

HOUSE BILL 569

Introduced by Russell, et al.

2/10	Introduced
2/10	Referred to Labor & Employment Relations
2/10	First Reading
2/16	Hearing
2/16	Tabled in Committee

1 House BILL NO. 569
 2 INTRODUCED BY Russell Yellowtail
 3 Enrolled
 4 A BILL FOR AN ACT ENTITLED: "AN ACT ESTABLISHING AN
 5 ENFORCEMENT PROCEDURE FOR NONCOMPLIANCE WITH THE STATE LAW
 6 THAT A HIRING PREFERENCE BE GIVEN TO A QUALIFIED INDIAN
 7 RESIDENT OF AN INDIAN RESERVATION FOR A STATE JOB WITHIN THE
 8 RESERVATION; ESTABLISHING A PENALTY FOR NONCOMPLIANCE WITH
 9 THE HIRING PREFERENCE LAW FOR A STATE CONSTRUCTION JOB;
 10 MAKING HIRING PREFERENCE FOR RESIDENTS OF INDIAN
 11 RESERVATIONS CONSISTENT WITH OTHER PREFERENCE LAWS; AMENDING
 12 SECTIONS 2-18-111, 18-1-110, AND 39-30-201, MCA; AND
 13 PROVIDING AN IMMEDIATE EFFECTIVE DATE."

14
 15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 Section 1. Section 2-18-111, MCA, is amended to read:

17 "2-18-111. Hiring preference for residents of Indian
 18 reservations for state jobs within reservation -- rules. (1)
 19 A state agency that operates within an Indian reservation
 20 shall give a preference in hiring for a position of
 21 employment with the state agency to an Indian resident of
 22 the reservation who has substantially equal qualifications
 23 for the position.

24 (2) A state agency shall, either by posting or by
 25 printing on the application form, give notice of the

1 preference.

2 (3) A job applicant who believes that the preference
 3 should apply shall claim the preference in writing before
 4 the deadline for filing applications for the position.
 5 Failure to make a timely preference claim for a position is
 6 a complete defense to an action instituted by an applicant
 7 under this section with regard to that position.

8 (4) If an applicant for a position makes a timely
 9 preference claim, the state agency shall give written notice
 10 of its hiring decision to the applicant claiming the
 11 preference.

12 (2)(5) The commissioner of labor and industry shall
 13 enforce this section, investigate complaints of its
 14 violation, and may adopt rules to implement this section.

15 (3)(6) For the purposes of this section, the following
 16 definitions apply:

17 (a) "Indian" means a person who is enrolled or who is a
 18 lineal descendant of a person enrolled upon an enrollment
 19 listing of the bureau of Indian affairs or upon the
 20 enrollment listing of a recognized Indian tribe, domiciled
 21 in the United States.

22 (b) "Position" means a permanent, temporary, or
 23 seasonal position as defined in 2-18-101 for a state
 24 position. The term does not include:

25 (i) a state elected office;

(ii) appointment by an elected official to a body, such as a board, commission, committee, or council;

(iii) appointment by an elected official to a public office if the appointment is provided for by law; or

(iv) engagement as an independent contractor or employment by an independent contractor.

(c) "State agency" means a department, office, board, bureau, commission, agency, or other instrumentality of the executive or judicial branches of the government of this state.

(d) "Substantially equal qualifications" means the qualifications of two or more persons among whom the employer cannot make a reasonable determination that the qualifications held by one person are significantly better suited for the position than the qualifications held by the other persons.

(7) The preference provided in this section has priority over the preference provided in 39-30-201."

