



UNEMPLOYMENT INSURANCE EMPLOYER HANDBOOK

RIGHTS AND RESPONSIBILITIES UNDER THE NEW MEXICO COMPENSATION LAW

2019

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Table of Contents

Unemployment Insurance Information	4
Unemployment Insurance Tax & Claims System.....	4
Unemployment Insurance Practice Manual.....	4
The New Mexico Unemployment Insurance Program	4
Financing Unemployment Benefits	5
Tax Liability	5
Non-Agricultural Employment.....	5
<i>Agricultural Employment</i>	5
<i>Domestic Employment</i>	5
Covered Employers.....	6
Non-covered Employers and Non-Covered Employment	6
Reportable Wages	6
Quarterly Reporting and Contribution Procedures	7
Periodic Audits of Employer Records	8
Method for Calculating Contribution Rates	8
Taxable Wage Base.....	8
New Employers.....	8
Experienced, Contributing Employers	8
<i>Reserve Factor</i>	9
<i>Experience History Factor</i>	9
<i>Excess Claims Premium</i>	9
<i>Equation for Total Rate</i>	10
<i>Challenging Contributions</i>	10
Business Transfers	10
SUTA Dumping.....	11
Unemployment Insurance Claims Process	11
Unemployment Claims filed by an Employee:	11
Confidentiality of Records	11
Appeals	12
How to appeal:	12

When to appeal 12

Notice of Hearing..... 12

Burden of proof 12

Exhibits 13

Call-in Procedures..... 13

Hearing Procedures 13

Higher Authority 13

Information about Misclassification 14

 Misclassification 14

Additional Resources about Misclassification 15

Six Tips to Achieve a Lower Unemployment Tax Rate 15

Unemployment Insurance Information

Unemployment Insurance Tax & Claims System

Employers can access their Unemployment Insurance (UI) account online at <https://ui.dws.state.nm.us/Employer/Core/Login.aspx>, 4:00 a.m. to 9:00 p.m. Sunday through Friday. For additional assistance, contact a Customer Service Agent in the UI Operations Centers via the toll-free number at 1-877-NM-4-MYUI (1-877-664-6984). The UI Operations Center is open from 8:00 a.m. - 4:30 p.m., Monday – Friday, and English and Spanish-speaking Customer Service Agents are available. Unemployment Insurance tax-related questions can be submitted to uitax.support@state.nm.us.

Unemployment Insurance Practice Manual

The UI Practice Manual guides the reader through many Unemployment Insurance law topics including eligibility requirements, claims & tax issues, fraud, overpayments, and the hearing and appeal process. The manual also includes an examination of judicial decisions applying the Unemployment Compensation Law. The Unemployment Insurance Practice Manual is available at www.dws.state.nm.us under the “Unemployment Insurance” header.

The New Mexico Unemployment Insurance Program

The UI program pays benefits to people who are out of work through no fault of their own and who meet certain qualifications. The New Mexico Department of Workforce Solutions administers the UI program within guidelines established by both federal and state law.

New Mexico’s Unemployment Insurance program provides for benefits to assist persons who are generally attached to the job market, actively searching for new work, and temporarily unemployed through no fault of their own. Eligibility for unemployment benefits, unemployment benefit amounts, and the length of time benefits are available are determined according to the New Mexico Unemployment Compensation Law. In general, whether an individual can receive unemployment benefits depends on several factors:

1. Did the individual receive sufficient wages in employment to be covered by the law?
2. Is the individual able to work, available for work, and actively searching for work?
3. Is the individual disqualified from receipt of benefits because the individual voluntarily quit without good cause?
4. Is the individual disqualified from receipt of benefits because the individual was terminated for misconduct? Or
5. Is the individual disqualified from receipt of benefits because the individual refused an offer of suitable work without good cause?

The individuals who meet the coverage and eligibility provisions of the law can receive benefits, while those who fall within the disqualification provisions cannot.

