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HOUSE BILL 169

45TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2002

INTRODUCED BY

Terry T. Marquardt

AN ACT

RELATING TO UNEMPLOYMENT COMPENSATION; PERMITTING EMPLOYERS OF CERTAIN AGRICULTURAL WORKERS NOT TO PAY UNEMPLOYMENT INSURANCE IN CERTAIN CIRCUMSTANCES TO MAINTAIN CONFORMITY WITH FEDERAL LAW.

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

Section 1. Section 51-1-42 NMSA 1978 (being Laws 1936 (S.S.), Chapter 1, Section 19, as amended) is amended to read:

"51-1-42. DEFINITIONS. --As used in the Unemployment Compensation Law:

A. "base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year;

B. "benefits" means the cash unemployment compensation payments payable to an eligible individual

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1 pursuant to Section 51-1-4 NMSA 1978 with respect to his weeks  
2 of unemployment;

3 C. "contributions" means the money payments  
4 required by Section 51-1-9 NMSA 1978 to be made into the fund  
5 by an employer on account of having individuals performing  
6 services for him;

7 D. "employing unit" means any individual or type  
8 of organization, including any partnership, association,  
9 cooperative, trust, estate, joint-stock company, agricultural  
10 enterprise, insurance company or corporation, whether domestic  
11 or foreign, or the receiver, trustee in bankruptcy, trustee or  
12 successor thereof, household, fraternity or club, the legal  
13 representative of a deceased person or any state or local  
14 government entity to the extent required by law to be covered  
15 as an employer, which has in its employ one or more  
16 individuals performing services for it within this state. All  
17 individuals performing services for any employing unit that  
18 maintains two or more separate establishments within this  
19 state shall be deemed to be employed by a single employing  
20 unit for all the purposes of the Unemployment Compensation  
21 Law. Individuals performing services for contractors,  
22 subcontractors or agents that are performing work or services  
23 for an employing unit, as described in this subsection, which  
24 is within the scope of the employing unit's usual trade,  
25 occupation, profession or business, shall be deemed to be in

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1 the employ of the employing unit for all purposes of the  
2 Unemployment Compensation Law unless such contractor,  
3 subcontractor or agent is itself an employer within the  
4 provisions of Subsection E of this section;

5 E. "employer" includes:

6 (1) any employing unit [~~which~~] that:

7 (a) unless otherwise provided in this  
8 section, paid for service in employment as defined in  
9 Subsection F of this section wages of four hundred fifty  
10 dollars (\$450) or more in any calendar quarter in either the  
11 current or preceding calendar year or had in employment, as  
12 defined in Subsection F of this section, for some portion of a  
13 day in each of twenty different calendar weeks during either  
14 the current or the preceding calendar year, and irrespective  
15 of whether the same individual was in employment in each such  
16 day, at least one individual;

17 (b) for the purposes of Subparagraph

18 (a) of this paragraph, if any week includes both December 31  
19 and January 1, the days of that week up to January 1 shall be  
20 deemed one calendar week and the days beginning January 1,  
21 another such week; and

22 (c) for purposes of defining an

23 "employer" under Subparagraph (a) of this paragraph, the wages  
24 or remuneration paid to individuals performing services in  
25 employment in agricultural labor or domestic services as

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1 provided in Paragraphs (6) and (7) of Subsection F of this  
2 section shall not be taken into account; except that any  
3 employing unit determined to be an employer of agricultural  
4 labor under Paragraph (6) of Subsection F of this section  
5 shall be an employer under Subparagraph (a) of this paragraph  
6 so long as the employing unit is paying wages or remuneration  
7 for services other than agricultural services;

8 (2) any individual or type of organization  
9 that acquired the trade or business or substantially all of  
10 the assets thereof, of an employing unit that at the time of  
11 the acquisition was an employer subject to the Unemployment  
12 Compensation Law; provided that where such an acquisition  
13 takes place, the secretary may postpone activating the  
14 separate account pursuant to Subsection A of Section 51-1-11  
15 NMSA 1978 until such time as the successor employer has  
16 employment as defined in Subsection F of this section;

