

**TITLE 11      LABOR AND WORKERS COMPENSATION**  
**CHAPTER 3    EMPLOYMENT SECURITY**  
**PART 400     TAX ADMINISTRATION**

**11.3.400.1      ISSUING AGENCY:** New Mexico Department of Workforce Solutions, Workforce Transition Services Division.

[11.3.400.1 NMAC - Rp, 11.3.400.1 NMAC, 11/30/2016]

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**11.3.400.2      SCOPE:** General public

[11.3.400.2 NMAC - Rp, 11.3.400.2 NMAC, 11/30/2016]

**11.3.400.3      STATUTORY AUTHORITY:** Sections 51-1-1 to 51-1-59 NMSA 1978.

[11.3.400.3 NMAC - Rp, 11.3.400.3 NMAC, 11/30/2016]

**11.3.400.4      DURATION:** Permanent

[11.3.400.4 NMAC - Rp, 11.3.400.4 NMAC, 11/30/2016]

**11.3.400.5      EFFECTIVE DATE:** November 30, 2016, unless a later date is cited at the end of a section.

[11.3.400.5 NMAC - Rp, 11.3.400.5 NMAC, 11/30/2016]

**11.3.400.6      OBJECTIVE:** The purpose of these rules is to provide clarification of the Unemployment Compensation Law. These rules assist employers and claimants to better understand how specific sections of the law are being administered by the department. The rules also assist employers achieve compliance by facilitating understanding of the department's procedure so that employers can meet the requirements of unemployment compensation law.

[11.3.400.6 NMAC - Rp, 11.3.400.6 NMAC, 11/30/2016; A, 10/29/2019]

**11.3.400.7      DEFINITIONS:**

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

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

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

**D.      “Annual payroll”** means the total taxable amount of payment from an employer for employment during a 12-month period ending on a computation date.

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

**F.      “Base-period employers”** means the employer of an individual during the individual's base period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**W. “Interested agency”** means the agency of an interested jurisdiction.

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

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

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

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

**BB. “Payment in lieu of contributions”** means nonprofit employers or governmental agencies that elect to pay the division for the fund an amount equal to the amount of regular benefits and of one-half of the

extended benefits paid, that is attributable to service in the employ of such nonprofit organization or governmental agency, to individuals of weeks of unemployment that begin during the effective period of such election.

**CC. “Predecessor”** means the owner and operator of an employing enterprise immediately prior to the transfer of such enterprise.

**DD. “Reserve factor”** means the annual factor determined by the department that is necessary to ensure that the unemployment trust fund sustains an adequate reserve.

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

**FF. “Successor”** means any person or entity that acquires an employing enterprise and continues to operate such business entity.

**GG. “Taxable year”** means the calendar year beginning the first day of January and ending the last day of December.

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

**II. “Trust fund balance”** means the trust fund balance on deposit with the U.S. treasury in the state’s account as of June 30 that includes only funds that will be used for payments of benefits to claimants.

**JJ. “Violates or attempts to violate”** means intent to evade, a misrepresentation or a willful nondisclosure.

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

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

#### **11.3.400.8 THROUGH 11.3.400.400: [RESERVED]**

#### **11.3.400.401 EMPLOYER TAX ACCOUNT AUDITS:**

##### **A. Records of employing units:**

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

- (a) the individual's name, address and social security number;
- (b) the dates on which the individual performed services for such employing unit, including beginning and ending dates, and the state or states in which such services were performed;
- (c) the total amount of wages paid to the individual for each separate payroll period, date of payment of said wages, and amounts paid to the individual for each separate payroll period other than “wages”, as defined in the Unemployment Compensation Law;
- (d) whether, during any payroll period, the individual worked less than full time, and, if so, the hours and dates worked;
- (e) the reasons for separation of the individual.

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

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

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

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

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

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

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

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

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

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

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

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

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

**11.3.400.402 IDENTIFICATION OF EMPLOYEES:** Each employer shall report an employee's social security account number in making any report required by the department with respect to such employee. If the employee has no such number, the employer shall request the employee show the employer a receipt issued by the social security administration acknowledging that the employee has filed an application for an account number. The receipt shall be retained by the employee and a copy of the receipt shall be retained by the employer. In making any report required by the department with respect to such an employee, the employer shall report the date of issue of the receipt, its termination date, the address of the issuing office, and the name and address of the employee exactly as shown in the receipt.

[11.3.400.402 NMAC - Rp, 11.3.400.402 NMAC, 11/30/2016]

**11.3.400.403 POSTING OF NOTICES:** Each employer, including each person or entity which has elected, with the approval of the department, to become an employer, shall post and maintain printed notices to individuals in its employ informing them that they are covered under the provisions of the Unemployment Compensation Law of New Mexico. Such notices shall also include information as to the employees' rights to benefits and instructions as to the procedure for registering for work and filing claims for benefits. No such notice may be posted or maintained by any person or entity to whom an unemployment insurance account has not been assigned by the department or who has ceased to be an employer. Such notices shall be furnished by the department in such numbers as the department may determine to be necessary and shall be posted and maintained in conspicuous places near the location where the workers' services are performed. The department may furnish other notices, including those containing either information as to employees' rights to benefits or instructions as to the procedure for registering for work and for filing claims for benefits. These notices shall be posted or made available by each employer so that an employee entitled to benefits is informed of his rights to benefits and the means of attaining them.

