This is an amendment to 11.3.400 NMAC, Sections 6-7, 401, 404, 409, 413, 417-419, 416 and adding section 428, effective 10/29/2019.

11.3.400.6 OBJECTIVE: The purpose of these rules is to provide clarification of the Unemployment Compensation Law. These rules assist employers and claimants [~~in~~] to better [~~understanding~~] understand how specific sections of the law are being administered by the department. The rules also assist employers [~~in better~~] achieve compliance [~~and provide~~] by facilitating understanding of the department's procedures [~~necessary to~~] so that employers can meet [~~it's~~] the requirements of unemployment compensation law.
[11.3.400.6 NMAC - Rp, 11.3.400.6 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.7 DEFINITIONS:

A. "Account" means the employer account, identified by an account number, established and maintained [~~for~~] by each employer, or employer member of a group account, for the purpose of determining liability for contributions or payments in lieu of contributions and includes a record of all unemployment insurance activity including benefit charge allocations, contributions and wages from which benefits to eligible claimants can be determined.

B. "Agency" means any officer, board, commission, or other authority charged with the administration of the unemployment compensation law of a participating jurisdiction.

C. "Alternate base period" means the last four completed quarters immediately preceding the first day of the claimant's benefit year.

D. "Annual payroll" means the total taxable amount of [~~remuneration~~] payment from an employer for employment during a 12-month period ending on a computation date.

E. "Base period" means the first four of the last five completed quarters as provided in Subsection A of Section 51-1-42 NMSA 1978 or the alternate base period.

F. "Base-period employer~~s~~" means the employer of an individual during the individual's base period.

G. "Base-period wages" means the wages of an individual for insured work during the individual's base period on the basis of which the individual's benefit rights were determined.

H. "Benefit charges" means the dollar amounts allocated or accrued to an employer's account for unemployment benefits paid to individuals.

I. "Benefit payments used to calculate the average benefit cost rate" means all unemployment compensation benefits and state extended benefits paid from the trust fund to claimants with wages from non-reimbursable covered employment.

J. "Benefit ratio" means the result determined by dividing an employer's benefit charges by the employer's taxable payroll.

K. "Common ownership" means that two or more businesses are substantially owned, managed or controlled by the same person or persons.

L. "Computation date" means for each calendar year the close of business on June 30 of the preceding calendar year.

M. "Contributions" means the tax payments required by Section 51-1-9 NMSA 1978 to be made into the fund by an employer on account of having individuals performing services for the employer.

N. "Contribution rate" means the rate applicable to the tax payments the employer is required to pay into the fund.

O. "Employer's reserve" means the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, up to a maximum of three fiscal years.

P. "Employing enterprise" means a business activity engaged in by an employing unit in which one or more persons have been employed within the current or the three preceding calendar quarters.

Q. "Employment" means services performed by an individual including corporate officers for wages or other [~~remuneration~~] payment for an employer that has the right, whether utilized or not, to control or direct the individual in the performance of the services at the employer's place of business which includes all locations where services are performed for the employer under the individual's contract of service and the individual is not customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of services.

R. "Excess claims premium" means the charge in addition to the contribution rate applicable to the employer if an employer's contribution rate is calculated to be greater than five and four-tenths percent, provided that an employer's excess claims premium shall not exceed one percent of the employer's annual payroll.

S. "Experience history factor" means the determination based on the employer's reserve which is the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, to a maximum of three fiscal years.

T. "Good cause" means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason. In determining whether good cause has been shown for permitting an untimely action or excusing the failure to act as required, the department may consider any relevant factors including, but not limited to, whether the party acted in the manner that a reasonably prudent individual would have acted under the same or similar circumstances, whether the party received timely notice of the need to act, whether there was administrative error by the department, whether there were factors outside the control of the party that prevented a timely action, the efforts made by the party to seek an extension of time by promptly notifying the department, the party's physical inability to take timely action, the length of time the action was untimely, and whether any other interested party has been prejudiced by the untimely action. However, good cause cannot be established to accept or permit an untimely action or to excuse the failure to act, as required, that was caused by the claimant's, failure to keep the department directly and promptly informed of the claimant's correct email or postal mailing address or the employer's or employing unit's failure to keep the department directly and promptly informed of the employer's or employing unit's correct email address. A written decision concerning the existence of good cause need not contain findings of fact on every relevant factor, but the basis for the decision must be apparent from the order.

U. "Group account" means the account, identified by an account number, established for two or more employers whose application to become liable for payments in lieu of contributions and for sharing the cost of benefits paid by them, has been approved by the department in accordance with Subsection E of Section 51-1-13 NMSA 1978.

V. "Group member" means any employer who has become associated with another or others to form a group account.

W. "Interested agency" means the agency of an interested jurisdiction.

X. "Interested jurisdiction" means any participating jurisdiction to which an election submitted under this rule is sent for its approval.

