

TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 3 EMPLOYMENT SECURITY
PART 300 CLAIMS ADMINISTRATION

11.3.300.1 ISSUING AGENCY: New Mexico Department of Workforce Solutions, P.O. Box 1928
Albuquerque, NM 87103.

[11.3.300.1 NMAC - Rp, 11.3.300.1 NMAC, 11/1/2018; A, 10/29/2019]

11.3.300.2 SCOPE: General public

[11.3.300.2 NMAC - Rp, 11.3.300.2 NMAC, 11/1/2018]

11.3.300.3 STATUTORY AUTHORITY: Sections 51-1-1 to 51-1-59, NMSA 1978.

[11.3.300.3 NMAC - Rp, 11.3.300.3 NMAC, 11/1/2018]

11.3.300.4 DURATION: Permanent

[11.3.300.4 NMAC - Rp, 11.3.300.4 NMAC, 11/1/2018]

11.3.300.5 EFFECTIVE DATE: November 1, 2018, unless a different date is cited at the end of a section.

[11.3.300.5 NMAC - Rp, 11.3.300.5 NMAC, 11/1/2018]

11.3.300.6 OBJECTIVE: The purpose of this rule is to provide clarification of the Unemployment Compensation Law. This rule assists claimants and employers in better understanding how specific sections of the law are administered by the department. The rule also assists claimants and employers to better comply and better understand the department's procedures.

[11.3.300.6 NMAC - Rp, 11.3.300.6 NMAC, 11/1/2018]

11.3.300.7 DEFINITIONS:

A. “Additional claim” means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a period of employment other than self-employment which occurred subsequent to the date of filing the last initial, additional or reopened claim.

B. “Agent state” means any state in which an individual files a claim for benefits from another state or states.

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

D. “Base period and benefit year” means the base period and benefit year applicable under the unemployment compensation law of the paying state.

E. “Base period”, also called the **“regular 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. “Benefits” means the benefits payable to a claimant with respect to their unemployment, under the unemployment compensation law of any state.

G. “Claimant” means an individual who has filed an initial claim, additional claim or reopened claim for unemployment benefits and this filing is within a benefit year or other eligibility period.

H. “Combined-wage claimant” means a claimant who uses wages from more than one state to establish monetary eligibility for benefits and who has filed a claim under this arrangement.

I. “Educational or training institution or program” means any primary school, secondary school or institution of higher education, public or private, which offers instruction, either for a fee or without charge, and which requires attendance and participation, either in person or online, to receive the instruction.

J. “Emergency unemployment compensation” (EUC) occurs when regular unemployment benefits are exhausted and extended for additional weeks. Unemployment extensions are created by passing new legislation at the federal level, often referred to as an “unemployment extension bill”. This new legislation is introduced and passed during high or above average unemployment rates.

K. “Employment” means all services which are covered under the unemployment compensation law of a state, whether expressed in terms of weeks of work or otherwise.

L. “Full-time employment” means the normal full-time hours customarily scheduled and prevailing in the establishment in which an individual is employed, but in no event less than 32 hours per week.

M. “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 failure to keep the department directly and promptly informed of the claimant’s, employer’s or employing unit’s correct 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.

N. “Initial claim” means a new claim application submitted by the claimant to establish a benefit year and to obtain a determination of weekly and maximum benefit amounts.

O. “Instruction” means all teaching or opportunity for learning whether of a vocational or academic nature.

P. “Interstate benefit payment plan” means the plan approved by the interstate conference of employment security agencies as approved by the United States secretary of labor under which benefits shall be payable to unemployed individuals absent from the state or states in which benefit credits have been accumulated.

Q. “Interstate claimant” means an individual who claims benefits under the unemployment compensation law of one or more liable states through the facilities of an agent state. The term “interstate claimant” shall not include any individual who customarily commutes from a residence in an agent state to work in a liable state unless the department finds that this exclusion would create undue hardship on such claimants in specified areas.

R. “Last employer” means the most recent employer or employing unit from which the claimant separated for reasons other than lack of work; or in the event that the claimant separated from the most recent employer for lack of work, the employer or employing unit before that from which the claimant separated for any reason other than lack of work, provided the claimant has not subsequently worked and earned wages in insured work or bona fide employment other than self-employment in an amount equal to or exceeding five times the claimant’s weekly benefit amount.

S. “Liable state” means any state against which a claimant files, through another state, a claim for benefits.

T. “Paying state” means the state against which the claimant is filing that actually issues the benefit payment.

U. “Real estate salesperson” means an individual who is licensed by the New Mexico real estate commission.

V. “Regular base period” means the first four of the last five completed quarters as provided in Subsection A of Section 51-1-42 NMSA 1978.

W. “Reopened claim” means a claim application which reactivates a claim during an existing benefit year or other eligibility period and certifies to a continuous period of unemployment for which the claimant did not file timely continued claims and during which the claimant either remained unemployed or had a period of self-employment since last reporting on this claim.

X. “State” means the states of the United States of America, the District of Columbia, the Commonwealth of Puerto Rico and the Virgin Islands.

Y. “Student” means any individual enrolled in an educational or training institution or program.

Z. “Trade adjustment assistance” (TAA) is a federal program that provides a variety of reemployment services including training and job-searching assistance and benefits to displaced workers who have lost their jobs or suffered a reduction of hours and wages as a result of increased imports or shifts in production outside the United States.

AA. “Trade readjustment allowances” (TRA) are income support payments to individuals who have exhausted unemployment benefits and whose jobs were affected by foreign imports as determined by a certification of group coverage issued by the Department of Labor.

BB. “Transitional claim” means a claim filed to request a determination of eligibility and establishment of a new benefit year having an effective date within a seven-day period immediately following the benefit year ending date and a week for which compensation or waiting week credit was claimed; i.e. continuous certification.

CC. “Wages” means all compensation for services, including commissions and bonuses and the cash value of all compensation in any medium other than cash.

DD. “Week of unemployment” means any week of unemployment as defined in the law of the liable state from which benefits with respect to such week are claimed.

[11.3.300.7 NMAC - Rp, 11.3.300.7 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.8 THROUGH 300 [RESERVED]

11.3.300.301 FILING INITIAL, ADDITIONAL AND REOPENED CLAIMS:

A. Upon filing an initial claim, an additional claim, or a reopened claim, the claimant shall be subject to a waiting week period before the commencement of benefits begins.

B. Unless otherwise prescribed, any claimant wishing to claim benefits shall register for work, file an initial, additional, transitional or reopened claim for benefits and provide the name and address of their last employer.

C. The date of filing of any initial, additional or reopened claim shall be the Sunday of the week in which filed. Upon a showing of good cause, any initial claim or additional claim may be back-dated to the Sunday of the week immediately following the week in which the claimant was separated, and any reopened claim may be back-dated up to a maximum of 21 days from the preceding Sunday of the date of the request for back-dating. “Good cause,” as used in 11.3.300.301 NMAC, exists when it is established that factors or circumstances beyond the reasonable control of the claimant caused the delay in filing. All requests for back-dating or post-dating shall include a fact-finding response.

D. Unless otherwise prescribed, all claims shall be made online or by phone, giving all information required thereby. A claimant shall also separately register for work within 14 calendar days of the date the claim is filed. If a claimant is already registered with the department from a prior claim, the registration must be reactivated within 14 days of the date the claim is filed. If a claimant’s registration is not current with the department, their benefits shall be temporarily withheld until they comply unless good cause for the failure to register is shown.

[11.3.300.301 NMAC - Rp, 11.3.300.301 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.302 FILING CONTINUED CLAIMS: In order to establish and maintain eligibility for benefits a claimant cannot be subject to an administrative penalty pursuant to Subsection C of 11.3.300.314 NMAC, shall continue to report weekly as directed, and file continued claims for benefits online, by phone, or as otherwise prescribed by the department providing the information setting forth that:

A. the claimant is continuing their claim for benefits;
B. the claimant is unemployed or partially unemployed;
C. the claimant has registered for reemployment services;
D. since the claimant last registered for reemployment services, the claimant has not performed services or earned wages, except as indicated;

E. claimant is able to work, available for work, and actively seeking work; and

F. the claimant shall provide to the department their most current mailing or email address. It is the claimant’s responsibility to maintain a current address with the department.

[11.3.300.302 NMAC - Rp, 11.3.300.302 NMAC, 11/1/2018]

11.3.300.303 TIMELY RESPONSE TO REQUEST FOR INFORMATION:

A. Any response to a request for information from the department must be received by the department within 10 calendar days from the date transmitted. Responses to requests for additional information must be received within two business days from the date of transmission.

B. The 10 calendar day period shall begin to run on the first day after the date the request was transmitted to the claimant or to the employer. If the tenth calendar day falls on a date when the department offices are closed, receipt on the first business day thereafter shall be timely. If a response is not received timely, the department will make a determination based on the information available at that time.

