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### The Montana Wrongful Discharge from Employment Act: A supervisor's handbook.

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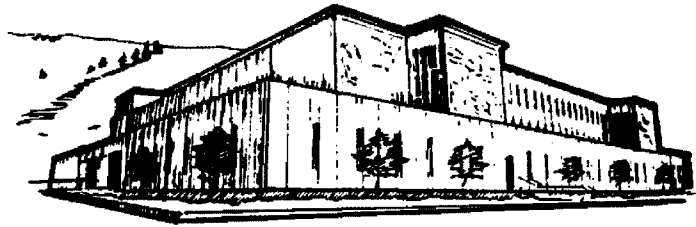
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University of  
**Montana**



**The Montana Wrongful Discharge from Employment Act:  
A Supervisor's Handbook**

by

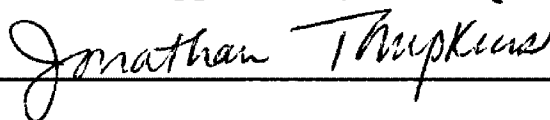
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**B.A., Eastern Montana College, 1972**

**Presented in partial fulfillment of the requirements  
for the degree of Master of Public Administration  
University of Montana**

**1990**


Approved by

  
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## **PREFACE**

Montana employers have seen tremendous changes in their relationship with their employees in the 1980s. Early in the decade, in response to decisions protecting employees issued by the Montana Supreme Court, employers became increasingly hesitant to discipline or discharge problem employees. A lack of understanding of the rights of the employer, coupled with a fully justified fear of lawsuit, created tremendous uncertainty. To reduce this uncertainty, the Montana Liability Coalition engaged the author to write a handbook which would contribute to a greater understanding of an employer's rights and obligations and to show how problem employees can be managed in ways that minimize an employer's exposure to litigation. This professional paper represents an expanded version of the handbook to be published by the Montana Liability Coalition entitled An Employer's Guide to Avoiding Wrongful Discharge. It is organized along the following lines:

- Chapter I provides an overview of the employment relationship and provides a background for understanding these often complex issues.

- Chapter II presents an explanation of the Montana Wrongful Discharge from Employment Act.
- Chapter III addresses some of the more difficult issues that arise in employment that might relate to an employer's obligations under the Act.
- Chapter IV provides materials such as sample personnel policy provisions and incident documentation that may prove useful to employers in managing disciplinary situations.

Several words of caution regarding this professional paper are appropriate. First, this paper is written primarily for employers operating in the state of Montana. Special rules that apply to government employers are addressed in chapter III. Employers in other states must be sensitive to the statutory and case law in the particular jurisdiction.

Second, this publication is being issued in late 1989, when little experience with the Act is available. The meaning of the Act will change with time as it is interpreted by the courts, and, possibly, modified by the Legislature. Therefore, employers should not view this information as definitive.

Finally, the material contained in this professional paper is meant to be informative in nature. It is not intended as legal or professional advice that employers should rely upon. Every employment relationship contains unique

facts. This professional paper should be used, therefore, for basic information and as a tool to understanding the rights of an employer generally. When specific problems arise, the employer should obtain assistance from a professional.



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## CHAPTER I

### THE EVOLUTION OF "AT-WILL" EMPLOYMENT

#### BACKGROUND

In England when an employee is hired, the term of the employment is presumed, if not otherwise stated, to be for one year. Although the American legal system is based on English Common Law, Americans developed their own unique concept of the employment relationship.<sup>1</sup> In Montana, as elsewhere, the concept of "At Will" employment became the standard. Under this concept, persons not having a specified length of employment could be terminated or could quit, without legal liability to either party, "for a good reason, a bad reason, or no reason at all".<sup>2</sup>

Employment At Will has been statutory in Montana since the turn of the century.<sup>3</sup> In reality, however, actions by Congress, the courts and the Legislature have put a number of limitations on an employer's freedom to

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<sup>1</sup> See Feinman, " The Development of the Employment at Will Rule," American Journal of Legal History 20 (1976): 118.

<sup>2</sup> Philips v. Goodyear Tire and Rubber Co., 651 F.2d 1051, 1054 (5th Cir. 1981).

<sup>3</sup> Montana Codes Annotated, sec. 39-2-503.

terminate employees "At-Will". Employers, for example, have long been prohibited from terminating an employee because of the employee's religious beliefs, marital status or on any other basis prohibited by anti-discrimination laws. Likewise, employers may not lawfully terminate an employee in violation of "public policy".

## THE EXPANSION OF EMPLOYEE RIGHTS

For many years, the Montana Supreme Court consistently applied the "At Will" doctrine to employment relationship cases. As late as 1981, the Montana Court refused to conclude that even a long-term employee (18 years of employment) should have any expectation of continued employment since employment was "At Will".<sup>4</sup>

It was in the early 1980s, however, that opinions from the Court began to hint at the existence of a new doctrine applicable to the employment relationship - The Covenant of Good Faith and Fair Dealing. The first case in which the Court imposed the new doctrine upon a Montana employer was one brought against a Bozeman insurance company, Life of Montana, by discharged former employee Marlene S. Gates.<sup>5</sup> Life of Montana had issued an employee handbook that listed certain grounds for termination without warning. Ms. Gates was, she claimed, fired without warning for a reason not listed in the handbook.

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<sup>4</sup> *Reiter v. Yellowstone County*, 38 St. Rept. 686, (1981).

<sup>5</sup> *Gates v. Life of Montana Insurance Company* 196 Mont. 178 (1980).

