

NEW MEXICO

Agnes Fuentesvilla Padilla
BUTT THORNTON & BAEHR PC
4101 Indian School Road NE, Suite 300 South
Albuquerque, New Mexico 87110
Phone: (505) 884-0777
Fax: (505) 889-8870
Web: www.btblaw.com
Email: afpadilla@btblaw.com

I. AT-WILL EMPLOYMENT

A. Statute

New Mexico has not addressed this issue by statute.

B. Case law

Employment without a definite term is presumed to be at will. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶ 10, 121 N.M. 710, 917 P.2d 1382; *Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, 115 N.M. 665, 857 P.2d 776.

In *Gonzales v. United Southwest National Bank*, the New Mexico Supreme Court held that the at-will presumption rule is uniform, and that a contract for permanent employment not supported by any consideration other than performance of duties and payment of wages is a contract for an indefinite period. *Gonzales v. United S.W. Nat'l Bank*, 1979-NMSC-086, 93 N.M. 522, 602 P.2d 619. It is terminable at the will of either party. A discharge without cause does not constitute a breach of such contract justifying recovery of damages. *Gonzales*, 602 P.2d at 621. See also *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333; *Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304; *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382.

Below are the most recently published decisions on at-will employment in New Mexico, which continue to uphold the rules expressed in *Gonzales v. United Southwest National Bank*.

In *Shull v. N.M. Potash Corporation*, the New Mexico Supreme Court held that at-will employees can be terminated for any objectively reasonable reason that does not violate statutory, constitutional, or common law rights. *Shull v. N.M. Potash Corp.*, 1990-NMSC-110, 111 N.M. 132, 802 P.2d 641, 644; see also *Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304 (at-will employer/employee relationship is subject to termination at any time, with or without cause); *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

Under New Mexico law, an employer's practice of terminating employees only for cause is not sufficient on its own to create an implied contract that employees may only be terminated for cause. *Hartnett v. Papa John's Pizza USA, Inc.*, 912 F. Supp. 2d 1066 (D.N.M. 2012). However, reliance is an important factor in determining whether an implied employment contract exists. *Id.* The totality of circumstances should be considered when determining whether an implied contract exists. *Id.*

Employment is generally terminable at will, absent an express contract to the contrary. *West v. Washington Tru Solutions, LLC*, 2010-NMCA-001, ¶ 6, 147 N.M. 424, 224 P.3d 651; *see also Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304. However, an exception exists when an employer creates an implied contract limiting its ability to terminate an employee at will by either providing that termination will only be for cause or providing certain procedural protections prior to termination. *West*, 2010-NMCA-001 at ¶ 6.

In *Ettenson v. Burke*, the New Mexico Court of Appeals held that when a jury finds an implied contract of employment that intended to cover the employee until the company is sold, then a jury could fairly infer from the terms of the contract that the employee could not be fired before that time, unless for cause. *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67, 17 P.3d 440. Further, annual benefit negotiations are proper evidence from which a jury may determine whether there was an implied contract for severance pay. *Id.*

In *Lopez v. Kline*, the New Mexico Court of Appeals held that consideration for an implied employment contract provision that limits an employer's authority to discharge will be implied, as a matter of law, where the employee presents evidence of a promise sufficient to support such a provision. *Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304. A factfinder must examine the totality of circumstances surrounding the employment relationship when considering whether an employer made a promise modifying the employment relationship. *Id.* The terms of the implied contract, however, must be sufficiently explicit.

In *Hartbarger v. Frank Paxton Co.*, the New Mexico Court of Appeals held that where there is proof of a promise sufficient to support an implied contract between employer and employee, consideration sufficient to support an implied contract will be implied as a matter of law by the court, so long as the promise: (1) was part of the original employment agreement; or (2) was made later in modifying the employment relationship. *Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 9, 115 N.M. 665, 857 P.2d 776.

A promise or offer that supports an implied contract might be found in written representations, such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *Id.* at ¶ 7. When such a contract is implied, it is implied in fact. A factual showing of additional consideration or mutual assent to the terms of the implied contract is not required. *Id.*

To support the existence of an implied contract, an oral representation must be sufficiently explicit and definite. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶¶ 11-12, 121 N.M. 710, 917 P.2d 1382.

1. Employee Handbooks/Personnel Materials

A promise, or offer, that supports an implied contract might be found in written representations such as an employee handbook, in oral representations, in the conduct of the parties, or in a combination of representations and conduct. *Hartnett v. Papa John's Pizza USA, Inc.*, 912 F. Supp. 2d 1066 (D.N.M. 2012).

Whether an employee handbook has modified the employment relationship is a question of fact to be discerned from the totality of the parties' statements and actions regarding the employment relationship. *Hartbarger*, 1993-NMSC-029 at ¶ 15.

An employee's property interest in continued employment under a personnel manual must be clearly established at the time of discharge. *Cockrell v. The Bd. of Regents of NMSU and Jim Paul*, 1999-NMCA-073, 127 N.M. 478, 983 P.2d 427. When individual provisions within a manual are arguably inconsistent and contradictory, they do not lend themselves to a clear understanding of the kind that would alert an objectively reasonable official that he was unconstitutionally infringing upon an employee's rights of continued employment under the manual. *Id.*

A subsequent decision involving the same parties held that a personnel manual gives rise to an implied contract if it controlled the employer-employee relationship and an employee could reasonably expect his employer to conform to the procedures outlined in the manual. *Cockrell v. The Bd. of Regents of NMSU and Jim Paul*, 2002-NMSC-009, 132 N.M. 156, 45 P.3d 876. However, employers are free to not issue a personnel manual at all or to issue a personnel manual that clearly and conspicuously tells their employees the manual is not part of the employment contract. *Id.*

However, even where a personnel manual purports to disclaim any intention of forming contractual obligations, enforceable against an employer, a fact finder may still look to the totality of the parties' statements and actions, including the contents of a personnel manual, to determine whether contractual obligations were created. *Beggs v. City of Portales*, 2009-NMSC-023, ¶ 20, 146 N.M. 372.

In *Forrester v. Parker*, the trial court granted summary judgment in favor of the defendant employer on Forrester's claim that he was discharged in violation of Chaves County Community Action Program, Inc.'s personnel policy guide. *Forrester v. Parker*, 1980-NMSC-014, 93 N.M. 781, 606 P.2d 191. The policy guide was in effect when Forrester was first hired, and a section of the guide was recited as the grounds for his termination. *Id.* The Supreme Court reversed the trial court's judgment and held:

Forrester should have and did expect Forrester's supervisor to conform to the procedures for terminating him as spelled out in the guide. For the guide constituted

an implied employment contract; the conditions and procedures provided in it bound both Forrester and Parker. The words and conduct of the parties here gave rise to this implied contract.

Id. at ¶ 4; *see also Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, 108 N.M. 424, 773 P.2d 1231; *but see Sanchez v. The New Mexican*, 1987-NMSC-059, 106 N.M. 76, 738 P.2d 1321 (employee handbook that lacked specific contractual terms and contained language of a nonpromissory nature did not constitute either a written or implied contract of employment).

An employee handbook can either create or modify an express contract of employment. *Lukoski v. Sandia Indian Mgmt.*, 1988-NMSC-002, 106 N.M. 664, 748 P.2d 507. For an employee handbook or personnel manual to modify a preexisting employment contract, the court must be convinced that such modification was intended from the “totality of the parties’ statements and actions.” *Lukoski*, 1988-NMSC-002 at ¶ 7, 748 P.2d at 509; *see also Zaccardi v. Zale Corp.*, 856 F.2d 1473 (10th Cir. 1988).

Although an employer is not required to issue a personnel manual, once an employer makes the unilateral decision to issue a manual and encourages employees to rely on it, “the employer may not treat it as illusory.” *Lukoski*, 1988-NMSC-002 at ¶ 7, 748 P.2d at 509.

In order to modify at-will employment, an employee handbook or employee manual must contain specific contractual terms that might evidence the intent to form a contract. *Sanchez v. The New Mexican*, 1987-NMSC-059, 106 N.M. 76, 738 P.2d 1321. Where the language is of a nonpromissory nature and is merely the declaration of an employer’s general approach to the subject matter discussed, no implied employment contract is created. *Id.* at ¶ 12.

A personnel manual does give rise to an implied employment contract if it controls the employer/employee relationship and the employee could reasonably expect the employer to conform to the procedures it outlines. *Newberry*, 1989-NMSC-024 at ¶ 7; *see also Bayliss v. Contel Fed. Sys., Inc.*, 930 F.2d 32 (10th Cir. 1991); *Hudson v. Village Inn Pancake House of Albuquerque, Inc.*, 2001-NMCA-104, 131 N.M. 308, 35 P.3d 313; *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7.

2. Provisions Regarding Fair Treatment

There is no New Mexico statutory law on this issue. Retaliatory discharge is an exception to the employment at will doctrine in New Mexico. *Sherrill v. Farmers Ins. Exchange*, 2016-NMCA-056, ¶ 9, 374 P.3d 723, 727. To support a cause of action based on retaliatory discharge, an employee must: (1) identify a specific expression of public policy which the discharge violated; (2) demonstrate that he or she acted in furtherance of the clearly mandated public policy; and (3) show that he or she was terminated as a result of those acts. *Id.* In the absence of a clearly mandated public policy, the employer retains the right to terminate workers at will. *Id.* at ¶ 16. In order to succeed on a retaliatory discharge claim in New Mexico, the plaintiff must identify a specific expression of public policy which the discharge violated. *Id.* at ¶ 17. The New Mexico Unfair Practices Act embodies a clear expression of public policy sufficient to support a claim of retaliatory discharge. *Id.* at ¶ 33; *see NMSA 1978 § 59A-16-20.*

See also infra, § II(B), Public Policy Exceptions.

3. Disclaimers

Courts will not find an implied contract of employment in cases in which the alleged contract by the employer is not sufficiently explicit. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382. A written personnel policy that expressly reserves the right to terminate an employee for any reason cannot be said to have created any reasonable expectation of an implied contract. *Garrity*, 1996-NMSC-032 at ¶ 12; *see also Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, 41 N.M. 658, 41 P.2d 333; *Mealand v. E. N.M. Med. Ctr.*, 2001-NMCA-089, 131 N.M. 65, 33 P.3d 285.

However, even if an employee manual contains clear disclaimers that the manual does not create an employment contract, the disclaimer may be superseded by other representations made by the employer outside of the manual. *West v. Washington Tru Solutions, LLC*, 2010-NMCA-001, 147 N.M. 424, 224 P.3d 651 (reversing summary judgment in favor of the employer and holding that: (1) disclaimers were not dispositive; and (2) there was a genuine issue of material fact as to the existence of an implied contract); *see also Beggs v. City of Portales*, 2009-NMSC-023, ¶ 20, 146 N.M. 372, 210 P.3d 798 (“Even where a personnel manual purports to disclaim any intentions of forming contractual obligations enforceable against an employer, a fact finder may still look to the totality of the parties’ statements and actions, including the contents of [the] personnel manual, to determine whether contractual obligations were created.”). An implied contract can be created, even in the absence of an employment manual or other written guidance, based solely upon the practices and representations of the employers. *Kestenbaum v. Pennzoil Co.*, 1988-NMSC-092, 108 N.M. 20, 766 P.2d 280. The test to determine the existence of such a contract is based upon the totality of the circumstances. *Id.*

However, no implied contract based upon oral representations is permitted where an employee handbook says modifications to the at-will nature of employment must be in writing. *Chavez v. Manville Prod. Corp.*, 1989-NMSC-050, 108 N.M. 643, 777 P.2d 371.

All contracts with governmental entities must be in writing. NMSA 1978 § 37-1-23(A) (1976); *Carrillo v. Rostro*, 1992-NMSC-054, 114 N.M. 607, 845 P.2d 130. However, once a valid written contract is found to exist with a governmental entity, it can incorporate implied contract items. *Garcia v. Middle Rio Grande Conservancy Dist.*, 1996-NMSC-029, 121 N.M. 728, 918 P.2d 7.

Where a promise not to fire for a certain reason is made, an employee may have an implied-in-fact contract with the employer. *Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304. The existence of such an implied-in-fact contract is a factual issue. *Id.*

4. Implied Covenants of Good Faith and Fair Dealing

There is an implied covenant that an employer will deal in good faith and fairly in every case where the court determines that there is an express or implied employment contract. *Bourgeois v. Horizon Healthcare Corp.*, 1994-NMSC-038, 117 N.M. 434, 872 P.2d 852. The implied covenant of good faith and fair dealing does not apply to at-will employment. *Id.* at ¶ 15, P.2d at 856; *see also Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201, 131 P.3d 51.