17 (3) any employing unit that acquired all or  
18 part of the organization, trade, business or assets of another  
19 employing unit and that, if treated as a single unit with such  
20 other employing unit or part thereof, would be an employer  
21 under Paragraph (1) of this subsection;

22 (4) any employing unit not an employer by  
23 reason of any other paragraph of this subsection:

24 (a) for which, within either the  
25 current or preceding calendar year, service is or was

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1 performed with respect to which such employing unit is liable  
2 for any federal tax against which credit may be taken for  
3 contributions required to be paid into a state unemployment  
4 fund; or

5 (b) [~~which~~] that, as a condition for  
6 approval of the Unemployment Compensation Law for full tax  
7 credit against the tax imposed by the Federal Unemployment Tax  
8 Act, is required, pursuant to such act, to be an "employer"  
9 under the Unemployment Compensation Law;

10 (5) any employing unit that, having become an  
11 employer under Paragraph (1), (2), (3) or (4) of this  
12 subsection, has not, under Section 51-1-18 NMSA 1978, ceased  
13 to be an employer subject to the Unemployment Compensation  
14 Law;

15 (6) for the effective period of its election  
16 pursuant to Section 51-1-18 NMSA 1978, any other employing  
17 unit that has elected to become fully subject to the  
18 Unemployment Compensation Law;

19 (7) any employing unit for which any services  
20 performed in its employ are deemed to be performed in this  
21 state pursuant to an election under an arrangement entered  
22 into in accordance with Subsection A of Section  
23 51-1-50 NMSA 1978; and

24 (8) an Indian tribe as defined in 26 USCA  
25 Section 3306(u) for which service in employment is performed;

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F. "employment":

(1) means any service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied;

(2) means an individual's entire service, performed within or both within and without this state if:

(a) the service is primarily localized in this state with services performed outside the state being only incidental thereto; or

(b) the service is not localized in any state but some of the service is performed in this state and:

1) the base of operations or, if there is no base of operations, the place from which such service is directed or controlled, is in this state; or 2) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed but the individual's residence is in this state;

(3) means services performed within this state but not covered under Paragraph (2) of this subsection if contributions or payments in lieu of contributions are not required and paid with respect to such services under an unemployment compensation law of any other state, the federal government or Canada;

(4) means services covered by an election pursuant to Section 51-1-18 NMSA 1978 and services covered by

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1 an election duly approved by the secretary in accordance with  
2 an arrangement pursuant to Paragraph (1) of Subsection A of  
3 Section 51-1-50 NMSA 1978 shall be deemed to be employment  
4 during the effective period of such election;

5 (5) means services performed by an individual  
6 for an employer for wages or other remuneration unless and  
7 until it is established by a preponderance of evidence that:

8 (a) such individual has been and will  
9 continue to be free from control or direction over the  
10 performance of such services both under his contract of  
11 service and in fact;

12 (b) such service is either outside the  
13 usual course of business for which such service is performed  
14 or that such service is performed outside of all the places of  
15 business of the enterprise for which such service is  
16 performed; and

17 (c) such individual is customarily  
18 engaged in an independently established trade, occupation,  
19 profession or business of the same nature as that involved in  
20 the contract of service;

21 (6) means service performed after December  
22 31, 1977 by an individual in agricultural labor as defined in  
23 Subsection Q of this section if:

24 (a) such service is performed for an  
25 employing unit that: 1) paid remuneration in cash of twenty

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1 thousand dollars (\$20,000) or more to individuals in such  
2 employment during any calendar quarter in either the current  
3 or the preceding calendar year; or 2) employed in agricultural  
4 labor ten or more individuals for some portion of a day in  
5 each of twenty different calendar weeks in either the current  
6 or preceding calendar year, whether or not such weeks were  
7 consecutive, and regardless of whether such individuals were  
8 employed at the same time;

9 (b) such service is not performed  
10 before January 1, 1980 by an individual who is an alien  
11 admitted to the United States to perform service in  
12 agricultural labor pursuant to Sections 214(c) and 101(15)(H)  
13 of the federal Immigration and Nationality Act; and

