

## CUT AND PASTE POST MARCH, 2019

### Montana Legislative Update

The deadline for transmittal of bills from one chamber to the other has passed. Once the transmittal date has passed, any non-fiscal bills which have not been transmitted or introduced are probably dead. However, sometimes bills that wouldn't seem to have fiscal implications somehow manage to be considered even after the transmittal deadline.

Please see the end of this *Cut N Paste* for the status of HR general interest bills, and stay tuned for more updates as the Session continues.

### U.S. Supreme Court Decision Does Not Reverse EPA Protections

On April 9, 2018, in *Rizo v. Yovino*, the 9<sup>th</sup> Circuit Court of Appeals held that under the federal Equal Pay Act (EPA), employers can't justify a wage differential between male and female employees based on prior salary.

On February 25, 2019, the U.S. Supreme Court vacated and remanded this decision, finding that the 9<sup>th</sup> circuit erred when it counted as a member of the majority a judge who died before the opinion in this case was filed.

It's important to understand that *the Supreme Court's decision did not overrule relevant state law or remove EPA protections*. Rather, it addressed the question of whether a federal court could count the vote of a judge who dies before the decision is issued. The Court held that it could not "[b]ecause Judge Reinhardt was no longer a judge at the time ... [the] decision in [Rizo] was filed, the Ninth Circuit erred in counting him as a member of the majority. That practice effectively allowed a deceased judge to exercise the judicial power of the United States after his death." The Court added, "[f]ederal judges are appointed for life, not for eternity."

Read the Supreme Court [opinion](#).

### White Collar Rule Update

According to the Office of Management and Budget website, the proposed revision to this Rule is still "under review". You will be notified once it is posted for public comment.



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## EEO-1 Survey Opening Postponed

The federal Equal Employment Opportunity Commission announced that due to the recent partial lapse in appropriations, the opening of the EEO-1 has been postponed until early March 2019. The deadline to submit EEO-1 data will be extended to May 31, 2019. Details and instructions for the 2018 EEO-1 Report filers will be forthcoming on the EEO-1 website in the coming weeks for schedule updates.

## NRLB Returns to Common-Law Standard for Independent Contractors

In a January 25, 2019 press release, the National Labor Relations Board (Board) returned to its long-standing independent contractor standard, reaffirming the Board's adherence to the traditional common-law test. In doing so, the Board clarified the role entrepreneurial opportunity plays in its determination of independent-contractor status.

The case, [SuperShuttle DFW, Inc.](#), involved shuttle-van-driver franchisees of SuperShuttle at Dallas-Fort Worth Airport. Applying its clarified standard, the Board found that the franchisees are independent contractors under the National Labor Relations Act (NLRA) and are, therefore, excluded from NLRA coverage.

*The "common-law test" to determine whether a worker is an employee or an independent contractor takes into account all of the following:*

- The extent of control which, by the agreement, the master may exercise over the details of the work.
- Whether or not the one employed is engaged in a distinct occupation or business.
- The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- The skill required in the particular occupation.
- Whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work.
- The length of time for which the person is employed.
- The method of payment, whether by the time or by the job.
- Whether or not the work is part of the regular business of the employer.
- Whether or not the parties believe they are creating the relation of master and servant.
- Whether the principal is or is not in business.



Quoting the press release, "[t]he franchisees' leasing or ownership of their work vans, their method of compensation, and their nearly unfettered control over their daily work schedules and working conditions provided the franchisees with significant entrepreneurial opportunity for economic gain. These factors, along with the absence of supervision and the parties' understanding that the franchisees are independent contractors, resulted in the Board's finding that the franchisees are not employees under the Act."













In its decision, the Board said that, in applying the common law factors, "all the incidents of the relationship must be assessed and weighed with *no one factor being decisive*. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles."

The Press Release concludes by saying "This decision overrules [FedEx Home Delivery](#), a 2014 NLRB decision that modified the applicable test for determining independent-contractor status by severely limiting the significance of a worker's entrepreneurial opportunity for economic gain."

























