



CUT AND PASTE POST FEBRUARY 2021

Biden Freezes “Midnight” Rules

According to an [article](#) on the Society for Human Resource Management’s website, as of one of his first actions, President Biden directed his chief of staff to direct federal agencies to freeze proposed regulations and those with pending effective dates. This will allow the new Department Heads to review any new or pending legislation.

Two of the rules passed in the ‘midnight hours’ of the Trump administration which may be subject to review and/or reversal under this freeze include: the [Independent Contractor Rule](#), which was published on January 7, 2021 and was scheduled to take effect on March 8, 2021, and the [EEOC Conciliation Procedures](#) which were sent for publication on January 11, 2021. The [Tip Sharing Rule](#), which is supposed to be effective March 1, 2021 is also subject to this review, and is being challenged by several states.

Battle Over Rideshare Worker Classification Continues

In [Matter of Lowry \(Uber Tech., Inc.--Commissioner of Labor\)](#), the New York Supreme Court, Appellate Division, Third Judicial Department upheld a decision of the Unemployment Insurance Appeal Board which held that Uber exercised sufficient control over its drivers to qualify as their employer. Therefore, it found Uber to be liable for unemployment insurance contributions with respect to the drivers at issue.

Courts and state labor agencies across the United States are struggling with similar worker classification issues for gig economy workers. For example:

- California sued Uber in May, seeking an injunction forcing the companies to reclassify their drivers as employees rather than independent contractors; and
- On November 5, 2020, the United States Court of Appeals for the Third Circuit vacated a trial court’s summary judgment which ruled in favor of UberBLACK on the classification of its drivers as independent contractors under the Fair Labor Standards Act.

While the *Matter of Lowry* decision is a victory for rideshare drivers in upstate New York, the classification battle continues: the courts have split over this issue, and the Biden Administration will likely take a hard look at the Department of Labor’s recently published Independent Contractor Rule. It’s possible this issue will end up before the U.S. Supreme Court.

Professional Pointer: You do not want to misclassify employees as independent contractors. The penalties are huge! Calling someone an independent contractor does not make it be so. The best source of guidance on this issue can be found on the [IRS website](#).

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Probable Workplace Changes under a Biden Administration

According to an [article](#) by the law firm of *Proskauer Rose LLP*, employers are likely to see some significant workplace changes under the new federal administration. It's generally believed the new Administration will first focus on the COVID issue. After that, here are a few workplace issues likely to come into play:

Equal Employment and Paid Leave Issues

- **More stringent federal equal pay laws:** During the campaign, President Biden publicly committed to supporting measures aimed at tackling pay disparity, including signing the Paycheck Fairness Act.
- **Broader anti-discrimination laws.** President Biden has repeatedly stated he hopes to sign the [Equality Act](#) within his first 100 days in office. This Act would prohibit discrimination with respect to employment, housing, education, and public accommodation on the basis of sexual orientation and gender identity. Additionally, Biden has expressed support for expanding protections for pregnant and disabled employees.
- **Paid family leave.** President Biden supports providing employees up to 12 weeks of paid family and medical leave. The proposal will include provisions similar to those in the 2015 [Family and Medical Insurance Leave Act](#).
- **Reverse the U. S Supreme Court's decision in [Gross v. FML Financial Services, Inc.](#)** In this 2009 decision, the Court held that a plaintiff bringing an disparate-treatment claim under the Age Discrimination in Employment Act must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The Court also removed the 'burden shifting' requirement for the employer to show it would have taken the action regardless of the plaintiff's age. This raised the bar, so to speak, for a plaintiff to prevail in age based discrimination cases. President Biden said he intends to protect older Americans in the workplace by making it easier for such workers to prove that they were victims of age discrimination.

Wage and Hour Issues:

- **Minimum wage:** President Biden has repeatedly called for increasing the federal minimum wage to \$15 per hour, and to eliminate the provisions that allow employers to: 1) include tips as part of the minimum wage; and 2) pay subminimum wages to individuals with disabilities.
- **White Collar Salary Rule.** The Biden administration is expected to increase the minimum salary for the white collar overtime exemption through a combination of legislative and agency rulemaking processes, and to implement ongoing adjustments to this minimum salary. This may decrease the number of employees exempt from overtime pay.

Montana Legislative Update

The following pages list the introduced bills that may impact human resource management in Montana. The hyperlinks in the table will take you to the current bill text. Many of these bills seem to be in direct conflict with what we might see at the federal level, so HR management is going to be fun for the next few years! A few comments:



- The **bill titles** are not always the best indicator of the content of the bill. You really need to read the bill to know what's going on. Be on the lookout for unintended consequences.
- You can create a **preference list** and ask to be notified when action is being taken on Bills you want to track. See [this link](#) for more information.
- This year, the public is able to **provide remote testimony** on Bills under consideration. This is a great opportunity to exercise your right to be involved in the legislative process. For more information, go to <https://leg.mt.gov/faq-remote-testimony/>.

Stay tuned for updates as the Session progresses.