Y. "Jurisdiction" means any state of the United States, the District of Columbia, Puerto Rico, and the Virgin Islands or, with respect to the federal government, the coverage of any federal unemployment compensation law.

Z. "Knowingly" means having actual knowledge of or acting with deliberate ignorance of or reckless disregard for the prohibition involved.

AA. "Participating jurisdiction" means a jurisdiction whose administrative agency has subscribed to the interstate reciprocal coverage arrangement and whose adherence thereto has not terminated.

BB. "Payment in lieu of contributions" means nonprofit employers or governmental agencies that elect to pay the division for the fund an amount equal to the amount of regular benefits and of one-half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization or governmental agency, to individuals of weeks of unemployment that begin during the effective period of such election.

[~~**BB**~~] **CC.** "Predecessor" means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise.

[~~**CC**~~] **DD.** "Reserve factor" means the annual factor determined by the department that is necessary to ensure that the unemployment trust fund sustains an adequate reserve.

[~~**DD**~~] **EE.** "Services customarily performed by an individual in more than one jurisdiction" means services performed in more than one jurisdiction during a reasonable period, if the nature of the services gives reasonable assurance that they will continue to be performed in more than one jurisdiction or if such services are required or expected to be performed in more than one jurisdiction under the election.

[~~**EE**~~] **FF.** "Successor" means any person or entity that acquires an employing enterprise and continues to operate such business entity.

[~~**FF**~~] **GG.** "Taxable year" means the calendar year beginning the first day of January and ending the last day of December.

[~~**GG**~~] **HH.** "Total wages for the purpose of computing the reserve ratio and the benefit cost rate" means all wages paid to covered employees for payroll periods ending in a calendar year as reported on the quarterly census of employment and wages.

[~~HH~~] **II.** "Trust fund balance" means the trust fund balance on deposit with the U.S. treasury in the state's account as of June 30 that includes only funds that will be used for payments of benefits to claimants.

[~~H~~] **JJ.** "Violates or attempts to violate" means intent to evade, a misrepresentation or a willful nondisclosure.

[~~JJ~~] **KK.** "Wages" means all remuneration for services, including commissions, bonuses or unpaid loans to employees and the cash value of all remuneration in any medium other than cash.

[11.3.400.7 NMAC - Rp, 11.3.400.7 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.8 THROUGH 11.3.400.400: [RESERVED]

11.3.400.401 [~~RECORDS OF EMPLOYING UNITS~~] EMPLOYER TAX ACCOUNT AUDITS:

A. Records of Employing Units:

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

[~~(1)~~] **(a)** the individual's name, address, and social security number;

[~~(2)~~] **(b)** the dates on which the individual performed services for such employing unit, including beginning and ending dates, and the state or states in which such services were performed;

[~~(3)~~] **(c)** the total amount of wages paid to the individual for each separate payroll period, date of payment of said wages, and amounts [~~or remuneration~~] paid to the individual for each separate payroll period other than "wages", as defined in the Unemployment Compensation Law;

[~~(4)~~] **(d)** whether, during any payroll period, the individual worked less than full time, and, if so, the hours and dates worked;

[~~(5)~~] **(e)** the reasons for separation of the individual.

[~~B.~~] **(2)** In addition to the records required by Subsection A of 11.3.400.401 NMAC, each employing unit shall keep [~~, in addition to the records required by Subsection A of 11.3.400.401 NMAC,~~] and provide to the department upon request, the following:

(a) [~~such~~] records [~~as will~~] to establish and demonstrate the ownership and any changes of ownership of the employing unit and the address at which such records are available for inspection or audit by representatives of the department. The records shall show the addresses of the owners of the employing unit or, in the event the employing unit is a corporation or unincorporated organization, such records shall show the addresses of directors, officers, registered agents and any person on whom subpoenas or legal process may be served in New Mexico. In the event the employing unit is a group account, the records shall show the address of the group representative; and

(b) records to verify any and all workers providing services to the employer are properly classified as employees or independent contractors such as the employer's general ledger or check register.

[~~C.~~] **(3)** If any[~~remuneration~~] payments other than money wages is paid to or received by an individual with respect to services performed by his employer, the records shall show the total amount of cash wages and the cash value of any other [~~remuneration~~] payments.

[~~D.~~] **(4)** All records shall be kept and maintained as to establish clearly the correctness of all reports which the employing unit is required to file with the department and shall be readily accessible to authorized representatives of the department within the geographical boundaries of New Mexico; and in the event such records are not maintained or are not available in New Mexico, the employing unit shall pay to the department the expenses and costs incurred when a representative of the department is required to go outside the state of New Mexico to inspect or audit such records.

[~~E.~~] **(5)** If an employing unit elects to maintain its payroll records on magnetic media, it shall be the obligation of such employing unit to reproduce such records on a media, readable by the human eye for the purpose of an audit.

[~~F.~~] **(6)** The records prescribed by this rule shall be preserved for a period of at least four years in addition to the current calendar year.

