

1 HOUSE BILL NO. 161

2 INTRODUCED BY BARNHART

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT CREATING A PUBLIC EMPLOYMENT HIRING PREFERENCE FOR
5 PERSONS ELIGIBLE FOR PARTICIPATION IN THE FAMILIES ACHIEVING INDEPENDENCE IN MONTANA
6 PROJECT; AND AMENDING SECTIONS 10-2-402, 49-2-405, AND 49-3-103, MCA."
7

8 STATEMENT OF INTENT

9 A statement of intent is required for this bill because the department of administration is required
10 in [section 4] to adopt rules to implement the provisions of the Families Achieving Independence in Montana
11 Employment Preference Act. The legislature anticipates that the rules will address the forms required for
12 certification of eligible persons and the procedures for public employers to follow in ensuring the application
13 of the preferences provided in the Families Achieving Independence in Montana Employment Preference
14 Act.
15

16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
17

18 NEW SECTION. **Section 1. Short title.** [Sections 1 through 11] may be cited as the "Families
19 Achieving Independence in Montana Employment Preference Act".
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21 NEW SECTION. **Section 2. Purposes.** The purposes of [sections 1 through 11] are to recognize
22 the effects of state and federal reforms of public assistance programs and the employment needs of
23 persons and families attempting to achieve economic independence and to facilitate the transition of
24 economically dependent families to economic independence by encouraging the employment of persons and
25 families through a public hiring preference.
26

27 NEW SECTION. **Section 3. Definitions.** For the purposes of [sections 1 through 11], the following
28 definitions apply:

29 (1) "Eligible person" means a person determined by the department of public health and human
30 services to be eligible under the families achieving independence in Montana project pursuant to 53-4-606.

1 (2) (a) "Initial hiring" means a personnel action for which applications are solicited from outside the
2 ranks of the current employees of:

3 (i) a department, as defined in 2-15-102, for a position within the executive branch;

4 (ii) a legislative agency for a position within the legislative branch;

5 (iii) a judicial agency, such as the office of supreme court administrator, office of supreme court
6 clerk, state law library, or similar office in a state district court, for a position within the judicial branch;

7 (iv) a city or town for a municipal position, including a city or municipal court position; and

8 (v) a county for a county position, including a justice's court position.

9 (b) A personnel action is not an initial hiring if it is limited to current employees of a specific public
10 entity identified in subsection (2)(a), current employees in a reduction-in-force pool who have been laid off
11 from a specific public entity identified in subsection (2)(a), or current participants in a federally authorized
12 employment program.

13 (3) (a) "Position" means a permanent or seasonal position as defined in 2-18-101 for a state
14 position or a similar permanent or seasonal position with a public employer other than the state.

15 (b) The term does not include:

16 (i) a temporary position as defined in 2-18-101 for a state position or similar temporary position
17 with a public employer other than the state;

18 (ii) a state or local elected official;

19 (iii) employment as an elected official's immediate secretary, legal adviser, court reporter, or
20 administrative, legislative, or other immediate or first-line aide;

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

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

24 (vi) a department head appointment by the governor or an executive department head appointment
25 by a mayor, city manager, county commissioner, or other chief administrative or executive officer of a local
26 government; or

27 (vii) engagement as an independent contractor or employment by an independent contractor.

28 (4) (a) "Public employer" means:

29 (i) any department, office, board, bureau, commission, agency, or other instrumentality of the
30 executive, judicial, or legislative branch of the government of the state of Montana; and

1 (ii) any county, city, or town.

2 (b) The term does not include a school district, a vocational-technical program, a community
3 college, the board of regents of higher education, the Montana university system, a special purpose district,
4 an authority, or any political subdivision of the state other than a county, city, or town.

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

8
9 **NEW SECTION. Section 4. Adoption of rules.** The department of administration shall adopt rules
10 implementing [sections 1 through 11] and shall consult with the department of public health and human
11 services in adopting rules governing certification of eligible persons for purposes of [sections 1 through 11].
12 The department of administration's rules apply to all public employers.