B. Public Policy Exceptions

1. General

New Mexico courts have recognized an exception to the general rule of at-will termination when an employee is discharged in retaliation for engaging in an act favored by public policy. *Lihosit v. I & W, Inc.*, 1996-NMCA-033, ¶ 7, 121 N.M. 455, 457, 913 P.2d 262, 264; *see also Vigil v. Arzola*, 1983-NMCA-082, 102 N.M. 682, 699 P.2d 613, *rev'd on other grounds*, 1984-NMSC-090, 101 N.M. 687, 687 P.2d 1038, *overruled on other grounds by Chavez v. Manville Prod. Corp.*, 1989-NMSC-050, 108 N.M. 643, 777 P.2d 371. The Court in *Vigil* held:

A cause of action should exist when the discharge of an employee contravenes some clear mandate of public policy. The at-will rule is not abrogated, it only limits its application to those situations where the employee's discharge results from the employer's violation of a clear public policy...

For an employee to recover under this new cause of action, he must demonstrate that he was discharged because he performed an act that public policy has authorized or would encourage, or because he refused to do something required of him by his employer that public policy would condemn. A sufficient nexus must exist between the public policy asserted by the employee and the reasons for his or her discharge. Proof should be made by clear and convincing evidence because the claim in most instances will assert serious misconduct.

Vigil, 1983-NMCA-082 at ¶¶ 23, 30, 699 P.2d at 619-20.

In *Chavez v. Manville Prod. Corp.*, the New Mexico Supreme Court overruled *Vigil* to the extent that the standard of proof required in retaliatory discharge cases is now a preponderance of the evidence, and claimants can now recover damages for emotional distress. *Chavez*, 1989-NMSC-050, ¶ 28, 108 N.M. 643, 777 P.2d 371, 378.

Even when the court finds an implied employment contract, the clear mandate of public policy sufficient to support a claim of retaliatory discharge may fall into one of several categories: legislation that defines public policy and provides a remedy for violations of that policy; legislation that provides protection to the employee without specifying a remedy, in which case the employee would seek an implied remedy; legislation that defines public policy without specifying a right or remedy, in which case the employee would seek a judicial recognition of both; and there may be, in some instance, no expression of public policy, and a

judiciary would have to imply a right as well as a remedy. *Shovelin v. Cent. N.M. Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 25, 115 N.M. 293, 850 P.2d 996, 1006; *see also Davis v. Gardner Turfgrass, Inc.*, 2016 WL 5172820, at *13 (D.N.M. Jul. 29, 2016) (refusing to dismiss plaintiff's claim for retaliatory discharge under the NMHRA, and finding that plaintiff sufficiently alleged that employer violated New Mexico's policy of encouraging the reporting of racial harassment for the purposes of invoking the public policy exception); *Quiroz v. ConocoPhillips Company*, 310 F.Supp.3d 1271, 1318 (D.N.M. 2018) (discharge for violation of company policy did not violate public policy).

2. Exercising a Legal Right

In *Garcia-Montoya v. State Treasurer's Office*, the New Mexico Supreme Court held that in a case involving a public employee (not at-will), an employee cannot be discharged for reasons that infringe upon his or her free-speech interests. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084; *see also Leach v. N.M. Junior Coll.*, 2002-NMCA-039, 132 N.M. 106, 45 P.3d 46.

New Mexico courts use a four-part test based on *Pickering v. Bd. of Ed.*, 391 U.S. 563 (1968), to evaluate retaliatory employment action claims in relation to an employee's free-speech interests:

(1) whether the speech forming the basis of the employment action involves a matter of public concern; (2) if so, whether the interests of the employee in speaking on the matter outweigh the interests of the employer in maintaining and promoting efficiency in the performance of its responsibilities to the public; (3) if so, whether the employee is able to show that the speech was a substantial factor in the employment decision; and (4) if so, whether the employer is able to rebut the employee's evidence by showing that it would have instituted the employment action regardless of the protected speech.

Garcia-Montoya v. State Treasurer's Office, 2001-NMSC-003, ¶ 27, 130 N.M. 25, 16 P.3d 1084; *but see Carrillo v. Rostro*, 1992-NMSC-054, 114 N.M. 607, 845 P.2d 130 (discussing the difficulties of applying the "*Pickering* balance," a method of evaluating the second element of the claim).

An employer cannot discharge an employee in retaliation for the employee's filing of a workers' compensation claim. *Michaels v. Anglo Am. Auto Auctions, Inc.*, 1994-NMSC-015, ¶ 5, 117 N.M. 91, 869 P.2d 279, 280. An employee who alleges wrongful discharge in retaliation for filing a workers' compensation claim is not barred by the exclusivity provisions of the Workers' Compensation Act. *Id.* at ¶¶ 9-11; *see also* NMSA 1978 1978, § 52-1-28.2 (prohibiting an employer from discharging, threatening to discharge, or otherwise retaliating in the terms or conditions of employment against a worker who seeks workers' compensation benefits).

An employer who fires an employee because the employee has filed an EEOC or a Human Rights Claim against the employer may also be sued in tort for retaliatory discharge.

Gandy v. Wal-Mart Stores, Inc., 1994-NMSC-040, ¶¶ 11-12, 117 N.M. 441, 872 P.2d 859, 862-63; *but see Silva v. Am. Fed'n of State, County, and Mun. Employees*, 2001-NMSC-038, ¶ 1, 131 N.M. 364, 37 P.3d 81 (stating that the NM Supreme Court's holding in *Gandy* does not allow plaintiff, who is not at-will employee, to pursue action for tort of retaliatory discharge under public policy exception to at-will employment outlined in *Silva v. Albuquerque Assembly & Distrib. Freeport Warehouse Corp.*, 1987-NMSC-045, 106 N.M. 16, 738 P.2d 513).

3. Refusing to Violate the Law

In *Lihosit v. I & W, Inc.*, the plaintiff sued the defendant for retaliatory discharge, claiming he was fired because he refused to exceed the maximum number of driving hours allowed under New Mexico law. *Lihosit v. I & W, Inc.*, 1996-NMCA-033, 121 N.M. 455, 913 P.2d 262. The district court granted summary judgment against plaintiff because the court found that defendant did not have knowledge of plaintiff's alleged reasons for failing to report to work and, therefore, the termination was not in retaliation for engaging in a protected activity. The Court of Appeals affirmed the summary judgment entered by the district court since plaintiff did not claim anyone at I & W had any knowledge of his contention that further driving on the date in question would violate state law. The employee must prove that the employer was aware of, either by suspicion or actual knowledge, the employee's acts and discharged the employee, at least in part, because of the protected conduct. *Id.*; *see also Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089.

4. Exposing Illegal Activity (Whistleblowers)

An employer is prohibited from discharging an at-will employee in retaliation for reporting unsafe working conditions because such discharge would be contrary to public policy. *Gutierrez v. Sundancer Indian Jewelry Co.*, 1993-NMSC-156, ¶ 19, 117 N.M. 41, 868 P.2d 1266, 1272.

In *Garrity v. Overland Sheepskin Co. of Taos*, the New Mexico Supreme Court recognized a public policy exception for whistleblowers when an employee is terminated for reporting criminal activity by the employer. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d 1382. However, the employee must demonstrate that his or her actions furthered the public interest rather than a primarily private interest. *Id.* at ¶ 15. An employee is not required to establish he/she had a good faith belief that the employer was committing a crime, only that the employer's actions were improper or in violation of law. *Dart v. Westall*, 2018-NMCA-061, ¶ 17, 428 P.3d 292. In *Burke v. New Mexico*, allegations that the employee notified defendants about security concerns, code violations, and gender harassment at the department, and soon afterwards defendants retaliated against her by restructuring her job assignments and damaging her credibility and reputation were sufficient to state a plausible WPA claim. 696 Fed.Appx. 325 (10th Cir. 2017)

New Mexico state law also provides protection to whistleblowers via the Whistleblower Protection Act. NMSA 1978 §§ 10-16C-1 to -6 (2010). The New Mexico Whistleblower Protection Act has been interpreted as similar to the Federal Whistleblower Protection Act; accordingly, federal authority is persuasive on the issue in New Mexico state courts. *See Wills v.*

Bd. of Regents of Univ. of N.M., 2015-NMCA-105, 357 P.3d 453 (turning to federal courts interpreting the federal whistleblower protection act for guidance on application of the NMWPA).

Under the Whistleblower Protection Act, a public employer is prohibited from taking any retaliatory action against a public employee because the public employee: (1) communicates to the public employer or a third party information about an action or a failure to act that the public employee believes in good faith constitutes an unlawful or improper act; (2) provides information to, or testifies before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act; or (3) objects to or refuses to participate in an activity, policy or practice that constitutes an unlawful or improper act.” *Id.* at § 10-16C-3 (2010).

The Act defines “unlawful or improper act” as a practice, procedure, action, or failure to act on the part of a public employer that: (1) violates a federal law, a federal regulation, a state law, a state administrative rule, or a law of any political subdivision of the state; (2) constitutes malfeasance in police office; or (3) constitutes gross mismanagement, a waste of funds, an abuse of authority, or a substantial and specific danger to the public. NMSA § 10-16C-2(E).

If a public employer violates the Whistleblower Protection Act a public employee may bring a private cause of action against the public employer. *Id.* at § 10-16C-4 (2010). The WPA does not create a right of action against a current or former state officer in his or her personal capacity. *Flores v. Herrera*, 2016-NMSC-033, 384 P.3d 1070. This cause of action allows the public employee to receive actual damages, reinstatement with the same seniority status that the employee would have had but for the violation, and two times the amount of back pay with interest on the back pay and compensation for any special damage sustained as a result of the violation. *Id.* Also an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee. *Id.* The employer, however, may allege the affirmative defenses that “the action taken by a public employer against a public employee was due to the employee's misconduct, the employee's poor job performance, a reduction in work force or other legitimate business purpose unrelated to conduct prohibited pursuant to the Whistleblower Protection Act and that retaliatory action was not a motivating factor.” *Id.*

The Whistleblower Act does not preclude civil actions or criminal proceedings for libel, slander, or other claims against a person who brings a false claim under this act. *Id.* The statute of limitations for a claim under the Whistleblower Protection Act is two years from the date on which the retaliatory action occurred. *Id.* at § 10-16C-6 (2010).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge of an employee occurs when the employer makes working conditions so difficult a reasonable employee would feel compelled to resign. *Gormley v. Coca-Cola Enter.*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280. “Essentially, a plaintiff must show that she had no other choice but to quit.” *Id.* at ¶ 10. “The bar is quite high for proving constructive discharge.” *Id.* The specific facts of the employment condition, and the severity of its impact upon the employee, are pivotal in determining whether the claim rises to the level of constructive discharge. *See generally, id.* Constructive discharge is a prerequisite to a wrongful

termination claim when an employee resigns. In order to prevail on a wrongful termination claim involving an implied employment contract, a plaintiff must not only prove constructive discharge, but must also independently show the existence and breach of an implied contract to discharge for just cause only. *Gormley*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252.

Constructive discharge is not an independent cause of action, such as a tort or a breach of contract. Instead, constructive discharge is a doctrine that permits an employee to recast a resignation as a de facto firing, depending on the circumstances surrounding the employment relationship and the employee's departure. *Gormley*, 2005-NMSC-003 at ¶ 9.