B. Employers must provide accurate work records at any reasonable time and as often as necessary for effective administration of the Unemployment Compensation Law.

(1) The department shall complete random audits of employer records to ensure compliance. Such audits will be conducted electronically whereby employers shall return any requested documentation electronically through the employer's online account.

(2) Employers shall return the required documentation within 20 days from the date of the audit notification letter. Failure to return all documents timely could result in the department seeking compliance through a subpoena and enforcement in district court.

(3) If the audit results in reclassification of employees due to employer misclassification, the employer has the right to appeal the determination following procedures in 11.3.500 NMAC. Penalties and interest assessed as a result of the determination shall not be abated. Any removal of penalties and interest must be addressed during the appeal process.

C. The department determines whether an individual is considered an independent contractor using the "ABC test" as defined in Subparagraphs (a) through (c) of Paragraph (5) of Subsection F of Section 51-1-42 NMSA 1978.

[11.3.400.401 NMAC - Rp, 11.3.400.401 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.404 WAGE AND CONTRIBUTION REPORTS BY EMPLOYING UNITS:

A. QUARTERLY EMPLOYMENT & WAGE DETAIL REPORT: An employer's wage and contribution report must be filed electronically on the department's web page on or before the last day of the month immediately following the end of the calendar quarter. If the due date falls on a Saturday, Sunday or legal holiday, the report is due on the next department business day. A wage and contribution report must be filed even though no wages were paid, or no contribution or tax is due for the quarter unless the employer's liability has been terminated or suspended pursuant to Section 51-1-18 NMSA 1978. Each wage and contribution report must include only wages, as the term is defined in Subsection T of Section 51-1-42 NMSA 1978, paid during the quarter being reported. Corrections of errors made on previously submitted reports must be electronically submitted as an adjustment [~~on~~] through the [~~department's web~~] page employer's on-line account.

B. SIGNATURE REQUIREMENTS ON WAGE AND CONTRIBUTION REPORTS: Wage and contribution reports must have an appropriate electronic signature by the owner, partner, corporate officer or a designated representative of the employer. If the employer appoints a designated representative or third party agent who is not an employee, the employer must electronically specify what duties have been assigned to the designated representative or third party agent to perform on the employer's behalf.

C. WAGE DETAIL REPORTING REQUIREMENTS: All employers must file their quarterly wage and contribution report electronically, using one of the acceptable formats prescribed by the department. [~~The information provided by the employer as to individual employees shall be on a report form prescribed by the department and shall be entered in the department's records.~~] Reports that contain extraneous information, are incomplete or otherwise submitted or prepared improperly will [~~not be acceptable and will~~] be rejected and become subject to the following penalties:

(1) if the required report for any calendar quarter is not filed within 10 days after due date, a penalty of [~~fifty dollars ($50)~~] $50 is to be paid by the employer;

(2) if the contributions due on such report are not paid in full within 10 days after due date, an additional penalty of five percent but not less than [~~twenty-five dollars ($25)~~] $25 is to be paid by the employer on any such contributions remaining unpaid;

(3) if any payment required to be made by the Unemployment Compensation Law (51-1-9 NMSA 1978) is attempted to be made by check which is not paid upon presentment, a penalty of [~~twenty-five dollars ($25)~~] $25 shall be paid by the employer; and

(4) in no case shall any penalty as herein provided or as imposed by this section be assessed for any quarter prior to the six completed calendar quarters immediately preceding the quarter in which the employer shall be determined subject to the Unemployment Compensation Law; and in no case shall a penalty for late reporting or late payment of contribution be imposed if, in the opinion of the secretary, an employer's late reporting, late payment of contribution, or both, was occasioned by circumstances beyond the control of the employer, who in good faith exercised reasonable diligence in an effort to comply with the reporting and contribution payment provisions of the Unemployment Compensation Law.

D. ESTIMATED WAGE AND CONTRIBUTION REPORTS: If an employer fails or refuses to make reports in a manner as prescribed in Subsection C of 11.3.401.404 NMAC showing what the employer claims for the amount of wages which it believes to be due, the department's representative shall estimate the amount according to the process described in Subsection E of 11.3.401.404 NMAC. After the estimated wages are calculated, the department shall provide a notice to the employer advising it that the department is estimating the

amount of contribution due, provide the estimated amount of contribution due and advise the employer that unless an appeal is initiated within 15 days pursuant to Subsection B of 11.3.500.8 NMAC, the estimated amount shown in the notice shall be the amount of the contribution due for the period stated in the notice. The notice shall also inform the employer that the department may record a lien against the employer's assets. After service of the notice to the employer the department shall cause the warrant of levy and lien to be recorded in same manner as any other warrant issued by the department. If thereafter, the department should receive from the employer reports for the estimated quarters containing different wage amounts, the estimation of the contribution due shall not be altered, and the employer shall remain liable for the amount assessed.

