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HOUSE BILL 283

**52ND LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2016**

INTRODUCED BY

Larry A. Larrañaga

AN ACT

RELATING TO UNEMPLOYMENT COMPENSATION; TEMPORARILY REDUCING THE CONTRIBUTION RATE OF CERTAIN EMPLOYERS BASED ON THE EMPLOYER'S EXPERIENCE HISTORY; TEMPORARILY CAPPING THE PERCENTAGE INCREASE IN AN EMPLOYER'S YEAR-TO-YEAR CONTRIBUTION AND EXCESS CLAIMS RATES.

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

**SECTION 1.** Section 51-1-11 NMSA 1978 (being Laws 2013, Chapter 133, Section 3) is amended to read:

"51-1-11. EMPLOYER CONTRIBUTION RATES--BENEFITS CHARGEABLE--UNEMPLOYMENT COMPENSATION FUND ADEQUATE RESERVE--RESERVE FACTOR--EXCESS CLAIMS PREMIUM--DEFINITIONS.--

A. Benefits paid to an individual shall be charged to the individual's base-period employers on a pro rata basis according to the proportion of the individual's total

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1 base-period wages received from each employer, except that no  
2 benefits paid to a claimant as extended benefits under the  
3 provisions of Section 51-1-48 NMSA 1978 shall be charged to any  
4 base-period employer who is not on a reimbursable basis and who  
5 is not a governmental entity and, except as the secretary shall  
6 by rule prescribe otherwise, in the case of benefits paid to an  
7 individual who:

8 (1) left the employ of a base-period employer  
9 who is not on a reimbursable basis voluntarily without good  
10 cause in connection with the individual's employment;

11 (2) was discharged from the employment of a  
12 base-period employer who is not on a reimbursable basis for  
13 misconduct connected with the individual's employment;

14 (3) is employed part time by a base-period  
15 employer who is not on a reimbursable basis and who continues  
16 to furnish the individual the same part-time work while the  
17 individual is separated from full-time work for a  
18 nondisqualifying reason; or

19 (4) received benefits based upon wages earned  
20 from a base-period employer who is not on a reimbursable basis  
21 while attending approved training under the provisions of  
22 Subsection E of Section 51-1-5 NMSA 1978.

23 B. The division shall not charge a contributing or  
24 reimbursing base-period employer with any portion of benefit  
25 amounts that the division can bill to or recover from the

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1 federal government as either regular or extended benefits.

2 C. The division shall not charge a contributing  
3 base-period employer with any portion of benefits paid to an  
4 individual for dependent allowance or because the individual to  
5 whom benefits are paid:

6 (1) separated from employment due to domestic  
7 abuse, as "domestic abuse" is defined in Section 40-13-2 NMSA  
8 1978; or

9 (2) voluntarily left work to relocate because  
10 of a spouse, who is in the military service of the United  
11 States or the New Mexico national guard, receiving permanent  
12 change of station orders, activation orders or unit deployment  
13 orders.

14 D. All contributions to the fund shall be pooled  
15 and available to pay benefits to any individual entitled  
16 thereto, irrespective of the source of the contributions.

17 E. In the case of a transfer of an employing  
18 enterprise, notwithstanding any other provision of law, the  
19 experience history of the transferred enterprise shall be  
20 transferred from the predecessor employer to the successor  
21 under the following conditions and in accordance with the  
22 applicable rules of the secretary:

23 (1) except as otherwise provided in this  
24 subsection, for the purpose of this subsection, two or more  
25 employers who are parties to or the subject of any transaction

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1 involving the transfer of an employing enterprise shall be  
2 deemed to be a single employer and the experience history of  
3 the employing enterprise shall be transferred to the successor  
4 employer if the successor employer has acquired by the  
5 transaction all of the business enterprises of the predecessor;  
6 provided that:

7 (a) all contributions, interest and  
8 penalties due from the predecessor employer have been paid;

9 (b) notice of the transfer has been  
10 given in accordance with the rules of the secretary during the  
11 calendar year of the transaction transferring the employing  
12 enterprise or the date of the actual transfer of control and  
13 operation of the employing enterprise;

14 (c) the successor shall notify the  
15 division of the acquisition on or before the due date of the  
16 successor's first wage and contribution report. If the  
17 successor employer fails to notify the division of the  
18 acquisition within this time limit, the division, when it  
19 receives actual notice, shall effect the transfer of the  
20 experience history and applicable rate of contribution  
21 retroactively to the date of the acquisition, and the successor  
22 shall pay a penalty of fifty dollars (\$50.00); and

