRD will follow the procedures set forth in 11.1.4.104 to 11.1.4.109 NMAC."

<sup>288</sup> See 11.1.4.105 NMAC, "Response of the Employer": "Within 10 business days of the receipt of the initial correspondence regarding the wage claim, the employer shall respond in writing to the wage claim and shall provide all information and documentation it has that is relevant to the wage claim, including true and accurate wage and hour records."

Before sending the First Letter, you should verify the last known address for all possible employers.<sup>289</sup> You may call the employer to verify this information. If the employer does not respond to you, the Secretary of State's website allows searches of business registrations by both business name and individuals' names. The information on file with the Secretary of State may provide a business entity's legal identity, registered agent, and associated individuals. You can also search for the employer in the Unemployment Insurance (UI) Tax and Claims System. If an employer is not listed in the UI system, communicate that to LRD management for review and possible referral to UI management.

If the employer is a business that is not registered in New Mexico and you have reason to believe it may be registered in another state, look for online business registrations in that state. For example, the Texas Secretary of State's website allows searches for Texas business registrations.

The internet is also a useful tool. Mapping services such as Google Maps can assist when, for example, a wage claimant knows the site where they worked, but is unsure of the name of the employer.

Document in the case file what steps you took to identify all employers and send the First Letter by U.S. mail.

If you have not done so already, verify the employer's DBA and other employer identifiers in the LRD system.

b. Drafting the First Letter

To draft the First Letter, you should use the First Letter template, which states the preliminary dollar amount from the wage claim form (if known) plus applicable damages, if any, which the employer can pay to resolve the wage claim, and the records the employer must submit to substantiate their position.

If the wage claimant filed the wage claim before and LRD is re-investigating it pursuant to a legal settlement LRD reached with a class of wage claimants, then you may want to use the First Letter in Reinvestigation template.

If the wage claimant did construction work, you may want to use this first letter to the employer to satisfy the notice requirements for a prejudgment lien. See "Pre-judgment collections procedures applicable to construction work" (Section IV.Q.12.a) for more information.

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<sup>289</sup> See 11.1.4.104 NMAC, "Delivery of the Wage Claim to the Employer": "The initial correspondence shall be mailed to the last known address of the employer. The notice to the employer will give the employer the opportunity to choose to receive correspondence from the LRD by email or regular mail, but if the employer does not make a choice, the correspondence will be sent by regular mail."

## **2. Evaluating employer response to First Letter**

The employer's response is due within ten days of their receiving it. You should evaluate the employer's response to the First Letter for the following:

- Did the employer complete the Employer Response Form?
- Did the employer admit any portion of the wage claim?
- Did the employer include a payment for the portion of the wage claim that he admitted?
- If the employer disputed any portion of the wage claim, did the employer provide all of the records you requested?

Your next steps will depend on the answers to the above questions.

### **Scenario 1—Employer Fully Admits Nonpayment Violation and Remits Full Payment**

If the employer responds by agreeing to pay the full amount listed in the First Letter, you should:

- Collect the payment and contact the wage claimant to arrange for delivery.
- Confirm delivery of the payment to the wage claimant and obtain a Receipt Acknowledging Payment (Appendices 31 and 32) signed by the wage claimant.
- Send a Paid in Full Letter (Appendices 20 and 21) to both parties.<sup>290</sup>
- Close the case and note the reason for closure as paid in full.

### **Scenario 2—Employer Partially Admits Nonpayment Violation**

If the employer responds to the First Letter by agreeing to partially pay the amount listed in the First Letter, but does not submit supporting documents, you should:

- Contact the wage claimant to arrange for delivery, if the employer made a payment. In the LRD system, record the amount paid.
- Confirm delivery of the payment to the wage claimant and obtain a Receipt Acknowledging Payment (Appendices 31 and 32) signed by the wage claimant.
- Call the employer. Explain that the employer must produce records to prove that he does not owe the entire amount in the First Letter, unless the employer and the employee reach a settlement. Ask whether the employer would prefer to submit the records you requested or participate in a settlement meeting.
- If the employer prefers a settlement meeting, contact the wage claimant to ask whether they would like to participate.
- If both parties agree, conduct the settlement meeting. (See Settlement Meetings, below.)
- If you reasonably believe no settlement can be reached, issue a Subpoena giving the employer 10 business days to submit all records requested in the First Letter.

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<sup>290</sup> See 11.1.4.105 NMAC, "Response of the Employer": "If the employer fully admits the alleged violation, the LRD may proceed directly to the resolution phase of the investigation."

- If the employer does not submit records within 10 days, proceed to the No Records Resolution Steps.
- If the employer submits all records within 10 days, proceed to Scenario 5.
- If you need additional information from the employer, ask for it. If the person who communicates with you as the employer is not the only person with knowledge of the supervision of the wage claimant, you can try to interview those other supervisors or owners.

### Scenario 3—Employer Fails to Respond

If the employer fails to respond to the First Letter within 10 days, you should:

- Issue a subpoena using the template (Appendix 11). If the employer does not submit records within 10 days of the subpoena issuance, proceed to the No Records Resolution Steps.
- If the employer submits all records within 10 days, proceed to Scenario 5.

### Scenario 4—Employer Disputes Claim But Does Not Provide Requested Records

If the employer responds disputing the wage claim but does not produce all of the records you requested, you should:

- Call or email the employer.<sup>291</sup> Ask whether the records you requested exist. Explain that the employer has a duty under the law to maintain records for four years.
- If the employer responds records do not exist, document the employer's statements in the file and proceed to the No Records Resolution Steps.
- If the employer responds that records do exist, ask the employer to send them to you within 3 days. If the employer does not produce them within 3 days, issue a subpoena.
- You may also issue a subpoena for records from a third party, including a bank or payroll company using the subpoena template. This step can be helpful in cross-checking and assessing the credibility of an employer's records and/or statements.
- If the employer does not respond in full, proceed to the No Records Resolution Steps.
- If the employer submits all records within 3 days, proceed to Scenario 5.
- If you need additional information from the employer, ask for it. If the person who communicates with you as the employer is not the only person with knowledge of the supervision of the wage claimant, you can try to interview those other supervisors or owners.
- Employers may request an extension of time in order to comply with a document request. Such requests should be accommodated within reason and documented in the file. If the employer indicates that it is considering, or has or will initiate, bankruptcy

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<sup>291</sup> See 11.1.4.105 NMAC, "Response of the Employer": "The LLA may also call the employer to obtain any additional information. Any verbal communication from the Employer shall be documented by the LLA and placed in the Wage Claim file on the same date as the communication."

proceedings, consult with LRD management *before* agreeing to an extension of time. Under no circumstance should you agree to an extension with an employer who has indicated the possibility of filing for bankruptcy before consulting with LRD management or Legal. If you are uncertain about the impact of agreeing to a particular extension, consult with management.

#### Scenario 5—Employer Disputes Claim and Produces All Requested Records.

If the employer responds disputing the wage claim and produces all of the records you requested, you should:

- Send the employer’s entire response, including the records, to the wage claimant along with the Second Letter (Appendices 18 and 19).<sup>292</sup> Depending on their content, those records will likely need to be redacted to maintain confidential or personal identifying information (PII). Refer to Section IV.I for confidential information and, when in doubt, consult with management. Sending these records provides the wage claimant an opportunity to review and respond to the employer’s assertions.
- Examine the records. Identify any questions you have about the contents of the records and/or how they relate to either the employer or wage claimant’s version of events. Interview the employer and the wage claimant to resolve any questions or uncertainties.<sup>293</sup>
- In the event that you still have questions about the employer’s records, consider sending a third-party subpoena using the template in Appendix 11 to obtain records directly from a bank or payroll company.
- Determine whether there are any witnesses you need to speak with to determine the truth.
- Explain to the wage claimant what facts are in dispute and that you need to assess those facts. Be specific. For example, if the employer says the wage claimant never worked weekends, tell that to the wage claimant to identify anyone who can confirm that the wage claimant worked weekends, such as co-workers who worked with them on weekends. The wage claimant can better identify possible witnesses or other additional evidence if you tell them specifically what facts you need to render an informed Administrative Decision.
- If you need additional information from the employer, ask for it. If the person who communicates with you as the employer is not the only person with knowledge of the

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<sup>292</sup> 11.1.4.106 NMAC, “Delivery of the Response to the Wage Claimant”: “If the employer disputes the alleged violation and submits relevant documentary evidence, the LRD shall give the claimant an opportunity to respond in writing, by sending the claimant the employer’s response and evidence. The wage claimant may respond within 10 business days of receipt of the communication with any additional information regarding the wage claim.”

<sup>293</sup> See 11.1.4.105 NMAC, “Response of the Employer”: “If after the employer’s initial response the LRD deems necessary, the LRD may interview the employer to obtain any additional information”; 11.1.4.106 NMAC, “Delivery of the Response to the Wage Claimant”: “The LRD may also telephone the wage claimant to obtain any additional information needed.”

supervision of the wage claimant, request to speak with those other supervisors or owners.

- Proceed to the Records Provided Resolution Steps.

### **3. Resolution steps**

During the resolution phase, you will prepare the information you will need to write an Administrative Decision. The Administrative Decision should contain the material facts upon which your Administrative Decision is based; the specific statutes or regulations on which the Administrative Decision is based; an explanation of the reasons supporting the Administrative Decision; and a calculation of the damages if applicable.<sup>294</sup> The steps you will take to do this will depend on whether or not the employer produced the required time and pay records that employers must maintain by law.

#### **a. No Records resolution steps**

- Interview the wage claimant to confirm his/her best estimate of hours worked, wages paid, and wages owed.<sup>295</sup>
- Hold a hearing to memorialize the employer's testimony if the case meets the criteria (see "Hearings," Section IV.E.5).
- Calculate any applicable damages (see "Calculating damages in Administrative Decisions," Section IV.K).
- Write an Administrative Decision, and include the language for "No Records."

#### **b. Records Provided resolution steps**

- Hold a hearing to memorialize the employer's testimony if the case meets the criteria (see "Hearings," Section IV.E.5).
- Once you have completed all fact-gathering from the wage claimant, employer, and witnesses, put together the facts that will form the basis of your Administrative Decision.<sup>296</sup>

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<sup>294</sup> 11.1.4.109 NMAC, "Decision of the LRD": "The LRD shall issue a written determination whenever a wage claim or investigation is not resolved through settlement. The LRD has discretion to render a written decision without conducting a hearing. The decision of the LRD shall be in writing and shall set forth the material facts upon which the decision is based, the specific statutes or regulations on which the decision is based, an explanation of the reasons supporting the decision, and a calculation of the damages."

<sup>295</sup> If wage and hour records are not identified after these steps are completed, the LRD may interview the wage claimant to obtain any additional information needed and then shall proceed to the resolution phase of the investigation.

<sup>296</sup> 11.1.4.106 NMAC, "Delivery of the Response to the Wage Claimant": "Upon receipt of information from the claimant, or upon expiration of the 10-day period, whichever is earlier, the LRD shall proceed to the resolution phase of the investigation."

- Identify which facts the employer and wage claimant dispute.
- Identify the relevant facts you will rely on to reach your Administrative Decision.
- NOTE that documentary evidence does not necessarily carry more legal weight than testimony. You should weigh the credibility of both before making your Administrative Decision.
- Calculate any applicable damages (see “Calculating damages in Administrative Decisions,” Section IV.K).
- Write an Administrative Decision and include the language for “Records Provided.”

#### **4. How to proceed when the wage claimant or employer has an attorney**

If an employer or a wage claimant is represented by an attorney at any time during the case, the attorney shall give written notice to the LRD.<sup>297</sup> An email will suffice. Once LRD receives such notice, all LRD employees, including management, shall communicate with that wage claimant or employer through their attorney unless the attorney states that LRD can contact their client directly. It is often helpful to ask, after receiving such notice, if the attorney objects to your contacting the claimant directly. Apart from directing your communications to the attorney, in all other ways, follow your normal process for investigating wage claims.

#### **5. Hearings**

If parties do not agree to a settlement, and LRD deems it necessary, LRD may schedule a hearing.<sup>298</sup> You may consider holding a formal hearing only under the following circumstances:

- An employer or other witness you need to interview in order to investigate the wage claim will not agree to speak with you.
- You believe that an employer or other witness with information about the case is unlikely to tell the truth outside of a formal hearing, in which the person’s testimony is given under oath.
- One of the parties whose testimony is crucial to proving the case is likely to be unavailable to testify at trial (for example, they’re moving out of state, very ill, or some other reason).
- An employer has failed to provide records but disputes the wage claimant’s testimony about wages earned, and the wage claimant has either provided insufficient information or you also have reason to doubt the wage claimant’s account, such that it would help to have them present together to provide testimony.
- One of the parties requests a hearing.

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<sup>297</sup> 11.1.4.100, 105 NMAC.

<sup>298</sup> 11.1.4.108 NMAC.

- Upon direction or recommendation by LRD Management.

You should schedule the hearing on a date and at a location convenient for all parties. If both parties are closest to a town with a Workforce Connection office, you may schedule the hearing in that location. Once you have determined a date and location both are available—or if you have exhausted efforts to contact them—you may formally schedule the hearing by sending a Notice of Hearing (Appendices 22 and 23) to the wage claimant and the employer via their preferred method of communication, as indicated on the wage claim form.

Hearings may be held in person and/or telephonically and should be recorded. During a hearing, all witnesses are placed under oath. All hearings shall be held in accordance with the current LRD Hearing Procedures and Hearing Script (Appendix 24). After holding a hearing, work to synthesize the facts gathered, consider whether you can and should collect further information, and prepare and send an administrative decision pursuant to Section IV.N.

## **F. DIRECTED INVESTIGATIONS**

LRD has the authority to conduct Directed Investigations (DI) when LRD obtains information about an alleged violation that affects multiple employees and which the Director, in his or her sole discretion, believes involves a systemic violation of wage and hour laws.<sup>299</sup> LRD may obtain information that gives rise to a DI from a member of the public or an internal case or periodic system review, or LRD may select certain types of businesses or industries for directed investigations. A DI is not limited in scope to an individual wage claim or claimant, but rather is a workplace-wide investigation into an employer's wage payment practices.<sup>300</sup> A DI may also be undertaken into a subset of employees in a workplace affected by a particular wage payment practice.