E. ESTIMATION PROCESS: The estimated contribution shall be one and one-half times higher than the highest wages reported in any quarter in the most recent eight quarters in which wage reports were filed. If no wage and contribution report has been filed since the employer was determined liable or if the employer has never submitted a report to determine liability to the department, no estimations shall be done.

F. ADMINISTRATIVE ERROR: At any time, the department may correct any error the department determines has been made even if notifications have been given, estimations made or contributions paid pursuant to the notifications. By way of example and not by limitation, such internal errors may be the result of an estimation that has been made after notice was sent to an incorrect address, sent to a deceased or incapacitated natural employer, estimations otherwise imposed without proper notice to the employer, estimations imposed due to misinformation in a wage claim which precipitated the establishment of an incorrect account, or other incidents of human or computer error or excusable neglect within the department. Estimations may be removed only pursuant to the written authorization of the department.

[11.3.400.404 NMAC - Rp, 11.3.400.404 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.409 REPORT TO DETERMINE LIABILITY:

A. REGISTRATION: Each employing unit or employing enterprise engaged in 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, or otherwise, shall register the business on line. Registration for the business may be filed when the employer has hired its first employee, and:

(1) The employer has paid an individual wages of [~~four hundred fifty ($450) dollars~~] $450 or more in any calendar quarter in either the current or preceding calendar year or if there was one or more persons (part-time workers included) in employment in each of twenty different calendar weeks during either the current or the preceding calendar year irrespective of whether the same individual was in employment in each day.

(2) In agricultural labor, the employer has paid wages of [~~twenty thousand ($20,000) dollars~~] $20,000 or more to individuals during any calendar quarter in either the current or the preceding calendar year or employed 10 or more individuals in agricultural labor (part-time workers included) in each of 20 different calendar weeks in either the current or preceding calendar year, whether or not the weeks were consecutive and regardless of whether the individuals were employed at the same time.

(3) The employer has paid an individual in domestic service in a private home, local college club or local chapter of a college fraternity or sorority wages of [~~one thousand ($1,000) dollars~~] $1,000 in any calendar quarter in the current or preceding calendar year.

B. REPORT OF CHANGE IN STATUS:

(1) Every subject employer who shall sell, convey or otherwise dispose of its business, or all or any substantial part of the assets thereof, or who shall cease business for any reason, whether voluntarily or by being in bankruptcy shall, within five days, immediately report such fact, electronically, to the department, stating the name and address of the person, firm or corporation to whom such business, or all or any substantial part of the assets thereof, shall have been sold, conveyed or otherwise transferred.

(2) In cases of bankruptcy, receivership or similar situations, such employer shall report the name and address of the trustee, receiver or other official placed in charge of the business.

(3) Upon the death of any employer, the report shall be made by the employer's personal representative upon the representative's appointment by the court. In the event no personal representative is appointed, the report shall be made by the heir or other person who succeeds to the interest of the employer.

(4) In the event of a dissolution of a partnership or joint venture, such report shall be made by the former partners or joint venturers.

(5) For purposes of Paragraph (1) of Subsection B of 11.3.400.409 NMAC, "substantial" part of a business, shall be any identifiable part which, if considered alone, would constitute an employing unit as defined in Subsection D of Section 51-1-42 NMSA 1978.

[11.3.400.409 NMAC - Rp, 11.3.400.409 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.413 PROCEDURE FOR RELIEF FROM PENALTIES:

A. An employer aggrieved by the imposition of penalties for late reports or late payment of contributions or payments in lieu of contributions may, [~~file~~] submit a written request [~~with~~] to the [~~unemployment division director~~] department for relief from the imposition of penalties specifically identifying the relief requested and stating the reason for the request. Relief may be granted upon the showing of good cause.

B. [~~The unemployment division director shall~~] The department shall review the employer's request and make a recommendation to the secretary to grant or deny relief from penalties to taxpayers.

[11.3.400.413 NMAC - Rp, 11.3.400.413 NMAC, 11/30/2016]

11.3.400.415 CONTRIBUTION RATING OF EMPLOYERS: Contribution rates for employers are calculated in accordance with Section 51-1-11 NMSA 1978. [~~This rule shall govern the contribution rating provisions of Section 51-1-11 NMSA 1978.~~]

A. ELIGIBILITY OF EMPLOYER'S ACCOUNT FOR COMPUTED RATE BASED ON 24 MONTHS EXPERIENCE. For purposes of the interpretation and application of Subsection F of Section 51-1-11 NMSA 1978, no employer's experience rating account shall be deemed to have been chargeable with benefits throughout the preceding 24 consecutive calendar month period ending on a computation date as defined in Subsection J of 11.3.400.7 NMAC, unless as of such computation date, the department finds that the employer paid wages in employment during any part of the first calendar quarter of the 24 month period ending on such computation date and that the payment of such wages was not interrupted for eight or more consecutive calendar quarters, or by termination of coverage under Section 51-1-18 NMSA 1978; provided, all quarterly wage and contribution reports received by the department by July 31 following the computation date will be considered in computing the rate for the succeeding calendar year.

