



Cut and Paste Post January, 2013

The Legislature Begins...

The Montana Legislature 'opened for business' on January 7. So far, there have been 147 House bills, and 99 Senate bills introduced. An additional 1,597 bills have been requested, but not yet introduced. A legislative update since the November 2012 Cut N Paste is being sent as a separate attachment to this Cut N Paste.

The Montana Supreme Court Decides...

Same Sex Couples' Request to Direct Legislature to Grant Equal Rights Was Too Broad -

In *Donaldson et al v. State of Montana* (2012 MT 288, DA 11-0451), the plaintiffs were a group of same-sex couples from a variety of professions. In 2010 they sued the State of Montana, complaining that they are unable to obtain protections and benefits that are available to similarly situated different-sex couples who marry under State law. The plaintiffs did not challenge Montana law's restriction of marriage to heterosexual couples, did not seek the opportunity to marry, and did not seek the designation of marriage for their relationships.

The District Court denied Plaintiffs' motion for summary judgment and granted the State's motion to dismiss. The District Court noted that Plaintiffs did not ask the Court to determine which, if any, of the specific statutes are unconstitutional, but rather asked for a direction to the Legislature to enact a statutory scheme satisfactory to the Plaintiffs. The District Court found that granting such relief would be an "inappropriate exercise of judicial power."

A majority of the Montana Supreme Court ruled that the District Court's decision was appropriate and was not an abuse of power. The majority noted that "the Plaintiffs chose to pursue an overly broad request for a declaratory judgment and injunctive relief, without developing a factual record in the District Court and without identifying a specific statute or statutes that impose the discrimination they allege." However, the majority also signed an order which returned the case to the District Court so the parties could amend their complaint.

If the parties do amend their complaint, HR professionals should follow this case as it works its way through the Court. The outcome could have an impact on the benefits employers are required to provide to non-married couples.

Employee, or Contractor with an Arbitration Requirement? -

In Marsden v. BCBSMT (2012 MT 306 DA 12-0341) Shannon Marsden alleged that Blue Cross Blue Shield of Montana (BCBSMT) wrongfully discharged her in violation of the Montana Wrongful Discharge from Employment Act (WDEA).



Marsden had a two year employment agreement which had an arbitration provision to resolve disputes. There was also a provision in the agreement that allowed BCBSMT to terminate her employment if that termination would be “in the best interest of the company”. After Marsden was terminated, she claimed the ‘in the best interest’ provision nullified the two year term in her employment agreement and she was, therefore, an employee and subject to the WDEA.

BCBSMT argued that whether or not Marsden had a term contract was still in dispute and should have been resolved through arbitration. The District Court compelled arbitration to allow the arbitrator to determine whether Marsden had a term employment contract. Marsden appealed, and the Montana Supreme Court affirmed the District Court’s decision.

Even though the parties ended up in the Supreme Court and the question about Marsden employment status still hadn’t been resolved, this case shows the value of a well-written arbitration provision in an employment agreement.

Hutterite Colony Must Provide Workers’ Compensation -

Appellant Montana Department of Labor and Industry (DOL) appealed an order of the Ninth Judicial District Court, Glacier County that granted summary judgment to Big Sky Colony, Inc. The District Court had determined that the DOL’s requirement for the Colony to provide workers’ compensation coverage for Colony members engaged in certain commercial activities violated the Colony’s rights under the Free Exercise Clause and the Establishment Clause of the First Amendment to the U.S Constitution, and also violated the Colony’s right to equal protection of the laws under the U.S. Constitution and the Montana Constitution.

The Supreme Court reversed the District Court, finding that members of the Colony are ‘employees’ when employed in certain commercial activities, and that requiring the Colony to provide workers’ compensation in while performing these activities did not violate the Colony’s right to practice its religion.

I thought this was an interesting case for a couple reasons. First, because the decision includes a description of the history of the Hutterite people; and, second, because the decision addressed the problems business face when laws are applied unequally.

Trivia From The Human Rights Bureau

Question: *What is the remedy for a person who is fired because they are disabled but there is also ample evidence that the employer had cause to, and was working on, firing the employee for a non-discriminatory reason?*

Answer: *The employee is not entitled to any recovery since the harm suffered resulted from action that the employer would have taken anyway. The employer is ordered to not take adverse action against any employee because of a physical disability without first engaging in the interactive process, and is ordered adopt policies and to train staff regarding disability discrimination law and the proper accommodation process involved*

Read the Case: Livingston v. Huntley Project Museum. HRC Case No. 1684-2011

Health Care Reform 2013 Provision Highlights: Are You Ready?