The Court rejected Gates' argument that the handbook constituted a contract between her and the company. Nevertheless, the Court found that Ms. Gates was entitled to the security of knowing that the company would follow its policies as issued. The opinion discussed the "necessity of balancing the interests of the employer in controlling his work force with the interests of the employee in job security". The Court observed that "If the employer has failed to follow its own [personnel] policies . . . an injustice is done." The Court held that "a covenant of good faith and fair dealing was implied in the employment contract" and sent the case back to the District Court to determine if the covenant had been violated.

This finding that a "Covenant of Good Faith and Fair Dealing" could be implied in employment relationships radically changed the employment relationship throughout Montana. In subsequent cases, the Supreme Court held:

- Breaches of the covenant could subject the employer to damages including payments for emotional, mental and financial distress and punitive damages.<sup>6</sup>
- Probationary employees could be protected by the covenant.<sup>7</sup>

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<sup>6</sup> **Gates v. Life of Montana Insurance Company**, 668 P.2d 213 (1983) Referred to as **Gates II**.

<sup>7</sup> **Crenshaw v. Bozeman Deaconess Hospital** 41 St. Rept 2251 (1984) .

- Employees could sue over unfulfilled implications of job security made by supervisors.<sup>8</sup>

As a result of these rulings, many managers became reluctant to terminate employees, even when justified, since no one was certain which actions on the part of employers would be approved by the court or a jury, and which would not. It seemed as though every layoff or termination of a disgruntled employee was being challenged in court and that employers were routinely being subjected to substantial fines and other penalties. In 1987, for example, a jury awarded \$2,500,000 to a wrongfully discharged employee.<sup>9</sup>

#### THE LEGISLATIVE RESPONSE

Following an unsuccessful attempt in 1985 to reverse these court decisions, House Bill 241 - The Montana Wrongful Discharge From Employment Act - was introduced in the 1987 Legislature by Rep. Gary Spaeth (D-Silesia). It represented the first effort by a state legislature to spell out comprehensive rules and procedures governing discharge disputes. The concept of the bill was

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<sup>8</sup> Dare v. Montana Petroleum Marketing Company 41 St. Rept. 1766 (1984).

<sup>9</sup> Robert F. James, Billings, Montana, Employment Law and Practices, Summary of Wrongful Discharge Verdicts, Unpublished outline of a presentation given to the Montana Credit Union Network, July 12, 1989.

fairly simple. The former statutory principle of "employment at will," under which employers enjoyed tremendous discretion to terminate employees, was to be abolished. Similarly, court-created doctrines which had allowed litigation and permitted many large awards against employers were also to be abolished.

The bill attracted much attention. Business groups, plaintiff's attorneys, and other interested groups such as the Montana Liability Coalition worked hard with legislative committees to find a middle ground position the Legislature could enact into law.

The final version of the bill adopted by the legislature 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.

HB 241 was signed by the governor and went into effect July 1, 1987. Challenges to the constitutionality of the Act promptly followed its passage. When on June 29, 1989, the Montana Supreme Court upheld the constitutionality of the Act<sup>10</sup>, employers for the first time began to grasp the importance of familiarizing themselves with the Act and the changes it brought.

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<sup>10</sup> Meech v. Hillhaven West, Inc. and R. Ron Semingson, P.2d \_\_\_\_\_ (1989).

## **CHAPTER II**

### **THE MONTANA WRONGFUL DISCHARGE FROM EMPLOYMENT ACT**

The stated purpose of the Montana Wrongful Discharge From Employment Act (the Act, see Appendix A), Sec. 39-2-901, MCA, is to statutorily establish the rights and remedies with respect to wrongful discharge in the State of Montana. The Act re-establishes a modified form of employment "At Will" that allows, subject to the limitations contained in the Act, an employment relationship having no specified term to be terminated at the will of either party "for any reason considered sufficient by the terminating party". The Act limits the damages available to a wrongfully discharged employee to back pay and benefits and expressly prohibits awards for pain and suffering, emotional distress, compensatory, punitive and "any other form" of damages. Punitive damages may, however, be awarded in cases of actual fraud or actual malice involving public policy violations covered by the Act. The statute also provides incentives for the use of alternatives to court actions such as grievance procedures and arbitration.

## WHO IS COVERED ?

The Act covers persons who work for another for hire. The statute excludes from coverage:

- 1) Individuals under a written contract of employment for a specified term;
- 2) individuals covered by a written collective bargaining agreement; and
- 3) independent contractors.

If the discharge is covered by another statute that provides a remedy or procedure for settling the complaint, the claimant must use the other statute. For example, if the claimant is charging discharge on the basis of marital status, the claimant must use the procedures outlined in the Montana Human Rights Act - the law that prohibits marital status discrimination - and may not file a wrongful discharge claim.

## WHAT IS A DISCHARGE ?

Any termination of covered employment, no matter how it is described, is subject to the requirements of the Act. Therefore, layoffs, terminations due to re-organizations, terminations for cause and ultimatums to "quit or be fired" are covered by the law.



"Constructive Discharges" are also recognized by the law. A Constructive Discharge might occur when an employee voluntarily terminates a job because of a situation created by an act or omission of an employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive Discharge does not mean situations where an employer refuses to promote an employee or improve wages, responsibilities or other terms and conditions of employment.

#### WHICH DISCHARGES ARE "WRONGFUL" ?

The Act lists three categories of employer actions that can make a discharge "wrongful":

- 1) Where the employer has terminated an employee who refuses to violate public policy or who reports a violation of public policy. Public policy is defined by the Wrongful Discharge Act as "a policy in effect at the time of the discharge concerning the public health, safety or welfare established by constitutional provision, statute or administrative rule".