To survive a motion for summary judgment on constructive discharge, an employee must: (1) allege facts sufficient to find that an employer has made working conditions so intolerable, when viewed objectively, that a reasonable person would be compelled to resign; and (2) show that there was no other choice but to quit. *Gormley*, 2004-NMCA-021, 135 N.M. 128, 85 P.3d 252. Neither the employee's subjective view of the working conditions nor the employer's subjective intent of discharge is relevant when considering a motion for summary judgment on constructive discharge. *Id.*

In *Gormley*, an employer assigned an employee to lighter duties and promised the employee he would continue with 55 hours of work per week so the employee would make the same amount he was making in his previous position. *Gormley*, 2005-NMSC-003, 137 N.M. 192, 109 P.3d 280. Approximately four years later, a new supervisor reduced the employee's hours by five. The employee resigned and later filed suit. The employee alleged he was constructively discharged. The Supreme Court of New Mexico held that the reduction in the employee's overtime hours, a reduction in pay, the loss of lighter duty work, and the alleged criticism by the employee's manager did not give rise to constructive discharge. *Id.*

In *Charles v. Regents of New Mexico State Univ.*, the University appealed a jury verdict in favor of Plaintiff, a teaching assistant, on her claims for sexual harassment and constructive discharge. *Charles v. Regents of New Mexico State Univ.*, 2011-NMCA-057, 150 N.M. 17, 256 P.3d 29. The New Mexico Court of Appeals held that: (1) all of the conduct that occurred during assistant's employment at state university could have been considered by jury for her retaliation claim, pursuant to the continuing violation doctrine; (2) the evidence was sufficient to support the jury's conclusion that the state university made the teaching assistant's working conditions so intolerable that a reasonable person in her position would have been compelled to resign; and (3) the fact that the teaching assistant may have been looking for another job during the last months of her employment with the state university, and had tolerated the conduct she complained of for a significant period of time, was not fatal to her constructive discharge claim. *Id.*

In *Charles*, Plaintiff presented testimony that, over the course of her four-year employment at the university, Plaintiff's supervisor: verbally abused Plaintiff; intimidated Plaintiff by yelling at Plaintiff with his face within inches of Plaintiff's face; made sexually suggestive comments; made unfair criticisms of Plaintiff's work performance; and regularly slammed drawers and cabinets. *Id.* at ¶ 18. Some of this conduct occurred in front of students.

The appellate court thus concluded that “the evidence set forth by Plaintiff [was] sufficient to sustain the jury verdict” in favor of Plaintiff on the constructive discharge claim. *Id.* at ¶ 20.

IV. WRITTEN AGREEMENTS

A. Standard “For Cause” Termination

New Mexico courts have been wary of finding an implied contract to terminate only for cause when the only indication of such a contract is an employer's practice of only terminating for cause. As the Supreme Court of New Mexico explained, “this Court will not consider evidence that a company does not usually fire employees without a good reason as by itself establishing that the company does not maintain an at will policy.” *Hartnett v. Papa John's Pizza USA, Inc.*, 912 F.Supp.2d 1066 (D.N.M. 2012) (quoting *Hartbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 5, 115 N.M. 665, 674, 857 P.2d 776, 785).

B. Status of Arbitration Clauses

A valid agreement to arbitrate is a prerequisite to compelling arbitration, and the trial court, not the arbitrator, decides whether or not a valid agreement to arbitrate exists. *See Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, 140 N.M. 266, 142 P.3d 34; *see also Flemma v. Halliburton Energy Servs. Inc.*, 2013-NMSC-022, 303 P.3d 814 (holding a valid arbitration agreement was not present due to lack of consideration because the employer retained the right to unilaterally amend the agreement's terms after an employee's claim had accrued); *but see Boyd v. Springleaf Finane Mgmt. Corp.*, 2016 WL 5946912, *7 (D.N.M. Sept. 9, 2016) (employer did not have unfettered right to unilaterally amend or terminate the employment agreement; accordingly, mutual agreement to arbitrate and dispute constituted adequate consideration); *SRI of New Mexico, LLC v. Hartford Firs Ins. Co.*, 2015 WL 12803774, *4 (D.N.M. June 26, 2015) (where arbitration clause was part of original agreement that was supported by consideration, agreement to arbitrate did not fail for lack of separate consideration, despite ability of employer to unilaterally invoke arbitration).

Terms of an arbitration agreement govern the scope of the arbitration proceedings and are interpreted according to contract law principles and the plain meaning of the language used. *See Horanburg v. Felter*, 2004-NMCA-121, 136 N.M. 435, 99 P.3d 685. “Generally, a party who executes a written contract with another is presumed to know the terms of the agreement, and to have agreed to each of its provisions in the absence of fraud, misrepresentation or other wrongful act of the contracting party.” *Boyd v. Springleaf*, 2016 WL 5946912 at *7 (quoting *Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, 98 N.M. 541, 650 P.2d 825). New Mexico law reflects a public policy in favor of arbitration agreements. *Patterson v. Nine Energy Service, LLC*, 355 F.Supp.3d 1065 (D.N.M. 2018). While the presumption in favor of arbitration is properly applied in interpreting the scope of an arbitration agreement, this presumption disappears when the parties dispute the existence of a valid arbitration agreement. *Id.* Like other contracts, arbitration agreements may be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability. *Id.*

Third parties who are not signatories to an arbitration agreement generally are not bound by the agreement. *Horanburg*, 2004-NMCA-121, 136 N.M. 435, 99 P.3d 685. These third parties also generally lack standing to compel arbitration. *Id.*

In *Horanburg*, the court held that even if nonsignatories to an arbitration agreement could compel arbitration by virtue of equitable estoppel, equitable estoppel was not appropriate in an employee's action against a coworker who did not sign the arbitration agreement between the employee and employer, for assault, battery, and violation of the state Human Rights Act. *Horanburg*, 2004-NMCA-121 at ¶ 18. The employee's claims against the coworker were not alleged to be derived from the arbitration agreement, the coworker's alleged conduct did not involve concerted action with the employer, and the agreement between the employee and employer to arbitrate employment-related matters would not be rendered meaningless if the coworker were not involved in the arbitration. *Id.*

C. General

In *Giangreco v. Murlless*, the plaintiff alleged he had a binding contract when his supervisors notified him of their intention to recommend reemployment, which he then accepted in writing. The court disagreed, stating that an official offer to reemploy, just like notice to terminate, can only come from the contracting party, the school board in this case. *Giangreco v. Murlless*, 1997-NMCA-061, 123 N.M. 498, 943 P.2d 532; *see* NMSA 1978 § 22-10-12; *see also supra*, § II(A) (Implied Contracts).

V. ORAL AGREEMENTS

A. Promissory Estoppel

In New Mexico, the elements of "promissory estoppel" are: (1) An actual promise must have been made which in fact induced the promisee's action or forbearance; (2) The promisee's reliance on the promise must have been reasonable; (3) The promisee's action or forbearance must have amounted to a substantial change in position; (4) The promisee's action or forbearance must have been actually foreseen or reasonably foreseeable to the promisor when making the promise; and (5) Enforcement of the promise is required to prevent injustice. *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, 121 N.M. 622, 916 P.2d 822.

In *Chavez v. Manville Prod. Corp.*, the New Mexico Supreme Court found that it was unreasonable for an employee to change his position in reliance on oral representations contrary to an express term of an employment contract which provided that their agreement could only be modified in writing. *Chavez v. Manville Prod. Corp.*, 1989-NMSC-050, 108 N.M. 643, 777 P.2d 371.

B. Fraud

There is no direct New Mexico case law on the issue of fraud. *But see Jones v. Auge*, 2015-NMCA-016, 344 P.3d 989 (oral representations that all shareholder agreements contained the same terms constituted fraud for which representing shareholder could be liable to other

shareholders; employment agreement procured through fraud in the inducement was rendered voidable, not void).

C. Statute of Frauds

As a general rule, determination of the applicability of the defense of the statute of frauds is a question of law for the court, not the jury. *Kestenbaum v. Pennzoil Co.*, 1988-NMSC-092, ¶ 10, 108 N.M. 20, 24, 766 P.2d 280, 284. However, a factual question concerning the particulars of a contract may prevent a ruling on the statute's applicability as a matter of law. *Id.* The statute of frauds does not apply to a contract for employment until retirement. *Id.* According to the court in *Kestenbaum*, there is no indication that "a permanent employment contract should be construed as a contract for an expressly stated, fixed term of years by virtue of an employee's expectation that he or she will retire at some point." *Id.* at 108 N.M. 23, 766 P.2d 283. "No court or commentator has ever suggested that the possibility of the employee's death within one year would 'defeat' rather than 'complete' such a contract." *Id.* To the contrary, courts and commentators have consistently accepted the view that indefinite permanent employment contracts...fall outside the statute because they are capable of full performance within one year. *Id.*

D. General

In *Garrity v. Overland Sheepskin Co. of Taos*, the plaintiffs argued that the defendant fired them in violation of an oral employment contract. *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, 121 N.M. 710, 917 P.2d. 1382. The court found plaintiffs' argument was without merit because neither plaintiff testified that defendant or any of its agents "ever offered plaintiffs an employment contract, nor did plaintiffs allege that defendant even made any promises to them that they could be fired only for just cause." *Id.* at ¶ 10. The plaintiffs merely "had a general feeling that if they did good work, they would always have a job" with defendant. The court stated that "a vague impression or general feeling of continued employment is not sufficient to create an employment contract." *Id.*

A county is not bound by an oral promise of employment made by county commissioners outside of a board meeting when the language of a statute clearly states that the powers of the municipal council must be exercised at a legally called meeting. *Trujillo v. Gonzales*, 1987-NMSC-119, 106 N.M. 620, 747 P.2d 915.

VI. DEFAMATION

A. General Rule

Words will not be considered defamatory unless their plain and obvious import is of a defamatory character. *Lopez v. Kline*, 1998-NMCA-016, 124 N.M. 539, 953 P.2d 304. The language will receive an innocent interpretation where the words are fairly susceptible to it. Where plaintiff fails to show that her failure in being hired was proximately caused by the statements made by her employer, there is no defamation. *Id.*

1. Libel

In 1991, The Civil Uniform Jury Instruction Committee (“Committee”) recommended, and the New Mexico Supreme Court adopted, uniform jury instructions that entirely abolish the distinction between slander and libel. The line between libel and slander has blurred to the point that the New Mexico Supreme Court declared that “there are good reasons for abolishing the distinction between libel and slander.” *Reed v. Melnick*, 1970-NMSC-094, 81 N.M. 608, 612, 471 P.2d 178, 182, *overruled on other grounds by Marchiondo v. Brown*, 1982-NMSC-076, 98 N.M. 394, 649 P.2d 462. The Committee recommended abolishing all distinctions between libel and slander and the “per se” and “per quod” variations of each. It reasoned that defamation spoken on national media has as much capacity for harm as a written statement published in a periodical of limited circulation.

2. Slander

See supra, §§ VI(A) & VI(A)(1).

B. References

When requested to provide a reference on a former or current employee, an employer acting in good faith is immune from liability for comments about the former employee’s job performance. The immunity does not apply when the reference information supplied was knowingly false or deliberately misleading, was rendered with malicious purpose or violated any civil rights of the former employee. NMSA 1978 § 50-12-1 (1995).

At common law, a former employer is conditionally privileged when the employer provides information about a former employee. *DiMarco v. Presbyterian Healthcare Servs., Inc.*, 2007-NMCA-053, 141 N.M. 735, 160 P.3d 916. Currently, a good faith will suffice to provide employers with a conditional privilege. *Id.* NMSA 1978 § 50-12-1 also provides employers responding to an inquiry about a former employee with a conditional privilege. However, a conditional privilege is subject to forfeiture if the privilege is abused. *Baker v. Bhajan*, 1994-NMSC-028, ¶¶ 19-20, 117 N.M. 278, 283, 871 P.2d 374, 379.

In *Davis v. The Bd. of County Comm’rs of Doña Ana County*, the Court of Appeals addressed the question of whether an employer owes prospective employees and foreseeable third persons a duty of reasonable care not to misrepresent material facts in the course of making an employment recommendation about a present or former employee when a substantial risk of physical harm to third persons by the employee is foreseeable. *Davis v. The Bd. of County Comm’rs of Doña Ana County*, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172. A former county employee obtained recommendations from the county supervisor that provided unqualified praise of the former employee as an excellent employee. The recommendation omitted disciplinary action both taken and recommended by the same supervisor related to a concerned abuse of power and sexual abuse of women directly under the former employee’s control at a county detention center, based on documented complaints. Those complaints had a direct correlation to the potential risks female patients would incur if they were placed under the former employee’s control at his new place of employment. Therefore, the court was not

persuaded that reasonable people with the information possessed by the County supervisor could not have foreseen potential victims like the plaintiff. Although the employer's agents could have remained silent in response to a request for information about the former employee, when the employer elects to recommend an employee in a manner distorted by misrepresentations and half-truths, foreseeability is a question for the jury to decide. *Id.*

The *Davis* court also held that a suit for negligent misrepresentation by law enforcement officers fell within the waiver of immunity contained in the New Mexico Tort Claims Act. *Id.* Battery by a third person as a result of a law enforcement officer's negligence falls squarely within the narrow waiver of immunity since negligent misrepresentation is a tort determined by the general principles of the law of negligence. *Davis*, 1999-NMCA-110.

