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NEW MEXICO

AT-WILL EMPLOYMENT

Statute

New Mexico has not addressed this issue by statute.

Case Law

Generally, employment at will can be terminated by either employer or employee for any (or no) reason. *Sherrill v. Farmers Ins. Exch.*, 2016-NMCA-056, ¶ 9, 374 P.3d 723. 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, ¶ 4, 115 N.M. 665, 857 P.2d 776, *cert. denied*, 510 U.S. 1118, 114 S.Ct. 1068, 127 L.Ed.2d 387 (1994); *Zarr v. Washington Tru Sols., LLC*, 2009-NMCA-050, ¶ 8, 146 N.M. 274, 208 P.3d 919.

In *Gonzales v. United Southwest National Bank of Santa Fe*, 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. 1979-NMSC-086, ¶¶ 11-12, 93 N.M. 522, 602 P.2d 619. It is terminable at the will of either party. *Id.* ¶ 11. A discharge without cause does not constitute a breach of an at-will employment contract justifying recovery of damages. *Id.*; *see also Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶¶ 1, 21-24, 30, 131 N.M. 607, 41 P.3d 333 (concluding there was no implied contract to evade the presumption of at-will employment and reversing the award of damages to employee); *Lopez v. Kline*, 1998-NMCA-016, ¶¶ 10-11, 124 N.M. 539, 953 P.2d 304 (stating the general rule and exceptions that permit damages); *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶¶ 10-12, 121 N.M. 710, 917 P.2d 1382(concluding there was no express or implied employment contract based on employer's personnel policy and testimony).

In *Shull v. New Mexico 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. 1990-NMSC-110, ¶ 13, 111 N.M. 132, 802 P.2d 641; *see also Lopez v. Kline*, 1998-NMCA-016, ¶ 10, 124 N.M. 539, 953 P.2d 304 (reciting the general rule that the at-will employer/employee relationship is subject to termination at any time, with or without cause); *Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 20, 135 N.M. 128, 85 P.3d 252 ("New Mexico follows the general rule that employment is terminable at will be either the employee or the employer, absent an express contract to the contrary.").

EXCEPTIONS TO AT-WILL EMPLOYMENT
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. *Harbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 19, 115 N.M. 665, 857 P.2d 776; *see Hartnett v. Papa John's Pizza USA, Inc.*, 912 F. Supp. 2d 1066, 1095 (D.N.M. 2012) (explaining that under New Mexico law an employer's policy of firing employees for a good reason does not indicate the existence of an implied contract requiring termination be only for just cause). The reliance of an employee on language or action of his employer, however, is an important factor in determining whether an implied employment contract exists. *Harbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 14, 115 N.M. 665, 857 P.2d 776. The totality of "the parties' relationship, circumstances, and objectives" should be considered when determining whether an implied contract exists. *Id.* ¶ 15.

Absent an express contract providing otherwise, employment is generally terminable at will. *West v. Wash. Tru Sols., LLC*, 2010-NMCA-001, ¶ 6, 147 N.M. 424, 224 P.3d 651; *see Lopez v. Kline*, 1998-NMCA-016, ¶ 10, 124 N.M. 539, 953 P.2d 304 ("An employment agreement for an indefinite period is presumed to be terminable at will unless the parties have otherwise agreed."). An employer that creates an implied contract that limits its ability to terminate at will, however, is an exception to the general presumption of at will employment. *West*, 2010-NMCA-001, ¶ 6. An employer may create an implied contract "by either providing that termination will only be for cause or providing certain procedural protections prior to termination." *Id.*

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. 2001-NMCA-003, ¶¶ 36-37, 43-44, 130 N.M. 67, 17 P.3d 440 (applying similar employment law from Illinois). Further, annual benefit negotiations are proper evidence from which a jury may determine whether there was an implied contract for severance pay. *Id.* ¶ 52.

In *Lopez v. Kline*, the New Mexico Court of Appeals explained that consideration "will be implied as a matter of law" when a party presents evidence of a promise sufficient to modify the employer-employee relationship to form an implied employment contract. 1998-NMCA-016, ¶ 12, 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. *Id.*

In *Hartbarger v. Frank Paxton Company*, the New Mexico Supreme Court held that consideration supporting the existence of an implied contract "will be implied as a matter of law" when "there is proof of a promise sufficient to support an implied contract" between employer and employee, regardless as to whether "the promise was part of the original employment agreement or was made later in modifying the employment relationship." 1993-

NMSC-029, ¶ 9, 115 N.M. 665, 857 P.2d 776. Written representations—"such as those in an employee handbook"—oral representations, the parties' conduct, or a combination of conduct and representations can constitute promises or offers to support a finding of an implied contract; "When such a contract is implied, it is implied in fact." *Id.* ¶ 6. A factual showing of additional consideration is not required and mutual assent to the terms of the implied contract will be implied absent evidence to the contrary. *Id.* ¶¶ 9, 12.

To support the existence of an implied contract, an oral representation must be sufficiently explicit and definite to create the reasonable expectation of termination for good cause only where a written personnel policy otherwise provides for at-will employment. *See id.* ¶ 14; *Garrity v. Overland Sheepskin Co. of Taos*, 1996-NMSC-032, ¶¶ 10, 12, 121 N.M. 710, 917 P.2d 1382.

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. *Harbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 9, 115 N.M. 665, 857 P.2d 776; *see Hartnett v. Papa John's Pizza USA, Inc.*, 912 F. Supp. 2d 1066, 1093–94 (D.N.M. 2012) (stating the same federal rule).

Where the promise claimed to have altered the nature of at-will employment arises in a personnel manual, the manual must "control the employment relationship to the point that an employee could reasonable expect his employer to conform to the procedures it outlined." *Harbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 14, 115 N.M. 665, 857 P.2d 776. "An employer creates expectations by establishing policies or making promises." *Id.* 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. *Id.* ¶¶ 14-15.

In New Mexico, "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 it outlined." *Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 7, 108 N.M. 424, 773 P.2d 1231. Employers may elect to issue, or not, a personnel manual, or may make clear that a personnel manual issued is not part of an employment contract. *Id.* (quoting *Lukoski v. Sandia Indian Mgmt.*, 1988-NMSC-002, 106 N.M. 664, 748 P.2d 507).

"However, 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 a personnel manual, to determine whether contractual obligations were created." *Beggs v. City of Portales,* 2009-NMSC-023, ¶ 20, 146 N.M. 372, 210 P.3d 798.

In *Forrester v. Parker*, the employee appealed the trial court's grant of summary judgment in favor of his defendant-employer asserting that he was discharged in violation of his employer's personnel policy guide. 1980-NMSC-014, ¶ 1, 93 N.M. 781, 606 P.2d 191. At the time of hiring, the policy guide was in effect and provided, in relevant part, for a probationary period that permitted discharge without cause. *Id.* ¶ 3. Employee received a

letter indicating his successful completion of the probationary period and worked as a full time employee until his termination. *Id.* The letter of termination received by employee recited "that he was being terminated pursuant to paragraph XIX of the personnel policy guide." *Id.* The New Mexico Supreme Court reversed the trial court's judgment that employee was at-will, holding that

> [Employee] should have and did expect [his employer] 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 [employee] and [employer]. The words and conduct of the parties here gave rise to this implied contract.

Id. ¶ 4; *see also Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 7, 108 N.M. 424, 773 P.2d 1231 (explaining that personnel manuals can create implied contracts "if it control[s] the employer-employee relationship and an employee could reasonably expect his employer to conform to the procedures it outlined"); *cf. Sanchez v. The New Mexican*, 1987-NMSC-059, ¶¶ 11-12, 106 N.M. 76, 738 P.2d 1321 (holding an employee handbook that lacked specific contractual terms and contained language of a non-promissory nature did not constitute either a written or implied contract of employment, affirming the trial court's grant of employer's motion for directed verdict).

An employee handbook can either create or modify an express contract of employment. *Lukoski v. Sandia Indian Mgmt.*, 1988-NMSC-002, ¶¶ 6-8, 106 N.M. 664, 748 P.2d 507. Whether an employee handbook or personnel manual modifies a preexisting employment contract is a fact question "to be discerned from the totality of the parties' statements and actions regarding the employment relationship." *Id.* ¶ 7 (internal quotation marks and citation omitted).

Although an employer is not required to issue a personnel manual, once an employer makes the unilateral decision to issue a manual and by its language or other action, encourages employees' "reliance thereon, the employer cannot be free to only selectively abide by it . . . [or] treat it as illusory." *Lukoski*, 1988-NMSC-002, ¶ 7.

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. *See Sanchez v. The New Mexican*, 1987-NMSC-059, ¶ 12, 106 N.M. 76, 738 P.2d 1321 (holding the language in the handbook was of a non-promissory nature and was merely the declaration of the employer's general approach to the subject matter discussed, thus no implied employment contract was created). 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 Prods. Corp.*, 1989-NMSC-050, ¶ 11, 108 N.M. 643, 777 P.2d 371.

A public employee's property interest in continued employment under a personnel manual must be clearly established at the time of discharge. *Cockrell v. Bd. of Regents of N.M. State Univ.*, 1999-NMCA-073, ¶ 11, 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 a [public] employee's rights of continued employment under the manual. *Id.* ¶ 22.

All contracts with governmental entities must be in writing. *Carrillo v. Rostro*, 1992-NMSC-054, ¶ 12, 114 N.M. 607, 845 P.2d 130; *see* NMSA 1978, § 37-1-23(A) (limiting immunity for governmental entities on "actions based on a valid written contract"). 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, ¶ 19, 121 N.M. 728, 918 P.2d 7.

Provisions Regarding Fair Treatment

There is no New Mexico statutory law on this issue. Retaliatory discharge is a narrow exception to the employment at-will doctrine in New Mexico. *Sherrill v. Farmers Ins. Exch.*, 2016-NMCA-056, ¶ 9, 374 P.3d 723. 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.* Employers maintain the right to terminate employees at-will "[i]n the absence of a clearly mandated public policy." *Id.* ¶ 16. To succeed in New Mexico on a retaliatory discharge claim, a "plaintiff must identify a specific expression of public policy which the discharge violated." *Id.* ¶ 17. As an example, the New Mexico Court of appeals has held that the New Mexico Insurance Code's prohibition of unfair claims practices embodies a clear expression of public policy sufficient to support a claim of retaliatory discharge. *Id.* ¶ 33; *see* NMSA 1978, § 59A-16-20 (prohibiting unfair and deceptive practices by an insurer).