Examples of actions that might be found to violate public policy include:

- An employer has threatened any employee who reports a chemical spill with discharge. The employee reports the spill to the Health Department and is terminated.
- An employer has directed an employee to lie to a judge to try to get out of jury duty. The employee refuses and is discharged.

2) Where the employer has violated the express provisions of its own written personnel policy. If an employer has written personnel policies, it must follow them to the letter until they are rescinded or modified.

**Examples:**

- The employee handbook lists four reasons for discharge without prior warning. An employee is discharged without prior warning for a reason not listed in the handbook.
- A company's personnel policy lists a procedure for investigating alleged employee violations of policy. The supervisor skips several steps of the procedure because he "saw him do it."

- 3) Where the employer has terminated an employee who has completed his/her probationary period without good cause. This provision raises two issues: What constitutes a probationary period and what constitutes "good cause". Both topics are discussed in detail in a later chapter.

**Examples:**

- An employee is terminated for "failure to follow company policy" but the employer cannot show that the employee was told about the policy nor is there any documentation of the "failure".
- An employee is terminated for theft. There was no investigation or proof the employee was guilty, nor were other employees who were present terminated.

## **THE PENALTIES**

The Wrongful Discharge From Employment Act limits damages to persons who were wrongfully discharged to a maximum of four years lost wages and benefits plus interest. This amount can be offset by any interim earnings, including amounts the claimant could have earned with reasonable diligence.

## DISPUTE RESOLUTION

The Act provides for several forms of dispute resolution:

**Internal Procedures** - If the employer has a written policy, such as a grievance policy, that allows the employee to appeal a discharge, and the employer has given the employee a copy of the procedure within seven days of the date of discharge, the employee must first attempt to utilize the procedure before going to district court. If the procedure is not complete within 90 days of when the employee initiates his/her grievance action, the employee may then file an action in district court.

**District Court** - The law allows a claimant one year from the date of discharge to file a claim against an employer in District Court. If the internal grievance procedure is utilized, the one year limitation may be extended up to an additional 120 days to allow the internal procedure to be completed.

**Deferring to an Arbitration Procedure** - Out of court resolution of discharge disputes is encouraged by the Wrongful Discharge From Employment Act. The Act provides that either party to a wrongful discharge claim may request final and binding arbitration as a quicker and less costly means to settle the dispute. The offer to arbitrate may be

made in writing by either party within 60 days of the serving of the complaint and must be accepted by the other party within 30 days. If the parties decide to arbitrate, an arbitrator may be selected by mutual agreement or as provided by law. If arbitration is agreed to, the decision of the arbitrator is final and binding on the two parties and no further court actions are permitted in most cases.

If the discharged employee offers to arbitrate, the offer is accepted by the employer and the employee prevails in the arbitration, the employee is entitled to have all costs of arbitration paid by the employer. A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails under the Wrongful Discharge Act is entitled to reasonable attorney fees incurred subsequent to the date of the offer.

## **CHAPTER III**

### **PREVENTING WRONGFUL DISCHARGE CLAIMS**

The prevention of wrongful discharge claims begins with proper hiring procedures and continues throughout the employee's term of employment. Supervisors must know and apply their organization's personnel policies and must be sensitive to their legal obligations to employees and their rights as employers.

The following sections are guidelines that reflect general personnel principles which, if implemented, may reduce your exposure to a wrongful discharge claim. These recommendations are based on our knowledge of the Wrongful Discharge From Employment Act as it exists in late 1989. You should consult someone familiar with the law before applying these principles to your own situation.

#### **SELECTING EMPLOYEES**

The hiring of a skilled new employee can be the beginning of a pleasant and profitable association or it can, if handled improperly, be the beginning of a

nightmare. It is essential that employees be hired based on a matching of their knowledge, skills and ability to the job's duties and responsibilities. Incomplete screening can, and often does, lead to sub-standard performance that may result in termination or demotion of the employee or in a voluntary termination by the employee that might result in a claim of constructive discharge.

**Recommendations:**

- Clearly identify all the duties and responsibilities of the job and screen job applicants thoroughly. If possible, provide a copy of the job description to all parties involved in hiring, including outside parties such as recruiting services.
- Follow a hiring checklist to ensure that all the required procedures are followed.
- Notify the successful candidate, before hiring, of special or unusual requirements or restrictions associated with the job such as overtime or overnight travel requirements, non-competition agreements, compensation and probationary periods. Notify the successful candidate, in writing, of these requirements before they

begin work and have them acknowledge acceptance of the conditions in writing.

- All newly hired employees should be required to complete a probationary period in order to have an opportunity to determine if a new employee has the skills and ability to perform assigned job duties. The length of the probationary period should be reasonably related to the length of time necessary to demonstrate the employee's mastery of the duties of the job and may be extended, if permitted by the organization's personnel policies, due to observed performance or conduct deficiencies for an additional reasonable period of time. Employees should be notified upon hire of the probationary period. During the probationary period, the employee's performance and overall conduct should be observed, assessed and recorded by the employee's supervisor. During the probationary period, the employer may terminate the employment relationship without a showing of good cause as long as the termination is not in violation of other applicable legal requirements or the employer's own personnel policies.