C. Employers and third party administrators must respond to request for additional information electronically.

[11.3.300.303 NMAC - Rp, 11.3.300.303 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.304 LATE FILING OF CONTINUED CLAIMS:

A. If the department finds good cause for a claimant's failure to timely file a continued claim, the claimant may file a late continued claim provided the certification is filed within 14 days of the last date of the week requiring certification.

B. A certification not processed due to a department request for additional information from the claimant shall be considered timely if the requested information is received by the department no later than 10 calendar days after the request for additional information is transmitted to the claimant.

[11.3.300.304 NMAC - Rp, 11.3.300.304 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.305 ALTERNATE BASE PERIOD:

A. Application of alternate base period: If a claimant is determined ineligible because the claimant does not have sufficient wages during the base period to qualify for benefits and is not eligible for a regular claim in any other state or a combination of states and the claimant's work history reflects that the claimant may qualify using the alternate base period, the department will utilize the "alternate base period" to determine if the claimant is eligible for benefits. If the department applies the "alternate base period" and the wages for the most recent quarter have not yet been reported by the employer or processed by the department, the claimant will be required to provide proof of wages consisting of payroll checks ("check stubs"), W-2s or an appropriate affidavit. If the employer's reported wages are available for the most recent quarter, proof is not required from the claimant. On its own initiative and within its own discretion, if and when the department receives new or additional information regarding wages, it may initiate a reconsideration of the regular base period.

B. Effect of election: Wages that fall within the regular base period or the alternate base period established pursuant to 11.3.300.305 NMAC are not available for reuse in qualifying for a subsequent benefit year.

C. Procedure:

(1) Upon receipt of the claimant's documentary evidence of wages within the timeframe required, wages will be processed by the department and used on the claim.

(2) Upon processing of the most recent quarter's wages, a "notice of initial determination of benefits" will be issued utilizing the wage information provided by the claimant for the alternate base period.

(3) If the claimant fails to provide documentary evidence of wages within the timeframe required, the original "notice of initial determination of benefits" will become final.

(4) Employers will be notified of the wages used for the alternate base period on the notice to employer of claim determination, which may include wages based upon proof provided by the claimant. The employer will have 10 calendar days from date of transmission of determination to provide the actual wages or to object to the wages being used on the claim, and may also protest charges based upon the reason for separation pursuant to Subsections A and C of 11.3.500.8 NMAC.

[11.3.300.305 NMAC - Rp, 11.3.300.305 NMAC, 11/1/2018]

11.3.300.306 RESERVED

[11.3.300.306 NMAC - Repealed, 11.3.300.306 NMAC, 11/1/2018]

11.3.300.307 RESERVED

[11.3.300.307 NMAC - Repealed, 11.3.300.307 NMAC, 11/1/2018]

11.3.300.308 CLAIM DETERMINATION:

A. Notice to employer of filing of claim: 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, if so registered, and, if not registered, to the address provided by the claimant, a dated notice of the filing of the claim and a fact-finding questionnaire. 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 within 10 calendar days from the date the notice of claim is sent. Unless excused by the department, the response must be an electronic transmittal.

B. Request for additional information: Prior to issuance of a determination the department may request additional information from the employer, the claimant or witnesses relative to the separation of the claimant from employment. The employer shall provide the department full and complete information to the request for additional information within two business days from the transmission. Unless excused by the department, the response must be an electronic transmittal.

C. Initial determination: A determination on any claim for unemployment benefits shall be transmitted only after the department has evaluated the claim.

(1) If an employer's response is not received within 10 calendar days after the transmission of the notice of a claim and a non-monetary issue is not raised in the application for benefits, a determination shall be made upon the information on the application.

(2) The 10 day period shall begin to run on the day after the notice of claim was transmitted to the employer as indicated on the application. If the tenth calendar day falls on the weekend or on a holiday, the reply shall be timely if received by the department on the following business day.

(3) After the 10 day period has passed, the department shall immediately transmit to the parties the determination including the reason, and shall advise the parties of the right to appeal that determination pursuant to these rules.

(4) If the claimant is subsequently disqualified from the receipt of benefits resulting in an overpayment, the employer will remain liable for any benefit charges incurred to the date of disqualification if the employer or an agent of the employer demonstrates an established pattern of failing to respond timely or adequately to the notice of claim within the 10-day period.

(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.

(5) An employer may appeal a determination within 15 days of the assessment of the penalty that the employer or agent of the employer failed to respond timely or adequately to the notice of claim. Upon a finding on appeal that the employer or an agent of the employer had good cause for failure to transmit a timely or adequate response, the employer will be relieved of such charges. Overturned determinations will not be factored into the analysis of whether a pattern exists.

D. Redetermination: A redetermination may be issued only if all the following criteria are met:

(1) The department perceives the need for reconsideration as a result of a protest by an interested party due to new or additional information received. Examples of the type of errors which may prompt a redetermination are misapplication or misinterpretation of the law, mathematical miscalculation, an additional fact not available to the department at the time of the determination excluding those facts the employer and claimant had the opportunity to provide prior to the initial determination, transmitting a notice to the wrong employer or address, an employer's timely response statement disputing a claim for benefits, or other administrative error.

(2) All evidence and records are re-examined.

(3) A written redetermination notice is issued to the claimant and any other interested party, and is documented in the department records.

(4) A redetermination can be issued no later than 20 calendar days from the original determination date or 20 days from the date of the first payment derived from the original determination, whichever event occurs latest.

(5) The department may issue a redetermination provided that the employer's statement was received within the statutory time limits and within less than 20 calendar days from the date of the first payment.

(6) If the claimant began collecting benefits and as a result of redetermination will be denied benefits, the claimant shall be advised.

E. Stopping payment due to administrative error: Once an initial determination is made and payment of benefits is begun, payments shall not be stopped without prior notice and an opportunity to be heard pursuant to 11.3.500.9 NMAC. When payments are made as a result of administrative error by the department and are clearly not authorized by law, rule, regulation, or any determination made pursuant to Subsection C of 11.3.300.308 NMAC, such payment shall not be deemed to have been made pursuant to a determination of eligibility.

F. Employer's notice of a labor dispute: When there is a strike, lock-out or other labor dispute, the employer shall file with the department after the commencement of such activity, and upon the demand of the department, a report of the existence and nature of the labor dispute, and the number of persons affected; and shall promptly provide the names, social security numbers and work classifications of all individuals unemployed due to the labor dispute, and whether and in what manner each individual is participating in the dispute or has a direct interest in the outcome.

G. Termination of continued claims: Payment of continued benefits to any person who has been determined eligible to receive benefits on an initial claim in accordance with 11.3.300.308 NMAC shall not thereafter be terminated without notice and an opportunity to respond.

[11.3.300.308 NMAC - Rp, 11.3.300.308 NMAC, 11/1/2018 A, 10/29/2019; A, 1/12/2021]

11.3.300.309 BENEFITS FOR PARTIAL UNEMPLOYMENT:

A. Partially unemployed claimants: Claimants are partially unemployed in any week in which their usual full-time employment is reduced to less than the normal full-time hours customarily scheduled and prevailing in the establishment in which they are employed, and their wages fall below their weekly benefit amount, due to the employer having less than full-time work for them. For partially unemployed claimants whose wages are paid on a weekly basis, a week of partial unemployment shall consist of their pay period week, a calendar week or some other period designated by the department.

B. Notice of reduced employment: On the next payday after any week for which an employee's work has been reduced by the employer to less than 32 hours, their employer shall notify them that they may file a claim by contacting the department for a week of partial unemployment. If the employer fails to notify the employees of their rights under the law regarding reduced employment, the employees may file for benefits at any time. Once the employees have received notice from the employer, they may be denied benefits if they have earned five times the weekly benefit amount after notification.

C. Employer records in connection with partial unemployment: In addition to the requirements set forth in 11.3.400.401 NMAC, all employers shall keep their payroll records in such form that it would be possible from an inspection thereof to determine which employees may be eligible for partial benefits to include:

- (1) wages earned by weeks as described in Subsection A of 11.3.300.309 NMAC;
- (2) whether any week was in fact a week of less than full-time work; and
- (3) time lost, if any, by workers due to their unavailability for work.

[11.3.300.309 NMAC - Rp, 11.3.300.309 NMAC, 11/1/2018]

11.3.300.310 INTERSTATE CLAIMS:

A. Registration for work:

(1) Each interstate claimant shall be registered for work, through any public employment office in the agent state when and as required by the law, regulations, rules, policies and procedures of the agent state. The registration shall be accepted as meeting the registration requirements of the liable state.

(2) Each agent state shall report to the liable state whether each interstate claimant meets the registration requirements of the agent state.