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

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, ¶ 10, 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 create any reasonable expectation of an implied contract. *Id.* ¶ 12; *see also Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶ 23, 131 N.M. 607, 41 P.3d 333 (concluding that the express language of the employment manual did not create a reasonable expectation of an implied contract). An employer who has consistently acted in certain ways in accordance with a personnel policy may not later rely on contractual disclaimers, as an employee may infer that the employer will continue to follow its "norms of conduct." *McGinnis v. Honeywell, Inc.*, 1990-NMSC-043, ¶¶ 16, 18, 110 N.M. 1, 791 P.2d 452 (quoting *Zaccardi v. Zale Corp.*, 856 F.2d 1473, 1476–77 (10th Cir. 1988)).

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. Wash. Tru Sols., LLC*, 2010-NMCA-001, ¶¶ 17, 28, 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 ("[E]ven 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 a 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, ¶¶ 11-12, 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.* ¶ 20.

Implied Covenants of Good Faith and Fair Dealing

There is an implied covenant that an employer will deal fairly and in good faith in every case where the court determines that there is an express or implied employment contract. *Bourgeous v. Horizon Healthcare Corp.*, 1994-NMSC-038, ¶¶ 15-16, 117 N.M. 434, 872 P.2d 852 (recognizing a cause of action for breach of an implied covenant of good faith and fair dealing). However, the implied covenant of good faith and fair dealing does not apply to at-will employment. *Id.*; *see Callahan v. N.M. Fed'n of Teachers-TVI*, 2006-NMSC-010, ¶ 22, 139 N.M. 201, 131 P.3d 51 ("While we do not recognize breach of an implied covenant of good faith and fair dealing as a cause of action in New Mexico in at-will employment relationships, we have recognized breach of an implied covenant of good faith and fair dealing in employment agreements that are not at-will." (citations omitted)).

Public Policy Exceptions

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, 913 P.2d 262. The New Mexico Court of Appeals in *Vigil v. Arzola* recognized a cause for retaliatory discharge sounding in tort, explaining that

> a cause of action should exist when the discharge of an employee contravenes some clear mandate of public policy. We do not abrogate the at will rule; we only limit 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. Because the claim in most instances will assert serious misconduct, proof must be made by clear and convincing evidence.

1983-NMCA-082, ¶¶ 23, 27, 30, 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,.

In *Chavez v. Manville Products Corporation*, the New Mexico Supreme Court overruled the *Vigil* court's limitation on recovery and requirement for clear and convincing evidence for retaliatory discharge claims and held that claims shall be proved by a preponderance of the evidence and permitted emotional distress damages to be sought. *Chavez*, 1989-NMSC-050, ¶¶ 26, 28, 108 N.M. 643, 777 P.2d 371.

In New Mexico, courts determine on a case-by-case basis whether an employee has stated a sufficient public policy to support a retaliatory discharge claim. *See Garrity v. Overland Sheep Co.*, 1996-NMSC-032, ¶ 24, 121 N.M. 710, 917 P.2d 1382 (concluding that report of drug abuse by supervisor was not sufficient public policy to support a retaliatory discharge claim). 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 where there is no legislative expression of public policy, 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; *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 Co.*, 310 F.Supp.3d 1271, 1318 (D.N.M 2018) (noting the violation of company policy is not "an act that public policy has authorized or would encourage" (internal quotation marks and citation omitted)).

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. 2001-NMSC-003, ¶ 27, 130 N.M. 25, 16 P.3d 1084; *see also Leach v. N.M. Junior Coll.*, 2002-NMCA-039, ¶ 28, 132 N.M. 106, 45 P.3d 46 (evaluating employee's demonstration that the speech at issue on his retaliatory discharge claim pursuant to Section 1983 constituted a matter of "public concern" (internal quotation marks omitted)).

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; *see also Carrillo v. Rostro*, 1992-NMSC-054, ¶¶ 41–47, 114 N.M. 607, 845 P.2d 130 (noting the "intertwinement" of the "*Pickering* balancing" with the requirement for clarity to a reasonable official that their actions violate an employee's free speech rights and concluding that the "Gordian know that would be practically impossible to cut" between the intertwinement was not present in this matter because there was nothing in the record to support the employer-official's claims that the plaintiff's remarks undermined the official's authority, chilled relations, "or otherwise impeded the efficient functioning of the school district).

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, ¶ 6, 117 N.M. 91, 869 P.2d 279. An employee who alleges wrongful discharge in retaliation for filing a workers' compensation claim is entitled to other civil remedies and not limited to the remedy of reinstatement and civil penalty as provided by the provisions of the Workers' Compensation Act. *Id.* at ¶¶ 9–15; *see also* NMSA 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 at-will employee because the employee filed a discrimination complaint with the Human Rights Division of the New Mexico Department of Labor pursuant to the New Mexico Human Rights Act may also be sued in tort for retaliatory discharge. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶¶ 2, 11–12, 117 N.M. 441, 872 P.2d 859; *contra Silva v. Am. Fed'n of State, Cnty., and Mun. Emps.*, 2001-NMSC-038, ¶ 1, 131 N.M. 364, 37 P.3d 81 (concluding that an employee who is not employed at-will may not "pursue an action for the tort of retaliatory discharge under the public policy exception" (internal quotation marks and citation omitted)).

3. Refusing to Violate the Law

In *Lihosit v. I & W, Inc.*, employee filed suit against his employer for retaliatory discharge, claiming he was fired because he refused to exceed the maximum number of driving hours allowed under New Mexico law. 1996-NMCA-033, ¶ 1, 121 N.M. 455, 913 P.2d 262. The trial court granted summary judgment to employer after finding that it "did not have knowledge of [employee's] alleged reasons for failing to report to work and, therefore, the termination was not in retaliation for engaging in a protected activity." *Id.* ¶ 6. The New Mexico Court of Appeals affirmed the grant of summary judgment because employee could not "prove the causal connection necessary to sustain a claim for retaliatory discharge" as he did not claim that his employer "had any knowledge of his contention that further driving on

[the date in question] would violate state law. *Id.* ¶¶ 12, 21. An "employer's motive is a key element of retaliatory discharge," and while actual knowledge of an employee's engagement in a protected activity is not required, "there must be some evidence that the employer was aware, either by suspicion or actual knowledge" of it to succeed on a retaliatory discharge claim. *Weidler v. Big J Enters., Inc.*, 1998-NMCA-021, ¶ 25, 124 N.M. 591, 953 P.2d 1089 (quoting *Lihosit v. I & W, Inc.*, 1996-NMCA-033, ¶ 12, 121 N.M. 455, 913 P.2d 262).

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-NMCA-156, ¶ 19, 117 N.M. 41, 868 P.2d 1266.

In *Garrity v. Overland Sheepskin Company 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. 1996-NMSC-032, ¶¶ 16-17, 121 N.M. 710, 917 P.2d 1382. An employee "must also demonstrate that his or her actions furthered the public interest rather than served primarily a private interest." *Id.* ¶ 18. An employee is not required to establish a good faith belief that their employer committed a crime but rather that the employer's actions were improper or in violation of law. *Dart v. Westall*, 2018-NMCA-061, ¶¶ 6-7, 17, 428 P.3d 292 (reviewing the sufficiency of the evidence based on uncontested jury instructions); *see Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶¶ 35, 38, 484 P.3d 970 (concluding the employee's "communications were based on a reasonable belief that a waste of funds was imminent," affirming the jury's determination that employee acted in good faith, and that the evidence presented "supported a reasonable conclusion that [employee's] communications pertained to a good-faith belief about gross mismanagement" by her employer).

Distinct from the common law retaliatory discharge cause available under *Garrity*, 1996-NMSC-031, for private employment relationships, communications by a public employee may be separately protected by New Mexico's Whistleblower Protection Act. *Lerma v. State*, ___-NMCA-___, ¶ 16, ___-P.3d-___, 2023 WL 5696175 (explaining that *Garrity* concerns protected communications applicable to common law retaliatory discharge claims and the protections afforded by the Whistleblower Protection Act applicable to public employees and employers).

The New Mexico Whistleblower Protection Act (NMWPA), NMSA 1978, §§ 10-16C-1 to -4, forbids public employers from, among other things, "taki[ing] any retaliatory action against a public employee because the public employee . . . 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[.]" Section 10-16C-3(A). Although the NMWPA has been interpreted as similar to the Federal Whistleblower Protection Act, federal authority is rarely persuasive on the issue in New Mexico state courts. *See Lerma v. State*, ___-NMCA-___, ¶ 13, ___-P.3d-___, 2023 WL 5696175 ("New Mexico's courts do not necessarily follow federal whistleblower precedent."); *Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶¶ 31, 484 P.3d 970 (declining to follow federal precedent

due to "material differences between the plain language of the state and federal" whistleblower protection statutes); *but 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). There is no limitation under the NMWPA that requires, as there would be for common law retaliatory discharge as in *Garrity*, that a public "employee's actions furthered some singularly public purpose." *Lerma v. State*, ___-NMCA-___, ¶¶ 17-18, ___-P.3d-___, 2023 WL 5696175; *see* UJI 13-2321 to -27 NMRA (stating no requirement pursuant to NMWPA that a plaintiff prove that a communication benefit the public); *see Burke v. New Mexico*, 696 Fed.Appx 325, 335-36 (10th Cir. 2017) (unpublished) (concluding that a "plausible" claim pursuant to the NMWPA was made by allegations that the employee (1) notified employer about security concerns, gender harassment, and code violations, (2) soon afterwards had her job assignments restructured, and (3) suffered damage to her credibility and reputation).

Under the Whistleblower Protection Act, a public employer is prohibited from taking any retaliatory action against a public employee because the public employee:

> (A) 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;
>
> (B) provides information to, or testifies before, a public body as part of an investigation, hearing or inquiry into an unlawful or improper act; or
>
> (C) objects to or refuses to participate in an activity, policy or practice that constitutes an unlawful or improper act.

§ 10-16C-3 (2010). *See Lerma v. State*, ___-NMCA-___, ¶¶ 10-13, ___-P.3d-___, 2023 WL 5696175 (rejecting employer's arguments that no protection was afforded by the NMWPA to the communications at issue because the NMWPA "broadly protects communications to the public employer or a third party and . . . does not exclude communications made through normal channels or as part of the employee's ordinary duties" (alterations, internal quotation marks, and citation omitted)).

An "unlawful or improper act" is defined by the NMWPA 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.

§ 10-16C-2(E). If a public employer violates the NMWPA, a public employee may bring a private cause of action against the public employer in their official capacity. § 10-16C-4; *Flores v. Herrera*, 2016-NMSC-033, ¶¶ 12-13, 384 P.3d 1070 (discussing the liability created by NMSA 1978, Section 10-16C-4 against a public employer in their official capacity).

