

EMPLOYMENT: NORTH AMERICA

USA - New Mexico



Employment: North America

Quick reference guide enabling side-by-side comparison of key considerations, emerging issues and reform proposal for each state; the employment relationship; hiring; wage and hour laws; discrimination, harassment and family leave; privacy in the workplace; trade secrets and restrictive covenants; labour relations; and discipline and termination procedures.

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STATE SNAPSHOT

Key considerations

Which issues would you most highlight to someone new to your state?

In many aspects of labor and employment law applicable to private employers, New Mexico follows federal law, but there are a number of local laws with implications for private employers:

Paid sick leave

Effective July 1, 2022, New Mexico offers state-wide paid leave mandate under the Healthy Workplaces Act (HWA). See NM Chap. Laws 131 of 2021 . The law requires all private employers in the state to allow employees to accrue and use earned sick leave for the employee's or their qualifying family member's illness or injury, or to deal with certain legal and family issues.

Cannabis legalization

The Cannabis Regulation Act includes protections for employers to implement a zero-tolerance policy for cannabis in the workforce. 2021 Special Session HB 2 .

New Mexico also permits certain persons to use marijuana for medical purposes. Employers are prohibited from discriminating against an applicant or employee based on conduct allowed by the New Mexico medical marijuana law, subject to several exceptions (2019 N.M. Laws Ch. 247, § 11).

Key issues in New Mexico

There are laws specifically applicable to the healthcare industry, including the invalidation of restrictive covenants for certain healthcare providers (NMSA § 24-11-1 et seq.). New Mexico also has a Safe Harbor Act, providing protections for nurses who, in good faith, refuse to carry out an order (NMSA §§ 61-3A-1 et seq .).

Employers must report new hires to the state in a timely manner for inclusion in the new hire directory (NMSA § 50-13-3(F)).

New Mexico discrimination law includes protections for "physical or mental handicap or serious medical condition" (N.M. Stat. Ann. § 28-1-7). Employers must clearly understand the scope of the definitions.

Law stated - 30 April 2021

What do you consider unique to those doing business in your state?

The state offers attractive tax incentives to certain employers—including to create certain high-paying jobs (NMSA § 7-9G-1).

Under the Local Economic Development Act, communities can bolster infrastructure, job creation, and retail opportunities in the state. Employers may find attractive opportunities for partnership with government entities when considering locating to New Mexico.

Law stated - 30 April 2021

Is there any general advice you would give in the labor/employment area?

In the absence of a contract, employment relationships in New Mexico are presumed to be at will. However, New Mexico courts have held an implied contract may be created through written or oral statements and course of conduct both before and after hire, including oral representations made by managers or statements contained in employee handbooks or other materials. To avoid this, employee handbooks and other employment documents must include express disclaimers that such handbooks or documents do not constitute a contract, either express or implied.

Law stated - 30 April 2021

Emerging issues

What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

Recent changes to employment law in New Mexico include the following:

- prohibition of some confidentiality agreements relating to sexual harassment, discrimination, or retaliation;
- creation of paid sick leave requirements; and
- legalization of recreational cannabis.

Guidance around reasonable accommodation of employee's use of marijuana for medical purposes continues to develop.

Law stated - 30 April 2021

Proposals for reform

Are there any noteworthy proposals for reform in your state?

There have been unsuccessful proposals to substantially and automatically increase the state-wide minimum wage with a cost-of-living adjustment.

In 2022, the state-wide minimum wage is \$11.50 per hour and will increase to \$12 per hour on January 1, 2023. Employers can pay employees who are tipped more than \$30 per month an hourly rate of at least \$2.80 in 2022 and \$3 in 2023.

Law stated - 30 April 2021

EMPLOYMENT RELATIONSHIP

State-specific laws

What state-specific laws govern the employment relationship?

Chapters 28, 50, 51, and 52 of the New Mexico Statutes contains most guidance pertaining to private employer-employee relationships.

New Mexico's Administrative Code includes the administrative rules governing employment issues, primarily Titles 9 and 11.

Law stated - 30 April 2021

Who do these cover, including categories of workers?

These laws generally cover employees. Some provisions, including anti-discrimination laws, also apply to applicants.

Law stated - 30 April 2021

Misclassification

Are there state-specific rules regarding employee/contractor misclassification?