B. Benefit rights of interstate claimants:

(1) If a claimant files a claim against any state, and it is determined by such state that the claimant has available benefit credits in such state, then claims shall be filed only against such state as long as benefit credits are available in that state. Thereafter, the claimant may file claims against any other state in which the claimant has available benefit credits.

(2) For purposes of this rule, benefit credits shall be deemed to be unavailable whenever benefits have been exhausted, terminated, or postponed for an indefinite period or for the entire period in which benefits would otherwise be payable, or whenever benefits are affected by the application of a seasonal restriction.

C. Continued claims for benefits:

(1) Any claim for benefits or for waiting-period credit shall be filed by an interstate claimant in accordance with uniform procedures developed pursuant to the interstate benefit payment plan. The claim shall be filed in accordance with the type of week in use in the agent state. Any adjustments required to fit the type of week used by the liable state shall be made by the liable state on the basis of consecutive claims filed.

(2) The claim shall be filed in accordance with the agent state's rules or regulations for intrastate claims.

(a) With respect to claims for weeks of unemployment in which claimants are not working for their regular employers, the liable state shall, under circumstances which it considers good cause, accept a continued claim filed up to one week or one reporting period late. If a claimant files more than two weeks late, an initial interstate claim must be used to begin a claim series, and no continued claim for a past period shall be accepted.

(b) With respect to weeks of unemployment during which claimants are attached to their regular employers, the liable state shall accept any claim which is filed within the time limit applicable to such claims under the law of the agent state.

D. Determinations of claims:

(1) The agent state shall, in connection with each claim filed by an interstate claimant, ascertain and report to the liable state such facts relating to the claimant's availability for work and eligibility for benefits as are readily determinable in and by the agent state.

(2) The agent state's responsibility and authority in connection with the determination of interstate claims shall be limited to investigation and reporting of relevant facts. The agent state shall not refuse to take an interstate claim.

E. Appellate procedures:

(1) The agent state shall afford all reasonable cooperation in the taking of evidence and the holding of hearings in connection with appealed interstate benefit claims.

(2) With respect to the time limits imposed by the law of a liable state other than New Mexico, upon the filing of an appeal in connection with a disputed benefit claim, whether or not the appeal is timely shall be determined by the liable state by reference to that state's law, regulations, rules, policies and procedures. In interstate appeals in which New Mexico is the liable state, whether or not the appeal is timely shall be determined by reference to relevant provisions of the New Mexico Unemployment Compensation Act and 11.3.500.8 NMAC.

F. Extension of interstate benefit payments to include claims taken in and for Canada: This rule shall apply to claims taken in and for Canada.

[11.3.300.310 NMAC - Rp, 11.3.300.310 NMAC, 11/1/2018]

11.3.300.311 COMBINED-WAGE CLAIMS: All combined-wage claims shall be subject to the provisions of the interstate arrangement for combining employment and wages, the interstate benefit payment plan, the regulations and guidelines prescribed by the United States secretary of labor, and the applicable provisions of the Unemployment Compensation Law and department regulations which apply to claims for and payment of regular unemployment compensation.

A. Filing of claims:

(1) An unemployed claimant who has covered employment and wages in more than one state has the right to combine such wages and employment in the base period of one state if the combination will provide benefits for which the claimant could not otherwise qualify or will increase the benefits for which the claimant qualifies in a single state. The claimant must file a combined-wage claim if the claimant is eligible to do so rather than claim extended benefits. If the claimant wishes, the claimant has the right to reject a combined-wage and file against a state in which the claimant is separately eligible or to cancel the combined-wage claim and file no claim.

(2) Restrictions on combined-wage claims:

(a) any unemployed claimant who has covered employment in New Mexico and in another state may file a combined-wage claim unless:

(i) the claimant has established a valid claim under any other state;

(ii) the benefit year has not ended; and

(iii) there are still unused benefit rights; a claimant will not be considered to have unused benefit rights on a prior claim if all benefits have been exhausted or benefits have been denied by a seasonal restriction or benefits have been postponed for an indefinite period or for the remainder of the benefit year;

(b) if a claimant files a combined-wage claim, all wages and employment in all states in which the claimant worked during the base period of the paying state must be included except employment and wages which are not transferable under the provisions of Subsection C of 11.3.300.311 NMAC.

B. Responsibilities of new mexico when transferring wages:

(1) Wages earned in New Mexico in covered employment during the base period of the combined wage claim filed by a claimant will be promptly transferred to the paying state.

(2) Wages earned in New Mexico will not be transferred if the employment and wages have been:

(a) transferred to another paying state and have not been returned unused, or which have been previously used by New Mexico as the basis for a monetary determination which establishes a benefit year, or

(b) cancelled or are otherwise unavailable to the claimant as a result of a monetary determination by New Mexico prior to its receipt of the request for transfer, if such determination has become final or is the subject of a pending appeal; if the appeal is finally decided in favor of the combined-wage claimant, any employment and wages deemed eligible for use as wages in establishing monetary eligibility will be transferred to the paying state.

C. Non-monetary eligibility determination: When a combined-wage claim is filed, the law and eligibility requirements of the paying state apply even if an issue has been previously adjudicated by a transferring state.

D. Conditions for withdrawal of a combined wage claim: A combined-wage claimant may withdraw the combined-wage claim any time before the monetary determination of the paying state becomes final, provided that the combined-wage claimant:

(1) repays in full any benefits paid to the claimant; or

(2) authorizes the state against which the claimant will claim benefits to withhold and forward to the former paying state a full repayment of benefits.

E. Recovery of prior overpayments: If there is an overpayment outstanding in the transferring state, including New Mexico, and such transferring state so requests, the overpayment shall be deducted from any benefits the paying state would otherwise pay to the combined-wage claimant on the combined-wage claim except to the extent prohibited by the law of the paying state. The paying state shall transmit the amount deducted to the transferring state or credit the transferring state's required reimbursement under the arrangement. This paragraph shall apply to overpayments only if the transferring state certifies to the paying state that the determination of overpayment was made within three years before the combined-wage claim was filed and that repayment is legally required and enforceable against the combined-wage claimant under the law of the transferring state.

F. Notification and appeals:

(1) A combined-wage claimant will receive a monetary determination notice from the paying state once the wage information from all states is received. The claimant has the right to appeal any aspect of the monetary determination. The appeal may be against either the paying state or the transferring state depending upon which agency issued the determination which the combined-wage claimant considers adverse to the claimant's interest. If the transferring state refused to transfer wages because the wage credits were cancelled under a disqualification or because the work was not covered, the combined-wage claimant will be sent an appealable determination by the transferring state.

(2) Except as provided in this rule, when the claimant files a combined-wage claim in the paying state, any protest or appeal shall be in accordance with the law of such state.

(a) Where the combined-wage claimant files a combined-wage claim in a state other than the paying state or under the circumstances described in this rule, any protest or appeal shall be in accordance with the interstate benefit payment plan.

(b) To the extent that any protest or appeal involves a dispute as to the coverage of the employing unit or services in the transferring state or otherwise involves the amount of wages subject to transfer, the protest or appeal shall be decided by the transferring state in accordance with its law.

[11.3.300.311 NMAC - Rp, 11.3.300.311 NMAC, 11/1/2018]

11.3.300.312 EXTENDED BENEFIT CLAIMS AND PAYMENT:

A. Application of other rules: The pertinent provisions of the law and rules that apply to regular claimants apply also to claimants for extended claims insofar as such rules pertaining to regular claimants are not inconsistent with the provisions of this rule.

B. Filing claims: Unless otherwise prescribed, a claimant who has received all of the regular benefits that were available to the claimant under the Unemployment Compensation Law or any other state law and is an "exhaustee" as defined in Subsection H of Section 51-1-48 NMSA 1978, may apply for extended benefits by filing an extended benefits claim via internet or by contacting the department. The claim shall become effective as of the Sunday of the week in which filed, provided that the claim may be back-dated to the Sunday of the week immediately following the week which exhausted benefit eligibility if the failure to file is determined to be with good cause.

C. Claim determination and notice: Upon receipt of a claim for extended benefits the department will issue a determination on the eligibility for extended benefits and transmit a notice thereof to the claimant. The determination may be appealed in the manner prescribed for regular benefit determination appeals.

D. Continued claims: Any claimant, in order to claim weekly-extended benefits, shall file the continued claim as directed by the department.

E. Relief from certain eligibility requirements: A claimant who claims extended benefits will not be required to:

(1) be unemployed for a waiting-period of one week; or

(2) perform services in employment as designated in Section 51-1-5(B) NMSA 1978, before extended benefits are paid.

F. Requirement for additional initial claims: A claimant whose benefit year expires within an extended benefit period must file an initial claim for regular benefits at the end of that current benefit year and, if a new benefit year is not established, at the beginning of each calendar quarter during the period to determine if the claimant has sufficient wage credits in covered employment to establish a new regular claim.

