



CUT AND PASTE POST APRIL 2021

Montana Legislature Overhauls Wrongful Discharge from Employment Act

Montana’s Wrongful Discharge from Employment Act (“WDEA” – 39 MCA Chapter 2, Part 9) is a landmark piece of legislation which became law in 1987. As described by Jim Nys in his Graduate Thesis, [The Montana Wrongful Discharge from Employment Act: A Supervisor’s Handbook](#), “The concept of the [WDEA] was fairly simple. The former statutory principle of “employment at will,” ... was to be abolished. Similarly, court-created doctrines which had allowed litigation and permitted many large awards against employers were also to be abolished.”

Nys goes on to say, “The final version of the bill ...was the product of countless political compromises. Employers lost some of their freedom to terminate “At Will” in return for limits on the penalties and damages that could be assessed against them. Employees covered by the Act gained security against arbitrary dismissal. The Act included incentives for the parties to resolve their disputes outside the courts in arbitration proceedings, which promise a faster determination at far less cost than traditional litigation.”

Over 30 years later, thanks to the work of the 1987 legislature, some interim legislative tweaks, and the courts, the WDEA had become fairly predictable, settled law. Because of [HB254](#), it’s possible this settled law will suddenly become somewhat unsettled. HB254:

- Expands the employee actions which may constitute “Good Cause”;
- Adds language confirming previous court rulings giving employers “the broadest discretion when making a decision to discharge any managerial or supervisory employee”;
- Changes the presumptive probationary period from six months to one year;
- Sets time frames for initiating internal grievance procedures under the Act; and
- Adds language clarifying the damages available to wrongfully discharged employees.

HB254 was passed by the Legislature on a 28/22 vote, and sent to the Governor for his signature on March 25, 2021. As of today (3/31/21) it has not been signed, but it’s unlikely to be vetoed. It will be effective when signed.

While HB254 seems to be an attempt to clarify the WDEA and increase employer protections, the Bill includes undefined words like “materially” and “repeated” which will need defined. Defining undefined terms is usually within the realm of the Courts, and done through the process of litigation.

Professional Pointers: Assuming the Governor signs this bill, employers will need to review their discipline and grievance practices and policies for uniformity with the new law. And, be on the lookout for what could be a new round of court cases reinterpreting the WDEA’s coverage and provisions.

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| <p><i>Inside</i></p> <ul style="list-style-type: none"> • <i>Montana Legislature Overhauls Wrongful Discharge from Employment Act</i> • <i>Reminder: Use Caution When Implementing New Legislation</i> • <i>American Rescue Plan and HR Management</i> • <i>In Case You Missed It</i> • <i>Montana Legislative Update</i> • <i>And, Finally...</i> |
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Reminder: Use Caution When Implementing New Legislation

The last two pages of this *Cut N Paste Post* include a list of HR-related bills that have, or may, become new Montana law. These bills address wage and hour rules, the status of independent contractors, treatment of apprentices, and other HR issues.

March 29th was the deadline for legislators to introduce appropriation bills, revenue bills & bills proposing referenda. This week, the focus has been on bills implementing the recreational marijuana initiatives passed by the public last November. On April 2, the Legislature goes on Easter break, returning Tuesday the 6th to resume deliberations.

As a reminder, a change Montana law only affects Montana law: it doesn't change federal law. If there is a conflict between Montana law and a companion federal law, the law most advantageous to the employee will almost always apply. For example, an employer may want to take advantage of the child labor provisions in HB282. Because HB282 does not change federal law, the employer should:

- determine if it's also subject to the federal FLSA and, if so,
- Follow the law most advantageous to the employee (see "And, Finally...." below).

American Rescue Plan and Human Resource Management

On March 11, 2021, President Biden signed the [American Rescue Plan Act \(ARPA\) of 2021](#) into law. The goal of the ARPA is to provide additional economic relief during the coronavirus pandemic. The \$1.9 trillion measure has several provisions that directly affect a variety of employment issues. For a summary of the impacts of the ARPA on HR, read this [SHRM Article](#) (log in required.)

