

## EMPLOYMENT LAW --- THE MONTANA DIFFERENCE

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### I. The Employment Relationship

A. State and federal laws governing the employment relationship parallel one another, but are not always identical. This outline will attempt to highlight some areas of Montana law that differ from other state and federal laws, but it is not exhaustive. Practitioners should always consult case law, the Montana Code Annotated (MCA), and the Administrative Rules of Montana (A.R.M.).

B. The general rule, based on the idea that the worker is in an inferior bargaining position, is that the law most favorable to the employee will control unless federal law has preempted the field, i.e. *see* Labor Management Relations Act, 29 U.S.C §141, *et. seq.*

C. Basically a contractual relationship, but does not require a writing, i.e. employer will provide pay and benefits if employee does certain tasks. *See* 39-2-101, MCA.

D. Montana law will apply where there is even **one** employee.

### II. Obligations on both sides are set out in Title 39, MCA.

#### A. Workforce Drug and Alcohol Act, 39-2-206, through -211, MCA.

1. Unless testing is mandated by another specific law, Montana employers may only test certain applicants and employees for controlled substances and alcohol.

2. To be subject to testing, the person must be engaged in “performance, supervision or management of work in a hazardous work environment, security position, position affecting public safety or fiduciary position.” 39-2-206(4), MCA.

3. The employer must have a written testing policy that meets statutory qualifications. 39-2-207, MCA.

4. There are other procedural requirements.

- B. Montana employers cannot require lie detector tests as a condition of employment. 39-2-304, MCA.
- C. Employer must pay for any medical examinations required as a condition of employment. 39-2-301, MCA.
- D. With some exceptions, employers cannot discriminate based upon use of a lawful product like alcohol or tobacco during non-working hours. 39-2-313, MCA.

### **III. Termination of Employment**

#### **A. The Montana Wrongful Discharge from Employment Act (WDEA), 39-2-901, through -915, MCA.**

1. After completion of the employer's probationary period, an employee may only be discharged for "good cause" as defined in the statute, 39-2-903(5), MCA.
  - a) **Note:** The WDEA provides for a 6 month probationary period unless the employer establishes a specific period or has, at the time of hire, no probationary period. 39-2-904 (2)(b), MCA.
2. Employees may not be discharged, even during the probationary period, in retaliation for refusing to violate public policy or reporting a violation of public policy. 39-2-904(a), MCA.
3. A Montana employer may not discharge an employee in violation of "the express provisions of its own written personnel policy." 39-2-904(c), MCA.
  - a) Handbooks are not contracts under Montana law, but employers must follow their own policies.
4. There are no longer any common-law causes of action for discharge. 39-2-913, MCA.
5. A wrongfully discharged employee can recover up to four years lost wages and fringe benefits, but must mitigate.
  - a) No damages for pain and suffering, etc.
  - b) No attorney fees unless losing party has refused an offer to arbitrate.
    - (1) Offer must meet statutory conditions set out in 39-2-915, MCA.

(2) Offer must be made within 60 days after service of the complaint.

(3) Either party can make offer.

6. WDEA does not apply to situations where the discharged employee has another legal remedy, including illegal discrimination cases, and employees covered by a written collective bargaining agreement or those with a written contract for a specific term. 39-2-912, MCA.

7. One year statute of limitations on discharge cases. 39-2-911, MCA.

8. If employer has an appeal procedure, gives it to the discharged employee within 7 days of discharge, and the employee fails to use it, the claim is barred. 39-2-911(3), MCA.

## **B. Other Considerations**

### **1. Workers' Compensation**

a) Employees cannot be terminated for making a claim. 39-71-317, MCA.

b) An employee who is released to work has a hiring preference for two years from the date of injury. 39-71-317, MCA.

2. Employee cannot be terminated because of garnishment.

3. Blacklisting is prohibited. 39-2-801, MCA.

a) Blacklisted employees can seek punitive damages and blacklisting is a misdemeanor.

b) If employee demands reasons for discharge, employer must furnish them within a reasonable time.

(1) The demand must advise the employer that its statements may be used in litigation.

(2) Former employers are allowed to provide a "a truthful statement of the reasons for discharge." No other privilege or protection is given to employers who provide references.

## **IV. Wages and Hours**

A. Montana's laws are stricter than the federal Fair Labor Standards Act (FLSA).

1. State minimum wage exceeds federal minimum wage and is re-evaluated once a year. 39-3-409, MCA.
2. Exemptions from minimum wage and overtime requirements are not always the same under Montana law as they are under the FLSA. 39-3-405, -406, MCA.
3. Montana employers may not credit tips against wages.

**B.** Methods of payment are state-specific. 39-3-204, MCA.

1. Cannot pay electronically without consent of employee.
2. Must have employee's written permission for any deductions other than those mandated by law.
3. Must pay on time and give an itemized statement of deductions.
4. Must pay upon separation unless employer has a written policy that it will pay on the next regular payday or in 15 days, whichever is sooner. 39-3-205, MCA.
5. Certain employments are limited to 8-hour days. 39-4-101, through -112, MCA.