[11.3.400.403 NMAC - Rp, 11.3.400.403 NMAC, 11/30/2016]

**11.3.400.404 WAGE AND CONTRIBUTION REPORTS BY EMPLOYING UNITS:**

**A. QUARTERLY EMPLOYMENT & WAGE DETAIL REPORT:**

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

(2) In the event of a federal or state declaration of emergency, the department may extend the deadline for submission of the quarterly wage report and corresponding contributions due for up to one month after the deadlines stated in this Subsection.

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

**C. WAGE DETAIL REPORTING REQUIREMENTS:** All employers must file their quarterly wage and contribution report electronically, using one of the acceptable formats prescribed by the department. Reports that contain extraneous information, are incomplete or otherwise submitted or prepared improperly will be rejected and become subject to the following penalties:

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

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

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

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

**D. ESTIMATED WAGE AND CONTRIBUTION REPORTS:** If an employer fails or refuses to make reports in a manner as prescribed in Subsection C of 11.3.401.404 NMAC showing what the employer claims for the amount of wages which it believes to be due, the department's representative shall estimate the amount according to the process described in Subsection E of 11.3.401.404 NMAC. After the estimated wages are calculated, the department shall provide a notice to the employer advising it that the department is estimating the amount of contribution due, provide the estimated amount of contribution due and advise the employer that unless an appeal is initiated within 15 days pursuant to Subsection B of 11.3.500.8 NMAC, the estimated amount shown in the notice shall be the amount of the contribution due for the period stated in the notice. The notice shall also inform the employer that the department may record a lien against the employer's assets. After service of the notice to the employer the department shall cause the warrant of levy and lien to be recorded in same manner as any other warrant issued by the department. If thereafter, the department should receive from the employer reports for the estimated quarters containing different wage amounts, the estimation of the contribution due shall not be altered, and the employer shall remain liable for the amount assessed.

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

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

[11.3.400.404 NMAC - Rp, 11.3.400.404 NMAC, 11/30/2016; A, 10/29/2019; A/E, 4/24/2020]

**11.3.400.405 QUARTERLY PAYMENT OF CONTRIBUTIONS:** The contributions imposed on any individual or employing unit subject to the Unemployment Compensation Law of New Mexico other than an employer who has elected to become liable for payments in lieu of contributions shall be due and payable for each calendar quarter with respect to wages for employment paid in such quarter without assessment, notice or demand.

[11.3.400.405 NMAC - Rp, 11.3.400.405 NMAC, 11/30/2016]

**11.3.400.406 DUE DATE FOR PAYMENT OF CONTRIBUTIONS; NOTICE OF DELINQUENCY; INTEREST AND PENALTIES:**

**A.** All contributions shall become due on and shall be paid on or before the last day of the month immediately following the close of the calendar quarter for which they are payable, and any employer failing to pay any contribution when due shall be delinquent. The department shall serve a notice of delinquency to the employer at the employer's address of record. The failure of the department to locate and serve a notice of delinquency, or the failure of the employer to receive any notice of delinquency, shall not affect the employer's liability for any contribution, interest or penalty. Interest and penalties shall be assessed from and after the due date in accordance with the Unemployment Compensation Law of New Mexico.

**B.** Whenever the department finds that the collection of contributions from any particular employer may be jeopardized by delaying the collection thereof until the date otherwise prescribed, the department may advance the due date of such employer's contributions to such date, succeeding the period with respect to which they have accrued, as the department deems advisable, or may in the department's discretion, upon such finding prescribe payment of contributions from such employer monthly rather than quarterly. Monthly contributions shall become due on and shall be paid on or before the 15th day of the month next following the close of the month for which they are payable. Contributions not paid on or before the due date shall become delinquent and interest and penalties shall be assessed from and after the due date.

**C.** The department may, at its discretion, furnish an employer written permission to pay delinquent contributions in installments. Any arrangement for payment in installments must make provision for the payment of interest on the past due delinquent contribution balances from the due date through the ending date on which such installment is paid. In the event that such employer fails to pay an installment in full when it becomes due, the entire unpaid balance of contributions, interest and penalty will become due. No written permission for the payment of contributions shall preclude collection action pursuant to Section 51-1-36 NMSA 1978 against such employer.