The benefits that claimants receive are financed mainly through state taxes imposed on the payrolls of New Mexico employers. These payroll taxes, called “contributions” in the New Mexico Unemployment Compensation Law, function like insurance premiums, with rates being based on a combination of employers’ individual

experience with the UI program and economic factors. New Mexico employers who are required to pay contributions also pay federal unemployment taxes.¹

Financing Unemployment Benefits

The state of New Mexico and the federal government are jointly responsible for administering the UI system. With a few exceptions, employers in New Mexico finance unemployment benefits and program administration through taxes paid to the federal government pursuant to the Federal Unemployment Tax Act (FUTA)² and to the state government pursuant to the New Mexico Unemployment Compensation Law³. The unemployment taxes paid pursuant to state law are referred to under New Mexico law as “contributions”.

All states participating in the state-federal partnership, including New Mexico, have some ability to establish their own structure, qualifying requirements, benefit levels, and eligibility and disqualification standards. State plans must meet federal requirements for employers to qualify for credits against the tax imposed under FUTA. Employers who pay contributions on services under an approved state plan may credit their state contributions against the Federal tax. The state contributions paid by each employer are deposited and pooled into the Unemployment Trust Fund in accordance with such regulations and at such times as the secretary may prescribe. The Trust Fund acts like an insurance reserve, and the money in the Trust Fund, with few exceptions, is used solely to pay unemployment benefits. Employers are not permitted to make deductions from an employee’s wages to pay the unemployment taxes.

Tax Liability

Every employer doing business in the state of New Mexico, whether by succession to a business already being operated, by starting a new business, by change in partnership, merger, consolidation or other form of business organization, is required to register with the Department and file a report to determine the liability of the business organization for taxes to the Department. The time for filing the report to determine liability is based upon the type of employer.

Non-Agricultural Employment—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$450 or more, or if there are one or more persons (part-time workers included) in employment in any part of the week in each of 20 weeks within a calendar year.

Agricultural Employment—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$20,000 or more, or if there are ten or more persons (part-time workers included) in employment at any time in each of 20 weeks within a calendar year.

Domestic Employment—Employers must file when their total payroll for any calendar quarter for New Mexico employment is \$1000 or more.

¹ Except when referencing federal taxes, the terms “taxes” and “contributions” are used interchangeably throughout this handbook.

² 26 U.S.C. § 3301 et. seq.

³ NMSA 1978, § 51-1-9.

Covered Employers

Employers who pay contributions or other payments for UI are called “covered” employers. There are two methods for taxing “covered” employers for Unemployment Insurance. Private, for-profit employers, which includes most employers, are called contributing employers and pay a quarterly tax/contribution.

The second method of paying for Unemployment Insurance is the reimbursable method. This is only available to units of government and to non-profit organizations. Generally, a non-profit organization is one whose purpose is either educational, religious, cultural, or scientific (as defined in Section 501(c)(3) of the Internal Revenue Code), and is exempt from federal income taxes under Section 501(a) of that Code.

Reimbursable employers do not pay a quarterly tax. However, because they do pay into the Unemployment Trust Fund, each reimbursable employer is required to reimburse the Fund for all unemployment benefits paid to a former employee which are based upon wages earned in the employment of the reimbursable employer. Once liability is determined, a reimbursable employer shall not be relieved of charges for benefits paid to an individual who was separated from that employer for any reason.

Payments due from reimbursable employers to the Department are called payments in lieu of contributions. At the end of each calendar quarter, the Department shall bill the reimbursable employers for an amount equal to the full amount of regular benefits plus one-half of the amount of extended benefits paid during the quarter. Payments are due 30 days after the end of the quarter. Late payments are subject to penalties and interest.

Non-covered Employers and Non-Covered Employment

Employers that may be exempt from the requirement to pay Unemployment Insurance taxes are outlined in detail in the Unemployment Compensation Law. For specific information about which employers are exempt, refer to NMSA 1978, §51-1-42(E). Additionally, payments made to certain types of workers may not be considered reportable wages under the Unemployment Compensation Law. Workers whose wages are exempt are defined under NMSA 1978, §51-1-42(F).

Reportable Wages

Wages includes all payments made for services, including commissions and bonuses, to workers that do not meet the exemptions of NMSA 1978, §51-1-42(F). Employers are responsible for reporting wages to the Department in the quarter the wages are paid, not when they are earned.

