TITLE 11 LABOR AND WORKERS COMPENSATION
CHAPTER 1 LABOR GENERAL PROVISIONS
PART 4 WAGE AND HOUR AND EMPLOYMENT OF CHILDREN

11.1.4.1 ISSUING AGENCY: Labor Relations Division, New Mexico Department of Workforce Solutions (NMDWS).
[8/15/98; 11.1.4.1 NMAC - Rn & A, 11 NMAC 1.4.1, 06/30/08]

11.1.4.2 SCOPE: Employers and employees of New Mexico.
[8/15/98; 11.1.4.2 NMAC - Rn, 11 NMAC 1.4.2, 06/30/08]

11.1.4.3 STATUTORY AUTHORITY: Section 50-1-3 NMSA directs the director of the labor relations division, NMDWS to foster, promote and develop the welfare of wage earners, advance opportunities for profitable employment; require, acquire and disseminate useful information on all subject (s) connected with labor. Article 6, Section 50-6-1-16 NMSA sets guidelines for the welfare of children.
[8/15/98; 11.1.4.3 NMAC - Rn & A 11 NMAC 1.4.3, 06/30/08]

11.1.4.4 DURATION: Permanent.
[8/15/98; 11.1.4.4 NMAC - Rn, 11 NMAC 1.4.4, 06/30/08]

11.1.4.5 EFFECTIVE DATE: August 15, 1998
[8/15/98; 11.1.4.5 NMAC - Rn, 11 NMAC 1.4.5, 06/30/08]

11.1.4.6 OBJECTIVE: The objective of Part 4 of Chapter 1 is to establish standards and procedures for the administration of Chapter 50 NMSA.
[8/15/98; 11.1.4.6 NMAC - Rn, 11 NMAC 1.4.6, 06/30/08]

11.1.4.7 DEFINITIONS:

A. "Employ" includes 'suffer' or permit to work.

B. "Employee" is a person whose work is controlled by employer as to how and when to perform the task.

C. "Exempt" means an employee who is exempt from minimum wage or overtime provisions. In order for an employee to be exempt under the executive category, the worker must meet all of the following requirements:

(1) primary duty - perform non manual work related to management of business;
(2) exercise discretion;
(3) regularly assist executive, or perform specialized work, special assignments;
(4) perform less than 20 percent nonexempt work.

D. Hazardous occupation is defined as any occupation determined to be hazardous by the United States Fair Labor Standards Act.

E. "Independent contractor" is a person who works free from the control of the employer as defined by the internal revenue service.

F. "Overtime" means hours worked after 40 hours in a seven-day work week. Overtime will be computed at time and a half of the employee's regular rate of pay.

G. Pay periods are the days between pay days.

H. Pay days are designated days on which employees will be paid. Pay days cannot be more than sixteen (16) days apart, except for professional, administrative or executive employees or employees employed in the capacity of outside salesman, as those terms are defined under the Federal Fair Labor Standards Act. (FLSA).

I. "Travel time" means time spent by an employee in travel as part of his principal activity, such as travel from job site to job site, which must be counted as hours worked.

J. "Wage claim" is a document signed by an employee, giving the labor and industrial division authority to investigate a complaint of unpaid wages.

K. "Work permit" is a permit to allow a child under the age of 16 to be able to work under certain conditions and issued by a designated school official or an agent of the labor and industrial division.

L. "Wages" means all amounts at which the labor or service rendered is paid, whether the amount is fixed or on a time, task, piece, commission basis.

M. "Written authorization," means a document an employee signs at the time of hiring, giving the employer permission to deduct certain items from his pay. A written authorization is not needed for an employer to deduct an advance or over-payment of wages; however the employer must pay at least minimum wage times the hours worked to the employee.

N. "Entertainment industry" means an employer including but not limited to any organization, or individual using the services of any minor in: motion pictures of any type, using any format including theatrical film, commercial, documentary, and television program, or similar format by any medium including but not limited to photography; recording; modeling; theatrical productions; publicity; and any performances where minors perform or entertain.

O. "Legal guardian" means a person appointed as a guardian by a court or Indian tribal authority.

P. "Certified teacher" means any person with a valid and current New Mexico teaching certificate issued by the New Mexico public education department or its equivalent in the United States.

Q. "Place of employment", "work location", "movie set", "set", and "location" means the actual work site where any person provides services in New Mexico as a performer, paid or non-paid.

R. "Minor" means any person under the age of 18 years who is required to attend school under the provisions of the public education department, and includes minors under the age of six.

S. "Safety" means the condition of being protected from any situation that is detrimental to the child's health and well being.