23 (d) where the transaction involves only  
24 a merger, consolidation or other form of reorganization without  
25 a substantial change in the ownership and controlling interest

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1 of the business entity, as determined by the secretary, the  
2 limitations on transfers stated in Subparagraphs (a), (b) and  
3 (c) of this paragraph shall not apply. A party to a merger,  
4 consolidation or other form of reorganization described in this  
5 subparagraph shall not be relieved of liability for any  
6 contributions, interest or penalties due and owing from the  
7 employing enterprise at the time of the merger, consolidation  
8 or other form of reorganization;

9 (2) the applicable experience history may be  
10 transferred to the successor in the case of a partial transfer  
11 of an employing enterprise if the successor has acquired one or  
12 more of the several employing enterprises of a predecessor but  
13 not all of the employing enterprises of the predecessor and  
14 each employing enterprise so acquired was operated by the  
15 predecessor as a separate store, factory, shop or other  
16 separate employing enterprise and the predecessor, throughout  
17 the entire period of the contribution with liability applicable  
18 to each enterprise transferred, has maintained and preserved  
19 payroll records that, together with records of contribution  
20 liability and benefit chargeability, can be separated by the  
21 parties from the enterprises retained by the predecessor to the  
22 satisfaction of the secretary or the secretary's delegate. A  
23 partial experience history transfer will be made only if the  
24 successor:

25 (a) notifies the division of the

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1 acquisition, in writing, not later than the due date of the  
2 successor's first quarterly wage and contribution report after  
3 the effective date of the acquisition;

4 (b) files an application provided by the  
5 division that contains the endorsement of the predecessor  
6 within thirty days from the delivery or mailing of such  
7 application by the division to the successor's last known  
8 address; and

9 (c) files with the application a form  
10 with a schedule of the name and social security number of and  
11 the wages paid to and the contributions paid for each employee  
12 for the three and one-half-year period preceding the  
13 computation date through the date of transfer or such lesser  
14 period as the enterprises transferred may have been in  
15 operation. The application and form shall be supported by the  
16 predecessor's permanent employment records, which shall be  
17 available for audit by the division. The application and form  
18 shall be reviewed by the division and, upon approval, the  
19 percentage of the predecessor's experience history attributable  
20 to the enterprises transferred shall be transferred to the  
21 successor. The percentage shall be obtained by dividing the  
22 taxable payrolls of the transferred enterprises for such three  
23 and one-half-year period preceding the date of computation or  
24 such lesser period as the enterprises transferred may have been  
25 in operation by the predecessor's entire payroll;

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1 (3) if, at the time of a transfer of an  
2 employing enterprise in whole or in part, both the predecessor  
3 and the successor are under common ownership, then the  
4 experience history attributable to the transferred business  
5 shall also be transferred to and combined with the experience  
6 history attributable to the successor employer. The rates of  
7 both employers shall be recalculated and made effective  
8 immediately upon the date of the transfer;

9 (4) whenever a person, who is not currently an  
10 employer, acquires the trade or business of an employing  
11 enterprise, the experience history of the acquired business  
12 shall not be transferred to the successor if the secretary or  
13 the secretary's designee finds that the successor acquired the  
14 business solely or primarily for the purpose of obtaining a  
15 lower rate of contributions. Instead, the successor shall be  
16 assigned the applicable new employer rate pursuant to this  
17 section. In determining whether the business was acquired  
18 solely or primarily for the purpose of obtaining a lower rate  
19 of contribution, the secretary or the secretary's designee  
20 shall consider:

- 21 (a) the cost of acquiring the business;  
22 (b) whether the person continued the  
23 business enterprise of the acquired business;  
24 (c) how long such business enterprise  
25 was continued; and

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1 (d) whether a substantial number of new  
2 employees [~~were~~] was hired for performance of duties unrelated  
3 to those that the business activity conducted prior to  
4 acquisition;

5 (5) if, following a transfer of experience  
6 history pursuant to this subsection, the department determines  
7 that a substantial purpose of the transfer of the employing  
8 enterprise was to obtain a reduced liability for contributions,  
9 then the experience rating accounts of the employers involved  
10 shall be combined into a single account and a single rate  
11 assigned to the combined account;

12 (6) the secretary shall adopt such rules as  
13 are necessary to interpret and carry out the provisions of this  
14 subsection, including rules that:

15 (a) describe how experience history is  
16 to be transferred; and

17 (b) establish procedures to identify the  
18 type of transfer or acquisition of an employing enterprise; and