### **1. Identifying possible DI claims to submit to the Director**

The Director may instruct you to initiate a DI into a particular employer or set of employers. Similarly, as you conduct intake or claimant interviews for individual claimants, you are also responsible for identifying wage claims that (i) may present a systemic violation that affects multiple employees, or (ii) you determine present a danger of retaliation against the claimant. In those cases, it is your responsibility to prepare and submit a DI referral to the LRD Director. The standards for each are described below. If you receive information about a case that may be

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<sup>299</sup> 11.1.4.111, “Directed Investigations”: “When the LRD has information about an alleged violation that affects multiple employees, which the director, in his sole discretion, believes involves a systemic violation of the wage and hour laws of the state of New Mexico by an employer, the director may direct the LRD to undertake a directed investigation.”

<sup>300</sup> *Id.*: “A directed investigation is a workplace-wide investigation into an employer's wage payment practices, which is not limited in scope to the claims of the individual reporting the alleged violation of the law.”

appropriate for a DI, you will inform the Director via the LRD system, providing as much of the following information as possible:

1. The wage claimant/witness' description of the unlawful payment practice;
2. The wage claimant/witness' estimate of the number of affected employees;
3. Why the wage claimant/witness believes other employees are affected;
4. Names and phone numbers of employees who may have experienced the violation;
5. Description of any records that may show violations, including records in the employer's possession (such as time cards, second set of books, etc.);
6. Any concerns the wage claimant/witness has about retaliation; and
7. Any other information that may assist the Director in making a determination about whether to investigate the matter as a Directed Investigation.

Importantly, while your DI referral is pending, you should continue to proceed, assuming the matter is not one concerning retaliation, with the individual wage claim and the process outlined above. A DI is a separate investigation than an individual wage claim. While the DI is an opportunity to LRD to examine an employer's practices and potential systemic violations, an individual wage claim begins pursuant to the procedure described in Section IV.B and must continue pursuant to that procedure, alongside, or even in connection with, a DI.

a. Potential systemic violations

You may identify a systemic violation that affects multiple employees in many ways, including:

- Question 29 on the wage claim form (“Are you aware of other employees at this business impacted by similar issues?”).
- Individuals who contact LRD by phone, fax, email or letter to report a violation of wage and hour laws, but do not wish to submit a wage claim form. LRD has authority to investigate these informal reports if they meet the criteria for a DI.
- During the investigatory process on an individual wage claim, even if you did not identify the DI issue at the screening phase.
- When you are assigned multiple individual wage claims against the same employer, which indicate a pattern of behavior by that employer.
- The wage claim concerns an alleged minimum wage or overtime violation that may have applied to other employees in a workplace or job category.
- The Director instructs you to initiate a DI.

b. Risk of retaliation

As discussed in the Interview section (Section IV.C), you should screen wage claimants for any concerns that they raise about retaliation and, if so, the possibility of investigating the case as a DI. The purpose of this screening is to determine (a) whether you believe there is a danger of retaliation that you should investigate further and (b) whether it is possible to keep the wage claimant's name confidential.

If you determine that there is a danger of retaliation, then the case might be suited as a DI, subject to Director discretion.<sup>301</sup> New Mexico regulations may require the case to be investigated without revealing the wage claimant's identity, and as a practical matter this may only be accomplished by investigating the case as a DI. The Director may limit the scope of the DI to keep the wage claimant's name confidential while also saving the resources associated with conducting a full workplace-wide investigation.

## **2. DI screening**

Only the Director may decide whether to initiate a DI. Before submitting an employer for DI consideration, interview the witness by telephone or in-person to obtain all of the information needed by the Director. If your interview leads you to believe that the employer's wage payment practice is an individual issue that does not actually affect multiple individuals in a systemic way, it is not necessary to contact the Director.

When you inform the Director of a possible DI, wait for the Director's decision before taking any action. If it is approved, the Director will inform you, and this approval will be reflected in the LRD system. Examples of how to screen for DIs are in Appendix 54.

## **3. Worker identity in a DI must remain confidential**

In a Directed Investigation, you should not reveal to the employer the name of cooperating witnesses who are currently employed, including but not limited to any wage claimant. Assessing the risk of retaliation requires a factual determination on your part based on a totality of the circumstances.

In a DI, if the employer asks how they were chosen for the investigation, do not discuss any information received from witnesses or wage claimants through the DI or intake process. Instead, state something along the following lines:

*The LRD conducts directed investigations for a number of reasons, all having to do with enforcement of wage and hour laws and assuring an employer's compliance. Some directed investigations are initiated by complaints. In addition to complaints, LRD may select certain types of businesses or industries for directed investigation. LRD's reason for initiating a directed investigation cannot be disclosed, and whether an individual complained so as to initiate the DI also cannot be disclosed. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.*

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<sup>301</sup> 11.1.4.116, "Confidentiality": "If there is danger of retaliation by the employer against the individual or other good cause to believe that the person providing the information about the misconduct may suffer harm for providing the information, the identity of the source of the information of misconduct by the employer shall be kept confidential by the LRD and its employees."

In a DI, you should not generally reveal information to the employer that would identify cooperating witnesses. There may be instances where an individual wage claim becomes associated to a directed investigation. In those instances the employer may know who the wage claimant is already. Outside of this instance, however, you should otherwise keep the names of impacted workers or the names of cooperating witnesses confidential. This requires you to use common sense, judgment, and your knowledge of the workplace circumstances to avoid revealing wage claimant or witness identities. For example:

- When speaking with the employer or employer representatives in a directed investigation, avoid references to “the wage claimant” or any impacted employee with whom you have spoken.
- When speaking with the employer or employer representatives in any directed investigation, avoid references to any witnesses with whom you have spoken.

In a directed investigation, avoid specific requests or discussions about circumstances or time periods that could reveal who the wage claimant or witnesses are. For example, if a claimant fearful of retaliation and who triggered a DI only worked on Mondays and Wednesdays, do not limit your request for time records to just Mondays and Wednesdays. If the wage claimant only worked from September 2016 to January 2018, do not limit your request for records to that time period. Your investigation concerns all employees in the workplace or in a particular job category, not just the wage claimant.

#### **4. Performing a Directed Investigation: Fact Finding**

Among other investigatory methods, a DI may include interviews with individuals having information and obtaining and reviewing all employment records for the time period under investigation.<sup>302</sup>

Depending on the case, you may choose to begin the investigation by requesting records from the employer, interviewing witnesses, or conducting a work site inspection. Factors to consider in terms of which steps to take, and which to begin with, include:

- Do you know which records to ask for? Employee interviews or a work site inspection may help identify all records in the employer’s possession that you need to conduct the investigation.
- Do you know the correct time period? Employee interviews or a work site inspection may help you refine the period of time in which violations occurred.
- Do you know who the employer is? Employees may help identify the appropriate recipients of the letter.
- Do you have reason to believe the employer may hide information, or that the employer’s records are likely to be incomplete? A work site inspection may enable you to obtain more accurate information.

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<sup>302</sup> 11.1.4.111 NMAC, “Directed Investigations.”

a. Employer Letter

Similar to an investigation in an individual wage claim, LRD often sends a letter to an employer at the beginning of, or during, a DI. This letter (Appendix 8) notifies the employer, when appropriate, of the investigation and may also serve as a records request. Because each DI is different, it is up to your discretion as an investigator whether to send an initial employer letter. You may instead determine to move directly to a records subpoena, Section IV.F.4.d, witness interviews, or a site visit. Through the course of a DI, many investigative steps are, and should be, happening simultaneously.

b. Witness interviews

At some point during a DI, you may want to speak with employees who were subject to the employment practice at issue and take their statement. Ask the witness if they know of other employees who may be willing to speak with you.

During witness interviews, ask questions about all of the issues you are investigating. This is particularly important in investigations where you anticipate the employer's records may be inaccurate or incomplete. For example, where employees allege they were not fully compensated for off-the-clock work, you should gather witness statements containing each employee's best estimate of the amount of off-the-clock work performed on a daily or weekly basis, the employee's work schedule, rate of pay, and any changes over time.

When interviewing a witness you should use the Witness Statement Form, which contains direct questions to guide the interview. Generally, you should write the witness' responses to each question on the Witness Statement Form (Appendix 9). In some situations the witness may want to write their own statement and provide it to you without an interview. You should accept any such statements you receive. To the extent that you are able to interview a witness and write their responses on the Witness Statement Form, you should be sure to review the witness statement carefully for accuracy before the witness signs it.

The witness statement is important both during the investigation stage and throughout later litigation or prosecution. Statements are foundational evidence that can refresh a witness' recollection or impeach their credibility later. For those reasons, it is important that the witness statement includes only statements the witness knows to be true.

c. Work site inspections

The Labor Relations Division has the right to perform a work site inspection of any New Mexico employer during working hours.<sup>303</sup> This is a tool that you may use at any time. You may want to perform a work site inspection for many reasons. These may include, but are not limited to:

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<sup>303</sup> NMSA 1978 § 50-4-9(B): The Director "and his authorized representatives shall have the right at all reasonable times to inspect such records for the purpose of ascertaining whether the

- You need to find witnesses to substantiate certain allegations or to determine who was affected by the alleged wage payment violation.
- The employer has not responded to a subpoena, or has not provided all requested records.
- You believe the employer's response to the subpoena is incomplete.
- Your prior experience with this employer gives you reason to believe the employer will not provide records in response to the subpoena.
- You need to determine whether the employer has come into compliance with wage and hour laws.

This is not an exclusive list. There may be any number of circumstances in a DI that lead you to believe a work site inspection would be helpful.

Before performing a work site inspection, you must obtain authorization from LRD management. LRD management may ask you for more information and then give you approval to conduct the worksite inspection.

There is no need to give advance notice to the employer of your intent to conduct a work site inspection. In some situations, such as when you believe the employer may falsify records, or may instruct employees to provide false statements to you, it may be best not to provide advance notice. You should consult with LRD management to make this decision.

When you arrive at the work site, you must notify the person in charge before you begin the inspection.<sup>304</sup> The person in charge has a right to accompany you throughout the inspection.<sup>305</sup>

You should try to speak with employees at the work site about the pay practice you are investigating. Keep in mind that employees may be wary or even frightened of you. For example,

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provisions of this act are complied with"; NMSA 1978 § 50-1-5: The Director "shall have the power to enter any store, factory, foundry, mill, office, workshop, mine or public or private works at any time during working hours and remain as long as necessary for the purpose of gathering facts and statistics contemplated by this act, and to examine safeguards and methods of protection from danger to employees, the sanitary conditions of the buildings and surroundings, and make a record thereof; and any owner, corporation, occupant or officer who shall refuse such entry to said labor commissioner [chief], his officers or agents, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than fifty dollars [(\$50.00)] nor more than five hundred dollars [(\$500)], or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment."

<sup>304</sup> NMSA 1978 § 50-1-5: "Provided, that said labor commissioner [director] or his agent or agents, shall, upon entering any store, factory, foundry, mill, office, workshop, mine or any other public or private works, notify the owner, manager, superintendent or anyone in charge of such place of labor, of his intention to make such visit of inspection, and such owner, manager, superintendent or party in charge, shall have the right, either by himself or agent, to accompany such commissioner [director], or his agent or agents, during the entire time he spends upon such premises."

<sup>305</sup> *Id.*

immigrant employees may believe you are affiliated with federal immigration authorities. When speaking with employees, make your role clear to dispel any confusion, but do not make any promises to employees or render any legal advice. As the situation calls for, explain:

- The Labor Relations Division's only role is to make sure employees are being paid correctly. You are only investigating the employer's pay practices.
- If you are made aware that some of the employees are immigrants or if you reasonably believe this might be the case, you might explain that you have nothing to do with reporting or investigating immigration status, that the Labor Relations Division does not collect any information about immigration status, and that the law provides that all employees have a right to be paid legal wages. If employees are concerned about retaliation, you might assure them that you will not report their name to the employer.

When speaking with employees, keep in mind that employees may be unwilling or unable to speak freely about pay practices in the presence of the employer. You should be cognizant and respectful of this, particularly if the employer or his agent are accompanying you anywhere on the work site. As appropriate, you are welcome to give employees your card and encourage them to call your direct phone number with any information. Be sensitive to whether employees are interested in communicating with you or not. Collect witness statements from employees who contact you.

A work site inspection is also a useful way to make observations relevant to the investigation. For example:

- How is employee time recorded? This may be relevant in off-the-clock investigations. Does the system for recording employee time match what the employer told you?
- How many employees are there? Do your observations of employees working match what records show?
- What tasks are employees performing? This may be relevant if the employer claims an exemption to the MWA or WPA.
- Has the employer posted a summary of the MWA as required by NMSA 1978 § 50-4-25?

d. Subpoena

You may use the Subpoena template to obtain records from the employer (Appendix 11). The Subpoena template requests all time and pay records for the relevant time period. If you or witnesses know the approximate date the violations began, use that time period. If you or witnesses do not know, or are not sure, request records for up to a maximum of a period of four years in addition to the current calendar year.<sup>306</sup> For example, if you send a subpoena in September 2018, you may request records from January 1, 2014 through September 2018. Consult LRD management to make this decision.

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<sup>306</sup> 11.3.400.401 NMAC, "Records of Employing Units": "The records prescribed by this rule shall be preserved for a period of at least four years in addition to the current calendar year."

In addition to the time and pay records requested in the Subpoena template, you may request any other records you need to evaluate the employer, any worker allegations or claims, and whether any exemptions apply. For example, if you anticipate the employer may assert the administrative, executive, or professional exemptions to MWA coverage, you may request the job description for the job categories you are investigating.

You may also use the subpoena template (Appendix 11) to obtain records from a third party, including a bank or payroll company. This tool can be helpful both to cross-check the records produced by an employer as well as to begin an early assessment of an employer's assets. See Section IV.Q.11.d.