B. CONTRIBUTING EMPLOYERS FOR 24 MONTHS. For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer throughout the preceding 24 months, the contribution rate for that employer shall be determined by multiplying the employer's benefit ratio by the reserve factor then multiplying that product by the employer's experience history factor. An employer's benefit ratio is determined by dividing the employer's benefit charges during the immediately preceding fiscal years, up to a maximum of three fiscal years, by the total of the annual payrolls of the same time period, calculated to four decimal places, disregarding any remaining fraction. The reserve factor is the annual numerical factor determined by the department that is necessary to ensure that the unemployment trust fund sustains an adequate reserve. The employer's experience history factor shall be based on the employer's reserve. The employer's reserve shall be calculated as the difference between all of the employer's previous years' contribution payments and all of the employer's previous years' benefit charges, divided by the average of the employer's annual payrolls for the immediately preceding fiscal years, up to a maximum of three fiscal years, calculated to four decimal places, disregarding any remaining fraction, as set forth in the following table and provided that an employer's contribution rate shall not be less than thirty-three hundredths percent or more than five and four-tenths percent.

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

C. CONTRIBUTING EMPLOYERS FOR LESS THAN 24 MONTHS. For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer for less than 24 months, the contribution rate for that employer shall be the average of the contribution rates for all contributing employers in the employer's industry based on its North American industry classification system (NAICS) sector, but shall not be less than one percent or more than five and four-tenths percent; provided that an individual, type of organization or employing unit that acquires all or part of a employing enterprise that has a rate of contribution less than the average of the contribution rates for all contributing employers in the employer's industry, shall be entitled to the transfer of

the contribution rate of the other employing unit to the extent permitted pursuant to Subsection D of 11.3.400.417 NMAC.

D. EXCESS CLAIMS PREMIUM. If an employer's contribution rate pursuant to Subsection B of 11.3.400.415 NMAC is calculated to be greater than five and four-tenths percent, notwithstanding the limitation in Subsection B of 11.3.400.415 NMAC, the employer shall be charged an excess claims premium in addition to the contribution rate applicable to the employer; provided that an employer's excess claims premium shall not exceed one percent of the employer's annual payroll. The excess claims premium shall be determined by multiplying the employer's excess claims rate by the employer's annual payroll. An employer's excess claims rate shall be determined by multiplying the difference of the employer's contribution rate, notwithstanding the limitation in Subsection B of 11.3.400.415 NMAC, less five and four-tenths percent by ten percent.

E. NOTIFICATION OF ANNUAL RATE CONTRIBUTIONS. The department shall promptly notify each employer of the employer's rate of contributions and excess claims premium as determined for any calendar year on or before January 31st of the year the rate is effective. Such notification shall include the amount determined as the employer's annual payroll, the total of all of the employer's contributions paid on the employer's behalf for all the past years, total benefits charged to the employer for all such years and the employer's experience history factor. For an employer that has been a contributing employer for less than 24 months, the contribution rate for that employer shall be the average of the contribution rates for all contributing employers in the employer's industry as set forth in Subsection C of 11.3.400.415 NMAC. Such determination shall become conclusive and binding upon the employer unless, within 30 days after the service of notice thereof to the employer's [~~last known address on file with the department~~] address of record, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be promptly notified of the decision on the employer's application for review and redetermination, which shall become final unless, within 15 days after the service of notice thereof to the employer's [~~last known address on file with the department~~] address of record, further appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC. The employer shall not have standing, in any appeal involving the employer's rate of contributions or contribution liability, to contest the chargeability to the employer of any benefits paid in accordance with a decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.

F. NOTIFICATION OF QUARTERLY CHARGES. The department shall provide each contributing employer a written determination of benefits chargeable to the employer within 90 days of the end of each calendar quarter. Such determination shall become conclusive and binding upon the employer unless, within 30 days after the service of the determination to the employer's [~~last known address on file with the department~~] address of record, the employer files an application for review and redetermination, setting forth the employer's reason therefor. The employer shall be promptly notified of the decision on the employer's application for review and redetermination, which shall become final unless, within 15 days after the service of notice thereof to the employer's [~~last known address on file with the department~~] address of record, further appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC. The employer shall not have standing, in any appeal involving the employer's quarterly rate of contributions or contribution liability, to contest the chargeability to the employer of any benefits paid in accordance with a decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.

G. CORRECTION OF ERRORS. The secretary shall correct any error in the determination of an employer's rate of contribution during the calendar year to which the erroneous rate applies, notwithstanding that notification of the employer's rate of contribution may have been issued and contributions paid pursuant to the notification. Upon issuance by the division of a corrected rate of contribution, the employer shall have the same rights to review and redetermination as provided in Subsection E of 11.3.400.415 NMAC.