14 (c) for purposes of this paragraph, any  
15 individual who is a member of a crew furnished by a crew  
16 leader to perform service in agricultural labor for a farm  
17 operator or other person shall be treated as an employee of  
18 such crew leader: 1) if such crew leader meets the  
19 requirements of a crew leader as defined in Subsection L of  
20 this section; or 2) substantially all the members of such crew  
21 operate or maintain mechanized agricultural equipment that is  
22 provided by the crew leader; and 3) the individuals performing  
23 such services are not, by written agreement or in fact, within  
24 the meaning of Paragraph (5) of this subsection, performing  
25 services in employment for the farm operator or other person;

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1 (7) means service performed after December  
2 31, 1977 by an individual in domestic service in a private  
3 home, local college club or local chapter of a college  
4 fraternity or sorority for a person or organization that paid  
5 cash remuneration of one thousand dollars (\$1,000) in any  
6 calendar quarter in the current or preceding calendar year to  
7 individuals performing such services;

8 (8) means service performed after December  
9 31, 1971 by an individual in the employ of a religious,  
10 charitable, educational or other organization but only if the  
11 following conditions are met:

12 (a) the service is excluded from  
13 "employment" as defined in the Federal Unemployment Tax Act  
14 solely by reason of Section 3306(c)(8) of that act; and

15 (b) the organization meets the  
16 requirements of "employer" as provided in Subparagraph (a) of  
17 Paragraph (1) of Subsection E of this section;

18 (9) means service of an individual who is a  
19 citizen of the United States, performed outside the United  
20 States, except in Canada, after December 31, 1971 in the  
21 employ of an American employer, other than service that is  
22 deemed "employment" under the provisions of Paragraph (2) of  
23 this subsection or the parallel provisions of another state's  
24 law, if:

25 (a) the employer's principal place of

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1 business in the United States is located in this state;

2 (b) the employer has no place of  
3 business in the United States, but: 1) the employer is an  
4 individual who is a resident of this state; 2) the employer is  
5 a corporation organized under the laws of this state; or 3)  
6 the employer is a partnership or a trust and the number of the  
7 partners or trustees who are residents of this state is  
8 greater than the number who are residents of any one other  
9 state; or

10 (c) none of the criteria of  
11 Subparagraphs (a) and (b) of this paragraph are met, but the  
12 employer has elected coverage in this state or, the employer  
13 having failed to elect coverage in any state, the individual  
14 has filed a claim for benefits, based on such service, under  
15 the law of this state.

16 "American employer" for purposes of this paragraph means  
17 a person who is: 1) an individual who is a resident of the  
18 United States; 2) a partnership if two-thirds or more of the  
19 partners are residents of the United States; 3) a trust if all  
20 of the trustees are residents of the United States; or 4) a  
21 corporation organized under the laws of the United States or  
22 of any state. For the purposes of this paragraph, "United  
23 States" includes the United States, the District of Columbia,  
24 the commonwealth of Puerto Rico and the Virgin Islands;

25 (10) means, notwithstanding any other

1 provisions of this subsection, service with respect to which a  
2 tax is required to be paid under any federal law imposing a  
3 tax against which credit may be taken for contributions  
4 required to be paid into a state unemployment fund or which as  
5 a condition for full tax credit against the tax imposed by the  
6 Federal Unemployment Tax Act is required to be covered under  
7 the Unemployment Compensation Law; ~~and~~

8 (11) means service performed in the employ of  
9 an Indian tribe if:

10 (a) the service is excluded from  
11 "employment" as defined in 26 USCA Section 3306(c) solely by  
12 reason of 26 USCA Section 3306(c) (7); and

13 (b) the service is not otherwise  
14 excluded from employment pursuant to the Unemployment  
15 Compensation Law;

16 (12) does not include:

17 (a) service performed in the employ of:  
18 1) a church or convention or association of churches; or 2) an  
19 organization that is operated primarily for religious purposes  
20 and that is operated, supervised, controlled or principally  
21 supported by a church or convention or association of  
22 churches;

23 (b) service performed by a duly  
24 ordained, commissioned or licensed minister of a church in the  
25 exercise of his ministry or by a member of a religious order

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1 in the exercise of duties required by such order;

2 (c) service performed by an individual  
3 in the employ of his son, daughter or spouse, and service  
4 performed by a child under the age of majority in the employ  
5 of his father or mother;