19 (7) a person who knowingly violates or  
20 attempts to violate a rule adopted pursuant to Paragraph (6) of  
21 this subsection, who transfers or acquires, or attempts to  
22 transfer or acquire, an employing enterprise for the sole or  
23 primary purpose of obtaining a reduced liability for  
24 contributions or who knowingly advises another person to  
25 violate a rule adopted pursuant to Paragraph (6) of this

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1 subsection or to transfer or acquire an employing enterprise  
2 for the sole or primary purpose of obtaining a reduced  
3 liability for contributions is guilty of a misdemeanor and  
4 shall be punished by a fine of not less than one thousand five  
5 hundred dollars (\$1,500) or more than three thousand dollars  
6 (\$3,000) or, if an individual, by imprisonment for a definite  
7 term not to exceed ninety days or both. In addition, such a  
8 person shall be subject to the following civil penalty imposed  
9 by the secretary:

10 (a) if the person is an employer, the  
11 person shall be assigned the highest contribution rate  
12 established by the provisions of this section for the calendar  
13 year in which the violation occurs and the three subsequent  
14 calendar years; provided that, if the difference between the  
15 increased penalty rate and the rate otherwise applicable would  
16 be less than two percent of the employer's payroll, the  
17 contribution rate shall be increased by two percent of the  
18 employer's payroll for the calendar year in which the violation  
19 occurs and the three subsequent calendar years; or

20 (b) if the person is not an employer,  
21 the secretary may impose a civil penalty not to exceed three  
22 thousand dollars (\$3,000).

23 F. For each calendar year, if, as of the  
24 computation date for that year, an employer has been a  
25 contributing employer throughout the preceding twenty-four

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1 months, the contribution rate for that employer shall be  
2 determined by multiplying the employer's benefit ratio by the  
3 reserve factor as determined pursuant to Subsection H of this  
4 section and, for each year beginning with 2016 and through  
5 2018, for an employer that, as of the computation date for that  
6 year, has been a contributing employer throughout the preceding  
7 thirty-six months, then multiplying that product by the  
8 employer's experience history factor as determined pursuant to  
9 Subsection I of this section; provided that an employer's  
10 contribution rate shall not be less than thirty-three  
11 hundredths percent or more than five and four-tenths percent.  
12 An employer's benefit ratio is determined by dividing the  
13 employer's benefit charges during the immediately preceding  
14 fiscal years, up to a maximum of three fiscal years, by the  
15 total of the annual payrolls of the same time period,  
16 calculated to four decimal places, disregarding any remaining  
17 fraction.

18 G. For each calendar year, if, as of the  
19 computation date of that year, an employer has been a  
20 contributing employer for less than twenty-four months, the  
21 contribution rate for that employer shall be the average of the  
22 contribution rates for all contributing employers in the  
23 employer's industry, as determined by administrative rule, but  
24 shall not be less than one percent or more than five and four-  
25 tenths percent; provided that an individual, type of

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1 organization or employing unit that acquires all or part of the  
2 trade or business of another employing unit, pursuant to  
3 Paragraphs (2) and (3) of Subsection E of Section 51-1-42 NMSA  
4 1978, that has a rate of contribution less than average of the  
5 contribution rates for all contributing employers in the  
6 employer's industry, shall be entitled to the transfer of the  
7 contribution rate of the other employing unit to the extent  
8 permitted under Subsection E of this section.

9 H. The division shall ensure that the fund sustains  
10 an adequate reserve. An adequate reserve shall be determined  
11 to mean that the funds in the fund available for benefits equal  
12 the total amount of funds needed to pay between eighteen and  
13 twenty-four months of benefits at the average of the five  
14 highest years of benefits paid in the last twenty-five years.  
15 For the purpose of sustaining an adequate reserve, the division  
16 shall determine a reserve factor to be used when calculating an  
17 employer's contribution rate pursuant to Subsection F of this  
18 section by rule promulgated by the secretary. The rules shall  
19 set forth a formula that will set the reserve factor in  
20 proportion to the difference between the amount of funds  
21 available for benefits in the fund, as of the computation date,  
22 and the adequate reserve, within the following guidelines:

- 23 (1) 1.0000 if, as of the computation date,  
24 there is an adequate reserve;  
25 (2) between 0.5000 and 0.9999 if, as of the

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1 computation date, there is greater than an adequate reserve;  
2 and

3 (3) between 1.0001 and 4.0000 if, as of the  
4 computation date, there is less than an adequate reserve.

