

Doing business in United States: New Mexico

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OVERVIEW

1. What are the key recent developments affecting doing business in your jurisdiction?

Three state constitutional amendments passed by voter referenda in the 2012 election significantly reform the New Mexico Public Regulation Commission (PRC). The 2013 legislative session enacted laws to fully implement these amendments. The amendments:

- Remove jurisdiction over corporate entity formation and filings from the PRC to the New Mexico Secretary of State (SoS).
- Remove jurisdiction over insurance regulation to a Superintendent of Insurance appointed by an independent committee.
- Allow the legislature to enact minimum qualification requirements for PRC commissioners, respectively.

LEGAL SYSTEM

2. What is the legal system based on (for example, civil law, common law or a mixture of both)?

New Mexico has a common law system at both federal and state level.

FOREIGN INVESTMENT

3. Are there any restrictions on foreign investment (including authorisations required by central or local government)?

Generally, there are no restrictions on foreign shareholders and foreign entities can invest in New Mexico, subject to certain authorisation and registration restrictions that vary based on the type of business vehicle.

Corporations

A foreign corporation must receive an authorisation certificate from the PRC (soon, SoS) before doing business in New Mexico (*New Mexico Statutes Annotated (NMSA) 1978, § 53-17-5*). There are a number of activities (such as maintaining a bank account or engaging in isolated transactions) that do not constitute doing business in the state and do not require a certificate of authority (*NMSA 1978, § 53-17-1*).

Limited liability companies (LLCs)

Before doing business in New Mexico, a foreign LLC must register with the PRC (soon, SoS) (*NMSA 1978, § 53-19-48*).

Limited liability partnerships

Before doing business in New Mexico, a foreign limited liability partnership must file a statement of foreign qualification with the Secretary of State (*NMSA 1978, §§ 54-1A-1102; 54-2A-902*).

4. Are there any restrictions on doing business with certain countries or jurisdictions?

There are no state-specific restrictions in New Mexico.

5. Are there any exchange control or currency regulations?

There are no exchange control or currency regulations in New Mexico.

6. What grants or incentives are available to investors?

New Mexico counties and municipalities can issue industrial revenue bonds for qualified projects that promote industry and trade within the county or municipality. County and municipal governments can also issue private activity bonds.

The New Mexico Finance Authority can issue revenue bonds for eligible entities, including, among others, industrial, commercial, healthcare and educational facilities.

Furthermore, many other tax credits and incentives are available to those considering doing business in New Mexico, including:

- Renewable energy tax credits (see, for example, *NMSA 1978, §§ 7-2-18.25; 7-2A-19; 7-9J-1*).
- The Film Production Tax Credit (*NMSA 1978, § 7-2F-1*).
- The Technology Jobs Tax Credit (*NMSA 1978, § 7-9F-1*).

BUSINESS VEHICLES

7. What are the most common forms of business vehicle used in your jurisdiction?

The most common form of business vehicle used by foreign companies is a limited liability company (LLC). This is because of limited liability, flexible corporate structure and fewer corporate governance requirements.

8. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, what are the main registration and reporting requirements?

Registration and formation

LLCs may be formed by filing articles of organisation and related administrative filings with the New Mexico Secretary of State (SoS). Generally, formation of an LLC is processed within a few weeks of filing, but two-day and same-day expediting is available for additional fees. LLCs must have a unique name and there is a process for reserving a name prior to registering. More information is available at the SoS website, www.sos.state.nm.us/Business_Services/Corporations_Overview.aspx.

Reporting requirements

LLCs are exempt from filing reports.

Share capital

There is no maximum or minimum membership capital.

Non-cash consideration

Membership interests can be issued for non-cash consideration.

Rights attaching to shares

Restrictions on rights attaching to shares. Members of LLCs may have restricted managerial rights if the articles of organisation provide for management by managers rather than members.

Automatic rights attaching to shares. Management (unless manager-managed), voting, sharing of profits and losses, distribution.

9. In relation to the most common form of corporate business vehicle used by foreign companies in your jurisdiction, outline the management structure and key liability issues.

Management structure

LLCs may be managed by either members or managers. Member managed LLCs are managed by the member, if there is only one member. If there is more than one member, they are managed by all the members. Manager managed LLCs are managed by a manager appointed by a vote of the member(s).

Management restrictions

There are no restrictions on foreign managers.