T. "Child performer" means a minor person employed to act or otherwise participate in the performing arts, including but not limited to motion pictures, theatrical, radio or television products.

[8/15/98; 11.1.4.7 NMAC - Rn & A, 11 NMAC 1.4.7, 06/30/08]

11.1.4.8 WAGE CLAIMS:

A. Determination of employees who may file a wage claim because of inability to afford legal counsel will be based on the employee's earnings. An employee earning less than one and one-half times the state's average weekly wages, as determined by the economic research bureau of the New Mexico department of labor shall be considered financially unable to employ counsel.

B. Wage claim forms must be completed in duplicate, signed and notarized.

C. The labor and industrial division (LID) will notify the affected employer of any wage claim filed against him and allow at least ten (10) days for him to file a written response. If the employer disputes the claim, his written response will be given to the employee who will be allowed ten (10) days in which to rebut the claim in writing.

D. The labor law administrator (LLA)(s) may schedule an administrative hearing when, in their judgment, it would facilitate resolution of the complaint. The conduct of the hearing is not governed by the Administrative Procedures Act, but rather by procedures established by the LID. (50-1-2)

E. The LLA(s) may issue a subpoena duces tecum to compel the production of records they believe are necessary for the resolution of the complaint.

F. The LLA(s) may issue written findings whenever they have sufficient evidence upon which to base their determination.

G. The LLA(s) may accept a notarized acknowledgment of indebtedness from the employer if they believe it is the best way to resolve the complaint.

H. The LLA(s) may file complaints in any magistrate or metropolitan court in the state in order to resolve wage disputes or correct violations arising under Chapter 50 of the New Mexico state statutes.

I. The LLA(s) will obtain a written assignment form signed by the employee and notarized before initiating any legal action in any court of any jurisdiction after a thorough investigation and determination that the claim is valid.

J. The LLA(s) may file a proof of claim on behalf of employee(s) in any U.S. bankruptcy court when an employee files a wage claim, when in the LLA's judgment it is appropriate for the resolution of the claim.

[8/15/98; 11.1.4.8 NMAC - Rn, 11 NMAC 1.4.8, 06/30/08]

11.1.4.9 EMPLOYMENT OF CHILDREN:

A. A work permit is required at all times when employing children under the age of sixteen.

B. Work permits shall be issued only by the school superintendents, school principals, designated

issuing school officers or the director of the labor and industrial division or the director's designee, upon proof of age of the student and that the work the child is engaged is not dangerous to the child or prohibited as outlined in the Fair Labor Standards Act, (FLSA).

C. It is the responsibility of the employer to preserve on file the work permit in a place about the premises where the child is employed. All work permits and records are subject to inspection by representatives of the labor and industrial division.

D. The maximum number of hours allowed for children under the age of sixteen is eighteen hours a week during the school week and forty hours a week in a non-school week.

E. Children under the age of sixteen will be restricted from working between the hours of 7 p.m. and 7 a.m., except from June 1st through Labor Day, when they will be allowed to work until 9 p.m.

F. Hazardous occupation means any occupation defined as hazardous by the United States department of labor under 29USC 201 et seq. of the Fair Labor Standards Act.

G. The student labor specialist will investigate any alleged violation of the Child Labor Act. The investigation may include investigating the premises of the employer, issuing a subpoena duces tecum, or holding an administrative hearing, to resolve the complaint.

H. No work permits shall be in force without renewal for a longer period than one year from the date of issuance. In the event the permit is to be extended, the issuing officer will write the following words, This certificate is extended for a period of ... days from this date, and sign his or her name thereto.

[8/15/98; 11.1.4.9 NMAC - Rn, 11 NMAC 1.4.9, 06/30/08]

11.1.4.10 EMPLOYMENT OF CHILDREN IN THE ENTERTAINMENT INDUSTRY:

A. Any person who employs a person under the age of 18 as an actor or performer in the entertainment industry must obtain a pre-authorization certificate issued by the department of workforce solutions prior to the start of work. The pre-authorization certificate will include: the project name, estimated dates and length of the project, employer name, employer New Mexico address, a minimum of three contact personnel including name, address, and contact telephone numbers. The pre-authorization certificate will include: the child performer's information: name, address, date of birth, where the child is registered to attend to school, grade level of the child, special educational needs, anticipated length of employment on this project, nature of work on this project, and list any possible exposure to potentially hazardous materials or substances. A signature will be required from the child performer when the child is 14 years of age and older. A signature will be required from the parent or legal guardian giving the child permission to be employed in the entertainment industry. A signature will be required from the employer certifying compliance with all requirements of the pre-authorization certificate.