[11.3.400.406 NMAC - Rp, 11.3.400.406 NMAC, 11/30/2016]

**11.3.400.407 FIRST PAYMENT OF CONTRIBUTIONS FOR NEW EMPLOYERS AND EMPLOYERS ELECTING COVERAGE:**

**A.** The first contribution payment of any employing unit which becomes an employer within any calendar quarter of any calendar year shall become due and payable on or before the last day of the month immediately following the quarter for which such contributions have accrued, and shall include contributions which have accrued during the whole of such calendar year.

**B.** Notwithstanding the provisions of Subsection A of 11.3.400.407 NMAC, the first contribution payment of any employing unit which elects to become an employer shall, upon the written or electronic approval of the department, become due and payable on or before the last day of the month immediately following the close of the calendar quarter in which the department's approval is given. Such first payment shall include contributions with respect to all wages for services covered by such election paid on or after the effective date and up to and including the last day of such calendar quarter. Interest and penalties shall be assessed from and after the due date.

[11.3.400.407 NMAC - Rp, 11.3.400.407 NMAC, 11/30/2016]

**11.3.400.408 PAYMENT OF CONTRIBUTIONS FOR UNCOMPLETED CALENDAR QUARTERS:**

Contributions shall be payable for any expired part of an uncompleted calendar quarter with respect to wages for employment in such period in any case where an employer, by reason of the removal from the state, discontinuance, sale, or other transfer of the employer's business has ceased to employ individuals in employment. Such contributions shall become due and payable not later than 30 days after the removal, discontinuance, sale or other transfer of the employer's business; provided that where an application for transfer of the employer's account is filed within said 30-day period, it must be accompanied by all quarterly reports and payments as required by 11.3.400.415 NMAC and 11.3.400.416 NMAC. Interest shall be assessed from and after said due date. Penalties shall be assessed in accordance with law.

[11.3.400.408 NMAC - Rp, 11.3.400.408 NMAC, 11/30/2016]

**11.3.400.409 REPORT TO DETERMINE LIABILITY:**

**A. REGISTRATION:** Each employing unit or employing enterprise engaged in doing business in the state of New Mexico, whether by succession to a business already being operated, by starting a new business, by change in partnership, or otherwise, shall register the business on line. Registration for the business may be filed when the employer has hired its first employee, and:

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

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

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

**B. REPORT OF CHANGE IN STATUS:**

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

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

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

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

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

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

**11.3.400.410 EXTENSION OF DUE DATE FOR FILING QUARTERLY REPORTS OR PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:** Upon written application to the department establishing to the department's satisfaction that good cause exists therefore, an extension not to exceed 30 days may be granted with respect to the date when the employer's quarterly wage and contribution report or payment of contributions or payments in lieu of contributions shall become due and be paid. Such application must be filed prior to the regular due date.

[11.3.400.410 NMAC - Rp, 11.3.400.410 NMAC, 11/30/2016]

**11.3.400.411 INTEREST ON UNPAID CONTRIBUTIONS OR PAYMENTS IN LIEU OF**

**CONTRIBUTIONS:** Contributions or payments in lieu of contributions unpaid on the date on which they are due and payable shall bear interest at the rate of one percent per month from and after such date until payment is made.

[11.3.400.411 NMAC - Rp, 11.3.400.411 NMAC, 11/30/2016]

**11.3.400.412 IMPOSITION OF PENALTIES FOR LATE REPORTS AND LATE PAYMENT OF CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS:** Penalties shall be imposed and payable in accordance with Subsection C of 11.3.400.404 NMAC for failure to file any quarterly wage and contribution report or failure to pay contributions or payment in lieu of contributions when due.

[11.3.400.412 NMAC - Rp, 11.3.400.412 NMAC, 11/30/2016]

**11.3.400.413 PROCEDURE FOR RELIEF FROM PENALTIES:**

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

**B.** The department shall review the employer's request and make a recommendation to the secretary to grant or deny relief from penalties to taxpayers.

[11.3.400.413 NMAC - Rp, 11.3.400.413 NMAC, 11/30/2016; A, 10/29/2019]

**11.3.400.414 GROUNDS FOR RELIEF FROM PENALTIES:** For the purposes of a determination or decision as to relief from the assessment or payment of any penalty for late reporting or late payment of contribution may not be imposed if, in the opinion of the secretary, an employer's late reporting, late payment of contribution, or both, was occasioned by circumstances beyond the control of the employer, who in good faith exercised reasonable diligence in an effort to comply with the reporting and contribution payment provisions of the Unemployment Compensation Law.

[11.3.400.414 NMAC - Rp, 11.3.400.414 NMAC, 11/30/2016]

**11.3.400.415 CONTRIBUTION RATING OF EMPLOYERS:** Contribution rates for employers are calculated in accordance with Section 51-1-11 NMSA 1978.