Directors' and officers' liability

A member who is not vested with particular management responsibilities is not liable to the LLC or to other members solely by reason of acts or omissions in capacity as a member. A member who is vested with particular management responsibilities is not liable, responsible or accountable in damages or otherwise to the LLC or to other members solely by reason of acts or omissions on behalf of the LLC in a managerial capacity, unless that act or omission constitutes gross negligence or wilful misconduct.

Parent company liability

See above, *Directors' and officers' liability*.

EMPLOYMENT

Laws, contracts and permits

10. What are the main laws regulating employment relationships?

The main laws regulating the employment relationship are:

- **The New Mexico Human Rights Act (NMSA 1978, §§ 28-1-1 to -14).** This Act prohibits an employer from discriminating against an employee based on that employee's race, age, religion, colour, national origin, ancestry, sex, physical or mental handicap, or serious medical condition. No state law expressly prohibits a public or private employer from requiring its employees to undergo physical examinations. However, an employer cannot discriminate against an employee based on a disability revealed by any mandatory physical examination. If the employer has 50 or more employees, the employer cannot discriminate based on an employee's spousal affiliation. If the employer has 15 or more employees, the employer cannot discriminate based on an employee's sexual orientation or gender identity (*NMSA 1978, § 28-1-7(A)*).
- **The New Mexico Minimum Wage Act.** The minimum wage in New Mexico is US\$7.50 per hour (*NMSA 1978, § 50-4-22*). Some cities in the state, such as Santa Fe, currently impose a minimum wage higher than US\$7.50 per hour. An employee who works more than 40 hours in a week must be paid time and a half.
- **The New Mexico Employee Privacy Act.** This Act provides that an employer cannot discriminate against an employee based on whether that employee is a smoker or non-smoker (*NMSA 1978, § 50-11-3*).
- **The New Mexico State Directory of New Hires Act.** All New Mexico employers are required to provide the name, address and social security number of each new employee to the New Mexico New Hires Directory (*NMSA 1978, §§ 50-13-1 to -4*).
- An employer must keep records for each employee, including the employee's hours and wages (*NMSA 1978, § 50-4-9(A)*).
- An employee can join a union and any employee's promise not to join a union or to withdraw from a union is void as against public policy (*NMSA 1978, § 50-2-4*).

Choice of law provisions are valid in New Mexico employment contracts, but the above employment laws apply to all employees working in New Mexico, regardless of the employee's citizenship. There are no additional requirements affecting New Mexico employees working outside the state.

11. Is a written contract of employment required? If so, what main terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

No written employment contract is required in New Mexico. An employment relationship without a definite term is at will and may be terminated at any time by employer or employee. However, an employment contract may be implied as being substantive, procedural, or both. In a substantive implied contract, the employer may terminate only for cause. In a procedural implied contract, the employer must follow a particular implied procedure before terminating. No implied terms exist for at will employees, but for contract employees, there is an implied covenant of good faith and fair dealing. The terms that are likely to govern the employment relationship are set out in *Question 10*. Collective bargaining agreements can exist in union contexts, but are relatively uncommon in New Mexico.

12. Do foreign employees require work permits and/or residency permits?

Foreign employees can require work or residency permits under federal law (see *Doing Business in... United States*) but there are no additional permit requirements under New Mexico law.

Termination and redundancy

13. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

There are no state laws giving employees the right to management representation or the right to be consulted in relation to corporate transactions.

14. How is the termination of individual employment contracts regulated?

In general, New Mexico employment contracts are at will, meaning either party can terminate the relationship with or without cause. The parties can expressly contract to define the relationship differently. There are also other instances where the contract is not considered to be at will, such as where the parties have an implied contract of employment limiting discharge to situations where there is a reason for the discharge. (See, for example, *Trujillo v N Rio Arriba Elec Coop, Inc*, 41 P.3d 333 (NM 2002) and *Hartbarger v Frank Paxton Co*, 857 P.2d 776 (NM 1993)). In every contract in New Mexico, including employment contracts, there is an implied covenant of good faith and fair dealing as determined by *Sanders v. FedEx Ground Package Sys., Inc.*, 188 P.3d 1200. However even in cases involving at will arrangements (to which the covenant does not attach) whether the termination is fair or justified is an equitable consideration. There is not a statutory minimum notice period in New Mexico, and severance payments are not required. An employee employed under an at will arrangement who believes he has been dismissed without justification may have tort remedies available (for example, intentional infliction of emotional distress) and remedies for discrimination under the state Human Rights Act.