## ON THE JOB TREATMENT

Preventing employee problems is easier and far more effective than coping with the lost productivity, lost time and expense associated with disciplining and/or discharging employees. Although a complete discussion of proper on the job treatment is beyond the scope of this handbook, the following guidelines should help in reducing such problems:

- Communicate your performance expectations, work rules and policies to employees. When you observe superior or substandard performance, let the employee know immediately so they know how they are doing and can adjust their behavior accordingly. Utilize an appropriate Performance Appraisal System to establish and communicate the expectations to your employees and to document their success or lack thereof in meeting the standards.
- Train your employees thoroughly when hired and when assigning new duties or responsibilities.
- Develop personnel policies to record your work rules and to ensure consistent treatment of employees. Follow and enforce your company's or jurisdiction's reasonable, job-related policies, rules

and performance expectations. Avoid the temptation to impose your personal standards on others.

- Don't use generic "off the shelf" forms for hiring, performance appraisal or other personnel related purposes. The cost associated with having forms and policies developed specifically for your organization is small, especially when compared to the cost of an avoided wrongful termination lawsuit.
- While it is not mandatory that employers have written personnel policies, we believe it is advisable. Personnel policy handbooks have several purposes, one of the most important of which is to communicate the company's work rules, standards of behavior and other policies and procedures to employees. Policies are an aid to consistent treatment of employees. Under Montana's new Wrongful Discharge From Employment Act, policies take on a new importance. Once adopted, policies must be followed by both management and employees until management revises or abandons the policy. It is advisable that all managers be trained to know the content of the company policies and how to apply them. Because of the constant evolution of the law, policies should be reviewed from time to time by a competent party to ensure that

the policies are still appropriate and do not conflict with more recent changes of law or decisions of the court system.

- Be sensitive to and fully investigate complaints by employees of improper acts by supervisors or co-workers. Be sensitive to employees' legal rights such as the right to be free from harassment and unlawful discrimination, to refuse polygraph testing or to join or associate with a union. Do not harass or threaten an employee who exercises a right.

## TERMINATION OF EMPLOYMENT

No matter how much effort you put into hiring or how well you manage employees on the job, you are bound to have problems from time to time. The manner in which you as an employer, manager or supervisor handle problems will often dictate the success or failure of a grievance or lawsuit brought by a disgruntled employee.

Although it is not explicitly stated in the Act, we recommend employers adhere to the concept of "progressive discipline". Progressive discipline can be defined as "progressively more severe actions by an employer that take into consideration the history of the employee and the severity of the offense".

The goal of progressive discipline should be, whenever possible, to correct a problem, rather than punish an employee. Punishment in the form of

suspension or removal from a position is normally reserved for situations where less severe actions have not been successful in correcting a problem or where the severity of the offense is so great (stealing, reporting to work under the influence of alcohol, assaulting another employee, etc.) that a stronger penalty is warranted on a first offense.

Because the Wrongful Discharge From Employment Act covers all forms of termination of covered employment, it is important that you have a solid and well documented business-related reason any time you terminate an individual's employment. Even "voluntary" terminations can be subject to scrutiny under the Act if the employee claims after he/she voluntarily terminates that the employer in some way "forced me out".

As discussed above, an employee who has completed a probationary period can only be discharged if the employer can demonstrate "Good Cause" and the termination is handled in accordance with the employer's written personnel policies. Not only should "Good Cause" be present, the employer should be able to demonstrate good cause through documents, notes or evidence that would convince a judge or juror.

What exactly is "Good Cause" and how do you know when you are justified in discharging an individual? According to the Act, Good Cause means "reasonable job-related grounds for dismissal based on a failure [by the employee] to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason". The amount of cause necessary

is usually related to the proposed penalty. The amount of cause necessary to sustain a termination is obviously greater than that required to issue a reprimand to an employee.

Although the definition of Good Cause has not yet been addressed by the courts in Montana, we believe that if the following standards have been met, cause is present:

**Forewarning-** The employee has been forewarned about how the employer expects the employee to behave and perform and the employee has an understanding of the probable consequences of a particular action or failure to act. Employees may be forewarned through vehicles such as personnel policies, oral or written directives from their employer, performance appraisal standards or staff meetings.

**Appropriateness of Rule -** The rule the employee is accused of violating should be reasonably related to the safe, efficient or orderly operation of the company. Supervisors should not try to enforce "unwritten" rules nor should they try to make an example of someone by enforcing a rule that has gone unenforced for a long period of time.

**Investigation -** An investigation should have been conducted fairly and impartially before disciplinary action is taken. An organization cannot justify overly harsh disciplinary actions with information discovered after

the employee has been disciplined. The investigation must produce proof that the employee is guilty of the infraction he or she is charged with. The investigation should also include a determination of the organization's reaction in similar situations in the past.

A supervisor should attempt to obtain all sides of a dispute. If possible, another supervisor or management representative should be utilized to investigate the situation. The employee(s) and witnesses should be interviewed and physical, documentary or medical evidence should be reviewed before any disciplinary actions are taken.

Do not authorize supervisors to terminate an employee on the spot before an investigation can be completed. Supervisors should have authority to suspend for a short period of time, but given the potential penalties associated with a wrongful discharge claim, we advise you to allow another party to investigate the problem to ensure that all the relevant facts have been obtained and the required procedures have been followed.

Many restrictions exist on the way that evidence can be obtained about or from employees. Check with a person familiar with an employer's obligations when investigating any situation which might lead to a discharge.

**Equal Application of Rules** - The rules should be applied equally to all employees with similar performance/conduct histories and length of service. If not, you should have a legitimate job-related reason for differentiating between this and other situations.

**Penalty Related to Offense** - Is the penalty that you plan to administer justified by the seriousness of the proven offense? It is unlikely a court or an arbitrator would consider a single tardiness sufficient cause to sustain a discharge in most cases. On the other hand, few arbitrators would likely overturn the discharge of an employee who was convicted of drug dealing in the work place. Don't combine different types of offenses to escalate a disciplinary action.