## **5. Completing a DI: Synthesis and Enforcement**

The fact-gathering step of the DI process can be a lengthy and meticulous process. LRD must complete a comprehensive review and analysis of all records received, including witness statements and payroll records, and sometimes may be done with the help of a management analyst (MA).

Once you have completed the fact-gathering phase and synthesized records, statements, and facts, you should write an Administrative Decision. This phase will largely track the Administrative Decision steps discussed in Section IV.N. In the Administrative Decision, you will not describe facts the originating worker or witnesses have provided, but rather the investigatory steps you took, the facts you learned, and the conclusions you reached. In calculating damages, you should include wages and damages owed to every employee you identified during the investigation.<sup>307</sup> Because associated individual wage claims may be proceeding parallel to the DI, the DI damage calculation and administrative decision, should include notice to the employer that those individually proceeding claimants may be owed additional funds in their individual cases, depending on the time periods associated and applicable damages. Include with the letter to the employer a copy of the summary required by NMSA 1978 § 50-4-25 and instructions reminding the employer of its obligation to post the summary.

The DI Administrative Decision should also contain the following statement:

*The employees identified in this letter were identified through LRD's investigation into [EMPLOYER], which included analysis of employer records and other investigatory steps. Employees listed in this letter may not be aware of this investigation and may not have participated in it.*

*Please be advised that it is a violation of the Minimum Wage Act (MWA) for an employer to retaliate against any employee because the employee is listed in this Administrative Decision*

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<sup>307</sup> 11.1.4.111 NMAC, "Directed Investigations": Directed Investigations "may also include enforcement action against the employer to collect wages, damages, or penalties owed, based on violations uncovered as to any employee."

*Letter. Prohibited retaliation can be termination; demotion; denial of a promotion; reduction in hours; or assignment to lesser duties, a worse work schedule, or any other employment action that a reasonable person would view as less favorable. NMSA 1978 Section 50-4-26.1.*

## **6. Tracking Directed Investigations in the LRD database**

DIs should be tracked in the LRD system in a manner similar to all other cases, while also logging the fact that the matter is a DI. As you identify affected workers through your investigation, you should enter their information and cross reference them as “Impacted Workers” in the system, while being sure to add whatever contact information is available for each. Similarly, you should log the connection between individual wage claimants against an employer and an on-going DI against that same employer.

## **7. Compliance meeting and settlement**

To review the conclusions in the Administrative Decision, you may meet in person or call the employer and/or a representative of the employer who has authority to reach decisions and commit the employer to corrective actions. You should explain the violations that occurred and how to correct them. You should also explain the monetary amount owed, how you performed your calculations, and request payment of the amounts in the Administrative Decision letter. Otherwise, mail the Administrative Decision letter and proceed with enforcement activities after ten business days.

Take note if the employer disputes the conclusions in the Administrative Decision. If you believe there is reason to conduct further investigation and/or adjust the conclusions in the Administrative Decision based on the employer’s statements, discuss this with LRD management.

LRD has the authority to reach a settlement on behalf of the State of New Mexico with any employer found in violation of the MWA. This authority derives from LRD’s authority under Section 50-4-26(B) to litigate wage claims in district court.<sup>308</sup> Since most DIs concern MWA violations, LRD has authority to reach a settlement without first seeking the consent of the affected employees. However, an LRD settlement on behalf of the State of New Mexico, if less than the full amount owed to any individual employee under the wage and hour laws, does not waive the employee’s private right of action under Section 50-4-26(D) for the remaining amounts owed to that employee. It only represents a final resolution of the matter between the employer and the LRD. The employees’ acceptance of wages collected by LRD in a DI does not

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<sup>308</sup> NMSA 1978 § 50-4-26: “The director of the labor relations division of the workforce solutions department shall enforce and prosecute violations of the Minimum Wage Act. The director may institute in the name of the state an action in the district court of the county wherein the employer who has failed to comply with the Minimum Wage Act resides or has a principal office or place of business, for the purpose of prosecuting violations. The district attorney for the district wherein any violation hereof occurs shall aid and assist the director in the prosecution.”

waive their private right of action, either. The DI settlement agreement reflects these legal issues (Appendix 12).

The decision to propose a settlement for less than the full amount of back wages should be carefully thought through between the LLA and LRD management. Factors to consider include whether:

- A settlement is likely to deter future violations and encourage future compliance, not only within the affected employer, but also among other employers in the community.
- Litigation risk, including the evidentiary strength of the claims, the likely future availability of witnesses, and the ability of the DWS's Office of General Counsel or the relevant District Attorney to pursue the matter in court.
- Whether the employer has fully cooperated with all aspects of the investigation, including voluntarily providing true and accurate time and payroll records, providing truthful information during interviews, and not discouraging employees from being interviewed.
- Whether the employer has previously been the subject of an LRD investigation.
- Whether the employer believed in good faith that the company's wage payment practices complied with the MWA.

You may propose a settlement at any time after the issuing of an Administrative Decision. You may choose to propose a settlement amount or ask the employer to propose one. Discuss these strategic decisions with LRD management.

## **8. Remitting wages and damages to employees after resolving a DI**

The employer should issue checks in the names of each employee identified in the Administrative Decision letter or to DWS, which holds a specific trust account. You or an Administrative Assistant should call, mail, or email all of the employees to alert them to the resolution of the DI, confirm their addresses, and ask them how they would like to receive their payment. Employees may come to an LRD office to collect a wage payment or you may mail the wage payment to the employee using certified U.S. mail. In the rare circumstance that an employee does not have a valid mailing address or P.O. box and they indicate that travelling to an LRD office would pose a hardship, special accommodations can be made for the employee to visit a Workforce Connection office to collect a wage payment. Direct deposit options may also be available. Advise employees of all these options.

There may be some employees who you have determined in your Administrative Decision are owed wages, but who, for whatever reason, refuse to accept a payment that the employer has remitted to you on their behalf. You should not press anyone to accept a payment. You should make reasonable efforts to contact the individual to confirm whether they intend to collect the payment. If an employee indicates that they do not want the payment, you should return it to the employer with a note indicating the efforts you made to remit the payment to the employee. You should also note this in the file and record the same in the system.

If, after best efforts to contact an employee, you are still unable to do so, you should deposit the payment into the trust account to be reissued to the wage claimant when they eventually contact LRD.

## **9. Enforcement action when no administrative resolution reached**

If you do not reach an agreement with the employer, follow the steps for referring to the District Attorney or the DWS Office of General Counsel to litigate, which are discussed in Section IV.R.

Where circumstances show particularly egregious employer behavior, LRD may seek injunctive relief against an employer, including requiring that an employer cease and desist certain practices and post a notice describing the violations found by the court and the cease and desist order.<sup>309</sup> Decisions to take this action should be made with the approval of LRD management and in consultation with Legal.

## **G. INVESTIGATING RETALIATION CASES**

The MWA prohibits retaliation against employees for asserting rights under the MWA. LRD takes retaliation claims seriously, investigates them, and reports retaliatory conduct to the District Attorney in the county where the conduct occurred. District Attorneys may prosecute violations criminally.

A concise explanation of the legal framework for retaliation cases and how to analyze the facts are in Section I.H.1 of this Manual.

If a wage claimant states that they have experienced retaliation during employment, either by responding “yes” to question 30 on the wage claim form or at some other point in a wage claim investigation, you should attempt to gather the facts surrounding the alleged retaliatory activity. Often, it is helpful to put together a timeline of the events leading up to the alleged incident of retaliation. In gathering the facts, you should generally look for the following three issues:

- (1) Whether the wage claimant did something that is protected by the MWA (as outlined in Section I.H.1), such as filing a claim, reporting a violation to LRD, or informing other employees of their rights;
- (2) Whether the wage claimant experienced adverse action by the employer afterwards (as outlined in Section I.H.1), such as they were fired, demoted, or docked pay; and
- (3) Whether there is a “causal connection” between the wage claimant’s protected action and the employer’s adverse action against them. A wage claimant can show a causal connection either directly or circumstantially (i.e. it can be implied from the facts). See Section I.H.1 for more information about the difference between a direct and circumstantial causal connection.

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<sup>309</sup> See NMSA 1978 § 50-4-26.

If the wage claimant's description of the events indicates that all three elements are present, you should contact the claimant, or determine in the course of the first interview, whether the claimant fears further retaliation and wishes to keep their identity confidential. If that is the case, consider the matter for a Directed Investigation and refer to Section IV.F above.

If the claimant is comfortable proceeding in the absence of confidentiality, then you should send the employer the Retaliation Letter (Appendix 16) and the Employer Response Form. This letter informs the employer of the wage claimant's allegation of retaliation, and gives the employer an opportunity to respond to the allegation. It also gives the employer an opportunity to remedy the alleged retaliatory acts. For example, if the wage claimant's hours were cut in retaliation for telling other workers about the right to file a wage claim, the employer may reinstate the wage claimant's hours after receiving the Retaliation Letter. If the employer restores the wage claimant to their previous situation, or if the wage claimant is satisfied with the employer's remedy, or if the wage claimant simply elects not to proceed further, you should close the retaliation case. A retaliation assessment should run parallel to a wage claim investigation.

If there is not cause to close the retaliation investigation at this phase, then there are additional investigatory steps you may take. After you receive the employer's response, and if you feel it necessary to inform your assessment as to whether retaliation has occurred, you may choose to interview any witnesses you believe may have information about the situation, such as the employer, supervisors or other employees. If these witnesses will not voluntarily speak with you, you have the ability to subpoena them to a hearing using the procedures in Section IV.E.5.

Based on your assessment of the facts gathered, you should decide whether the circumstances reasonably establish that unlawful retaliation occurred. If you assess that unlawful retaliation occurred, you should consult with LRD management, who can refer the case to a District Attorney. You may refer the case to a district attorney using the District Attorney Referral Letter at Appendix 33. District Attorneys or their staff may reach out to you to aid in the prosecution. You should provide any reasonable assistance to them, at the discretion of LRD management.

If the retaliation investigation is not based on a wage claim, you should assign the claim its own tracking number in the LRD database with an –R at the end.

## **H. WORKFORCE CONNECTION OFFICES**

Staff members in Workforce Connection offices may be the first point of contact with some wage claimants. Many wage claimants cannot travel to one of the LRD offices in Albuquerque, Las Cruces, or Santa Fe. Others do not have reliable telephone, mail, or email service where they live, and may need to use Workforce Connection offices to communicate with LRD. The Office of General Counsel and the Director of the Employment Services Division have issued a memorandum instructing staff at Workforce Connection offices to make sure wage claimants feel welcome at Workforce Connection offices, get the information and assistance they need to file wage claims, and have access to the information and systems they need to access LRD services remotely. This memorandum is at Appendix 2, for your reference. The Office of

General Counsel has also trained WC staff in their role with respect to providing service to wage claimants and individuals seeking to file wage claims.

Sometimes, you may conduct hearings or settlement conferences in a Workforce Connection office.<sup>310</sup> If you plan to use a Workforce Connection office for this purpose, contact the relevant Workforce Connection staff sufficiently in advance of the scheduled hearing or settlement conference to ensure a telephone, desk, or other equipment will be available.

## **I. CONFIDENTIALITY CONSIDERATIONS**

You may receive information about wage claimant or individual employer social security numbers, taxpayer identification numbers in employer records, or from other sources, that should be redacted from the documents as soon as practicable after receiving them.<sup>311</sup> LRD should never have this information on file, as it is not relevant to the investigation of any wage claim.

For example, employer payroll records may include social security numbers or taxpayer identification numbers. Or, an employer may produce federal government forms containing this information. Common forms containing this information include IRS Forms 1099, W-2, W-4, and W-9, and Department of Homeland Security Form I-9.

Look for social security or taxpayer identification numbers on any documents you receive from employers or employees. Redact this information with black ink.

If you receive this protected information by email, print the email, redact the protected information, and delete the email.

## **J. SPECIAL CONSIDERATIONS FOR IMMIGRANT WORKERS**

As discussed in Section I.H.2, it is not a defense to any wage claim that an employee is an undocumented worker.<sup>312</sup> Employers sometimes assert the immigration status of the wage claimant, or the wage claimant's lack of a social security number, as a defense in wage claims. This "defense" may come in many forms, such as:

- "I couldn't pay him (or the payroll company wouldn't pay him) because he didn't have a social security number."
- "He's not authorized to work, so I didn't have to pay him."

These are not valid defenses to a wage claim. Whenever an employer asserts the wage claimant's immigration status as a defense or excuse for the wage claim, you should proceed with the wage

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<sup>310</sup> 11.1.4.123 NMAC, "Access to DWS Offices": "Administrative hearings or other LRD administrative functions may also be conducted in such offices."

<sup>311</sup> 11.1.4.116 NMAC, "Confidentiality": "The LRD shall not require a social security number or a taxpayer identification number of a wage claimant and shall adopt procedures to ensure that such information, if obtained, does not remain in its case files."

<sup>312</sup> NMSA 1978 § 50-4-8.

claim investigation and explain to the employer the inapplicability of the defense where appropriate.

Although an employer cannot legally withhold payment for these reasons, it may facilitate speedy resolution of the wage claim if a wage claimant provides the employer with certain tax forms. Regardless of immigration status, a wage claimant can fill out IRS Form W-4 and Form W-9. These forms concern the tax treatment of wages and do not relate to immigration status or work authorization. If an employer requests tax documents, and the wage claimant is unsure of how to complete them, you may wish to refer the wage claimant to a nonprofit organization that assists employees with wage claims and associated tax issues. These organizations may be able to assist the wage claimant to complete the required tax forms.

