

TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 1 LABOR GENERAL PROVISIONS
PART 6 HEALTHY WORKPLACES

11.1.6.1 ISSUING AGENCY: Labor Relations Division (LRD) of the New Mexico Department of Workforce Solutions (NMDWS).

[11.1.6.1 NMAC – N, 07/01/2022]

11.1.6.2 SCOPE: Employers and employees within the state of New Mexico.

[11.1.6.2 NMAC – N, 07/01/2022]

11.1.6.3 STATUTORY AUTHORITY: Section 50-17-9 NMSA 1978 authorizes the labor relations division of the workforce solutions department to coordinate implementation and enforcement of the Healthy Workplaces act and to promulgate appropriate rules to implement that act.

[11.1.6.3 NMAC – N, 07/01/2022]

11.1.6.4 DURATION: Permanent.

[11.1.6.4 NMAC – N, 07/01/2022]

11.1.6.5 EFFECTIVE DATE: July 1, 2022, unless a later date is cited at the end of a section.

[11.1.6.5 NMAC – N, 07/01/2022]

11.1.6.6 OBJECTIVE: To implement the complaint process articulated in Sections 50-17-1 NMSA 1978 through 50-17-12 NMSA 1978, including a process for investigating and resolving complaints alleging violations of the Healthy Workplaces Act.

[11.1.6.6 NMAC – N, 07/01/2022]

11.1.6.7 DEFINITIONS: All definitions contained in Section 50-17-2 NMSA 1978 are incorporated herein by reference. Additionally, as used in these rules:

A. “Frontloading” means when an employer elects to grant employees earned sick leave the employee could accrue within the year.

B. “Calendar year” means January 1st of any year through December 31st of that same year.

C. “Complainant” means an individual who believes they have been adversely impacted by violations of the Healthy Workplaces Act or these rules or an individual who was subjected to any of the retaliatory actions prohibited by the Act and files a complaint with the division alleging such violations.

D. “Foreseeable” means an employee is aware of the need to use earned sick leave seven or more days before such use.

E. “Good cause” means a substantial reason, one that affords a legal excuse, or a legally sufficient ground or reason.

F. “Violation(s)” means any violation of the Healthy Workplaces Act or these rules, including retaliation.

[11.1.6.7NMAC – N, 07/01/2022]

11.1.6.8 ACCRUAL AND USAGE

A. An employer may voluntarily frontload earned sick leave to an employee; however, the employer may not recoup any used frontloaded leave through payroll deductions even if the employee signs a written agreement authorizing the employer to do so or if the employee is separated before accruing the frontloaded leave.

B. Hours worked in excess of 40 hours per seven-day work week do not accrue earned sick leave at a rate greater than one hour of earned sick leave for every 30 hours worked unless an employer chose a higher accrual rate for its employees or if required under the terms of any applicable collective bargaining agreement.

C. An employer cannot deem an employee’s hours to be “cut” to a lower number due to taking earned sick leave. The employer must pay the employee all earned sick leave used according to the employee’s regularly scheduled hours. If the number of hours that the employee works fluctuate from week to week, the employer shall use the average number of hours worked by the employee during the preceding two weeks when paying earned sick leave.

D. Per diem employees may use earned sick leave for hours they were scheduled to work or for hours they would have worked absent a need to use earned sick leave. For per diem employees or employees with indeterminate shift lengths (e.g., a shift whose length is defined by employer needs), an employer shall base the hours of earned sick leave used upon the hours the employer had a replacement employee for the same shift. If this method is not possible, the hours of earned sick leave shall be based on the hours worked by the employee when the employee most recently worked the same shift.

E. Earned sick leave must be paid on the same scheduled payday as regular wages.

F. Employers shall retain records documenting hours worked by employees, sick leave accrued or earned by employees and earned sick leave taken by employees. All records shall be maintained for a minimum of 48 months from the date the record was created. Employers shall produce these records for inspection upon request by the division.

G. Employers must provide employees with an accurate year-to-date written summary of earned sick leave accrued and used at least once every calendar quarter. This may be done electronically, including by email, website, mobile application or other reasonable method. If employers include this information on pay records or earnings statements provided to employees according to their normal pay schedule, employers are deemed in compliance with this provision.

H. Tipped Employees: Employees who are ordinarily paid less than the full minimum wage due to a “tip credit” must receive the full state or local minimum wage (whichever is greater) when using earned sick leave.