Wages in lieu of notice are additional wages paid by an employer because of an advanced notice of wages in lieu or a written agreement that such wages would be paid out are reportable to the Department at the time the payment is made. Payments in lieu of dismissal, payments made for a notice period that the employer does not require the employee to work through, are also considered wages reportable upon payment.

Severance pay or Voluntary Buyout payments and legal settlements which result in payments to an employee are not considered wages and are not reportable to the Department.

For additional information about payments made after separation, refer to <https://www.dws.state.nm.us>.

Quarterly Reporting and Contribution Procedures

Employers must pay quarterly taxes to the Department. Each employer must keep true and accurate employment and payroll records, which must include the names of the individual employees, the dates that the individual performed services, the total amount of wages paid to the individual for each separate payroll period, the date of payment of said wages, the hours worked, and the reasons for an individual employee's separation from employment. In addition, every employer must maintain such records to establish the ownership, any changes of ownership of the employing unit and the address at which such records are available for inspection or audit by the Department.

All employers must submit their quarterly reports to the Department unless the employer is exempt from paying Unemployment Insurance taxes. An employer's quarterly report must be filed on or before the last day of the month immediately following the end of the calendar quarter. All employers **must file their quarterly reports electronically** (<https://ui.dws.state.nm.us/Employer/Core/Login.aspx>), using one of the acceptable formats prescribed by the Department. Each quarterly report must include only wages paid during the quarter being reported. Unless the employer's liability has been terminated or suspended, the employer must file a quarterly report even though no wages were paid or no tax is due for the quarter.

Once the employer is obligated to file quarterly reports, all wages must be reported for employment during the entire calendar year and contributions paid when due. This is true regardless of the number of persons employed or the amount of the payroll for any particular quarter. Contributions or payments in lieu of contributions that are unpaid on the date on which they are due bear interest at the rate of 1% per month until payment is made. Past due contributions are subject to a warrant of levy and lien against the employer until the past due amount is resolved. Failure to make timely payments could result in further legal action, up to and including enforcement of the recorded lien, tax refund intercepts, or injunctions against the business.

Quarterly reports that contain extraneous information, are incomplete, or otherwise submitted or prepared improperly are subject to penalties if:

1. The required report for any calendar quarter is not filed within ten (10) days after due date;
2. The contributions due on such report are not paid in full within ten (10) days after due date; or
3. If any payment is attempted to be made by check which is not paid upon presentment.

If an employer fails or refuses to make quarterly reports, the Department will estimate the amount according to the process described in the New Mexico Administrative Code. After the estimated contribution is calculated, the Department will mail a notice to the employer advising it that the Department is estimating the amount of contribution due, providing the estimated amount, and advising that, unless an appeal is initiated within fifteen (15) days pursuant to Subsection B of 11.3.500.8 NMAC, a lien may be recorded against the employer's property ten (10) days after the notice is given or ten (10) days after any final decision on any appeal filed by the employer.

Even if an employer does not have any employees in a given quarter, the employer must still file a wage report with the Department stating that they have zero reportable wages. Unless an employer account is suspended, the employer must comply with the reporting requirements of timely submitting quarterly wage reports each quarter.

Periodic Audits of Employer Records

The Department will conduct periodic, random audits of employer records. An Audit Notification Letter will be sent to the employer requesting specific records and designating the time period covered by the audit. The employer is responsible for submitting complete and accurate records to the Department electronically by following the instructions in the audit letter. If an employer does not respond timely or completely to the audit request, the Department shall issue a subpoena to the employer and will move to enforce compliance with the district court.

Method for Calculating Contribution Rates

Taxable Wage Base

Federal Unemployment Tax Act (“FUTA”) taxes and state Trust Fund contributions are assessed as a percentage of employers’ taxable payrolls. The FUTA tax paid to the federal government is assessed on the first seven thousand dollars of wages paid to each employee. The state taxable wage base against which state contributions are assessed is indexed and must be calculated by the Department of Workforce Solutions each year. The base wage upon which contribution shall be paid during any calendar year is 60% of the state’s average annual earnings. The Department computes this amount by dividing total wages reported to the Department by contributing employers for the second preceding calendar year before the calendar year the computed base wage becomes effective by the average annual employment reported by contributing employers for the same period rounded to the next higher multiple of one hundred dollars.