<p>Wage Claimants in Chaves, Curry, Lea, McKinley, Rio Arriba, Roosevelt, Santa Fe, or San Juan counties:</p> <p><b>Somos Un Pueblo Unido</b> 1804 Espinacitas St. Santa Fe, NM 87505 Phone: (505) 983-6247</p>	<p>Wage Claimants anywhere in New Mexico:</p> <p><b>UNM School of Law</b> Economic Justice Clinic 1117 Stanford Dr. NE Albuquerque, NM 87106 Phone: (505) 277-5265</p>
<p>Wage Claimants in Bernalillo county or bordering counties:</p> <p><b>El CENTRO de Igualdad y Derechos</b> 714 4th St. SW Albuquerque, NM 87102 Phone: (505) 246-1627</p>	

## **K. CALCULATING DAMAGES IN ADMINISTRATIVE DECISIONS**

You are responsible for determining whether a wage claimant is owed wages and, if so, the amount. You are similarly responsible for determining total amounts owed to discovered impacted workers and employees in Directed Investigations. You should calculate wages owed once you have completed your investigation and prior to any settlement meeting.

### **1. Sources of information for calculating damages**

Sometimes, there will be no disagreement about the right sources of information for calculating wages owed. This may happen in the following scenarios:

- The wage claim was for an unpaid final paycheck, and all records obtained during the investigation indicate that the paycheck was, in fact, not issued or could not be cashed.

- All time and pay records obtained during the investigation show WPA or MWA violations, **and** the wage claimant and employer agree that the time and pay records are accurate.
- The employer admits there are no accurate, contemporaneously-maintained time or pay records, and does not contradict the wage claimant's estimates about hours worked and wages paid.

In such cases, you should calculate unpaid wages based on the time and pay records and/or wage claimant's estimates.

In other cases, there may be disagreement about the right sources of information. This may happen in the following scenarios:

- All time and pay records obtained during the investigation show no violations, but you have reason to believe the records do not accurately reflect the hours the wage claimant actually worked or the wages the wage claimant actually received.
- The employer admits there are no accurate, contemporaneously-maintained time or pay records, but the employer contradicts the wage claimant's estimates about hours worked and wages paid.

In such cases, you must determine the most accurate source of information to calculate damages, based on the relevant legal principles discussed in Section I.F. If you have reason to believe the employer's records are incorrect or inaccurate, or if the employer's records are nonexistent, then you should weigh the reliability of the wage claimant's estimates of hours worked and wages paid.<sup>313</sup> An example of how to do this is in Appendix 54.

## **2. Time period for damages calculation**

Do not assume that your investigation goes back only three years from the date the wage claimant filed a wage claim. If any portion of the wage claim falls within the three-year statute of limitations, investigate the claim as far back as the beginning of the continuing course of conduct as to the wage claimant. Damages should be calculated back to the beginning of that conduct. If the wage violation was a regular pay practice of the employer's, it probably was a "continuing course of conduct." For example, if the wage claimant worked for the employer for five years and received \$6 per hour that entire time. Similarly, if going back for years the employer had paid the wage claimant a flat salary, with no overtime, although the wage claimant had regularly worked more than 40 hours a week.

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<sup>313</sup> 11.1.4.115 NMAC, "Employer Records": "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."

### **3. Categories of damages to calculate**

The two categories of damages you will calculate are MWA (minimum wage, overtime, and retaliation) damages and WPA (final pay) damages. These are the amounts that are owed to the wage claimant. The MWA damages shall include the amount of the wage claimant's unpaid minimum wages plus interest, and an additional amount equal to twice the unpaid or underpaid wages. The final pay damages shall include the unpaid wages and the wages the wage claimant would have been paid if he/she had continued working the same weekly schedule at the same regular hourly rate of pay, counting from the date the wages were due until he/she receives all wages he/she is due, up to a maximum of 60 days, provided the employer does not issue a written notice of the amount it concedes to be due and does not pay the claimant that amount.

Section IV.K provides detailed instruction on how to calculate damages. Follow the examples in that section for assessing violations and damage amounts. As you make your initial calculation, determine the regular hourly rate of pay and weekly hours worked based on the information and documents you have received.

### **L. SETTLEMENT MEETINGS**

You may schedule a settlement meeting between the wage claimant and the employer to discuss preliminary findings and settlement options. You are encouraged to conduct the settlement meetings informally by telephone. You may choose to facilitate this conversation with each party individually.

Any settlement discussion should include a complete and accurate description of estimated damages, enforcement action, and court proceedings. For this reason, in most cases you should not have a settlement meeting until you have calculated the damages. That way both the wage claimant and the employer can make an informed decision. Make every effort to ensure that the wage claimant and the employer understand the consequences of their decisions, whether that decision is to continue to negotiate, reject an offer, or accept an offer.

If both parties agree to a settlement, you should draft a Settlement Agreement (Appendix 25) to have both parties sign. Keep your case open until the payment is made. If the payment is not made by the date given in the Settlement Agreement, inform the wage claimant and the employer that your investigation continues and you will be issuing an Administrative Decision. If payment is made, then arrange with the wage claimant to pick up the payment. Record this activity and the amount of the settlement in the LRD system. Once the entire settlement amount is paid, mail or email a Closure Letter to the wage claimant and the employer, using the Paid in Full template. *See* Appendices 20 and 21.

If the employer asks for a payment plan, you should agree to one only if you think a payment plan is more likely to recover the money owed and do so more quickly than filing an action in court.

If the settlement is paid in installments, note the amount of the installment in the wage claim file.

At some point in your investigation process, the wage claimant and the employer may negotiate a settlement themselves, without your involvement. If you become aware that this has happened, you may contact them to follow up on your investigation and be sure that it should be closed. You should track the agreement in the wage claim file. You should mail or email the wage claimant and the employer a Closure letter using the “Claimant Request/Paid in Full” reason (Appendices 5, 6, and 7).

#### **M. OBTAINING A CONFESSION OF JUDGMENT (COJA)**

When you write a payment plan into the settlement agreement, you should also have the employer sign an Affidavit of Confession of Judgment (Appendix 26) in addition to signing the settlement agreement. An Affidavit of Confession of Judgment allows you to obtain a judgment against the employer for the amount of the settlement agreement without having to prove the underlying wage claim to a judge or jury.<sup>314</sup>

When your investigation indicates liability for damages with respect to both a business entity and an individual employer, you should obtain Affidavits of Confession of Judgment from each employer. This ensures the court judgment can be entered against each of them, if necessary. You should also obtain the wage claimant’s signature on the Assignment of Wage Claim Form at this time (Appendices 36 and 37).

Complete the Judgment by Confession Form (Appendix 27). Costs will be calculated as the cost of mailing the letter to the employer by certified mail. LRD does not have to pay a filing fee.<sup>315</sup> Judgments by Confession must be filed in district court, and not in magistrate or metropolitan court, so you cannot file this yourself. Instead, submit the completed Affidavit of Confession of Judgment, Settlement Agreement, Judgment by Confession, and Assignment of Wage Claim to the DWS Office of General Counsel, which will e-file it with the appropriate district court. The courts do not have an e-filing code specific to this type of document; it should be e-filed as Opn: Misc or Opn: Other. The clerk will record the judgment.<sup>316</sup>

If the employer fails to pay the judgment by the agreed deadline, the stay on executing the judgment is lifted. The Office of General Counsel can ask the court clerk for a transcript of judgment or execution, just as in any other collection effort when a judgment has been issued against an employer.<sup>317</sup> Then you can take your regular enforcement efforts.<sup>318</sup> (*See* Section IV.Q.11.)

#### **N. ADMINISTRATIVE DECISION LETTER ON WAGE CLAIM**

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<sup>314</sup> NMSA 1978 §§ 39-1-9 through 39-1-17.

<sup>315</sup> NMSA 1978 § 50-4-12(A).

<sup>316</sup> NMSA 1978 §§ 39-1-9, 39-1-11, 39-1-12.

<sup>317</sup> NMSA 1978 § 39-1-12.

<sup>318</sup> NMSA 1978 § 39-1-14.

The LRD shall issue an Administrative Decision for all individual wage claims not resolved through settlement and, in general, upon the completion of all Directed Investigations. In some cases, you will have to make this Administrative Decision without a full investigation of the wage claim because the wage claimant has stopped responding to you.<sup>319</sup> Generally, though, your Administrative Decision will be made after you complete your investigation and obtain information from all parties involved.

### **1. Information to include in Administrative Decisions**

Your Administrative Decision shall address all the violations that were alleged in the wage claim and all the issues that were disputed by the parties. You should state separately the evidence you obtained, your findings of fact, and your legal conclusions. Follow the template for Administrative Decisions, available at Appendices 28 and 29.

If there was a hearing in this case, include in this section that a hearing was conducted, when and where it happened, and all the people who were present, whether in person or via telephone.

In the next section, state the relevant facts you found. Include all facts that are material to your conclusion. Include all facts that are necessary to understand your legal analysis and final decision. State the facts in enough detail to make your conclusions clear. For example,

*The employer paid the wage claimant biweekly, for work done starting on a Monday and going through the next two weeks. The wage claimant's set workweek was Monday to Sunday. The workweek of January 8 to January 14, 2018, she worked 47 hours.*

If certain issues were uncontested, such as that this business employed the wage claimant in a case where the business issued the wage claimant a W-2 form and never disputed that it was his/her employer, then it may not be necessary to include a detailed list of all the facts you have gathered in support of that conclusion that this business was his/her employer. All the parties affected by your Administrative Decision will be able to understand your conclusion without that detailed list.

But when certain issues were in dispute, such as a case where the business where the wage claimant performed the work asserts that it has no record of them and they never worked there, you should state whatever facts you found that are necessary to understand your legal analysis and final decision. In this example, you would include facts that were the basis of your identification of this business as the employer.

To give one example, which is not exclusive, consider a hypothetical case in which the employee provided the location of the work, but did not know the employer's name. If you identified the employer by looking up the work location in property records or a corporation search, include statements such as "The wage claimant performed the work at [ADDRESS]. The owner of the company doing business at that address is [EMPLOYER]." Or, if you obtained the employer's

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<sup>319</sup> These decisions are discussed in Section IV.E.

name from a building permit, include statements such as “The wage claimant performed construction work at [ADDRESS]. The building permit for construction work on that address was obtained by and issued to [EMPLOYER].” As you write these facts, you can rely on your documentation in your case file of what steps you took to identify all employers.

When certain facts were in dispute, for example the wage claimant and the employer disagreed about how many hours were worked, you should describe the contrary versions of the facts that each side had and explain the relative weight you gave to the evidence in order to come to your conclusions. For example, in a situation where the employer disputes the wage claimant’s accounting of his hours, but either refused to provide time records or failed to maintain accurate time records, you would include an explanation like:

*The Department finds that the wage claimant worked 10 hours per day, 7 days a week, from May 1, 2017, through August 30, 2017. The wage claimant stated that he worked 10 hours every day, 7 days a week, from May 1 through August 30, 2017. He had no records of his hours. He and the employer both stated that the employer paid him in cash on a weekly basis, without a pay stub or receipt. The employer did not issue him any year-end tax document. The employer stated that the wage claimant worked no more than 40 hours any week. The employer provided records of four other workers. Those records showed work schedules of 8 hours per day, 5 days a week. He stated that he did not make or keep any records of wage claimant’s hours or pay because he knew the wage claimant would only be working with him for a few months.*

*The wage claimant’s testimony was credible. Given the employer’s lack of required records and his failure to explain how the other employees schedules were evidence of the wage claimant’s schedule, his testimony was not sufficient to overcome the wage claimant’s testimony.*

When the contested issues involve multiple factors, such as a case that required analysis of joint employment or independent contractor status, state your factual findings as to each factor. For example, if both the owner of the restaurant where the wage claimant worked and the corporate entity itself were potentially liable as the wage claimant’s employers, you would articulate your factual findings as to each factor under the economic reality test you applied. This would look like the following:

*The Department finds that Joe Smith and Provecho, Inc. employed the wage claimant. Mr. Smith is the sole owner and shareholder of Provecho, Inc. Mr. Smith exercises all operational and decision making control over Provecho, Inc.*

*Power to hire and fire*

*Mr. Smith made the personnel decisions or had authority to veto them. He hired the wage claimant. He hired and fired several other employees.*

*Supervised and controlled work schedules and conditions of employment*

*Mr. Smith and managers he supervised set employee schedules, including the wage claimant's. Mr. Smith exercised day-to-day direct control over the business operations. Mr. Smith supervised the wage claimant's work.*

*Determined rate and method of payment*

*Mr. Smith decided which employees were salaried and what amount employees were paid.*

*Maintained employment records*

*Mr. Smith did not maintain accurate payroll records. No other person or entity other than Mr. Smith was responsible for maintaining records.*

Similarly, for example, if a hotel were asserting that a wage claimant who cleaned rooms at the hotel was an independent contractor, you would state the factual findings relevant to each factor of the economic reality test for non-construction workers. Your over-arching evaluation would be whether the wage claimant was economically dependent on the hotel or was in business for himself, with each factor helping you make that evaluation. Stating the facts you found, factor by factor, would make clear how you formed your conclusion:

*Conclusion: As a matter of economic reality, the wage claimant was economically dependent on the employer and was not in business for herself.*

*Amount of control exercised by employer over claimant*

*The employer told the wage claimant what rooms to clean and when. The employer set the wage claimant's schedule and pay rate. The wage claimant checked in when he arrived at work and could not leave work early unless the hotel manager authorized it. The employer had the power to hire and fire the wage claimant.*

*How much the wage claimant's opportunity for profit and loss is determined by employer*

*The wage claimant was to be paid an agreed hourly rate. The wage claimant's opportunity for profit and loss was therefore determined by the employer.*

*Relative investments of wage claimant and employer*

*The wage claimant did not invest significant amounts of money in the work. The wage claimant's expenses were limited to purchases of cleaning supplies. The employer's investments include the hotel itself, the wages of all employees, and all fixtures, tools, and equipment, including cleaning equipment, at the hotel.*

*Degree of skill required to perform the work*

*The wage claimant learned how to do the work on the job. No formal training or level of education was required of the employees.*

*Permanency of employment relationship*

*The wage claimant worked for this employer for two years. There was no agreement between the employer and the wage claimant that the work was of a time-limited nature.*

*Extent to which the work is integral part of employer's business*

*The employer is a hotel, whose sole business is providing rooms for short-term stays or meetings. Having rooms available for guests requires that they be cleaned in between guests. Cleaning is therefore integral to the business.*

Depending on the type of wage claim, include the basis of your calculations of the hourly rate, the overtime rate, the wages paid, and the hours worked. You should also include here a summary of the procedural history of the wage claim, for example when it was submitted to LRD and what steps it went through.