Section 2. Section 18-1-110, MCA, is amended to read:

"18-1-110. Hiring preference for residents of Indian reservations for state construction projects within reservation -- rules -- penalty. (1) For any contract awarded by a state agency for a state construction project within the exterior boundaries of an Indian reservation, except a project partially funded with federal-aid money

from the United States department of transportation or when residency preference laws are specifically prohibited by federal law, there must be inserted in the bid specification and the contract a provision, in language approved by the commissioner of labor and industry, implementing the requirements of this subsection. The bid specification and the contract must provide that a preference in hiring for positions of employment be given to Indian residents of the reservation who have substantially equal qualifications for any position. The preference provided in this section has priority over the preference provided in 39-30-201. For the purposes of this section, the definitions in 2-18-111 apply.

(2) The commissioner of labor and industry shall enforce this section, investigate complaints of its violation, and may adopt rules to implement this section.

(3) A person, firm, or corporation that fails to comply with the provisions of subsection (1) shall forfeit \$1,000 of the contract price as liquidated damages. The money must be credited to the department of commerce and must be allocated to fund the office of state coordinator of Indian affairs.

(4) Whenever an action has been instituted in a district court in this state against any person, firm, or corporation for a violation of this part, the court in which the action is pending is authorized to issue an injunction

1 to restrain the person, firm, or corporation from proceeding
 2 with the contract until the final determination of the
 3 action.

4 (5) The license of a person, firm, or corporation that
 5 is found by a district court or the supreme court to have
 6 violated the provisions of this part must be suspended in
 7 the manner prescribed by 37-71-301 for a period of 1 year
 8 after the date of final judgment of the violation."

9 **NEW SECTION. Section 3. Enforcement of preference. (1)**
 10 An applicant who believes the applicant's rights under this
 11 chapter have not been recognized may, within 30 days of
 12 receipt of the notice of the hiring decision provided for in
 13 2-18-111, submit to the state agency a written request for
 14 an explanation of the state agency's hiring decision. Within
 15 15 days of receipt of the request, the state agency shall
 16 give the applicant a written explanation.

17 (2) The applicant may, within 90 days after receipt of
 18 notice of the hiring decision, file a petition in the
 19 district court in the county in which the application was
 20 received by the state agency. The petition must state facts
 21 that on their face entitle the applicant to an employment
 22 preference.

23 (3) (a) Upon filing of the petition, the court shall
 24 order the state agency to appear in court at a specified
 25 time, not less than 10 or more than 30 days after the day

1 the petition was filed, and show cause why the applicant was
 2 not hired for the position. At the hearing, the state agency
 3 has the burden of proving by a preponderance of the evidence
 4 that the employer made a reasonable determination pursuant
 5 to 2-18-111(6)(d) and the applicant has the burden of
 6 proving by a preponderance of the evidence that the
 7 applicant is a preference eligible applicant.

8 (b) The time to appear in court provided for in
 9 subsection (3)(a) may be waived by stipulation of the
 10 parties. If the time to appear in court has been specified
 11 pursuant to subsection (3)(a), the court may, on motion of
 12 one of the parties or on stipulation of all of the parties,
 13 grant a continuance.

14 (c) If the state agency does not carry its burden of
 15 proof under subsection (3)(a) and the court finds that the
 16 applicant is a preference eligible applicant, the court
 17 shall order the state agency to reopen the selection process
 18 for the position involved and shall grant the applicant
 19 reasonable attorney fees and court costs. The remedy
 20 provided by this section is the only remedy for a violation
 21 of 2-18-111, and a court may not grant any other relief.

22 (4) Failure of an applicant to file a petition under
 23 subsection (2) within 90 days bars the filing of a petition.
 24 If a state agency fails to provide a written explanation
 25 within 15 days, as provided in subsection (1), and a

petition is filed under subsection (2), the court shall order the state agency to reopen the selection process.

(5) The Montana Rules of Civil Procedure apply to a proceeding under this section to the extent that they do not conflict with this section.

NEW SECTION. Section 4. Notice and claim of preference. (1) A contractor shall, by posting or by printing on the application form, give notice of the preference provided in 18-1-110.