13
14 **NEW SECTION. Section 5. Certification of eligible persons.** The department of public health and
15 human services shall certify persons as eligible for the purpose of the employment preference as provided
16 in [sections 1 through 11].

17
18 **NEW SECTION. Section 6. No application if conflict with federal law.** [Sections 1 through 11] do
19 not apply to work or positions subject to federal laws or regulations if application of the employment
20 preference conflicts with those laws or regulations.

21
22 **NEW SECTION. Section 7. Employment preference in initial hiring.** (1)(a) Except as provided in
23 10-2-402 or in subsection (1)(b), in an initial hiring for a position, if a job applicant who is an eligible person
24 meets the eligibility requirements contained in [section 8] and claims a preference as required by [section
25 10], a public employer shall hire the applicant over any other applicant with substantially equal
26 qualifications who is not a preference-eligible applicant.

27 (b) A public employer is not required to hire an applicant claiming the preference provided in
28 [sections 1 through 11] if there is a substantially equally qualified applicant claiming a preference under
29 Title 39, chapter 30, the Montana Handicapped Persons' Employment Preference Act.

30 (c) In an initial hiring, a public employer shall hire an eligible person over any other nonhandicapped,

1 preference-eligible applicant with substantially equal qualifications.

2 (2) The employment preference provided for in subsection (1) does not apply to a personnel action
3 described in [section 3(2)(b)] or to any other personnel action that is not an initial hiring.

4
5 **NEW SECTION. Section 8. Eligibility requirements.** An eligible person is not entitled to receive an
6 employment preference as provided in [section 7] unless the person:

7 (1) is a United States citizen;

8 (2) has resided continuously in the state for at least 1 year immediately before applying for
9 employment;

10 (3) if applying for municipal or county employment, has resided for at least 30 days immediately
11 before applying for employment in the county, city, or town in which employment is sought; and

12 (4) meets those requirements considered necessary by a public employer to successfully perform
13 the essential duties of the position for which the applicant is applying.

14
15 **NEW SECTION. Section 9. Duration of preference.** Subject to [section 8], an eligible person
16 qualifies for employment preference as long as the person is eligible for the families achieving independence
17 in Montana project under 53-4-606.

18
19 **NEW SECTION. Section 10. Notice and claim of preference.** (1) A public employer shall, by posting
20 or on the application form, give notice of the preferences that [sections 1 through 11] provides in public
21 employment.

22 (2) A job applicant who believes the employment preference provided in [sections 1 through 11]
23 is applicable shall claim the preference in writing before the time for filing applications for the position
24 involved has passed. Failure to make a timely employment preference claim for a position is a complete
25 defense to an action in regard to that position under [section 11].

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

28
29 **NEW SECTION. Section 11. Enforcement of preference.** (1) An applicant who believes that the
30 provisions of [sections 1 through 11] should have been but were not applied during the hiring process may,

1 within 30 days of receipt of the notice of the hiring decision provided for in [section 10], submit to the
2 public employer a written request for an explanation of the public employer's hiring decision. Within 15
3 days of receipt of the request, the public employer shall give the applicant a written explanation.

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

7 (3) (a) Upon filing of the petition, the court shall order the public employer to appear in court at
8 a specified time not less than 10 or more than 30 days after the day the petition was filed and show cause
9 why the applicant was not hired for the position. At the hearing, the public employer has the burden of
10 proving by a preponderance of the evidence that the employer made a reasonable determination of
11 substantially equal qualifications and the applicant has the burden of proving by a preponderance of the
12 evidence that, as a preference-eligible applicant, the provisions of [sections 1 through 11] were not
13 appropriately applied.

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

17 (c) If the public employer does not carry its burden of proof under subsection (3)(a) and the court
18 finds that the applicant is a preference-eligible applicant, the court shall order the public employer to reopen
19 the selection process for the position involved and shall grant the applicant reasonable attorney fees and
20 court costs. The remedy provided by this section is the only remedy for a violation of [sections 1 through
21 11], and a court may not grant any other relief in an action for violation of [sections 1 through 11].