Generally, employers must consult case-law interpretations and regulations regarding the definition of “employ,” “employer,” and “employee.” A case applying a common-law definition of independent contractor in the worker’s exclusivity compensation context is *Shipman v. MacCo Corp.* (1964-NMSC-091, 74 N.M. 174, 392 P. 2d 9). The New Mexico Taxation and Revenue Department also has guidance concerning classifying workers as employees or independent contractors. See also NMSA § 51-1-42(F)(5) (unemployment) and NMSA § 60-13-3.1 (construction contractors).

For the purposes of assessing liability in civil litigation, New Mexico’s Uniform Jury Instructions provide definitions of both “employer” and “independent contractor.”

Law stated - 30 April 2021

Contracts

Must an employment contract be in writing?

No, New Mexico recognizes oral and implied contracts (*Lopez v. Kline* , 1998-NMCA-016, 124 NM 539, 953 P.2d 304 and *West v. Washington Tru Solutions, LLC* , 2010-NMCA-001, 147 NM 424, 224 P.3d 651).

Law stated - 30 April 2021

Are any terms implied into employment contracts?

Subject to certain limitations (including at-will employment contracts and express provisions addressed by the terms of an integrated, written contract), New Mexico law implies a duty of good faith and fair dealing into all contractual obligations, including employment contracts (*Melnick v. State Farm Mut. Auto. Ins. Co.* , 1988-NMSC-012, 16, 106 N.M. 726, 730, 749 P.2d 1105, 1109; *Beaudry v. Farmers Ins. Exch.* , 2018-NMSC-012, 22, 412 P.3d 1100, 1107).

Law stated - 30 April 2021

Are mandatory arbitration agreements enforceable?

“Arbitration is a ‘highly favored’ method of resolving disputes . . . as a result, when parties have agreed to arbitrate, the courts must compel arbitration” (*Piano v. Premier Distrib. Co.* , 2005-NMCA-018, 5, 137 N.M. 57, 60, 107 P.3d 11, 14).

Subject to important conditions and limitations, the New Mexico Uniform Arbitration Act permits arbitration of employment disputes (NMSA § 44-7A-1 and following).

Law stated - 30 April 2021

How can employers make changes to existing employment agreements?

The employer can change an employment agreement expressly, in writing (provided the employer meets the requirements for a valid contract and/or amendment under state contract law).

Employers can also modify an employment agreement based on verbal (e.g., statements made by managers) or written (e.g., in a handbook) statements and/or course of conduct, under an implied contract theory.

Law stated - 30 April 2021

HIRING

Advertising

What are the requirements relating to advertising open positions?

NMSA § 28-1-7(D) makes it unlawful for any state employer to advertise any statement, use any form of application, or make any inquiry regarding the applicant's membership in a protected class under the New Mexico Human Rights Act or that expresses any limitation or discrimination based on a protected class; for employers with fifty or more employees, the prohibition is extended to spousal affiliation.

Law stated - 01 July 2022

Background checks

(a) Criminal records and arrests

New Mexico has a "ban the box" requirement, prohibiting employers from asking about an applicant's arrest or conviction history. NMSA §28-2-3 et seq. Employers are permitted to consider an applicant's conviction record and are allowed to disqualify applicants for "particular positions" under employer policy if the applicant has "a certain criminal history."

Law stated - 01 July 2022

(b) Medical history

Under NMSA § 24-21-4(D), it is unlawful to use genetic information in employment decisions.

Under N.M. Stat. Ann. § 28-10A-1 it is unlawful to require disclosure of the results of a human immunodeficiency virus related test.

A number of definitions for the state's disability and medical condition protections are defined in New Mexico regulations (NMAC 9.1.1.7 (R, S, V, X, Z)).

Law stated - 01 July 2022

(c) Drug screening

New Mexico has no statute regulating drug testing employees or applicants.

Law stated - 01 July 2022

(d) Credit checks

New Mexico has no credit check statute.

Law stated - 01 July 2022

(e) Immigration status

New Mexico has no specific law addressing immigration or employment eligibility verification. Both “national origin” and “ancestry” are protected classes under the New Mexico Human Rights Act (NMSA § 28-1-7(A)).