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

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

If an employer's reserve is:	The employer's experience history factor is:
6.0% and over	0.4000
5.0% - 5.9%	0.5000
4.0% - 4.9%	0.6000

3.0% - 3.9%	0.7000
2.0% - 2.9%	0.8000
1.0% - 1.9%	0.9000
0.0% - 0.9%	0.9500
Under 0.0%	1.0000

**C. CONTRIBUTING EMPLOYERS FOR LESS THAN 24 MONTHS.** For each calendar year, if, as of the computation date of that year, an employer has been a contributing employer for less than 24 months, the contribution rate for that employer shall be the average of the contribution rates for all contributing employers in the employer's industry based on its North American industry classification system (NAICS) sector, but shall not be less than one percent or more than five and four-tenths percent; provided that an individual, type of organization or employing unit that acquires all or part of a employing enterprise that has a rate of contribution less than the average of the contribution rates for all contributing employers in the employer's industry, shall be entitled to the transfer of the contribution rate of the other employing unit to the extent permitted pursuant to Subsection D of 11.3.400.417 NMAC.

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

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

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

**G. CORRECTION OF ERRORS.** The secretary shall correct any error in the determination of an employer's rate of contribution during the calendar year to which the erroneous rate applies, notwithstanding that notification of the employer's rate of contribution may have been issued and contributions paid pursuant to the notification. Upon issuance by the division of a corrected rate of contribution, the employer shall have the same rights to review and redetermination as provided in Subsection E of 11.3.400.415 NMAC.  
[11.3.400.415 NMAC - Rp, 11.3.400.415 NMAC, 11/30/2016; A, 10/29/2019]

**11.3.400.416 BUSINESS TRANSFERS DEFINED; EFFECTIVE DATE:** It is deemed that two or more employing units are parties to or the subject of a business transfer transaction whenever one such unit acquires an employing enterprise from another such unit, either by merger, consolidation or other form of reorganization; by a contractual or other form of voluntary sale or transfer; or by a transfer by order of court. There is a transfer and an acquisition in this sense, not only where there is an outright sale between separate individuals or concerns, but also where individuals form partnerships or corporations; partnerships form into corporations; new partnerships are formed by the addition or withdrawal of members; a corporation officer or partner acquires the enterprise from the corporation or the partnership; or in any manner that a change is made in the identity or organization of the employing unit. The effective date of such an acquisition and transfer is the date the department determines that the change in ownership or possession and operation is actually consummated as evidenced by a bill of sale, deed to real estate and buildings, a transfer by any other form of written transfer agreement or legally valid instrument, transfer by court order, or by physical or constructive possession.  
[11.3.400.416 NMAC - Rp, 11.3.400.416 NMAC, 11/30/2016]

**11.3.400.417 PURCHASE OR SALE, EXPERIENCE HISTORY TRANSFERS:**

**A. TOTAL EXPERIENCE HISTORY TRANSFERS:**

**(1) ACQUISITION OF ALL EMPLOYING ENTERPRISES:** A total experience history transfer is available to a successor enterprise only in the situation where the successor has acquired all of the predecessor's business enterprise and, where the predecessor, immediately after the business transfer as defined in 11.3.400.416 NMAC, ceases operating the same enterprise except for liquidation purposes.

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

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

**(2) NOTIFICATION BY SUCCESSOR:** A successor who has acquired all of the predecessor's employing enterprises shall notify the department of such acquisition by completing an electronic notification for a total experience history transfer through the employer's on-line account 60 days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise or enterprises. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a total history transfer shall be given as prescribed by the electronic notification through the employer's on-line account or as requested by the department. Upon completion of the notification, the department shall furnish a statement of account to the predecessor and the successor, if the predecessor is delinquent in either submitting wage and contribution reports or the payment of contributions.

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

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

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

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

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

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

**B. PARTIAL EXPERIENCE HISTORY TRANSFERS:**

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

(2) The successor shall notify the department of such acquisition by completing an electronic notification for a partial experience history transfer through the employer's on-line account 60 days on or before the due date of the successor's first quarterly wage and contribution report after the effective date of the acquisition of the employing enterprise. The notification shall be endorsed by the predecessor. The notification shall provide a schedule of the name and social security number of and the wages paid to and the contributions paid for all employees for the three and one-half year period preceding the computation date through the date of transfer or such lesser period as the enterprises transferred may have been in operation. The notification shall be supported by the predecessor's permanent employment records, which shall be available for audit by the department. The notification shall be reviewed by the department and, upon approval the percentage of the predecessor's experience history attributable to the enterprises transferred shall be transferred to the successor. The percentage shall be obtained by dividing the taxable payrolls of the transferred enterprises for such three and one-half year period preceding the date of computation or such lesser period as the enterprises transferred may have been in operation, by the predecessor's entire payroll. Upon a showing of good cause as defined in 11.3.400.7 NMAC, the department may extend the due date for the filing of the endorsed notification and quarterly wage and contribution reports for an additional 30 days provided that the request for an extension of time is filed in writing on or before the regular due date. Information with respect to the predecessor and successor employing enterprises necessary to a department determination to approve or disapprove a partial history transfer shall be given as prescribed by the notification or as requested by the department.

