



CUT AND PASTE POST NOVEMBER 2020 Election Results

The Marijuana Initiatives and HR Management

Last week, Montana voters passed two ballot issues related to the non-medical use and possession of marijuana:

1. **Constitutional Initiative (CI) 118** allows the legislature to establish a 21 year age restriction for access to marijuana in the same manner as Montana establishes a 21 year age restriction for access to alcohol. So, under CI-118, persons 21 years of age and older will be allowed to purchase, consume, and possess marijuana. CI-118 was approved on a 58% for, 42% opposed, vote.
2. Among other things, **Initiative 190 (I-190)** legalizes the use and possession of limited amounts of marijuana for adults over the age of 21. The electors of an incorporated municipality, county, or consolidated city-county may prohibit adult-use dispensaries in their jurisdictions, and local governments may temporarily prohibit retail marijuana sales until an election can be held. This issue passed with a 57% majority.

It appears the both initiatives will be effective October 1, 2021.

So, *what effects will CI-118 and I-190 have on Montana's employers?*

Keep in mind that we have been dealing with medical marijuana for several years now and many of the same provisions will apply. When it comes to general use and employer rights, I-190 reads as follows:

- (1) The provisions of [I-190] do not permit:
 - (a) any individual to operate, navigate, or be in actual physical control of a motor vehicle... or other motorized form of transport while under the influence of marijuana;
 - (b) consumption of marijuana while operating or being in physical control of a motor vehicle... or other motorized form of transport while it is being operated;
 - (c) smoking marijuana while riding in the passenger seat within an enclosed compartment of a motor vehicle...or other motorized form of transport while it is being operated;...
 - (f) possession or transport of marijuana by a person under 21 years of age unless the underage person is at least 18 years of age and is an employee of an adult-use provider, adult-use marijuana-infused products provider, or adult-use dispensary and engaged in work activities;
 - (g) possession or consumption of marijuana or possession of marijuana paraphernalia:
 - (i) on the grounds of any property owned or leased by a school district, a public or private preschool, school, or postsecondary school as defined in 20-5-402;
 - (ii) in a school bus;
 - (iii) in a health care facility as defined in 50-5-101; or
 - (iv) on the grounds of any correctional facility;
 - (h) smoking marijuana in a location where smoking tobacco is prohibited;
 - (i) consumption of marijuana in a public place, except as allowed by the department;
 - (j) conduct that endangers others;
 - (k) undertaking any task while under the influence of marijuana if doing so would constitute negligence or professional malpractice...

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- (2) Nothing in [I-190] may be construed to:
- (a) require an employer to permit or accommodate conduct otherwise allowed by [I-190] in any workplace or on the employer's property;
 - (b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana;
 - (c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana while working.

Professional Pointers:

My non-legal mind sees a potential for at least 2 court challenges to I-190:

- Under MCA §13-27-101, initiatives may not tell the legislature where to appropriate funds. I-190 directs the legislature where taxes received from marijuana sales are to be appropriated. An anti I-190 group, "Wrong for Montana" has already indicated they intend to challenge I-190 on this basis.
- Since, among other things, I-190 addresses taxation, employer and employee rights, and local government rights, it may violate the Montana Constitution's single-subject initiative requirement (Article V, Section 11).

Montana Code Annotated §39-3-313 prohibits employers from taking adverse action against an employee who uses a "lawful product" during nonworking hours. This has historically been applied to the use of tobacco products during nonworking hours. However, employers may prohibit employees from using a lawful product during working hours, and during nonworking hours if use of a lawful product negatively affects an employee's ability to perform his/her job.

Between MCA §39-3-313 and I-190, employers should retain their right to maintain a drug and alcohol free workplace. However, there may be a few things you need to do to get 'your ducks in a row' before the initiatives take effect:

- ☞ Educate your employees about the limitations of user's rights under I-190.
- ☞ If you don't have a workplace drug and alcohol testing program that complies with federal or Montana law (as appropriate and applicable), it may be time to adopt one.
- ☞ If you have a workplace drug and alcohol testing program that includes marijuana as a testing component, is it time to have an organizational discussion about whether to continue to test for marijuana?
- ☞ Provide your supervisory personnel with training (or refresher training) on the signs and symptoms of being under the influence of marijuana. The Federal Transit Authority's website includes [Reasonable Suspicion Training](#) which meets federal DOT and Montana training requirements.



Crystal Ball Glazing

For the first time in 16 years, Montana citizens have elected a Republican Governor, and Republicans will hold the majority in both the House and Senate. So, what might this mean for human resource folks?

One frequently-used HR mantra is: "Past behavior is the best predictor of future performance". So, I looked for bills from past legislative sessions that were approved by a (Republican dominated) legislature, but vetoed by (a Democratic) Governor Bullock. Here are some HR-related bills meeting this criteria, and which therefore have a chance of resurfacing during future legislative sessions:



Wrongful Discharge: [SB148](#) (2013 Session) – This Bill would have limited lost wages and benefits awarded under the Wrongful Discharge from Employment Act (WDEA) to 2 years from discharge. These damages are currently limited to 4 years. The WDEA removed at-will employment for non-probationary employees, which was a win for employees, but it also preempted all tort and express or implied contract claims as avenues to remedy a wrongful discharge, which was a win for employers. In a recent interview, Senator Scott Sales said the legislature could at will employment policies, adding, “It will put employers on a more equal

footing with employees in terms of employment opportunities and managing their businesses”. Any changes to the WDEA may remove some of the employer protections under the Act.