15. Are redundancies and mass layoffs regulated?

There are no specific state laws on redundancies or mass layoffs, but the federal Workers Adjustment Retraining and Notification Act (29 USC § 2101, et seq) requires an employer to give 60 days' notice of a mass layoff or plant closure.

TAX

Taxes on employment

16. In what circumstances is an employee taxed in your jurisdiction and what criteria are used?

For employee tax purposes, New Mexico defines a tax resident as an individual who is domiciled in the state during the taxable year or who is in the state for 185 days or more during the taxable year (NMSA 1978, § 7-2-2(S)). A person who, on or before the last day of the taxable year, changes their place of abode to a place out-of-state with the bona fide intention of continuing to live permanently out-of-state, is not a tax resident for the periods after their change of abode (NMSA 1978, § 7-2-2(S)).

17. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

Tax resident employees

Depending on their income, tax resident employees must pay personal income tax at a rate between 1.7% and 4.9% (NMSA 1978, § 7-2-7). New Mexico taxable income is the federal taxable income with certain modifications to account for the difference between New Mexico and federal tax law (NMSA 1978, § 7-2-2(N)).

Non-tax resident employees

Non-tax resident employees must pay tax on the portion of their income that was derived in New Mexico, at a rate between 1.7% and 4.9%.

Employers

Employers, in relation to their employees, must pay state and federal unemployment taxes and federal social security taxes. Employers must also withhold and transmit the employees' state and federal personal income taxes, and the employees' share of unemployment and social security taxes.

Business vehicles

18. When is a business vehicle subject to tax in your jurisdiction?

Tax resident business. Tax residency for business vehicles is not specified in New Mexico. For the purpose of state taxes, foreign business entities are generally taxed in the same way as domestic business entities and are required to pay corporate income, franchise and property taxes. Like domestic business entities, foreign business entities are only taxed on the portion of their income that is generated in New Mexico.

Corporate income tax. The corporate income tax is imposed on the net income of every domestic or foreign corporation doing business in the state or deriving any income from any property or employment within the state (NMSA 1978, § 7-2A-3(A)).

Corporate franchise tax. The corporate franchise tax is imposed on both: (NMSA 1978, § 7-2A-3(B))

- Every domestic or foreign corporation doing business in the state or deriving any income from any property or employment within the state.
- Every domestic or foreign corporation, whether engaged in active business or not, but having its corporate franchise in the state.

19. What are the main taxes that potentially apply to a business vehicle subject to tax in your jurisdiction (including tax rates)?

Gross receipts tax

This is a tax on goods or services sold in the state. The basic tax rate imposed by the state is approximately 5% of gross receipts. County and municipal governments can impose an additional tax on gross receipts. Filing requirements are at least annually and can be semi-annually or quarterly.

Compensating tax

This is a tax on goods or services that were not subject to the gross receipts tax because, for example, they were bought in a state that does not have a gross receipts tax. The compensating tax rate is

5% of the value of the property or service at the time of acquisition or introduction into New Mexico or at the time of conversion to use, whichever is later.

Withholding tax

An employer must withhold a portion of each employee's wages for payment of the New Mexico state income tax (see *Question 17*).

Corporate income tax

This is a tax on the income derived from a business's operations in New Mexico. The basic rate is between 4.8% and 7.6%.

Corporate franchise tax

This is a tax on every domestic and foreign corporation that is either doing business or is franchised in the state. The tax is US\$50 per year.

Property tax

This is a tax on real property and tangible personal property located in the state. The property tax rates vary widely, but approximate average rates are:

- 2.6% for residential property.
- 3% for non-residential property.

Dividends, interest and IP royalties

20. How are the following taxed:

- **Dividends paid to foreign corporate shareholders?**
- **Dividends received from foreign companies?**
- **Interest paid to foreign corporate shareholders?**
- **Intellectual property (IP) royalties paid to foreign corporate shareholders?**

Dividends paid

New Mexico does not tax foreign corporations on dividends paid to foreign corporate shareholders.

Dividends received

A corporation is taxed on dividends received if it is considered to have its commercial domicile in New Mexico.

Interest paid

A foreign corporation is not taxed on the interest paid to foreign corporate shareholders.