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

**C. COMMON OWNERSHIP EXPERIENCE HISTORY TRANSFER:**

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

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

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

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

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

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

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

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

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

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

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

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

**11.3.400.418 TIME FOR CORRECTION OF ERRONEOUS RATE DETERMINATIONS:**

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

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

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

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

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

[11.3.400.418 NMAC - Rp, 11.3.400.418 NMAC, 11/30/2016; A, 10/29/2019]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**H. LIMITATION ON APPEALS:** Notwithstanding the provisions of Subsection F of 11.3.400.419 NMAC, the employer shall not have standing, in any appeal to contest the chargeability to the employer of any

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

**11.3.400.420 EMPLOYER ELECTIONS TO COVER MULTI-STATE WORKERS:**

**A.** This rule shall govern the department in its administrative cooperation with other states subscribing to the interstate reciprocal coverage arrangement, hereinafter referred to as “the arrangement”.

**B.** Submission and approval of coverage elections under the arrangement.

(1) Any employing unit may file an election, on a form provided by the division, to cover under the law of a single participating jurisdiction all of the services performed for the employer by any individual who customarily works for the employer in more than one participating jurisdiction.

(2) Such an election may be filed, with respect to an individual, with any participating jurisdiction in which:

(a) any part of the individual's services is performed;

(b) the individual resides; or

(c) the employing unit maintains a place of business to which the individual's services bear a reasonable relation.

(3) The agency of the elected jurisdiction shall initially approve or disapprove the election.

(4) If such agency approves the election, it shall forward a copy thereof to the agency of each other participating jurisdiction specified thereon, under whose unemployment compensation law the individual or individuals in question might, in the absence of such election, be covered. Each such interested agency shall approve or disapprove the election, as promptly as practicable; and shall notify the agency of the elected jurisdiction accordingly.

(5) In case its law so requires, any such interested agency may, before taking such action, require from the electing employing unit satisfactory evidence that the affected employees have been notified of, and have acquiesced in, the election.

(6) If the agency of the elected jurisdiction, or the agency of any interested jurisdiction, disapproves the election, the disapproving agency shall notify the elected jurisdiction and the electing employing unit of its action and of its reason therefore.

(7) Such an election shall take effect as to the elected jurisdiction only if approved by its agency and by one or more interested agencies.

(8) An election thus approved shall take effect, as to any interested agency, only if it is approved by such agency.

(9) In case any such election is approved only in part, or is disapproved by some of such agencies, the electing employing unit may withdraw its election within 10 days after being notified of such action.

**C.** Effective period of elections.

(1) Commencement.

(a) An election duly approved under this rule shall become effective at the beginning of the calendar quarter in which the election was submitted, unless the election, as approved, specified the beginning of a different calendar quarter.

(b) If the electing unit requests an earlier effective date than the beginning of the calendar quarter in which the election is submitted, such earlier date may be approved solely as to those interested jurisdictions in which the employer had no liability to pay contributions for the earlier period in question.

(2) Termination.

(a) The application of an election to any individual under this rule shall terminate, if the agency of the elected jurisdiction finds that the nature of the services customarily performed by the individual for the electing unit has changed, so that they are no longer customarily performed in more than one participating jurisdiction. Such termination shall be effective as of the close of the calendar quarter in which notice of such finding is sent to all parties affected.

(b) Except as provided in Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, each approved election shall remain in effect through the close of the calendar year in which it is submitted, and thereafter until the close of the calendar quarter in which the electing unit gives written notice of its termination to all affected agencies.

(c) Whenever an election hereunder ceases to apply to any individual, under Subparagraph (a) of Paragraph (2) of Subsection D of 11.3.400.420 NMAC, the electing unit shall notify the affected individual accordingly.

**D.** Reports and notices by the electing unit.

(1) The electing unit shall promptly notify each individual affected by its approved election, on a form approved by the elected jurisdiction, and shall furnish the elected agency a copy of such notice.

(2) Whenever an individual covered by an election hereunder is separated from the individual's employment, the electing unit shall again notify the individual, forthwith, as to the jurisdiction under whose unemployment compensation law the individual's services have been covered. If at the time of termination the individual is not located in the elected jurisdiction, the electing unit shall notify the individual as to the procedure for filing interstate benefit claims.

(3) The electing unit shall immediately report to the elected jurisdiction any change which occurs in the conditions of employment pertinent to its election, such as cases where an individual's services for the employer cease to be customarily performed in more than one participating jurisdiction or where a change in the work assigned to an individual requires the individual to perform services in a new participating jurisdiction.