Law stated - 01 July 2022

(f) Social media

It is unlawful in New Mexico for an employer to request or require a prospective employee to provide a password to gain access, or to otherwise demand access, to the prospective employee’s account or profile on a social media networking website (NMSA § 50-4-34).

Law stated - 01 July 2022

(g) Other

None.

Law stated - 01 July 2022

WAGE AND HOUR

Pay

What are the main sources of wage and hour laws in your state?

NMSA § 50-4-1 and following.

Law stated - 01 July 2022

What is the minimum hourly wage?

In 2022, the minimum wage is \$11.50 per hour and increases to \$12 per hour on January 1, 2023 (2019 N.M. Laws Ch. 114, § 2(A)). For tipped employees who customarily and regularly receive more than \$30 a month in tips, employers may pay a lower hourly rate, as long as the total received is at least the state minimum wage per hour. The hourly rate payable to tipped employees is \$2.80 in 2022 and \$3 per hour in 2023 (2019 N.M. Laws Ch. 114, § 2(D)). New Mexico has different minimum wage rules for students enrolled in secondary school (2019 N.M. Laws Ch. 114, § 2(B)).

Local variations

The cities of Santa Fe, Albuquerque, and Las Cruces, as well as the counties of Santa Fe and Bernalillo, have minimum wage rates higher than the state minimum wage

Law stated - 01 July 2022

What are the rules applicable to final pay and deductions from wages?

If discharged by the employer, an employee's unpaid wages must be paid within five days of the discharge (NMSA § 50-4-4(A)). Otherwise, the final paycheck must be issued within 10 days of the discharge (NMSA § 50-4-4(B)).

If an employee resigns employment, the final payment for wages or compensation must be paid no later than the next payday (NMSA § 50-4-5). Wage disputes are addressed in NMSA § 50-4-7.

NMSA § 50-4-2(B) regulates deductions.

Law stated - 01 July 2022

Hours and overtime

What are the requirements for meal and rest breaks?

New Mexico has no state laws requiring or regulating meal or rest periods.

Law stated - 01 July 2022

What are the maximum hour rules?

No employee may be required to work for more than 16 hours in a 24-hour period, with the exception of firefighters, law enforcement officers, employees who are in a standby position or work in emergency situations, or farm or ranch hands whose duties require them to work longer hours (NMSA § 50-4-30).

The number of hours that children between the ages of 14 and 16 may work is also restricted (NMSA § 50-6-3).

Law stated - 01 July 2022

How should overtime be calculated?

Overtime must be paid to non-exempt employees at one-and-a-half times their regular hourly rate for hours worked in excess of 40 hours per seven-day work week.

Law stated - 01 July 2022

What exemptions are there from overtime?

NMSA § 50-4-21 excludes several classes of employees from overtime coverage, including:

- individuals in certain executive, administrative, superintendent, and supervisor roles (NMSA § 50-4-21(C)(2), NMAC 11.1.4.7(F));
- some volunteers of non-profit organizations (NMSA § 50-4-21(C)(4));
- persons compensated on a piecework, flat-rate schedule, or commission basis (NMSA § 50-4-21(C)(5));

- students regularly enrolled in primary or secondary schools (NMSA § 50-4-21(C)(6));
- registered apprentices and learners (NMSA § 50-4-21(C)(7));
- persons aged 18 or under who are not students (NMSA § 50-4-21(C)(8)) or who are not graduates of a secondary school (NMSA § 50-4-21(C)(9));
- G.I. Bill trainees while under training (NMSA § 50-4-21(C)(10)); and
- certain specified employees in the agriculture and horticulture industry (NMSA § 50-4-21(C)(12-13)).

NMSA § 50-4-24 provides for additional exemptions from overtime, including certain agricultural workers and employees of air carriers subject to the FRLA.

Law stated - 01 July 2022

Record keeping

What payroll and payment records must be maintained?

Employers are required to maintain accurate records of “hours worked and wages paid to each employee” for at least one year (NMSA § 50-4-9(A)).

In addition, New Mexico regulations require employers to maintain certain records for unemployment compensation purposes (NMAC 11.3.300.309; 11.3.400.401).

Law stated - 01 July 2022

DISCRIMINATION, HARASSMENT AND FAMILY LEAVE

What is the state law in relation to:

Protected categories

(a) Age?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of age (NMSA § 28-1-7(A)).