[11.3.300.312 NMAC - Rp, 11.3.300.312 NMAC, 11/1/2018]

11.3.300.313 "WEEK" DEFINED:

A. Week of unemployment: Weeks of unemployment and claims shall be on a calendar week basis, except as prescribed in the case of partial unemployment, or as the department may direct otherwise in any case where it appears some other “week” may better secure the full payment of benefits when due.

B. Conditions for establishment: The calendar week within which the claimant becomes unemployed and in which the claimant earns less than the claimant’s weekly benefit amount shall be credited as a week of unemployment.

C. “Week” in more than one benefit year: A week of unemployment shall be deemed to be within that benefit year which includes the greater part of such week.

D. Week of disqualification: With respect to acts and periods of disqualification under Section 51-1-7 NMSA 1978, which occur or commence before the start of any week of unemployment as defined in 11.3.300.313 NMAC and Subsection A of 11.3.300.309 NMAC, “week” means the calendar week in which the disqualifying act or event occurs.

[11.3.300.313 NMAC - Rp, 11.3.300.313 NMAC, 11/1/2018]

11.3.300.314 FRAUDULENT CLAIMS:

A. Claimant Fraud:

(1) Subsection F of Section 51-1-38 NMSA of the Unemployment Compensation Law provides: “Notwithstanding any other provision of the Unemployment Compensation Law, including the provisions of Subsection J of Section 51-1-8 NMSA 1978, if any individual claiming benefits or waiting period credits shall, in connection with such claim, make any false statement or representation, in writing or otherwise, knowing it to be false or shall knowingly fail to disclose any material fact in order to obtain or increase the amount of a benefit payment, such claim shall not constitute a valid claim for benefits in any amount or for waiting period credits but shall be void and of no effect for all purposes. The entire amount of the benefits obtained by means of such claim shall be, in addition to any other penalties provided herein, subject to recoupment by deduction from the claimant’s future benefits or they may be recovered as provided for the collection of past due contributions in Subsection B of Section 51-1-36 NMSA 1978.” The terms used in, Section 51-1-38 NMSA 1978 mean:

(a) “False” means a statement contrary to fact.

(b) “Knowingly” means the person making the statement, at the time it was made, knew the statement to be false or should have known it to be false because the person had no reasonable basis for believing it to be true.

(c) “Knowingly fails to disclose any material fact” means the claimant deliberately withholds information which the claimant knows should be disclosed to the department.

(d) “Material fact” means the fact affects the eventual outcome of a transaction. A fact which, if known, would result in a determination adverse to the claimant is a material fact. A fact is not material if the failure to disclose it or the intentional misstatement of it would not cause injury. A fact which, if known, would not cause a denial or reduction of benefits or disqualification from receipt of benefits is not a material fact.

(e) “With intent to obtain benefits” means the claimant intended the statement to assist the claimant to obtain benefits. In the absence of facts to indicate otherwise, when concealment of a material fact by willful misstatement or nondisclosure occurs in connection with a claim for benefits, it is assumed that the claimant’s intent was to obtain or increase the amount of a benefit payment. When facts are established which indicate a different intent, the conclusions as to the claimant’s intent shall be based on consideration of all the facts and not merely an assumption.

(2) Claimants who inadvertently make a mistake or omission on the basis of information previously given them by the department, cannot reasonably be expected to understand their responsibility and shall not be subject to the provisions of Subsection D of Section 51-1-38 NMSA 1978.

(3) The department shall impose an administrative penalty pursuant to Subsection A of Section 51-1-38 NMSA 1978 for each week that a claimant knowingly makes a false statement or representation or knowingly fails to disclose a material fact to obtain or increase the amount of a benefit payment. Administrative penalties shall be imposed as follows:

(a) for each week of unreported or underreported earnings, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of 52 weeks, from the date of the determination;

(b) for each false statement on separation, eligibility, refusal of work and other issues, the claimant shall forfeit all benefit rights for a period of four weeks, up to a maximum of 52 weeks, from the date of the determination; and

(c) In any case where a claimant fraudulently obtained or increased benefits in two or more separate offenses, the claimant shall forfeit all benefit rights for 52 weeks from the date of the determination.

(4) The department shall demand immediate repayment of any overpayment established pursuant to Subsection D of Section 51-1-38 NMSA 1978. A warrant of levy and lien shall be filed in all cases where the overpayment is not repaid immediately. Recovery of the overpayment may be by any means permitted by law. Recovery of fraudulent overpayments may include court awarded costs. The court costs awarded by the court shall be added to the overpayment and shall be collected in the same manner as the underlying overpayment.

(5) Restitution of an amount overpaid to a claimant due to fraudulent misrepresentation or failure to disclose a material fact shall not preclude the department from requesting criminal proceedings against such claimant.

(6) The department shall impose a civil penalty pursuant to Subsection B of Section 51-1-38 NMSA 1978 upon every claimant who knowingly makes a false statement or representation or knowingly fails to disclose a material fact to obtain or increase the amount of a benefit payment. The total amount of the penalty shall be twenty-five percent of the amount of benefits overpaid as a result of the claimant's false statement or representation or knowing failure to disclose a material fact. The department shall apply the penalty as follows:

(a) an amount equal to the first fifteen percent of the amount of benefits overpaid as a result of the claimant's false statement or representation or knowing failure to disclose a material fact shall be deposited in the "unemployment compensation fund" set forth in Section 51-1-19 NMSA 1978.

(b) an amount equal to the remaining ten percent of the amount of benefits overpaid as a result of the claimant's false statement or representation or knowing failure to disclose a material fact shall be deposited in the Employment Security Department Fund.

(7) Any payments received from a claimant for repayment for any overpayment and civil penalty shall be applied first to the principal amount of the overpayment and any payment in excess of the principal amount of the overpayment shall be applied to pay the civil penalty.

B. Employer Fraud:

(1) Subsection D of Section 51-1-38 NMSA 1978 provides: "In addition to the penalty pursuant to subsection C of this section, any employing unit or officer or agent of an employing unit that makes a false statement or representation knowing it to be false or that knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any claimant eligible for benefits under the Unemployment Compensation Law shall be required to pay a civil penalty in an amount not to exceed \$10,000 as determined by rule established by the department. The penalty shall be collected in a manner provided in Subsection B of Section 51-1-36 NMSA 1978 and distributed to the fund."

(2) When imposing a civil penalty upon employers found to have made a false statement or representation knowing it to be false or to have knowingly failed to disclose a material fact to prevent or reduce the payment of benefits to any claimant eligible for benefits under the Unemployment Compensation Law, the department shall adhere to the following guidelines:

(a) an initial violation shall subject the employer to a maximum penalty of \$500.00;

(b) a second violation within a period of three years of the previous violation shall subject the employer to a penalty that is no less than \$500.00 and no more than \$1,000.00;

(c) a third violation within a period of three years of the most recent violation shall subject the employer to a penalty that is no less than \$1,000.00 and no more than \$2,000.00;

(d) a fourth or subsequent violation within a period of three years of the most recent violation shall subject the employer to a penalty that is no less than \$2,000.00 and no more than \$10,000.00.

(3) The department shall demand immediate repayment of any civil penalty established pursuant to Subsection D of Section 51-1-38 NMSA 1978. A warrant of levy and lien shall be filed in all cases where the civil penalty is not repaid immediately. Recovery of the civil penalty may be by any means permitted by law. Recovery of the civil penalty may include court awarded costs. The court costs awarded by the court shall be added to the civil penalty.

(4) Payment of the civil penalty due to fraudulent misrepresentation or failure to disclose a material fact by any employing unit or officer or agent of an employing unit shall not preclude the department from requesting criminal proceedings against such employing unit or officer or agent of an employing unit.

[11.3.300.314 NMAC - Rp, 11.3.300.314 NMAC, 11/1/2018; A, 06/21/2022]

11.3.300.315 RETIREMENT INCOME:

A. Each eligible claimant who, pursuant to a pension or retirement plan financed in whole or in part by a base-period employer of the claimant shall have the weekly benefit amount reduced, but not below zero, by the prorated amount of the pension, retirement pay, annuity or other similar periodic or lump-sum payment that exceeds the percentage contributed to the plan by the eligible claimant. The maximum benefit amount payable shall also be

reduced to an amount not more than 26 times the reduced weekly benefit amount. For purposes of this section periodic retirement income is not deemed “received”, if , under the time period allowed by the Internal Revenue Code, 26 U.S.C. Section 3405 and related provisions, that amount is placed in a non-taxable qualifying retirement account.

B. A claimant’s monthly pension or retirement payment shall be multiplied by 12, then divided by 52 to determine the amount of pension or retirement income attributed to a week beginning with the last week worked prior to separation from employment.