- Health flexible spending account limit of \$2,500.
- All plans must cover women's preventive services.
- Restricted annual limit on essential benefits at \$2 million.
- Exchange notices to all employees due by March 1, 2013.
- Elimination of Medicare Part D subsidy tax advantage.
- Patient-centered outcome research fee on health insurers and sponsors of self-funded plans
- 0.9 percent increase in Medicare tax for employees earning at least \$200,000, which affects withholding and W-2 forms.



The Benefits of SHRM Membership: *Managing Smart*

Managing Smart is a service available to members of the Society for Human Resource Management. Every quarter, SHRM provides a new collection of articles that can help your company's line managers supervise their staffs effectively—and legally. This online collection features authoritative advice from SHRM about communicating with, training, rewarding and motivating employees, complying with employment laws and many, many other hands-on duties managers face on a daily basis. *SHRM members are authorized to distribute copies, excerpts or e-mails of the content for educational purposes internally within their organizations.*

I've included an article from the Fall, 2012 Managing Smart below. If you're not a SHRM member and need some help convincing your boss to spend the money to join, Managing Smart itself is probably worth more than the price of the annual membership.

DEPRESSION AT WORK

By Vincent F. Caimano

Clinical depression, or major depressive disorder, is a pervasive and growing problem for employees, their managers and their organizations. At any given time, depression affects about 6 percent of the U.S. adult population, according to the National Institute of Mental Health. The World Health Organization predicts that depression will be the second-largest disease burden in the world by 2030 behind HIV and AIDS.

Already, depressed employees are a drain on workplace productivity, accounting for an average of 2.3 lost workdays a month, more than double the average sick days taken by employees, according to "The Effects of Major Depression on Moment-in-Time Work Performance," published in the October 2004 issue of the *American Journal of Psychiatry*.

As a manager, you should be concerned about the impact of depression on your employees and your organization. Employees diagnosed with depression are unlikely to admit their condition because of the stigma associated with mental health and because of concerns about losing their jobs. While you should not put yourself in the role of diagnostician or therapist, you should be aware of employees who might be struggling with this insidious disease.

Work-related signs and symptoms of depression include:

- Reduction in performance—in particular, difficulty completing projects well within the employee's capabilities.

- Sudden lack of teamwork.
- Need for more coaching or guidance than usual.
- Reduced ability to focus on a task for a period of time or to keep work organized.
- Decreased ability to juggle multiple assignments.
- Increased instances of finding ways to work alone or to be away from the employee's desk for long periods.
- Loss of interest in work-related social activities.
- Noticeable increase in irritability and moodiness.
- Significant decrease in energy.
- Difficulty making decisions.
- Increased criticism of plans and general pessimism.
- Increased work hours with diminishing returns.
- Decreased interest in training or development activities.

No single one of these symptoms is evidence of depression. But if you notice several symptoms during a period of a few weeks, you may have an employee who has become depressed.

Coping Mechanisms

For the employee experiencing these performance problems, which may be attributable to depression, you must tread carefully. Meet with the employee to discuss specific changes in work behavior. If the employee brings up personal problems or feelings of sadness, stop the conversation and refer him to the company's employee assistance program or an outside resource. Offer compassion and support during this rough time, but remind the employee that performance goals must be met.

As a compassionate manager, you may be tempted to "lower the bar" for the struggling employee. But you can't treat an employee whom you believe has depression any differently from how you treat another employee when it comes to meeting performance standards.

If an employee comes to you and reveals his depression, there are actions you might be required to take. The Americans with Disabilities Act states, in part, that employers are required to make a "reasonable accommodation" for employees with depression who request it and who qualify under the act's disability definition.

Accommodations can include a flexible or part-time schedule, time off for doctors' appointments, extended leave for a hospitalization, or other options that don't create an "undue hardship" on the business.

Contact your company's HR specialist. He or she can help determine if the employee qualifies for protection and, if so, can work with you on reasonable accommodations that are appropriate for your business and function.

More likely, an employee will not want to reveal depression because of the stigma surrounding mental illness. In that case, present resources in a group setting to all employees. Suggest to your HR specialist that he or she bring in a mental health expert for a seminar on how to recognize signs of depression and where to get help.

At a minimum, continue giving regular feedback and coaching for performance improvement. Document work issues and results, and look forward to a time when the employee performs better professionally and gets the help he needs personally.

The author, an organizational psychologist, is founder and chief executive officer of Depression Recovery Groups, www.depressionrecoverygroups.com. He previously served as a practice leader at Accenture, Watson Wyatt and Towers.