Law stated - 30 April 2021

(b) Race?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of race (NMSA § 28-1-7(A)).

Law stated - 30 April 2021

(c) Disability?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “physical or mental handicap or serious medical condition” (NMSA § 28-1-7(A)).

Law stated - 30 April 2021

(d) Gender?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of sex (NMSA § 28-1-7(A)). Discrimination on the basis of “sex” includes harassment, as well as discrimination due to “pregnancy, childbirth, or related medical condition” (NMAC 9.1.1.7(AA)(1, 2)).

New Mexico employers of at least four employees cannot discriminate against an employee because of gender identity.

Law stated - 30 April 2021

(e) Sexual orientation?

New Mexico employers of at least four employees cannot discriminate against an employee because of sexual orientation.

Law stated - 30 April 2021

(f) Religion?

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of religion (NMSA § 28-1-7(A)).

Law stated - 30 April 2021

(g) Medical?

Employers will want to clearly understand the scope of the definitions of other protected categories of “physical or mental handicap” and “serious medical conditions.” (NMAC 9.1.1.7(R, S, V, X, Z)).

It is unlawful to fail to “accommodate a person’s physical or mental handicap or serious medical condition, unless such accommodation is unreasonable or an undue hardship” (NMSA § 28-1-7(J)).

Law stated - 30 April 2021

(h) Other?

Additional protected bases

It is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “color,” “national origin,” and/or “ancestry” (NMSA § 28-1-7(A)).

Spousal affiliation

If an employer has at least 50 employees, it is unlawful to refuse to hire, discharge, promote, demote, or discriminate in matters of compensation, terms, conditions, or privileges of employment against any person otherwise qualified because of “spousal affiliation” (NMSA § 28-1-7(A)).

Sex and pregnancy discrimination

Sex discrimination includes discrimination on the basis of “pregnancy, childbirth, or related medical condition” (NMAC 9.1.1.7(AA)(2)). Consequently, employers are prohibited from refusing to grant leave to pregnant employees on the same terms as are offered to employees with other medical conditions. Employers are also subject to accommodation requirements for pregnancy, childbirth or conditions related to the same.

Genetic information

It is unlawful to use genetic information in employment decisions (NMSA § 24-21-4(D)).

Law stated - 30 April 2021

Harassment

What is the state law in relation to harassment?

New Mexico law does not address harassment in the workplace.

Law stated - 30 April 2021

Family and medical leave

What is the state law in relation to family and medical leave?

Under the HWA and employer paid sick leave policies, employers are required to permit eligible employees to use accrued sick leave to care for certain family members in the same way that an employee can use accrued sick leave for the employee. See NM Chap. Laws 131 of 2021 (2021 Reg. Session HB 21).

Law stated - 30 April 2021

PRIVACY IN THE WORKPLACE

Privacy and monitoring

What are employees’ rights with regard to privacy and monitoring?

New Mexico has no statute specifically addressing the monitoring of employees or employee communications. Because of the potential for common law tort claims (e.g., invasion of privacy), however, employers should notify employees in writing and obtain prior written acknowledgement and consent before conducting any monitoring. The consent should expressly state that employees do not have an expectation of privacy in any information or items brought onto the employer’s premises or contained on or accessed through the employer’s computer systems or devices.

Any monitoring should be tailored to a clearly articulated legitimate business interest. Video surveillance should be avoided (NMSA § 30-9-20).in any public or private place where a person “has a reasonable expectation of privacy” so that the “intimate areas” of a person are not viewed or recorded without the person’s knowledge and consent. New Mexico is a one-party consent state for monitoring telephonic communications.

Law stated - 30 April 2021

Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

It is unlawful for an employer to request or require a prospective employee to provide a password to gain access, or to otherwise demand access, to the prospective employee's account or profile on a social media networking website (NMSA § 50-4-34).

Law stated - 30 April 2021

Bring your own device

What is the latest position in relation to bring your own device?

New Mexico law does not address the issue of bringing your own device to work or the use of personal devices at work.

Law stated - 30 April 2021

Off-duty

To what extent can employers regulate off-duty conduct?