**E.** Approval of reciprocal coverage elections. The authority to approve or disapprove reciprocal coverage elections in accordance with this rule shall be exercised by the secretary or the secretary's designee. [11.3.400.420 NMAC - Rp, 11.3.400.420 NMAC, 11/30/2016]

### **11.3.400.421 EMPLOYERS ELECTING COST BASIS FINANCING AND GROUP ACCOUNTS:**

**A.** CHARGING OF BENEFITS: Any benefits or any portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer who has elected to become liable for payments in lieu of contributions, shall be reimbursed by the employer in accordance with Subsection B of Section 51-1-13 NMSA 1978, and any benefits or portion thereof, paid on the basis of wage credits earned within the claimant's base period with any employer while the employer was subject to contributions pursuant to Subsection A of Section 51-1-18 NMSA 1978, shall be charged to the experience rating account of the employer as provided in Section 51-1-11 NMSA 1978.

**B.** DUE DATES OF WAGE AND CONTRIBUTION REPORTS AND PAYMENTS IN LIEU OF CONTRIBUTIONS: Each employer who has elected to become liable for payments in lieu of contributions shall submit a wage and contribution report electronically to the department each calendar quarter with respect to wages paid in such quarter. Said wage and contribution report shall be submitted on or before the end of the month following the close of the calendar quarter to which the wage and contribution report applies. The wages so reported shall not be used for computation of rates as provided for employers subject to contributions.

**C.** SUBMISSION OF WAGE AND CONTRIBUTION REPORTS FOR GROUP ACCOUNTS: The quarterly wage and contribution report required of each group member of a group account shall be transmitted electronically by the group representative. The payments in lieu of contributions required of each group member shall be transmitted by the group representative, together with all amounts owing by all the group members, within 30 days after transmission by the department of a statement showing the payments in lieu of contributions owing. Each report and any payments required of each employer or group member not transmitted within the time specified will be delinquent and penalties and interest as provided by the Unemployment Compensation Law shall be assessed from and after the delinquent date.

**D.** EXTENSION OF TIME TO SUBMIT REPORTS: Upon written application, transmitted prior to the due date, by an employer, group member, or group account representative establishing to the satisfaction of the department that good cause exists, excluding any dilatory act, negligence or lack of funds on the part of the employer, an extension, not to exceed 30 days, may be granted by the department with respect to the due date of the wage and contribution report or payment.

**E.** TERMINATION OF RIGHT TO MAKE PAYMENTS IN LIEU OF CONTRIBUTIONS: If, after due notice, any employer who has elected to become liable for payments in lieu of contributions remains delinquent for payments or interest or penalty, the department shall transmit a determination to said employer of pending termination of the organization's election to make payments in lieu of contributions for the next calendar year. If payment is not forthcoming within 30 days from the date of said notice, the department shall transmit a final determination to such employer that election has been terminated for the next calendar year.

**F.** REQUIREMENTS FOR SURETY BOND: At the discretion of the department, termination of an organization's election to make payments in lieu of contributions shall continue effective for any succeeding calendar year unless the employer provides a surety bond or other surety acceptable to the department and underwritten by a corporate surety authorized to transact business in New Mexico; or an agreement of cash collateral

assignment, executed with a state or national bank or federally insured savings association authorized to do business in New Mexico, as trustee, in a form prescribed by the department. Interest, if any, accumulating on the cash collateral assignment shall accrue to the employer. Said surety or cash bond shall be in the amount of not more than two and seven tenths percent of the taxable wages paid for employment subject to the Unemployment Compensation Law by the employer in the four quarter period immediately preceding the date of notice of termination was issued and shall be released by the department only when no further delinquency for payment in lieu of contributions of the employer exists.

**G. ESTABLISHING ACCOUNTS, PROVIDING FOR ADDITIONS AND WITHDRAWALS OF GROUP MEMBERS:** The department, upon receipt of properly completed form prescribed by the department bearing the endorsement of each group member, accompanied by any forms enumerated therein or otherwise requested in writing, shall establish a group account and notify the group representative of the effective date as provided in Subsection E of Section 51-1-13 NMSA 1978. The group account shall remain in effect for a period of not less than two calendar years, ending on December 31, and thereafter, until terminated at the discretion of the department, or by approval by the department, of an application from the group received on or before December 1, immediately preceding the calendar year in which termination is desired. Upon establishment and after termination of the group account, each group member, group account and group account representative shall be fully liable for:

(1) any payment in lieu of contributions, penalties or interest required under Subsection E of Section 51-1-13 NMSA 1978, for the period during which any benefits or portion thereof are payable on the basis of wage credits earned during the period the claimant's base period employer was a group member; and

(2) the performance of the group representative.

**H. ADDITIONS OF GROUP MEMBERS:** Any nonprofit organization liable for payments in lieu of contributions which becomes subject to the Unemployment Compensation Law on or after January 1, 1972, may, with the approval of the department, be added to an existing group account if the department receives an application not later than 30 days prior to the beginning of the calendar year for which the application is to be effective.

**I. ACQUISITION OF GROUP MEMBERS:** Any nonprofit organization liable for payments in lieu of contributions which acquired the organization, trade or business, or substantially all the assets thereof, of a group member who because of the transaction no longer employs workers in employment will be a group member of the group account to which the predecessor belonged provided the department receives an application as called for in Subsection H of 11.3.400.421 NMAC not later than 30 days after the date of the transaction.