New Employers

North American Industry Classification System (“NAICS”) codes are determined based on keywords that describe a business and a primary business activity. If the assigned NAICS code does not correspond to the business activity, products, or services provided, contact the Department via email at uitax.support@state.nm.us.

New employers that have been in operation in New Mexico for **less than two years** pay a rate reflecting their industry’s average rate for Unemployment Insurance in New Mexico. New contributing employers will have a rate that is the greater of their industry average Unemployment Insurance Contribution rate or 1%. Industry classifications for contributory, experienced employers are used to determine the average industry rates of new employers. Based on the NAICS code for the establishment, this is the employer’s Assigned Industry Rate. This rate will remain in effect until the employer has acquired two years as an experience rate employer after which new employers will be assessed according to the “Benefit Ratio Formula.” The annual industry rate averages can be found at www.dws.state.nm.us.

Experienced, Contributing Employers

Employers that have been in operation in New Mexico for two years or more pay contributions to the Department based on the Benefit Ratio Formula. The minimum available contribution rate is 0.33%, while the maximum contribution rate is capped at 5.4%. The Benefit Ratio Formula is determined by dividing an employer’s last three years of benefit charges by the employer’s last three years of taxable payroll.

Benefits Charged Against Employer Account (3-year. period) X Reserve Factor X Experience History Factor
Employer’s Average taxable payroll (3-year. period)

Employer's experience benefit charges are calculated based upon claims for which they are the last employer or are in a claimant's base period. When a claimant's base period contains multiple employers, benefit charges are prorated among the employers based on the proportion of wages each employer paid during the base period.

Reserve Factor

The Benefit Ratio will then be multiplied by a "Reserve Factor," which floats between 0.5 and 4.0 and may change annually based upon the solvency of the Unemployment Trust Fund.

Experience History Factor

The "Experience History Factor" is based on the difference between all of the employer's previous years' tax payments and all the previous years' benefit charges to the account, divided by the average of the annual taxable payrolls for the immediately preceding fiscal years, up to a maximum of three years. The calculation is then cross-referenced with the table below to determine the "Experience History Factor."

Account Balance ÷ Average Total Taxable Payroll X 100 = "Employer's Reserve"

If an "Employer's Reserve" is: The employer's "Experience History Factor" is:

6.0% and over	0.4000
5.0% - 5.9%	0.5000
4.0% - 4.9%	0.6000
3.0% - 3.9%	0.7000
2.0% - 2.9%	0.8000
1.0% - 1.9%	0.9000
0.0% - 0.9%	0.9500
Under 0.0%	1.0000

The "Experience History Factor" can only affect the employer's account in a positive way, but there are other factors that are a part of the overall tax rate calculation.

Excess Claims Premium

The calculation includes an excess claims premium, which is capped at 1% of taxable payroll. Should the tax rate exceed 5.4% prior to adjusting the 5.4% maximum rate, an Excess Claims Rate will be added. The Excess Claims Rate is the pre-adjusted tax rate minus 5.4% and then multiplied by 10%. The Excess Claims Rate cannot exceed 1%. The Excess Claims Premium is then determined by multiplying the Excess Claims Rate by the taxable payroll. An example will help illustrate the excess claims premium: A hypothetical employer who has high benefit charges relative to payroll will have a high benefit ratio. The benefit ratio multiplied by the reserve factor yields 15.4%. This is the employer's "real tax or contribution rate." The difference between 15.4% and 5.4% is 10%. Ten percent of 10% is 1%. Accordingly, the employer in this example is responsible for a 1% excess claims premium in addition to its tax rate, which would be the maximum rate of 6.4%.

