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HOUSE BILL 62

45TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2001

INTRODUCED BY

Max Coll

AN ACT

**RELATING TO EMPLOYMENT; ENACTING THE EMPLOYEE PROTECTION ACT;
PROHIBITING EMPLOYER RETALIATORY ACTION AGAINST EMPLOYEES IN
CERTAIN CIRCUMSTANCES; PROVIDING FOR GRIEVANCE PROCEDURES AND
PENALTIES.**

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

**Section 1. SHORT TITLE.--This act may be cited as the
"Employee Protection Act".**

**Section 2. PURPOSE.--It is the purpose of the Employee
Protection Act to encourage employees to notify the
appropriate persons of illegal acts of public concern. This
reporting is encouraged in order to protect the public and
employees and to assist public bodies charged with ensuring
adequate safety and health standards.**

Section 3. DEFINITIONS.--As used in the Employee

1 Protection Act:

2 A. "blacklisting" means informing others that a
3 person acted in a manner that is protected by the Employee
4 Protection Act and intending to hinder that person's ability
5 to obtain employment; "blacklisting" also consists of an
6 employer or his agent preventing or attempting to prevent a
7 former employee from obtaining other employment;

8 B. "commission" means the human rights commission;

9 C. "director" means the director of the division;

10 D. "division" means the human rights division of
11 the labor department;

12 E. "employee" means a person who performs services
13 for and under the control and direction of an employer for
14 wages or other remuneration;

15 F. "employer" means a person who has four or more
16 employees and includes an agent of an employer and a public
17 employer;

18 G. "improper act" means a practice, procedure,
19 action or failure to act on the part of an employer that
20 violates a state law, federal regulation or state
21 administrative rule;

22 H. "public body" means a state government
23 department, agency or political subdivision;

24 I. "retaliatory action" means the discharge,
25 suspension, demotion, disciplining or any discriminatory or

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1 adverse employment action against an employee in the terms and
2 conditions of employment; and

3 J. "secretary" means the secretary of labor.

4 Section 4. EMPLOYER RETALIATORY ACTION PROHIBITED. -- An
5 employer shall not take any retaliatory action against an
6 employee because the employee does any of the following:

7 A. discloses, or threatens to disclose, to an
8 employer or to a private or public body an activity, policy or
9 practice of the employer that constitutes an improper act of
10 public concern;

11 B. provides information to, or testifies before, a
12 public body as part of an investigation, hearing or inquiry
13 into an improper act; or

14 C. objects to or refuses to participate in an
15 activity, policy or practice that constitutes an improper act.

16 Section 5. EMPLOYER BLACKLISTING PROHIBITED. -- An
17 employer shall not blacklist a current or former employee.

18 Section 6. GRIEVANCE PROCEDURE. --

19 A. An employee claiming to be subject to a
20 retaliatory action prohibited by the Employee Protection Act
21 may file with the division a written complaint that shall
22 state the name and address of the person alleged to have
23 engaged in the retaliatory action, all information relating to
24 the retaliatory action and any other information that may be
25 required by the commission. All complaints shall be filed

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1 with the division within sixty days after the alleged
2 retaliatory action was committed.

3 B. The director shall advise the respondent that a
4 complaint has been filed against him and shall furnish him
5 with a copy of the complaint. The director shall promptly
6 investigate the alleged retaliatory action. If the director
7 determines that the complaint lacks probable cause, he shall
8 dismiss the complaint and notify the complainant and
9 respondent of the dismissal. The complaint shall be dismissed
10 subject to appeal as in the case of other orders of the
11 commission.

12 C. If the director determines that probable cause
13 exists for the complaint, he shall attempt to achieve a
14 satisfactory adjustment of the complaint through persuasion
15 and conciliation. The director and staff shall neither
16 disclose what has transpired during the attempted conciliation
17 nor divulge information obtained during any hearing before the
18 commission or a commissioner prior to final action relating to
19 the complaint. An officer or employee of the labor department
20 who makes public in any manner whatever any information in
21 violation of this subsection is guilty of a misdemeanor and
22 upon conviction shall be fined not more than one thousand
23 dollars (\$1,000) or imprisoned not more than one year.

24 D. A person who has filed a complaint with the
25 division may request and shall receive an order of

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1 nondetermination from the director one hundred eighty days
2 after the division's receipt of the complaint. The order of
3 nondetermination may be appealed pursuant to the provisions of
4 Section 39-3-1.1 NMSA 1978.

5 E. If conciliation fails or if, in the opinion of
6 the director, informal conference cannot result in
7 conciliation and the complainant has not requested a waiver of
8 right to hearing pursuant to the provisions of Subsection I of
9 this section, the commission shall issue a written complaint
10 in its own name against the respondent. The complaint shall
11 set forth the alleged retaliatory action, the secretary's rule
12 or the section of the Employee Protection Act alleged to have
13 been violated and the relief requested. The complaint shall
14 require the respondent to answer the allegations of the
15 complaint at a hearing before the commission or hearing
16 officer and shall specify the date, time and place of the
17 hearing. The hearing date shall not be more than fifteen or
18 less than ten days after service of the complaint. The
19 hearing shall be held in the county where the respondent is
20 doing business or the alleged retaliatory action occurred.

21 F. Within one year of the filing of a complaint by
22 a person aggrieved, the commission or its director shall:

23 (1) dismiss the complaint for lack of
24 probable cause;

25 (2) achieve satisfactory adjustment of the

1 complaint as evidenced by order of the commission; or

2 (3) file a formal complaint on behalf of the
3 commission.

