



CUT AND PASTE POST MAY 2021

Marijuana Regulation and Employment

Last month, the *Cut N Paste Post* took a hard look at the legislative changes to the Wrongful Discharge in Employment Act. This month, we're going to focus on recreational marijuana.

On April 27, 2021, the Montana Legislature passed [House Bill 701](#), the Bill that implements the recreational marijuana initiatives voters approved last fall. The bill went to the Governor's Office on May 11, 2021. The Governor has 10 days to sign or veto the bill. If the Governor does not act, the bill becomes law.

The bill is about 160 pages. What follows is a summary of the provisions of the Bill which may impact HR policies or practices in Montana, in the order in which they appear in the Bill. General *Professional Pointers* for complying with this Bill have also been provided. What a specific organization needs to do will depend on its current policies, practices and procedures.

Section 2: Describes the process for certifying employees to work in the marijuana industry, including Certification, and the Fingerprint-based background check conducted by the Montana Department of Justice and the Federal Bureau of Investigation.

Section 3: Details the requirements for employees hired to deliver marijuana or marijuana products for a marijuana 'transporter'.

Section 7: Describes workers will obtain a permit to work and the factors disqualifying a person from employment in the industry.

Professional Pointer: If you are going to have employees engaged in marijuana retail sales, you'll want to understand the processes described in these 3 sections.

Section 37 – Under the Montana Marijuana Regulation and Taxation Act, the Department of Revenue may suspend or modify a license or endorsement without advance notice upon a finding that presents an immediate threat to the health, safety, or welfare of consumers, employees of the licensee, or members of the public.

Professional Pointer: If you are going to be in the marijuana industry, this Section may affect the contents of your Safety Plan. Refer to the Montana Safety Culture Act and related OSHA/state law for more information.

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Section 43.

First, this Section amends MCA 16-12-108, Limitations of Act, Paragraph (1) as follows:

"16-12-108. Limitations of act. (1) This chapter does not permit:

- (a) any individual to operate, navigate, or be in actual physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while under the influence of marijuana or marijuana products;
- (b) consumption of marijuana or marijuana products while operating or being in physical control of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while it is being operated;
- (c) smoking or consuming marijuana while riding in the passenger seat within an enclosed compartment of a motor vehicle, train, aircraft, motorboat, or other motorized form of transport while it is being operated;
- (d) delivery or distribution of marijuana or marijuana products, with or without consideration, to a person under 21 years of age;
- (e) purchase, consumption, or use of marijuana or marijuana products by a person under 21 years of age;
- (f) possession or transport of marijuana or marijuana products by a person under 21 years of age unless the underage person is at least 18 years of age and is an employee of an adult-use provider, adult-use marijuana-infused products provider, or adult-use dispensary a marijuana business licensed under this chapter and engaged in work activities;
- (g) possession or consumption of marijuana or marijuana products, or possession of marijuana paraphernalia:
 - (i) on the grounds of any property owned or leased by a school district, a public or private preschool, school, or postsecondary school as defined in 20-5-402;
 - (ii) in a school bus or other form of public transportation;
 - (iii) in a health care facility as defined in 50-5-101; or
 - (iv) on the grounds of any correctional facility; or
 - (v) in a hotel or motel room;
- (h) ~~smoking using~~ marijuana or marijuana products in a location where smoking tobacco is prohibited;
- (i) consumption of marijuana or marijuana products in a public place, except as allowed by the department;
- (j) conduct that endangers others;
- (k) undertaking any task while under the influence of marijuana or marijuana products if doing so would constitute negligence or professional malpractice; or
- (l) performing solvent-based extractions on marijuana using solvents other than water, glycerin, propylene glycol, vegetable oil, or food-grade ethanol unless licensed for this activity by the department.

Professional Pointer: Your employment policies may need expanded to address the use of marijuana and/or marijuana products in the workplace and on your property.

Second, Section 43 amends 16-12-108 paragraph (2) as follows:

~~(2)~~(4) Nothing in this chapter may be construed to:

- (a) require an employer to permit or accommodate conduct otherwise allowed by this chapter in any workplace or on the employer's property;
- (b) prohibit an employer from disciplining an employee for violation of a workplace drug policy or for working while intoxicated by marijuana or marijuana products;
- (c) prevent an employer from declining to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual with respect to hire, tenure, terms, conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana or marijuana products while working;

- (d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition; or
(e) permit a cause of action against an employer for wrongful discharge pursuant to 39-2-904 or discrimination pursuant to 49-1-102.