I. Salaried Employees: When using earned sick leave, salaried employees must receive their regular salary converted to an hourly rate based on the employee’s regular work week and weekly salary amount. For example, someone who normally earns a weekly salary of \$1,000 and whose normal work week consists of 40 hours, would be entitled to be paid \$25 per hour for any earned sick leave used (\$1,000 divided by 40). If the individual normally works 30 hours per week, then their hourly rate would be \$33.33 for any earned sick leave used (\$1,000 divided by 30). For a salaried employee whose work hours fluctuate from week to week, the hourly rate would be determined by dividing their weekly salary by 40.

J. Employees paid on task, piece or commission basis must receive the greater of their hourly or salary rate or the state or local minimum wage.

K. Employers are not required to pay an employee for sick leave accrued or earned pursuant to the requirements of the Healthy Workplaces Act that was not used upon the employee’s termination, resignation, retirement, or other separation from employment.

L. Employers are not required to permit more than 64 hours of unused earned sick leave to carry over year-to-year.

M. If an employer requires an employee to provide documentation when the employee’s use of earned sick leave results in an absence of two or more consecutive workdays, the employee shall be allowed 14 days from the date they return to work to provide such documentation.

N. Employers may elect a different 12-month period for benefits to be used for employees covered by a collective bargaining agreement than for employees not covered by a collective bargaining agreement.

[11.1.6.8 NMAC – N, 07/01/2022]

11.1.6.9 COMPLIANCE MEASURES: Compliance assurance measures available to the division include the following:

A. Investigations of alleged violations of the Healthy Workplaces Act upon complaints filed by individuals;

B. interviews of employers, their managers and employees and any other witness who may have relevant information;

C. requests for production of records and other information from employers;

D. administrative subpoenas for records and other information from employer, or for the taking of depositions from employers, their managers and other potential witnesses;

E. audits of employer records of the kind described in Section 50-17-9 NMSA 1978;

F. education and outreach efforts regarding the requirements of the Healthy Workplaces Act; and

G. directed Investigations: When the division has credible information about alleged violations of the Healthy Workplaces Act that affect multiple employees working for an employer, the director may, in their sole discretion, direct a comprehensive, workplace-wide investigation into the earned-sick-leave practices of that employer. All the investigatory and compliance tools available to the division by law can be used in a directed investigation into alleged violations of the Healthy Workplaces Act. If a directed investigation results in a finding of

violations of the Act, the division may, in its sole discretion, file a civil action to enforce compliance with the Act, including payment of any earned sick leave payment owed, damages and attorney's fees.
[11.1.6.9 NMAC – N, 07/01/2022]

11.1.6.10 NOTICE BY EMPLOYERS:

A. Employers shall give written or electronic notice to an employee at the commencement of employment of the employee's rights to earned sick leave; the manner in which sick leave is accrued and calculated; the terms of use of earned sick leave as guaranteed by the Healthy Workplaces Act; that retaliation against employees for using sick leave is prohibited; the employee's right to file a complaint with the division if earned sick leave accrual or use is denied or if the employee is retaliated against; and all means of enforcing the Healthy Workplaces Act. This notice must be in English, Spanish or any other language that is the first language spoken by at least ten percent of the employer's workforce, as requested by the employee.

B. Employers shall display a poster containing the information required in Section A, above, in a conspicuous and accessible place in each establishment where employees are employed. The poster should be in English, Spanish and in any language that is the first language spoken by at least ten percent of the employer's workforce.

[11.1.6.10 NMAC – N, 07/01/2022]

11.1.6.11 COMPLAINTS: Individuals may file complaints alleging violations of the Healthy Workplaces Act or these rules, including retaliation, with the division.

A. Complaints must be submitted using a division-approved form.

B. Complainants may complete the form on their own or have an LRD employee assist in completing the form based on the complainant's statements in-person or by telephone. If the division provides assistance in completing the form by telephone, the division shall mail or email the unsigned form to the complainant to be reviewed, approved, signed, and submitted to the division for filing. The complaint form does not need to be notarized. The complainant may attach additional information or documentation supporting the complaint, but this is not a requirement.

C. Upon receipt of the completed complaint form, the division will:

(1) review the complaint to determine whether the division has jurisdiction;

(2) determine if more information from the complainant is needed; and

(3) interview the complainant, if necessary, to clarify any discrepancies, omissions, or errors in the complaint form, and obtain additional information regarding the complaint.

D. If a complainant is represented by an attorney, the attorney shall submit a written notice of the representation to the division of said representation and shall also indicate in that notice whether the division may communicate with the complainant directly without the attorney being present. If the attorney fails to indicate anything in this regard, it will be assumed the division is authorized to communicate directly with the complainant without the attorney being present.