The right of action created by the NMWPA "runs against a state officer only in his or her official capacity," and there is no "right of action against a current or former state officer in his or her personal capacity." *Flores v. Herrera*, 2016-NMSC-033, ¶¶ 11-12, 384 P.3d 1070. An action pursuant to the NMWPA permits "a public employee who suffers a violation of his or her right against retaliatory action" to seek recovery "directly from a state entity." *Id.* ¶ 14. A public employer who violates the NMWPA becomes liable for "actual damages, reinstatement [of the employee] with the same seniority status that the employee would have had but for the violation, 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.* ¶ 9 (quoting NMSA 1978, Section 10-16C-4(A)). An employer found liable under the NMWPA shall also be required to pay to an employee litigation costs and reasonable attorney fees. § 10-16C-4(A) ("In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees of the employee."); *see Maestas v. Town of Taos*, 2020-NMCA-027, ¶ 20, 464 P.3d 1056 (concluding that attorneys fees under the NMWPA are awarded when a public employer is found to have violated the Act). The employer, however, may allege as affirmative defenses that their action "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" prohibited conduct and "retaliatory action was not a motivating factor." § 10-16C-4(B).

The NMWPA does not preclude civil or criminal actions "for libel, slander or other civil or criminal claims" against persons who file false claims under the NMWPA. § 10-16C-4(D) (2010). The statute of limitations for a claim under the NMWPA is "two years from the date on which the retaliatory action occurred." § 10-16C-6 (2010).

III. CONSTRUCTIVE DISCHARGE

Constructive discharge of an employee occurs when the employer makes working conditions objectively intolerable that a reasonable employee would feel compelled to resign. *Gormley v. Coca-Cola Enters.*, 2005-NMSC-003, ¶ 10, 137 N.M. 192, 109 P.3d 280 (citing *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986)). Constructive discharge is "a doctrine that permits an employee to recast a resignation as a de facto firing," and is not an independent cause of action. *Id.* ¶ 9. Proof of constructive discharge by a resigning employee is part of their establishment of a wrongful termination. *Id.* "The bar is quite high for proving constructive discharge;" "Essentially, a plaintiff must show that she had no other choice but to quit." *Id.* ¶ 10 (internal quotation marks and citations omitted). Generalized claims of criticism by an employer and "[m]ere speculation" about potential—but unrealized—injury through duties reassigned are not sufficient to establish constructive discharge. *Id.* ¶¶ 16-17.

Determining whether a claim rises to the level of constructive discharge depends on "the specific facts of the employment condition, and the severity of its impact upon the employee." *Id.* ¶ 12.. Actions by an employer against an employee that may rise to the level of constructive discharge include "a humiliating demotion, extreme cut in pay, [] transfer to a position in which the employee would face unbearable working conditions[,] . . . [threatening termination,] overt pressure to resign and accept early retirement[,] . . . and retaliatory measures." *Id.* ¶ 11. 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. *See id.* ¶ 9 (noting the plaintiff had to prove constructive discharge to pursue compensatory damages for his breach of contract claim).

In *Gormley*, an employer assigned an employee to lighter duties and promised the employee he would continue with 55 hour work-weeks so that his income would remain the same. *Id.* ¶ 2. Approximately four years later, a new supervisor, "implementing a policy to reduce overtime hours for all employees," reduced the employee's hours by increments of five resulting in a 45-hour work-week for employee. *Id.* ¶ 3. The employee resigned and later filed suit, alleging, among other things, breach of implied employment contract, constructive discharge. and wrongful termination. *Id.* ¶ 5. The New Mexico Supreme Court held that the reduction in the employee's working hours and overtime pay, change in duties, and the alleged criticism by the employee's manager did not give rise to a genuine issue of material fact to support his claim of constructive discharge. *Id.* ¶¶ 14-18, 21-22.

In another case, New Mexico State University appealed a jury verdict in favor of Plaintiff, a teaching assistant, on her claims of retaliation and constructive discharge. *Charles v. Regents of N.M. State Univ.*, 2011-NMCA-057, ¶1, 150 N.M. 17, 256 P.3d 29. Plaintiff presented testimony that, over the course of her employment, her supervisor engaged in (1) verbal abuse, including sexually suggestive comments, (2) intimidation, (3) unfair criticism, and (4) conduct that included slamming drawers and cabinets; some of this conduct occurred in front of students. *Id.* ¶ 18. The New Mexico Court of Appeals held that the evidence set forth by Plaintiff was sufficient to sustain the verdict of the jury and rejected Defendant's argument that because Plaintiff remained in her employment and tolerated the behavior for a significant period during her search for another job, her evidence was insufficient to merit constructive discharge, and noted that there is no "time within which an employee must leave to complain of constructive discharge." *Id.* ¶¶ 20, 23.

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. *See Harbarger v. Frank Paxton Co.*, 1993-NMSC-029, ¶ 19, 115 N.M. 665, 857 P.2d 776 (refusing to consider an employer's usual practice of firing employees for "a good reason"). The New Mexico Supreme Court has explicitly stated that, "[a]s a matter of policy," it "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 employment policy." *Id.*

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 exists. *See Sisneros v. Citadel Broad. Co.*, 2006-NMCA-102, ¶ 13, 140 N.M. 266, 142 P.3d 34; *see also Flemma v.*

Halliburton Energy Servs. Inc., 2013-NMSC-022, ¶ 26, 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 Fin, Mgmt. Corp.*, 2016 WL 5946912, *6-7 (D.N.M. Sept. 9, 2016) (concluding that because employer did not have unfettered right to unilaterally amend or terminate the employment agreement, mutual agreement to arbitrate constituted adequate consideration for a valid arbitration agreement); *SRI of N.M., LLC v. Hartford Fire Ins. Co.*, 2015 WL 12803774, *4 (D.N.M. June 26, 2015) (explaining that unlike in *Flemma*, 2006-NMCA-102, because the arbitration clause was part of the original agreement that was supported by consideration, the agreement to arbitrate did not fail for lack of separate consideration despite the employer's ability to unilaterally invoke arbitration).

The scope of an arbitration proceeding is governed by the terms of the arbitration agreement that are interpreted according to the plan language used and contract law principles. *See Horanburg v. Felter*, 2004-NMCA-121, ¶ 8, 136 N.M. 435, 99 P.3d 685. "Generally, a party who executes and enters into 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." *Smith v. Price's Creameries, Div. of Creamland Dairies, Inc.*, 1982-NMSC-102, ¶ 13, 98 N.M. 541, 650 P.2d 825. New Mexico law reflects a public policy in favor of arbitration agreements. *United Tech. and Res., Inc. v. Dar Al Islam*, 1993-NMSC-005, ¶ 11, 115 N.M. 1, 846 P.2d 307; *see Patterson v. Nine Energy Service, LLC*, 355 F.Supp.3d 1065, 1088, (D.N.M. 2018) ("Both federal and New Mexico law reflect a public policy in favor of arbitration agreements."). "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." *Patterson*, 355 F.Supp.3d at 1092 (internal quotation marks and citation omitted). Arbitration agreements, like other contracts, may be invalidated by generally applicable contract defenses (e.g., fraud, duress, or unconscionability). *Id*. at 1096.

"Generally, third parties who are not signatories to an arbitration agreement are not bound by the agreement and are not subject to, and cannot compel, arbitration." *Horanburg*, 2004-NMCA-121, ¶ 16. The New Mexico Court of Appeals in *Horanburg v. Felter* noted federal courts' exceptions, pursuant to the doctrine of equitable estoppel, to the general rule that a non-signatory cannot compel arbitration. *Id.* ¶ 17. The Court held that the equitable estoppel exceptions did not apply because the plaintiff's claims against a co-worker were not alleged to be derived from the agreement between plaintiff and employer and the conduct alleged against co-worker did not meet the type of conduct applicable for the exception. *Id.* ¶¶ 2, 17-18. 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.* ¶ 19.

C. General

In *Giangreco v. Murlless*, the plaintiff, a nontenured schoolteacher, had been provided with a written memorandum that noted his supervisors' recommendation to the school board for his retention. 1997-NMCA-061, ¶ 2, 123 N.M. 498, 943 P.2d 532. Shortly after, plaintiff's supervisors indicated that their recommendation had changed and plaintiff would no longer be recommended for reemployment. *Id.* Plaintiff then attempted to respond to the initial memorandum, stating his "intention to accept [their] offer of employment" for the next schoolyear. *Id.* Plaintiff was not rehired and sued, claiming that a binding contract was created from the initial offer. *Id.* ¶¶ 2-3. 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. *Id.* ¶ 5; *see* NMSA 1978, § 22-10A-22 (offers of reemployment or termination are served by the school superintendent); *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 Expl. Co., 1996-NMSC-016, ¶ 20, 121 N.M. 622, 916 P.2d 822.

In *Chavez v. Manville Products Corporation*, an at-will employee sued his employer for breach of an oral contract, alleging that he was provided with express assurances contrary to a written employment contract. 1989-NMSC-050, ¶¶ 1, 8–9, 108 N.M. 643, 777 P.2d 371. 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." *Id.* ¶ 15.

B. Fraud

There is no direct New Mexico case law on the issue of fraud and oral agreements regarding employment. *But see Jones v. Auge*, 2015-NMCA-016, ¶¶ 25-27, 29-30, 34-37, 344 P.3d 989 (holding that the oral representations that all shareholder agreements contained the same terms constituted fraud for which representing shareholder could be liable to other shareholders and the employment agreement procured through fraud in the inducement was voidable).

C. Statute of Frauds

Generally, whether the statute of frauds is applicable as a defense is question of law for the court that the party seeking to use the defense has the burden of pleading and proving. *Kestenbaum v. Pennzoil Co.*, 1988-NMSC-092, ¶ 10, 108 N.M. 20, 766 P.2d 280. A court may be prevented from ruling as a matter of law on the applicability of the statute of frauds when there is "a factual question concerning the particulars of a contract." *Id.* The statute of frauds does not apply to a contract for employment until retirement. *Id.* ¶ 9. In *Kestenbaum*, the employee alleged his contract was for permanent employment and the court explained that it could not 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.* (quoting *Hodge v. Evans Fin. Corp.* 823 F.2d 559, 564 (D.C. Cir. 1987)). Indefinite permanent employment contracts, as the *Kestenbaum*-employee's, are not subject to the statute of frauds "because they are capable of full performance within one year," and "the possibility of the employee's death within one year" does not "defeat" or "complete" such a contract. *Id.* (internal quotation marks and citation omitted).