In Case You Missed It

FMLA Entitlements and Rotating Schedules - On January 15, 2021, the 9th U.S. Circuit Court of Appeals reversed a decision of an Alaska district court that would have expanded the annual leave entitlement of the Family and Medical Leave Act (FMLA) from 12 weeks to 24 weeks for employees who work a rotational schedule of seven straight workdays followed by seven days off. Since Montana is in the 9th Circuit, this decision applies to Montana. If you are subject to the FMLA and have employees working any kind of rotating schedule, you'll probably want to read this case. It seems to reverse prior U.S. DOL guidance regarding leave entitlements for employees who don't work a 'normal' 40-hour per week schedule. Read a summary of the case [here](#), or the full decision [here](#).

OSHA to Focus Efforts on COVID – On March 12, the Occupational Safety and Health Administration (OSHA) announced 2 initiatives designed to limit COVID-related illness at the worksite:

- The goal of the [COVID-19 National Emphasis Program \(NEP\) Directive](#), is to reduce or eliminate worker exposures to COVID-19. The NEP focuses OSHA resources on target industries and worksites with a high frequency of close contact exposures. The NEP combines inspection-targeting, employer outreach and compliance assistance to promote safe workplaces. Target/ high-hazard industries include healthcare, meat processing, supermarkets, restaurants, discount department stores, general warehousing and storage facilities and correctional institutions. The NEP also includes a secondary target industry list covering, among others, a mix of manufacturing, construction, general merchandise stores, and transportation companies.
- In its update to its [Interim Enforcement Response Plan](#), OSHA prioritizes the use of onsite workplace inspections, or a combination of onsite and remote methods. The updated Plan relies heavily on Centers for Disease Control and Prevention (CDC) guidance on a wide-range of issues including: type of work activity, safe distancing, hygiene protocols and the ability of workers to wear face coverings and appropriate personal protective equipment (PPE). During investigations, OSHA will consult [current](#) CDC guidance in assessing potential

workplace hazards and will evaluate the adequacy of an employer's protective measures for workers. This means employers must be aware of, and adapt as necessary to, the most recent CDC guidance.

Montana Legislative Update

Once again, technology has won, and the links in this table aren't working from my computer. If you're in the same boat and want to read or track a bill, enter the Bill number here:

[http://laws.leg.mt.gov/legprd/law0203w\\$.startup?P_SESS=20211](http://laws.leg.mt.gov/legprd/law0203w$.startup?P_SESS=20211).

Bill Type - Number	Primary Sponsor	Status	Status Date	Short Title
HB 13	Julie Dooling (R) HD 70	(S) In Second House - Non Tabled	02/04/2021	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	Signed By Governor	02/18/2021	Generally revise gun laws
HB 143	Llew Jones (R) HD 18	Transmitted to Governor	03/20/2021	Provide incentives for increasing starting teacher pay
HB 198	Derek J Harvey (D) HD 74	(H) Transmitted to Governor	03/25/2021	Revise workers' compensation death benefit laws
HB 199	Derek J Harvey (D) HD 74	(H) Signed by Governor	03/25/2021	Revise workers compensation laws relating to information and reopening of claims
HB 201	Kenneth L Holmlund (R) HD 38	(S) Scheduled for 2nd Reading	03/31/2021	Revise prevailing wage district laws and dispatch city designations
HB 213	Jim Keane (D) HD 73	(H) Transmitted to Governor	03/25/2021	Revise apprenticeship rules
HB 252	Llew Jones (R) HD 18	(H) Sent to Enrolling	03/29/2021	Non-refundable tax credit for employer-paid education of trade professions
HB 254	Ross H Fitzgerald (R) HD 17	(H) Transmitted to Governor	03/25/2021	Revise the wrongful discharge act
HB 282	Fred Anderson (R) HD 20	(H) Transmitted to Governor	03/26/2021	Revise labor laws relating to the employment of minors
HB 283	Fred Anderson (R) HD 20	(H) Transmitted to Governor	03/26/2021	Revise workers' compensation laws relating to student interns
HB 289	Matt Regier (R) HD 4	(H) Sent to Enrolling	03/26/2021	Generally revise labor laws relating to employee associations.
HB 379	Sue Vinton (R) HD 56	(H) Sent to Enrolling	03/30/2021	Revise laws for non-discriminatory rate setting in insurance
HB 397	Joshua Kassmier (R) HD 27	(S) Hearing -- (S) Taxation	03/24/2021; 9:00 AM, Rm 405	Establish workforce housing tax credits
HB 436	Scot Kerns (R) HD 23	(S) Hearing -- (S) Judiciary	03/16/2021; 8:00 AM, Rm 303	Generally revise firearms laws
HB 446	Ron Marshall (R) HD 87	(H) Sent to Enrolling	03/25/2021	Revise workers' compensation laws relating to prosthetic devices
HB 590	Scot Kerns (R) HD 23	(S) Hearing -- (S) State Administration	04/07/2021; 3:00 PM, Rm 335	Clarify military access to federal leave of absence
SB 56	Jason W Ellsworth (R) SD 43	Chapter Number Assigned	03/08/2021	Make MDT, FWP employee grievance procedures same as for other state employees
SB 118	Terry Gauthier (R) SD 40	(S) Signed by Governor	03/18/2021	Revise laws relating to false statements to employers and workers' compensation
SB 152	Brian Hoven (R) SD 13	(S) Transmitted to Governor	03/29/2021	Revise public swimming pool licensing to allow online training