6 (d) service performed in the employ of  
7 the United States government or an instrumentality of the  
8 United States immune under the constitution of the United  
9 States from the contributions imposed by the Unemployment  
10 Compensation Law except that to the extent that the congress  
11 of the United States shall permit states to require any  
12 instrumentalities of the United States to make payments into  
13 an unemployment fund under a state unemployment compensation  
14 act, all of the provisions of the Unemployment Compensation  
15 Law shall be applicable to such instrumentalities, and to  
16 service performed for such instrumentalities in the same  
17 manner, to the same extent and on the same terms as to all  
18 other employers, employing units, individuals and services;  
19 provided, that if this state shall not be certified for any  
20 year by the secretary of labor of the United States under  
21 Section 3304 of the federal Internal Revenue Code of 1986, 26  
22 U. S. C. Section 3304, the payments required of such  
23 instrumentalities with respect to such year shall be refunded  
24 by the department from the fund in the same manner and within  
25 the same period as is provided in Subsection D of Section

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1 51-1-36 NMSA 1978 with respect to contributions erroneously  
2 collected;

3 (e) service performed in a facility  
4 conducted for the purpose of carrying out a program of  
5 rehabilitation for individuals whose earning capacity is  
6 impaired by age or physical or mental deficiency or injury or  
7 providing remunerative work for individuals who because of  
8 their impaired physical or mental capacity cannot be readily  
9 absorbed in the competitive labor market, by an individual  
10 receiving such rehabilitation or remunerative work;

11 (f) service with respect to which  
12 unemployment compensation is payable under an unemployment  
13 compensation system established by an act of congress;

14 (g) service performed in the employ of  
15 a foreign government, including service as a consular or other  
16 officer or employee or a nondiplomatic representative;

17 (h) service performed by an individual  
18 for a person as an insurance agent or as an insurance  
19 solicitor, if all such service performed by such individual  
20 for such person is performed for remuneration solely by way of  
21 commission;

22 (i) service performed by an individual  
23 under the age of eighteen in the delivery or distribution of  
24 newspapers or shopping news, not including delivery or  
25 distribution to any point for subsequent delivery or

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1 distribution;

2 (j) service covered by an election duly  
3 approved by the agency charged with the administration of any  
4 other state or federal unemployment compensation law, in  
5 accordance with an arrangement pursuant to Paragraph (1) of  
6 Subsection A of Section 51-1-50 NMSA 1978 during the effective  
7 period of such election;

8 (k) service performed, as part of an  
9 unemployment work-relief or work-training program assisted or  
10 financed in whole or part by any federal agency or an agency  
11 of a state or political subdivision thereof, by an individual  
12 receiving such work relief or work training;

13 (l) service performed by an individual  
14 who is enrolled at a nonprofit or public educational  
15 institution that normally maintains a regular faculty and  
16 curriculum and normally has a regularly organized body of  
17 students in attendance at the place where its educational  
18 activities are carried on as a student in a full-time program,  
19 taken for credit at the institution that combines academic  
20 instruction with work experience, if the service is an  
21 integral part of such program and the institution has so  
22 certified to the employer, except that this subparagraph shall  
23 not apply to service performed in a program established for or  
24 on behalf of an employer or group of employers;

25 (m) service performed in the employ of

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1 a hospital, if the service is performed by a patient of the  
2 hospital, or services performed by an inmate of a custodial or  
3 penal institution for any employer;

4 (n) service performed by real estate  
5 salesmen for others when the services are performed for  
6 remuneration solely by way of commission;

7 (o) service performed in the employ of  
8 a school, college or university if such service is performed  
9 by a student who is enrolled and is regularly attending  
10 classes at such school, college or university;

11 (p) service performed by an individual  
12 for a fixed or contract fee officiating at a sporting event  
13 that is conducted by or under the auspices of a nonprofit or  
14 governmental entity if that person is not otherwise an  
15 employee of the entity conducting the sporting event;

16 (q) service performed for a private,  
17 for-profit person or entity by an individual as a product  
18 demonstrator or product merchandiser if the service is  
19 performed pursuant to a written contract between that  
20 individual and a person or entity whose principal business is  
21 obtaining the services of product demonstrators and product  
22 merchandisers for third parties, for demonstration and  
23 merchandising purposes and the individual: 1) is compensated  
24 for each job or the compensation is based on factors related  
25 to the work performed; 2) provides the equipment used to