D. General

In *Garrity v. Overland Sheepskin Company of Taos*, the plaintiffs argued that the defendant fired them in violation of an oral employment contract. 1996-NMSC-032, ¶ 9, 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," and plaintiffs did not allege that defendant "even made any promises to them that they could be fired only for just cause." *Id.* ¶ 9. The plaintiffs merely "had a general feeling" that if they did good work, they would always have a job with defendant. *Id.* The court stated that "a vague impression or general feeling of continued employment is not sufficient to create an employment contract." *Id.* ¶ 10.

A municipal 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, ¶ 8, 106 N.M. 620, 747 P.2d 915.

VI. DEFAMATION

A. General Rule

Words will not be considered defamatory when the language is fairly susceptible to "an innocent interpretation" unless "their plain and obvious import" is of a defamatory character. *Monnin v. Wood*, 1974-NMCA-069, ¶ 12, 86 N.M. 460, 525 P.2d 387; *see Lopez v. Kline*, 1998-NMCA-016, ¶ 19, 124 N.M. 539, 953 P.2d 304 (quoting *Monnin*, 1974-NMCA-069, ¶ 12). In a case where plaintiff's former employer provided statements to a prospective employer that were allegedly defamatory, plaintiff sued former employer for defamation. *Lopez*, 1998-NMCA-016, ¶¶ 17-18. The court held that plaintiff did not show that the alleged statements were defamatory or that her failure in being hired was proximately caused by the statements. *Id.* ¶¶ 19–20 ("Proximate cause is an element of defamation."). Ignorance is a valid defense to a claim of defamation. *Young v. Wilham*, 2017-NMCA-087, ¶ 38, 406 P.3d 988.

1. 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, ¶¶ 9, 16, 81 N.M. 608, 612, 471 P.2d 178, 182, *overruled on other grounds by Marchiondo v. Brown*, 1982-NMSC-076, ¶ 59, 98 N.M. 394, 649 P.2d 462. At present, the Uniform Jury Instructions in New Mexico do not distinguish between libel and slander. UJI 13-1001 NMRA comm. cmt; UJI 13-1001 use note ("The term 'defamation' is to be used throughout the instructions instead of 'libel' or 'slander.' Where the law varies depending upon whether written or spoken defamation is involved, the judge will select the appropriate instruction from among those contained herein. The jury need not be made aware of the distinction."). 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)(1).

B. References

An employer is immune from liability when, acting in good faith and by request they "provide a reference on a former or current employee," and "comments about the former employee's job performance." NMSA 1978, § 50-12-1. The immunity does not apply when the reference information supplied by the employer was "knowingly false or deliberately misleading, [] rendered with malicious purpose or violated any civil rights of the former employee." *Id.* This immunity is a conditional privilege. *DiMarco v. Presbyterian Healthcare Servs., Inc.*, 2007-NMCA-053, ¶ 10, 141 N.M. 735, 160 P.3d 916.

A former employer is conditionally privileged, at common law, "when it provides information about a former employee to another person who has an interest in the subject matter of the information." *DiMarco*, 2007-NMCA-053, ¶ 10, 141 N.M. 735, 160 P.3d 916. Public policy encourages employers to fully and accurately disclose non-confidential information; when an employer fails to act in such good faith, they lose the conditional privilege of immunity for their statements. *Id.* ¶¶ 10, 15; *Baker v. Bhajan*, 1994-NMSC-028, ¶ 20, 117 N.M. 278, 871 P.2d 374 ("A conditional or qualified privilege will be lost if it is abused.").

The New Mexico Court of Appeals considered whether an employer owes prospective employers and foreseeable third persons a duty of reasonable care 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. Bd. of Cnty. Comm'rs of Doña Ana Cnty.*, 1999-NMCA-110, ¶ 13, 127 N.M. 785, 987 P.2d 1172. The *Davis* Court, adopting the Restatement, held that an employer who "negligently gives false information to another is subject to liability for physical harm caused by action taken on the other in reasonable reliance upon such information" where the harm is to the other

taking the information or other third persons foreseeably "put in peril by the action taken." *Id*. ¶¶ 18, 20. "Such negligence may consist of failure to exercise reasonable care (a) in ascertaining the accuracy of the information, or (b) in the manner in which it is communicated." *Id*. ¶ 18. Applying these rules to the matter at hand, the Court held that (1) the battery and assault suffered by the plaintiff was not "too remote" or "unforeseeable" to foreclose the claims made by plaintiff and (2) employers' owed a duty of care, when they decided to act by making employment recommendations, to the plaintiff as a third-party victim. *Id.* ¶¶ 21-22. 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.* ¶ 21.

The granting of summary judgment on a claim for defamation is generally improper where a plaintiff has come forward with evidence of a defamatory statement by a former employer presents an issue of fact. *See Silverman v. Progressive Broad., Inc.*, 1998-NMCA-107, ¶¶ 22-26, 125 N.M. 500, 964 P.2d 61 (reversing the grant of summary judgment on plaintiff's defamation claim 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.* ¶¶ 23-24. 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 ("If . . . the communication is only to a person who knows that the communication is false, then there has been no publication."); *see Martinez v. Sears, Roebuck & Co.*, 1970-NMCA-029, ¶ 11, 81 N.M. 371, 467 P.2d 37 ("It is not sufficient that plaintiff testified that people were looking and watching, for the burden of proof is not met unless the allegedly slanderous words were shown to have been in fact overhears." (internal citation marks omitted)).

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. 1982-NMSC-007, ¶¶ 7, 16-17, 97 N.M. 336, 639 P.2d 1190. The New Mexico Supreme Court stated the "[o]ne form of qualified privilege" that serves as a defense to a defamation claim "exists where there is a good faith publication in the discharge of a public or private duty." *Id.* ¶ 16. "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.*

New Mexico declined to adopt an absolute privilege on intracorporate communications and elected to adopt a qualified privilege that bars defamation lawsuits based on intracorporate communications when defamatory statements are made in good faith. *Hagebak v. Stone*, 2003-NMCA-007, ¶¶ 12-22, 133 N.M. 75, 61 P.3d 201 (adopting the Restatement (Second) of Tort position).

An employee's written agreement not to sue persons who provide information to prospective employers evidences their consent to such disclosure and 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.

D. Other Defenses

1. Truth

"[T]ruth is a complete defense to a defamation claim. *Jaramillo v. Gonzales*, 2002-NMCA-072, ¶ 32, 132 N.M. 459, 50 P.3d 554 (citing *Newberry v. Allied Stores, Inc.*, 1989-NMSC-024, ¶ 18, 108 N.M. 424, 773 P.2d 1231, characterizing the "traditional rule in New Mexico" as an affirmative defense to a defamation claim).

2. No publication

If a communication is not published, there can be no defamation. *See Bookout v. Griffin*, 1982-NMSC-007, ¶15, 97 N.M. 336, 639 P.2d 1190; UJI 13-1003 NMRA ("To support a claim for defamation, there must be a publication."). Publication is required because a statement that is "neither seen nor heard by a third party, cannot cause harm to one's reputation." *Hagebak v. Stone*, 2003-NMCA-007, ¶ 5, 133 N.M. 75, 61 P.3d 201.

3. Self-Publication

Self-publication as an actionable form of defamation is not recognized in New Mexico. *De la Rosa v. Southwest Cmty. Health Servs., Inc.*, No. 21,277, 1994 WL 841126, at *4 (Supreme Court of New Mexico, Oct. 20, 1994) ("New Mexico is aligned with the majority of states that do not recognize self-publication as an actionable form of defamation.").

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-NMCA-123, ¶ 10, 92 N.M. 465, 589 P.2d 1056. An employer asked "to provide a reference about a former or current employee" 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) ("Employer immunity from liability for references on former employee.").

5. Opinion

Mere opinion statements are not actionable for defamation. *Fikes v. Furst*, 2003-NMCA-006, ¶ 17, 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 ("[S]tatements of opinion alone cannot give rise to a finding of defamation."). Opinion statements that imply the existence of underlying facts, however, are actionable. *See Kutz v. Indep. Publ'g Co., Inc.*, 1981-NMCA-147, ¶6, 97 N.M. 243, 638 P.2d 1088 ("If it is opinion only it is a privileged communication; but if it is a false statement of fact, it is not worthy of constitutional protection and it may subject the publisher to liability." (internal quotation

marks and citations omitted)); UJI 13-1004 ("However, an opinion which implied that it is based upon the existence of undisclosed facts is the same as a statement of fact.").

The common law "defense of fair comment is predicated upon the principle that the interest of society are furthered through a free discussion of public affairs and matters of public interest." *Coronado Credit Union v. Koat Television, Inc.*, 19820NMCA-176, ¶ 35, 99 N.M. 233, 656 P.2d 896 (internal quotation marks and citation omitted). To fall within the purview of the defense, "it must be shown that the publication relates to a matter of public interest; that it does not impute dishonorable motives to its subject; and that it must constitute an expression of opinion on based truly-stated facts." *Id.* (internal quotation marks and citation omitted). The "fair comment" defense is a conditional privilege and requires that subject "comments [] be substantially accurate and complete or constitute a fair abridgement." *Id.* ¶ 44.

There is absolute immunity from liability for defamation that takes place during the course of labor-grievance arbitration proceedings. *Neece v. Kantu*, 1973-NMCA-020, ¶¶ 29, 34, 84 N.M. 700, 507 P.2d 447.

In a defamation case, the statute of limitations period of three years runs from the point of publication of the defamatory statement. *Woodhull v. Meinel*, 2009-NMCA-015, ¶ 8, 145 N.M. 533, 202 P.3d 126. A statement is considered to be "published" when it becomes available to the public. *Id.*

6. Actual Harm to Reputation Recognized

While proof of actual damages in a defamation claim "will be impossible in a great many cases," actual harm to reputation is a necessary element of defamation in New Mexico. *Smith v. Durden*, 2012-NMSC-010, ¶¶ 34-36, 276 P.3d 943.

E. Job References and Blacklisting Statutes

Blacklisting occurs when "an employer or his agent prevent[s] or attempt[s] to prevent a former employee from obtaining other employment;" One who engages in blacklisting is guilty of a misdemeanor. NMSA 1978, § 30-13-3 (1963). *see Andrews v. Sterns-Roger, Inc.*, 1979-NMSC-089, ¶¶ 19-22, 93 N.M. 527, 602 P.2d 624 (reversing the dismissal of employees' tort action derivative of the blacklisting statute because issues of material fact existed as to whether the employer had committed a tort against the plaintiffs by blacklisting them). *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 requires that "(1) the conduct in question was extreme and outrageous; (2) the conduct of the defendant was intentional or in reckless disregard of the plaintiff; (3) the plaintiff's mental distress was extreme and severe; and (4) there is a causal connection between the defendant's conduct and the claimant's mental distress." *Trujillo v. N. Rio Arriba Elec. Co-op, Inc.*, 2002-NMSC-004, ¶ 25, 131 N.M. 607, 41 P.3d 333. Failing to meet any one of the requisite elements will defeat the claim. *Id.* ¶ 27.

