

1 **13-2326. Whistleblower Protection Act; damages.**

2 If you decide in favor of \_\_\_\_\_ (*name of plaintiff*) on [any of]  
3 \_\_\_\_\_'s (*name of plaintiff*) claim[s] under the Whistleblower Protection Act, then  
4 you must fix the amount of money damages that will reasonably and fairly compensate  
5 \_\_\_\_\_ (*name of plaintiff*) for any of the following elements of damages proved to  
6 have resulted from the wrongful conduct of \_\_\_\_\_ (*name of defendant*):

7 [(1) The wages \_\_\_\_\_ (*name of plaintiff*) would have earned during the  
8 period that \_\_\_\_\_ (*name of plaintiff*) would have remained employed by  
9 \_\_\_\_\_ (*defendant*) had there been no retaliatory action.]

10 [(2) The value of employment benefits, including \_\_\_\_\_ (*insert*  
11 *specific benefits at issue*).]

12 [(3) Compensation for any \_\_\_\_\_ (*insert any special damage*)  
13 sustained as a result of the violation.]

14 Whether any of these elements of damages has been proved by the evidence is for you to  
15 determine. Your verdict must be based on proof, and not on speculation, guess, or conjecture.  
16 Further, sympathy for a person, or prejudice against any party, should not affect your verdict and  
17 is not a proper basis for determining damages.

18 USE NOTES

19 This is the basic form of damages instructions for Whistleblower Protection Act claims. It  
20 must be completed by inserting appropriate elements of general and/or special damages as  
21 supported by the law and the evidence. The court should decide what, if any, special damages may  
22 be included.

1 [Adopted by Supreme Court Order No. 22-8300-030, effective for all cases pending or filed on or  
2 after December 31, 2022.]

3 **Committee commentary.** — The Whistleblower Protection Act (“WPA”), NMSA 1978, §§ 10-  
4 16C-1 to -6 (2010), permits recovery of actual damages, special damages, and double back pay  
5 with interest, and an order of reinstatement. *See* ~~[NMSA 1978, § 10-16C-4(A)]~~ § 10-16C-4(A);  
6 *Maestas v. Town of Taos*, 2020-NMCA-027, ¶ 17, 464 P.3d 1056. This combination of legal and  
7 equitable remedies implicates both the court and the jury. The term “actual damages” is  
8 “synonymous with compensatory damages.” *Behrmann v. Phototron Corp.*, 1990-NMSC-073, ¶  
9 24, 110 N.M. 323, 795 P.2d 1015 (addressing the meaning of “actual damages” under the New  
10 Mexico Human Rights Act, NMSA 1978, § 28-1-13(D) (2005)). General and/or special damages  
11 may include lost wages (UJI 13-2311 NMRA), lost benefits (UJI 13-2312 NMRA), and reasonable  
12 expenses (UJI 13-2313 NMRA). Expenses of securing new employment (UJI 13-2313) is a typical  
13 element of special damage that could be inserted in appropriate cases. *See* § 10-16C-4(A); *see also*  
14 *Velasquez v. Regents of N. N.M. Coll.*, 2021-NMCA-007, ¶¶ 50-60, 484 P.3d 970 (addressing  
15 reinstatement remedy under the WPA). Subsections ~~[10-16A-4(C) and (D)]~~ 10-16C-4(C) and (D)  
16 indicate that the remedies provided under the WPA are not exclusive.

17 In addition, an employer shall be required to pay the litigation costs and reasonable attorney fees  
18 of the employee. “The WPA provides that an employer that violates the WPA ‘shall’ be required  
19 to pay the employee’s reasonable attorney fees.” *Maestas*, 2020-NMCA-027, ¶ 19 (citing Section  
20 10-16C-4(A)). “Attorney fees under the WPA, in contrast [to attorney fee statutes that contain the  
21 term “prevailing party”], depend on whether a public employer is found to have violated the  
22 provisions of the WPA, and are not conditioned on an employee’s status as a prevailing party.”  
23 *Maestas*, 2020-NMCA-027, ¶ 20.

1 “Section 10-16C-4(A) creates two kinds of remedies—*viz.*, monetary damages and the injunctive  
2 relief of reinstatement of a public employee to [~~his or her~~] [the employee’s] former position of  
3 employment.” *Flores v. Herrera*, 2016-NMSC-033, ¶ 13, 384 P.3d 1070. “Courts are in general  
4 agreement that front pay is only available if the court finds that reinstatement is inappropriate.”  
5 *Maestas*, 2020-NMCA-027, ¶ 12 (internal quotation marks and [~~citations~~] citation omitted).

6 As a result of the potential mix of equitable and legal claims under the WPA, the court should  
7 consider the division of roles under Section 10-16C-4(A) between the jury and the judge. Where,  
8 for example, the Act’s equitable remedy of reinstatement is implicated, “the district court must  
9 determine the mode and order of trial when legal and equitable claims have been joined.” [~~*Maestas*,~~  
10 ~~2020-NMCA-027,~~] *Id.* ¶ 11 ([~~internal quotation marks, citations, and brackets omitted~~] brackets,  
11 internal quotation marks, and citation omitted). “As a general matter, the district court determines  
12 when and if equitable relief is appropriate, not a jury.” *Id.* Further,

13 when equitable and legal claims present common issues of fact which are material  
14 to the disposition of both claims, the legal claims must be submitted to a jury before  
15 the equitable claims are decided. Otherwise, the judge while deciding the equitable  
16 claims will have invaded the province of the jury by deciding disputed facts that  
17 are material to the legal claim.

18 *Blea v. Fields*, 2005-NMSC-029, ¶ 1, 138 N.M. 348, 120 P.3d 430.

19 These instructions have been drafted on the assumption that the jury will be asked to determine  
20 the amount of back pay and the court will double that amount in entering judgment, as a ministerial  
21 act under the statutory directive. The instructions also have been drafted on the assumption—  
22 though the statute is not specific on this point—that the court will determine the rate of interest to  
23 be applied to the award of double back pay.

- 1 [Adopted by Supreme Court Order No. 22-8300-030~~], effective for all cases pending or filed on~~
- 2 ~~or after December 31, 2022~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]