C. A lump-sum pension or retirement payment shall be considered a periodic payment and the amount divided by 52 and allocated on a weekly basis beginning with the last week worked prior to separation from employment.

[11.3.300.315 NMAC - Rp, 11.3.300.315 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.316 DETERMINATION OF ELIGIBILITY OF FULL-TIME STUDENTS:

A. Except for students in approved training in accordance with Subsection E of Section 51-1-5 NMSA 1978 and 11.3.100.103 NMAC, the availability of benefits for full-time students shall be determined in accordance with the provisions of Subsection E of Section 51-1-5 NMSA 1978 and 11.3.300.316 NMAC.

B. The general requirement: Any claimants enrolled in an educational or training institution or program in a course of study who are able to work and are available for work and are actively seeking permanent full-time work or part-time work in accordance with Subsection I of Section 51-1-42 NMSA 1978, will not be denied from receiving benefits or waiting period credit.

C. Any claimants enrolled in an educational or training institution or program who can demonstrate by credible evidence that they are unequivocally attached to the labor force and available for full-time or part time permanent work for which they are presently qualified without regard to the hours spent in attending classes or doing homework will not be subject to denial if all of the following requirements are met:

(1) While working full-time or part-time and attending school, they became unemployed for reasons not attributable to the schooling and the hours of school attendance have not changed substantially since becoming unemployed, or they began attending school after becoming unemployed and no rearrangement of their school hours would be required to accommodate their normal and customary working hours.

(2) For school terms commencing after the filing of the unemployment claim, the claimants are required to submit to the department a completed student questionnaire, a schedule of classes and, if required by the department, an authorization of release of school records prior to the commencement of each school term. For school terms commencing prior to the filing of the unemployment claim, a student questionnaire and schedule of classes may be verified by the department prior to issuance of a determination that the claimants are available for full-time or part-time permanent work for the school term covered on the student questionnaire notwithstanding their status as full- students.

(3) Full time school is defined as 12 or more credit hours during a regular school term; six or more credit hours for summer term or graduate school or as defined by the school or training institution.

D. A determination of eligibility made in accordance with Subsection C of 11.3.300.316 NMAC shall apply only to the semester or period covered on the student questionnaire.

E. A claimant who receives a determination pursuant to Subsection C of 11.3.300.316 NMAC shall promptly transmit to the department any changes to class schedule during the school term. If the claimant adds or changes any classes, the claimant’s eligibility shall be subject to redetermination pursuant to Subsection C of 11.3.300.316 NMAC and Subsection A of 11.3.300.308 NMAC.

[11.3.300.316 NMAC - Rp, 11.3.300.316 NMAC, 11/1/2018]

11.3.300.317 POST EMPLOYMENT PAYMENTS:

A. The following payments made to a claimant are considered wages that must be reported by the claimant at the time they are earned and which are deductible from any benefits otherwise payable to the claimant for the week or weeks covered by such payments:

(1) Wages in lieu of notice, meaning wages paid by an employer to an employee upon separation in lieu of providing a definite period of notice per a written employer contract, a clearly defined, uniformly applied, written employer policy in place prior to the date of separation, or a statutory requirement;

(2) Bonuses, including commissions, incentive pay, ratification lump sum payments (such as union layoff bonuses), retention or “stay” bonuses, and transfer or relocation bonuses;

(3) Supplemental unemployment payments whose premiums are paid by the employer;

(4) Vacation or leave pay, bereavement pay, continuation pay, or PTO payouts with a letter of intent to return to work within four weeks of separation; or

(5) Back pay

B. A claimant who receives payments listed in Subsection A of this part cannot establish a waiting period credit or receive benefits for the week or weeks covered by such payments, if such payments equal or exceed the claimant's weekly benefit amount.

C. When a claimant leaves work voluntarily without good cause connected with work, is discharged for misconduct connected with work, or fails without good cause to apply for or accept an offer of suitable work and receives a payment listed in Subsection A of this part for services actually performed in any week for which benefits are claimed, these payments cannot be used to meet the requirement of wages earned during employment equal to or exceeding five times the weekly benefit amount of the claim to restore eligibility following a disqualification from benefits or filing a new claim under the provisions of Subsection A of Sections 51-1-7, Subsection B of Section 51-1-7 or Subsection C of Section 51-1-7 NMSA 1978.

D. The following payments are not considered wages and will not be deducted from any benefits otherwise payable to a claimant:

- (1) Severance
- (2) Supplemental unemployment payments whose premiums are paid by the claimant
- (3) Vacation or leave pay bereavement pay, continuation pay, or PTO payouts without a letter of intent to return to work
- (4) Residuals

[11.3.300.317 NMAC - Rp, 11.3.300.317 NMAC, 11/1/2018]

11.3.300.318 BENEFITS DUE DECEASED PERSONS:

A. If prior to the claimant's death, a claimant had filed a weekly certification, for benefits which were unpaid at the time of the claimant's death, the benefits shall be paid to the deceased claimant's court-appointed executor, administrator or personal representative. If the deceased claimant's next of kin demonstrates, to the secretary's satisfaction, that the court appointment of a fiduciary is impractical or legally unnecessary, then the benefits shall be paid to the next of kin. The order of priority for such payment shall be:

- (1) one-half to the surviving spouse, if residing with the deceased claimant at the time of death, and one-half to the natural parent or physical custodian of any minor children or any dependent disabled adult children of the deceased claimant (if more than one, per capita by children and not per stirpes);
- (2) if no minor children and no dependent disabled adult children of the deceased claimant, all to the surviving spouse; if no surviving spouse, all equally
- (3) to the surviving adult children; if no surviving adult children, all equally
- (4) to the surviving parents; if no surviving parents, all equally
- (5) to the surviving siblings; if no surviving siblings, all
- (6) to the deceased claimant's heirs at law as provided in the New Mexico Probate Code,

Sections 45-2-101 through 45-2-114 NMSA 1978.

B. Whenever there is more than one legal heir in any of the above classes, payment may be made to any one of such group as agent for the others upon submission of proper evidence of authority and identification.

C. Application for payment of benefits must be made in writing and on the prescribed form within six months of the death of the decedent and must be accompanied by a certified copy of the death certificate. The application form shall set forth that the individual died intestate, that no executor, administrator or personal representative has been appointed to administer the deceased claimant's estate, and the relationship of the person to the deceased. Any outstanding payments representing benefits claimed must accompany the application for payment for re-issuance.

D. Unless, within the time prescribed herein a claim is made for benefits due a deceased claimant by one of the parties herein authorized to make such claim, any payments issued directly to the deceased claimant shall be canceled, and any additional benefit payments due to the deceased claimant for weeks of unemployment prior to the claimant's death shall be canceled, and all sums represented by benefits payable to the deceased claimant prior to the claimant's death shall remain a part of the unemployment compensation fund.

[11.3.300.318 NMAC - Rp, 11.3.300.318 NMAC, 11/1/2018]

11.3.300.319 STANDARDS FOR WAGES ELIGIBLE TO PURGE BENEFIT DISQUALIFICATION; BONA FIDE EMPLOYMENT: In determining whether a claimant has earned wages to requalify for benefits after imposition of a disqualification under the provisions of Section 51-1-7 NMSA 1978, the following shall apply:

A. Wages required to requalify will include both covered and non-covered wages, but will not include earnings from self-employment or earnings excluded under the provisions of 11.3.300.317.NMAC.

B. The wages must have been earned for work performed subsequent to the effective date of the disqualification.

C. The proof required to establish wages for requalification may consist of check stubs or other payment records, employer statement or W-2 form if the W-2 establishes that the wages were paid after the effective date of the disqualification. When employers' quarterly wage reports available to the department show the contended wage items, the department may accept the report as proof of wages. If necessary for a determination under Subsection B of 11.3.300.319 NMAC, the period during which the wages were earned shall be established by other proof.

D. Except for wages of which the department has knowledge through employers' quarterly wage reports, the burden of establishing requalifying wages shall rest on the claimant. The department may, as it deems appropriate, assist the claimant in the verification of wages which the claimant states that the claimant has earned but of which the claimant has no proof or insufficient proof, by contacting the employers.