Summary Judgment is inappropriate where a plaintiff has come forward with evidence of a defamatory statement by a former employer. *Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, 125 N.M. 500, 964 P.2d 61 (summary judgment on plaintiff's defamation claim reversed where plaintiff introduced evidence that defendant had written a letter to her current employer in which plaintiff was labeled a "liar," a "gossip," and a "problem employee"). In *Silverman*, an issue of fact existed as to whether the person to whom defendant sent the letter believed the statements made about plaintiff. *Id.* The defendant argued that plaintiff could not maintain her claim for defamation because she failed to show that the letter was published or that any actual damages resulted from such publication. See UJI 13-1002, NMRA. If a defamatory statement is made to a person who knows that the statement is untrue, then a publication has not occurred. UJI 13-1003, NMRA; *Martinez v. Sears, Roebuck & Co.*, 1970-NMCA-029, 81 N.M. 371, 375, 467 P.2d 37, 41.

C. Privileges

In *Bookout v. Griffin*, republication of a letter from faculty indicating that the plaintiff had used foul language toward them was held to be qualifiedly privileged. *Bookout v. Griffin*, 1982-NMSC-007, 97 N.M. 336, 639 P.2d 1190. The New Mexico Supreme Court held that "[o]ne form of qualified privilege exists where there is a good faith publication in the discharge of a public or private duty. The privilege is abused if a person said to be privileged lacks the belief, or reasonable grounds to believe, the truth of the alleged defamation." *Id.* at ¶ 16, 639 P.2d at 1193.

A qualified privilege precludes defamation lawsuits, based on intracorporate communications, if the defamatory statements are made in good faith. *Hagebak v. Stone*, 2003-NMCA-007, 133 N.M. 75, 61 P.3d 201.

An employee's written agreement not to sue persons who provide information to prospective employers creates an absolute privilege for those seeking the information and those persons providing the information. *Baker v. Bhajan*, 1994-NMSC-028, ¶¶ 11-16, 117 N.M. 278, 871 P.2d 374, 377-78; *Davis v. Bd. of County Comm'rs of Doña Ana County*, 1999-NMCA-110, 127 N.M. 785, 987 P.2d 1172.

D. Other Defenses

1. Truth

Truth is a complete defense to a defamation claim. *Jaramillo v. Gonzales*, 2002-NMCA-072, 132 N.M. 459, 50 P.3d 554.

2. No publication

If a communication is not published, there can be no defamation. *See Bookout v. Griffin*, 1982-NMSC-007, 97 N.M. 336, 639 P.2d 1190; UJI 13-1003 NMRA. Publication is required because a statement that is neither seen nor heard by a third party cannot cause harm to a person's reputation. *Hagebak v. Stone*, 2003-NMCA-007, 133 N.M. 75, 61 P.3d 201.

3. Self-Publication

New Mexico case law has not addressed this issue. However, federal courts applying New Mexico law pointed out that there are no clear indications that New Mexico would recognize such a claim, and noted that only a minority of jurisdictions recognize defamation by self-publication as a cause of action. *Yeitrakis v. Schering-Plough Corp.*, 51 F.3d 287 (10th Cir. 1995).

4. Invited Libel

If a person invites or consents to the publication of defamatory words, that person cannot later complain of the resulting damage to his reputation. *Gengler v. Phelps*, 1978-NMSC-123, 92 N.M. 465, 589 P.2d 1056. Also, when an employer is asked to provide a reference about a former employee, the employer is immune from liability for comments about the former employee's job performance as long as the employer acts in good faith. NMSA 1978 § 50-12-1 (1995).

5. Opinion

Opinion statements are not actionable for defamation. *Fikes v. Furst*, 2003-NMCA-006, 133 N.M. 146, 61 P.3d 855, *overruled in part on other grounds by Fikes v. Furst*, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545; *see also* UJI 13-1004 NMRA. Opinion statements are not actionable because we recognize that defamation is only actionable if it is false, and opinions cannot be false. *Kutz v. Indep. Publ'g Co., Inc.*, 1981-NMSC-147, 97 N.M. 243, 638 P.2d 1088. Therefore, opinions can never be actionable even if they are defamatory. *Id.*

In a defamation action, the common law defense of "fair comment" is predicated upon the principle that interests of society are furthered through free discussion of public affairs and matters of public interest. The rule normally requires that publication relate to a matter of public interest, cannot impute dishonorable motives to its subject, and must reflect expression of opinion on truly stated facts. *Marchiondo v. N.M. State Tribune Co.*, 1981-NMSC-156, 98 N.M. 282, 648 P.2d 321, *overruled on other grounds by Marchiondo v. Brown*, 1982-NMSC-076, 98 N.M. 394, 649 P.2d 462.

There is absolute immunity from liability for defamation, which takes place during the course of labor grievance arbitration proceedings. *Neece v. Kantu*, 1973-NMSC-020, 84 N.M. 700, 507 P.2d 447.

In a defamation case, the statute of limitations runs from the point of publication of the defamatory statement. *See Fikes v. Furst*, 2003-NMCA-006, 133 N.M. 146, 61 P.3d 855, *overruled in part on other grounds by Fikes v. Furst*, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545; NMSA 1978 § 37-1-8 (1976).

6. Ignorance

Ignorance is, in fact, a valid defense to a defamation claim. *Young v. Wilham*, 2017-NMCA-087, ¶ 38, 406 P.3d 988, 1004.

E. Job References and Blacklisting Statutes

The current blacklisting statute of New Mexico provides: “[b]lacklisting consists of an employer or his agent preventing or attempting to prevent a former employee from obtaining other employment.” NMSA 1953 § 30-13-3 (1963). It is a misdemeanor under the statute. *Id.*

In *Andrews v. Sterns-Roger, Inc.*, the trial court dismissed a blacklisting count against an employer on summary judgment. *Andrews v. Sterns-Roger, Inc.*, 1979-NMSC-089, 93 N.M. 527, 602 P.2d 624. Former employees alleged that the employer prepared and circulated a blacklist of former employees. The employer denied the allegations and asserted that any comments made to third persons concerning the former employees were true, privileged, justified, and not made to harm the former employees. The New Mexico Court of Appeals reversed, finding that there was a genuine issue of material fact as to whether the employer had committed a tort against the former employees by blacklisting them. *Id.*

However, when an employer is asked to provide a reference for a former employee an employer acting in good faith is immune from liability for comments about the former employee's job performance. NMSA 1978 § 50-12-1; *see supra*, § VI(B).

F. Non-Disparagement Clauses

There is no New Mexico case law on this issue.

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

The elements of intentional infliction of emotional distress in New Mexico were clearly articulated by the Court of Appeals in *Mantz v. Follingstad*, which held:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Mantz v. Follingstad, 1972-NMCA-164, ¶ 43, 84 N.M. 473, 505 P.2d 68, 75 (quoting Rest. 2d of Torts § 46 cmt. (h) (1965)); see also *Nieto v. Kapoor*, 61 F.Supp.2d 1177 (D.N.M. 1999); *Dominguez v. Stone*, 1981-NMCA-146, 97 N.M. 211, 638 P.2d 423.

New Mexico courts have been very clear that, in order to qualify as intentional infliction of emotional distress, a defendant's conduct must have been extreme, outrageous, beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized community. See *Malandris v. Merrill Lynch*, 703 F.2d 1152, 1159 (10th Cir. 1981). A plaintiff must show that defendant either desired to inflict emotional distress and knew it was substantially certain to result from the alleged conduct, or acted recklessly in deliberate disregard of a high degree of probability that emotional distress would follow. *Id.*

In *Stock v. Grantham*, the New Mexico Court of Appeals recognized that only in extreme circumstances can the act of firing an employee support a claim of intentional infliction of emotional distress. *Stock v. Grantham*, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125. Being fired is a common occurrence that rarely rises to the level of being "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." *Id.*

In *Coates v. Wal-Mart Stores, Inc.*, the New Mexico Supreme Court upheld an award of punitive damages against an employer for intentional infliction of emotional distress where the conduct of an employee was witnessed and condoned "by high level supervisory personnel." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, 127 N.M. 47, 976 P.2d 999

In *Garcia-Montoya v. State Treasurer's Office*, the New Mexico Supreme Court held that the State Treasurer and Deputy State Treasurer were immune from a former state employee's claims of intentional infliction of emotional distress and defamation, under the Tort Claims Act, because the former employee failed to specify any actions by the State Treasurer and Deputy State Treasurer which they were not requested, required, or authorized to perform. *Garcia-Montoya v. State Treasurer's Office*, 2001-NMSC-003, 130 N.M. 25, 16 P.3d 1084; see NMSA 1978 § 41-4-4(A) (2001).

In *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, the New Mexico Supreme Court held that evidence of emotional distress experienced by a terminated employee was legally insufficient to support a claim of intentional infliction of emotional distress, where employee's initial reaction was to feel offended by being called "Sir" in their termination letter, the employee resented being fired after giving his employer so many years, the employee felt lousy and depressed and was prescribed an antidepressant, and the employee was described by his spouse as being depressed, sleeping long hours, and as having erratic eating habits during the period after he was fired. *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, 131 N.M. 607, 41 P.3d 333.

In *Vigil v. Pub. Serv. Co. of N.M.*, the New Mexico Court of Appeals held that a former employee could not state a claim against the employer for intentional infliction of emotional distress based on conduct associated with retaliatory discharge claim, where the employee, who was covered by a collective bargaining agreement, could not state a claim for retaliatory discharge. *Vigil v. Pub. Serv. Co. of N.M.*, 2004-NMCA-085, 136 N.M. 70, 94 P.3d 813.

In *Weise v. Washington Tru Solutions, LLC*, the Court held that a former Waste Isolation Pilot Plant employee, also an active member of the PACE union, could not make a claim for intentional infliction of emotional distress because it was preempted by the National Labor Relations Act (“NLRA”). *Weise v. Washington Tru Solutions, LLC*, 2008-NMCA-121, 144 N.M. 867, 192 P.3d 1244. In order to avoid preemption by the NLRA, an intentional infliction of emotional distress claim brought pursuant to state law must be based on outrageous conduct that is either unrelated to governed labor practices, or accomplished in such an abusive manner that the manner itself becomes the basis for the claim. *Id.* at ¶¶ 7-12.

B. Negligent Infliction of Emotional Distress

At this time, the cause of action for negligent infliction of emotional distress is limited to “bystander” recovery in New Mexico. The threshold requirements to establish the genuineness of a claim for negligent infliction of emotional distress are allegation and proof that plaintiff and victim enjoyed a marital or intimate family relationship, plaintiff suffered severe shock from contemporaneous sensory perception of the accident involving victim, and the accident caused physical injury or death to the victim; it is not a requirement that there is some physical manifestation of, or physical injury to the plaintiff resulting from, the emotional injury. *Folz v. State*, 1990-NMSC-075 110 N.M. 457, 797 P.2d 246. This is in accord with other federal court decisions in this district that have found that where the allegations supporting a claim of outrageous conduct are the same as those forming the basis of a Title VII claim, they fail to state an independently cognizable claim for which relief can be granted and are properly dismissed. *See, e.g., Visor v. Sprint United Mgmt. Co.*, 965 F.Supp. 31, 33 (D. Colo. 1997).

VIII. PRIVACY RIGHTS

A. Generally

New Mexico has not addressed the issue of privacy rights in the employment context. However, the law on privacy rights has been outlined in other case law. *See Andrews v. Stallings*, 1995-NMCA-015, 119 N.M. 478, 892 P.2d 611.

New Mexico recognizes the tort of invasion of privacy. *McNutt v. N.M. State Tribune Co.*, 1975-NMCA-085, ¶ 8, 88 N.M. 162, 165, 538 P.2d 804, 807. The tort is generally broken down into four categories: (1) false light; (2) intrusion; (3) publication of private facts; and (4) appropriation. *See Moore v. Sun Publ’g Corp.*, 1994-NMCA-104, ¶ 28, 118 N.M. 375, 383, 881 P.2d 735, 743.