"[O]nly in extreme circumstances can the act of firing an employee support a claim of intentional infliction of emotional distress." *Id.* ¶ 27 ("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.'"). Evidence that an employee was offended by being called "Sir" in his termination letter, resented being fired, felt "lousy and depressed" and was prescribed Prozac, and employee's spouse described him as being depressed, sleeping long hours, and having erratic eating habits during the period after he was fired, was insufficient to support the requisite severity to establish a claim of intentional inflictions of emotional distress. *Id.* ¶ 28.

In order to satisfy a claim for intentional infliction of emotional distress, a defendant's conduct must have been extreme, outrageous, "beyond all possible bounds of decency and utterly intolerable in a civilized community," In that "a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances." *See id.* ¶¶ 27-28 (internal quotation marks omitted).

Punitive damages on a claim for intentional infliction of emotional distress may be warranted when "the misconduct was malicious, willful, reckless, wanton, fraudulent, or in bad faith." *Coates v. Wal-Mart Stores, Inc.*, 1999-NMSC-013, ¶47, 127 N.M. 47, 976 P.2d 999. The New Mexico Supreme Court upheld an award of punitive damages against an employer for intentional infliction of emotional distress where evidence supported that the conduct of an employee was witnessed and condoned "by high level supervisory personnel." *Id.* ¶ 48; *but see Garcia-Montoya v. State Treasurer's Off.*, 2001-NMSC-003, ¶¶ 49-50, 130 N.M. 25, 16 P.3d 1084 (holding state officials were entitled to qualified immunity from former employee's claims of intentional infliction of emotional distress pursuant to the New Mexico Tort Claims Act, NMSA 1978, § 41-4-4(A) (2001), because the former employee failed to specify any actions "requested, required, or authorized" to be performed (internal quotation marks omitted)).

Where an employee is covered by a collective bargaining agreement, thus eliminating a claim for retaliatory discharge, a claim of intentional infliction of emotional distress derivative of retaliatory discharge is unavailable to the employee. *Vigil v. Pub. Serv. Co. of N.M.*, 2004-NMCA-085, ¶¶ 15-18, 136 N.M. 70, 94 P.3d 813 (declining to reach the issue of whether evidence was sufficient to support a claim of intentional infliction of emotional distress because employee could not lodge a claim for retaliatory discharge).

In *Weise v. Washington Tru Solutions, L.L.C.*, the New Mexico Court of Appeals held that a former employee who was an active member of the PACE union could not make a claim for intentional infliction of emotional distress because the National Labor Relations Act

("NLRA") preempted the claim. 2008-NMCA-121, ¶ 19, 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.* ¶¶ 7–12.

B. Negligent Infliction of Emotional Distress

At this time, the cause of action for negligent infliction of emotional distress ("NIED") is limited to "bystander" recovery in New Mexico. *See Baldonado v. El Paso Natural Gas Co.*, 2008-NMCA-010, ¶¶ 3, 21, 143 N.M. 297, 176 P.3d 286 (explaining that plaintiff firefighters could not establish a claim for NIED absent "a close marital or family relationship with the third-person victim"). NIED is an extremely narrow tort. *Id.* ¶ 21. The threshold requirements to establish the "genuineness" of an NIED claim are (1) the existence of a marital or intimate familial relationship between the plaintiff and victim; (2) plaintiff suffered severe emotional trauma as "a consequence of contemporaneous sensory perception of the accident;" and (3) there was physical injury or death to the victim. *Folz v. State*, 1990-NMSC-075, ¶40, 110 N.M. 457, 797 P.2d 246.

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, ¶ 58, 119 N.M. 478, 892 P.2d 611 ("New Mexico recognizes the tort of invasion of privacy. The tort is generally broken down into four categories: false light, intrusion, publication or private facts, and appropriation." (citations omitted)).

The "false light" category of invasion of privacy is "a close cousin of defamation." *Moore v. Sun Pub. Corp.*, 1994-NMCA-104, ¶ 28, 118 N.M. 375, 881 P.2d 735 (quoting treatise summary). Defamation to a plaintiff is not, however, necessary for the action of invasion of privacy. *Id.* ¶ 30. "In the absence of proof of a specific false statement of fact," unfairness, improper tone, or unfounded implication or innuendo, even though they might sound as though they fit the phrase 'false light,' will no sooner support a recovery for false-light invasion of privacy than for defamation." *Andrews v. Stallings*, 1995-NMCA-015, ¶ 59, 119 N.M. 478, 892 P.2d 611 (alterations, internal quotation marks, and citation omitted). "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

The purpose of New Mexico's New Hire statute and database has been explained by the New Mexico Supreme Court:

> NMSA 1978, Sections 50-13-1 to -4 (1997), 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." Section 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. Neither the New Mexico New Hires statute or database is designed to perform employment eligibility verification. *Id.* (explaining employer did not receive work from New Mexico New Hires because the newly hired undocumented worker "did not owe child support or have any paternity issues").

1. Eligibility Verification & Reporting Procedures

New Mexico applies federal law regarding employers' duties for verifying eligibility and reporting. *See Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶¶ 27-28, 303 P.3d 802 (stating that federal Immigration Reform and Control Act imposes an affirmative duty on employers to determine that their employees are authorized for work). Employers are required by federal law 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-9[]s, within three business days of the date of hire." *Id.* (citation omitted). "An employer who complies with the requirements in good faith has an affirmative defense to any allegation that it has knowingly hired an illegal alien in violation of federal law." *Id.* (citation omitted).

2. Background Checks

NMSA 1978, Section 22-10A-5(C) (2023), The School Personnel Act, NMSA 1978, 22-10A-1 to -40.1 requires local school boards, regional education cooperatives, and other governing authorities "to develop policies and procedures to require criminal history record checks" on applicants who have been offered employment or who volunteer for schools, and contractors and their employees who work for a public school "who may have unsupervised contact with children or students on school premises." § 22-10A-5(C) (2023).

The New Mexico Children's and Juvenile Facility and Program Criminal Records Screening Act, NMSA 1978, §§ 32A-15-1 to -3, requires "[s]tate and national criminal history records checks . . . on all operators, staff, employees and volunteers," including on prospective persons seeking such roles, of child care facilities that have "primary custody of children for twenty hours or more per week." § 32A-15-3(A) (pertaining additionally to "juvenile detention, correction or treatment facilities"). The same criminal history records check "shall" be conducted on "prospective foster or adoptive parents." *Id.* Records obtained pursuant to the New Mexico Children's and Juvenile Facility and Program Criminal Records Screening Act are confidential and not subject to the Inspection of Public Records Act. § 32A-15-3(E). "A person who releases or discloses criminal history records or information

contained in those records in violation of the provisions of this section is guilty of a misdemeanor." § 32A-15-3(F).

New Mexico law also requires criminal history background checks for applicants seeking certification as a public accountant, NMSA 1978, § 61-28B-8.1 (2007), and for applicants seeking licensure as a real estate broker or salesman, NMSA 1978, § 61-29-4.4(A) (2019).

New Mexico law permits criminal background checks on individuals looking 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 (2019).

In most cases, where a background check is required prior to employment, the prospective employee must pay the cost of obtaining it. *See* NMSA 1978, § 61-28B-8.1(A)(2) (requiring applicants for certification pursuant to the 1999 Public Accountancy Act "pay the cost of obtaining the fingerprints and criminal history background checks); NMSA 1978, § 61-29-4.4(A)(2) (requiring applicants seeking licensure as a real estate broker or salesmen "pay the cost of obtaining the fingerprints and criminal history background checks").

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

In *Spencer v. Health Force, Inc.*, the Supreme Court of New Mexico held that employer owed a duty of care, both under the former caregivers criminal history screening statute and under common law theory of negligent hiring, to conduct criminal history background check before hiring a care giver. *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶¶ 8-9, 19, 137 N.M. 64, 107 P.3d 504 (considering a negligent hiring and retention claim). The court held that in this context, a questionable issue of fact arose as pertains to the element of breach of duty when the employer elected not to perform a criminal background check. *Id.* ¶¶ 22-25.

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

It is unlawful for an employer to request access to social networking accounts from prospective employees. NMSA 1978, § 50-4-34 (2013). Public and private institutions of post-secondary education are similarly prohibited from requesting or requiring a prospective

students to provide a password or access to the prospective employee's social networking account. NMSA 1978, § 21-1-46 (2013).

4. Taping of Employees

New Mexico case law has not addressed this issue. In the context of an employer investigating a peace-officer employee, an accurate transcript or tape of an investigation must be provided to the peace officer under investigation upon their request, suggesting that taping is permissible during an investigation of a peace officer. NMSA 1978, § 29-14-4 (1991).

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(C) (2020). New Mexico also recognizes the physician-patient and psychotherapist-patient privileges. *See* Rule 11-504 NMRA ("Physician-patient and psychotherapist-patient privilege.").

7. Restrictions on Requesting Salary History

New Mexico case law has not addressed this issue.

IX. WORKPLACE SAFETY

A. Negligent Hiring/Supervision/Retention

"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 (citing *Spencer v. Health Force, Inc.*, 2005-NMSC-002, ¶ 10, 137 N.M. 64, 107 P.3d 504).

"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, 34, 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).

A connection between the employer's business and the injured plaintiff must be present for an employer to be liable for negligent retention and hiring. *Spencer v. Health*

Force, Inc., 2005-NMSC-002, ¶ 22, 137 N.M. 64, 107 P.3d 504. Under common law, negligent hiring liability "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." *Id.* ¶ 10 (internal quotation marks and citation omitted). New Mexico recognizes "both an employer's common law duty for negligently hiring employees to those at risk of injury as a result of a hiring as well as an explicit statutory duty for agencies such as [home health care agencies] that provide home care services to the disabled." *Id.*

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 Ctr. Assocs., L.P.*, 2014-NMSC-014, ¶¶ 4-5, 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.* ¶¶ 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.* ¶ 25. Juries consider foreseeability when deciding whether there was a breach of duty. *Id.* ¶¶ 4, 22("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.").