Equation for Total Rate

Benefit Ratio X Reserve Factor X Experience History Factor = Contribution Rate

Contribution Rate + Excess Claims Rate = Total Rate

Challenging Contributions

Each November, employers will receive a notice stating their contribution rate for the upcoming calendar year. The rate becomes binding unless the employer files an application for review and redetermination. After review, the Department will issue a determination regarding the rate calculation. If the employer does not agree with the determination, they may file an appeal to the Appeal Tribunal. Any appeal of contribution rate is limited to the issues regarding the annual tax rate. Employers cannot raise separation issues in their appeals of the annual tax rate. The Unemployment Compensation Law provides that an employer shall not have standing to contest the chargeability to the employer's account in a proceeding involving the employer's contribution rate except upon satisfying two conditions: first, the employer must not have employed the individual who collected benefits, and second, the employer must not have been a party to the separation determination. Appeals regarding chargeability on a particular claim must be timely raised by the employer at the time of the initial separation determination.

Reimbursable employers also receive quarterly notices identifying the amount of contributions that must be paid to the Department for claims paid during the quarter. The same two conditions for challenging annual contribution rates also apply to quarterly liability charges. Any appeal of quarterly liability charges is limited to the issues regarding the correct individuals and wage calculations and not any causes related to the separation from employment.

Business Transfers

Whenever all or part of one business enterprise acquires all or part of another business enterprise, either by merger, consolidation or other form of reorganization and there is a substantial change in ownership, the transaction is a business transfer for purposes of administration of the unemployment law. The Department will review the transaction and based upon the applicable rules determine what contribution rate will apply to the successor business enterprise. The effective date of the acquisition and transfer of liability for contributions is the date the Department determines that the change in ownership or possession and operation is actually consummated as evidenced by a legally valid instrument or by physical or constructive possession.

A successor business that has acquired all or part of the predecessor's business must notify the Department of the acquisition by completing an electronic application for a total or partial experience history transfer on the Department's webpage. The electronic application should be filed with the Department sixty (60) days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition. If the successor employer fails to complete an electronic application before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition, the Department shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition once the Department receives notice of the transfer and the successor shall be assessed a \$50.00 penalty. All contributions, interest and penalties due from the predecessor employer must

also be paid prior to the transfer. Employers who disagree with the Department's determinations resulting from the history transfer process may file an appeal with the Appeal Tribunal within 15 days of the determination.

SUTA Dumping

"SUTA dumping" is a colloquial term that refers to various unlawful transactions businesses effectuate for the purpose of reducing Unemployment Insurance liability. Under New Mexico law, any person who transfers or acquires, or attempts to transfer or acquire, an employing enterprise for the sole or primary purpose of obtaining a reduced liability for contributions or who knowingly advises another person to engage in that activity faces criminal fines and imprisonment, in addition to civil penalties. The Department will prosecute violators to the fullest extent permitted by law.

Unemployment Insurance Claims Process

Unemployment Claims filed by an Employee:

When an individual is separated from their employment, they may file a claim for unemployment insurance benefits with the Department. The Department will investigate the claim by sending fact finding questionnaires to all parties. The parties have ten (10) days to respond to the fact finding inquiries before the Department will make a decision based on the information at hand. The employer must respond to the fact finding inquiries electronically. At the time of submission, the employer may upload supporting documentation to the Department to substantiate their position. Once a determination is issued by the Department, the party aggrieved by the determination may appeal to the Appeal Tribunal. If the Appeal Tribunal later reverses the initial determination based on information or documents that were not submitted with the employer's initial fact finding response, the Department will assess a penalty against the employer for failing to respond timely or accurately. The employer shall be liable for any benefit charges incurred to the date of disqualification if a pattern of untimely or insufficient responses is present.

The Department may also request information from the employer regarding other issues such as wage verification information, employment status, offers of suitable work, or additional information concerning a claim. These inquiries will be sent to the employer's address of record by the method elected by the employer. The employer is responsible for maintaining and updating their address with the Department. Failure to respond to Department inquiries because the employer did not check for correspondence is not considered good cause.

Confidentiality of Records:

All records obtained by the Department from either an employer or a claimant in furtherance of administering the Unemployment Compensation Law, and any determinations made as to benefit rights of any individual, are confidential and shall not be disclosed or be open to public inspection in any manner. A party in a proceeding before the Department is entitled to a copy of their file so long as the matter is pending. Otherwise the records shall not be released without a written authorization signed by both parties.