“False light” invasion of privacy is “a close cousin of defamation.” *Moore*, 1994-NMCA-104. In the absence of proof of a specific false statement of fact, “[u]nfairness, improper

tone, or unfounded implication or innuendo,” even though they might sound as though they fit the phrase, will no sooner support a recovery for false light invasion of privacy than for defamation. *Id.* at ¶¶ 28-31, 881 P.2d at 743-44. Thus, public figures involved in matters of public concern must hurdle the same constitutionally based limitations on false light recovery as apply to defamation claims. *Id.*

B. New Hire Processing

Gonzalez v. Performance Painting, Inc. discussed the purpose of New Mexico’s New Hire statute and database:

Sections 50-13-1 to -4 (1997), NMSA 1978, established the New Mexico New Hires database which requires employers to submit certain information about each worker they hire. According to the statute, “[t]he state directory of new hires shall use the information received to locate individuals for purposes of establishing paternity and establishing, modifying and enforcing child support obligations” [NMSA 1978 § 50-13-3(B)]. The database’s website also espouses a similar purpose.

Gonzalez v. Performance Painting, Inc., 2013-NMSC-021, ¶ 36, 303 P.3d 802. Therein, the court explicitly stated that the New Mexico New Hires database is not designed to perform employment eligibility verification, and the database should not be relied upon as such; it is focused on newly hired workers who owe child support or have paternity issues. *Id.*

1. Eligibility Verification & Reporting Procedures

New Mexico applies federal law regarding employers’ duties for verifying eligibility and reporting. Under federal law, employers are required to “verify the identity and eligibility of all new hires by examining specified documents before they begin work.” *State v. Sandoval*, 2007-NMCA-103, ¶ 14, 142 N.M. 412, 166 P.3d 473 (citations omitted). The employer must physically examine the documentation presented, verify its genuineness under penalty of perjury, and complete two of the Employment Eligibility Verification Forms, known as Form I-9s, within three business days of the date of hire. *Id.*

2. Background Checks

Section 22-10A-5(C), NMSA 1978, requires local school boards and regional education cooperatives to develop policies and procedures to require background checks on an applicant who has been offered employment, a contractor, or a contractor’s employee, with unsupervised access to students at a public school. NMSA 1978 § 22-10A-5(C) (2007).

Section 32A-15-3(A), NMSA 1978, requires nationwide criminal history record checks on all operators, staff and employees and prospective operators, staff and employees of child care facilities, including every facility or program that has primary custody of children for twenty hours or more per week, and juvenile detention, correction or treatment facilities. NMSA 1978 § 32A-15-3(A) (2005). Subsection C states that criminal history records obtained by the

department are confidential, and the department is authorized to use these records to conduct background checks. *Id.* at § 32A-15-3(C). Subsection D clarifies that criminal history records obtained pursuant to the provisions of this section shall not be used for any purpose other than conducting background checks. *Id.* at § 32A-15-3(D).

New Mexico law also requires criminal history background checks for all applicants for certification in public accountancy, NMSA 1978 § 61-28B-8.1 (2007), and for licensure as a real estate broker or salesman, NMSA 1978 § 61-29-4.4 (2011).

New Mexico law allows background checks in order for individuals to obtain professional and occupational licenses in the fields of pharmacy, NMSA 1978 § 61-11-6.1(A) (2007), and psychology, NMSA 1978 § 61-9-11.2 (2009).

In most cases, where a background check is required prior to employment, the prospective employee must pay the cost of obtaining it. *Id.* at § 61-28B-8.1(A)(2); § 61-29-4.4(A)(2).

New Mexico case law has yet to address these statutes. This is not an exhaustive list of all employments contexts where background checks are required or allowed.

In *Spencer v. Health Force, Inc.*, the Supreme Court of New Mexico held that employer owed duty of care, under former caregivers criminal history screening statute and under common law theory of negligent hiring, to conduct criminal history background check before hiring caregiver. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, 137 N.M. 64, 107 P.3d 504.

C. Other Specific Issues

1. Workplace Searches

New Mexico case law has not addressed this issue.

2. Electronic Monitoring

New Mexico case law has not addressed this issue.

3. Social Media

New Mexico case law has not addressed this issue. However, NMSA 1978 § 21-1-46 (2013) prohibits prospective employers from requesting or requiring a prospective employee to provide a password or access to the prospective employee's social networking account.

4. Taping of Employees

New Mexico case law has not addressed this issue.

5. Release of Personal Information on Employees

See supra, § VI(B) for discussion on References.

6. Medical Information

New Mexico agencies regard records and documentation pertaining to physical or mental examinations and medical treatment of persons as confidential. NM Admin. Code 1.7.1.12 (2005). New Mexico also recognizes the physician-patient and psychotherapist-patient privileges. *See* Rule 11-504 NMRA.

IX. WORKPLACE SAFETY

A. Negligent Hiring

The basic inquiry in all negligent hiring cases is whether the employer knew or should have known of circumstances in the employee's background which create an unreasonable risk of injury to the persons with whom the employee could be reasonably expected to interact. *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 78, 150 N.M. 283, 258 P.3d 1075.

In *Ovecka v. Burlington N. Santa Fe Ry. Co.*, the Court of Appeals held that an employer's duty to third parties for negligent hiring or retention stems from two factors: foreseeability as to a particular plaintiff and a particular harm, and then, if the particular injury is foreseeable, a consideration of public policy to determine if imposing a duty is supported by law. *Ovecka v. Burlington N. Santa Fe Ry. Co.*, 2008-NMCA-140, ¶ 26, 145 N.M. 113, 194 P.3d 728 (affirming summary judgment in favor of employer when parents of motorist who was killed in an automobile collision with intoxicated driver brought action against driver's employer).

For an employer to be liable for negligent hiring and retention, there must be a connection between the employer's business and the injured plaintiff. As a matter of common law, liability for negligent hiring flows from a direct duty running from the employer to those members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury as a result of the hiring. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, 137 N.M. 64, 107 P.3d 504. In *Spencer*, the court held that an employer of an in-home caregiver for a disabled patient owed a duty of care, under the former caregivers criminal history screening statute and under the common law theory of negligent hiring, to conduct a criminal history background check before hiring a caregiver who, after his hiring, allegedly gave a fatal injection of heroin to a patient. *Id.*

In a recent line of cases, the New Mexico Supreme Court has held that foreseeability is not a factor to be considered by a trial court when determining the existence of a duty or deciding whether to eliminate an existing duty. *Rodriguez v. Del. Sol Shopping Center Associates, L.P.*, 2014-NMSC-014, 326 P.3d 465. In *Rodriguez*, a shopping center was sued by patrons and employees of a medical clinic located in the shopping center. *Id.* at ¶ 2. Plaintiffs sued for personal injuries sustained after a runaway vehicle crashed into the medical clinic building. *Id.* The New Mexico Supreme Court ruled foreseeability could not be used by the trial court as a factor in determining the existence of duty of a shopping center owner to protect store patrons

from runaway vehicles. *Id.* at ¶¶ 4-9. Instead, trial courts must “articulate specific policy reasons, unrelated to foreseeability considerations, when deciding whether a defendant does or does not have a duty or that an existing duty should be limited.” *Id.* at ¶ 25. The Supreme Court, however, stated that juries still continue to consider foreseeability when deciding whether there was a breach of duty, which depends on whether the defendant acted reasonably under the circumstances of a case. *Id.* at ¶ 4. “Foreseeability determinations are reserved for a jury because such determinations require the jury’s common sense, common experience, and its consideration of community behavioral norms.” *Id.* at ¶ 22.

B. Negligent Supervision/Retention

New Mexico law recognizes that the doctrine of corporate negligence may impose liability on a hospital for the negligent granting of staff privileges or the negligent supervision of treatment. *See Diaz v. Feil*, 1994-NMCA-108, 118 N.M. 385, 881 P.2d 745. In order to make a prima facie showing that a hospital negligently granted hospital staff privileges to a physician or negligently retained a staff member, a plaintiff must establish that the hospital negligently failed to screen the competency of the individual, or that it negligently retained a staff member after it knew or should have known of matters involving the general competency of such individual. *Id.* at ¶ 14, 118 N.M. at 390, 881 P.2d at 750.

An individual or entity may be held liable in tort for negligent hiring, negligent supervision, or negligent retention of an employee even though it is not responsible for the wrongful acts of the employee under the doctrine of respondeat superior. *Los Ranchitos v. Tierra Grande, Inc.*, 1993-NMCA-107, 116 N.M. 222, 228, 861 P.2d 263, 269.

An employer who is liable for negligently hiring an intentional tortfeasor is vicariously liable for the fault attributed to the tortfeasor employee. *Medina v. Graham’s Cowboys, Inc.*, 1992-NMCA-016, ¶ 18, 113 N.M. 471, 475, 827 P.2d 859, 863.

The New Mexico Tort Claims Act does not bar a claim against state police officers whose alleged negligent supervision and training of their subordinates proximately caused the commission by subordinates of torts of assault, battery, false arrest, and malicious prosecution. *Ortiz v. N.M. State Police*, 1991-NMCA-031, 112 N.M. 249, 814 P.2d 117.

C. Interplay with Worker’s Compensation Bar

In *Weidler v. Big J Enterprises, Inc.*, the Environment Department filed a petition claiming that an employer unlawfully discharged an employee for raising workplace safety concerns. *Weidler v. Big J Enterprises, Inc.*, 1998-NMCA-021, 124 N.M. 591, 953 P.2d 1089. The employer identified the employee under a “do not rehire” category because the employee had filed a worker’s compensation claim, not because he was an unsatisfactory worker. *Id.* at ¶ 44. The employee was thus entitled to worker’s compensation benefits, lost wages, and emotional distress damages.

The New Mexico Administrative Code requires all employers, as identified in NMSA 1978 § 52-1-6.2, to have a safety inspection at least once per year. NMAC § 11.4.2.9(A). All

other employers are encouraged to do so. Subsection B describes the extra-hazardous employer program/risk reduction program. *Id.* at § 11.4.2.9(B). Section 11.4.2.10 requires accident notice posters stating the requirement that workers notify employers of accidents to be posted in conspicuous places on its business premises. NMAC § 11.4.2.10.

D. Firearms in the Workplace

There is no case law regarding this issue and no statute or regulation specifically governing firearms in the workplace. New Mexico does have a Concealed Handgun Carry Act. NMSA 1978 § 29-19-1, *et seq.* The Act places limitations on the validity of a concealed carry license on certain property, *i.e.*, a gun may not be carried on certain property, concealed or otherwise. *See, e.g.*, NMSA 1978 §§ 29-19-10 (tribal land) and 29-19-11 (courthouse).

E. Use of Mobile Devices

There is no case law regarding this issue and no statute or regulation specifically governing use of mobile devices in the workplace. New Mexico has banned texting while driving, NMSA § 66-7-374, and banned non-hands free device calls for commercial motor vehicle drivers, NMSA § 66-7-375. Counties and municipalities in New Mexico, however, further restrict the use of mobile devices while driving. *See* Albuquerque City Ord. § 8-2-1-24 (hands-free device required for all non-emergency calls while driving); Santa Fe City Code § 12-6-18(B) (2014) (no calls or texting while driving).

X. TORT LIABILITY

A. Respondeat Superior Liability

Under the doctrine of respondeat superior, an employer can be held vicariously liable for the negligent actions of an employee who is acting within the scope of his employment. *Medina v. Graham's Cowboys, Inc.*, 1992-NMCA-016, ¶ 18, 113 N.M. 471, 475, 827 P.2d 859, 863.

An employer may also be liable under the doctrine of respondeat superior for an intentional tort committed by its employee if the wrongful acts are committed in the course and scope of his or her employment. *Los Ranchitos v. Tierra Grande, Inc.*, 1993-NMCA-107, ¶ 13, 116 N.M. 222, 226, 861 P.2d 263, 267.

The primary test to determine whether an employer-employee relationship exists for respondeat superior purposes is whether the employer has the right to control the details of the work of the employee, while secondary tests include: (1) direct evidence of the employer's right to control the manner and means of the employee's performance; (2) the method of payment of compensation; (3) whether the employer furnishes equipment; and (4) the employer's right to end the relationship. *Tercero v. Roman Catholic Diocese of Norwich, Connecticut*, 2002-NMSC-018, ¶ 22, 132 N.M. 312.

New Mexico courts use a four-point test to consider scope of employment. An employee's action, although unauthorized, is considered to be in the scope of employment if the

action: (1) is the kind the employee is employed to perform; (2) occurs during a period reasonably connected to the authorized employment period; (3) occurs in an area reasonably close to the authorized area; and (4) is actuated, at least in part, by a purpose to serve the employer. *Narney v. Daniels*, 1992-NMCA-133, ¶ 34, 115 N.M. 41, 49, 846 P.2d 347, 355.

Further guidance is provided in the uniform jury instruction. An act of an employee is within the scope of employment if: (1) it was something fairly and naturally incidental to the employer's business assigned to the employee; and (2) it was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee. UJI 13-407 NMRA.