22 (4) Failure of an applicant to file a petition under subsection (2) within 90 days bars the filing of
23 a petition. If a public employer fails to provide an explanation under subsection (1) within 15 days and a
24 petition is filed under subsection (2), the court shall order the public employer to reopen the selection
25 process.

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

28
29 **Section 12.** Section 10-2-402, MCA, is amended to read:

30 **"10-2-402. Superintendent to be given veterans' preference.** In the selection of the superintendent

1 of each of the Montana veterans' homes, the department of public health and human services shall apply
2 the preference granted to veterans and disabled veterans under 39-29-102, but not the preference granted
3 to other persons under 39-29-102 ~~or~~, Title 39, chapter 30, or [sections 1 through 11]."

4
5 **Section 13.** Section 49-2-405, MCA, is amended to read:

6 **"49-2-405. Veterans' and handicapped persons' employment preference.** The application of an
7 employment preference as provided for in Title 39, chapter 29 or 30, ~~and 10-2-402,~~ and [sections 1
8 through 11] by a public employer as defined in 39-29-101 ~~and~~, 39-30-103, and [section 3] may not be
9 construed to constitute a violation of this chapter."

10
11 **Section 14.** Section 49-3-103, MCA, is amended to read:

12 **"49-3-103. Permitted distinctions.** (1) ~~Nothing in this~~ This chapter prohibits any ~~does not prohibit~~
13 a public employer:

14 (a) from enforcing a differentiation based on marital status, age, or physical or mental disability
15 when based on a bona fide occupational qualification reasonably necessary to the normal operation of the
16 particular business or where the differentiation is based on reasonable factors other than age;

17 (b) from observing the terms of a bona fide seniority system or any bona fide employee benefit
18 plan, such as a retirement, pension, or insurance plan, that is not a subterfuge to evade the purposes of
19 this chapter, except that an employee benefit plan may not excuse the failure to hire any individual;

20 (c) from discharging or otherwise disciplining an individual for good cause; or

21 (d) from providing greater or additional contributions to a bona fide group insurance plan for
22 employees with dependents than to those employees without dependents or with fewer dependents.

23 (2) The application of an employment preference as provided for in 2-18-111, 10-2-402, 18-1-110,
24 ~~and~~ Title 39, chapter 29 or 30, and [sections 1 through 11] by a public employer as defined in 39-29-101
25 ~~and~~, 39-30-103, and [section 3] may not be construed to constitute a violation of this chapter."

26
27 **NEW SECTION. Section 15. Codification instruction.** [Sections 1 through 11] are intended to be
28 codified as an integral part of Title 39, and the provisions of Title 39 apply to [sections 1 through 11].

29
30 **NEW SECTION. Section 16. Saving clause.** [This act] does not affect rights and duties that

1 matured, penalties that were incurred, or proceedings that were begun before [the effective date of this
2 act].

3 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0161, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

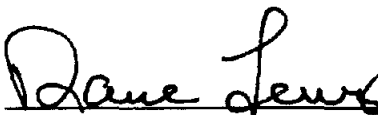
An act creating a public employment hiring preference for eligible persons participating in the Families Achieving Independence in Montana (FAIM) program.

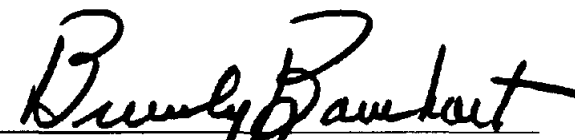
ASSUMPTIONS:

1. It is difficult to anticipate the number of FAIM participants who would be employed as a result of this legislation.
2. In addition, without knowing the earnings level and particular circumstances of eligible persons, it is not possible to project whether their employment as a result of this bill would impact any benefits they receive.
3. The cost of modifying state applications and claims forms to reflect this legislation will be absorbed by agencies as an ongoing cost of doing business.
4. Costs of litigation from petition to enforce the preference are unknown. However, a hiring preference exists for veterans and handicapped persons, and is rarely applied.

FISCAL IMPACT:

Unable to determine, but expected to be negligible.

 1-11-97
DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning


BEVERLY BARNHART, PRIMARY SPONSOR DATE 1-13-97
Fiscal Note for HB0161, as introduced

HB 161