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1 perform the service, unless special equipment is required and  
2 provided by the manufacturer through an agency; 3) is  
3 responsible for completion of a specific job and for any  
4 failure to complete the job; 4) pays all expenses, and the  
5 opportunity for profit or loss rests solely with the  
6 individual; and 5) is responsible for operating costs, fuel,  
7 repairs and motor vehicle insurance. For the purpose of this  
8 subparagraph, "product demonstrator" means an individual who,  
9 on a temporary, part-time basis, demonstrates or gives away  
10 samples of a food or other product as part of an advertising  
11 or sales promotion for the product and who is not otherwise  
12 employed directly by the manufacturer, distributor or  
13 retailer, and "product merchandiser" means an individual who,  
14 on a temporary, part-time basis builds or resets a product  
15 display and who is not otherwise directly employed by the  
16 manufacturer, distributor or retailer; ~~[or]~~

17 (r) service performed for a private,  
18 for-profit person or entity by an individual as a landman if  
19 substantially all remuneration paid in cash or otherwise for  
20 the performance of the services is directly related to the  
21 completion by the individual of the specific tasks contracted  
22 for rather than to the number of hours worked by the  
23 individual. For the purposes of this subparagraph, "landman"  
24 means a land professional who has been engaged primarily in:  
25 1) negotiating for the acquisition or divestiture of mineral



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1 rights; 2) negotiating business agreements that provide for  
2 the exploration for or development of minerals; 3) determining  
3 ownership of minerals through the research of public and  
4 private records; and 4) reviewing the status of title, curing  
5 title defects and otherwise reducing title risk associated  
6 with ownership of minerals; managing rights or obligations  
7 derived from ownership of interests and minerals; or utilizing  
8 or pooling of interest in minerals; [~~and~~] or

9 (s) service performed after January 1,  
10 1995 by an individual who is an alien admitted to the United  
11 States to perform services in agricultural labor pursuant to  
12 Section 1101 (a)(15)(H)(ii)(A) of the federal Immigration and  
13 Nationality Act; and

14 (13) for the purposes of this subsection, if  
15 the services performed during one-half or more of any pay  
16 period by an individual for the person employing him  
17 constitute employment, all the services of such individual for  
18 such period shall be deemed to be employment but, if the  
19 services performed during more than one-half of any such pay  
20 period by an individual for the person employing him do not  
21 constitute employment, then none of the services of such  
22 individual for such period shall be deemed to be employment.

23 As used in this paragraph, the term "pay period" means a  
24 period, of not more than thirty-one consecutive days, for  
25 which a payment of remuneration is ordinarily made to the

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1 individual by the person employing him. This paragraph shall  
2 not be applicable with respect to services performed in a pay  
3 period by an individual for the person employing him where any  
4 of such service is excepted by Subparagraph (f) of Paragraph  
5 (12) of this subsection;

6 G. "employment office" means a free public  
7 employment office, or branch thereof, operated by this state  
8 or maintained as a part of a state-controlled system of public  
9 employment offices;

10 H. "fund" means the unemployment compensation fund  
11 established by the Unemployment Compensation Law to which all  
12 contributions and payments in lieu of contributions required  
13 under the Unemployment Compensation Law and from which all  
14 benefits provided under the Unemployment Compensation Law  
15 shall be paid;

16 I. "unemployment" means, with respect to an  
17 individual, any week during which he performs no services and  
18 with respect to which no wages are payable to him and during  
19 which he is not engaged in self-employment or receives an  
20 award of back pay for loss of employment. The secretary shall  
21 prescribe by regulation what constitutes part-time and  
22 intermittent employment, partial employment and the conditions  
23 under which individuals engaged in such employment are  
24 eligible for partial unemployment benefits;

25 J. "state", when used in reference to any state

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1 other than New Mexico, includes, in addition to the states of  
2 the United States, the District of Columbia, the commonwealth  
3 of Puerto Rico and the Virgin Islands;