List in a separate section the laws that you decided to apply to this wage claim. Identify the laws and separate them by the type of wage claim (Wage Payment Act and Minimum Wage Act) if appropriate. Provide at least some explanatory information, so the basis for your Administrative Decision of any contested issues is more transparent and can be more easily understood. For example, in a case where two joint employers paid the wage claimant less than the minimum wage and refused to give the employee his/her his final pay:

*Wage Payment Act:*

*NMSA 1978 § 50-4-1 (defining employer)*

*NMSA 1978 § 50-4-4 (wages due discharged employee, including damages)*

*Minimum Wage Act:*

*NMSA 1978 § 50-4-21 (defining employer, employee, and employ)*

*NMSA 1978 § 50-4-22 (minimum wage rate)*

*NMSA 1978 § 50-4-26 (damages)*

*NMAC 11.1.4.109 (LRD decisions); NMAC 11.1.4.115 (calculating wages due); NMSA 1978 § 56-8-4 (interest rate on damages)*

Apply the law to the facts you found. Refer to the law you are applying. Provide enough detail about the source of the law that the wage claimant and the employer can understand why it applies to the wage claim. State your legal conclusions and the reasoning behind them. For example,

*Section 50-4-2(B) of the New Mexico wage payment laws prohibits unlawful deductions from wages. The deduction from the wage claimant's wages was made to comply with a*

*court child-support order. Therefore, the deduction was lawful and the wage claimant is not entitled to damages.*

If the employer provided no records to you, use the template language for “No Records.” If the employer did provide records to you, use the template language for “Records Provided.”<sup>320</sup>

Clearly state what you are ordering any party to do and their deadline for doing so. Explain the parties’ rights and obligations under your Administrative Decision. If your Administrative Decision orders the employer to make a payment to the wage claimant, it shall order the employer to make that payment by company or individual check, cashier’s check, or money order payable to the wage claimant or agency account and to deliver it or mail it to LRD within 10 business days of the date of the Administrative Decision. Keep in mind that this Administrative Decision may be submitted to the court if you have to enforce it. This is another reason that the letter should clearly explain your reasoning and weighing of the evidence. Consider including with the letter to the employer a copy of the summary required by NMSA 1978 § 50-4-25 and instructions reminding the employer of its obligation to post the summary.

If your Administrative Decision closes the wage claim but the wage claimant may be covered by FLSA, state here that he may file a claim with the U.S. Department of Labor and how to contact them. Use the template USDOL referral language in the Closure Letter (Appendices 5 and 6) for this.

Ensure that a copy of the Administrative Decision is sent to the wage claimant and the employer, by their preferred method. A copy of the Administrative Decision shall be kept in LRD’s file regarding the wage claim.

## **2. When to hold a corporation or individual liable as an employer in an Administrative Decision**

You may have identified one or more potentially liable individual employers during your investigation of the wage claim. Consider the context of the employment relationship to decide whether it is necessary to bring enforcement action against an individually liable employer. The decision to hold any person or company liable as an employer turns on the remedial purpose of the MWA or WPA, which is to ensure employees receive the wages they are owed. Therefore, it is not necessary to systematically name an individual employer by virtue of their meeting the economic reality test. In many instances naming an individual will not materially advance the remedial purpose of the MWA or WPA.

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<sup>320</sup> 11.1.4.115 NMAC, “Employer Records”: “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.”

In situations where you have applied the economic reality test and found multiple employers, and at least one of them is a limited liability entity, you should consider whether a decision to name a particular person is likely to serve the remedial purpose of the statute: namely, to ultimately collect wages owed. For example, if the employee worked for a limited liability employer that was fairly substantial in size and in organizational structure, chances are the only individuals who would meet the economic reality test for individual liability are front-line supervisors or low/mid-level managers, since these are typically the people who exercise control over wages, working conditions, and other economic reality factors in such businesses. However, supervisors and low/mid-level managers are unlikely to have the financial resources to pay wages owed, and thus collection efforts would be generally futile. Additionally, these individuals do not have sufficient influence nor possess unilateral ability to shut down the business; take its assets; or declare bankruptcy; all of which, if possessed, would make collection of wages owed impossible. Where such risks are not apparent, and collection from the business entity alone is viable, electing to name these individuals would not serve the remedial purposes of the New Mexico wage laws.

In contrast, in a smaller company (or where there is no identifiable business entity), the only way to collect wages owed to the claimant may be to hold liable the individual owner or manager who exercised control over the economic reality factors. In a small limited liability entity, sole proprietorship, or partnership it is important to identify the person who, as a matter of economic reality, exercised control over employee wages and working conditions, and to hold that person responsible for wages owed to employees. Generally speaking, an employee is at a greater risk of not recouping funds from a smaller business entity, sole proprietorship, or partnership unless the individual employers are named in the enforcement action.

This common sense approach to individual liability decisions in investigations into limited liability entities should by no means be construed as a blanket exception to individual liability. Rather, questions of individual liability should be considered and analyzed case by case. In situations where it is unusually difficult to determine whether or not an individual should be named, you are encouraged to consult with the Director, who may in turn consult with the Office of General Counsel to ensure consistency of application.

If, after some analysis, you elect not to name one or any of the individuals whom you have put on notice via the First Letter, you should advise said individuals in writing that they are no longer the subject of an investigation.

#### **O. EMPLOYER COMPLIANCE WITH ADMINISTRATIVE DECISION**

An employer may comply with the decision by submitting a full payment to LRD in the wage claimant's name or by issuing payment for the amount due to DWS for deposit in a trust account. When LRD receives the payment, contact the wage claimant within 1–2 business days to make arrangements to give the payment to the wage claimant after ensuring confirmation of receipt.

If the wage claimant wants to collect the payment in person at an LRD office, arrange a convenient time for them to come in. Have the wage claimant sign the Receipt Acknowledging Payment (Appendices 31 and 32), and then give them the payment and a copy of the receipt.

If the wage claimant wants the payment mailed, mail the payment to the wage claimant at the address listed on their form. In rare situations, if the wage claimant does not have a valid mailing address or P.O. box and claims that coming in to an LRD office would be a hardship, the claimant may list the Workforce Connection office as the address to mail the payment. See Section IV.F.8 for more information about this.

## **P. EMPLOYER FAILURE TO COMPLY WITH ADMINISTRATIVE DECISION**

If the employers fail to pay the wages and damages you order them to pay in the Administrative Decision, LRD can enforce your Administrative Decision by filing a civil action in court where appropriate.<sup>321</sup> To do so, the wage claimant must make an assignment to LRD of their wage claim. If LRD does not receive the employer's payment by the deadline, within two business days of the deadline you should send the wage claimant the Assignment of Wage Claim Notification Letter (Appendices 34 and 35), enclosing the Assignment of Wage Claim Form (Appendices 36 and 37). If you do not receive a response from the wage claimant after 10 business days have passed from the date you mailed the Assignment of Wage Claim Form, attempt to contact the wage claimant by telephone, leave a voicemail if possible. If an additional three business days pass without any communication from the wage claimant, then send the wage claimant a closure letter, using the Closure Letter template and log the reason for the closure, and the closure itself, in the LRD system.

If the wage claimant contacts you after receiving this letter, you should generally accept the late Assignment of Wage Claim unless the statute of limitations has passed.

### **1. Steps prior to filing a case in court or referring to a District Attorney**

Once you have the signed Assignment of Wage Claim, you should pursue enforcement action. This involves either filing a civil case in court or referring the case to Legal for referral to a District Attorney for civil or criminal prosecution, as discussed in the following sections.

Before pursuing enforcement action, you should generally give the employer a final opportunity to pay the amount in the Administrative Decision. Call the employer and explain that LRD is preparing enforcement action. Give the employer an opportunity to arrange for payment. If the employer requests a payment plan, you may schedule a settlement meeting with the employer and wage claimant before pursuing legal action in court. If you decide to do this, you should follow the settlement procedures discussed in Section IV.L, including obtaining an Affidavit of Confession of Judgment from the employer. If the employer does not execute an Affidavit of Confession of Judgment, you should pursue enforcement action.

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<sup>321</sup> See NMSA §§ 50-4-11, 50-4-12, 50-4-26.

If you are unable to reach the employer by telephone, send the employer a Pre-Filing Demand Letter (Appendix 30), and enclose the original Administrative Decision. Pursue enforcement action, as discussed in the following sections, if the employer does not respond within 10 days.

## **Q. CASES UNDER \$10,000: PROVING THE CASE IN COURT**

### **1. General overview of litigation process**

When you receive a completed Assignment of Wage Claim form from the wage claimant, and the case is less than \$10,000, prepare for the action to be filed with the appropriate court. Find out from the wage claimant if they anticipate traveling or otherwise being difficult to reach. If the wage claimant will be unavailable, you may want to prepare a statement for them to sign, especially including the facts that you used to calculate the damages and attesting to any documents they gave you.<sup>322</sup> Use the Witness Statement Form at Appendix 9. The reason for a statement would be to prepare for the possibility of default judgment if the employer does not respond to the lawsuit, and if the wage claimant is not available.

Like any plaintiff who files a lawsuit, LRD has the burden of proving that it has the right to be awarded the wages and/or damages it is requesting. LRD created a record through its investigation and Administrative Decision, and that record can help LRD present its case in court. However, the court's job is not to review LRD's record, but to evaluate whether LRD sufficiently proves all the elements of the legal claims it alleges in its complaint.

In a court action, LRD will have to present the case to the court for the court to make the same factual findings and legal conclusions that LRD did. Generally the complaint that is filed with the court to initiate the court case should include enough information and details to convince the judge to order the employer to pay the wage claimant what you have decided the wage claimant is owed.

If the employer never responds to or participates in the court action, then the judge may order all the damages that were requested in the complaint. An order in this type of situation is called a "default judgment." The judge can grant a default judgment only if the complaint and a motion for default judgment contain sufficient factual allegations to show that LRD is a proper party to the lawsuit, the employer who was sued is a proper party to the lawsuit, the wage claimant was employed by the employer, and the amount of damages.<sup>323</sup> The judge has his/her standards for what is sufficient and whether the evidence is reliable. LRD's court filings and documents, even when the employer is not participating, should be complete and convincing.

If the employer does respond to the lawsuit, then LRD will have to convince the judge at trial, by presenting evidence and witnesses. LRD will have to respond to arguments and evidence from

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<sup>322</sup> See the discussion below about default judgments.

<sup>323</sup> NMRA 2-702, 3-702.

the employer. The court will be applying the New Mexico Rules of Evidence to decide which evidence and testimony can be admitted and considered by the court.<sup>324</sup>

With that background information in mind, whether you will be presenting the lawsuit yourself or LRD management determines it should be referred to DWS's Office of General Counsel, you need to be sure the case file is organized and makes clear what evidence exists and how it helps prove your case. Your Administrative Decision will have some of that information.

Of course, if at any point before you file the complaint the employer makes the required payment or the wage claimant and the employer agree to a settlement, you should not file the complaint. If they agree to a settlement, you should follow the procedures described in Section IV.L.

## **2. Filing the complaint**

If the wage claimant completes the Assignment of Wage Claim form, you should prepare and file a complaint in the appropriate metropolitan or magistrate court.<sup>325</sup> At any point in this court process, if you have questions about legal procedure, ask LRD management to discuss with DWS's Office of General Counsel. The courts provide sample forms for some commonly filed documents. Please check for the current version of those forms, most of which are available at <https://www.nmcourts.gov/forms.aspx>. Those forms need not be used specifically, nor is it necessary to use the content of those forms verbatim in your own filings, however they can aid your understanding of what format you should use and some of the information you should include. You should also check for the current version of the court's rules before filing a complaint.

The sample complaint form for the metropolitan and magistrate courts is currently at NMRA Form 4-201. It is available online at <https://www.nmcourts.gov/forms.aspx>. The court clerk may also be able to provide it to you. State the amount of damages the employer owes the wage claimant. Be sure you are asking for all the damages he/she can request under the law. For cases involving MWA violations, consider asking for the injunctive relief available under Section 50-4-26(F). If the employer never responds to the lawsuit and you ask the court for a default judgment, you will be limited to the damages you requested in your complaint.<sup>326</sup> (You could file an amended complaint before seeking default judgment, but then you would have to file and serve the amended complaint. To avoid this additional burden, you should always be sure of the damages you are asking for in your original complaint.)

You should include at least the following information in the complaint: the wage claimant was employed by the employer; what rights the employer violated under New Mexico's wage payment laws; what underpaid or unpaid wages are owed and the basis for that calculation; and the wage claimant's assignment of wage claim to LRD pursuant to NMSA 1978 § 50-4-11. You

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<sup>324</sup> NMRA 2-601, 3-601.

<sup>325</sup> 11.1.4.113 NMAC.

<sup>326</sup> NMRA 2-701, 3-701.

could copy most of this information from your Administrative Decision and paste it into a complaint.

You should attach as exhibits in every case:

- The Administrative Decision
- The signed assignment form

If you are seeking damages, you should generally include the following, subject to LRD Management and DWS Office of General Counsel edits and/or approval:

- The form Memorandum of Law in Support of Award of Nondiscretionary Statutory Damages (Appendix 40)

If you are seeking to hold an employer individually liable, you should generally include the following, subject to LRD Management and DWS Office of General Counsel edits and/or approval:

- The form Memorandum of Law in Support of Finding of Individual Liability (Appendix 41)

### **3. Service of process**

After the complaint is filed, the court will issue a summons. The summons will be served on the defendant within the boundaries of New Mexico by the sheriff's office. Make sure a summons is completed for each defendant. For example, if you named as defendants both a business and the person who is the sole owner of the business, a summons should be issued for the business and another summons should be issued for the person. You want both summonses even if the person is also the registered agent for the business and will be the person receiving the summons against the business.