E. The complaint form will give the complainant the opportunity to choose to correspond with the division by email or regular mail. If the complainant does not make a choice, the correspondence with the complainant will be by regular mail.

F. The division shall send complainants written notification summarizing the status of the investigation by the complainant's chosen correspondence method no less frequently than every 90 days starting from the date the complaint is received by the division.

G. The division shall provide limited English proficient (LEP) complainants, employers and witnesses with free language assistance services according to the NMDWS language access plan throughout the complaint process.

[11.1.6.11 NMAC – N, 07/01/2022]

11.1.6.12 JURISDICTION: The division's authority is limited to the enforcement of the laws of the state of New Mexico. The division does not have authority to enforce the laws of any other state. The division may close a complaint that alleges violations of the Healthy Workplaces Act for work performed outside the state of New Mexico, including work performed entirely on tribal land.

[11.1.6.12 NMAC – N, 07/01/2022]

11.1.6.13 DEADLINE FOR FILING A COMPLAINT: All complaints alleging violations of the Healthy Workplaces Act must be filed with the division within three years of when the last alleged violation occurred. The

division will accept complaints for investigation in which any portion of the alleged violation falls within the three-year time limit.

[11.1.6.13 NMAC – N, 07/01/2022]

11.1.6.14 CONFIDENTIALITY: The division will maintain the complainant's identity as confidential unless disclosure is necessary to facilitate investigation or resolve the complaint or is otherwise required by law. Prior to disclosing the complainant's identity and to the extent practicable, the division will notify the complainant before any such disclosure.

[11.1.6.14 NMAC – N, 07/01/2022]

11.1.6.15 CLOSURE OF COMPLAINTS: The division may close any complaint alleging violations of the Healthy Workplaces Act after the initial screening with no further investigation if the division determines that it does not have jurisdiction, it is unable to identify complainant's employer after reasonable efforts have been made, or if no portion of the alleged violations falls within a three-year time period. Upon closure, the division will send the complainant a letter setting forth the reasons for closure.

[11.1.6.15 NMAC – N, 07/01/2022]

11.1.6.16 NOTICE OF COMPLAINT TO EMPLOYER: Within 10 business days of receipt of the complaint, the division shall send the employer a copy of the complaint form, any supporting documentation received from the complainant, and a blank response form. The initial letter shall be mailed to the last known address of the employer. The notice to the employer will give the employer the opportunity to choose to receive correspondence from the division by email or regular mail, but if the employer does not make a choice, the correspondence will be sent by regular mail.

[11.1.6.16 NMAC – N, 07/01/2022]

11.1.6.17 EMPLOYER REPRESENTATION: If an employer is represented by an attorney at any time during the investigation, the attorney shall submit a written notice to the division of representation and shall also indicate in that notice whether the division may communicate with the employer directly without the attorney being present. If the attorney fails to indicate anything in this regard, it will be assumed that the division is authorized to communicate directly with the employer without the attorney being present.

[11.1.6.17 NMAC – N, 07/01/2022]

11.1.6.18 RESPONSE BY EMPLOYER: The employer shall respond in writing to the initial letter regarding the complaint within 10 business days of receipt. The employer shall also provide the division with true and accurate copies of the records that are required to be maintained by the Healthy Workplaces Act with respect to the complainant(s). The employer shall produce any other records related to the complaint requested by the division. The employer may provide other records of its choosing in responding to the complaint but this is not a requirement. In its discretion, the division may grant an employer a reasonable extension to respond to the initial letter if requested by the employer in writing specifically setting forth the good cause upon which the request for an extension is based.

[11.1.6.18 NMAC – N, 07/01/2022]

11.1.6.19 REQUESTS FOR ADDITIONAL INFORMATION: In its discretion, the division may interview the employer and other witnesses to obtain additional information relevant to the investigation and may issue an administrative subpoena to compel production of records necessary to conduct the investigation if such records are not voluntarily provided by the employer.

[11.1.6.19 NMAC – N, 07/01/2022]

11.1.6.20 REPLY BY COMPLAINANT: If the employer disputes the alleged violation(s) and submits relevant documentary evidence, the division shall allow the complainant an opportunity to submit a written reply to the employer's response along with additional documentation. The complainant has 10 business days from the date of the complainant's receipt of the employer's response to submit the reply. In its discretion, the division may interview the complainant and other witnesses to obtain additional information relevant to the investigation.