4 K. "unemployment compensation administration fund"  
5 means the fund established by Subsection A of Section 51-1-34  
6 NMSA 1978 from which administrative expenses under the  
7 Unemployment Compensation Law shall be paid. "Employment  
8 security department fund" means the fund established by  
9 Subsection B of Section 51-1-34 NMSA 1978 from which certain  
10 administrative expenses under the Unemployment Compensation  
11 Law shall be paid;

12 L. "crew leader" means a person who:

13 (1) holds a valid certificate of registration  
14 as a crew leader or farm labor contractor under the federal  
15 Migrant and Seasonal Agricultural Worker Protection Act;

16 (2) furnishes individuals to perform services  
17 in agricultural labor for any other person;

18 (3) pays, either on his own behalf or on  
19 behalf of such other person, the individuals so furnished by  
20 him for service in agricultural labor; and

21 (4) has not entered into a written agreement  
22 with the other person for whom he furnishes individuals in  
23 agricultural labor that such individuals will be the employees  
24 of the other person;

25 M "week" means such period of seven consecutive

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1 days, as the secretary may by regulation prescribe. The  
2 secretary may by regulation prescribe that a week shall be  
3 deemed to be "in", "within" or "during" the benefit year that  
4 includes the greater part of such week;

5 N. "calendar quarter" means the period of three  
6 consecutive calendar months ending on March 31, June 30,  
7 September 30 or December 31;

8 O. "insured work" means services performed for  
9 employers who are covered under the Unemployment Compensation  
10 Law;

11 P. "benefit year" with respect to any individual  
12 means the one-year period beginning with the first day of the  
13 first week of unemployment with respect to which the  
14 individual first files a claim for benefits in accordance with  
15 Subsection A of Section 51-1-8 NMSA 1978 and thereafter the  
16 one-year period beginning with the first day of the first week  
17 of unemployment with respect to which the individual next  
18 files such a claim for benefits after the termination of his  
19 last preceding benefit year; provided that at the time of  
20 filing such a claim the individual has been paid the wages  
21 required under Paragraph (5) of Subsection A of Section 51-1-5  
22 NMSA 1978;

23 Q. "agricultural labor" includes all services  
24 performed:

25 (1) on a farm, in the employ of any person,

1 in connection with cultivating the soil or in connection with  
2 raising or harvesting any agricultural or horticultural  
3 commodity, including the raising, shearing, feeding, caring  
4 for, training and management of livestock, bees, poultry and  
5 fur-bearing animals and wildlife;

6 (2) in the employ of the owner or tenant or  
7 other operator of a farm, in connection with the operation,  
8 management, conservation or maintenance of such farm and its  
9 tools and equipment, if the major part of such service is  
10 performed on a farm;

11 (3) in connection with the operation or  
12 maintenance of ditches, canals, reservoirs or waterways used  
13 exclusively for supplying and storing water for farming  
14 purposes when such ditches, canals, reservoirs or waterways  
15 are owned and operated by the farmers using the water stored  
16 or carried therein; and

17 (4) in handling, planting, drying, packing,  
18 packaging, processing, freezing, grading, storing or delivery  
19 to storage or to market or to a carrier for transportation to  
20 market any agricultural or horticultural commodity but only if  
21 such service is performed as an incident to ordinary farming  
22 operations. The provisions of this paragraph shall not be  
23 deemed to be applicable with respect to service performed in  
24 connection with commercial canning or commercial freezing or  
25 in connection with any agricultural or horticultural commodity

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1 after its delivery to a terminal market for distribution for  
2 consumption.

3 As used in this subsection, the term "farm" includes  
4 stock, dairy, poultry, fruit, fur-bearing animal and truck  
5 farms, plantations, ranches, nurseries, greenhouses, ranges  
6 and orchards;

7 R. "payments in lieu of contributions" means the  
8 money payments made into the fund by an employer pursuant to  
9 the provisions of Subsection A of Section 51-1-13 NMSA 1978 or  
10 Subsection E of Section 51-1-59 NMSA 1978;

11 S. "department" means the labor department; and

12 T. "wages" means all remuneration for services,  
13 including commissions and bonuses and the cash value of all  
14 remuneration in any medium other than cash. The reasonable  
15 cash value of remuneration in any medium other than cash shall  
16 be established and determined in accordance with regulations  
17 prescribed by the secretary; provided that the term "wages"  
18 shall not include:

19 (1) subsequent to December 31, 1977, that  
20 part of the remuneration in excess of the base wage as  
21 determined by the secretary for each calendar year. The base  
22 wage upon which contribution shall be paid during any calendar  
23 year shall be sixty percent of the state's average annual  
24 earnings computed by the division by dividing total wages  
25 reported to the division by contributing employers for the

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1 second preceding calendar year before the calendar year the  
2 computed base wage becomes effective by the average annual  
3 employment reported by contributing employers for the same  
4 period rounded to the next higher multiple of one hundred  
5 dollars (\$100); provided that the base wage so computed for  
6 any calendar year shall not be less than seven thousand  
7 dollars (\$7,000). Wages paid by an employer to an individual  
8 in his employ during any calendar year in excess of the base  
9 wage in effect for that calendar year shall be reported to the  
10 department but shall be exempt from the payment of  
11 contributions unless such wages paid in excess of the base  
12 wage become subject to tax under a federal law imposing a tax  
13 against which credit may be taken for contributions required  
14 to be paid into a state unemployment fund;

15 (2) the amount of any payment with respect to  
16 services performed after June 30, 1941 to or on behalf of an  
17 individual in its employ under a plan or system established by  
18 an employing unit that makes provision for individuals in its  
19 employ generally or for a class or classes of such  
20 individuals, including any amount paid by an employing unit  
21 for insurance or annuities, or into a fund, to provide for any  
22 such payment, on account of:

23 (a) retirement if such payments are  
24 made by an employer to or on behalf of any employee under a  
25 simplified employee pension plan that provides for payments by

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1 an employer in addition to the salary or other remuneration  
2 normally payable to such employee or class of such employees  
3 and does not include any payments that represent deferred  
4 compensation or other reduction of an employee's normal  
5 taxable wages or remuneration or any payments made to a third  
6 party on behalf of an employee as part of an agreement of  
7 deferred remuneration;

8 (b) sickness or accident disability if  
9 such payments are received under a workers' compensation or  
10 occupational disease disablement law;

11 (c) medical and hospitalization  
12 expenses in connection with sickness or accident disability;  
13 or

14 (d) death; provided the individual in  
15 its employ has not the option to receive, instead of provision  
16 for such death benefit, any part of such payment, or, if such  
17 death benefit is insured, any part of the premiums or  
18 contributions to premiums paid by his employing unit and has  
19 not the right under the provisions of the plan or system or  
20 policy of insurance providing for such death benefit to assign  
21 such benefit, or to receive a cash consideration in lieu of  
22 such benefit either upon his withdrawal from the plan or  
23 system providing for such benefit or upon termination of such  
24 plan or system or policy of insurance or of his service with  
25 such employing unit;

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1 (3) remuneration for agricultural labor paid  
2 in any medium other than cash;

3 (4) any payment made to, or on behalf of, an  
4 employee or an employee's beneficiary under a cafeteria plan  
5 within the meaning of Section 125 of the federal Internal  
6 Revenue Code of 1986;

7 (5) any payment made, or benefit furnished to  
8 or for the benefit of an employee if at the time of such  
9 payment or such furnishing it is reasonable to believe that  
10 the employee will be able to exclude such payment or benefit  
11 from income under Section 129 of the federal Internal Revenue  
12 Code of 1986;

13 (6) any payment made by an employer to a  
14 survivor or the estate of a former employee after the calendar  
15 year in which such employee died;

16 (7) any payment made to, or on behalf of, an  
17 employee or his beneficiary under an arrangement to which  
18 Section 408(p) of the federal Internal Revenue Code of 1986  
19 applies, other than any elective contributions under Paragraph  
20 (2)(A)(i) of that section;

21 (8) any payment made to or for the benefit of  
22 an employee if at the time of such payment it is reasonable to  
23 believe that the employee will be able to exclude such payment  
24 from income under Section 106 of the federal Internal Revenue  
25 Code of 1986; or

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(9) the value of any meals or lodging furnished by or on behalf of the employer if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such items from income under Section 119 of the federal Internal Revenue Code of 1986. "

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