**J. WITHDRAWAL OF GROUP MEMBERS:** A member may withdraw or be removed from a group account only at the end of a calendar year provided written application for withdrawal or removal is received by the department not later than 30 days prior to the first day of the following calendar year. Such withdrawal or removal of a member from a group account shall not be effective until approved by the department. No group member may withdraw or be removed from a group account unless it has been a member of such group account for at least two calendar years as of the effective date of the withdrawal or removal; except that a member may withdraw or be removed from a group at any time if the group member:

(1) has permanently ceased to employ workers in employment; or

(2) has ceased to be an employer exempt under Section 3306 (c) (8) of the federal Unemployment Tax Act; or

(3) has, in accordance with Paragraph (2) of Subsection A of Section 51-1-13 NMSA 1978, terminated its election to be liable for payments in lieu of contributions; or

(4) has for a period of two successive quarters been delinquent in its payment of assessments under the group plan for benefits chargeable to its account.

[11.3.400.421 NMAC - Rp, 11.3.400.421 NMAC, 11/30/2016]

### **11.3.400.422 INDIAN TRIBES:**

#### **A. ELECTION OF TREATMENT:**

(1) An Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe ("electing entity") shall make its election to be a contributing employer or reimbursable employer on or before December 1, for previously registered Indian tribes, and 30 days after subjectivity is determined for newly subject Indian tribes, except for the year 2001, Indian tribes may make the election any time between July 1, 2001, and December 1, 2001. If the electing entity fails to make an affirmative election in writing in the manner provided in 11.3.400.422 NMAC, the electing entity shall be deemed to have elected status as a contributing employer.

(2) If the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe is currently registered with the department and desires to change its manner of treatment, the

electing entity may change its election on or before the due date of the wage and contribution report for the fourth quarter of 2001, which report is due January 31, 2002. Such change in election shall be in writing in the manner provided in 11.3.400.422 NMAC

**B. MASTER CONTRIBUTORY ACCOUNTS:**

(1) Effective July 1, 2001, master contributory accounts for the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe previously established with the department are discontinued. If the Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe elects to be a reimbursable employer, it may apply for group account treatment as provided in 11.3.400.421 NMAC.

(2) Upon the termination of a master account, all members of the master account will be assigned the then existing tax rate for the master account. Each member of the former master account will enjoy the former master account's tax rate for the remainder of the calendar year 2001. Thereafter, each former member of the former master account will be assigned an individual tax rate based on its individual experience history commencing July 1, 2001.

**C. ASSIGNMENT OF ACCOUNT NUMBERS:**

(1) Upon registration with the department, an Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe not previously registered will be assigned an employer account number.

(2) An Indian tribe, tribal unit or a subdivision, subsidiary or business enterprise wholly owned by a tribe previously registered as part of a master account may be assigned a new account number.  
[11.3.400.422 NMAC - Rp, 11.3.400.422 NMAC, 11/30/2016]

**11.3.400.423 PARTNERSHIPS:** A separate employer account number and experience rating shall be assigned to each partnership of a group of two or more partnerships composed of identical partners with identical interests, if all of the following conditions are met:

- A.** each separate partnership joins in a request that individual reporting is appropriate;
- B.** a separate written partnership agreement exists for each partnership;
- C.** the accounting records for each partnership are separately maintained; and
- D.** there is no commingling of the employment of the two or more partnerships.

[11.3.400.423 NMAC - Rp, 11.3.400.423 NMAC, 11/30/2016]

**11.3.400.424 CHARGING OF BENEFITS PAID DUE TO FEDERAL DISASTER:** Each contributing employer's account shall not be subject to potential pro rata benefit charges during the period wherein a claimant's eligibility for unemployment benefits is directly attributable to unavailability of work due to a federally certified disaster which results in the suspension or termination of operations by such employer. Any nonprofit organization or governmental unit electing to make payments in lieu of contributions shall not be relieved of charges for benefits paid to an individual whose eligibility for unemployment benefits is directly attributable to unavailability of work due to a federally certified disaster.

[11.3.400.424 NMAC - Rp, 11.3.400.424 NMAC, 11/30/2016]

**11.3.400.425 NOTICE OF TAX DETERMINATIONS FINAL AND APPEALS:**

**A.** Finality of decision: The department shall give written notice to any employer, employing unit or claimant of every determination made by the department which could alter or affect the employer's or employing unit's tax liability or the claimant's monetary eligibility under the law. Such determination shall be deemed to be the final decision of the department, unless an appeal is initiated pursuant to Subsection B of 11.3.500.8 NMAC.

**B.** Stay pending appeal: Legal action, including the issuance of 10 day notices and warrants of lien and levy, shall not be taken on accounts that have an appeal pending within the department.