Professional Pointer: Employers should review and/or modify or expand their personnel policies to address these new provisions.

Finally, paragraph 5 of Section 43 addresses the content of lease agreements:

(5) ~~Nothing in this chapter may be construed to prohibit a person from prohibiting or otherwise regulating the consumption, cultivation, distribution, processing, sale, or display of marijuana, marijuana-infused marijuana products, and marijuana paraphernalia on private property the person owns, leases, occupies, or manages, except that a lease agreement executed after January 1, 2021, may not prohibit a tenant from lawfully possessing and consuming marijuana by means other than smoking unless required by federal law or to obtain federal funding,~~ except that a lease agreement executed after January 1, 2021, may not prohibit a tenant from lawfully possessing and consuming marijuana by means other than smoking unless required by federal law or to obtain federal funding.

Professional Pointer: Review your leases and funding requirements for compliance with the changes made above.

Section 44 - Unlawful conduct by licensees -- penalties. Under paragraph (3), certain actions by licensees or their agents will be “aggravating circumstances” and the Department of Revenue may use these aggravating circumstances to adjust penalties, most likely upwards. Some of these aggravating circumstances include:

- (a) prior warnings about compliance problems; ...
- (c) lack of written policies governing employee conduct;
- (d) additional violations revealed during the course of the investigation;
- (e) efforts to conceal a violation;
- (f) intentional violations; or
- (g) involvement of more than one patron or employee in a violation.

Professional Pointer: Employers in the industry may need to expand their personnel policies to prohibit, and to provide an avenue to investigate complaints alleging, violations of the law.

Section 65. MCA Section 39-2-210 of The Workforce Drug and Alcohol Testing Program, is amended to read:

39-2-210. Limitation on adverse action. Except as provided in ~~50-46-320~~ 16-12-108, no adverse action, including follow-up testing, may be taken by the employer if the employee presents a reasonable explanation or medical opinion indicating that the original test results were not caused by illegal use of controlled substances or by alcohol consumption. If the employee presents a reasonable explanation or medical opinion, the test results must be removed from the employee's record and destroyed."

Professional Pointer: Every employer with a Workforce Drug and Alcohol Testing Program complying with Montana law needs to review that program for compliance with HB701.

Section 66. Amends Section 39-2-313, MCA, as follows:

"39-2-313. Discrimination prohibited for use of lawful product during nonworking hours -- exceptions.

(1) For purposes of this section, "lawful product" means a product that is legally consumed, used, or enjoyed and includes food, beverages, ~~and~~ tobacco, and ~~marijuana~~.

(2) Except as provided in subsections (3) and (4), an employer may not refuse to employ or license and may not discriminate against an individual with respect to compensation, promotion, or the terms, conditions, or privileges of employment because the individual legally uses a lawful product off the employer's premises during nonworking hours.

(3) Subsection (2) does not apply to:

(a) use of a lawful product, ~~including the use of marijuana for a debilitating medical condition as defined in 50-46-302,~~ that:

- (i) affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or
- (ii) conflicts with a bona fide occupational qualification that is reasonably related to the individual's employment;

(b) an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of the services provided authorizes the employer, as part of the service contract, to limit the use of certain products; or

(c) an employer that is a nonprofit organization that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.

(4) An employer does not violate this section if the employer takes action based on the belief that the employer's actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.

Professional Pointer: Employers need to assure their practices don't illegally discriminate against employees for lawful use of products off duty.

In addition subsection (5) addresses insurance coverages and premiums based on the use of a lawful product:

(5) An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employees' use of a product if:

- (a) differential rates assessed against employees reflect actuarially justified differences in providing employee benefits;
- (b) the employer provides an employee with written notice delineating the differential rates used by the employer's insurance carriers; and
- (c) the distinctions in the type or price of coverage are not used to expand, limit, or curtail the rights or liabilities of a party in a civil cause of action

Professional Pointer: Employers may need to have their insurance policies and premiums reviewed given the passage of recreational cannabis laws.





























Section 67 –Temporarily Amends "39-71-407, **Liability of Insurers**. This is not new law, but it reminds us that, once an employer has knowledge that an employee is using alcohol or drugs “not prescribed by a physician”, the employer has an obligation to attempt to stop this use. If the employer fails to do so, workers’ compensation may be available for that employee’s on the job illness/injury or death.

