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, ¶ 13, 118 N.M. 385, 881 P.2d 745. A prima facie showing of negligent supervision or retention in the context of hospital employment requires a plaintiff to establish that the employer "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.* ¶ 14.

Liability in tort for negligent supervision, hiring, or retention of an employee may exist on an individual or entity "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, ¶ 19, 116 N.M. 222, 861 P.2d 263. 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, 827 P.2d 859.

The New Mexico Tort Claims Act does not bar a claim against state police officers whose negligent supervision and training of their subordinates proximately causes the commission by subordinates of assault, battery, false arrest, and malicious prosecution. *Ortiz v. N.M. State Police*, 1991-NMCA-031, ¶¶ 1, 14, 112 N.M. 249, 814 P.2d 117.

B. 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. 1998-NMCA-021, ¶¶ 11-12, 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.* ¶ 44. The employee was entitled to worker's compensation benefits, lost wages, and emotional distress damages. ¶¶ 38–40.

The New Mexico Administrative Code requires all employers, as identified in NMSA 1978, § 52-1-6.2, to have a safety inspection once per year. 11.4.2.9(A)(1) NMAC. All other employers are encouraged to do so. *Id.* Section 11.4.2.10 NMAC requires accident notice posters be placed conspicuously on work premises that inform workers to notify their employers of accidents.

C. 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), -11 (courthouse).

D. 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 1978, § 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 (2010) (hands-free device required for all non-emergency calls while driving); Santa Fe City Code § 12-6-12.18(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, ¶ 17, 113 N.M. 471, 827 P.2d 859.

Under the doctrine of respondeat superior, an employer may be liable "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, 861 P.2d 263,.

The primary test to determine whether an employer-employee relationship exists for purposes of respondeat superior "whether the employer has the right to control the details of the work of the employee." *Tercero v. Roman Catholic Diocese of Norwich, Connecticut*, 2002-NMSC-018, ¶ 22, 132 N.M. 312, 48 P.3d 50. Secondary tests of the employment relationship 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." *Id.*.

New Mexico courts use a four-point test to consider whether an act was committed in the 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, ¶¶ 33-34, 115 N.M. 41, 846 P.2d 347. 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 ("Scope of employment; definition.").

The New Mexico Court of Appeals identified three required circumstances to impose vicarious liability on an employer for an employee's negligent actions while 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, ¶¶ 14-15, 142 N.M. 583, 168 P.3d 155.

B. Tortious Interference with Business/Contractual Relations

A claim of intentional interference with a contract cannot be brought by the contracting parties against each other. *Deflon v. Sawyers*, 2006-NMSC-025, ¶ 6, 139 N.M. 637, 137 P.3d 577. "A corporate officer acting outside the scope of authority . . . may be liable for interfering with a corporate contract." *Id.* ¶ 7. A corporate officer is, however, "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.* ¶ 8.

A cause of action for tortious interference with contractual relations is recognized in New Mexico. *El Dorado Utils., Inc. v. Eldorado Area Water & Sanitation Dist.*, 2005-NMCA-036, ¶ 24, 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, ¶ 14, 130 N.M. 67, 17 P.3d 440 (applying the elements to establish a tortious interference with a contract claim and stating that such establishment "is not easy").

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, ¶¶ 21-22, 134 N.M. 602, 81 P.3d 545.

A claim for tortious interference with contractual relations that does not result in a breach of an existing contract sits "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, ¶ 28, 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. *Quintana v. First Interstate Bank of Albuquerque*, 1987-NMCA-062, ¶ 9, 105 N.M. 784, 737 P.2d 896. 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. *Id.* ¶ 13.

One may be subject to liability for pecuniary harm resulting from loss of benefits of a prospective contractual relation by intentional and improper interference, "whether the interference consists of (a) inducing or otherwise causing a third person not to enter into or continue the prospective relation or (b) preventing the other from acquiring or continuing the prospective relation." *M&M Rental Tools, Inc. v. Milchem, Inc.*, 1980-NMCA-072, ¶20, 94 N.M. 449, 612 P.2d 241 (quoting the Restatement of Trots (Second)). "Whether the parties are competitors is a consideration in determining whether the motive or means was improper." *Id.* ¶ 25 (stating "Competition, whether called a proper interference or a privilege, extends only to prospective contractual relations; It does not justify interference with existing contract relations" (internal quotation marks and citation omitted)).

The interference with or induction of a breach of a corporation's contracts with others may constitute privileged actions of corporate agents "as long as their actions are in good faith and for the best interests of the corporation." *Bogle v. Summit Inv. Co., LLC*, 2005-NMCA-024, ¶ 18, 137 N.M. 80, 107 P.3d 520. To determine whether a corporate agent has a qualified privilege to interfere with or induce breach, a court looks "to the motivating forces behind the agent's decision to induce the corporation to breach its contractual obligations." *Id.*

A cognizable injury for the purposes of establishing personal jurisdiction over an out-of-state corporate defendant includes allegations of economic loss. *See Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 2002-NMCA-030, ¶ 15, 131 N.M. 772, 42 P.3d 1221 (recognizing that the economic loss suffered from a plaintiff's exclusion from a federal bid is a "cognizable injury" to satisfy the first two prongs of the three part test for personal jurisdiction). Under New Mexico's 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 acted to replace the plaintiff corporation in a federal contract bid to the exclusion of resident-plaintiff. *Id. See* NMSA 1978, § 38-1-16 ("Personal service of process outside state.").

XI. RESTRICTIVE COVENANTS/NON-COMPETITION 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, ¶ 19, 76 N.M. 645, 417 P.2d 450; *Bowen v. Carlsbad Ins. & Real Estate, Inc.*, 1986-NMSC-060, ¶ 4, 104 N.M. 514, 724 P.2d 223 ("It is well-settled that a restrictive covenant is valid if it is within reasonable limits of time and space and ancillary to a sale of a business."). In the context of buy-sell agreements, rather than in employment contracts, "[c]ourts are more reluctant to disturb restrictive covenants" but the reasonability of a restraint is based on the facts of a case. *Bowen*, 1986-NMSC-060, ¶ 4.

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. 1971-NMSC-095, ¶ 10, 83 N.M. 168, 489 P.2d 881 (holding the restriction did not violate New Mexico public policy). 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.* ¶ 2.

The *Campbell v. Millennium Ventures, LLC*, court held that personal services contracts that include non-solicitation clauses "may be assigned with the consent of the parties to the assignment." 2002-NMCA-101, ¶¶ 21-22, 132 N.M. 733, 55 P.3d 429. The *Campbell* court

also recognized the connection between non-competition agreements and goodwill, and stated that the sale of goodwill is usually sufficient to assign an employment agreement. *Id.* ¶¶ 27-28, 34.

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. 2008-NMCA-122, ¶¶ 14-15, 17, 144 N.M. 804, 192 P.3d 799.

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. 2015-NMCA-064, ¶¶ 14, 16, 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.* ¶ 12 (alteration omitted). Thus, once the district court found the non-compete covenant was overly broad, modification of that provision via reformation was specifically allowed by the agreement. *Id.* The district court's reformation in reducing the non-compete radius to thirty miles was not error. *Id.* ¶ 14 (district court found that approximately 90% of the patients were within a thirty-mile radius).

Non-compete 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; (7) certified nurse-midwives; (8) psychologists; (9) physician assistants; and (10) pharmacists. NMSA 1978, § 24-1I-1, *et seq.* (2015, amended 2023). For these health care practitioners, a non-competition provision in an employment agreement is unenforceable upon the termination of: (1) the agreement; (2) renewal or extension of the agreement; or (3) a health care practitioner's employment with a party seeking to enforce the agreement. § 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. § 24-1I-2(B) (stating that 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 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, ¶ 17, 98 N.M. 541, 650 P.2d 825 (concluding that where the evidence is undisputed that a contract was freely entered into by the parties, the court will not alter language). 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 id.* ¶¶ 8–9.

In the absence of fraud, unconscionability, or other grossly inequitable conduct, courts will not "rewrite obligations that the parties have freely bargained for themselves."

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, ¶¶ 12-16, 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, applied New Mexico law to hold 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" and the employees remained "free to work for whomever they wished, wherever they wished, and at whatever they wished." *Id.* at 287-88. 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 to -7 (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, ¶ 23, 144 N.M. 804, 192 P.3d 799.

"General skills and knowledge do not rise to the level of trade secrets." *Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶¶ 18 20, 25, 128 N.M. 611, 995 P.2d 1053 (concluding 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 is evaluated in light of the long-recognized policy in favor of liberal and open discovery when asserted during the discovery phase. *Pincheira v. Allstate Ins. Co.*, 2007-NMCA-094, ¶ 35, 142 N.M. 283, 164 P.3d 982. A party asserting a trade secret privilege must demonstrate an element of harm in order to establish the existence of the privilege. *Id.* ¶ 47. "If the resisting party establishes that the information sought derives economic value that can be obtained by others if the information is disclosed, then the loss of that value results in harm." *Id.* A trial court will balance the need of disclosure of the

information, if the requesting party shows it is necessary for a fair adjudication of the claims, against the harm demonstrated by the resisting party." *Id.* The worth of information in a trade secret, as determined by "the value of the information to the business and to its competitors and the amount of effort or money expended in developing the information," provides to the party resisting discovery an automatic "basis upon which the trial court can assess harm." *Id.* ¶ 48.

In relation to employee privacy, see NMSA 1978, section 50-11-3 (1991) that discusses unlawful practices by an employer related to privacy of an employee in their hire or discharge.

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

Every person has a right to inspect the public records of New Mexico, except, in relevant part, trade secrets. *See* NMSA 1978, § 14-2-1(F) (2023).

E. Fiduciary Duty and their Considerations

Employees owe a duty of loyalty to their employers. *Cent. Sec. and Alarm Co., Inc. v. Mehler*, 1996-NMCA-060, ¶ 10, 121 N.M. 840, 918 P.2d 1340. An employee may not be in competition with their employer unless otherwise agreed. *Id.* Employers have potential remedies if an employee violates their duty of loyalty. *Id.* (stating remedies include actions for restitution and losses, "including a constructive trust or accounting for profits"). "The determination of what the employer can recover depends upon the remedy pursued." *Id.*

"[T]he employment relationship is one of trust and confidence" that places a duty on an employee "to use his best efforts on behalf of his employer." *Las Luminarias of N.M. Council of the Blind v. Isengard*, 1978-NMCA-117, ¶ 8, 92 N.M. 297, 587 P.2d 444 ("The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of the one relying upon his integrity."). An exception to the duty of loyalty exists when an employee "merely organizes a corporation during his employment to carry on a rival business after the expiration of this term of employment." *Id.* ¶ 9. "Thus, in making arrangements to compete, an employee may not use confidential information peculiar to his employer's business and acquired through the course of employment. *Id.* Employees "may not solicit customers before the end of his employment or do other similar acts in direct competition with the employer's business." *Id.* A cause of action for a breach of the duty of loyalty existed based on allegations from the plaintiff-employer that former employees (1) helped organize a corporation to compete for public funding, (2) used plaintiff's records and papers in preparation of competing proposals, and (3) threatened to resign from their employment if plaintiff was awarded a funding contract with an alternative that if their corporation was awarded they would seek employment there. *Id.* ¶¶ 6, 11.