[11.3.400.415 NMAC - Rp, 11.3.400.415 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.417 PURCHASE OR SALE, EXPERIENCE HISTORY TRANSFERS:

A. TOTAL EXPERIENCE HISTORY TRANSFERS:

(1) ACQUISITION OF ALL EMPLOYING ENTERPRISES: A total experience history transfer is available to a successor enterprise only in the situation where the successor has acquired all of the

predecessor's business enterprise and, where the predecessor, immediately after the business transfer as defined in 11.3.400.416 NMAC, ceases operating the same enterprise except for liquidation purposes.

(a) In the sale of a business enterprise, the phrase "all assets" includes the transfer of a favorable experience history.

(b) In the sale of a business enterprise, the phrase assumption of "all liabilities" includes an unfavorable experience history and any unpaid contributions, interest and penalties.

(2) NOTIFICATION BY SUCCESSOR: A successor who has acquired all of the predecessor's employing enterprises shall notify the department of such acquisition by completing an electronic notification for a total experience history transfer [~~on the department's webpage~~] through the employer's online account 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 of the employing enterprise or enterprises. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a total history transfer shall be given as prescribed by the electronic notification [~~on the department's webpage~~] through the employer's online account or as requested by the department. Upon completion of the notification, the department shall furnish a statement of account to the predecessor and the successor, if the predecessor is delinquent in either submitting wage and contribution reports or the payment of contributions.

(a) All contributions, interest and penalties due from the predecessor employer must be paid. If any amount remains due to the department at the time of the transfer, the successor employer assumes the liability for the outstanding balance as part of the history transfer.

(b) If the successor employer fails to complete an electronic notification to the department before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition, when the department receives actual notice of the transfer, the department shall effect the transfer of the experience history and applicable rate of contribution retroactively to the date of the acquisition and the successor shall pay a penalty of [~~fifty ($50) dollars~~] $50.

(c) An electronic notification for a history transfer must be completed on line during the calendar year of the transaction transferring the employing enterprises. Upon a showing of good cause, the department may extend the due date for the completion of the endorsed notification and quarterly wage and contribution reports for an additional 30 days provided that the request for an extension of time is filed in writing on or before the regular due date.

(3) LIQUIDATION WAGES: Any wages reported by the predecessor and contributions paid by the predecessor for the cessation of the predecessor's business after the acquisition date of the business by the successor shall be credited to the successor's account for experience rating purposes.

(4) WRITTEN DETERMINATION TO SUCCESSOR AND PREDECESSOR: The department shall issue a written determination to the successor and predecessor approving or disapproving the total history transfer. All such determinations shall be subject to the provisions of 11.3.500.8 NMAC governing appeals of contribution or tax determinations. Failure to timely appeal a denial of the transfer of a favorable experience transfer without good cause as defined in11.3.400.7 NMAC will deprive the successor business of the opportunity for the transfer of the favorable experience history transfer.

(5) PREDECESSOR RESUMES OR CONTINUES IN BUSINESS: If the predecessor owner operates a new or different business enterprise upon or after the business transfer, the predecessor shall retain its account number and a rate in accordance with the provisions of Section 51-1-11 NMSA 1978.

B. PARTIAL EXPERIENCE HISTORY TRANSFERS:

(1) NOTIFICATION BY SUCCESSOR AND SUBMISSION OF JOINT NOTIFICATION FORM: The applicable experience history may be transferred to the successor in the case of a partial transfer of an employing enterprise if the successor has acquired one or more of the several employing enterprises of a predecessor but not all of the employing enterprises of the predecessor and each employing enterprise so acquired was operated by the predecessor as a separate store, factory, shop or other separate employing enterprise and the predecessor, throughout the entire period of the contribution with liability applicable to each enterprise transferred, has maintained and preserved payroll records that, together with records of contribution liability and benefit chargeability, can be separated by the parties from the enterprises retained by the predecessor to the satisfaction of the secretary or the secretary's designee.

(2) The successor shall notify the department of such acquisition by completing an electronic notification for a partial experience history transfer [~~on the department's webpage~~] the employer's online account 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 of the employing enterprise. The notification shall be endorsed by the predecessor. The notification shall provide a schedule of the name and social security number of and the wages paid to and the

contributions paid for all employees for the three and one-half year period preceding the computation date through the date of transfer or such lesser period as the enterprises transferred may have been in operation. The notification shall be supported by the predecessor's permanent employment records, which shall be available for audit by the department. The notification shall be reviewed by the department and, upon approval the percentage of the predecessor's experience history attributable to the enterprises transferred shall be transferred to the successor. The percentage shall be obtained by dividing the taxable payrolls of the transferred enterprises for such three and one-half year period preceding the date of computation or such lesser period as the enterprises transferred may have been in operation, by the predecessor's entire payroll. Upon a showing of good cause as defined in 11.3.400.7 NMAC, the department may extend the due date for the filing of the endorsed notification and quarterly wage and contribution reports for an additional 30 days provided that the request for an extension of time is filed in writing on or before the regular due date. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a partial history transfer shall be given as prescribed by the notification or as requested by the department.