The metropolitan and magistrate courts in New Mexico do not have jurisdiction over out-of-state defendants.<sup>327</sup> As such, in instances where an out-of-state employer is non-responsive or refusing to settle, you will be unable to further assist the wage claimant by pursuing a court action in metropolitan or magistrate court. There may be other methods of collection for you to consider as discussed in Section IV.Q.12. If no other collection methods are applicable to the case you are working on, you should refer the case to the District Attorney for prosecution.

If a significant amount of time has passed and you have not received the returned summons, you may consider following-up with the official serving the summons. You may be able to assist the

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<sup>327</sup> NMSA 1978 § 35-3-6(D): "In a civil action arising within the magistrate's territorial jurisdiction, the magistrate court has personal jurisdiction over the defendant for the purpose of service of process upon the defendant *wherever the defendant resides or may be found within the state.*" (emphasis added).

official in providing further contact information. If, for whatever reason the Sheriff's office is unsuccessful in serving the summons, and it becomes evident through your good faith efforts to communicate with them that they will not be able to serve the summons, you should so note in the file and, with approval from LRD management, refer the claim to the District Attorney for prosecution.

If a returned summons is not filed with the court, file it yourself. You will want proof in the court's record that the defendant was served, if you ever ask the court to enter a default judgment.

#### **4. Answer by Employer(s)**

In many instances, the employer(s) will file an Answer to your complaint. In addition to filing an Answer, sometimes employers, particularly those represented by attorneys, will file a Counterclaim against LRD and/or the wage claimant. A Counterclaim is a lawsuit against LRD or the wage claimant that is related to the same subject matter or series of events as the lawsuit you have filed against the employer(s). If you receive an Answer from an employer that includes a Counterclaim, it is important that you immediately inform the Office of General Counsel and provide it with a copy of the Counterclaim. LRD must file an Answer to the Counterclaim and there are strict deadlines that apply.

#### **5. Deadlines**

The court rules provide some deadlines. These are discussed in more detail throughout this section. These deadlines apply to every case unless the judge in your specific case orders something different. Some judges issue a scheduling order that sets out deadlines for the parties to follow. Be sure you understand the deadlines, follow them, and watch for whether the defendant follows them.

#### **6. Hearings**

You may not have any hearings in a court case. If you do have a hearing, follow these steps. If your case is in metropolitan court, before the hearing, request that the proceeding be tape recorded.<sup>328</sup> If the wage claimant or any other witness will need language assistance services, as soon as you receive notice of the hearing, notify the court in writing that the person will require interpretation services.<sup>329</sup> You may use NMRA Form 4-115 to notify the court. If you find out in advance of the hearing that the person for whom you requested interpretation will not be at the hearing, notify the court in writing to cancel the interpretation services. You may use NMRA Form 4-116.

If at any point in the case the wage claimant or a witness requires an interpreter and the court does not provide it, raise this issue to the judge. Even if you think the judge will continue without

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<sup>328</sup> NMRA 3-708; 11.1.4.113 NMAC.

<sup>329</sup> See NMRA 2-113(B)(3) (for magistrate courts) and 3-113(B)(3) (for metropolitan courts).

interpretation regardless of what you say, state your objection to continuing without interpretation services. Otherwise you risk waiving your right to have the interpretation provided, and you may lose the ability to complain later about how that impacted your case and the wage claimant's rights.

## **7. Default judgments**

If the employer does not file an answer to the complaint or appear at a hearing within the time period stated in the summons or does not appear for trial, you should ask the judge to make a default judgment.<sup>330</sup> Do this by filing a motion for default judgment. You can use the court's Form 4-702. Your filings with the court must prove that service was made on the defendant and allege sufficient facts that LRD is a proper party to the lawsuit, the defendant is a proper party to the lawsuit, the defendant employed the wage claimant, and the basis for and amount of damages.

The allegations in your complaint should be sufficient, along with proof of service on the defendant. But including additional evidence with your motion will help convince the judge to grant the default judgment and to do so without having a hearing first. Attach evidence you relied on in making these determinations yourself.

If you attach evidence to your motion, do it through an affidavit or unsworn affirmation from the person who obtained or created the documents, explaining their origin. The statement does not have to be notarized, as long as it is dated, signed, and affirms under penalty of perjury under the laws of the State of New Mexico that the statement is true and correct.<sup>331</sup> The way this would look is you would have your motion for default judgment and an exhibit attached to the motion. The first page(s) of the exhibit would be the affirmation by the person with personal knowledge of the evidence. Then following that affirmation would be the pages of the evidence.

If you want to submit any documents that were created by the wage claimant or that you obtained from the wage claimant, write an affirmation for the wage claimant to sign. For example, if the wage claimant made notes while he/she was working of what time he/she started and stopped work, and you wanted to submit that to the judge, his/her affirmation would include a statement like, "While I was working for [EMPLOYER], at the end of each day I wrote down the time I started work and the time I stopped. This document is a photocopy of these notes I made." If you want to prove for a wage payment violation that the wage claimant made a demand to his/her employer for payment, and the wage claimant made that demand by text message, you would include a statement like, "The attached document is a print-out of a picture of the text messages on my phone."

You may have created or obtained documents that you want to submit, and then you should sign an affirmation about the documents. For example, if you want to submit the employer's business

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<sup>330</sup> See NMRA 2-702 (for magistrate courts) and 3-702 (for metropolitan courts).

<sup>331</sup> NM Sup. Ct. Order 0019; NMRA 2-301 (for magistrate courts) and 3-301 (for metropolitan courts).

license, maybe to prove that the defendant was who employed the wage claimant, you would write an affirmation for yourself to sign that includes a statement like, “I searched the Albuquerque business licenses online and found this license issued for the address where [WAGE CLAIMANT] worked. I printed the attached document from the web site of the City of Albuquerque.”

Also complete and attach an Affirmation of Plaintiff in Support of Application for Default Judgment, which attests that the defendant is not in military service. You can use Form 4-702A.

If the judge does set a hearing on the motion, prepare to present the evidence you submitted. Follow the trial-preparation checklist from Section IV.Q.9.

If you submitted a statement by or documents from the wage claimant or any other witness, arrange with the witness to go to the hearing to testify. Although you should not have to present your whole case because the defendant has not even filed anything to contradict your complaint, you can never be entirely sure what the judge will want to cover at the hearing.

## **8. Discovery**

In most cases, you should have already gathered the information and evidence you need to proceed in litigation. However, filing the case in court provides an additional opportunity to obtain evidence through what is called “discovery.”

If the employer does not provide you specific documents or information you want, you can ask the judge to order the defendant to provide the documents or information.<sup>332</sup> For example, if you asked the employer for payroll records during your investigation of the wage claim and the employer never provided them, you could ask the judge to order the employer to provide them. Or maybe the employer did give you payroll records during your investigation, but they seemed incomplete. You would have to explain to the judge why the information is relevant and the defendant should provide it to you. The defendant also has this right to ask the judge for materials from you.

You can also ask the judge to order someone other than the defendant to provide you with information or documents.<sup>333</sup> You would be asking the judge to issue a subpoena to that person or corporate entity. You may want to do this, for example, if someone other than the defendant kept records; to inspect the worksite; or to ensure a specific person is at a hearing so you can question them. The defendant also has these rights to try to get information from non-parties. Anyone who refuses to follow one of these orders from the court could be punished by the court for not complying. Again, you should have already obtained all the evidence you needed before filing the lawsuit, so you will not have to use these discovery procedures.

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<sup>332</sup> See NMRA 2-501 (for magistrate courts) and 3-501 (for metropolitan courts).

<sup>333</sup> See NMRA 2-502 (for magistrate courts) and 3-502 (for metropolitan courts).

## 9. Trial

If the employer files an Answer to your complaint, request a trial setting. In most cases, you should do this within two (2) business days from receipt of the employer's Answer to the complaint.

If you have never been to trial or if you have never appeared before the judge assigned to the case, you are encouraged to go to court with other LLAs to observe hearings or trials in other related cases. Find out from LRD management or case files if another LLA has appeared before the judge. Talk to anyone who has experience with this judge.

Unless the court has issued an order with different deadlines, each case will have the following deadlines:<sup>334</sup>

- At least 20 days before trial, you must serve the defendant with a document about the evidence you will be using and damages. The document will describe any documents or other objects you have that you intend to use as evidence at the trial. It will state that the evidence is available for the employer to inspect or copy. It will provide an itemized list of the damages that you claim and intend to seek at trial. It will list witnesses you intend to call at trial. This list should provide their names, their addresses, their telephone numbers, and a summary of what they will testify to.
- At least 15 days before trial, the defendant has to provide you with a similar document, describing any items the defendant has and intends to use as evidence at the trial. You should receive a list of the names, addresses, telephone numbers, and summary of the testimony of any witnesses the defendant intends to have at the trial. If you do not receive this document by this deadline, contact the defendant to ask for it. If the defendant fails to provide you with this document, the judge can order the defendant to provide it to you, postpone the trial, or prohibit the defendant from calling a witness or using evidence that wasn't disclosed to you.

If any party discovers new material or witnesses after these deadlines, the party has to update the information it has already given to the opposing party.

At trial, you will present your case to the judge using witnesses, documents, and your explanation of the case. Before the trial, request that it be tape recorded.<sup>335</sup> If the evidence presented at trial supports additional damages beyond what you had requested in your complaint, ask the judge to award these additional damages as well.<sup>336</sup>

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<sup>334</sup> See NMRA 2-501 (for magistrate courts) and 3-501 (for metropolitan courts).

<sup>335</sup> 11.1.4.113 NMAC; NMRA 2-601(B) (for magistrate court); NMRA 3-708 (for metropolitan court).

<sup>336</sup> Except for a default judgment, the final judgment "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." NMRA 2-701(D) (for magistrate courts); NMRA 3-701(D) (for metropolitan courts).

Look ahead to issues LRD may appeal, if the judge makes a decision based on an error of law that prevents you from collecting the wages and damages owed. (*See* Section IV.Q.10.) During trial, be sure to present the legal arguments and the evidence on all issues. Then if LRD does appeal, all issues are in the record of the trial for the court hearing the appeal to consider.

**Follow this checklist to prepare for trial:**

- ☐ **Prepare your witnesses.**
  - ☐ At least two weeks before the trial, contact the wage claimant and any other witnesses you want to use to support your claims or get documents admitted into evidence. Arrange to meet with them individually if possible.
  - ☐ When you meet with them, explain what you expect will happen at trial. Review what information you expect to ask them about at trial, such as the hours worked and how much was paid. If you tell witnesses the topics you will be covering and what the defendant is likely to ask them about, they can be better prepared and less hesitant in testifying to what they know.
  - ☐ Explain to them where they should be and when on the day of the trial. Be sure they have a way to reach you, for example, if they get lost. Be sure you have a way to reach them, for example, if they do not show up when you expected them to.
- ☐ **Review the law.**
  - ☐ Re-read the legal sections of this Manual that relate to your lawsuit.
  - ☐ Either print out these sections or prepare a memorandum for yourself to refer to if you have to explain these issues to the judge.
  - ☐ Re-read the Evidence section.
  - ☐ Either print out the evidentiary standards you may have to use or prepare a memorandum for yourself to refer to.
- ☐ **Review your case.**
  - ☐ Re-read your case file and make notes about the case that you can refer to during the trial.
  - ☐ Be sure you are familiar with the hours the wage claimant worked and how much the wage claimant was paid.
  - ☐ Write a timeline of important events.

- ☐ Decide what evidence you are going to submit and how you will get it admitted.
- ☐ **Draft the questions you will ask your witnesses.**
- ☐ **Draft the questions you will ask the defendant's witnesses.**
- ☐ **Put your notes into a format that will allow you to easily refer to them during the trial.**
- ☐ **Make three sets of any documents you will want to use.** You can have one copy yourself to refer to and can provide one copy to the judge and another to the defendant.

a. Evidence

You have already been working with evidence as you investigated the wage claim and as you came to your Administrative Decision. You may have obtained certain records that you trusted without any doubts, such as business registrations from the Secretary of State's web site. You may have ignored other records that were provided to you because they did not relate to the issues you had to decide in the case. Other statements or records may have contradicted each other, and you evaluated them to decide which ones were more believable.

The magistrate and metropolitan courts follow the New Mexico Rules of Evidence.<sup>337</sup> You should be familiar with the standards and terminology the courts will use. In large part these rules of evidence simply articulate the same evaluations you were making in your investigation and that we all make in our daily lives. But they do have their own terminology, address concerns that are particular to court proceedings, and try to protect us from common pitfalls of false reasoning. Their goal is to ensure the evidence that is considered in making a decision is reliable and the process is fair and efficient.

To better understand these concepts, start with a closer look at the gold standard for evidence: live testimony in court by a witness with direct, personal knowledge of the topic. When a witness testifies in court, he/she is under oath, is in a formal setting, and can be cross-examined by the opposing party. These safeguards make the witness' statements more trustworthy. There are potential consequences if the witness lies. The witness is likely to take the proceeding seriously because it seems serious and solemn. The opposing party has an incentive to expose any weaknesses or falsehoods in his/her testimony, and has the opportunity through cross-examination to test it for any lies or errors.

Comparing this kind of evidence to others, it is easier to understand why some kinds of evidence might have so few safeguards that they are inadmissible and will not be considered by the court. Statements made outside of court don't have these same protections. The category of "statements made outside of court" is generally called "hearsay." It includes some things that you probably would not ordinarily think of. For example, a live witness testifying in court to what someone

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<sup>337</sup> NMRA 2-601 and 3-601.

else told them is hearsay. That's because they are testifying about a statement made by someone else, somewhere else.

Perhaps the wage claimant could testify that a co-worker told him that their employer said the employer fired the wage claimant for complaining about being underpaid. That may seem like great evidence, but the judge may refuse to allow it. If the opposing party wanted to find out more about this statement supposedly made by the employer, it could not do that through this witness. The witness is just recounting what someone else told them that yet another person said. This witness may be entirely trustworthy. But all they can really testify to is that the co-worker made this statement, not the truth of the statement. The co-worker could be lying. Maybe the co-worker was telling the truth, but the employer was lying when they said that to the co-worker because they wanted to scare the co-worker to keep them from complaining. Since neither of them are on the witness stand testifying, there is no way to know.

b. Entering documents in evidence

A big category of statements made outside of court are documents. They are often hearsay because a party is trying to use them to prove the truth of statements contained in the documents. The rules of evidence address this and recognize other safeguards to help ensure that documents are trustworthy. Most of these rules are not absolute, and even if a type of document is generally admissible it can still be excluded if the opposing party shows why it is not trustworthy.