5 I. For each year beginning with 2016 and through  
6 2018, if, as of the computation date for that year, an employer  
7 has been a contributing employer throughout the preceding  
8 thirty-six months, the employer's experience history factor  
9 shall be determined as of the computation date and shall be  
10 based on the employer's reserve. The employer's reserve shall  
11 be calculated as the difference between all of the employer's  
12 previous years' contribution payments and all of the employer's  
13 previous years' benefit charges, divided by the average of the  
14 employer's three previous years' annual payrolls.

| <u>If an employer's reserve is:</u> | <u>The employer's experience</u><br><u>history factor is:</u> |
|-------------------------------------|---|
| <u>6.0% and over</u>                | <u>0.4</u>  |
| <u>5.0%-5.9%</u>                    | <u>0.5</u>  |
| <u>4.0%-4.9%</u>                    | <u>0.6</u>  |
| <u>3.0%-3.9%</u>                    | <u>0.7</u>  |
| <u>2.0%-2.9%</u>                    | <u>0.8</u>  |
| <u>0.0%-1.9%</u>                    | <u>0.9</u>  |
| <u>Under 0.0%</u>                   | <u>1.0</u>  |

24 [~~F.~~] J. If an employer's contribution rate pursuant  
25 to Subsection F of this section is calculated to be greater

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1 than five and four-tenths percent, notwithstanding the  
2 limitation pursuant to Subsection F of this section, the  
3 employer shall be charged an excess claims premium in addition  
4 to the contribution rate applicable to the employer; provided  
5 that an employer's excess claims premium shall not exceed one  
6 percent of the employer's annual payroll. The excess claims  
7 premium shall be determined by multiplying the employer's  
8 excess claims rate by the employer's annual payroll. An  
9 employer's excess claims rate shall be determined by  
10 multiplying the difference of the employer's contribution rate,  
11 notwithstanding the limitation pursuant to Subsection F of this  
12 section, less five and four-tenths percent by ten percent.

13 K. For each year beginning with 2016 and through  
14 2018, in spite of any provision of law to the contrary, an  
15 employer's contribution rate plus the employer's excess claims  
16 rate, if any, shall increase by no more than two percent from  
17 one calendar year to the next.

18 [~~J.~~] L. The division shall promptly notify each  
19 employer of the employer's rate of contributions and excess  
20 claims premium as determined for any calendar year pursuant to  
21 this section. Such notification shall include the amount  
22 determined as the employer's annual payroll, the total of all  
23 of the employer's contributions paid on the employer's behalf  
24 for all past years and total benefits charged to the employer  
25 for all such years. Such determination shall become conclusive

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1 and binding upon the employer unless, within thirty days after  
2 the mailing of notice thereof to the employer's last known  
3 address or in the absence of mailing, within thirty days after  
4 the delivery of such notice, the employer files an application  
5 for review and redetermination, setting forth the employer's  
6 reason therefor. The employer shall be granted an opportunity  
7 for a fair hearing in accordance with rules prescribed by the  
8 secretary, but an employer shall not have standing, in any  
9 proceeding involving the employer's rate of contributions or  
10 contribution liability, to contest the chargeability to the  
11 employer of any benefits paid in accordance with a  
12 determination, redetermination or decision pursuant to Section  
13 51-1-8 NMSA 1978, except upon the ground that the services on  
14 the basis of which such benefits were found to be chargeable  
15 did not constitute services performed in employment for the  
16 employer and only in the event that the employer was not a  
17 party to such determination, redetermination or decision, or to  
18 any other proceedings under the Unemployment Compensation Law  
19 in which the character of such services was determined. The  
20 employer shall be promptly notified of the decision on the  
21 employer's application for redetermination, which shall become  
22 final unless, within fifteen days after the mailing of notice  
23 thereof to the employer's last known address or in the absence  
24 of mailing, within fifteen days after the delivery of such  
25 notice, further appeal is initiated pursuant to Subsection D of  
  
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1 Section 51-1-8 NMSA 1978.