IP royalties paid

Patent and copyright royalties are taxed in New Mexico to the extent that a patent or copyright is used in the state. The royalties can also be taxed if both (*NMSA 1978, § 7-4-9*):

- A patent or copyright is used in another state, but is not taxed in that state.
- The royalty owner is domiciled in New Mexico.

Groups, affiliates and related parties

21. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

New Mexico does not have any thin capitalisation rules other than those applicable under federal law (see *Doing Business in... United States*).

22. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident in your jurisdiction (controlled foreign company rules)?

There is no requirement that the profits of a foreign subsidiary be imputed to a parent company with New Mexico tax residency.

23. Are there any transfer pricing rules?

New Mexico does not have any transfer pricing rules other than those applicable under federal law (see *Doing Business in... United States*).

Customs duties

24. How are imports and exports taxed?

New Mexico has no specific tax for imports or exports.

Double tax treaties

25. Is there a wide network of double tax treaties?

See *Doing Business in... United States* for information on double tax treaties.

COMPETITION

26. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single-firm) conduct regulated by competition law?

Competition authority

The New Mexico Attorney General may investigate and bring actions against violators of the New Mexico Antitrust Act (*NMSA 1978, §§ 57-1-1 to -19*).

Restrictive agreements and practices

The New Mexico Antitrust Act (*NMSA 1978, §§ 57-1-1 to -19*) closely parallels the federal anti-trust laws, particularly the Sherman Antitrust Act (*15 USC § 7*). The New Mexico law contains some deviations from federal law with regard to private remedies. To be subject to the New Mexico law, some part of the affected trade or commerce must be within the state. The fact that the activity affects or involves interstate or foreign commerce does not preclude action under state law.

Unilateral conduct

Every contract, agreement, combination or conspiracy in restraint of trade or commerce, any part of which trade or commerce is within the state, is unlawful under the New Mexico Antitrust Act (*NMSA 1978, §§ 57-1-1 to -19*). However, to prove this, a plaintiff must show a combination or conspiracy among two or more persons and an unreasonable restraint of trade due to this combination or conspiracy.

Independent action is not proscribed (*Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)).

27. Are mergers and acquisitions subject to merger control?

Mergers and acquisitions are subject to merger control, to the extent they result in an unlawful monopoly, or demonstrate a conspiracy or combination among two or more persons and an unreasonable restraint of trade due to this combination or conspiracy (see *Question 26*). There are no statutory controls or exemptions that apply to foreign entities.

INTELLECTUAL PROPERTY

28. Outline the main IP rights in your jurisdiction.

Patents

Patents and copyrights are protected under federal law (see *Doing Business in...United States*).

Trade marks

Definition and legal requirements. This right prevents others from using a mark that is already being used to identify the goods or services of the mark's owner. Trade marks, in addition to being protected by the federal Lanham Act (15 USC § 1051), are protected by the New Mexico Trademark Act (NMSA 1978, §§ 57-3B-1 to -17).

Protection. A trade mark must be registered to receive protection under New Mexico law. To register a mark, an owner must file an application with the Secretary of State. The application fee is US\$25 (NMSA 1978, § 57-3B-5).

Enforcement and remedies. If a registered trade mark owner's rights are infringed, the owner can sue for damages or to recover the profits of the infringing party (NMSA 1978, § 57-3B-16).

Length of protection and renewability. A registered trade mark lasts for ten years, but the registration can be renewed for successive ten-year periods. There is no limit to the number of renewals so long as the mark is still in use (NMSA 1978, § 57-3B-8).

Registered designs

These rights can be protected under federal patent, trade mark or copyright law.

Unregistered designs

These rights can be protected under federal patent, trade mark or copyright law.

Copyright

Patents and copyrights are protected under federal law (see *Doing Business in...United States*).

MARKETING AGREEMENTS

29. Are marketing agreements regulated?

Agency

Out-of-state business entities frequently employ local sales representatives in New Mexico. The nature of the contractual relationship between an employing entity and a sales representative doing business in New Mexico determines whether the employing entity is required to qualify and pay income, gross receipts and other state taxes (see *Question 19*).

Distribution

Before establishing a presence in New Mexico, a foreign distributor must determine whether the entity under which it is operating must become qualified to conduct business in New Mexico and whether state income, gross receipts and other taxes apply. The nature of the contractual relationship between the distributor of products and the person or entity whose products are being distributed

determines whether it is necessary to qualify and pay and collect state taxes.