(2) A job applicant who believes the preference should apply shall claim the preference in writing before the deadline for filing applications for the position. Failure to make a timely employment preference claim for a position is a complete defense to an action instituted by an applicant under [section 5] with regard to that position.

(3) If an applicant for a position makes a timely employment preference claim, the contractor shall give written notice of its hiring decision to each applicant claiming preference.

NEW SECTION. Section 5. Enforcement of preference. (1) An applicant who believes the applicant's rights under 18-1-110 have not been recognized may, within 30 days of receipt of the notice of the hiring decision provided for in [section 4], submit to the contractor a written request for an explanation of the contractor's hiring decision. Within

15 days of receipt of the request, the contractor shall give the applicant a written explanation.

(2) The applicant may, within 90 days after receipt of notice of the hiring decision, file a petition in the district court in the county in which the application was received by the contractor. The petition must state facts that on their face entitle the applicant to an employment preference.

(3) (a) Upon filing of the petition, the court shall order the contractor to appear in court at a specified time, not less than 10 or more than 30 days after the day the petition was filed, and show cause why the applicant was not hired for the position. At the hearing, the contractor has the burden of proving by a preponderance of the evidence that the contractor applied the employment preference under 18-1-110 and made a reasonable hiring decision. The applicant has the burden of proving by a preponderance of the evidence that the applicant is eligible for the preference.

(b) The time to appear provided in subsection (3)(a) may be waived by stipulation of the parties. If a time to appear has been specified pursuant to subsection (3)(a), the court may, on motion of one of the parties or on stipulation of all of the parties, grant a continuance.

(c) If the contractor does not carry the burden of

1 proof under subsection (3)(a) and the court finds that the
 2 applicant is a preference eligible applicant, the court
 3 shall order the contractor to comply with the provisions of
 4 18-1-110. The court shall, upon proper proof, grant the
 5 applicant backpay, reasonable attorney fees, and costs.

6 (4) Failure of an applicant to file a petition under
 7 subsection (2) within 90 days bars the filing of a petition.
 8 If a contractor fails to provide an explanation under
 9 subsection (1) within 15 days and a petition is filed under
 10 subsection (2), the court shall order the contractor to
 11 comply with the provisions of 18-1-110.

12 (5) The Montana Rules of Civil Procedure apply to a
 13 proceeding under this section to the extent that they do not
 14 conflict with this section.

15 **Section 6.** Section 39-30-201, MCA, is amended to read:

16 "39-30-201. **Employment preference in initial hiring.**
 17 (1) (a) Except as provided in 10-2-402, in an initial hiring
 18 for a position, if a job applicant who is a handicapped
 19 person or eligible spouse meets the eligibility requirements
 20 contained in 39-30-202 and claims a preference as required
 21 by 39-30-206, a public employer shall hire the applicant
 22 over any other applicant with substantially equal
 23 qualifications who is not a preference eligible applicant.

24 (b) In an initial hiring, a public employer or a state
 25 agency, as defined in 2-18-111, shall hire a handicapped

1 person over any other preference eligible applicant with
 2 substantially equal qualifications unless the position of
 3 employment is located within an Indian reservation and an
 4 applicant meets the preference requirements provided in
 5 2-18-111 or 18-1-110.

6 (2) The employment preference provided for in
 7 subsection (1) does not apply to a personnel action
 8 described in 39-30-103(3)(b) or to any other personnel
 9 action that is not an initial hiring."

10 **NEW SECTION. Section 7.** Codification instruction. (1)
 11 [Section 3] is intended to be codified as an integral part
 12 of Title 2, chapter 18, part 1, and the provisions of Title
 13 2, chapter 18, part 1, apply to [section 3].

14 (2) [Sections 4 and 5] are intended to be codified as
 15 an integral part of Title 18, chapter 1, part 1, and the
 16 provisions of Title 18, chapter 1, part 1, apply to
 17 [sections 4 and 5].

18 **NEW SECTION. Section 8.** Effective date. [This act] is
 19 effective on passage and approval.

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