Appeals:

How to appeal:

In most cases, an interested party may file an appeal if they disagree with a determination issued by the Department. An employer may file their appeal by logging into their online account and following the prompts. Supporting documentation may also be uploaded to the Department through the employer online account. Employers may also fax an appeal to (505) 841-8636 or send by US mail to Appeal Tribunal, PO BOX 1928, Albuquerque, NM 87103.

An appeal must be in writing and must clearly communicate the desire to file an appeal. The appeal must include the employer name and identification number, the claimant name and identification number, the issue being appealed, and the reason for the appeal.

When to appeal:

An appeal must be filed with the Department within 15 days from the date the determination was issued, unless otherwise indicated. If an appeal is not filed within the deadline, the issue will be dismissed unless good cause for the late appeal is demonstrated. Good cause is a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. A hearing to determine whether the party filing the appeal has good cause for the late filing.

Notice of Hearing:

Once an appeal has been received, a hearing will be scheduled before an Administrative Law Judge ("ALJ"). A Notice of Hearing will be issued to all parties stating the date of the hearing, the time of the hearing, the ALJ assigned to the case, and the issues being heard during the hearing. The Notice of Hearing will include instructions to the parties concerning how to participate and how to submit any exhibits that the parties would like to be considered. It is important to read the entire Notice of Hearing carefully as failure to properly follow the instructions in the Notice of Hearing could result in the appeal being dismissed, parties disqualified, or documents excluded.

Burden of proof:

The employer carries the burden of proof in the following matters:

- Establishing the separation was for reasons other than a layoff due to lack of work
- Establishing the separation was for misconduct
- Establishing tax audit results are incorrect
- Establishing workers are independent contractors rather than employees
- Demonstrating good cause for a late appeal or a reopen request, if the employer is the moving party

The burden of proof in appeal hearings before the Department means that the employer has to demonstrate by substantial evidence that their position is correct. The employer may present documents or witnesses to support their position. However, while evidentiary rules in administrative hearings are less stringent than in district court, the appeal tribunal may not consider witness statements without the witness present during the hearing and available for cross-examination. First hand witnesses are stronger witnesses. A claimant cannot be

disqualified from receiving unemployment benefits based solely on controverted, or disputed, testimony. Additional supporting evidence or testimony is required.

Exhibits:

If a party would like to use exhibits to support their position, the documents must be sent to the other party at least 48 hours prior to the hearing. The documents must also be marked appropriately according to the instructions in the Notice of Hearing and submitted to the Appeal Tribunal prior to the hearing. Documents not properly submitted may be excluded from the hearing.

Call-in Procedures:

Hearings are held telephonically. The parties must call the Appeal Tribunal prior to the hearing to confirm their participation and to provide contact information for the ALJ to use at the time of the hearing. If a party wishes to present witnesses, the witnesses must also call prior to the hearing with contact information, if they will be calling in separately. Third Party Administrators or employer Representatives must also call in to confirm participation separately if they are not participating at the same contact number as the employer.

Hearing Procedures

During the hearing, the parties will be presented an opportunity to give opening and closing arguments, present witnesses and testimony, and cross examine witnesses from the opposing side. Testimony is given under oath and the hearing is recorded.

Higher Authority

If a party disagrees with the decision issued by the Appeal Tribunal, they may file an appeal to Higher Authority. The appeal must be filed within 15 days from the date the decision was issued by the Appeal Tribunal. Appeals to Higher Authority may be faxed to (505) 841-8636, mailed to Higher Authority, PO BOX 1928, Albuquerque, NM 87103, or emailed to higherauthority@state.nm.us. Appeals must be in writing and must include the employer name and identification number, the Claimant name and identification number, the issue being appealed and a brief statement as to the reason for the appeal.

Appeals to Higher Authority will result in a record review. No hearing is held at this level and the decisions from either the Cabinet Secretary or the Board of Review are based on information already on the record. Typically, new evidence is not considered.

Additional information on the appeal process can be found in 11.3.500 NMAC.