[11.1.6.20 NMAC – N, 07/01/2022]

11.1.6.21 SETTLEMENT BY PARTIES: At any stage of the investigation, the division may schedule a settlement meeting between the parties. The division may inform the parties of its preliminary conclusions based on the evidence reviewed, including any actual or statutory damages owed to the complainant for violations of the Healthy Workplaces Act, as found by the division. If a settlement is reached, it shall be reduced to writing and signed by the complainant and the employer. After the settlement is signed by both parties, the division will close the investigation and advise the parties in writing that the case is close to include the date the three-year statute of limitations expires.

[11.1.6.21 NMAC – N, 07/01/2022]

11.1.6.22 ADMINISTRATIVE DECISION: The division shall complete its investigation of a complaint and issue a written decision if a settlement is not reached, or if a settlement is reached but the employer fails to comply with the terms of the settlement, and a party submits a written request to the division to reopen prior to the expiration of the three year time limit outlined in NMAC 11.1.6.13. After completing its investigation the division shall issue an administrative decision on the complaint. The decision shall:

- A. be issued within 180 days from the date the complaint was received;
- B. be in writing and set forth findings of facts and conclusions of law, including a calculation of damages owed, if any;
- C. inform the parties that if they disagree with the decision, there is no right of administrative appeal;
- D. inform the parties whether the division will file a civil action to enforce its administrative decision; and
- E. inform complainants of their private right of action pursuant to Subsection B of Section 50-17-10 NMSA 1978.

[11.1.6.22 NMAC – N, 07/01/2022]

11.1.6.23 CIVIL ACTIONS BY THE DIVISION: Although the division may, in its sole discretion, bring a civil action for violations of the Healthy Workplaces Act, the division will do so only in cases that it deems appropriate based on its enforcement priorities, including but not limited to, repeat violations by a particular employer or problematic industries where systemic and/or abusive practices have been identified through investigation by the division. The division's decision on whether to bring a civil action under the Healthy Workplaces Act is final and not subject to any right of appeal or review.

[11.1.6.23 NMAC – N, 07/01/2022]

11.1.6.24 SUBPOENA POWERS: The division may issue a subpoena compelling any witness, including but not limited to the employer and the complainant, to appear for the taking of a deposition or a recorded statement under oath, and for the production of any documents relevant to the complaint at the time that the deposition or recorded statement is taken. A recorded statement may be taken before a qualified court stenographer, but it may also be recorded digitally or on audio tape or video tape.

[11.1.6.24 NMAC – N, 07/01/2022]

11.1.6.25 EMPLOYER RECORDS: Section 50-17-7 NMSA 1978 requires employers to keep records documenting hours worked by employees and earned sick leave taken by employees for the 48-month period immediately preceding the date the record was created. If the division finds, during the course of its investigation, the employer did not maintain and produce the required records, or that the records are inaccurate or incomplete, the division may base its calculation of damages owed on other reasonable, credible evidence, including but not limited to the complainant's estimates.

[11.1.6.25 NMAC – N, 07/01/2022]

11.1.6.26 CONFLICTS WITH STATE LAW: In the event any of the rules and regulations set forth herein conflict with any applicable state law, the state law shall control.

[11.1.6.26 NMAC – N, 07/01/2022]

11.1.5.27 CIVIL ACTIONS: The division may close a complainant's file and take no further action if the complainant files a separate civil action against the employer in a court of competent jurisdiction asserting the same legal claims that are the subject of the division's investigation.

[11.1.6.27 NMAC – N, 07/01/2022]

11.1.6.28 REOPENING AN INVESTIGATION: A complainant or employer may request in writing a reopening of the investigation of a complaint upon a showing of good cause for doing so. Examples of good cause include, but are not limited to, failure of an employer to comply with the terms of the settlement, or the discovery of new, previously undisclosed evidence that would have changed the result of the previous determination. Except in the case of unfulfilled settlement terms, the division's determination of whether good cause to reopen exists is final and shall not be subject to any right of appeal or other review. All requests for reopening must be received by the division before the three-year time limit referenced in NMAC 11.1.6.13 expires. Reopening requests received after the three-year period expires will not be considered. Upon reopening, the division may pursue any investigatory steps available under the law and pursuant to these regulations and may affirm, modify, or reverse, in whole or in part, any previous decision issued.
[11.1.6.28 NMAC – N, 07/01/2022]

11.1.6.29 STANDARD OPERATING PROCEDURES: The division may adopt standard operating procedures to provide additional instructions for its employees in the performance of their duties and responsibilities.
[11.1.6.29 NMAC – N, 07/01/2022]

History of 11.1.6 NMAC: [RESERVED]