XII. DRUG TESTING LAWS

A. Public Employers

The Court in *Barreras v. New Mexico Corrections Department* 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. 1992-NMSC-059, ¶¶ 16-17, 114 N.M. 366, 838 P.2d 983.

Suspicion-less 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, ¶¶ 15–17, 125 N.M. 194, 958 P.2d 1244 ("The United States Constitution requires more than mere speculation that at some time in the future the City would need [employee-mechanic] to drive a heavy vehicle.").

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 to -15, an employer is "any person employing four or more persons and any person acting for an employer." *Id.* § 28-1-2(B) (2023). An employee is defined as "any person in the employ of an employer or an applicant for employment." *Id.* § 28-1-2(E) (2023). New Mexico courts "may look at federal civil rights adjudication for guidance in interpreting the NMHRA." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶ 35, 135 N.M. 539, 91 P.3d 58.

B. Types of Conduct Prohibited

The NMHRA prohibits discharging employees or refusing to hire persons, otherwise qualified, based on "race, age, religion, color, national origin, ancestry, sex, sexual orientation, gender, gender identity, pregnancy, childbirth . . ., physical or mental disability or serious medical condition; or, if the employer has fifty or more employees, spousal affiliation.". NMSA 1978, § 28-1-7(A) (2023). The NMHRA also prohibits retaliation against an employee who opposes unlawful practices or participates in proceedings under the NMHRA. *Id.* § 28-1-7(I)(2); *Juneau v. Intel Corp.*, 2006-NMSC-002, ¶ 11, 139 N.M. 12, 127 P.3d 548 ("Prohibited acts of 'threats, reprisal or discrimination' are considered together under the general label of unlawful retaliation.") For purposes of the NMHRA, a prima facie case of retaliation is established by a showing that employee was (1) "engaged in protected activity," (2) "subject to adverse employment action subsequent to, or contemporaneous with the

protected activity," and (3) "a causal connection exists between the protected activity and the adverse employment action." *Juneau*, 2006-NMSC-002, ¶ 11, 139 N.M. 12, 127 P.3d 548.

C. Administrative Requirements

The NMHRA provides a grievance procedure policy that requires persons claiming to have suffered unlawful discriminatory practices file, upon the belief of a member of the commission that discrimination has occurred, "a written complaint" to the human rights division of the labor department relaying the details alleged discrimination within 300 days after the alleged act was committed. NMSA 1978, § 28-1-10(A) (2005). In order to bring a civil claim under the NMHRA, a plaintiff must first exhaust the administrative remedies against a party. *Sontag v. Shaw*, 2001-NMSC-015, ¶ 13, 130 N.M. 238, 22 P.3d 1188. Compliance with the grievance procedure of the NMHRA is a "prerequisite" to suit under the NMHRA. *Jaramillo v. J.C. Penney Co.*, 1985-NMCA-002, ¶¶ 2-3, 102 N.M. 272, 694 P.2d 528 (concluding "the legislature intended that the grievance procedure [of the NMHRA] is mandatory when unlawful discriminatory practices are alleged"). The remedies afforded to a complainant under the NMHRA are not, however, exclusive and an independent action in tort can be filed without administrative exhaustion. *See Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶¶ 8-9, 117 N.M. 441, 872 P.2d 859, (concluding that "because the [NMHRA] does not provide an exclusive remedy, exhaustion of administrative remedies under the Act is not a prerequisite to proceeding with an independent tort claim"). 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, ¶ 9, 117 N.M. 441, 872 P.2d 859; *but see Gormley v. Coca-Cola Enters.*, 2004-NMSC-021, ¶ 8, 135 N.M. 128, 85 P.3d 252 (explaining that while "employees can pursue claims without filing a human rights complaint under three tort theories: retaliatory discharge, intentional infliction of emotional distress, and prima facie tort," age and disability claims do not lie in common law tort and must be pursued under the administrative procedures" of the NMHRA (citations omitted)).

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, ¶ 35, 135 N.M. 539, 91 P.3d 58.

In order to constitute a hostile work environment prohibited by 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." *Ocana v. Am. Furniture Co.*, 2004-NMSC-018, ¶¶ 23-24, 135 N.M. 539, 91 P.3d 58. "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 N.M. Corr. Acad., 2006-NMSC-009, ¶ 12, 139 N.M. 193, 131 P.3d 43 (internal quotation marks and citation omitted).

The Worker's Compensation Act and its exclusivity provisions will not bar claims for sex discrimination, so long as the claimant can demonstrate that their alleged damages under the NMHRA are separate and distinct from damages under the worker's compensation claim. *Sabella v. Manor Care, Inc.*, 1996-NMSC-014, ¶¶ 15–22, 21, 121 N.M. 596, 915 P.2d 901 (analyzing the intent behind New Mexico's Worker's Compensation Act and NMHRA to conclude that plaintiff's sexual harassment claim was independent from her worker's compensation claim).

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." NMSA 1978, § 28-1-11(E) (1995).

Under the NMHRA, "if the complainant prevails in an appeal, "the court in its discretion may allow actual damages and reasonable attorney 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, ¶¶ 16, 22, 136 N.M. 647, 103 P.3d 571 (explaining that Section 28-1-13(D) does not include an award of post-judgment interest to a prevailing complainant but noting that remittitur is appropriate in NMHRA cases where a defendant is intended to be punished by the jury). Punitive damages are not recoverable under the NMHRA. *Gandy v. Wal-Mart Stores, Inc.*, 1994-NMSC-040, ¶ 8, 117 N.M. 441, 872 P.2d 859.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

No employee may be discharged or deprived of employment for serving jury duty. NMSA 1978, § 38-5-18 (2005). Additionally, employers may not require or request an employee to use annual, vacation, or sick leave for time spent serving on a jury. *Id.*

B. Voting

On an election day, an employee "may absent himself from employment" for two hours to place their vote and "shall not be liable to any penalty for such absence," although employers can specify the times during which the employee may be absent to vote.. NMSA 1978, § 1-12-42 (2001); *see State v. Kenneth P. Thompson Co., Inc.*, 1985-NMCA-098, ¶ 13, 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 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, ¶¶ 22-23, 125 N.M. 564, 964 P.2d 125 (concluding employed nanny who was unable to perform the work of a nanny due to illness was terminated without violation to NMHRA).

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.* ¶ 9. Furthermore, "[b]eing ill is not synonymous with having a medical condition under the NMHRA. *Id.* ¶ 12 (stating the legislature did not intend the term "medical condition," as used in the NMHRA, includes "temporary illness with minimal residual effects").

An employer must permit "an employee domestic abuse leave without interfering with, restraining or denying" the employee from exercising rights under the Promoting Financial Independence for Victims of Domestic Abuse Act, 1978 NMSA §§ 50-4A-1 to -8 (2009).

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

D. Pregnancy/Maternity/Paternity Leave

It is unlawful discrimination for an employer to discharge or refuse to hire persons, otherwise qualified, based on "pregnancy, childbirth or condition related to pregnancy or childbirth." NMSA 1978, § 28-1-7(A) (providing the same protections to pregnant persons pursuant to the NMHRA). An employer cannot "refuse or fail to make reasonable accommodation for an employee or job applicant with a need arising from pregnancy, childbirth or condition related to pregnancy or childbirth. *Id.* § 28-1-7(K).

See *infra* Section XVI(G) regarding nursing mothers right to breastfeed.

E. Day of Rest Statutes

New Mexico does not address this issue by statute.

F. Military Leave

Employees who leave employment in good standing to serve their military obligations are entitled to rehire on their return from service so long as they are still qualified to perform the duties of their employment and apply for reemployment within 90 days after

they are "relieved from training and service, or from hospitalization and convalescence continuing after discharge for a period of not more than two years." NMSA 1978, § 28-15-1 (1941, amended 2023) ("Reemployment of Persons in Armed Forces.").*See Ramirez v. State, CYFD*, 2016-NMSC-016, ¶ 32, 372 P.3d 497 ("[I]t has long been the policy of New Mexico to provide a private right of action for damages against the State as an employer for the failure to reemploy a qualifying service member who returns to state employment from active duty.").

G. Sick Leave

The Healthy Workplaces Act, NMSA 1978, §§ 50-17-1 to -12 (2021), mandates that employers with one employee or more—not including the United States, state, or other political subdivisions of the state—provide for the accrual of paid sick leave to their employees. *Id.* An employer who engages in retaliation against an employee who uses earned sick leave may be subject to sanctions. *Id.* § 50-17-2(J). An employee may use earned sick leave for their own care, including but not limited to mental or physical illness and preventive care, and to care for family members. *Id.* § 50-17-3(C).

An employer must also provide notice to an employee at the commencement of employment of the following:

(1) the employee's right to earned sick leave;

(2) the manner in which the sick leave is accrued and calculated;

(3) the terms of the use of earned sick leave as guaranteed by the Healthy Workplaces Act;

(4) that retaliation against employees for the use of sick leave is prohibited;

(5) the employee's right to file a complaint with the division if earned sick leave as required pursuant to the Healthy Workplaces Act is denied by the employer or if the employee is retaliated against; and

(6) all means of enforcing violations of the Healthy Workplaces Act.

§ 50-17-6(A). This is a new statutory act with no case law construing it.

H. Domestic Violence Leave

An employer must permit "an employee domestic abuse leave without interfering with, restraining or denying" the employee from exercising rights under the Promoting Financial Independence for Victims of Domestic Abuse Act, 1978 NMSA §§ 50-4A-1 to -8 (2009).

I. Other Leave Laws

None.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

The minimum wage in New Mexico since 2023 is $12.00 per hour. NMSA 1978 § 50-4-22(A)(5) (2021). This minimum wage does not apply to employees "who customarily and regularly receive more than thirty dollars . . . a month in tips," as those employees are entitled to a different minimum wage--$3.00 per hour from 2023. § 50-4-22(C)(5).