E. The wages must have been earned in "bona fide" employment. The basic test to determine whether employment is "bona fide" to purge a disqualification is whether the total facts lead a reasonable person to conclude that the claimant was in good faith genuinely attached to the labor market. A claimant is not engaged in bona fide employment when the service is performed for the purpose of purging a disqualification. No fixed rule can govern when employment is "bona fide," but the following factors shall be considered by the department:

- (1) whether a valid, arms-length employer-employee relationship exists; this excludes self-employment and incidental cash payments for services reportedly performed for relatives and friends;
- (2) whether the work is of the type of which the claimant would accept referral on a full-time basis or for repeated temporary durations;
- (3) whether the work bears any relation to the claimant's main occupational skills;
- (4) whether the work is of the type that employers generally offer in the job market;
- (5) whether the work is related to the particular employer's normal activity and customarily offered to the working public by this employer;
- (6) whether the employer is registered for employment purposes with appropriate taxing and licensing authorities;
- (7) the nature of the work, concerning hours to be worked, where the work is performed, and rate of pay;
- (8) whether the employer can produce payroll records to substantiate the amount of payment and appropriate tax withholding information;
- (9) whether the wages for the employment were equivalent to the claimant's wages in the claimant's usual occupation or last preceding employment; and
- (10) the manner in which the work was obtained, and the nature and extent of the claimant's search for work.

[11.3.300.319 NMAC - Rp, 11.3.300.319 NMAC, 11/1/2018]

11.3.300.320 WORK SEARCH REQUIREMENT:

A. WORK SEARCHES: To qualify for continued benefits, a claimant must:

- (1) be a member of a union with a hiring hall or a referral hall and meet the union requirements for job referral or placement;
 - (a) the claimant must be a member in good standing at the time of certification;
 - (b) the hiring hall or referral hall must be actively seeking to place its members in employment; or
- (2) actively seek work by contacting a minimum number of different employers each week during the week for which benefits are claimed, as directed by department representatives. It is not mandatory that the work searches occur on different days of the week;
 - (a) a claimant may contact the same employer more than one time during a given week, which may count for multiple searches if the claimant applies for multiple jobs with the same employer so long as the applications are distinct and separate positions;
 - (b) a claimant may list jobs applied for through the New Mexico department of workforce solutions workforce connection centers, the New Mexico state personnel office (SPO), America's job bank, Workforce Innovation and Opportunity Act (WIOA) partners and similar programs as approved from time to time by the department as valid work search contacts for each week of claim certification;
- (3) Other unions may apply for work search waivers by submitting a request in writing to the secretary, who may upon discretion make an exception to the work search requirements.

B. in order to qualify for continued benefits, interstate, if New Mexico is the liable state, claimants must seek work within the week for which benefits are being claimed and actively seek work by contacting a minimum of two different employers each week, or if a union member, actively seek work by contacting the union as required by the union in order to be eligible for job referral or placement

C. claimants must keep a record of the name, address and telephone number or electronic mail address of each employer contacted in the event of an audit and must retain a copy of any email confirmation received as a result of applying for a job on-line;

(1) This information must be provided to department representatives upon request;

(2) the claimant must provide the requested information no later than 10 calendar days from the date of the department's request;

(3) the claimant must provide sufficient information for the department to verify the claimant's work search efforts. If the claimant is able to provide specific job numbers or requisition numbers for the job applied for, this information will be considered sufficient to verify the contact;

(4) failure to provide the required information without good cause may result in a denial of benefits for the week in question;

(5) if the information provided is insufficient to verify a valid work search occurred, benefits for the week in question will be denied;

(6) if a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits. Such benefits would constitute an overpayment which would be recouped pursuant to Section 51-1-38 NMSA 1978;

(7) any denial imposed for failure to provide the required information may be appealed pursuant to 11.3.300.500.9 NMAC;

D. A claimant whose work search is deemed inadequate or invalid shall be denied benefits for the week in question. A rebuttable presumption that the claimant failed to meet the active work-search requirements for that week will be raised in all cases where a claimant's work search is deemed inadequate or invalid. In order to overturn the denial of benefits the claimant shall provide proof that the claimant did meet the active work-search requirements for that week. If a denial is imposed, the effective period may include weeks for which the claimant has already been paid benefits. Such benefits would constitute an overpayment which would be recouped pursuant to Section 51-1-38 NMSA 1978. Any denial imposed on the basis of an inadequate or invalid work search may be appealed pursuant to 11.3.300.500.9 NMAC.

E. The department may waive the work search requirements for claimants who the department determines are on temporary lay-off status from their regular full-time employment upon receipt of an assurance from the employer that the lay-off shall not exceed four weeks or upon receipt of an express offer in writing of substantially full-time work which will begin within a period not exceeding four weeks. Such waivers shall apply only to the four-week period covered on the determination. A claimant who receives a determination granting a waiver for the four-week period shall promptly transmit any change to the claimant's recall date or start date to the department. The claimant's eligibility shall then be subject to redetermination pursuant to Subsection A of 11.3.300.308 NMAC.

F. In cases where the department determines a claimant is in a temporary lay-off status due to a government furlough or shutdown, the department may waive the work search requirements during the period of the temporary lay-off for all affected claimants.

G. In the event of a public health emergency declaration issued by the governor, work searches shall be waived for all claimants at the discretion of the secretary until the end of the public health crisis.

[11.3.300.320 NMAC - Rp, 11.3.300.320 NMAC, 11/1/2018; A/E, 1/9/2019 A, 10/29/2019; A/E 7/28/2020; A, 1/12/2021]

11.3.300.321 REEMPLOYMENT SERVICES: A claimant shall be eligible to receive benefits with respect to any week only if the claimant participates in reemployment services such as job search assistance services, if the claimant has been determined to be likely to exhaust regular benefits, and needs reemployment services pursuant to a profiling system established by the department, unless the department determines that:

A. this claimant has completed such services; or

B. there is justifiable cause for the claimant's failure to participate in such services;

C. if the claimant does not participate in reemployment services as required by the department, benefits shall be denied for the week of non-participation.

[11.3.300.321 NMAC - Rp, 11.3.300.321 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.322 CLAIM CANCELLATIONS:

A. A claim may be canceled by the claimant at any time after an initial or amended monetary determination even though final, provided that no disqualifying determination has been issued nor any benefits paid on the claim. Requests for cancellation must be made by the claimant or their authorized representative in the manner prescribed by the department and signed electronically or in writing by the claimant or the authorized representative of the claimant.

B. A request to change the date of a claim is deemed a request to cancel a claim and file a new claim.

(1) Only if the claimant does not qualify for benefits using the base period consisting of the first four of the last five completed quarters will the base period be changed.

(2) In situations where claimants might be benefited by a delayed filing, the department will advise the claimant that the claim determination will not show any wages for the first quarter and that this is not an error. If using the new base period will cause an increase in the weekly benefit amount, the department will make an effort to advise the claimant of this option to file a claim at a future date.

C. Claimants who are eligible to file a combined wage claim may cancel such claim when New Mexico is the paying state if benefits have been paid on the combined wage claim. Cancellation will be authorized only if the claimant agrees in the manner prescribed by the department to reimburse all benefits paid by cash or by authorizing any other state to deduct the amount due from any benefit payments to which the claimant is eligible. Requests for cancellation must be made in the manner prescribed by the department signed electronically or in writing by the claimant or the authorized representative of the claimant.

[11.3.300.322 NMAC - Rp, 11.3.300.322 NMAC, 11/1/2018]

11.3.300.323 VOLUNTARY WITHHOLDING OF FEDERAL INCOME TAX:

A. The department shall provide each claimant filing a new claim for benefits with the following information in documented form:

- (1)** benefits are subject to federal, state and local income tax;
- (2)** requirements exist under federal law pertaining to estimated tax payments;
- (3)** a claimant may elect to have federal income tax deducted and withheld from the claimant's benefit payments at the amount specified in the federal Internal Revenue Code, 26 U.S.C. Section 3402(p)(2); and
- (4)** a claimant is permitted to change a previously elected withholding status one time during each benefit year.

B. Amounts deducted and withheld from benefits shall remain in the unemployment compensation fund until transferred to the internal revenue service as a payment of income tax.

C. The department shall follow all procedures specified by the United States department of labor and the internal revenue service pertaining to the deducting and withholding of federal income tax.

D. Amounts shall be deducted and withheld for the purpose of federal income tax payments only after amounts are deducted and withheld for any overpayments of benefits, child support obligations and food stamp over-issuances required to be deducted and withheld under the Unemployment Compensation Law.

[11.3.300.323 NMAC - Rp, 11.3.300.323 NMAC, 11/1/2018]

11.3.300.324 COLLECTIONS:

A. Deferred collections: From time to time, the department may, at its discretion determine that it is not economically efficient to actively pursue collection of certain overpayments due to the claimant's situation or the department's resources. The department may cease or forbear active collection activities for either a finite period or an indefinite period depending on the circumstances. However, overpayment debts will remain on the department's books as an obligation owed by the claimant to the department. The department's discretion in this matter is final.

B. Money collected by the department with respect to an overpayment or civil penalty will be applied in the following order unless specifically directed otherwise:

- (1)** costs incurred by the department to pursue collection of the overpayment or civil penalty;
- (2)** the principal amount of the overpayment;
- (3)** the portion of the civil penalty equal to fifteen percent of the overpayment amount which will be deposited in the Unemployment Compensation Fund set forth in Section 51-1-19 NMSA 1978; and
- (4)** the portion of the civil penalty equal to ten percent of the overpayment of the amount which will be deposited in the employment security department fund created pursuant to Section 51-1-34 NMSA 1978.