[11.3.400.425 NMAC - Rp, 11.3.400.425 NMAC, 11/30/2016]

**11.3.400.426 APPLICATION OF UNDERPAYMENTS:** In the event an employing unit fails to submit payment in an amount sufficient to satisfy the total amount of outstanding debt for any current or past-due contributions, interest or penalty, the amount of the underpayment shall be applied in the following order: first, to any contributions and excess claims premiums due, second, to any interest due and third, to any penalties due, from the oldest debt to the newest.

[11.3.400.426 NMAC - Rp, 11.3.400.426 NMAC, 11/30/2016; A, 10/29/2019]

**11.3.400.427 ADEQUATE RESERVE DETERMINATION:** The department shall ensure that the fund sustains an adequate reserve.

**A.** An adequate reserve shall be determined to mean that the funds in the fund available for benefits equal the total amount of funds needed to pay between 18 and 24 months of benefits at the average of the five highest years of benefits paid in the last 25 years.

**B.** For the purpose of sustaining an adequate reserve, the department shall determine a reserve factor to be used when calculating an employer's contribution rate based upon a formula that will set the reserve factor in proportion to the difference between the amount of funds available for benefits in the fund, as of the computation date, and the adequate reserve, within the following guidelines:

- (1) 1.0000 if, as of the computation date, there is an adequate reserve;
- (2) between 0.5000 and 0.9999 if, as of the computation date, there is greater than an adequate reserve; and
- (3) between 1.0001 and 4.0000 if, as of the computation date, there is less than an adequate reserve.

**C.** The New Mexico adequate reserve multiple (NMARM) is a measure of fund adequacy used in determining the reserve factor. The NMARM is equal to the reserve ratio divided by the average benefit cost rate. The reserve ratio is the trust fund balance, as of June 30, divided by calendar year total wages. The average benefit cost rate is the average of the state's five highest benefit cost rates, during the preceding 25 years. The benefit cost rate is calendar year benefit payments divided by the sum of total wages for the same period.

**D.** The formula for setting the reserve factor shall be determined as follows:

- (1) If  $NMARM \leq 0.5$  then reserve factor = 4.
- (2) If  $0.5 < NMARM < 1.5$  then reserve factor =  $11/2 - 3 \times NMAR$
- (3) If  $1.5 \leq NMARM \leq 2$  then reserve factor = 1.
- (4) If  $2 < NMARM < 3.150$  then reserve factor =  $43/23 - 10/23 \times NMARM$ .
- (5) If  $NMARM \geq 3.150$  then reserve factor = 0.5.

[11.3.400.427 NMAC - Rp, 11.3.400.427 NMAC, 11/30/2016]

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

[11.3.400.428 NMAC - N, 10/29/2019]

#### **HISTORY OF 11.3.400 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 10/1/1974; Regulation 401, Records of Employing Units, amended and filed 5/4/1990; Regulation 402, Identification of Employees, amended and filed 5/25/1990; Regulation 403, Posting of Notices, amended and filed 5/25/1990; Regulation 404, Tax Reports by Employing Units, amended and filed 5/25/1990, Regulation 405, Quarterly Payment of Contributions, amended and filed 5/25/1990; Regulation 406, Due Date for Payment of Contributions Notice of Delinquency; Interest and Penalties, amended and filed 5/25/1990; Regulation 407, First Payment of Contributions for New Employers and Employers Electing Coverage, amended and filed 6/14/1990; Regulation 408, Payment of Contributions for Uncompleted Calendar Quarters amended and filed 6/14/1990; Regulation 409, Report to Determine Liability, amended and filed 6/14/1990; Regulation 409A, Report of Change in Status, amended and filed 6/14/1990; Regulation 410, Extension of Due Date for Filing Quarterly Reports or Payment of Contributions or Payments in Lieu of Contributions, amended and filed 6/14/1990; Regulation 411, Interest on Unpaid Contributions or Payments in Lieu of Contributions, amended and filed 6/14/1990; Regulation 412, Imposition of Penalties for Late Reports and Late Payment of Contributions or Payments in lieu of Contributions, amended and filed 8/17/1990; Regulation 413, Procedure for Relief from Penalties, amended and filed 8/17/1990; Regulation 414, Grounds for Relief from Penalties, amended and filed 8/17/1990; Regulation 415, Experience Rating of Employers, amended and filed 9/20/1994; Regulation 416, Business Transfers Defined; Effective Date, amended and filed 8/17/1990; Regulation 417, Experience History Transfers, amended and filed 8/17/1990; Regulation 418, Time for Correction of Erroneous Rate Determinations, amended and filed 10/9/1990; Regulation 420, Employer Elections to Cover Multi-State Workers, amended and

filed 10/9/1990; Regulation 423, Partnerships, filed 10/9/1990; Charging of Benefits Paid Due to Federal Disaster, filed 2/14/2001.

**History of Repealed Material:**

11.3.400 NMAC - Tax Administration, filed 7/15/1998, repealed effective 11/30/2016.