B. It is the responsibility of the employer to obtain a child performer pre-authorization certificate before the employment begins. The employer must be able to provide a copy at the work site when requested to do so. The department of workforce solutions will retain a copy.

C. The child performer pre-authorization certificate is valid for one year from the date it was issued or until the specific project for which the child is employed by the employer who makes the application for the pre-authorization ceases, whichever time period is shorter.

D. The parent or legal guardian of the child performer can contact the department of workforce solutions to renew the permit 30 days prior to expiration.

E. A pre-authorization certificate for a child performer can only be issued by the department of workforce solutions.

F. No pre-authorization certificate will be given or issued without a signature of a parent or legal guardian indicating their permission for their child to work on the specific project. A parent or legal guardian must be within eyesight and earshot of the child performer at all times other than the time periods in which teachers are teaching school.

G. The employer must provide a certification of compliance for the certified teacher with appropriate teaching credentials for grade levels kindergarten through 12 or to teach the level of education required for the child performer at the place of employment to the department of workforce solutions prior to issuance of the pre-authorization certificate.

H. It is the responsibility of the employer to provide a New Mexico certified trainer or technician accredited in a United States department of labor occupational safety and health administered-certified safety program at the place of employment at all times when a child performer may be exposed to potentially hazardous conditions. Hazardous conditions are special effects, which potentially could be physically dangerous to the child performer.

I. The employer must provide a written background check on all certified teachers, and certified trainers and technicians on the movie set to the department of workforce solutions. It is the responsibility of the employer, parent, legal guardian, teacher, trainer and technician to report any arrest or conviction record and any other information that may present a possible danger to the health, safety and well being of the child performer.
[11.1.4.10 NMAC - N, 06/30/08]

11.1.4.11 CERTIFICATE AND DUTIES OF CERTIFIED TEACHERS:

A. A certified teacher of New Mexico resident children, who attend public schools, must posses a valid and current teaching certificate issued by the New Mexico public education department. Certified teachers of non-resident students must possess a valid and current teaching certificate from one of the United States to teach grade levels kindergarten through 12 or teach the level of education required for the child performer at the place of employment.

B. All certified teachers, shall, in addition to teaching, and in conjunction with the parent or legal guardian, also have the responsibility of monitoring and protecting the health, safety and well being of the child performers they have been hired to teach during the time the teacher is required to be present.

C. The certified teacher, parent, or legal guardian may refuse to allow the engagement of the child performer at the place of employment. Any party may report conditions threatening the health, safety, and well being of the child performer to the department of workforce solutions. It is the ultimate responsibility of the parent or legal guardian to assure that the safety; health and well being of the child are being protected. A teacher must be present during the time reserved for school, except that the child performers under 16 do not require the presence of a teacher for up to one hour for wardrobe, make-up, hairdressing, promotional publicity, personal appearances, or audio recording if these activities are not the actual site of filming or at the theatre or if school is not in session, and if the parent or legal guardian is present within earshot or eyesight of the child performer.
[11.1.4.11 NMAC - N, 06/30/08]

11.1.4.12 LIMITATIONS OF CHILD PERFORMERS WORKING HOURS INCLUDING SCHOOL TIME:

A. All child performers' ages six to 18 years must be provided with a teacher for each group of 10 or fewer child performers when school is in session.

B. No child performers shall begin work before 5:00 a.m. or continue work after 10:00 p.m., on evenings preceding school days. Child performers shall not work later than 12:00a.m. on days preceding non-school days. The time the child performer can be permitted at the place of employment may be extended by one-half hour for a meal period.

C. No infants 15 days old to six months of age may be employed as a child performer unless a United States licensed physician who is board-certified in pediatrics provides a written certification that the infant is at least 15 days old and, is physically capable of handling the stress of filmmaking. With the physician's approval the infant performer may be at the place of employment a maximum of two hours, with no more than 20 minutes of work time. Work time for infants shall be limited to one period of two consecutive hours in any one day.

D. Child performers ages seven months to two years may be at the place of employment for up to four hours and may work up to two hours. The remaining time must be reserved for the child performers rest and recreation.

E. Child performers ages three years to five years may be at the place of employment for up to six hours and may work up to three hours. The remaining time must be reserved for the child performer's rest and recreation.

F. When school is in session, child performers ages six years to eight years may be at the place of employment for up to eight hours, the sum of four hours work, three hours schooling, and one hour of rest and recreation. When school is not in session, work time may be increased up to six hours, with the remaining time reserved for the child performer's rest and recreation.