[11.3.300.324 NMAC - Rp, 11.3.300.324 NMAC, 11/1/2018]

11.3.300.325 OVERPAYMENTS AND WAIVERS OF OVERPAYMENTS:

A. Trade acts or any enacted federal extension program overpayment waivers: The department shall use the process set forth in this subsection to evaluate disputes of overpayments paid under the Trade Acts, the Trade Adjustment Assistance (TAA), Trade Readjustment Assistance (TRA), Federal Extended Benefits, or any enacted federal extension program under the following circumstances:

(1) When a decision of the department results in an overpayment, an appealable determination will be sent to the claimant. The claimant may file an appeal no later than 15 days from the date of the determination in accordance with 11.3.500 NMAC.

(2) At the department's discretion, a request for review of an overpayment may be administratively initiated to determine if a waiver of overpayment will be approved. A waiver will be approved if the department determines that:

- (a) the application was made timely;
- (b) payment was made without the fault of the claimant; and
- (c) requiring repayment would be contrary to equity and good conscience.

(3) The department's affirmative finding of any one of the following factors of fault precludes a waiver:

- (a) that the claimant knowingly made a material misrepresentation, which misrepresentation resulted in the overpayment; or
- (b) that the claimant knowingly failed to disclose a material fact, which failure to disclose resulted in the overpayment; or
- (c) that the claimant knew or should have known that he was not eligible for the payment; or
- (d) that the department has previously issued a determination of fraud in regards to the overpayment.

(4) The department shall consider the following factors in determining whether, in equity and good conscience, the department should require repayment:

- (a) whether the overpayment was the result of a decision on appeal;
- (b) whether the claimant was given notice that repayment would be required in the event of reversal on appeal;
- (c) whether the recovery of the overpayment would cause an extraordinary and lasting financial hardship to the claimant, resulting in the claimant's inability to obtain minimal necessities of food, medicine and shelter for at least 30 days and period of financial hardship lasting at least three months, and
- (d) whether, if recoupment from other benefits is proposed, the length of time of extraordinary and lasting financial hardship shall be the longest potential period of benefit eligibility as seen at the time of the request for waiver of determination.

(5) In determining whether fraud has occurred, the department shall consider the following factors:

- (a) whether the claimant knowingly made, or caused another to make, a false statement or representation of a material fact resulting in the overpayment;
- (b) whether the claimant knowingly failed, or caused another to fail, to disclose a material fact resulting in the overpayment.

(6) If a determination of fraud is made, the claimant shall be ineligible for any further TAA, TRA or any other enacted federal extension program benefits and shall be ineligible for waiver of any overpayment.

(7) A finding that the TAA or TRA overpayment was not the result of a decision on appeal or that the recovery would not cause extraordinary and lasting financial hardship shall preclude a waiver.

(8) If a TAA or TRA claimant fails, without good cause, to complete training, a job search or a relocation, any TAA or TRA payment to such claimant that is not properly and necessarily expended in attempting to complete the activity shall constitute an overpayment. Such overpayments shall be recovered or waived according to the standards of fault, equity and good conscience contained in 11.3.300.325 NMAC.

B. Coronavirus Aid, Relief and Economic Securities (CARES) Act overpayment waivers: The department shall use the process set forth in this subsection to grant or deny waivers of recoupment of overpayments paid under section 2105 of the CARES Act to specifically include Pandemic Unemployment Assistance (PUA) benefits, Federal Pandemic Unemployment Compensation (FPUC) benefits, Mixed Earners Unemployment Compensation (MEUC) benefits, and Pandemic Emergency Unemployment Compensation (PEUC) benefits:

(1) Claimants who were assessed an overpayment of CARES Act benefits are eligible to apply for a waiver of all or part of the federal benefit overpayment, including overpayments that have already been partially or fully recouped by the department. If the department grants a waiver and has already recouped some or all of the

overpayment, the department will refund the amount previously recouped, with the exception of amounts offset from the claimant's benefits as part of a reconciliation process to avoid or prevent double payment of benefits. A waiver will be approved if the department determines that:

- (a) payment was made without fault of the claimant; and
- (b) requiring repayment would be contrary to equity and good conscience. Equity and good conscience, for the purposes of this subsection, exists when at least one of three circumstances exists: 1) recovery would cause financial hardship to the person for whom it is sought; 2) the recipient of the overpayment can show that due to the notice that such overpayment could be made or because of the incorrect payment, either the claimant has relinquished a valuable right or changed positions for the worse; or 3) recovery would be unconscionable under the circumstances.

(2) Claimants seeking an overpayment waiver must affirmatively request an overpayment review. Waivers will be considered on an individual basis and shall not be granted as a matter of course unless a blanket waiver is specifically approved by the US Department of Labor.

(3) Claimants may file an application for a waiver of a federal CARES Act overpayment by completing the application in their online account or by contacting the department's operations center.

(4) The department's affirmative finding that any one of the following factors precludes a waiver:

- (a) that the claimant knowingly made a material misrepresentation, which misrepresentation resulted in the overpayment; or

- (b) that the claimant knowingly failed to disclose a material fact, which failure to disclose resulted in the overpayment; or

- (c) that the department has previously issued a determination of fraud in regards to the overpayment. Claimants may appeal the underlying fraud determination by following procedures outlined in 11.3.500 NMAC.

(5) After the waiver application has been adjudicated, a determination shall be issued informing the claimant of the outcome of the request, the overpayment amount waiver, the reason any amount was not waived, and explaining the claimant's right to appeal the determination in accordance with 11.3.500 NMAC.

C. In any event, no repayment shall be required or deduction made until a notice and an opportunity for fair hearing have been provided to the claimant in accordance with 11.3.500 NMAC, a determination has been issued by the department, and the determination has become final. Once a waiver application has been received by the department, all collections activity, including benefit offsets, collections notices, or liens shall cease until the waiver application has been processed and the decision is deemed final or all appeal deadlines under 11.3.500 NMAC or NMRA 1-077 have expired.

[11.3.300.325 NMAC - Rp, 11.3.300.325 NMAC, 11/1/2018 A, 10/29/2019; A, 11/19/2024]

11.3.300.326 DOMESTIC ABUSE:

A. A claimant is eligible for waiting period credit or benefits if the claimant voluntarily leaves work due to circumstances directly resulting from domestic abuse.

(1) "Domestic abuse" means abuse as defined in Section 40-13-2 NMSA 1978, and includes but is not limited to any incident by a household member against another household member resulting in: physical harm; severe emotional distress; bodily injury or assault; a threat causing imminent fear of bodily injury by any household member; criminal trespass; criminal damage to property; repeatedly driving by a residence or work place; telephone harassment; stalking; harassment, or harm or threatened harm to children.

(2) "Household member" means a spouse, former spouse, family member, including relative, parent, present or former stepparent, present or former in-law, child or co-parent of a child, intimate partner or a person with whom the claimant has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member.

B. Documentation: The claimant shall provide documentation satisfactory to the department for the determination of whether the claimant has experienced domestic abuse for purposes of benefit eligibility. The documentation shall be of a competent nature, reasonably susceptible to verification and bearing indicia of credibility. The documentation shall include a sworn statement by the claimant regarding the domestic abuse. The documentation may include information from individuals or organizations from whom the claimant has sought assistance for the domestic abuse, including but not limited to police or court records, documentation from a shelter worker, attorney at law, a member of the clergy, physician or other medical or mental health practitioner. If upon review of the claimant's documentation, the department determines that further verification is warranted, the department may require additional supporting documentation.

C. Determination: To be eligible for benefits as a result of domestic violence, the department must determine that the claimant is monetarily eligible. The existence of domestic violence shall be established by a preponderance of the evidence.

(1) Factors to be considered in determining if claimant voluntarily leaves work as a result of domestic violence include but are not limited to whether: claimant reasonably fears domestic abuse at or en route to or from claimant's place of employment; claimant reasonably is required to relocate to another geographic area to avoid future domestic abuse; claimant reasonably believes that leaving employment is necessary for the future safety of the claimant or the claimant's family due to the domestic abuse; the abuse itself interfered with claimant's ability to work, travel or prepare for work; claimant reasonably left the labor market to escape such abuse; the abuse occurred at claimant's place of employment; the abuser's relatives or friends or the abuser were co-workers of claimant or otherwise present at the worksite; claimant informed the employer and gave the employer the opportunity to ameliorate the domestic abuse within a reasonable period of time, but the employer would not or could not do so; claimant has filed a civil or criminal proceeding against an alleged abuser; however nothing in this provision shall be construed as requiring the filing of a civil or criminal proceeding as a prerequisite to establishing the existence of domestic violence.