## Bills at the Montana Legislature

Here are the bills of general HR interest that survived the Montana Legislature's transmittal date deadline. (Those indicated in **red** are new since the February Cut and Paste Post.) Click on the links for more information.

| Bill Type - Number   | Primary Sponsor                       | Status   | Status Date                 | Short Title   |
|--|---------------------------------------|--|-----------------------------|---|
| <a href="#">HB 16</a>        | Dave Fern (D) HD 5                    | (S) Hearing -- (S) Taxation                                  | 02/20/2019; 8:00 AM, Rm 405 | Establish affordable housing loan program   |
| <a href="#">HB 67</a>        | Thomas Winter (D) HD 96               | (H) Signed by Governor                                       | 02/28/2019                  | Revise unemployment insurance benefits for members of the military  |
| <a href="#">HB 214</a>       | Vince Ricci (R) HD 55                 | (H) Transmitted to Senate                                    | 02/26/2019                  | Revise laws relating to the State Fund  |
| <a href="#">HB 295</a>       | Fred Anderson (R) HD 20               | (H) Hearing -- (H) Appropriations                            | 02/20/2019; 3:00 PM, Rm 102 | Create grant program to encourage work-based learning   |
| <a href="#">HB 323</a>       | Brad Tschida (R) HD 97                | (S) Hearing -- (S) Business, Labor, and Economic Affairs     | 03/13/2019; 8:30 AM, Rm 422 | Provide for free association for non-union public employees   |
| <a href="#">HB 343</a>       | Bradley Hamlett (D) HD 23             | (H) Transmitted to Senate                                    | 02/28/2019                  | Extend retention of (State) employee settlement documents   |
| <a href="#">HB 543</a>       | Zach Brown (D) HD 63                  | (H) Transmitted to Senate                                    | 03/01/2019                  | Revise laws related to misdemeanor expungement  |
| <a href="#">HB 547</a>   | Laurie Bishop (D) HD 60               | (H) Transmitted to Senate                                    | 02/28/2019                  | Revise laws related to employee disclosure of wage information  |
| <a href="#">HB 631</a>   | Kimberly Dudik (D) HD 94              | (H) Hearing -- (H) Business and Labor                        | 03/12/2019; 8:30 AM, Rm 172 | Create public private partnership to help workers in targeted industries                                  |
| <a href="#">HB 645</a>   | Katie Sullivan (D) HD 89              | (H) Introduced   | 03/01/2019                  | Establish the Montana Biometric Information Privacy Act. (Could affect biometric based security systems.) |
| <a href="#">HJ 6</a>     | Kimberly Dudik (D) HD 94              | (S) Referred to Committee -- (S) Judiciary                   | 02/06/2019                  | Study resolution on post incarceration employment opportunities   |
| <a href="#">SB 18</a>    | Margaret (Margie) MacDonald (D) SD 26 | (S) Committee Report-- Bill Passed as Amended - (S) Taxation | 02/15/2019                  | Establish workforce housing tax credits   |
| <a href="#">SB 23</a>    | Keith Regier (R) SD 3                 | (H) Referred to Committee -- (H) Judiciary                   | 02/05/2019                  | Require accommodations to employer-mandated vaccinations to be uniformly offered                          |
| <a href="#">SB 29</a>    | Fred Thomas (R) SD 44                 | (S) Transmitted to House                                     | 01/29/2019                  | Require workers' comp for all volunteer firefighters  |
| <a href="#">SB 54</a>    | Fred Thomas (R) SD 44                 | (S) Transmitted to Governor                                  | 02/26/2019                  | Revise laws governing multiple employer welfare arrangements  |
| <a href="#">SB 65</a>    | Keith Regier (R) SD 3                 | (S) Hearing -- (S) Finance and Claims                        | 02/19/2019; 2:00 PM, Rm 303 | Generally revise drug and alcohol laws (raises question on interlocking devices for company vehicles)     |