The "Labor Conditions; Payment of Wages" article governs wage, hour, and working conditions for all employees. NMSA 1978, §§ 50-4-1, *et seq.* (2019). 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, Section 50-4-30 (1971).

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

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

With regard to public works contracts, see the "Public Works Minimum Wage Act," NMSA 1978 §§ 13-4-10 through 13-4-17 (2022). *See Mem'l Med. Ctr., Inc. v. Tatsch Const., Inc.*, 2000-NMSC-030, ¶ 1, 129 N.M. 677, 12 P.3d 431 (holding the standard to determine "whether a private entity should be considered a 'political subdivision' . . . or 'local public body' [under the 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").

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 amount deducted and withheld from the employee's wages."). An employer may make certain deductions from an employee's pay if those items were specifically stated in an employment agreement entered into at the time of hiring. NMSA 1978, § 50-4-2(B) (2005).

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); *N.M. Dep't of Lab. v. A.C. Elec., Inc.*, 1998-NMCA-141, ¶ 12, 125 N.M. 779, 965 P.2d 363 ("[A]s a general

rule, employees covered by the MWA may be 'required to work' more than 40 hours per week even when their employers do not overtly demand such work."). 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.* ¶¶ 21-22. 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. Dep't of Lab. v. Echostar Commc'ns Corp.*, 2006-NMCA-047, ¶¶ 1, 5, 7-12, 139 N.M. 493, 134 P.3d 780 (construing the MWA to hold that the Act does not "permit employer and employees to negotiate a fluctuating workweek and resulting fluctuating rate of pay on which to calculate overtime"). The MWA's intent was to "adequately compensate for overtime, to discourage overtime, and to encourage the employment of more workers," and employer's overtime calculation would have "severely undercut" the MWA's time-and-a-half provision. *Id.* ¶¶ 12, 16.

In order to prevail on a claim alleging an employer violated the MWA, an employee must show that: "(a) they worked more than forty hours a week, (b) that management knew or should have known that they did so, and (c) that they were not compensated for the overtime." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 15, 126 N.M. 396, 970 P.2d 582. *See Cruse v. St. Vincent Hosp.*, 729 F. Supp. 2d 1269, 1271, 1273-74 (D.N.M. 2010) (applying the *Self*, 1998-NMSC-046, ¶ 15, requirements to collective action brought by numerous employees who alleged employer violated New Mexico's MWA "by refusing to pay [p]laintiffs for time worked during the lunch period").

Certain employers in New Mexico are exempt from overtime provisions for certain categories of employees. *See* NMSA 1978, § 50-4-24 (2013) (exempting, among others, employers of workers engaged in cotton ginning, agriculture, and air carriers).

D. Time for payment upon termination

NMSA 1978, Section 50-4-4(A), mandates that unpaid wages or compensation be paid to employees, within five days of discharge, when the amount is definite and fixed. *Id.* (applying this mandate to wages and compensation "not based on a task, commission basis or other method of calculation"). "In all other cases of discharged employees the settlement and payment of wages or compensation shall be made within ten days of such discharge." NMSA 1978, § 50-4-4(B). On the failure of an employer to pay wages and compensation to a discharged employee within the foregoing time constraints, "the wages and compensation of the employee shall continue from the date of discharge until paid at the same rate the employee received at the time of discharge, and may be recovered in a civil action." NMSA 1978, § 50-4-4(C) (requiring a complainant to make a demand for payment within a

reasonable time to employer and payment being refused in order to establish a claim for recovery of wages and compensation).

"By enacting [NMSA 1978,] Section 50-4-4, the legislature declared the public policy of New Mexico to be that wages due employees upon discharge from their employment should be promptly paid." *Wolf v. Sam's Town Furniture, Inc.*, 1995-NMCA-114, ¶ 15, 120 N.M. 603, 904 P.2d 52; NMSA 1978, § 50-4-4 (penalizing delinquent employers by provided that both wages and compensation continue from the date of discharge for up to 60 days). 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, ¶¶ 14-16, 22. In classifying items of compensation, the determining factor "is whether the amount is fixed and definite, as opposed to variable, and not the method of calculation or computation." *Id.* ¶ 20 (internal quotation marks omitted); *See Litteral v. Singer Bus. Mach. Co.*, 1975-NMSC-015, ¶¶ 2, 5-6, 9-15, 87 N.M. 365, 533 P.2d 754 (concluding that employee with both a fixed wage and quarterly varied commissions on maintenance contracts was not entitled to have his fixed wages continue until payment of commissions was made because "each class of wages or compensation" had to be considered separately and different periods of time for payment of each class applied). .

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

E. Breaks and Meal Periods

New Mexico statutes and case law do not address this issue.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

Under the Employee Privacy Act, NMSA 1978, §§ 50-11-1 to -6, it is unlawful for employers to discriminate against or discipline employees who smoke. NMSA 1978, § 50-11-3 (1991). NMSA 1978, Section 24-16-14, permits employers to provide designated outdoor smoking areas for their employees so long as the requirements of the Dee Johnson Clean Indoor Air Act are adhered to, and "shall adopt, implement, post and maintain a written smoking policy." Employers may not retaliate against employees or applicants for employment for exercising their rights under the Dee Johnson Clean Indoor Air Act. NMSA 1978, § 24-16-19.

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 to -12, created the New Mexico Health Insurance Exchange. The Exchange is "a nonprofit public corporation" intended "to provide individuals and qualified employers with increased access to health insurance in the state" and is governed by the Exchange's board of directors. NMSA 1978 § 59A-23F-3(A).

The Small Group Rate and Renewability Act, NMSA 1978, §§ 59A-23C-1 to -10, is intended "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).

New Mexico enacted the Health Insurance Portability Act in 1998. NMSA 1978, §§ 59A-23E-1 to -20 (1998 as amended 2023).

Two separate statutes in New Mexico authorize the state to administer the Medicaid program: (1) NMSA 1978, Sections 27-1-1 through 27-1-16 (2014); and (2) NMSA 1978, Sections 27-2-1 through 27-2-12.33 (2023).

C. Immigration Laws

New Mexico applies federal employment eligibility and verification rules. *See Gonzalez v. Performance Painting, Inc.*, 2013-NMSC-021, ¶¶ 27-28, 303 P.3d 802 (stating that federal Immigration Reform and Control Act imposes an affirmative duty on employers to determine that their employees are authorized for work).

D. Right to Work Laws

There is currently no "right to work" statute in New Mexico. 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)

See *supra* Section XVI(A) (regarding smoking in the workplace).

The Lynn and Erin Compassionate Use Act ("CUA"), NMSA 1978, §§ 26-2B-1 to -10, provides for the lawful use of medical marijuana. *See* NMSA 1978 § 26-2B-2. The Worker's Compensation Act authorizes reimbursement for medical marijuana obtained through the CUA. *Maez v. Riley Indus.*, 2015-NMCA-049, ¶ 1, 347 P.3d 732. Where the use of medical marijuana is reasonable and necessary pursuant to a worker's compensation claim, an

employer may be responsible for reimbursement. *Id.* ¶¶ 30-31, 34 (reversing the worker's compensation judge's ruling that medical marijuana was not reasonable or necessary); *but see Garcia v. Tractor Supply Co.*, 154 F. Supp. 3d 1225, 1229 (D.N.M. 2016) (applying New Mexico's NMHRA to conclude that an employer was not required to accommodate an employee's use of medical marijuana).

The CUA protects employees from adverse employment actions based on conduct permitted by the CUA. NMSA 1978, § 26-2B-9(A). An employer may, however, take adverse employment actions on an employee who uses or is impaired by medical cannabis on the premises of the workplace during hours of business. *Id.* § 26-2B-9(B).

The Cannabis Regulation Act, NMSA 1978, §§ 26-2C-1 to -42, legalized the use of recreational marijuana. Under the Cannabis Regulation Act, an employer may "prohibit or take an adverse employment action against an employee for impairment by or possession or use of intoxicating substances at work or during work hour." *Id.* § 26-2C-34. The Act does not prohibit an employer from adopting and implementing "a written zero-tolerance policy regarding the use of cannabis products" which may allow for the discipline or termination of an employee "on the basis of a positive drug test that indicates any amount of delta-9tetrahydrocannbinol or delta-9tetrahydrocannbinol metabolite." *Id.* A person cannot be restricted in their consumption or use of cannabis, used in accordance with the Act, when used in the person's privately owned property. *Id.* § 26-2C-26.

F. Gender/Transgender Expression

See *supra* Section XIII(B) regarding unlawful discriminatory practices of an employer based on gender and gender identity. The New Mexico Human Rights Act amended the definitions of "gender" and "gender identity" in 2023. N.M. Laws Ch. 29 §1 (Laws 2023). The NMHRA provides the following relevant definitions:

> T. "gender identity" means a person's self-perception, based on the person's appearance, behavior or physical characteristics, that the person exhibits more masculinity or femininity or the absence of masculinity of femininity whether or not it matches the person's gender or sex assigned at birth;
>
> U. "gender" means an individual or societal expectation or perception of a person as masculine or feminine based on appearance, behavior or physical characteristics[.]

NMSA 1978, §§ 28-1-2(T), (U).

G. Other Key State Statutes

Agency employers are prohibited from dismissing "an employee for failure or refusal to pay or promise to pay any assessment, subscription or contribution to any political organization or candidate" and may not "prevent voluntary contributions to political organizations." NMSA 1978, § 10-9-21 (1991) ("Public Officers and Employees; Personnel; Prohibited Acts").

NMSA 1978, Section 50-9-25(A) (1993), 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.

Employers are prohibited from requesting the disclosure of results of HIV related testing ”as a condition of hiring, promotion or continued employment” 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). Employers, including state employers, must foster the ability of a nursing employee to use a breast pump in the workplace by providing a space and flexible break times for pumping. *Id.* § 28-20-2. Employers are not, however, liable for: (1) storage or refrigeration of breast milk; (2) payment for a nursing mother’s break time in addition to established employee breaks; or (3) payment of overtime while a nursing mother is using a breast pump.” *Id.*

The Unemployment Compensation Law in New Mexico governs the general rights and obligations pertaining to unemployment claims. *See* NMSA 1978, §§ 51-1-1 to -59 (1936 as amended 2021).

New Mexico also has a statutory compilation that governs apprenticeships. NMSA 1978, §§ 21-19A-1 to -13 (1991 as amended 2014).

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 of compensation otherwise owed from an employer to employee shall be reduced by a minimum of ten percent but by no more than ninety percent as the degree to which an employee’s intoxication contributed to an accident that caused injury or death. *Id.*