Whenever possible in cases of termination, the employer should conduct and record an exit interview with all employees leaving their jobs. The exit interviewer should record reasons for termination, departure date, address changes (where appropriate) and termination payments. You should protect yourself by giving all departing employees except those excluded by the Act a copy of your dispute resolution or grievance procedure upon termination. If the staff member is unavailable for interview, a copy of the grievance policy should be sent to the employee by certified mail, with a return receipt requested, within seven days of the date of termination.

## WHEN DISPUTES ARISE - THE GRIEVANCE OPTION

If the worst should happen and an employee should claim he or she was wrongfully discharged, the employer has several opportunities prior to going to court to resolve the dispute. The first and best protection is to allow the employee to appeal the decision within your organization using a dispute resolution or grievance procedure. The law requires<sup>11</sup> the employee to utilize any such procedure, if the employer has given the employee a copy of the procedure within seven days of the date of discharge.

If you do not have a grievance procedure, you may wish to adopt one. It provides several advantages to employers over going to arbitration or to court:

- A grievance procedure is usually the least expensive option.
- The procedure allows upper management an opportunity to review the actions of lower level supervisors and provides you a relatively easy way to correct any mistakes that may have been committed.
- The grievance procedure option is quicker than litigation or arbitration. Grievance procedures usually require a discharged

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<sup>11</sup> 39-2-911 (2) M.C.A. states "If an employer maintains written internal procedures... under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part."



employee to file his dispute within a specified number of days.

You will then know if the employee plans to challenge a discharge when the dispute is still fresh, information is still available and accrued back pay is minimal.

Remember that the law requires the internal procedure to be completed within 90 days of the date the employee files his grievance. If it is not completed, the employee can take the dispute to the court system and the company may have lost an opportunity to resolve the dispute quickly, cheaply and amiably.

The Wrongful Discharge From Employment Act contains a provision that is unusual for nonunion employees. The Act provides for arbitration of the dispute as an alternative to a lawsuit. Arbitration is generally to the employer's benefit for a number of reasons:

- Arbitration is typically quicker and less expensive than defending a lawsuit.
- An adverse district court decision is appealable to the Montana Supreme Court. Arbitration decisions are, by contrast, final and binding; appeals are allowed only where the arbitrator departed from the standards of the Uniform Arbitration Act.

- The arbitrator is bound to the same remedies as the court.
- Less adverse publicity may be generated for the employer.
- The employer may participate in the selection of the arbitrator.

## **SPECIAL ISSUES**

Employers must be sensitive to other legal requirements beyond those contained in the Wrongful Discharge Act that may become involved in a termination. A partial list of other laws or legal issues that may apply includes:

- State law prohibits and federal law severely limits the circumstances under which polygraph tests may be used.<sup>12</sup> Therefore, with very few exceptions, polygraphs may not be required as a condition of employment or continuation of employment.
- There are restrictions on when and how employees can be tested for suspected alcohol or drug use.<sup>13</sup> State law allows employers to conduct blood or urine tests for applicants for employment only

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<sup>12</sup> Montana Code Annotated, sec. 39-2-304.

<sup>13</sup> Montana Code Annotated, sec. 39-2-304 (1) (b).

when the position is in hazardous work environments or in jobs where the primary responsibility is security, public safety or fiduciary responsibility.

- Employees can be subjected to testing where the employer has "reason to believe the employee's faculties are impaired as a result of alcohol consumption or illegal drug use".<sup>14</sup>
- All blood and urine testing requires the employer to adopt a written testing procedure and make the policy available to all persons subject to testing. The policy must include provisions listed in Section 39-2-304(2), M.C.A.
- The Courts may recognize a number of claims that may occur following discharge and be considered independent of a wrongful discharge claim. They might include claims that an employer injured a former employee's good name through information given to prospective employers or released to the general public.

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<sup>14</sup> Montana Code Annotated, sec. 39-2-304 (1)(c).

- There are statutory requirements that prohibit blacklisting of former employees.<sup>15</sup>
- Montana Wage and Hour Law<sup>16</sup> requires that an employee who is terminated be paid within 3 days of termination. An employee who is terminated for cause must be paid "immediately".
- Employees who become sick or disabled whether or not due to work related causes are protected by the Montana Human Rights Act<sup>17</sup>. I recommend that an employer check with a person familiar with the Human Rights Act before terminating an individual who is suffering from an incapacitating illness or disability. If the illness or injury is covered by Worker's Compensation, the employer has an obligation<sup>18</sup> to grant a preference over all other applicants for a comparable position that becomes vacant if the injured worker is capable of returning to work and has received a medical release to return to work, and the

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<sup>15</sup> Montana Code Annotated, sec. 39-2-801.

<sup>16</sup> Montana Code Annotated, sec. 39-3-205.

<sup>17</sup> Montana Code Annotated, sec. 49-2-201.

<sup>18</sup> Montana Code Annotated, sec. 39-71-317.

position is consistent with the injured worker's physical condition and vocational abilities.

- An employer may take disciplinary action against an employee for off-the-job activities where the conduct is a violation of the employer's work rules, a conflict of interest with the employer's business or where the conduct has a negative effect on the employer's legitimate business interests. If you plan to base a disciplinary action on an employee's off-the-job behavior, we recommend the behavior be directly related to the employee's job and the information substantiating the activity be verified wherever possible.