The court in *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, identified three circumstances that must exist in order to impose vicarious liability on an employer for an employee's negligent actions in driving a personal vehicle to and from work: (1) the employer must expressly or impliedly consent to the use of the vehicle; (2) the employer must have the right to control the employee in his operation of the vehicle, or the employee's use of the vehicle must be so important to the business of the employer that such control could be inferred; and (3) the employee must be engaged at the time in furthering the employer's business. *Lessard v. Coronado Paint & Decorating Ctr., Inc.*, 2007-NMCA-122, ¶ 14, 142 N.M. 583, 168 P.3d 155.

B. Tortious Interference with Business/Contractual Relations

In *Deflon v. Sawyers*, the New Mexico Supreme Court discusses the claim of intentional interference with a contract in depth. *Deflon v. Sawyers*, 2006-NMSC-025, 139 N.M. 637, 137 P.3d 577. Some of the court's findings include: (1) Parties to a contract cannot bring such a claim against each other, *id.* at ¶ 6; (2) A corporate officer acting outside the scope of authority may be liable for interfering with a corporate contract, *id.* at ¶ 7; and (3) A corporate officer is privileged to interfere with his corporation's contracts only when he acts in good faith and in the best interests of the corporation, as opposed to his own private interests, *id.* at ¶¶ 8-9.

New Mexico recognizes a cause of action for tortious interference with contractual relations. *El Dorado Util., Inc. v. Eldorado Area Water & Sanitation Dist.*, 2005-NMCA-036, 137 N.M. 217, 109 P.3d 305. To establish tortious interference with contract, a plaintiff must prove that: (1) defendant had knowledge of the contract between plaintiff and a third party; (2) performance of the contract was refused; (3) defendant played an active and substantial part in causing plaintiff to lose the benefits of his contract; (4) damages flowed from the breached contract; and (5) defendant induced the breach without justification or privilege to do so. *Ettenson v. Burke*, 2001-NMCA-003, 130 N.M. 67, 17 P.3d 440.

For a claim based on interference with an existing contract, a plaintiff must prove that a defendant acted with either an improper motive or improper means, but the improper motive need not be the sole motive. *See Fikes v. Furst*, 2003-NMSC-033, 134 N.M. 602, 81 P.3d 545.

A claim for tortious interference with contractual relations that does not induce the breach of an existing contract is in the nature of a claim for interference with prospective

business advantage, and it requires a plaintiff to prove that the defendant used improper means or acted with an improper motive intended solely to harm the plaintiff. *Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, 125 N.M. 500, 964 P.2d 61.

Mere refusal to deal with a party cannot support a claim for tortious interference with contractual relations. Furthermore, a breach of contract with a third party is not the sort of improper means sufficient to support a claim of tortious interference with contractual relations. *Quintana v. First Interstate Bank of Albuquerque*, 1987-NMSC-062, 105 N.M. 784, 737 P.2d 896.

One who intentionally and improperly interferes with another's prospective contractual relation, except a contract to marry, is subject to liability to the other for pecuniary harm resulting from the loss of the benefits of the relation, whether the interference consists of inducing or otherwise causing a third person not to enter into or continue the prospective relation, or preventing the other from acquiring or continuing the prospective relation. *M&M Rental Tools, Inc. v. Milchem, Inc.*, 1980-NMSC-072, 94 N.M. 449, 612 P.2d 241.

When the tort is interference with prospective contractual relations, whether the parties are competitors is a consideration in determining whether the motive or means was improper. "Competition," whether called a proper interference or a privilege, extends only to prospective contractual relations; it does not justify interference with existing contractual relations. *Id.*

Corporate agents are privileged to interfere with or induce a breach of the corporation's contracts with others as long as their actions are in good faith and for the best interests of the corporation. In determining whether a corporate agent has a qualified privilege to interfere with or induce breach of the corporation's contracts with others, the district court must look to the motivating forces behind the agent's decision to induce the corporation to breach its contractual obligations. *Bogle v. Summit Inv. Co., LLC*, 2005-NMCA-024, 137 N.M. 80, 107 P.3d 520.

Under the New Mexico long-arm statute, a court has personal jurisdiction over a nonresident defendant corporation, in a resident plaintiff corporation's action for tortious interference with a business opportunity, when a proposed business venture failed and the defendant corporation purchased a third party to replace the plaintiff corporation in a federal contract bid. The plaintiff corporation suffered economic loss and that alleged economic loss was the "cognizable injury," which completed the tort and satisfied the first two prongs of the three-part test for personal jurisdiction. *See Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, 131 N.M. 772, 42 P.3d 1221; NMSA 1978 § 38-1-16.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

New Mexico courts take the view that restrictive covenants in employment contracts, where the restraints imposed are reasonable, create legally enforceable rights and duties apart from the rights and duties that would be so enforced in the absence of such covenants. *Lovelace Clinic v. Murphy*, 1966-NMSC-165, 76 N.M. 645, 417 P.2d 450. The public has an interest in

seeing that competition is not unreasonably limited or restricted, but it also has an interest in protecting the freedom of persons to contract, and in enforcing contractual rights and obligations. *See also Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, ¶¶ 8-11, 104 N.M. 514, 517, 724 P.2d 223, 226; *Manuel Lujan Ins., Inc. v. Jordan*, 1983-NMSC-100, ¶¶ 14-16, 100 N.M. 573, 577, 673 P.2d 1306, 1310.

Courts are more reluctant to disturb restrictive covenants in buy-sell agreements than those in employment contracts. *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, 104 N.M. 514, 724 P.2d 223.

In *Swift v. Shop Rite Food Stores, Inc.*, the New Mexico Supreme Court held that a provision in defendant's profit sharing plan against competition was not an unreasonable restriction of the freedom of plaintiff to earn a living, nor was the public necessarily deprived of plaintiff's skill and services. *Swift v. Shop Rite Food Stores, Inc.*, 1971-NMSC-095, 83 N.M. 168, 489 P.2d 881. Plaintiff had the choice of either preserving his interest in the profit sharing plan by not accepting competing employment within one year, or risking forfeiture of his interest by exercising his right to work for whomever he chose. *Id.* The court held that the restriction, which had no territorial limitation, did not violate New Mexico public policy. *Id.*

In *Campbell v. Millennium Ventures, LLC*, the court held that personal services contracts that include non-solicitation clauses may be assigned with the consent of the parties to the assignment. *Campbell v. Millennium Ventures, LLC*, 2002-NMCA-101, ¶ 22, 132 N.M. 733, 55 P.3d 429. The court also recognized the connection between non-competition agreements and goodwill, and that the sale of goodwill is usually sufficient to assign an employment agreement. *Id.* at ¶¶ 27-28.

The Court in *Rapid Temps, Inc. v. Lamon* found that a three-year restriction on competition contained in the former employee's covenant not to compete commenced on the date that the former employee was terminated, rather than on the date that judgment was entered, where the non-compete agreement plainly so stated. *Rapid Temps, Inc. v. Lamon*, 2008-NMCA-122, 144 N.M. 804, 192 P.3d 799.

Recently, in *KidsKare, P.C. v. Mann*, the New Mexico Court of Appeals upheld the district court's ruling that a covenant not to compete within one hundred miles was not reasonable and thus unenforceable, but was fairly susceptible to reformation based on the terms of the employment agreement. *KidsKare, P.C. v. Mann*, 2015-NMCA-064, 350 P.3d 1228. The employment agreement specifically provided for the amendment of any provision found by a court to be overbroad or otherwise unenforceable. *Id.* at ¶ 12. Thus, once the district court found the covenant not to compete within a 100-mile radius of the office was overly broad, modification of that provision via reformation was specifically allowed by the agreement. *Id.* The Court of Appeals did not find error in the district court's reformation in reducing the non-compete radius to thirty miles. *Id.* at ¶ 14 (district court found that approximately 90% of the patients were within a thirty-mile radius).

For agreements entered into after July 1, 2015, non-competition clauses are restricted for the following "health care practitioners" that provide clinical health services in New Mexico: (1)

dentists; (2) osteopathic physicians; (3) physicians; (4) podiatrists; (5) certified registered nurse anesthetists; (6) certifies nurse practitioners; and (7) certified nurse-midwives. NMSA 1978 § 24-1I-1, *et seq.* (2015, amended 2017). For these health care practitioners, a non-competition provision in an employment agreement is unenforceable upon the termination of: (1) the agreement; (2) a renewal or extension of the agreement; or (3) a health care practitioner's employment with a party seeking to enforce the agreement. NMSA 1978 § 24-1I-2(A). Further, the statute provides that the employer cannot contract around the statue by providing that the agreement is governed by the law of another state or litigation must be conducted in another state, provided the services are to be performed in New Mexico. NMSA 1978 § 24-1I-2(B) (such a provision is void, unenforceable, and against public policy).

B. Blue Penciling

Where a contract was freely entered into between parties, it is not the province of the court to alter or amend it. Courts cannot change or modify the language of a contract, otherwise legal, for the benefit of one party and to the detriment of another. *See Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, 98 N.M. 541, 650 P.2d 825.

Where a contract is fair and unambiguous in its terms, a court will not amend or alter the terms of the contract and will enforce the agreement as made by the parties. *See Smith*, 1982-NMSC-102, 98 N.M. 541, 650 P.2d 825.

Courts may not rewrite obligations that the parties have freely bargained for themselves in the absence of fraud, unconscionability, or other grossly inequitable conduct. *WXI/Z SW Malls v. Mueller*, 2005-NMCA-046, 137 N.M. 343, 110 P.3d 1080; *but see KidsKare, P.C. v. Mann*, 2015-NMCA-064, 350 P.3d 1228 (where employment agreement allowed for judicial reformation upon a finding that a provision was overly broad or unenforceable, district court properly reformed covenant not to compete to include a reasonable geographic restriction).

C. Confidentiality Agreements

There is no New Mexico case law on this issue. The Tenth Circuit, however, applying New Mexico law, has held that Patent Waiver Agreements and Confidentiality and Non-Disclosure Agreements could not be characterized as restrictive covenants and must be treated separate and apart from agreements not to compete. *MAI Basic Four, Inc. v. Basis, Inc.*, 880 F.2d 286, 287 (10th Cir. 1989). The confidentiality and nondisclosure agreement merely required employees to treat as confidential all information disclosed to them as a result of or through their employment; the employees remained free to work for whomever they wished, wherever they wished, and at whatever they wished. *Id.* The court also stated that under New Mexico Law, the employer was not required to provide additional consideration in addition to continued employment in order to require employees to sign a patent waiver agreement and a confidentiality and nondisclosure agreement; such agreements were necessary incidents to a contract for employment in the field of computer software. *Id.* at 288.

D. Trade Secrets Statute

New Mexico has adopted a Uniform Trade Secrets Act. *See* NMSA 1978 §§ 57-3A-1, *et seq.* (1989).

In *Rapid Temps, Inc. v. Lamon*, the court found that the evidence presented was sufficient to establish that: (1) former employer's client database constituted a trade secret; (2) there was evidence that the information in the database was developed over many years and at considerable expense; and (3) such information went beyond former employee's general skills and knowledge, her recollection of client preferences, and information that one could easily obtain by consulting a phone directory. *Rapid Temps, Inc. v. Lamon*, 2008-NMCA-122, 144 N.M. 804, 192 P.3d 799.

General skills and knowledge do not rise to the level of trade secrets. *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 18, 128 N.M. 611, 995 P.2d 1053 (information possessed by the salesman, regarding customers' insurance needs and the expiration dates for their policies, was not confidential information or trade secrets).

The trade secret privilege when asserted during discovery is evaluated in light of the long-recognized policy in favor of liberal and open discovery. *Pincheira v. Allstate Insurance Co.*, 2007-NMCA-094, 142 N.M. 283, 164 P.3d 982. When a party resisting discovery based on trade secret satisfies the initial burden of establishing the existence of the trade secret privilege, the party seeking disclosure must make a prima facie, particularized showing that the information sought is relevant and necessary to the proof of, or defense against, a material element of the case. *Id.* at ¶¶ 39-41.

In relation to employee privacy, *see* NMSA 1978 § 50-11-3 (1991), discussing employers and unlawful practices.

In relation to Occupational Health and Safety, *see* NMSA 1978 § 50-9-21 (1993), discussing Civil Actions, Admissibility of Evidence, and Confidentiality of Trade Secrets.