2           ~~[K.]~~ M. The division shall provide each contributing  
3 employer, within ninety days of the end of each calendar  
4 quarter, a written determination of benefits chargeable to the  
5 employer. Such determination shall become conclusive and  
6 binding upon the employer for all purposes unless, within  
7 thirty days after the mailing of the determination to the  
8 employer's last known address or in the absence of mailing,  
9 within thirty days after the delivery of such determination,  
10 the employer files an application for review and  
11 redetermination, setting forth the employer's reason therefor.  
12 The employer shall be granted an opportunity for a fair hearing  
13 in accordance with rules prescribed by the secretary, but an  
14 employer shall not have standing in any proceeding involving  
15 the employer's contribution liability to contest the  
16 chargeability to the employer of any benefits paid in  
17 accordance with a determination, redetermination or decision  
18 pursuant to Section 51-1-8 NMSA 1978, except upon the ground  
19 that the services on the basis of which such benefits were  
20 found to be chargeable did not constitute services performed in  
21 employment for the employer and only in the event that the  
22 employer was not a party to such determination, redetermination  
23 or decision, or to any other proceedings under the Unemployment  
24 Compensation Law in which the character of such services was  
25 determined. The employer shall be promptly notified of the

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1 decision on the employer's application for redetermination,  
2 which shall become final unless, within fifteen days after the  
3 mailing of notice thereof to the employer's last known address  
4 or in the absence of mailing, within fifteen days after the  
5 delivery of such notice, further appeal is initiated pursuant  
6 to Subsection D of Section 51-1-8 NMSA 1978.

7 ~~[L.]~~ N. The contributions and excess claims  
8 premiums, together with interest and penalties thereon imposed  
9 by the Unemployment Compensation Law, shall not be assessed nor  
10 shall action to collect the same be commenced more than four  
11 years after a report showing the amount of the contributions  
12 was due. In the case of a false or fraudulent contribution  
13 report with intent to evade contributions or a willful failure  
14 to file a report of all contributions due, the contributions  
15 and excess claims premiums, together with interest and  
16 penalties thereon, may be assessed or an action to collect such  
17 contributions may be begun at any time. Before the expiration  
18 of such period of limitation, the employer and the secretary  
19 may agree in writing to an extension thereof and the period so  
20 agreed on may be extended by subsequent agreements in writing.  
21 In any case where the assessment has been made and action to  
22 collect has been commenced within four years of the due date of  
23 any contribution, excess claims premium, interest or penalty,  
24 including the filing of a warrant of lien by the secretary  
25 pursuant to Section 51-1-36 NMSA 1978, such action shall not be

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1 subject to any period of limitation.

2 ~~[M.]~~ O. The secretary shall correct any error in the  
3 determination of an employer's rate of contribution during the  
4 calendar year to which the erroneous rate applies,  
5 notwithstanding that notification of the employer's rate of  
6 contribution may have been issued and contributions paid  
7 pursuant to the notification. Upon issuance by the division of  
8 a corrected rate of contribution, the employer shall have the  
9 same rights to review and redetermination as provided in  
10 Subsection ~~[J]~~ L of this section.

11 ~~[N.]~~ P. Any interest required to be paid on advances  
12 to this state's unemployment compensation fund under Title 12  
13 of the Social Security Act shall be paid in a timely manner as  
14 required under Section 1202 of Title 12 of the Social Security  
15 Act and shall not be paid, directly or indirectly, by the state  
16 from amounts in the state's unemployment compensation fund.

17 ~~[O.]~~ Q. As used in this section:

18 (1) "annual payroll" means the total taxable  
19 amount of remuneration from an employer for employment during a  
20 twelve-month period ending on a computation date;

21 (2) "base-period employers" means the  
22 employers of an individual during the individual's base period;

23 (3) "base-period wages" means the wages of an  
24 individual for insured work during the individual's base period  
25 on the basis of which the individual's benefit rights were

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1 determined;

2 (4) "common ownership" means that two or more  
3 businesses are substantially owned, managed or controlled by  
4 the same person or persons;

5 (5) "computation date" for each calendar year  
6 means the close of business on June 30 of the preceding  
7 calendar year;

8 (6) "employing enterprise" means a business  
9 activity engaged in by a contributing employing unit in which  
10 one or more persons have been employed within the current or  
11 the three preceding calendar quarters. An "employing  
12 enterprise" includes the employer's work force;

13 (7) "experience history" means the benefit  
14 charges and payroll experience of the employing enterprise;

15 (8) "knowingly" means having actual knowledge  
16 of or acting with deliberate ignorance of or reckless disregard  
17 for the prohibition involved;

18 (9) "predecessor" means the owner and operator  
19 of an employing enterprise immediately prior to the transfer of  
20 such enterprise;

21 (10) "successor" means any person that  
22 acquires an employing enterprise and continues to operate such  
23 business entity; and

24 (11) "violates or attempts to violate"  
25 includes an intent to evade, a misrepresentation or a willful

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1 nondisclosure."

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