**C.** Everything that is owed to the employee is "wages" including accrued vacation. 39-3-201(6)(a), MCA.

1. Once vacation is accrued, employers cannot apply a "use it or lose it" policy.
2. Employers can put conditions on earning or accrual.

**D.** Montana law does not require employers to provide meal or rest breaks – paid or unpaid, but:

1. Any break less than 30 minutes must be paid time.
2. Breaks over 30 minutes can be unpaid as long as the worker is completely relieved of duty.

**E.** The burden is on the employer to keep accurate records of hours and wages.

**V. Independent Contractors.**

A. True independent contractors are exempt from minimum wage and overtime laws, as well as workers' compensation, unemployment, etc.

B. If the worker does not have her own fixed business location, she must apply to the department of labor and industry for certification as an independent contractor. 39-71-417, MCA.

1. An independent contractor has to prove:
  - a) She is free from control or direction over the performance of the work;
  - b) She is engaged in an independently established trade, occupation or business;
2. Proof must be a satisfactory form such as business documents, tax returns, etc.

C. If the department of labor and industry finds that a worker is not really an independent contractor, that worker is an employee and is entitled to the benefit of all the labor laws.

D. The burden is on the person employing the worker to make sure she is really an independent contractor.

## **VI. Discrimination**

### **A. The Montana Human Rights Act, 49-2-101 MCA, *et. seq.***

1. Employers may not discriminate “because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status or sex distinction.” 49-2-303, MCA.

- a) Two categories not listed under federal law
  - (1) creed
  - (2) marital status
    - (a) this includes married, divorced or single
- b) Complaint must be filed with the department of labor and industry within 180 days of last discriminatory act. 49-2-501, MCA.
- c) Must go through the administrative process first.
- d) Punitive damages are not available.

2. Retaliation is also prohibited. 49-2-301, MCA.

3. Supervisors can be held individually liable. 49-2-101(11), MCA.

**B. The Montana Maternity Leave Act, 49-2-310, -311, MCA.**

1. Employer cannot terminate an employee because of her pregnancy.

2. Employer must grant a “reasonable leave of absence for the pregnancy.”

3. May not deny an “employee who is disabled as a result of pregnancy any compensation to which the employee is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by the employer.”

4. Employers may not require a mandatory leave for an “unreasonable length of time.”

5. Must reinstate the employee at the end of a “pregnancy-related leave” to her original job or an equivalent position unless circumstances have so changed that it is impossible.

6. **Note:** This is the only Montana law similar to the federal Family and Medical Leave Act (FMLA). There is no mandatory leave for new fathers (*but see* discussion of marital status discrimination above.)

**VII. Miscellaneous Provisions**

**A. Right to Privacy**

1. Montana employees have a right to privacy

a) in their employment files, personnel records, lifestyle

b) Neither employer nor employee can record conversations without the knowledge of the other person. 45-8-213, MCA.

**B. Safe Place to Work, 50-71-201, MCA.**

1. Employers must provide safe places to work. This includes preventing damages to mental health as well as physical harm.

2. Must “purchase, furnish, and require the use of health and safety devices, safeguards, protective safety clothing, or other health and safety items, including but not limited to air masks, hardhats, and protective gloves, that may be required by state or federal law.”

**C. Clean Indoor Air Act, 50-40-101, et. seq MCA.**

1. Smoking is prohibited in workplaces, even if only one worker.

**D. Administrative Hearings (Discrimination, Wages, Unemployment, etc.)**

1. Corporations must be represented by counsel with authority to practice in Montana.
2. Even in telephone hearings, employer has burden of providing admissible evidence. No hearsay.

**E. Unemployment Compensation**

1. Findings and decisions of the department may not be used as admissible evidence in any other proceeding. 39-59-110, MCA.
  - a) Worker may not use the fact that he was eligible to receive unemployment compensation as evidence of wrongful discharge.
2. The 2013 Montana Legislature enacted a new detailed definition of “misconduct” as would disqualify a worker from receiving benefits. 39-59-201 (19), MCA.

**F. Workers’ Compensation/ Occupational Disease**

1. Mental injuries caused by mental distress are not covered by the workers’ compensation laws.
2. Occupational diseases are covered in the same way as workplace injuries.

**G. Medical Marijuana, 50-46-320, MCA.**

1. Employers do not have to accommodate the use of medical marijuana in the workplace.
2. Employer can include “in any contract a provision prohibiting the use of marijuana for a debilitating medical condition.”
3. Employees may not bring a claim against an employer for wrongful discharge or discrimination because of use of medical marijuana.

**H. Non-compete Agreements**

1. Are considered a restraint on trade. 28-2-708, MCA.
  - a) Cannot completely restrict an employee from practicing his or her occupation.
2. They must reasonable or they won’t be enforced.

3. If existing employees are asked to agree, there must be independent consideration.

## VIII. **Traps for the unwary**

- A. WDEA
  1. Probationary period
  2. Appeal or grievance procedure
- B. Wages
  1. Minimum wage
  2. Final paycheck
  3. Accrued vacation
  4. Electronic transfer
- C. Drug testing restrictions
- D. Discrimination
  1. Marital status
  2. Maternity Leave Act

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