Professional Pointer: What is your process for addressing employees with substance abuse issues?

And finally:

1. **The department responsible for implementing the law:** Montana Department of Revenue
2. **Important Date:** January 1, 2022, when:
 - Retail sales of recreational marijuana are slated to begin; and
 - All the changes or additions to the law described above become effective.

Montana 2021 Legislative Session Wrap Up: List of HR-Related Bills That Made It through the Entire Process

Bill Type - Number	Primary Sponsor	Status	Status Date	Short Title
HB 79  	Mark Noland (R) HD 10	Chapter Number Assigned	02/25/2021	Revised definition of beer to include other fermented-style beverages
HB 102  	Seth Berglee (R) HD 58	Chapter Number Assigned	02/18/2021	Generally revise gun laws
HB 198  	Derek J Harvey (D) HD 74	Chapter Number Assigned	04/01/2021	Revise workers' compensation death benefit laws
HB 199  	Derek J Harvey (D) HD 74	Chapter Number Assigned	03/26/2021	Revise workers compensation laws relating to information and reopening of claims
HB 201  	Kenneth L Holmlund (R) HD 38	Chapter Number Assigned	04/16/2021	Revise prevailing wage district laws and dispatch city designations
HB 213  	Jim Keane (D) HD 73	Chapter Number Assigned	04/01/2021	Revise apprenticeship rules
HB 252  	Llew Jones (R) HD 18	Chapter Number Assigned	04/19/2021	Non-refundable tax credit for employer-paid education of trade professions
HB 254  	Ross H Fitzgerald (R) HD 17	Chapter Number Assigned	04/01/2021	Revise the wrongful discharge act
HB 282  	Fred Anderson (R) HD 20	Chapter Number Assigned	04/01/2021	Revise labor laws relating to the employment of minors
HB 283  	Fred Anderson (R) HD 20	Chapter Number Assigned	04/01/2021	Revise workers' compensation laws relating to student interns
HB 289  	Matt Regier (R) HD 4	Chapter Number Assigned	04/16/2021	Generally revise labor laws relating to employee associations.
HB 379  	Sue Vinton (R) HD 56	Chapter Number Assigned	04/19/2021	Revise laws for non-discriminatory rate setting in insurance
HB 397  	Joshua Kassmier (R) HD 27	(H) Transmitted to Governor	05/04/2021	Establish workforce housing tax credits
HB 446  	Ron Marshall (R) HD 87	Chapter Number Assigned	04/14/2021	Revise workers' compensation laws relating to prosthetic devices

Bill Type - Number	Primary Sponsor	Status	Status Date	Short Title
HB 461  	Amy Regier (R) HD 6	(H) Died in Process*	04/29/2021	Revise union membership laws
HB 491  	Moffie Funk (D) HD 82	Chapter Number Assigned	05/07/2021	Revise access to military discharge records
HB 590  	Scot Kerns (R) HD 23	(H) Signed by Governor	04/30/2021	Clarify military access to federal leave of absence
HB 614  	Mary Caferro (D) HD 81	(H) Transmitted to Governor	05/04/2021	Revise the HELP Link program
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	Chapter Number Assigned	03/18/2021	Revise laws relating to false statements to employers and workers' compensation
SB 152  	Brian Hoven (R) SD 13	Chapter Number Assigned	04/09/2021	Revise public swimming pool licensing to allow online training
SB 156  	Bryce Bennett (D) SD 50	Chapter Number Assigned	04/21/2021	Protect drivers license private data
SB 190  	Terry Gauthier (R) SD 40	(S) Signed by Governor	05/03/2021	Establish valid tip pool agreements
SB 234  	Gordon Vance (R) SD 34	(S) Transmitted to Governor	04/27/2021	Create the Unemployment Insurance Program Integrity Act
SB 301  	Theresa Manzella (R) SD 44	(S) Signed by Governor	04/29/2021	Provide statewide uniformity regarding wages/benefits for political subdivisions. (Living wage.)
SB 367  	Shane A Morigeau (D) SD 48	(S) Signed by Governor	04/30/2021	Generally revise labor laws relating to independent contractor certification
SB 396  	Brian Hoven (R) SD 13	(S) Transmitted to Governor	05/04/2021	Generally revise boiler licensing laws
SJ 13  	Steve Hinebauch (R) SD 18	(S) Filed with Secretary of State	04/28/2021	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
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