| Bill Type - Number   | Primary Sponsor             | Status                                     | Status Date                 | Short Title  |
|--|-----------------------------|--|-----------------------------|--|
| <a href="#">SB 78</a>    | Mary McNally (D) SD 24      | (H) Hearing -- (H) Business and Labor      | 03/13/2019; 8:30 AM, Rm 172 | Require workers' comp insurers to provide notice to worker of claim closure      |
| <a href="#">SB 160</a>   | Nate McConnell (D) SD 48    | (H) Hearing -- (H) Business and Labor      | 03/15/2019; 8:30 AM, Rm 172 | Provide workers' compensation for presumptive diseases of firefighters           |
| <a href="#">SB 168</a>   | Brian Hoven (R) SD 13       | (H) Hearing -- (H) Business and Labor      | 03/14/2019; 8:30 AM, Rm 172 | Restrict certain initial employment applications regarding criminal history      |
| <a href="#">SB 218</a>   | Steve Fitzpatrick (R) SD 10 | (H) Hearing -- (H) Business and Labor      | 03/15/2019; 8:30 AM, Rm 172 | Exempt certain students from minimum wage and overtime compensation requirements |
| <a href="#">SB 286</a>   | Bryce Bennett (D) SD 50     | (H) Referred to Committee -- (H) Judiciary | 02/28/2019                  | Generally revise laws on privacy (Has to do with employee microchipping)         |
| <a href="#">SB 313</a>   | Nate McConnell (D) SD 48    | (H) Referred to Committee -- (H) Judiciary | 02/28/2019                  | Generally revise enforcement of discrimination laws                              |

**Here are the bills of general HR interest that are unlikely to have any further action taken during the 2019 Session:**

| Bill Type - Number   | Primary Sponsor            | Short Title   |
|--|----------------------------|---|
| <a href="#">HB 171</a>     | David Bedey (R) HD 86      | Create career and technical education and workforce development commission  |
| <a href="#">HB 208</a>   | Moffie Funk (D) HD 82      | Establishing family medical leave insurance                                 |
| <a href="#">HB 216</a>   | Kimberly Dudik (D) HD 94   | Revise tax laws related to student loan reimbursements by employers         |
| <a href="#">HB 313</a>   | Andrea Olsen (D) HD 100    | Allow worker to choose treating physician in workers' compensation cases    |
| <a href="#">HB 345</a>   | Mary Ann Dunwell (D) HD 84 | Provide a stepped increase in minimum wage to a living wage                 |
| <a href="#">HB 465</a>   | Kim Abbott (D) HD 83       | Generally revise the Montana human rights act                               |
| <a href="#">HB 468</a>   | Jade Bahr (D) HD 50        | Involve certain state agencies in disability integrated employment programs |
| <a href="#">HB 565</a>   | Casey Schreiner (D) HD 26  | Create the Montana apprentice utilization and investment act                |
| <a href="#">HB 588</a>   | Mary Caferro (D) HD 81     | Prohibit subminimum wages for workers with disabilities                     |
| <a href="#">SB 122</a>   | Sue Malek (D) SD 46        | Revise clean indoor air act to include vaping. (*See comment below)         |
| <a href="#">SB 233</a>   | Terry Gauthier (R) SD 40   | Establish the small business retirement program                             |
| <a href="#">SB 272</a>   | Steve Hinebauch (R) SD 18  | Revise zone pay and dispatch cities for prevailing wages                    |

\* There are a couple lawsuits making their way through Montana courts regarding vaping's relationship to the Clean Indoor Air Act. The plaintiffs are arguing that local governments can prohibit vaping in the workplace, but cannot include this prohibition in a policy addressing the requirements of the Montana Clean Indoor Air Act (Title 50, Chapter 40 of Montana Code Annotated). Stay tuned!