Information about Misclassification

Misclassification

Misclassification occurs when an employer incorrectly identifies a worker as an “independent contractor” rather than an employee.

The standard by which the Department determines if an individual is an independent contractor can be found in NMSA 1978, §51-1-42(F)(5) and is referred to as the “ABC test”. The three part test defines a non-employee/contractor as one who established by a preponderance of the evidence that:

- A. Such individual has been and will continue to be free from control or direction over the performance of such services both under his contract of service and in fact;
- B. Such service is either outside the usual course of business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- C. Such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of service. N.M. Stat. § 51-1-42(F)(5).

The Fair Labor Standards Act has set forth an Economic Realities Test that the Department may use as guidance to direct the investigation into determining if a worker is an independent contractor or an employee. The information obtained during the investigation assists the auditors when evaluating if the worker meets the standards set forth in the statute. Some additional information the Department may seek includes, but is not limited to:

1. the extent to which the worker's services are an integral part of the employer's business (examples: Does the worker play an integral role in the business by performing the primary type of work that the employer performs for his customers or clients? Does the worker perform a discrete job that is one part of the business' overall process of production? Does the worker supervise any of the company's employees?);
2. the permanency of the relationship (example: How long has the worker worked for the same company?);
3. the amount of the worker's investment in facilities and equipment (examples: Is the worker reimbursed for any purchases or materials, supplies, etc.? Does the worker use his or her own tools or equipment?);
4. the nature and degree of control by the principal (examples: Who decides on what hours to be worked? Who is responsible for quality control? Does the worker work for any other company(s)? Who sets the pay rate?);
5. the worker's opportunities for profit and loss (examples: Did the worker make any investments such as insurance or bonding? Can the worker earn a profit by performing the job more efficiently or exercising managerial skill or suffer a loss of capital investment?); and
6. the level of skill required in performing the job and the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise (examples: Does the worker perform routine tasks requiring little training? Does the worker advertise independently via yellow pages, business cards, etc.? Does the worker have a separate business site?).

Additional Resources about Misclassification

- “Independent Contractor or Employee?” Special Article (https://www.dws.state.nm.us/Portals/0/Independent_Contractor_or_Employee_Article.pdf)
- “Get the Facts on Misclassification Under the Fair Labor Standards Act, Employee or Independent Contractor?” (<https://www.dol.gov/whd/workers/Misclassification/misclassification-facts.pdf>)
- “Myths About Misclassification” (<https://www.dol.gov/whd/workers/Misclassification/myths-main.htm>)
- New Mexico Department of Taxation & Revenue (<http://www.tax.newmexico.gov/>)
- Employee versus Independent Contractor (<http://www.tax.newmexico.gov/Individuals/independent-contractors-vs-employees.aspx>)
- New Mexico Workers’ Compensation Administration (<http://www.workerscomp.state.nm.us/>)

Misclassification and Unemployment Insurance tax-related questions can be submitted to uitax.support@state.nm.us. The Operations Center is available at (877) 664-6984, Monday through Friday from 8:00 a.m. to 4:30 p.m.

Six Tips to Achieve a Lower Unemployment Tax Rate

1. Respond timely and accurately to Department requests for information

Benefit charges play a large role in employer’s contribution rates. Employers can often avoid an improper award of benefits by simply responding to the initial claim in a timely and thorough fashion. When a claimant files for benefits, the claimant is required to answer detailed questions regarding his or her employment and the manner of separation from employment. An employer potentially subject to benefit charges will receive a notice from the Department advising that a claim has been filed and requesting information regarding the claimant’s work and separation from employment. Employers have 10 days to respond to that notice. Failure to respond to the notice can lead to improper awards of benefits which will be charged to the employer. Furthermore, if an employer appeals a decision to award benefits, an employer who failed to respond within the 10-day deadline may still be liable for some benefit charges, even if the employer prevails in showing that the claimant was not eligible for benefits.

2. Understand Eligibility Requirements

Claimants are only eligible for benefits when they become unemployed through no fault of their own. This includes being laid off due to lack of work, a reduction in hours resulting in less than full-time work, being discharged for reasons other than misconduct, or quitting for good cause connected with the work. It could also include a transfer from one business entity to another, if the businesses have different ownership or federal identification numbers.

