

## CUT AND PASTE POST NOVEMBER, 2015:

### SHRM ADVOCACY, MONTANA MINIMUM WAGE, LOOSE ENDS

#### **SHRM Advocacy: Join the A-Team!**

(From the SHRM website)

Thomas Jefferson once said, "America is not governed by the majority, but by the majority of those who participate." Jefferson's belief about the impact political advocacy had on Government 200+ years ago still rings very true today. That's why SHRM, in an effort to enhance the visibility of the HR profession among policymakers in Washington and the states, has embarked on a 5-year initiative to establish the SHRM Advocacy Team (aka The 'A-Team'); a network of SHRM member advocates throughout all 435 congressional districts across America. Learn how to become part of the A-Team here:

<http://www.advocacy.shrm.org/about>.

Other advocacy resources are available on the **SHRM Policy Action Center website**. Here, you'll find a links for Writing Your Elected Officials, accessing the A-Team Resource Page, as well as information about our Day Inside the Beltway and our Day Inside the District programs, where members meet face-to-face with legislators and their staffs either in Washington or back home in their districts during a recess.

Also, be sure to take a moment to familiarize yourself with the public policy issues SHRM is advocating on and consider exercising your HR Voice by actively participating in the political process of government. Check out the "Issues and Position Statements" and "Regulatory and Judicial Filings" tabs to get a flavor of what public policy issues SHRM is actively engaged in.

### **2016 Montana Minimum Wage**

Based on an increase in the CPI of 0.20% from August, 2014 to August, 2015, Montana's Minimum Wage will remain at \$8.05 per hour for 2016.

### **New Overtime Rules Delayed Until Late 2016**

The Department of Labor ("DOL") recently announced that the proposed changes to the overtime white-collar exemption regulation will likely be issued in late 2016. Earlier this year, the DOL proposed to amend the FLSA's overtime rule. The amendment would more than double the minimum salary threshold from \$23,660 to \$50,440 per year and expand the overtime eligibility to more than 4.6 million employees. Approximately 270,000 comments were submitted to the Labor Department on the proposed change. According to a November 11, 2015 article in the *Wall Street Journal*, DOL Solicitor of Labor Patricia

Smith has stated that the length of time needed to finish drafting the final regulation is due to the volume of comments and the complex nature of the change. *So, enjoy the holidays and look for more in 2016.*

## Tying Up Loose Ends

The May, 2015 *Cut N Paste Post* referred to 2 cases pending before the Montana Supreme Court which could affect human resource management practices. These cases have now been decided. Here's an update.

### ***Anderson v. BNSF (DA 14-0253)***

On August 12, 2015, the Montana Supreme Court reversed a Great Falls District Court's judgment following a jury verdict against Robert Anderson and in favor of BNSF Railway Company. The Supreme Court sent the case back to the District Court for a new trial.

Anderson worked for BNSF in Havre for thirty-three years, primarily as a carman inspecting and repairing rail cars. Throughout most of his career, Anderson experienced intermittent aches and pains in his back, shoulders, neck, and wrists. Those symptoms always resolved over time, however, and did not limit his ability to work. On December 23, 2008, Anderson stumbled and fell while working. Anderson's back condition worsened after the fall and, in October 2009, BNSF took Anderson off work due to his back injury.

Anderson sued BNSF under the Federal Employers' Liability Act (FELA), the federal law that covers railroad employees who are injured on the job. Anderson contended that his years of work for BNSF caused cumulative trauma injuries to his lower back, resulting in a back disorder. Anderson also contended that BNSF negligently assigned him to the same work that caused his injuries even after learning he was injured. Finally, Anderson contended that BNSF negligently caused his December 23, 2008 fall.

The jury returned a verdict finding that because Anderson did not file his case within three years after discovering he was suffering from work-related injuries, his cumulative trauma injury claim was barred by the FELA statute and that BNSF did not negligently cause Anderson's December 23, 2008 fall. Anderson appealed to the Montana Supreme Court.

After oral arguments, the Supreme Court held that *even if Anderson knew he was suffering from work-related injuries more than three years before he filed his lawsuit, his claim would still be timely as long as he could prove that BNSF caused at least some of his injuries during the three years before he filed his case.* The Supreme Court also held that BNSF's attorneys made improper arguments in violation of the District Court's orders that unfairly prejudiced the jury against Anderson. The Supreme Court therefore reversed the District Court's judgment and remanded the case for a new trial.

***Professional Pointer:*** In Montana, employees must report all on-the-job injuries or occupational diseases to their employer within **30 days** after the occurrence of the accident (for occupational diseases, the deadline is one year from the date the employee knew or should have known about the occupational disease.) The State encourages employees to report minor injuries whether or not they receive medical treatment. Employers have six days of notice of an on-the-job injury, accident, or Occupational Disease to complete the First Report of Injury. Employers who follow these rules will avoid situations like the one described in this case.

**McDonald v. Ponderosa Enterprises (DA 14-0316)**

The Montana Occupational Safety and Health Act (MOSHA) Section 50-71-201, MCA requires employers to furnish a safe place of employment for its employees. MOSHA incorporates the definition of “employee” from the Worker’s Compensation Act, which defines an “employee,” as “each person ... including a contractor *other than an independent contractor*, who is in the service of an employer... under any appointment or contract of hire, expressed or implied, oral or written.”

RTK, a construction company, hired Ponderosa Enterprises to frame a quilt shop in Sidney, Montana. Ponderosa then hired McDonald as an independent contractor to assist with the framing. McDonald was approved as an Independent Contractor by the Montana Department of Labor in 2008.

On June 28, 2011, Matt Orrell, the owner of Ponderosa, asked McDonald and two plumbers working on a building to help manually lift a wall. As the men were lifting the wall it collapsed and fell on McDonald and Orrell. McDonald was seriously injured.

In September of 2011, McDonald filed for Worker’s Compensation benefits and began receiving \$633 per week in Temporary Total Disability payments from State Fund. In doing so, McDonald contended that he had been an employee of Ponderosa at the time of the accident. In February 2013, McDonald reached a settlement with State Fund, dismissing his claim in exchange for \$332,000.

On February 29, 2012, McDonald brought suit against Ponderosa and RTK in District Court, alleging, in part, negligence and violation of MOSHA. In his initial complaint, McDonald claimed to be an employee of Ponderosa. In later documents, he stipulated he was an independent contractor.

The District Court found that, because McDonald was an independent contractor at the time of his injury, MOSHA did not apply. McDonald appealed to the Montana Supreme Court.

On June 16, 2015, the Supreme Court upheld the lower Court’s ruling, finding that McDonald was not an employee under the plain language of MCA § 50-71-204 and § MCA 39-71-118 and, therefore, MOSHA did not apply.

There was an interesting footnote in this decision. It said: *“We acknowledge the confusion engendered by McDonald’s shift from employee status to independent contractor status. However, because that issue is not before us, we do not address it here.”* It would have been interesting to see how this case would have resolved had the question about independent contractor status been raised in earlier pleadings.

**Professional Pointer:** This case shows the importance of properly classifying independent contractors, ***and*** of verifying that any independent contractor you contract with has been approved by the Montana Department of Labor and Industry. You may search for independent non-construction and construction contractors at: <http://erd.dli.mt.gov/work-comp-regulations/montana-contractor>.