Public employers have additional constitutionally based requirements that go beyond those applicable to the private employer. These additional requirements include:

**Right to Privacy-** The Montana Constitution creates a right to Privacy.<sup>19</sup>

From 1972 until 1985, it was believed that this right applied to private actions as well as those taken by governmental entities. In 1985, however, the Montana

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<sup>19</sup> Article II, Section 10 of the 1972 Montana Constitution states: "The right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest."

Supreme Court reversed itself<sup>20</sup> and held that the right protected individuals only from governmental intrusions. Although private employers can still be held liable under a tort theory of invasion of privacy, only governmental employers need worry about the constitutional issues. In practice, the Right to privacy often becomes intermeshed with the Montana Constitution's freedom from unreasonable search and seizure. These rights make investigations and searches a much more difficult issue for the public employer than for the private employer. For example, a private employer could, were it not for the statutory limitation on testing, randomly test employees for alcohol or drug use. A public employer, on the other hand, would probably be in violation of the constitutional prohibitions unless it could demonstrate "compelling state interest"- not an easy thing to do in most cases.

**Right to Due Process-** The right to due process stems from both the Montana Constitution<sup>21</sup> and from the 5th and 14th Amendments to the United States Constitution. Both procedural and substantive due process are required. If a public employer has procedures that apply to a certain type of transaction, the public employer must follow these procedures or face a charge of violation of

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<sup>20</sup> State v. Long 42 St. Rep. 643 (1985).

<sup>21</sup> Article II, Section 17 states: "No person shall be deprived of life, liberty, or property without due process of law."

due process. Due process often equates to the "right" to a hearing<sup>22</sup>. Hearings can run the spectrum from very formal hearings with representation by attorneys to opportunities for an employee to state their side of the story in an informal disciplinary actions. The commonly accepted "rule of thumb" is that the seriousness of the penalty being contemplated indicates the amount of "process" due. For example, if an employee is being terminated, some courts have insisted that public employers offer a pre-termination "full-blown" hearing before an informal tribunal. On the other hand, where the disciplinary action being taken is simply a letter to an employee's personnel file, the public manager need only present the letter to the employee and provide an opportunity to the employee to place their own statement in the file.

**Freedom of Speech-** It is not uncommon for a public employee to accuse the employer of infringing his or her constitutional right to free speech.<sup>23</sup> Such claims might arise when the employee has been disciplined for making public statements against the employer or for "whistle blowing" activities. Generally speaking, public statements made by a public employee are protected. The employer can only act when the words become translated into a form of action that affects the employee's work performance. In such circumstances, it is wise

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<sup>22</sup> See *Welsh v. City of Great Falls* 41 St. Rept. 1826 (1984).

<sup>23</sup> See *Rankin v. McPherson*, 483 US \_\_\_\_, 6 Law. Alert 378 (July 13, 1987).

for the public employer to focus on and document the employee's work performance- not the public speech. The "interference" with the employee's work should be of major consequence; otherwise, a charge of violating the employee's freedom of speech rights may be successful.

**Freedom from Political Belief Discrimination-** The Montana Governmental Code of Fair Practice makes political belief discrimination against most public employees unlawful.<sup>24</sup> The statute provides exceptions only for appointees of five top elected state officials. Acts of political belief discrimination by other public officials- even other elected officials such as County Commissioners or County Sheriffs-is unlawful. It is frequently difficult to separate a "political belief" from a management philosophy. A change of public officials usually reflects a desire on the part of voters for new management style. Under the Code of Fair Practice, a new public official could not "clean house" upon entering office. They could, however, radically alter the way business is conducted and direct the former employees to implement the new methods and procedures. Only when it can be shown that a given employee cannot or will not implement their new instructions would the public employer have a basis for disciplinary action.

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<sup>24</sup> Montana Code Annotated, sec. 49-2-308(3).



## **CHAPTER IV**

### **SAMPLE MATERIALS**

**This chapter contains examples of materials designed to assist the employer in avoiding wrongful discharge claims. This material is not exhaustive and the suggestions made are general guidelines only. The specific steps an employer takes in any given situation must be based on an evaluation of the facts of the situation and the circumstances of the employer and employee.**

#### **DOCUMENTATION**

**The success or failure of a wrongful discharge claim will often turn on the completeness of the documentation maintained by the employer in support of its reasons for discharging an employee. Documentation should be kept from the initial screening of applicants, throughout day-to-day employment and through final termination. This section includes samples of suggested formats for some of the more common documents you will have an opportunity to create.**

**Offer of Employment Letter- It is wise to issue a letter to new employees or recently promoted employees to outline the terms and conditions of**

employment and any special issues such as non-competition agreements, ownership of patents and ideas, and to ensure that the employee fully understands. The letter should have a place for the employee to sign in acknowledgement of the conditions of employment and to, if appropriate, acknowledge receipt of the company's personnel policies and a job description.

**Recording Performance and Conduct Observations-** Supervisors are responsible for ensuring compliance with the company's policies, procedures and work rules. An important component of this responsibility is the day-to-day recording of observations and conversations regarding an employee's performance or conduct and any informal discipline actions, such as oral warnings or corrective interviews.

These supervisory observations can be recorded in a supervisor's log. The log should include the employee's name, the place where the observation or conversation took place, the date and a brief statement of what happened. It may not be necessary or appropriate to include information from the supervisor in the employee's personnel file unless the supervisor:

- Decides to use the information in support of a decision such as to discipline the employee or to promote or not promote the employee; or

- Shares the information with a person other than the employee; or
- Treats the information as a permanent record.