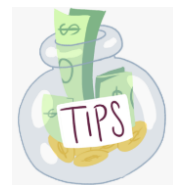
Bill Type - Number	Primary Sponsor	Status	Status Date	Short Title
SB 190	Terry Gauthier (R) SD 40	(H) Committee Report--Bill Concluded -- (H) Business and Labor	03/19/2021	Establish valid tip pool agreements
SB 301	Theresa Manzella (R) SD 44	(H) Committee Report--Bill Concluded -- (H) Business and Labor	03/19/2021	Provide statewide uniformity regarding wages/benefits for political subdivisions. (Appears to relate to "Living Wage" ordinances)
SB 341	David Howard (R) SD 29	(S) Rereferred to Committee -- (S) Finance and Claims	03/01/2021	Revise business laws related to sale of marijuana
SB 367	Shane A Morigeau (D) SD 48	(H) Committee Report--Bill Concluded as Amended -- (H) Business and Labor	03/24/2021	Generally revise labor laws relating to independent contractor certification
SJ 13	Steve Hinebauch (R) SD 18	(H) Referred to Committee -- (H) Business and Labor	03/18/2021	Interim study of prevailing wage laws
SR 78	Steve Fitzpatrick (R) SD 10	(S) Filed with Secretary of State	03/02/2021	Confirm Governor's appointee to the Board of Personnel Appeals. (Bryan Hopkins)
SR 79	Steve Fitzpatrick (R) SD 10	(S) Filed with Secretary of State	03/02/2021	Confirm Governor's appointee to the Commission for Human Rights. (Richard Bartos)

And, Finally...

Notices of Proposed Rule Making for Tipped Employees

On March 23, 2021 the U.S. Department of Labor (DOL) announced two Notices of Proposed Rulemaking related to tipped workers. As a reminder, on Feb. 26, 2021, the department issued a rule to delay the effective date of the 2020 final rule until April 30, 2021, to provide additional time to consider the 2020 Final Rule. According to a departmental news release, the DOL will allow several portions of the 2020 Tip final rule to go into effect, including:

- A prohibition on employers, including supervisors and managers, keeping tips received by workers, regardless of whether the employer takes a tip credit, which establishes significant protections for tipped employees.
- The ability of an employer that does not take a tip credit to include non-tipped workers (e.g., cooks and dishwashers) in nontraditional tip-sharing agreements, which boosts these employee's earnings.



[The first NPRM](#) would withdraw and re-propose portions of the 2020 Tips final rule that narrow the DOL's ability to assess civil money penalties for violations. The DOL is also seeking comments on whether to revise the portion of the final rule that addresses "managers or supervisors" to better understand those who also engage in tipped work.

[The second NPRM](#) proposes to extend further the effective date of three provisions of the 2020 final rule to December 31, 2021. They are two provisions addressing the assessment of civil money penalties and a provision which addresses the application of the FLSA tip credit to employees who perform tipped and non-tipped duties. The 8 month extension will give the DOL the opportunity to consider "questions of law, policy and fact raised by these portions of the 2020 Tips final rule."

The DOL invites comments from the public on both proposed rules at www.regulations.gov.

2019 and 2020 EEO-1 Reporting Timelines

On March 29, 2021, the U.S. Equal Employment Opportunity Commission [announced](#) that data collection for 2019 and 2020 EEO-1 Component 1 filing will open on Monday, April 26, 2021, and that employers will have until Monday, July 19, 2021 to submit their data for those years. *Get Ready!*