4 G. Upon the commission's petition, the district
5 court of the county where the respondent is doing business or
6 the alleged retaliatory action occurred may grant injunctive
7 relief pending hearing by the commission or pending judicial
8 review of an order of the commission so as to preserve the
9 status quo or to ensure that the commission's order as issued
10 will be effective. The commission shall not be required to
11 post a bond.

12 H. For purposes of this section, "urgent medical
13 condition" means any medical condition as defined by an
14 appropriate medical authority through documentation or by
15 direct witness of a clearly visible disablement and that poses
16 a serious threat to the life of the person with the medical
17 condition.

18 I. The complainant may seek a trial de novo in the
19 district court in lieu of a hearing before the commission;
20 provided that the complainant requests from the director, in
21 writing, a waiver of the complainant's right to hearing within
22 sixty days of service of written notice of a probable cause
23 determination by the director. The director shall approve the
24 waiver request and shall serve notice of the waiver upon the
25 complainant and respondent. The complainant may request a

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1 trial de novo pursuant to Section 39-3-1 NMSA 1978 within
2 thirty days from the date of service of the waiver. Issuance
3 of the notice shall be deemed a final order of the commission
4 for the purpose of appeal pursuant to Section 39-3-1.1 NMSA
5 1978.

6 Section 7. HEARING PROCEDURES. --

7 A. The respondent to a complaint made pursuant to
8 Section 6 of the Employee Protection Act may file a written
9 answer to the complaint, appear at the hearing, give testimony
10 and be represented by counsel and may obtain from the
11 commission subpoenas for any person or for the production of
12 any evidence pertinent to the proceeding. The complainant
13 shall be present at the hearing and may be represented by
14 counsel. Each party shall have the right to amend his
15 complaint or answer.

16 B. A panel of three members of the commission
17 designated by the chairman shall sit, and a decision agreed
18 upon by two members of the panel shall be the decision of the
19 commission. However, no commissioner who has filed a
20 complaint may sit on the panel hearing his complaint.
21 Hearings also may be conducted by a hearing officer employed
22 by the division or, if the hearing officer is unavailable, one
23 member of the commission may be designated by the chairman to
24 act as a hearing officer. A hearing officer shall have the
25 same powers and duties as the commission as set forth in

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1 Paragraph (2) of Subsection A of Section 28-1-4 NMSA 1978.

2 C. The complainant or his representative shall
3 present to the commission or the hearing officer the case
4 supporting the complaint. No evidence concerning prior
5 attempts at conciliation shall be received. The director
6 shall not participate in the hearing, except as a witness.

7 D. The commission and the hearing officer shall
8 not be bound by the formal rules of evidence governing courts
9 of law or equity but shall permit reasonable direct
10 examination and cross-examination and the submission of
11 briefs. Testimony at the hearing shall be taken under oath
12 and recorded by tape or otherwise. Upon the request of any
13 party, testimony shall be transcribed; provided that all costs
14 of transcribing shall be paid by the party so requesting.
15 Each commissioner and hearing officer may administer oaths.

16 E. Upon the conclusion of a hearing conducted by a
17 hearing officer, the hearing officer shall prepare a written
18 report setting forth proposed findings of fact and conclusions
19 of law and recommending the action to be taken by the
20 commission. The hearing officer shall submit the report to a
21 review panel consisting of no more than three members of the
22 commission designated by the chairman. No commissioner may
23 sit on the panel reviewing the hearing officer's report issued
24 in connection with a complaint filed by the commissioner. A
25 decision by a majority of the members of the review panel

1 shall be the decision of the commission. If the commission
2 finds from the evidence presented at any hearing held pursuant
3 to this section that the respondent has engaged in a
4 retaliatory action, it shall make written findings of fact,
5 conclusions of law and its decision based upon the findings of
6 fact and conclusions of law. The commission may adopt, modify
7 or reject the proposed findings of fact and conclusions of law
8 and the action recommended by the hearing officer. Within
9 five days after any order is rendered by the commission
10 following a hearing, the commission shall serve upon each
11 party of record and his attorney, if any, a written copy of
12 the order by certified mail to the party's address of record.
13 All parties shall be deemed to have been notified on the tenth
14 day following the mailing. As part of its order, the
15 commission may require the respondent to pay actual damages to
16 the complainant and to pay reasonable attorney fees, if the
17 complainant was represented by private counsel, and to take
18 such affirmative action as the commission considers necessary,
19 including a requirement for reports of the manner of
20 compliance.

21 F. If the commission finds from the evidence that
22 the respondent has not engaged in a retaliatory action, it
23 shall make written findings of fact and serve the complainant
24 and respondent with a copy of the findings of fact and with an
25 order dismissing the complaint.

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1 Section 8. **ENFORCEMENT.** -- If a respondent to a complaint
2 filed pursuant to the Employee Protection Act is not complying
3 with an order of the commission, the attorney general or
4 district attorney, at the request of the secretary, shall
5 secure enforcement of the commission's order by a district
6 court. The proceeding shall be initiated by the filing of a
7 petition in the district court where the respondent is doing
8 business or the alleged retaliatory action occurred. A copy
9 of the petition shall be served on the respondent personally
10 or by certified mail, return receipt requested. The court may
11 make and enter upon the proceedings an order to decree
12 enforcement of the order of the commission.

13 Section 9. **APPEAL.** -- A party may appeal the final
14 decision of the commission pursuant to the provisions of
15 Section 39-3-1.1 NMSA 1978.

16 Section 10. **POSTING OF LAW AND INFORMATION.** -- Every
17 employer subject to the Employee Protection Act shall keep
18 posted in a conspicuous place on his premises notices prepared
19 by the division that set forth excerpts of that act and other
20 relevant information as determined by the secretary.