**Formal Disciplinary Actions-** Formal letters should be issued and maintained in support of more severe disciplinary actions such as suspensions or terminations. Formal documentation should include:

- Date, place and time of incident.
- Detailed description of the problem (don't generalize).
- Implications. Why is the problem important to the Company (overtime required, lost sales, lost production, safety hazard, etc)?
- A summary of the employee's prior record and any prior discussions or actions taken with the employee in this or similar areas.
- Observed improvements (or lack thereof) noted since previous communications. (Note: If there are multiple but related problems, give credit for improvements made).

- Expected solutions: Be specific as to your expectations of change. Don't discuss attitude or initiative or other "personality traits". Instead, describe expected solutions in terms of specific action or inaction on the part of the employee.
- If you are taking an action, clearly say so. For example: "You are suspended without pay for a period of five working days." If suspending someone, specify the date and time they are expected to call in or return to work.
- Explain the consequences of not conforming with the expected solution outlined above. You may wish to be very specific by saying, "further violations will result in your immediate termination" or you may wish to leave your options more open with "appropriate disciplinary action up to and including discharge from employment". The important thing is that the employee has forewarning of the possible consequences of future behavior and would not be surprised if suspended or terminated.
- Set a follow-up date by which time they must meet the expected solutions outlined above and a date that you will review the situation to see if the changes have been accomplished. Avoid

giving a specific date. Instead, give a time frame such as "the week of April 21st". If you have agreed to give three weeks to see improvement, do not take further action on this problem until that period has elapsed.

## PERSONNEL POLICY PROVISIONS

The following are sample personnel policy provisions that may be modified as necessary for use within an organization. Personnel policies should be written or reviewed by a person familiar with the current requirements of the various laws, rules or regulations that might apply to the particular organization.

**Sample Change Of Policy Provision-** Any company will find it necessary to change its personnel policies and procedures from time to time. It is advisable to include a provision in your policy handbook that notifies employees that you may make changes:

*This handbook is written to inform employees of standard Company/Agency policies and procedures. Management reserves the right to change, suspend, revoke, terminate or supersede policies or benefits described herein with or without notice in any manner it believes to be in the best interests of the Company/Agency and consistent with applicable laws. These*

*personnel policies are not intended to constitute the terms and/or conditions of an expressed or implied contract of employment with any applicant to or employee of [the Company/Agency].*

When personnel policies, procedures or benefits are changed, it is advisable to notify employees of the change and maintain a record of how the notice was given:

- If you tell people at a staff meeting, have them sign in and keep notes of what was discussed.
- If you issue a revised policy, have employees sign a receipt that states they received the revised policy and are responsible for reading it.

Grievance/Appeal Procedures- Depending on the size of the organization, an appeal procedure may involve a one-person review or a multi-step procedure. The following elements are recommended elements of any grievance procedure:

- There should be an attempt to resolve the problem with the employee's direct supervisor before the employee has access to higher level management.

- The procedure should have time limits on how long the employee has to raise the grievance and how long each step of a multi-step procedure can take. For grievances involving discharges, a Company should not allow the total procedure to exceed 90 days from the time the employee first complained since that gives the employee the right under the Wrongful Discharge From Employment Act to take the complaint to court even if the grievance has not been settled.
- If the discussion with the immediate supervisor does not resolve the dispute, the employee should be required in writing to describe his problem(s) or state the reason(s) the employee believes he has been treated unfairly as specifically as possible and should indicate what action(s) the employee is requesting the employer take to resolve his complaint.
- The employer should pledge not to retaliate against employees who utilize the procedure or who aid other employees by their testimony. A grievance procedure is an opportunity to work out problems before they become big problems or lawsuits.

- If the procedure includes the use of a committee to review a grievance, it should be clear what the composition, role and authority of the committee is. It is advisable to allow the committee to only resolve issues of fact that may surround a grievance. The committee can determine whether an event did or did not occur, what the past practice of the employer has been or how similarly situated employees were disciplined in the past. The decision as to what action to take should properly remain with management employees or owners, not with employee representatives or persons outside the firm.

**Sample Probationary Period Provision:**

*In order to have an opportunity to determine if a new employee has the skills and ability to perform assigned job duties, all newly hired employees must complete a six-month probationary period. The length of the probationary period may be extended due to observed performance or conduct deficiencies for up to an additional six months upon written notice to the employee on or before the end of the probationary period. During the probationary period, the employee's performance and overall conduct should be observed and assessed by the employee's supervisor. The supervisor is responsible for*



*recommending whether the employee should be retained as a permanent employee or be discharged.*

During the probationary period the employer or employee may terminate the employment relationship without a showing of cause.

## PROGRESSIVE DISCIPLINE

Corrective Interview- Progressive Discipline normally begins with a Corrective Interview if the problem or deficiency is minor and has not been discussed with the employee previously. The following interview model attempts to involve the employee in the problem's solution:

1. Describe to the employee the behavior you are concerned about: lateness, failure to follow normal procedures, etc. Avoid expressing a judgment on why the problem exists; allow the employee an opportunity to provide you with this information. Be specific as to the date, time, and type of behavior; don't talk in generalities or in terms of personality traits such as "you lack initiative".

*Example: I am concerned about the way that you mounted the tire for Mr. Smith yesterday. The bolts were loose when I checked them . . . .*

2. Listen! Invite the employee to explain the reasons for the problem.

*Example: How did that happen?*

3. Try to come to an agreement with the employee on the causes of the problem. If the employee refuses to cooperate in the identification of the problem or refuses to acknowledge any responsibility, you will have to determine the facts and causes on your own. If you allow the employee to give you information you didn't have, you might be surprised:

*Example: I guess I wasn't aware that you had a problem with alcohol. I'm sorry about it but I can't allow that to justify you not completing your work properly.*

4. Invite the employee to suggest a solution. If the employee believes that he or she has had a chance to help in solving a problem, he will be more committed to implementing the solution.

