



Montana Makes Significant Changes to State Employment Laws

By Josh Kirkpatrick, Michelle Gomez and Michael Wilson © Littler Mendelson

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Montana Gov. Greg Gianforte recently signed three bills that make significant changes to Montana's Wrongful Discharge from Employment Act, Human Rights Act and Wage Protection Act.

Wrongful Discharge

The changes to the Wrongful Discharge from Employment Act (WDEA) are significant and benefit employers. Specifically, the amendments extend the default probationary period during which an employee may be discharged without good cause, increase proof required for wrongful discharge, expand the sources of income that are required to be subtracted from an employee's award and simplify notice that employers must provide to an employee of their internal grievance procedure, which an employee must exhaust prior to filing a WDEA claim.

- **Default probationary period extended.** Under the amended WDEA, the default probationary period is now extended to 12 months from six months after an employee's date of hire. Employers are also allowed to extend this probationary period at any point prior to its expiration by up to an additional six months (for a maximum probationary period of 18 months). Employers may also set their own probationary period in their written policies. It is crucial that Montana employers update their employee handbooks and personnel policies to increase the length of their new employees' probationary period, as any discharge that occurs following this period must be for good cause.
- **Clarification of when an employer's violation of its policies constitutes wrongful discharge.** An employer's violation of its written policies under the new amendments may result in a wrongful discharge only when the employer materially violates its own written policies and the violation deprives the employee of a "fair and reasonable opportunity" to maintain employment with the employer. Prior to this change, former employees commonly brought WDEA claims alleging nothing more than an employer's minor violation of its written personnel policies.
- **Definition of "good cause" expanded.** The amendments expand "good cause" to terminate employment to include an employee's material or repeated violation of an express provision of the employer's written policies.
- **Broad discretion to terminate the employment of managerial employees codified.** Codifying a long line of Montana Supreme Court precedent, the act now provides that an employer "has the broadest discretion when making a decision to discharge any managerial or supervisory employee."
- **Sources of income that must be deducted from an award expanded.** The act now requires that any award for wrongful discharge must include a deduction for any post-discharge compensation earned or that could have been earned from any new kind, nature or type of work, among other things, provided that the employee was not receiving the compensation prior to the discharge.
- **Unemployment benefits received must be deducted from an award.** For the first time, any monetary payments an employee receives as a result of the discharge must be deducted from any award the employee receives, including unemployment benefits. This is a significant departure from the "collateral source rule" that exempts unemployment compensation from mitigation earnings

in most jurisdictions and has the potential to greatly diminish the award available to WDEA plaintiffs as claimants commonly receive unemployment benefits until they find subsequent employment. By requiring that these unemployment benefits be deducted from any award, this change significantly reduces an employer's damage exposure in a WDEA claim.

- **Additional procedural requirements created.** Employees must now serve a WDEA complaint within six months of filing their complaint, whereas they previously had three years. In addition, an employer may now notify employees of its internal grievance procedure within 14 days from the date of the discharge and provide this notice by sending these procedures to an employee's last known postal or email address. This is a critical change as an employee's failure to exhaust an employer's internal grievance procedure can result in the dismissal of a WDEA claim.

Given these amendments, Montana employers should review their employee handbooks and other personnel policies to ensure they are taking full advantage of these employer-friendly changes. In particular, Montana employers should consider extending the probationary period for new employees and changing their personnel policies to fully cover the performance for their employees. Montana employers should further train their human resources employees to provide adequate notice to any discharged employee of the employer's internal grievance procedure within the statutory period.

Montana Human Rights Act (MHRA)

As a result of the COVID-19 pandemic and the controversy surrounding vaccinations and "immunity passports," Montana has amended the MHRA to provide protection to those who choose not to receive a COVID-19 vaccination.

The amendments to the MHRA prohibit employers from refusing or barring an individual from employment or making compensation decisions based on the individual's vaccine status or whether the individual has an immunity passport. The act now also prevents an employer from requiring that an individual receive any vaccine whose use is allowed under an emergency use authorization or any vaccine undergoing safety trials. The act does not, however, prohibit an employer from "recommending" that an individual receive a vaccine.

Given the MHRA's broad definition of "employer," nearly every employer with operations in Montana is now prohibited from considering an individual's vaccination status when making employment or compensation decisions and from requiring that employees receive the current COVID-19 vaccines.

Importantly, this amendment calls into question whether a Montana employer may offer its employees incentives for receiving a COVID-19 vaccine. Any Montana employer that is currently offering incentives or is considering doing so should seek legal advice to best understand the risks involved in doing so. Claims under the MHRA can be expensive to defend, and the act allows for the recovery of attorney's fees for an employee who prevails on a claim under the act.

Montana Wage Protection Act (WPA)

The amendments to Montana's WPA include employer-friendly changes to Montana's tip-pooling statute. Previously, Montana was one of the few states that allowed only voluntary tip-pooling. Under the amended WPA, however, Montana employers generally may now require tip pooling but must adhere to the following requirements:

- An employer must notify its employees of any mandatory tip-pooling arrangement.
- A tip-pooling arrangement may include employees involved in providing customer service or food preparation, including servers, hosts, bussers, dishwashers and cooks. Employers and exempt salaried supervisors or managers, however, cannot participate in a tip pool but may keep tips they receive directly from customers based on service they directly provided to the customers.
- There is no minimum or maximum contribution limits for mandatory tip pools, provided that an employer does not require employees to contribute more than the amount of tips they actually receive to a tip pool.

- An employer that collects and redistributes employee tips as part of a tip pool must fully distribute any tips collected no later than the regular payday for the workweek in which the tips were collected.
- An employer must maintain payroll and other records showing the tips received and distributed under the tip-pooling arrangement.

The Montana Department of Labor likely will revise the current regulations that permit only voluntary tip pools.

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