Franchising

The relationship between the grantor and the grantee of a franchise is usually defined by contract. However, New Mexico has addressed franchise matters under various trade practices statutes, particularly for motor vehicle franchises and alcoholic beverage distribution (see *NMSA 1978, §§ 57-16-1 to -16 and §§ 60-8A-1 to -19*).

E-COMMERCE

30. Are there any laws regulating e-commerce (such as electronic signatures and distance selling)?

New Mexico recognises the validity of electronic signatures to satisfy many legal requirements (NMSA 1978, § 14-16-1 to -19). New Mexico substantially conforms to the federal Electronic Signatures in Global and National Commerce Act (NMSA 1978, § 44-7A-31).

ADVERTISING

31. Outline the regulation of advertising in your jurisdiction.

The New Mexico Unfair Trade Practises Act defines trade and commerce to include advertising, bringing it under the purview of that Act, enforceable by Attorney General, District Attorneys and private citizens. There are also state and local regulations pertaining to outdoor and roadside advertising, as well as advertising particular goods and professions.

DATA PROTECTION

32. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

The New Mexico Privacy Protection Act requires New Mexico businesses to take adequate steps to protect their customers' social security numbers (NMSA 1978, § 57-12B-4). Other New Mexico statutes require state agencies to protect the financial and health information of consumers (NMSA 1978, § 59A-2-9.3 and § 24-14A-3).

PRODUCT LIABILITY

33. How is product liability and product safety regulated?

New Mexico product liability and product safety laws are generally governed by common law. A claimant in New Mexico can recover under the following:

- **Strict liability.** To recover, a claimant must show that a product was unreasonably dangerous.
- **Negligence.** To recover, a claimant must show that the product's supplier failed to exercise ordinary care.
- **Breach of warranty.** These claims are generally regulated by the Uniform Commercial Code. To recover, a claimant must prove damages as a result of breach of (NMSA 1978, §§ 55-2-313 to -318):
 - an express warranty;
 - an implied warranty of merchantability; or
 - an implied warranty of fitness for a particular purpose.
- **Failure to warn.** To recover, the claimant must show that the supplier had a duty to warn and that failure to warn caused the injury.

MAIN BUSINESS ORGANISATIONS

New Mexico Public Regulation Commission (PRC)

W www.nmprc.state.nm.us/index.html

Main activities. Currently, the PRC regulates the utilities, telecommunications, and transportation industries to ensure fair and reasonable rates, and to assure reasonable and adequate services to the public as provided by law. The PRC also has responsibility for the State Fire Marshal's Office, the Firefighter Training Academy and Pipeline Safety.

New Mexico Secretary of State (SoS)

W www.sos.state.nm.us

Main activities. Records, files, or registers all corporations and LLCs doing business in New Mexico, partnership registrations, trademark/service mark registrations, Uniform Commercial Code (UCC) filings, service of process on corporations, and agricultural liens.

New Mexico Attorney General (N MAG)

W www.nmag.gov/

Main activities. Chief law enforcement officer of the state. The Attorney General enforces consumer protection laws to prevent and deter unfair, deceptive, anti-competitive and unlawful practices that injure consumers and businesses.

ONLINE RESOURCES

The Compilation Commission

W www.nmcompcomm.us/

Description. The New Mexico Compilation Commission is statutorily responsible for compiling the state's session laws into the official New Mexico Statutes Annotated, including state court rules, and is the official legal publisher of New Mexico appellate court decisions.

Practical Law Contributor profiles



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Qualified. New Mexico, 1968

Areas of practice. Real estate; land use and development law; municipal and administrative law.

Recent transactions

- Represented developer in subdividing and developing the second phase of a residential community and in other ongoing real estate matters.
- Represented university in lease of land for student housing project.
- Represented university in acquisition, possibly by condemnation, of lots adjacent to the university's campus.
- Represented university in negotiations with development group for development of mixed-use buildings, parking structures and high-density developments on campus.

Qualified. New Mexico, 2008

Areas of practice. Real estate; land use; finance law.

Recent transactions

- Represented oil companies in acquisition, leasing and development of real estate.
- Represented community college in its acquisition of an industrial business centre.
- Represented for profit and non-profit corporations in lease and sublease of commercial space.