(2) Claimant must indicate at the time of filing the claim that the reason for leaving employment was as a result of qualifying domestic abuse.

(3) Claimant must provide evidence tending to prove the existence of qualifying domestic abuse within 10 days of the filing of the claim.

(4) Claimant will be eligible to receive benefits retroactively to the date of filing if adequate documentation is received within 10 days of the filing of the claim, if otherwise eligible for benefits.

(5) If no documentation is received within 10 days of the filing of the claim, an initial determination will be issued denying the claim on the basis of domestic abuse.

(6) If claimant subsequently submits documentation tending to demonstrate the existence of domestic abuse, a determination will be made on the basis of the subsequent documentation submitted. Claimant will not be eligible to receive benefits retroactively to the date of filing but will be eligible to receive benefits retroactively to the date of submission of the subsequent documentation supporting domestic abuse.

(7) Only an alleged victim of domestic abuse may obtain benefits under this provision; an alleged perpetrator may not.

D. If domestic abuse is proven, a determination will be issued identifying domestic abuse as the reason for the separation and a contributing employer's account will not be charged any portion of benefits paid.
[11.3.300.326 NMAC - Rp, 11.3.300.326 NMAC, 11/1/2018 A, 10/29/2019]

11.3.300.327 DEPENDENTS' ALLOWANCE:

A. A claimant is eligible to receive benefits in the amount of \$25 for each unemancipated child, up to a maximum of two children, and not to exceed fifty percent of the claimant's weekly benefit amount.

B. The claimant shall declare the dependents' allowance on the date that the claimant files an initial claim for the benefit year.

C. Within 14 days of an application for the dependents' allowance, the claimant must supply verification that, for each child for whom the allowance is claimed, the child is the claimant's child, under the age of 18, unemancipated and the child is:

(1) in fact dependent on and wholly or mainly supported by the claimant; or

(2) in the legal custody of the claimant pending adjudication of a petition for adoption filed in a court of competent jurisdiction; or

(3) the subject of a decree or order from a court of competent jurisdiction requiring the claimant to contribute to the dependent's support; and no other claimant is receiving dependents' allowance benefits for that child under the Unemployment Compensation Law.

D. Definitions: "Child" means a person:

(1) who is related to the claimant within the third degree of consanguinity; or

(2) who is a stepchild of the claimant by virtue of the claimant's marriage to the child's biological or legal parent and that biological or legal parent has sole or primary legal and physical custody of the child and the child physically resides with the claimant; or

(3) who is in the claimant's legal or physical custody pursuant to a decree or order from a court of competent jurisdiction including but not limited to orders of custody, guardianship, conservatorship, trusteeship or foster care;

(4) “wholly or mainly supporting” means that the claimant who is applying for the dependents' allowance is in fact furnishing contemporaneously more than fifty percent of the actual cost of support for the dependent.

E. The claimant has the burden of establishing to the satisfaction of the department that the claimant is actually furnishing more than one-half of the cost of support of the child.

F. No fixed dollar amount shall be used to make the determination regarding support.

(1) The department considers “cost of support” to include but is not limited to a reasonable proration of the expenses of shelter (including but not limited to household grocery, toiletries, household cleaning products, rent or mortgage payments, customary utilities such as water, sewer, gas, electricity and basic telephone), school expenses of the child (including but not limited to tuition, books, clothing and supplies for special school or educational activities), medical and dental expenses including actual payments and payments of insurance premiums; payment of expenses related to any special needs of the child.

(2) The department may also use any child support worksheets utilized by a court of competent jurisdiction in determining the amount of child support due from each parent.

G. Verification:

(1) Claimant shall not be eligible to claim a dependents' allowance for any person unless the dependent has been issued a social security number or other federal identification sufficient for purposes of verification.

(2) A claimant who is otherwise eligible for benefits and who has not yet submitted the required dependents' allowance verification shall not be paid the dependents' allowance unless and until verification satisfactory to the department is presented.

(3) Upon receipt of verification within 14 days of the application the dependents' allowance shall be paid retroactively to the date of the application.

(4) If the claimant submits verification after 14 days, the claimant will not be eligible to receive benefits retroactively to the date of the application but will be eligible to receive benefits retroactively to the date of submission of verification satisfactory to the department.

H. Changes in eligibility:

(1) During the life of the claim, should claimant become eligible for a dependents' allowance, claimant may request from the department that the dependents' allowance be granted. Claimant will be required to provide proof that the dependent for which the benefit is being sought was not a dependent at the time of the filing of the initial claim. The department will issue a written determination whether claimant is granted or denied the dependents' allowance.

(2) During the life of the claim, should claimant no longer be eligible to claim a dependents' benefit for one or more of the dependents for whom claimant is receiving the dependents' allowance, claimant is required to report to the department within five days any such change in circumstances. A claimant who fails to report such change in circumstances may be assessed an overpayment.

(3) Should the circumstances of who provides support for the dependent change during the life of the claim, the claimant shall inform the department within five days of the change of circumstances.

I. Multiple claims: Only one claimant may receive a dependents' allowance for any specific dependent. In the event two claimants each request to receive the dependents' allowance for the same child, upon notification of the dispute, the department shall continue making payments to the claimant who the department initially determined was eligible to receive benefits for the dependent. A later claimant may demonstrate a superior claim to the dependents' allowance for a child by producing documentation showing that the later claimant has a paramount right to claim the dependents' allowance, including but not limited to:

(1) a custody decree or order from a court of competent jurisdiction finding that the dependent child is or should be in the primary physical custody of the later claimant or that the later claimant is obligated to provide more than fifty percent of the dependent child's support and that the later claimant is in fact the primary physical custodian of the dependent child or is in fact providing more than fifty percent of the dependent child's support;

(2) a custody decree or order from a court of competent jurisdiction or similar document including, but not limited to IRS form 8332, finding that the later claimant is eligible to claim the child as a dependent for official purposes.

J. Once a claimant has been determined to be eligible for the dependents' allowance that determination will remain in effect for the life of the claim, subject to the provisions of Subsection H of 11.3.300.327 NMAC.

K. Payment of regular benefits will not be delayed due to any delay in processing the application for dependents' allowance.

L. A contributing employer's account will not be charged any portion of benefits paid for the dependents' allowance.
[11.3.300.328 NMAC - Rp, 11.3.300.328 NMAC, 11/1/2018]

11.3.300.328 APPRENTICES:

A. Apprentices participating in an approved apprenticeship program registered with the Apprenticeship Office through the department of workforce solutions who are required to attend unpaid training sessions during weeks in which they are not otherwise receiving compensation may be eligible to receive unemployment benefits for the training weeks under 51-1-1 *et seq.* NMSA as long as all other unemployment eligibility requirements are met.

B. During the week in which an apprentice is eligible for unemployment benefits though this provision, the work search requirements will be waived since the apprentice will have a predetermined return to work date established though their apprentice program.

[11.3.300.328 NMAC - N, 1/12/2021]

HISTORY OF 11.3.300 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the State Records Center and Archives under ESD 74-1, Unemployment Compensation Law of New Mexico and Rules and Regulations of the Commission, filed 10-1-74; Regulation 301, Filing Initial, Additional and Reopened Claims, amended and filed 5/23/1990; Regulation 303, Timely Response to Request for Information, amended and filed 5/4/1990; Regulation 304, Late Filing of Continued Claims, amended and filed 5/4/1990; Regulation 306, Claim Registration Form, amended and filed 9/20/1994; Regulation 308.1, Termination of Continued Claims, amended and filed 11/5/1987; Regulation 310, Interstate Claims, amended and filed 8/17/1990; Regulation 311, Combined Wage Claims, amended and filed 8/17/1990; Regulation 314, Fraudulent Claims, amended and filed 10/16/1990; Regulation 315, Retirement Income, amended and filed 9/20/1994; Regulation 316, Availability of Full-Time Students, amended and filed 1/8/1990; Regulation 317, Wages in Lieu of Notice, Backpay for Loss of Employment, or Vacation Pay and Benefit Rights, amended and filed 9/20/1994; Regulation 318, Benefits Due Deceased Persons, amended and filed 5/4/1990; Regulation 319, Standards for Wages Eligible to Purge Benefit Disqualification; Bona Fide Employment, amended and filed 6/14/1991; Regulation 320, Work Search Requirement, amended and filed 9/20/1994; Regulation 321, Reemployment Services, amended and filed 9/20/1994; Regulation 322, Claim Cancellations, amended and filed 9/20/1994.

History of Repealed Material:

11.3.300 NMAC Labor and Workers Compensation, Employment Security, Claims Administration, filed 1/1/2003 - Repealed effective November 1, 2018.