Every person has a right to inspect the public records of New Mexico, except trade secrets. *See* NMSA 1978 § 14-2-1(A)(6) (2011).

E. Fiduciary Duty and their Considerations

In *Cent. Sec. & Alarm Co., Inc. v. Mehler*, the New Mexico Court of Appeals discussed an employee's duty of loyalty to his/her employer:

An employee has a duty of loyalty to the employer. Unless otherwise agreed, the employee may not compete with the employer. The employer's potential remedies for violation of this duty include an action for losses and an action for restitution, including a constructive trust or accounting for profits. The determination of what the employer can recover depends upon the remedy pursued.

Cent. Sec. & Alarm Co., Inc. v. Mehler, 1996-NMCA-060, ¶ 10, 121 N.M. 840, 918 P.2d 1340 (internal citations omitted).

The Court in *Las Luminarias of the New Mexico Council of the Blind v. Isengard* held that plaintiff employer's allegations were sufficient to state a cause of action for breach of duty of loyalty to the nonprofit corporation. *Las Luminarias of the New Mexico Council of the Blind v. Isengard*, 1978-NMCA-117, 92 N.M. 297, 587 P.2d 444. Specifically, the employer alleged that employees were instrumental in organizing the corporation to compete against corporation for public funding; that in preparing competitive proposal, employees used its records and papers; and that employees made it publicly known that, if corporation were awarded funding contract, they would resign from their employment with it and if their corporation were funded, they would seek employment there. *Id.*

XII. DRUG TESTING LAWS

A. Public Employers

Barreras v. N.M. Corr. Dep't held that canine searches and urinalysis testing of probationary corrections officers did not violate the Fourth Amendment since searches and testing were reasonable responses to a possible drug problem within a facility, particularly in light of officers' diminished expectation of privacy within prison grounds. *Barreras v. N.M. Corr. Dep't*, 1992-NMSC-059, 114 N.M. 366, 38 P.2d 983.

Suspicionless drug testing of a city mechanic, pursuant to a city policy requiring drug testing of drivers of heavy vehicles, constituted an unreasonable search under the Fourth Amendment, where the mechanic had not worked on heavy vehicles for nine months prior to the time of his drug test, and the city failed to provide any evidence of the likelihood that the mechanic would be transferred to a position requiring him to work on such vehicles. *Jaramillo v. City of Albuquerque*, 1998-NMCA-062, 125 N.M. 194, 958 P.2d 1244.

B. Private Employers

There is no New Mexico case law on this issue. New Mexico law does not prohibit or restrict drug testing in private employment. *See infra* § XVI(E) re: medical marijuana.

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

A. Employers/Employees Covered

Under the New Mexico Human Rights Act ("NMHRA"), NMSA 1978 §§ 28-1-1, *et seq.*, "employer" means any person employing four or more persons and any person acting for an employer, and "employee" means any person in the employ of an employer or an applicant for employment. NMSA 1978 § 28-1-2 (2007).

B. Types of Conduct Prohibited

Section 28-1-7 of the NMHRA prohibits discharging an employee based on race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical

condition; or, if the employer has fifty or more employees, spousal affiliation; or if the employer has fifteen or more employees, to discriminate against an employee based upon the employee's sexual orientation or gender identity. NMSA 1978 § 28-1-7 (2004, amended 2008). The NMHRA also prohibits retaliation against an employee who opposes unlawful practices or participates in proceedings under the Act. *Id.* To prove a prima facie case of retaliation under NMHRA, an employee needs to show that: (1) he/she engaged in protected activity; (2) he/she suffered an adverse employment action; and (3) there is a causal connection between these two events. *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 11, 139 N.M. 12, 127 P.3d 548.

C. Administrative Requirements

To have a claim for retaliation under the NMHRA, the employee's communications to his employer (or someone with managerial authority) must sufficiently convey the employee's reasonable concerns that his employer has acted or is acting in an unlawful discriminatory manner; thus, at the very least, if the statement does not mention a specific act of discrimination, the employer must be able to discern from the context of the statement that the employee opposes an allegedly unlawful employment practice. *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, 135 N.M. 539, 91 P.3d 58. In order to constitute a hostile work environment prohibited by Title VII and the New Mexico Human Rights Act (NMHRA), the work environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the employee did perceive as being hostile or abusive. *Id.*

When determining whether a work environment was hostile or abusive, we look at "the totality of the circumstances, including 'the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Ulibarri v. State of New Mexico Corr. Acad.*, 2006-NMSC-009, ¶ 12, 139 N.M. 193, 131 P.3d 43 (*quoting Ocana*, 2004-NMSC-018).

In *Sabella v. Manor Care, Inc.*, a female former employee's claim for sex discrimination under the NMHRA was not barred as a matter of law by the exclusivity provision of the Workers' Compensation Act ("WCA") if the employee could show that her damages under NMHRA were separate and distinct from those for which she had already been compensated in the workers' compensation settlement. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, 121 N.M. 596, 915 P.2d 901.

Before a claim for a violation of the NMHRA can be filed in district court, the claimant must first comply with the mandatory grievance procedures provided in the NMHRA. *Luboyeski v. Hill*, 1994-NMSC-032, 117 N.M. 380, 872 P.2d 353. However, the requirement that administrative remedies for employment discrimination claims recognized by statute be exhausted does not prevent an employee from filing a complaint based on a common law tort without first resorting to such administrative remedies. *Gandy v. WalMart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859.

D. Remedies Available

Upon complying with the mandatory grievance procedures in the NMHRA, the respondent might be required to pay actual damages to the complainant, pay reasonable attorney's fees, if the complainant was represented by private counsel, and to take such affirmative action deemed necessary, including a requirement for reports of the manner of compliance. *See* NMSA 1978 § 28-1-11 (1995).

Under the NMHRA, “[i]n any action or proceeding under this section if the complainant prevails, the court, in its discretion, may allow actual damages and reasonable attorney’s fees, and the state shall be liable the same as a private person.” NMSA 1978 § 28-1-13(D) (2005); *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 21, 136 N.M. 647, 103 P.3d 571.

Remittitur is appropriate under NMHRA cases if the jury intended to punish the defendant. *Nava*, 2004-NMSC-039, ¶ 16.

Punitive damages may not be recovered under the NMHRA; however, the remedies available under the act are not exclusive. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, 117 N.M. 441, 872 P.2d 859. Therefore, exhaustion of administrative remedies under the Act is not a prerequisite to proceeding with an independent tort claim of retaliatory discharge. *Id.*

However, a plaintiff cannot recover both under the NMHRA for retaliatory discharge and again in a tort action for retaliatory discharge. *Id.*

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged for taking time off to serve on jury duty. NMSA 1978 § 38-5-18 (2005).

B. Voting

No employee may be discharged for taking time off to vote. NMSA 1978 § 1-12-42 (2001); *see State v. Kenneth P. Thompson Co., Inc.*, 1985-NMCA-098, 103 N.M. 453, 708 P.2d 1054 (holding that employer's adjusting work schedule on election day, shortening work day by 30 minutes in order to accord employees more than three hours within which to vote prior to closing of polls, did not violate pay-while-voting statute requiring employers to allow employees to absent themselves in order to vote, without penalty or deduction in pay).

C. Family/Medical Leave

New Mexico does not have a family/medical leave statute similar to the federal FMLA. However, NMSA 1978 § 28-1-7(A), part of the NMHRA, allows for the discharge of an employee “based on a bona fide occupational qualification.” The ability to attend work regularly is a bona fide occupational qualification. *Stock v. Grantham*, 1998-NMCA-081, 125 N.M. 564, 964 P.2d 125.

The terms “medical condition,” “handicap,” and “disability” can be viewed as interchangeable in the context of the NMHRA. *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶ 8, 131 N.M. 607, 41 P.3d 333. A medical condition is defined by an appropriate medical authority through documentation or by direct witness of a clearly visible disablement. *Id.* at ¶ 9. Furthermore, being ill is not synonymous with having a medical condition under the NMHRA. *Id.* at ¶ 12.

Employers in New Mexico are not required by state law to provide employees with paid or unpaid sick leave. There have, however, been recent attempts to propose legislation for mandatory sick leave in various localities. For instance, the City of Albuquerque and the County of Bernalillo will have proposed legislation on the ballot in October 2017, which would require employers in those areas to allow employees to earn paid sick leave. This bill did not pass, narrowly failing by 700 votes out of 91,000 cast. However, the bill has recently been reintroduced.

The Promoting Financial Independence for Victims of Domestic Abuse Act mandates domestic abuse leave, discusses the impact of domestic abuse leave on employee benefits, and discusses the Act’s effect on other laws and existing employment benefits. NMSA 1978 §§ 50-4A-1 through 50-4A-8 (2009).

The person in charge of a state agency may grant a leave of absence, not to exceed twenty days, to a state agency employee for the purpose of donating an organ or bone marrow. NMSA 1978 § 24-28-3 (2007).

D. Pregnancy/Maternity/Paternity Leave

New Mexico does not have a statute requiring employers to give time off for pregnancy. Women affected by pregnancy, childbirth or related medical conditions shall be treated the same as other persons who are temporarily disabled for all employment-related purposes, including receipt of benefits under fringe benefit programs. NMAC 9.1.1.7 (HH).

New Mexico has applied the *McDonnell Douglas* instruction to juries in order to evaluate whether the plaintiff was discharged as a result of becoming pregnant:

Plaintiff has the burden of proving that the nondiscriminatory reasons given by Defendant for her discharge were a pretext. If Defendant has shown legitimate, nondiscriminatory reasons for discharging Plaintiff, then you must decide whether Plaintiff has proven that the reasons offered by Defendant were not the true reasons for her discharge, and that her employment was terminated because she was pregnant.

Behrmann v. Phototron Corp., 1990-NMSC-073, ¶ 12, 110 N.M. 323, 326, 795 P.2d 1015, 1018.

E. Day of Rest Statutes

New Mexico does not address this issue by statute.

F. Military Leave

The Reemployment of Persons in Armed Forces statute, NMSA 1978 § 28-15-1, *et seq.*, requires that employers reemploy persons who reapply for their old positions within 90 days of the date they are honorably discharged from full-time active Armed Forces duty. NMSA 1978 § 28-15-1 (1971).

In *Ramirez v. State ex. rel. Children, Youth and Families Dept.*, a veteran sued his former employer (the New Mexico State Children, Youth, and Family Department) alleging he was fired due to his military service. *Ramirez v. State ex. rel. Children, Youth and Families Dept.*, 2014-NMCA-057, 326 P.3d 474. The New Mexico Court of Appeals initially ruled Congress did not have the power under the War Powers clause to subject a State to private Uniformed Services Employment and Reemployment Rights Act suits in that state's courts, absent the state's consent to waive sovereign immunity. *Id.* at ¶ 13. The New Mexico Supreme Court reversed, however, holding that the legislature waived the New Mexico State Children, Youth, and Family Department's immunity from suit in an action brought under the Uniformed Services Employment and Reemployment Rights Act in state court. *Ramirez v. State ex. rel. Children, Youth and Families Dept.*, 2016-NMSC-016, 372 P.3d 497 (finding waiver of sovereign immunity based on NMSA 1978 § 20-4-7.1(B)).

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

The minimum wage per state statute in New Mexico for 2019 is \$7.50 per hour. NMSA 1978 § 50-4-22 (2007). Municipalities within New Mexico, however, are free to increase this minimum wage for employers within city limits. *See* Albuquerque Code of Ordinances § 13-12-1, *et seq.* (\$8.80 per hour for 2017); Santa Fe Living Wage Ord. 28-1 (\$11.09 per hour beginning March 1, 2017). However, the legislature recently passed a new minimum wage. Starting on July 1, 2019, minimum wage will be \$10 per hour. A year later it will climb to \$11 per hour, and \$12 per hour in 2021.

The "Labor Conditions; Payment of Wages" statute governs wage, hour, and working conditions for all employees. NMSA 1978 §§ 50-4-1, *et seq.* (2013). Sections 50-4-19 through 50-4-30 comprise the New Mexico "Minimum Wage Act." NMSA 1978 §§ 50-4-19 through 50-4-30 (2005). For "Daily maximum hours of employment; exceptions," *see* NMSA 1978 § 50-4-30 (1971).

With regard to the employment of children and maximum hours, *see* "Maximum hours for children fourteen to sixteen," NMSA 1978, § 50-6-3 (2007).

With regard to the minimum wage rate for all noncertified school personnel, *see* "Noncertified school personnel; salaries," NMSA 1978 § 22-10A-39 (2003).