(3) WRITTEN DETERMINATION TO SUCCESSOR: The department shall issue a written determination to the successor approving or disapproving the partial history transfer. All determinations disapproving the partial history transfer shall be subject to the provisions of 11.3.500.8 NMAC governing appeals of contribution or tax determinations. Failure to timely appeal a denial of the partial history transfer without good cause as defined in 11.3.400.7 NMAC will deprive the successor business of the opportunity for the transfer of the partial history experience.

C. COMMON OWNERSHIP EXPERIENCE HISTORY TRANSFER:

(1) If the transaction involves only a merger, consolidation or other form of reorganization without a substantial change in the ownership and controlling interest of the business entity, as determined by the secretary, and both the predecessor and the successor are under common ownership, a party to a merger, consolidation or other form of reorganization shall not be relieved of liability for any contributions, interest or penalties due and owing from the employing enterprise at the time of the merger, consolidation or other form of reorganization.

(2) The experience history attributable to the transferred business shall also be transferred to and combined with the experience history attributable to the successor employer. The rates of both employers shall be recalculated and made effective immediately upon the date of the transfer.

D. DETERMINATION OF CONTRIBUTION RATES AFTER TOTAL OR PARTIAL EXPERIENCE HISTORY TRANSFER:

(1) If, on the effective date of the transfer, the successor employer has a contribution rating for the calendar year there will be no change in rate determined for the successor's account as a result of the transfer.

(2) If, on the effective date of the transfer, the successor employer does not have a contribution rating for the calendar year, the rate shall be computed from the successor's prior history combined with the acquired total or partial history of the predecessor.

(3) If, on the effective date of the transfer, the successor employer has not been a contributing employer throughout the preceding 24 months, the contribution rate for the successor employer shall be:

(a) the rate of the predecessor or combined predecessors in the case of a total experience transfer; and

(b) a rate based on experience of the separate schedule of employment and related benefits charged will apply in the case of a partial experience transfer.

(4) If, on the effective date of the transfer, the successor employer has not been a contributing employer throughout the preceding 24 months, and the successor employer acquires all or part of a employing enterprise that has a rate of contribution less than the average of the contribution rates for all contributing employers in the employer's industry, shall be entitled to the transfer of the contribution rate of the predecessor employing enterprise.

(5) A new rate based on experience of the remaining schedule of employment and related benefits charged will apply to the predecessor account from the effective date of the transfer in the case of a partial experience transfer.

E. CHARGING OF BENEFITS AFTER TRANSFER: Benefits paid subsequent to the effective date of a partial, total or common ownership experience history transfer shall be charged to the successor's account if the base period wages were transferred to the successor.

[11.3.400.417 NMAC - Rp, 11.3.400.417 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.418 TIME FOR CORRECTION OF ERRONEOUS RATE DETERMINATIONS:

A. Where an employer's rate of contribution for any calendar year has been incorrectly determined, the error or omission shall be corrected and the rate adjusted accordingly by the department on its own initiative with notification to the employer at its [~~last known address~~] address of record, within the following periods:

(1) on or before June 30 of the calendar year in which the erroneous rate determination was issued if the error was in the determination of benefits chargeable to the employer's experience rating account;

(2) at any time within the calendar year in which the erroneous rate determination was issued if the error or omission was due to the employer's misrepresentation or nondisclosure of a material fact;

(3) at any time during the calendar year in which the erroneous rate determination was issued and any time within the next calendar year if the error or omission was due wholly or in part to a rate computation.

B. Upon issuance of a corrected rate of contribution, the employer shall have the right to a review and redetermination as provided in Subsection L of Section 51-1-11 NMSA 1978.

[11.3.400.418 NMAC - Rp, 11.3.400.418 NMAC, 11/30/2016]

11.3.400.419 CHARGING OF BENEFITS: Whenever a claimant files a new claim for benefits and is found by the department to have sufficient base period wages to entitle the claimant to benefits if otherwise eligible, the department shall issue a "notice to employer of claim determination" on a form prescribed by the department, to each base period employer unless that employer was also the claimant's last employer and has been sent notice pursuant to 11.3.300.308 NMAC. The notice to each employer will give the name and social security account number of the claimant, the claim date and the amount of wages paid by that employer in each quarter of the base period.

A. NOTICE TO LAST EMPLOYER OF CLAIM DETERMINATION -- RESPONSE REQUIRED: Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to the claimant's last known employer, at the [~~address of the employer as registered with the department~~] employer's address of record, if [~~so~~] the employer is registered, and, [~~if not registered~~], to the address provided by the claimant if the employer is not registered with the department, a dated notice of the filing of the claim and a fact-finding questionnaire.

(1) The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response directly to the department electronically through the employer's online account within 10 calendar days from the date of the transmittal of the notice of claim. [~~Unless excused by the department, the response must be an electronic transmittal.~~]

(2) If the employer fails to respond by the deadline, or if the submitted response is untimely or inadequate, and the initial claim determination is later reversed at the appeal level, the employer may be liable for any benefit charges incurred to the date of disqualification if the employer or the employer's agent has demonstrated an established pattern of failing to respond timely or adequately.