Employers may not consider an employee's smoking or tobacco product use as a condition of employment. It is unlawful to require employees to abstain from using tobacco products during non-working hours.

It is also unlawful for an employer to discriminate against an applicant or employee based on conduct allowed by the New Mexico medical marijuana law, subject to several important exceptions.

New Mexico passed the Cannabis Regulation Act in 2021. Under the Act, employers are provided flexibility in their actions against employees for substance use or possession during work hours if noncompliance with a zero-tolerance policy would cause the company to be in violation of federal laws or regulations that would result in loss of federal contracts or funding.

Law stated - 30 April 2021

Gun rights

Are there state rules protecting gun rights in the employment context?

New Mexico has no specific state law preventing employers from adopting policies relating to guns in the workplace.

Law stated - 30 April 2021

TRADE SECRETS AND RESTRICTIVE COVENANTS

Intellectual property

Who owns IP rights created by employees during the course of their employment?

New Mexico has no statute generally governing ownership of employee creations, but there is a statute regulating creations of employees of private employers who are associated with a "technology research collaborative" (NMSA § 21-11-8.6(D)). There is a "research applications center" provision applicable to certain job titles requiring the use of

NDA's prohibiting the employee "from acquiring an intellectual property right" (NMSA § 53-7B-8(B)(4)).

Law stated - 01 July 2022

Restrictive covenants

What types of restrictive covenants are recognized and enforceable?

In general, covenants not to compete and not to solicit employees or customers are enforceable if reasonable in scope, considering the interests of the parties and the public (Lovelace Clinic v. Murphy , 1966-NMSC-165, 417 P.2d 450, 454).

Law stated - 01 July 2022

Non-compete

Are there any special rules on non-competes for particular classes of employee?

Yes. For certain healthcare providers, the state has limited restrictive covenants (NMSA § 24-11-1 and following). The Rules of Professional Conduct governing attorneys also prohibit attorneys from entering into agreements that would restrict their right to practice in certain situations (NMRA 16-506).

Law stated - 01 July 2022

LABOR RELATIONS

Right to work

Is the state a "right to work" state?

No. The state has rejected "right to work" as a matter of policy. Instead, the state permits "union security" agreements which require an employer or union to require union membership as a condition of employment (2019 N.M. Laws Ch. 81).

Law stated - 01 July 2022

Unions and layoffs

Is the state (or a particular area) known to be heavily unionized?

There are some unions that operate in New Mexico. In 2018, 6.8% of the state's employed workers were members of a union, ranking New Mexico as number 32 out of the 50 states for the percentage of employees who are members in a union, according to data from the Bureau of Labor.

Law stated - 01 July 2022

What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

New Mexico has no "mini-WARN" statute.

Law stated - 01 July 2022

DISCIPLINE AND TERMINATION

State procedures

Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

In general, New Mexico has no law governing private employers' use of discipline and grievance procedures. However, employers may, by their conduct or written or oral statements, create an express or implied contract to follow specific procedures about discipline and grievance procedures, including a progressive discipline process.

Law stated - 01 July 2022

At-will or notice

At-will status and/or notice period?

New Mexico is an at-will state.

Law stated - 01 July 2022

What restrictions apply to the above?

At-will status can be modified by an express or implied contract or can be limited by a public policy exception. An implied contract can be established by reference to an employer's written materials (e.g., employee handbooks and policies), oral promises, and representations, and/or course of conduct.

There are numerous public policy exceptions to at-will employment when an employee is terminated. See (NMSA § 52-1-28.2).

Law stated - 01 July 2022

Final paychecks

Are there state-specific rules on when final paychecks are due after termination?

Yes. If an employee is discharged by the employer, unpaid wages or compensation of a "fixed and definite amount" must be paid within five days of the discharge (NMSA § 50-4-4(A)). Otherwise, the final paycheck must be issued to a discharged employee within 10 days of the discharge (NMSA § 50-4-4(B)). If not timely paid, the employee has a private right of action to recover damages. If an employee resigns, the final payment for wages or compensation must be paid by the next payday (NMSA § 50-4-5). Under NMSA § 50-4-7, if there is a dispute over wages the employer is required to give written notice to the employee of the amount of wages conceded to be due, and to pay such amount unconditionally, within the above-stated timeframes.

Law stated - 01 July 2022

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