*Example: I'm glad to hear that you want to get help by going in for counseling.*

5. Agree on a solution.

*Example: I am willing to let you take your lunch hour late so that you can attend counseling to help you with your problem.*

*Since this is your first time, I hope it will help you. I will not place a reprimand in your personnel file if you will agree to attend counseling. If, however, the problem reoccurs, I will be forced to take more serious actions.*

6. Agree on an appropriate timetable for correction.

*Example: I will have the service manager spot check your work for a period of 60 days to make sure that the problem doesn't reoccur. I will meet with him and you every two weeks to see how things are going.*

7. Follow-up and Feedback. Conduct the meeting you said you would conduct and let the employee know if he is or isn't making the required amount of progress toward solving the problem.
8. Document the meeting.

**Written Warning/Reprimand** - A written warning/reprimand is often considered to be the last warning an employee will receive before punitive action is taken. Written warnings should contain the elements listed in the formal

documentation example. A copy of the written warning/reprimand should be placed in the personnel file and a copy given to the employee.

**Suspensions** - Suspensions are generally considered to be a serious disciplinary action since the employee suffers a loss of pay. Suspensions are useful for situations such as the first major infraction by an otherwise good, long-term employee; to give management time to investigate charges that if found to be true would warrant termination; or, to get an employee out of the work place quickly, such as following a fight with another employee. Suspensions are of limited value for deficiencies in skill or ability. Suspending someone is rarely going to make them work faster or more efficiently.

**Termination** - Removal from a job is the most severe form of discipline and should be used only where repeated corrective actions have been unsuccessful or where the employee has been found, after proper investigation, to be guilty of serious misconduct such as criminal activity, breach of confidentiality, or other equally serious acts or omissions that affect his or her employment. Since termination is the final action taken by an employer, it is important that all the proper steps be followed:

- All procedures required by the organization's personnel policies have been followed.

- The termination is for "Good Cause" if the employee has completed his/her probationary period and documentation exists to prove it.
- The employee is provided with a copy, within seven days of the date of termination, of the procedure that allows him to appeal the discharge to higher company authority.

### TERMINATION CHECKLIST

- Conduct exit interview
- Give employee copy of the grievance procedure. If employee is not available, mail a copy, return receipt requested, and maintain copy with receipt for at least five years.
- ↓ all  
 • Ask for resignation in writing citing reason for termination.
- If terminating the employee for cause verify that you have "good cause" and documentation to prove it.
- ↗ all  
 • Check personnel policies for other termination procedures.

## SUMMARY

The Wrongful Discharge From Employment Act represents the first effort by a state legislature to spell out comprehensive rules and procedures governing discharge disputes. The concept of the Act is fairly simple. The former statutory principle of "employment at will," under which employers enjoyed tremendous discretion to terminate employees, was abolished. Similarly, court-created doctrines which had stimulated litigation and permitted many large awards against employers were also abolished. The Act, the product of countless political compromises in an effort to produce a fair result for all, replaced the former system and recognized a right for employees to be discharged only for "good cause". In exchange for that right, an employee's damages in the event of a finding of wrongful discharge were, in most cases, limited to an amount not exceeding four years' wages and fringe benefits. The Act also included incentives for the parties to resolve their disputes outside the courts.

The favorable Montana Supreme Court ruling in June, 1989, makes it important for employers to understand the Act and that their prerogatives regarding problem employees remain relatively limited. While the Act is a substantial improvement over the doctrines it replaced, employers must act cautiously and with respect for the rights of their employees.

## APPENDIX A

### THE MONTANA WRONGFUL DISCHARGE FROM EMPLOYMENT ACT

**Purpose** - This part sets forth certain rights and remedies with respect to wrongful discharge. Except as limited in this part, employment having no specified term may be terminated at the will of either the employer or the employee on notice to the other for any reason considered sufficient by the terminating party. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

**Definitions** - In this part, the following definitions apply:

- 1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employers which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.
- 2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.
- 3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.
- 4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of termination.
- 5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason.
- 6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and includes additional compensation deferred at the option of the employee.
- 7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by the constitutional provision, statute, or administrative rule.

**Elements of wrongful discharge** - A discharge is wrongful only if:

- (1) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;
- (2) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or
- (3) the employer violated the express provisions of its own written personnel policy.

**Remedies** - (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earning, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-2-904(1).

(3) There is no right under any legal theory to damages for wrongful discharge under this part for paid and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages, except as provided for in subsections (1) and (2).

**Limitation of actions** - (1) An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer's internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer's internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee with a copy of them. If the employer fails to comply with this subsection, the discharge employee need not comply with subsection (2).

**Exemptions** - This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. Such statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, handicap, creed, religion, political belief, color, marital status, and other similar grounds.

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

**Preemption of common-law remedies** - Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.



**Arbitration** - (1) Under a written agreement of the parties, a dispute that otherwise could be adjudicated under this part may be resolved by final and binding arbitration as provided in this section.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) A neutral arbitrator must be selected by mutual agreement or, in the absence or agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 27, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part applies.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

(5) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator's fee and all costs of arbitration paid by the employer.

(6) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under this part. The arbitrator's award is final and binding, subject to review of the arbitrator's decision under the provisions of the Uniform Arbitration Act.

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