(a) A pattern is defined as failure to respond timely or adequately to five claims, or more at the secretary's discretion, within a calendar year.

(b) An inadequate response is defined as the employer's failure to provide relevant information or documentation that was reasonably available at the time a response was requested by the department.

B. NOTICE TO BASE PERIOD EMPLOYERS OF POTENTIAL LIABILITY– RESPONSE REQUIRED: Whenever a claimant files an initial claim for benefits or an additional claim, the department shall immediately transmit to all employers who employed the claimant during the established base period at the addresses of record, a dated notice of the filing of the claim that the employer may have liability for and a fact finding questionnaire.

(1) The employer shall provide the department with full and complete information in response to the inquiry. The employer shall transmit a response through the employer's online account within 10 days from the date of the transmittal of the notice of claim.

(2) If the employer fails to respond by the deadline, the department shall issue a determination based on the information on hand.

(3) If the employer appeals the determination issued by the department, the employer must first establish good cause for failing to timely respond to the department's inquiry before the appeal may be heard on the merits of the employer's liability.

C. PRIOR DETERMINATION OF ELIGIBILITY FINAL: If a prior, final determination has been made by the department that the claimant did not voluntarily leave claimant's employment with the employer for a cause not attributable to the employer, or that the claimant was not discharged for misconduct connected with claimant's work, or that the employer is no longer an interested party to proceedings on the claim because of failure to respond within the time allowed on the "notice to employer of claim for benefits" issued at the time of the

claimant's separation, that determination will remain final and binding for purposes of making a determination in response to the "notice to employer of claim determination" on the chargeability of the employer's account for benefits payable to the claimant.

D. MULTIPLE PERIODS OF EMPLOYMENT WITH SAME EMPLOYER: If the individual had more than one period of employment and termination of employment with the same base period employer during and after the current and past five quarters, the employer must include in the report:

(1) the date on which each period of employment terminated;

(2) full particulars as to the circumstances of the termination including the reason given by the individual for leaving the employment or the nature of the individual's actions for which he was discharged, or the reason the claimant was laid off, as the case may be.

E. CONCURRENT EMPLOYMENT WITH TWO OR MORE EMPLOYERS: Where an individual works concurrently for two or more employers and becomes unemployed from one or more, but one or more of the concurrent employers continues to furnish that individual substantially the same amount of work, benefits shall not be charged to that employer or those employers who continue to furnish the claimant substantially the same amount of employment during such period of unemployment as long as the individual is receiving benefits based on base period earnings, in whole or in part, from the former concurrent employers. Those employers who continue to furnish the claimant work must respond to the "notice to employer of claim determination" within 10 days from the date shown on the notice setting forth the number of hours per week the claimant worked during the current and two preceding quarters.

F. CHARGING UNDER COMBINED WAGES: Benefits paid to a claimant based on wage credits from one or more states combined with New Mexico shall not be charged to an employer's account when no benefits have been paid upon the sole basis of wage credits in New Mexico.

G. NOTICE OF DEPARTMENT'S DETERMINATION: Upon receipt of the employer's response to the "notice to employer of claim determination" within 10 days, the department shall make a determination with respect to relief from the charging of benefits, and shall promptly notify the employer if it is determined that the employer's account will be charged for benefits paid. The determination shall become final unless the employer files an application for appeal, in accordance with 11.3.500.8 NMAC, setting forth the reasons therefore, within 15 days from the date shown on the determination.

H. LIMITATION ON APPEALS: Notwithstanding the provisions of Subsection F of 11.3.400.419 NMAC, the employer shall not have standing, in any appeal to contest the chargeability to the employer of any benefits paid in accordance with a decision pursuant to Section 51-1-8 NMSA 1978, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for the employer and only in the event that the employer was not a party to the decision, or to any other proceedings under the Unemployment Compensation Law in which the character of such services was determined.
[11.3.400.419 NMAC - Rp, 11.3.400.419 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.426 APPLICATION OF UNDERPAYMENTS: In the event an employing unit fails to submit payment in an amount sufficient to satisfy the total amount of outstanding debt for any current or past-due contributions, interest or penalty, the amount of the underpayment shall be applied in the following order: first, to any contributions and excess claims premiums due, second, to any interest due and third, to any penalties due, from the oldest debt to the newest.
[11.3.400.426 NMAC - Rp, 11.3.400.426 NMAC, 11/30/2016; A, 10/29/2019]

11.3.400.428 EMPLOYER RESPONSES: The employer is required to respond timely and accurately to all inquiries from the department. If the department does not receive timely or adequate responses, the department will, at its discretion, take action based on the information at hand based which may result in assessed penalties or employer liabilities. Absent a showing of good cause, the department will not reverse determinations as a result of the employer's failure to appropriately respond.
[11.3.400.428 NMAC – N, 10/29/2019]