G. When school is in session, child performer ages nine to 15 years may be at the place of employment for up to nine hours, the sum of five hours work, three hours schooling, and one hour rest and recreation. When school is not in session, work time may be increased up to seven hours, with the remaining time reserved for the child performer's rest and recreation.

H. When school is in session, child performers age 16 to 18 years may be at the place of employment for up to 10 hours, the sum of six hours work, three hours schooling and one hour of rest and recreation. When school is not in session, work time may be up to eight hours, with the remaining time reserved for the child

performer's rest and recreation.

I. In exceptional circumstances due to unusual performance requirements, a waiver of the mandatory hours and start to finish times may be granted by the department of workforce solutions. Such waiver must be granted prior to the performances of the work that is the subject of the waiver. The department of workforce solutions will grant a waiver only under the following circumstances:

(1) written notification through a listing of specific dates and times that the child performers will be employed or present at the place of employment;

(2) written acknowledgement that the child performer's parent or legal guardian have been fully informed of the circumstances and have granted advance consent.

J. The child performer must be provided with a 12-hour rest break at the end of the workday.

K. All time spent in traveling from a studio to a location or from a location to a studio shall count as part of the working day for a minor. When a minor with a company on a location which is sufficiently distant to require an overnight stay and is required to travel daily between living quarters and the place where the company is actually working, the time spent by the minor in such traveling will not count as work time, provided the company does not spend more than 45 minutes traveling each way and furnishes the necessary transportation.

[11.1.4.12 NMAC - N, 06/30/08]

11.1.4.13 REQUIREMENT OF TRUST ACCOUNT FOR ALL CHILD PERFORMERS:

A. Each time a child performer is employed in the state of New Mexico with a contract equal or greater than one thousand dollars ($1000), a trust account will be created for the child performer.

B. It is the responsibility of the parent or legal guardian, or trustee to set up a trust account for the child performer in the child's state of residence for the sole benefit of the child within seven business days after the child performer's employment contract is signed. The child will not have access to the trust account until the child is 18 years of age or becomes legally emancipated.

C. The parent, guardian, or trustee shall provide the employer with a trustee statement within 15 days after the start of employment. Once the employer receives the trustee statement, the employer will provide the parent, guardian, or trustee with a written acknowledgement of receipt.

D. If the employer does not receive the trustee statement within 90 days after the start of employment, the child's employer shall refer the matter to district court. The district court shall have continuing jurisdiction over the trust.

E. The employer shall deposit not less than 15 percent of the child's gross earnings directly into the child trust account with in 15 business days of the work performance. If the account is not established, the employer shall withhold 15 percent of the gross income until a trust account is established or until court orders otherwise. Once the employer deposits 15 percent of the gross earnings in the trust account, the employer shall have no further obligation to monitor the funds.

F. Once the funds are deposited in the trust account, only the trustee shall be obligated to monitor and account for the funds.

[11.1.4.13 NMAC - N, 06/30/08]

11.1.4.14 SAFETY REQUIREMENTS FOR CHILD PERFORMERS:

A. No dressing room is to be occupied simultaneously by a minor and an adult performer or by minors of the opposite sex.

B. It is the responsibility of the employer to provide a safe, secure shelter for child performers under the age of 18 to rest when required to be at the place of employment during non-performances times.

C. No employer may cause, induce, entice, or permit a child performer to engage or to be used sexually exploitive material for the purpose of producing a performance. No child performer may be depicted in any media as appearing to participate in a sex act.

[11.1.4.14 NMAC - N, 06/30/08]

11.1.4.15 PENALTIES AND DETERMINATION PROCESS:

A. The director of the labor relations division may for cause refuse to issue a pre-authorization certificate to any project that has violated the provision of this act within a two-year period.

B. The director of labor relations division will notify the employer within 10 days from the dates requested of a non-issuance of a pre-authorization certificate.

C. Any affected party may request a reconsideration of the director's actions, in writing, within 10

days.

D. The director of labor relations division may schedule an administrative hearing when, in their judgment, it would facilitate resolution of the complaint. The conduct of the hearing is not governed by the Administrative Procedures Act, but rather by procedures established by the labor and industrial bureau. (50-1-2)

E. The director of the labor relations division may issue a subpoena duces tecum to compel the production of records they believe are necessary for the resolution of the complaint.

F. The director of the labor relations division may issue written findings whenever they have sufficient evidence upon which to base their determination.

G. Other penalties for violations may be assessed pursuant to Section 50-6-12 NMSA 1978 Compilation.

[11.1.4.15 NMAC - N, 06/30/08]

HISTORY OF 11.1.4 NMAC: [RESERVED]