Montana 2021 Legislative Session

HR-Related Introduced Bills

Date: 1/30/2021

HR-Related Bills working their way through the legislative process include:

Bill Number	Primary Sponsor	Status	Status Date	Short Title
HB 13	Julie Dooling (R) HD 70	(H) Transmitted to Senate	01/29/2021	State Employee Pay Plan
HB 95	Brad Tschida (R) HD 97	(S) Referred to Committee	01/28/2021	Revise ethics laws related to confidentiality
HB 102	Seth Berglee (R) HD 58	(S) Committee Report--Bill Concurred as Amended	01/29/2021	Generally revise gun laws
HB 137	Ron Marshall (R) HD 87	(H) 2nd Reading Passed	01/29/2021	Generally revise vaping and alternative nicotine products laws
HB 143	Llew Jones (R) HD 18	(H) Committee Report--Bill Passed	01/28/2021	Provide incentives for increasing starting teacher pay
HB 168	Bill Mercer (R) HD 46	(H) Hearing -- (H) Business and Labor	01/22/2021; 08:30 AM, Rm 172	Generally revise laws related to union fees
HB 198	Derek J Harvey (D) HD 74	(H) Hearing -- (H) Business and Labor	01/27/2021; 08:30 AM, Rm 172	Revise workers' compensation death benefit laws [increases burial expenses reimbursement rate]
HB 199	Derek J Harvey (D) HD 74	(H) Committee Report--Bill Passed	01/29/2021	Revise workers compensation laws relating to information and reopening of claims
HB 201	Kenneth L Holmlund (R) HD 38	(H) Hearing -- (H) Business and Labor	02/04/2021; 08:30 AM, Rm 172	Revise prevailing wage district laws and dispatch city designations
HB 213	Jim Keane (D) HD 73	(H) Committee Report--Bill Passed as Amended	01/29/2021	Revise apprenticeship rules
HB 222	Jessica Karjala (D) HD 48	(H) Hearing -- (H) Human Services	02/01/2021; 3:00 PM, Rm 152	Establish limits on cost-sharing for insulin
HB 228	Moffie Funk (D) HD 82	(H) Rereferred to Committee -- (H) Business and Labor	01/28/2021	Establish family medical leave insurance
HB 229	Jane Gillette (R) HD 64	(H) Committee Report--Bill Passed	01/29/2021	Generally revise insurance laws
HB 230	Matt Regier (R) HD 4	(H) Committee Report--Bill Passed	01/29/2021	Generally revise emergency and disaster laws
HB 237	Denley M Loge (R) HD 14	(H) Hearing -- (H) Judiciary	02/01/2021; 8:00 AM, Rm 137	Generally revise cell phone regulations
HB 251	Caleb Hinkle (R) HD 68	(H) Hearing -- (H) Business and Labor	02/11/2021; 08:30 AM, Rm 172	Implement right-to-work
SB 56	Jason W Ellsworth (R) SD 43	(H) Referred to Committee	01/29/2021	Make MDT, FWP employee grievance procedures same as for other state employees

Bill Number	Primary Sponsor	Status	Status Date	Short Title
SB 69	Steve Fitzpatrick (R) SD 10	(H) Hearing	02/01/2021; 8:00 AM, Rm 137	Revise settlement laws
SB 89	Keith Regier (R) SD 3	(S) Hearing -- (S) State Administration	01/25/2021; 3:00 PM, Rm 335	Revise laws related to collection of union dues
SB 118	Terry Gauthier (R) SD 40	(S) Committee Report--Bill Passed	01/27/2021	Revise laws relating to false statements to employers and workers' compensation
SB 124	Shane A Morigeau (D) SD 48	(S) Hearing -- (S) Taxation	01/27/2021; 9:00 AM, Rm 405	Revise laws related to student loans [tax exemption to employee for employer-provided payments.]
SB 132	Keith Regier (R) SD 3	(S) Committee Report--Bill Passed	01/27/2021	Require accommodations to employer-mandated vaccinations to be uniformly offered
SR 17	Steve Fitzpatrick (R) SD 10	(S) Referred to Committee -- (S) Business, Labor, and Economic Affairs	01/28/2021	Confirm Governor's appointee to the Commission for Human Rights <ul style="list-style-type: none"> • Margaret Campbell, Havre, MT
SR 18	Steve Fitzpatrick (R) SD 10	(S) Referred to Committee -- (S) Business, Labor, and Economic Affairs	01/28/2021	Confirm Governor's appointee to Board of Personnel Appeals: <ul style="list-style-type: none"> • Anne McIntyre, East Helena, MT
SR 28	Steve Fitzpatrick (R) SD 10	(S) Hearing -- (S) Business, Labor, and Economic Affairs	02/09/2021; 9:00 AM, Rm 422	Confirm Governor appointees to Commission for Human Rights: <ul style="list-style-type: none"> • Debra Broadbent, Kalispell MT • Curtis Almy, Miles City, MT • Pete Damrow, Billings, MT
SR 31	Steve Fitzpatrick (R) SD 10	(S) Hearing -- (S) Business, Labor, and Economic Affairs	02/09/2021; 9:00 AM, Rm 422	Confirm Gov appointees to Personnel Appeals and Unemployment Insurance Appeals <ul style="list-style-type: none"> • Jenny Springer, Livingston, Montana • Clint Penny, Butte, Montana • Stacey Yates, Colstrip, Montana

HR-Related Bills that Are Probably Dead include:

Bill Number	Primary Sponsor	Status	Status Date	Short Title
HB 125	Jeremy Trebas (R) HD 26	(H) Tabled in Committee * -- (H) Taxation	01/15/2021	Provide an Exemption from Montana income tax withholding