**Records of a regularly conducted activity.**<sup>338</sup> Such records are not excluded as hearsay. You would have to establish the following: 1) The record was made at or near the time of the activity by someone with knowledge or from information transmitted by someone with knowledge. 2) The record was kept in the course of a regularly conducted activity of a business or organization. 3) Making the record was a regular practice of that activity. 4) The custodian of the record or another qualified witness must testify or certify all the above-listed facts.

**Absence of a record of a regularly conducted activity.**<sup>339</sup> Similarly, if a matter is not included in such records, you may be able to use that as evidence to prove that the matter did not occur or exist. You would have to show that a record was regularly kept for that type of matter.

**Public records.**<sup>340</sup> Such records are not excluded as hearsay. You would have to show that the record or statement was by a public office and sets out one of the following: 1) the office's activities; 2) a matter observed while under a legal duty to report; or 3) factual findings from a legally authorized investigation.

You may want to use this rule to admit documents from your investigation of the wage claim. Certainly your Administrative Decision seems to fall within this rule. You could also possibly

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<sup>338</sup> N.M. R. Evid. 11-803(6).

<sup>339</sup> N.M. R. Evid. 11-803(7).

<sup>340</sup> N.M. R. Evid. 11-803(8).

admit print-outs from your logs or database. The required elements would have to be attested to and explained by yourself or another LRD official.

**Absence of a public record.**<sup>341</sup> You may be able to admit testimony or a certification that a diligent search failed to find a public record or statement. This would be permitted only to prove that 1) the record or statement does not exist or 2) a matter did not occur or exist, even though a public office regularly kept records or statements of that kind of matter.

For example, if an employer were trying to escape personal liability by insisting there was a corporate entity that employed the wage claimant, you could use this rule to prove that there was no such corporate entity. You could attest to searching the public records that the Secretary of State keeps of corporate registrations.

**Recorded recollection.**<sup>342</sup> You may want to use a document when a witness is unable to recall something that he used to know. You would have to show that the record 1) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; 2) was made or adopted by the witness when the matter was fresh in the witness' memory; and 3) accurately reflects the witness' knowledge.

If the witness was someone you called to testify, such as the wage claimant, the record could be read into evidence but not admitted itself as a document. You or the witness could read what the record says. You should show or provide a copy of the document to the defendant. You may want to do this if the wage claimant does not remember all the details of their work anymore, but, for example, they wrote down the hours while working for the employer or you worked with them to create a chart of the hours during your investigation. You could do this with the wage claim form.

If the witness was an opponent, such as the employer, then you could admit the document itself as evidence. You wouldn't be limited to just reading from the document.

**A prior statement by a person who is unavailable as a witness.**<sup>343</sup> If you cannot obtain live testimony from someone, but you have prior testimony or a prior statement, you may be able to use the prior statement. Being unavailable as a witness includes if the person is there but refuses to testify about the subject matter or testifies to not remembering the subject matter. "Statement" includes an assertion made by a person orally or in writing.<sup>344</sup>

You can only use certain prior statements. The type of statement you might have available to use would be what is called a statement against interest. That is a statement that a reasonable person would have made only if he/she believed it to be true because making it was so contrary to his/her interests. That's why the statement is trustworthy. Compare it to a statement that benefits

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<sup>341</sup> N.M. R. Evid. 11-803(10).

<sup>342</sup> N.M. R. Evid. 11-803(5).

<sup>343</sup> N.M. R. Evid. 11-804.

<sup>344</sup> N.M. R. Evid. 11-801.

the witness, like a statement by an employer that he/she paid his/her employees in full every week. That statement may not be very trustworthy because it was self-serving and supported the employer's case. But if the employer said that he/she withheld employees' pay, then that may be admissible as a statement against interest because he/she admitted he/she violated New Mexico's wage payment laws.

**A witness' prior statement.**<sup>345</sup> The rules are not so concerned here about the prior statement having been made out of court, because the person who made the statement is testifying and available to be questioned about the prior statement. The use of prior statements is still very limited, though. You can use a prior statement only under the following conditions: 1) The witness must testify and be subject to cross-examination about the prior statement. 2) That statement must a) have been made under penalty of perjury at a court proceeding and be inconsistent with the current testimony, or b) be consistent with the current testimony and be offered to rebut a suggestion that the witness recently fabricated the testimony.

**An opposing party's statement.**<sup>346</sup> You can offer into evidence a statement that 1) was made by the defendant in an individual or representative capacity, 2) the defendant adopted or believed to be true, 3) was made by a person whom the defendant authorized to make a statement on the subject, 4) was made by the defendant's agent or employee on a matter within the scope of that relationship and while it existed, or 5) was made by a co-conspirator of the defendant and in furtherance of the conspiracy. Often this kind of evidence is used when an owner makes a statement that could be used against a co-owner, or a manager makes a statement that could be used against the corporate entity.

Keep in mind, especially when you are considering using people's prior statements or submitting documents from your case file that statements made in settlement negotiations are generally inadmissible.<sup>347</sup> This is because the courts want to encourage people to resolve their disputes. People will be less inclined to try to resolve a case outside of court if that will later be used against them. For example, a defendant may want to use a wage claimant's settlement offer against him in court. Maybe the wage claim is worth \$3,000 in damages, but the wage claimant had offered to accept \$2,000. The defendant could try to use that offer as proof that the wage claimant knows he's not entitled to \$3,000, and the judge shouldn't award him \$3,000. You should object and argue that such offers are not admissible. Also, for the same reason, you should not submit statements the defendant made in settlement negotiations to the court.

Another issue to keep in mind is the use of just part of a document.<sup>348</sup> Perhaps one week of an employer's payroll records matches what the wage claimant said he worked, so you want to use that week to bolster the wage claimant's testimony. But another week of the payroll records contradicts the wage claimant. You may be tempted to submit just the pages of the payroll records that support your case. As you make that decision, consider that if one party introduces

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<sup>345</sup> N.M. R. Evid. 11-801(D)(1).

<sup>346</sup> N.M. R. Evid. 11-801(D)(2).

<sup>347</sup> N.M. R. Evid. 11-408.

<sup>348</sup> See N.M. R. Evid. 11-106.

part of a document or statement, the opposing party can require the introduction of any other part of that document or statement. The standard the court applies is if that other part in fairness ought to be considered at the same time. In this payroll record example, it would probably be better to just not use the employer's records at all if they're inaccurate. If the employer tries to use them, use whatever arguments you have to keep them out or keep the judge from giving them much weight. But you are risking contradicting yourself if you first submit some of the records, and then when the defendant submits the rest of them you are having to change your argument to say the records are not accurate. You should not have submitted them to the court to consider as evidence if you thought they were not accurate.

c. Authentication

Documents have the additional problem of authentication. It is easy to prove and believe that a witness is who he says he is. It is harder with a document.

To address these problems and get a document admitted, it is often necessary to use a witness to introduce the document. A witness who knows the document can identify it. For example, an employer who created a payroll record can identify a document as being the record he/she created. Using a witness to introduce a document into evidence can be very simple, like this:

*The questioner shows the document to the witness.*

*Question: Do you recognize this document?*

*Answer: Yes, it was the pay stub I received from [EMPLOYER].*

*Question: When did you get it from him?*

*Answer: When he paid me that week.*

*The questioner asks the judge to admit the document into evidence.*

The questioner established what the document is and why the judge can believe it is what the questioner says it is. Similarly, you can prove a document was signed by a person by having that person or someone who knows his signature confirm it. You can do the same with handwriting.

For many types of documents, you will not be able to get a witness to authenticate them. The rules of evidence address commonly used documents and how to authenticate them based on their distinctive characteristics and other circumstances that make them identifiable and trustworthy.

d. Public records and other self-authenticating documents

With records from governmental entities, you probably could not get the person who created the records to testify. Probably the records were not even created by just one person who could attest to them. But such records have other qualities that make them easily identifiable and trustworthy. So you can admit the following documents into evidence as "self-authenticating."<sup>349</sup>

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<sup>349</sup> NMRA 11-902.

- Sealed and signed: The document contains a seal from a governmental entity, including from a political subdivision or official of a governmental entity. It also contains a signature attesting to the document.
- Not sealed, but signed and certified: The document contains the signature of a governmental official or employee. It also is certified by another official who has a seal and official duties within the governmental entity. He/she certifies that he/she has that official capacity and the signature is genuine.
- Certified copy of an official record: The document was recorded or filed in a public office as authorized by law. The copy of the document is certified as being correct. The certification must either be by the custodian of the record or another authorized person or comply with the self-authentication requirements of being sealed and signed or being signed and certified.
- Official publication: A book, pamphlet, or other publication issued by a public entity.

You should be able to authenticate your own records under these standards.

The following documents are also self-authenticating:<sup>350</sup>

- Material from a newspaper or periodical
- A document or object with a trademark or similar type of business label
- A document accompanied by a certificate of acknowledgment executed by a notary public

Keep all these evidentiary standards in mind throughout the case. They will help you address possible weaknesses in the case early on, before you are suddenly preparing for trial and do not have time to try to track down more witnesses or documents. Remember that the main issues are that the evidence be based on personal knowledge and have other traits that make them reliable and trustworthy.

You should also hold the defendant's evidence to these standards. If the defendant calls a witness who testifies to something some second person told him, object and ask the judge to not allow the testimony because it is hearsay. If the defendant wants to introduce some documents that he says show the wage claimant agreeing to certain terms of the work, and you know the wage claimant never saw those documents, then object and ask the judge not to admit them. Make the defendant authenticate them and explain on what basis they are admissible.

Prepare for the right process to follow in these arguments over evidence. If you ask the judge to admit a piece of evidence you believe is important, and the judge says no, you are welcome to object and state why you think the evidence should be admitted. If the judge does exclude your

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<sup>350</sup> NMRA 11-902(6).

evidence, make what is called an “offer of proof.”<sup>351</sup> You may tell the judge you would like to make an offer of proof and you describe the evidence to the judge, for example: “This is a statement signed by the defendant admitting that he/she did not pay [WAGE CLAIMANT].” This creates a record of what was excluded from evidence. Without an offer of proof, the record of the trial will only include evidence that was admitted. The offer of proof prevents you from waiving any rights you had to have certain evidence considered.

As you are presenting your case to the judge, keep track of what you have to prove. Often when certain issues in a case are disputed, it is easy to forget to address the issues that are not actively in dispute. Remember to put into evidence all the facts you need to get the unpaid wages and damages you are asking for.

## **10. Appeals**

### **a. Appealing adverse judgments**

When you receive the judgment, provide it to LRD management immediately. This is important because the deadline for filing a notice of appeal is 15 days after the judgment.<sup>352</sup> Inform LRD management of any rulings that differed from your findings in the Administrative Decision. LRD management will bring the case to the DWS’s Office of General Counsel to decide whether to appeal the decision of the court. To assist the Office of General Counsel, be prepared to identify if you believe the magistrate or metropolitan judge based his/her ruling on any legal standards or interpretations that are different from LRD’s explanations of the law in this Manual. For example:

- The judge did not apply the economic reality test to determine whether the claimant was an employee versus an independent contractor, and instead applied a different test or no test at all;
- The judge dismissed an individual employer from the case without applying the economic reality test;
- The judge applied a higher legal standard for MWA or WPA damages than the standard that appears in the law (i.e. applying a malice or willfulness standard);
- The judge did not use the claimant’s credible testimony or other credible evidence concerning hours worked to calculate wages due.

In the event that LRD determines not to appeal, and in light of the deadlines associated with appeal, LRD will still file the notice of appeal so as to preserve the claimant’s appellant rights. If LRD determines not to appeal, but the claimant wishes to pursue the case, then LRD will file a Motion to Substitute Real Party in Interest (Appendix 42) as soon as possible in order to remove LRD from the case and allow the claimant to pursue the action on his/her own. Because of the

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<sup>351</sup> See N.M. R. Evid. 11-103.

<sup>352</sup> Notice of appeal must be filed with the district court clerk within 15 days of the filing of the final judgment. NMSA § 35-13-1; NMRA 1-072 (magistrate court); NMRA 1-703 (metropolitan court); NMRA 2-705 (magistrate court); NMRA 3-706 (metropolitan court).

short deadlines associated with the appeal, the LRD will also telephone and/or email the wage claimant to inform them of the deadline for filing a notice of appeal and provide them with contact information for legal services providers who may be able to represent the wage claimant in the appeal. These are:

**UNM School of Law**

Economic Justice Clinic

1117 Stanford Dr. NE, Albuquerque, NM 87106

(505) 277-5265

**New Mexico Legal Aid**

301 Gold Ave. SW # 101, Albuquerque, NM 87102

Phone: (505) 243-7871

Once LRD has taken those steps, log the actions in LRD's system and close the case.

b. Defending judgments that are appealed by employers

If you receive notice that the defendant (the employer) is appealing a judgment that LRD won, inform LRD management immediately so that they can pass the information along to the Office of General Counsel, which will determine the next steps and communicate to the claimant. This will enable DWS's Office of General Counsel to make substantive determinations in the matter and to represent the Department in the appeal before the district court.

Whatever happens with the judgment or an appeal, please keep the wage claimant updated.