With regard to public works contracts, *see* the “Public Works Minimum Wage Act,” NMSA 1978 §§ 13-4-11 through 13-4-17 (2011).

The proper standard in determining whether a private entity should be considered a “political subdivision” subject to meaning of Public Works Minimum Wage Act is whether under the totality of the circumstances the private entity is so intertwined with a public entity that the private entity becomes an alter ego of the public entity. *Memorial Medical Center, Inc. v. Tatsch Const., Inc.*, 2000-NMSC-030, ¶ 1, 129 N.M. 677, 12 P.3d 431.

B. Deductions from Pay

New Mexico case law has not addressed discretionary employer deductions. *But see* NMSA 1978 § 7-3-4 (no employee shall have a right of action against the employer for any tax amount deducted and withheld from the employee’s wages in accordance with the Withholding Tax Act). Also, an employer may make certain deductions from an employee’s pay if those item were specifically stated in an employment agreement entered into at the time of hiring. NMSA 1978 § 50-4-2(B).

C. Overtime Rules

Employees covered by the Minimum Wage Act (MWA) may be “required to work” more than forty hours per week, thus entitling them to overtime pay, even when their employers do not overtly demand such work. NMSA 1978 § 50-4-22(D) (2008); *New Mexico Dept. of Labor v. A.C. Elec., Inc.*, 1998-NMCA-141, 125 N.M. 779, 965 P.2d 363. An employee could meet her burden of proving she was “required to work” more than forty hours in a week if she could show by a preponderance of the evidence that she worked those hours with employer's knowledge and consent, and there was any pressure from employer, however subtle, to work those hours. *Id.* at ¶ 21. Furthermore, employer's policy of allowing employee to “bank” hours worked in excess of forty per week and then convert those hours to compensatory time off on hour-for-hour basis did not exempt employer from overtime pay requirement under MWA. *Id.*

Employment agreement whereby overtime would be calculated based on fluctuating workweek, pursuant to which employee earned diminishing hourly overtime wages as number of overtime hours increased, violated public policy set forth in MWA. *N.M. Dept. of Labor v. Echostar Communications Corp.*, 2006-NMCA-047, 139 N.M. 493, 134 P.3d 780. The MWA's intent was to adequately compensate for overtime, to discourage overtime, and to encourage employment of more workers, and employer's overtime calculation would have severely undercut Act's time-and-a-half provision. *Id.* at ¶ 12.

In order to prevail on overtime claim under New Mexico Minimum Wage Act, employees must show that: (1) they worked more than forty hours a week; (2) that employer knew or should have known that they did so; and (3) that they were not compensated for the overtime. *Self v. United Parcel Service, Inc.*, 1998-NMSC-046, ¶ 15, 126 N.M. 396, 970 P.2d 582. *See also* *Cruse v. St. Vincent Hosp.*, 729 F. Supp. 2d 1269 (D.N.M. 2010).

Certain employers in New Mexico are exempt from overtime provisions for certain categories of employees. *See* NMSA 1978 § 50-2-4 (2005).

D. Time for payment upon termination

Section 50-4-4(A), NMSA 1978, mandates that unpaid wages or compensation be paid to employee within five days of employee's discharge when the amount is definite. NMSA 1978 § 50-4-4(A) (1975). Payment requiring further calculations must be paid within ten days of discharge. NMSA 1978 § 50-4-4(B). Claims regarding payment after discharge must be brought within sixty days. NMSA 1978 § 50-4-4(C).

By enacting Section 50-4-4, the legislature declared public policy to be that wages due employees upon discharge from employment should be promptly paid. *Wolf v. Sam's Town Furniture, Inc.*, 1995-NMCA-114, ¶ 15, 120 N.M. 603, 606, 904 P.2d 52, 55; NMSA 1978 § 50-4-4 (1975). Vacation pay that employer owed to discharged employees was a "fixed and definite amount," and appropriate penalty for employer's failure to provide vacation pay thus was continued wages for 60 days, rather than vacation pay accrued in 60 days; unlike payment on task, piece, or commission basis, payment of accrued vacation did not depend on any variable element, but was based upon vacation time earned, multiplied by rate of pay. *Wolf*, 1995-NMCA-114 at ¶ 15. The determining factor in classifying items of compensation, for purposes of determining the appropriate penalty for employer's failure to provide compensation to discharged employee, is whether the amount is fixed and definite, as opposed to variable, and not the method of calculation or computation. *Id.* at ¶ 20.

Where discharged employee was entitled to wages of definite amount and commissions which were not fixed and definite in amount, each class of wages or compensation was required to be treated separately, under statute, so that payment of both within respective times provided was not required to terminate obligation of employer to pay either, and thus payment of wages of fixed and definite amount discharged employer's obligation in relation thereto, but commissions, which were not fixed and definite in amount, and which were not paid within required ten-day period, continued to be payable until payment or tender. *Litteral v. Singer Business Machines Co.*, 1975-NMSC-015, 87 N.M. 365, 533 P.2d 754.

Section 50-4-5, NMSA 1978, states that wages or compensation due to employees who quit or resign are payable at the next succeeding payday. NMSA 1978 § 50-4-5 (1937). Section 50-4-6, NMSA 1978, mandates payment on the next payday in the event of suspension of work as a result of an industrial dispute. NMSA 1978 § 50-4-6. Section 45-3-1301, NMSA 1978, states that a spouse of a deceased person may collect final payments owed to the decedent at the time of his death. NMSA 1978 § 45-3-1301 (1983).

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Under the Employee Privacy Act in NMSA 1978 § 50-11-3, employers may not discriminate against or discipline employees who smoke. NMSA 1978 § 50-11-3 (1991). Section 24-16-14, NMSA 1978, mandates that employers provide that their places of employment meet the requirements of the Dee Johnson Clean Indoor Air Act and shall adopt, implement, post and maintain a written smoking policy pursuant to said Act. NMSA 1978 § 24-16-14.

B. Health Benefit Mandates for Employers

New Mexico does not mandate that employers provide health insurance to their employees. However, the New Mexico legislature has enacted some provisions to encourage employers to provide health benefits to their employees.

The New Mexico Health Insurance Exchange Act, NMSA 1978 § 59A-23F-1 through 59A-23F-8, created the New Mexico Health Insurance Exchange as well as provided a board of directors for the Exchange. NMSA 1978 §§ 59A-23F-1, *et seq.* (2013). This Act replaced the Health Insurance Alliance Act, NMSA 1978 §§ 59A-56-1, *et seq.* The Exchange is created as a nonprofit public corporation to provide individuals and qualified employers with increased access to health insurance in the state and shall be governed by the aforementioned board of directors. NMSA 1978 § 59A-23F-3.

The purpose of the Small Group Rate and Renewability Act is to promote the continuing availability of health insurance coverage to small employers, to prevent abusive rating practices, to require disclosure of rating practices to purchasers, to establish rules for continuity of coverage for employers and covered individuals and to improve the efficiency and fairness of the small group health insurance marketplace. NMSA 1978 § 59A-23C-2 (1991).

Health insurance portability is governed by statute in New Mexico. NMSA 1978 §§ 59A-23E-1 through 59A-23E-20 (2008).

Two separate statutes in New Mexico authorize the state to administer the medicaid program: (1) NMSA 1978 §§ 27-1-1 through 27-1-16 (2014); and (2) NMSA 1978 §§ 27-2-1 through 27-2-12.10 (2007).

C. Immigration Laws

New Mexico applies federal employment eligibility and verification rules.

D. Right to Work Laws

There is currently no “right to work” statute in New Mexico. Proposed legislation in New Mexico has failed every year from 2015 to 2017. On March 27, 2019, Governor Michelle Lujan Grisham signed House Bill 85, which invalidates any local right to work laws and prohibits the passing of any future local right to work resolutions.

E. Lawful Off-duty Conduct (including lawful marijuana use)

The only New Mexico statute discussing off-duty employee conduct is § 53-11-3 which prohibits employers from firing an employee for smoking if the individual complies with applicable laws and policies regulating smoking on the premises of the employer during working hours. An employer cannot require that an employee abstain from smoking or using tobacco products during nonworking hours, provided the individual complies with the applicable laws and policies regulating smoking on the premises of the employer. NMSA 1978 § 53-11-3.

Currently, marijuana is not a legal substance for recreational use in New Mexico. New Mexico has, however, enacted a Compassionate Use Act (“CUA”), which provides for the lawful use of medical marijuana. *See* NMSA 1978 § 26-2B-1. Employers in New Mexico do not need to accommodate an employee’s use of medical marijuana. *Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (applying state law). In *Garcia*, an employee who suffered from HIV/AIDS had a valid prescription for medical marijuana. *Id.* at 1226-27. Mr. Garcia was fired from his job at Tractor Supply after failing a drug test based on cannabis metabolites. Mr. Garcia then filed suit, claiming unlawful discrimination and failure to accommodate based on the New Mexico Human Rights Act (“HRA”). The Federal Court for the District of New Mexico granted Tractor Supply’s Motion to Dismiss, holding: (1) New Mexico’s CUA did not mandate that employers accommodate medical marijuana use; and (2) the Federal Controlled Substances Act preempts New Mexico’s ability to affirmatively require an employer to accommodate illegal drug use under the CUA and HRA. *Id.* at 1229-30. One of the Court’s key findings was that the employee was not being terminated because of his condition but rather the treatment therefor, *i.e.*, the HIV/AIDS was the medical condition, not the marijuana. *Id.* at 1228.

However, in 2019, New Mexico amended the CUA to add protections from employers for those complying with the statute. It states:

A. Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, it is unlawful to take an adverse employment action against an applicant or employee based on conduct allowed under the Lynn and Erin Compassionate Use Act.

B. Nothing in this section shall:

(1) restrict an employer’s ability to prohibit or take adverse employment action against an employee for use of, or being impaired by, medical cannabis on the premises of the place of employment or during the hours of employment; or

(2) apply to an employee whose employer deems that the employee works in a safety-sensitive position.

NMSA § 26-2B-7 (Section 11). 2019 New Mexico Laws Ch. 247 (S.B. 406). This bill was signed by the Governor on April 4, 2019.

F. Gender/Transgender Expression

New Mexico statutes do not specifically address gender/transgender expression; however, The New Mexico Human Rights Act clearly states that it is an unlawful discriminatory practice

for an employer of fifteen or more employees to discriminate against an employee based on the employee's gender identity or sexual orientation. NMSA 1978 § 28-1-7 (2004).

G. Other Key State Statutes

New Mexico law provides that no employer shall dismiss an employee for failure or refusal to pay or promise to pay any assessment, subscription or contribution to any political organization or candidate; however, nothing contained in this section shall prevent voluntary contributions to political organizations. *See* NMSA 1978 § 10-9-21 (1991) (“Public Officers and Employees; Personnel; Prohibited Acts”).

Section 50-9-25(A), NMSA 1978, provides that an employee may not be discharged for filing a complaint or testifying in a proceeding under the New Mexico Occupational Health and Safety statute. NMSA 1978 § 50-9-25(A) (1993) (“Discrimination”).

HIV testing or information is not required to be disclosed in the hiring process, unless the employer can prove HIV status relates to a bona fide job qualification. NMSA 1978 § 28-10A-1 (1989) (“Human Immunodeficiency Virus Related Test; Limitation”).

A mother may breastfeed her child in any location, public or private, where the mother is otherwise authorized to be present. NMSA 1978 § 28-20-1 (1999). In order to foster the ability of a nursing mother who is an employee to use a breast pump in the workplace, an employer, including the state and its political subdivisions, shall provide: (1) a space for using the breast pump that is clean and private, near the employee's workspace, and not a bathroom; and (2) flexible break times. NMSA 1978 § 28-20-2 (2007).

The Unemployment Compensation Law in New Mexico governs the general rights and obligations pertaining to unemployment claims. NMSA 1978 §§ 51-1-1 through 51-1-59 (2013).

New Mexico also has a statutory compilation that governs apprenticeships. NMSA 1978 §§ 21-19a-1 through 21-19a-13 (1991).

The New Mexico Workers' Compensation Act provides that, if an employee fails a post-accident alcohol or drug test, the compensation benefits otherwise available to an injured employee under the Act shall be reduced by the degree to which the intoxication or influence contributes to the worker's injury or death. NMSA 1978 § 52-1-12.1 (2016). The benefits shall be reduced by a minimum of ten percent but by no more than ninety percent. *Id.*