What is Misconduct?

Misconduct is limited to conduct in which employees bring about their own unemployment by such callousness, and deliberate or wanton misbehavior that they may have given up any reasonable expectation of receiving unemployment benefits. The employee’s actions may evince a willful or wanton

disregard of an employer's interests as is exemplified by deliberate violations of, or indifference to, the employer's reasonable standards of behavior. The employee's misconduct may demonstrate carelessness or negligence to such a degree or recurrence so as to suggest equal culpability, wrongful intent, or evil design, or so as to reveal an intentional and substantial disregard of the employer's legitimate interests, or of the employee's duties and obligations to the employer.

The employee must know that the behavior could result in termination. In most cases, the conduct must occur on the job or on the employer's premises. An employer may establish misconduct by presenting evidence of an existing and known policy, prior warnings to an employee prohibiting certain conduct, notices to the employee that their job may be in jeopardy if the conduct continues, and witness statements or accounts. If available, an employer may submit recordings or video to substantiate any allegations of misconduct.

Mere inefficient or unsatisfactory job performance, inability to perform to the employer's standards, and isolated instances of carelessness or ordinary negligence do not constitute misconduct. In order for poor job performance to be considered misconduct, the employer must be able to prove that the employee was fully capable of performing the job to the employer's standards and expectations. The most frequent way of proving this is by showing that the employee has a prior track record of performing his or her job at or above standards and then later on stopped performing satisfactorily.

Quitting for Good Cause

To be eligible for benefits, a claimant who voluntarily quits must show that he or she had good cause connected with the work. Good cause means that there were forceful and necessitous circumstances of such a magnitude that a reasonable person would have no choice but to quit. Examples of good cause include unsafe working conditions, a hostile work environment or other unlawful discrimination, and failure to pay wages. To show good cause, a claimant must show that he or she took steps to preserve employment by reporting the conditions to management and allowed the employer an opportunity to correct any issues.

3. Implement Clear Employee Policies and Keep Records

By implementing and communicating clear employee policies and workplace expectations, employers can help minimize Unemployment Insurance costs. Employers bear the burden of proving misconduct. To prove misconduct, employers need to maintain clearly documented and communicated policies. Employers also need to document the circumstances of the separation. Without documentation and evidence of clearly communicated policies, employers are often unable to meet their burden of proof.

4. Report and Pay Contributions Promptly

Employers who do not report wages in the manner prescribed by the Department and who do not timely pay contributions are subject to penalties and interest in addition to the contributions owed. Such costs are unnecessary and can be avoided by timely reporting wages in the manner prescribed by the Department and then promptly paying contributions when they become due.

5. Report Fraud

Unemployment Insurance fraud harms both employers and legitimate recipients of unemployment benefits. The Department conducts crossmatch searches of state and national databases to ascertain whether a claimant is simultaneously working and claiming benefits. These crossmatches are very effective in detecting fraud but are not perfect. Crossmatches sometimes take time, and many individuals will not show up in crossmatches because they work for cash (i.e. under the table). If fraud is suspected, employers may report it by calling the toll free number at 1-877-664-6984.

If the Department sends a request for information based on data detected during the crossmatch process, the employer is responsible for responding timely to the inquiry. If the employer does not respond, the Department will make a determination based on the information at hand which may negatively impact the employer's unemployment tax rate. The Department will not make retro-active corrections to incorrect rate information if an employer fails to respond timely.

6. Report Individuals that Refuse Offers of Suitable Work

Unemployment claimants are required to be able, available, and actively seeking work. That means that if they are offered suitable work and refuse a bona fide offer, they become ineligible for benefits. A bona fide offer includes specific information such as the title of the job offered, the duties, the pay rate, and the number of hours the individual is expected to work. Employer cooperation is essential to enforcing suitable work requirements because employers are best situated to advise the Department when they have made an offer of employment to a potential claimant who then refused the employment. Claimants are not required to accept any job offered to them, but they are required to accept suitable work unless good cause for the refusal is demonstrated.