**11. Post-judgment collections procedures**

When you obtain a judgment against an employer, take the following steps:

a. Obtain and file a transcript of judgment

A transcript of judgment allows you to place a lien on real property owned by the employer. While transcripts of judgment are generally not issued in magistrate court, they are available in metropolitan and district court. As soon as a wage judgment is filed, ask the court clerk to issue a transcript of judgment. See the template Transcript of Judgment at Appendix 43. Then record the transcript in the county clerk's office of any and all counties in New Mexico where the employer owns or may own real property. The employer cannot sell the property without first paying the judgment to LRD. If the employer later pays the judgment, you must file a satisfaction of judgment. Civil Form 4-706 may be used for this purpose. Once the court clerk has been notified, the case is closed.

b. Demand letter

The employer has 15 days to appeal the judgment. Once 15 days have passed, if you have not received notice of appeal, send a demand letter to the employer seeking payment of the judgment. See the template Demand Letter to Employer Post-Judgment at Appendix 44.

c. Writ of Execution

If approximately ten business days have passed since you issued the demand letter, and the employer still refuses to voluntarily pay the wage claimant or does not respond, you may choose to seek a writ of execution. Forms for a writ of execution and other collection steps are available online at <https://www.nmcourts.gov/forms.aspx>.

A writ of execution allows a sheriff to take and sell the employer's property. The proceeds from the sale are used to pay the costs of the sale and then are applied to what is owed under the judgment. If you obtained information about the employer's assets, either through your own investigation of the case or through post-judgment information requests, you can share that information with the sheriff. For employers who are not individuals, you can do this any time after filing the judgment.<sup>353</sup>

For employers who are individuals, you first have to serve the employer with a notice of right to claim exemptions and a claim of exemption form.<sup>354</sup> A sample notice for the metropolitan and magistrate courts is currently at NMRA Form 4-808a. A sample claim of exemption form is currently at NMRA Form 4-803.

Ten days after serving the individual employer with the notice of right to claim exemptions and a claim of exemption form, if the employer has not filed a claim of exemptions, you can file a sworn application for writ of execution with the court.<sup>355</sup> A sample application is currently at NMRA Form 4-805a.

After the court or clerk issues the writ of execution, you submit the writ to the appropriate sheriff. The contact information for the Sheriff's Office in each county can be found on the Internet. Call the appropriate Sheriff's Office to get more information on their processes. After getting the required information to the Sheriff, wait to hear from them if any property was seized to sell or money was collected. The sheriff must serve the writ on the employer within 60 days of the issuance of the writ.<sup>356</sup>

If the employer does file a claim of exemptions, you can dispute it. A sample notice of dispute is currently at NMRA Form 4-810a. The judge will hold a hearing and decide if the property is exempt. If you do not dispute the claim of exemptions, the sheriff will not take any property claimed to be exempt.

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<sup>353</sup> NMRA 2-801 (in magistrate courts), 3-801 (in metropolitan courts).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.*

<sup>356</sup> *Id.*

If you have pursued a writ of execution, but a balance remains due after collection, the Department may choose to pursue a writ of garnishment. Garnishment is a process for getting money or property that belongs to the employer and is held by a third party, such as a bank. Income or bank accounts are the most common types of property that are garnished. If you think that garnishment is an appropriate method of collection for a case, discuss the matter with Management, which can refer the matter to the Office of General Counsel for collection. Whether to pursue garnishment or other collection methods is within the discretion LRD Management and the Office of General Counsel.

d. Obtaining more information about assets

During the course of your investigation, it is likely that you gathered information regarding an employer's assets or ability to pay a judgment. In the post-judgment phase, there are additional steps that you can take, in consultation with LRD Management, to learn more about an employer's assets.

*(1) Interrogatories*

Where you believe a case to be particularly egregious, and where you are unable to locate any employer assets to collect on a judgment, you should consult with LRD management about whether it may be worth requesting discovery from the employer or third parties.

One discovery option is to serve written questions on the employer.<sup>357</sup> The rules of the district courts apply to this process.<sup>358</sup> The written questions are called "interrogatories." You may serve interrogatories on the employer; you do not need to ask the court to order the employer to answer unless you want to ask more than 50 interrogatories.<sup>359</sup> The employer has to answer each interrogatory in writing and under oath, unless it makes a specific, legal objection to having to answer.<sup>360</sup> The person answering the interrogatories has to sign them.<sup>361</sup> The employer has to serve you with its answers within 30 days of receiving the interrogatories.<sup>362</sup>

If the employer fails to answer an interrogatory, you may choose to ask the court to compel a response, by filing a motion, to issue an order compelling the employer to answer.<sup>363</sup> If the court grants your motion, it will provide an opportunity for a hearing and then can require the employer to pay the expenses LRD incurred in obtaining the court order, including attorney's

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<sup>357</sup> NMRA 2-804(C) (in magistrate courts), 3-804(C) (in metropolitan courts).

<sup>358</sup> *Id.*

<sup>359</sup> NMRA 1-033(A).

<sup>360</sup> NMRA 1-033(C)(1).

<sup>361</sup> NMRA 1-033(C)(2).

<sup>362</sup> NMRA 1-033(C)(3).

<sup>363</sup> NMRA 1-033(C)(5), 1-037(A).

fees.<sup>364</sup> If the employer still does not answer after the court has ordered it to answer, the failure to answer may be considered contempt of court.<sup>365</sup>

Sample interrogatories to help identify assets are in Appendices 45 and 46. One set is for individuals and another is for businesses. If you are serving interrogatories, you should also serve copies on any other defendants in the lawsuit.<sup>366</sup>

### *(2) Subpoenas*

Another way to seek information from third parties is by subpoena.<sup>367</sup> You can complete a subpoena from the court clerk, stating what documents you want and who has them. The subpoena must be served on the third party and instruct them to provide the documents to you. You must provide notice to the defendant that a subpoena is being issued for these documents. Notably, you also have the ability to issue administrative subpoenas to third parties during the investigation phase.

### *(3) Hearing*

A third way to get information is to ask the court to set a hearing and direct the employer or anyone with knowledge of the employer's assets to appear before the court to provide information about the assets.<sup>368</sup> A sample motion for such a hearing ("Motion for Supplementary Proceedings") is at Appendix 47.

Remember also that the wage claimant may be able to provide additional information or ideas about the employer's assets.

#### e. Post-judgment collection when employer is outside of New Mexico

An employer with a headquarters or main office outside of New Mexico may have assets inside New Mexico. If that is the case, you should therefore attempt to collect on the judgment just as you would with an in-state defendant. If the defendant does not have any property in New Mexico, refer the matter to LRD management to evaluate if further collection efforts should be taken. Relevant factors include whether the employer regularly does business in New Mexico or repeatedly violates the wage and hour laws. Generally LRD will not try to collect in another state.

## **12. Pre-judgment collections procedures**

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<sup>364</sup> *Id.*

<sup>365</sup> NMRA 1-037(B).

<sup>366</sup> NMRA 1-033(B), 2-804(D) (in magistrate courts), 3-804(A) (in metropolitan courts).

<sup>367</sup> NMRA 2-804 (in magistrate courts), 3-804 (in metropolitan courts).

<sup>368</sup> *Id.*

If the wage claimant worked in construction or as a security guard, you may be able to start collection efforts before you have a court judgment against the employer, or instead of going to court at all. The subsections below discuss collection efforts that can be taken throughout your work on a case. Given the variables associated with pursuing pre-judgment collection, you are not responsible for making that determination. You should consult with LRD management who will determine if it would be prudent to engage in such efforts.

a. Pre-judgment collections procedures applicable to construction work

A construction lien is available when a construction worker has not been paid wages owed. A lien creates a legal right in the property, which can impair the owner from freely transferring the property and can require the owner and contractor to set aside the amount owed to the claimant and not use it for any other purpose until the claim is resolved.<sup>369</sup> This procedure is available when the claimant performed labor in the construction, alteration, or repair of a building or structure.

In consultation with LRD management, you may consider seeking a construction lien as soon as you issue an Administrative Decision that the employer owes wages to a wage claimant engaged in the performance of construction-related services or activities. In many cases, a lien can be obtained more quickly and easily than a court judgment, and is often more effective than a court judgment in getting an employee what he is owed. You can take an assignment of the wage claimant's lien just as you take an assignment of a wage claim.<sup>370</sup> The form is available at Appendices 48 and 49. Then LRD can place the lien and enforce the wage claimant's rights under the lien.<sup>371</sup>

The deadlines for getting a lien vary depending on the type of property and the amount owed to the wage claimant. You may consult with LRD management after reviewing the following guidelines:

*(1) When the property is not residential with four or less dwelling units, and the claim is not for more than \$5,000*

The provisions below apply when:

- The construction work was performed on a residential property with five or more units or any commercial property, and
- The claim, including wages and damages, is for less than \$5,000.

Within 90 days of the completion of the construction project, you must record a claim with the county clerk of the county where the property is located. The claim must include the name of the property owner, the person who employed the wage claimant, the agreed terms of the

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<sup>369</sup> NMSA 1978 § 48-2-12.

<sup>370</sup> NMSA 1978 § 50-4-11.

<sup>371</sup> *Id.*

employment, and a description of the property.<sup>372</sup> A sample form is available at Appendix 50. If the employer fails to pay after the claim has been recorded, refer the matter to LRD management to consider foreclosing on the lien.

*(2) The property is not residential with four or less dwelling units, and the claim is for more than \$5,000*

The provisions below apply when:

- The construction work was performed on a residential property with five or more units or any commercial property, and
- The claim, including wages and damages, is for \$5,000 or more.

Before recording the claim with the county clerk as described above, you must provide a preliminary notice. A sample form is available at Appendix 51. The preliminary notice must be given no more than 60 days after the claimant started the construction work in order to get a lien for the entire amount of work performed. Otherwise the lien can be for only the 30 days' work prior to the notice. The preliminary notice is written notice of LRD's right to claim a lien if the wage claimant is not paid. It must:

- be delivered by certified mail return receipt requested and fax or by personal delivery.
- be delivered to the owner of the property or the original contractor. The original contractor is the contractor that contracted directly with the owner.<sup>373</sup>
- include a description of the property; your name, address, and telephone number; the wage claimant's name, address, and telephone number; and the name and address of the person who employed the wage claimant.

As soon as possible, you should make a written request to the owner or contractor for the original contractor's legal name and contact information, the owner's name and address, a description of the property, and the name and address of any surety. A sample letter is available at Appendix 52. If they fail to provide you with this information, then the owner or the original contractor cannot use lack of notice as a defense to the enforcement of the lien.<sup>374</sup>

*(3) The property is residential with no more than four dwelling units*

The provisions below apply when:

- The construction work was performed on a residential property with between one to four units, and
- The claim is worth any amount of money.

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<sup>372</sup> NMSA 1978 § 48-2-6.

<sup>373</sup> NMSA 1978 § 48-2-2.1.

<sup>374</sup> *Id.*

There is no lien available in this situation. Rather, a stop notice may be sent to the owner or lender for the project to ensure that the people performing the labor are paid.<sup>375</sup> Once the lender, or the owner if there is not a lender, receives the stop notice, it withholds paying that amount to the original contractor until the wage claim is resolved.<sup>376</sup> If the lender doesn't withhold these funds and instead goes ahead and pays them to the original contractor, the lender could itself be directly liable for the wages owed.<sup>377</sup> Ordinarily, a stop notice is not effective unless it is accompanied by a bond in the amount of 1.25 times the amount of the claim. Furthermore, a lawsuit must be filed quickly after the stop notice is sent in order to enforce the notice. You would therefore only pursue this option in extraordinary situations.

b. Pre-judgment collections procedures applicable to security guard cases

The Private Investigations Act (PIA) regulates private patrol companies and operators, and the New Mexico Regulation and Licensing Department (RLD) enforces the PIA. Certain provisions of the PIA may enable LRD to collect pre- and post-judgment against private patrol operators and private patrol companies who fail to pay wages owed to their employees. After rendering an Administrative Decision, and with direction from LRD management, you may contact the RLD to ask them if it would be possible for them to direct the surety company of the bonded private patrol operator to make a payment on the wage claim. To initiate this process, LRD may send the Administrative Decision to RLD in any wage claim involving a security guard or other employee of a private patrol operator along with a request for authorization of payment from the surety bond (Appendix 53).

If this is unsuccessful, and you pursue an action in court, you may be able to seek collection from the private patrol company's general liability certificate of insurance. If RLD informs LRD that a surety bond is on file, upon obtaining a judgment, LRD may contact the surety company to request payment of the judgment from the surety bond.

Contact LRD management before reaching out to RLD to determine if these efforts would be prudent under the circumstances.

During this process, you may learn that the employer has not posted a surety bond at all. If you learn that this has happened, please contact LRD management, who will contact their counterparts at RLD to report this information.

**R. EMPLOYER OWES MORE THAN \$10,000: REFERRING TO DA OR LEGAL DEPARTMENT**

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<sup>375</sup> NMSA 1978 § 48-2A-2.

<sup>376</sup> NMSA 1978 § 48-2A-8.

<sup>377</sup> *Id.*

If the wage claim is a Wage Payment Act claim, you should consult with Legal and refer the matter to the appropriate District Attorney, who has a statutory duty to assist in the prosecution of the claim. A form letter for this purpose is at Appendix 33.

If the wage claim is a Minimum Wage Act claim, you should consult with Legal about referring the matter to the appropriate District Attorney, who has a statutory duty to assist in the prosecution of the claim. A form letter for this purpose is at Appendix 33.

Similarly, if a Directed Investigation results in an amount owed, but not paid, for over \$10,000, consult with Legal and refer to the appropriate District Attorney.

Consultation with Legal *prior* to making a case referral will help ensure that the file contains what is needed to ensure that the DA will accept and pursue the referral. That decision, however, ultimately rests with the Office of the District Attorney.

In the event the District Attorney fails to respond, ask LRD management to refer the case to DWS's Office of General Counsel. LRD may pursue a MWA action in district court. LRD's priorities for seeking enforcement are (1) Directed Investigation scenarios, (2) systemic or repeated violations of law in individual cases, and (3) other scenarios pursuant to the Director's discretion. Be sure that the complete case file is provided to DWS's Office of General Counsel. The Office of General Counsel will take the matter under advisement.

Once you have made a referral and either received a response from the District Attorney or referred the case to the Office of General Counsel, you should also send a letter to the wage claimant explaining the status of the case, its whereabouts, and that LRD has closed the matter. Log the closure and its reason in the LRD Database.