Overtime: [HB 496](#) (2017 Session) - This Bill would have exempted from eligibility for overtime pay all employees working for seasonal outdoor recreation service providers that operate a dude ranch, guest ranch, and licensed and unlicensed outfitting businesses. If this bill were to become law, these employers would need to carefully evaluate their obligations under the federal Fair Labor Standards Act.

Employee Privacy: [HB532](#) (2019 Session) - This bill would have required the State to create and maintain a website publishing information on ‘compromises and settlements’ related to state employee litigation/claims, and to make those records available for 20 years. In [Billings Gazette v. City of Billings](#) and other cases, the Montana Supreme Court uses a ‘balancing test’ to assess whether the demands of a public employee’s privacy clearly exceeds the merits of public disclosure. If a bill like HB532 were to become law, it would likely see a court evaluate whether its provisions infringe on the privacy rights found in Article II, Section 10 of the Montana Constitution.

Unions: [HB 323](#) (2019 Session) – This bill would have banned mandatory union fees for public sector employees, and would have prohibited Montana’s public employers from withholding dues and other union assessments from their employee’s paychecks. The ban on withholding dues and assessments went a step further than the U.S. Supreme Court did in [Janus v. AFSCME](#) (2018) which, in effect, made all public sector employment “right to work” employment. In the years to come, it is possible we will see an effort to expand these provisions to the private sector.

Guns in the Workplace: In the past 4 sessions, there have been a number of bills that would have banned public and/or private employers from prohibiting concealed or open carry on their premises. These bills were vetoed by the Governor and were either unable to muster enough votes to override the veto, or a veto override vote was not requested.

In 2019, the legislature decided to take the question to the voters, which resulted in **Legislative Referendum 130 (LR-130)**. LR -130 passed last week on a 51% to 49% vote and prohibits public agencies from passing laws that ban the possession on public property of firearms: 1) by people with concealed carry permits, and 2) by people who are openly carrying these weapons.

LR-130 only applies to public agencies. If past behavior is any indicator of future behavior, you may see an effort to expand these provisions to the private sector.

The Montana Legislature meets again in 2021. Stay tuned for updates from your GVHRA Board.

Please see the Page 4 for a bunch of data regarding 2021 wages and benefit contributions. As always, please email me (bergpersonnelsolutions@live.com) with any suggestions for a *Cut N Paste* topic!

Pattie Berg
Legislative Chair

Data Dump

Montana Minimum Wage: \$8.75 per hour effective 1/1/21. This reflects a 1.31% unadjusted CPI-U increase from August of 2019 to August 2020.

2021 Contribution and Out-of-Pocket Limits for HSA's AND HDHP's			
	2021	2020	Change
HSA contribution limit (employer + employee)	Self-only: \$3,600 Family: \$7,200	Self-only: \$3,550 Family: \$7,100	Self-only: +\$50 Family: +\$100
HSA catch-up contributions (age 55+)	\$1,000	\$1,000	No change
HDHP minimum deductibles	Self-only: \$1,400 Family: \$2,800	Self-only: \$1,400 Family: \$2,800	No change No change
HDHP maximum out-of-pocket amounts (deductibles, co-payments and other amounts, but not premiums)	Self-only: \$7,000 Family: \$14,000	Self-only: \$6,900 Family: \$13,800	\$100 \$200

Payroll Taxes: Cap on Maximum Earnings			
Type of Payroll Tax:	2021	2020	Change
Social Security	\$142,800	\$137,700	\$5,100
Medicare	No limit	No limit	No Change
Additional .9% Medicare Taxes for highly compensated employees, specifically:			
<ul style="list-style-type: none"> • \$250,000 married/filing jointly • \$125,000 married/filing separately • \$200,000 single / all others 			

2021 Retirement Plan Contribution Limits			
	2021	2020	Change
457 Plan Limits			
• Annual Deferral Limit	\$19,500	\$19,500	No change
• "Age 50" Catch-Up Limit	<u>\$19,500</u>	<u>\$19,500</u>	No change
Total	\$39,000	\$39,000	N/A
401 Plan Limits			
• 401 Defined Contribution Plans - Annual Additions	\$58,000	\$57,000	\$1,000
• 401 Defined Benefit Plans - Maximum Annual Benefit*	\$225,000	\$230,000	\$5,000
• 401 Annual Compensation Limit** (non-grandfather/grandfather)	\$285,000/\$425,000	\$290,000/\$430,000	\$5,000/\$5,000
Deferrals:			
• Annual Deferral Limit			
• "Age 50" Catch-Up Limit	\$19,500	\$19,500	No change
Total:	<u>\$ 6,500</u> \$26,000	<u>\$ 6,500</u> \$26,000	No change No change
403(b) Plan Limits:			
Annual Deferral Limit for Plans	\$19,500	\$19,500	No change
"Age 50" Catch-Up Limit	<u>\$ 6,500</u>	<u>\$ 6,500</u>	No change
Total	\$26,000	\$26,000	No change
Traditional IRA & Roth IRA Contribution Limits			
Annual Deferral Limit	\$6,000	<u>\$1,000</u>	No change
"Age 50" Catch-Up Limit	<u>\$1,000</u>	\$7,000	No change
Total	\$7,000		

*Special limitations apply to defined benefit plans. Contact your defined benefit plan administrator for additional information.