



## PRACTICING HR IN MONTANA – A UNIQUE CHALLENGE FOR EMPLOYERS

**Presented to: Montana Hospital Association  
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**Presented by:**



### ASSOCIATED EMPLOYERS TRAINING

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- Please call our **HR Hotline (406-248-6178)** if you have any questions not addressed in these materials, and we will attempt to help you arrive at an answer.

## SESSION OBJECTIVES



Identify the requirements of Montana employment laws such as:

- MT is *NOT* an At-Will Employment State!
- Montana Human Rights Act
- MT Maternity Leave Act
- MT Drug-Free Workforce Act
- MT Wrongful Discharge from Employment Act

*And More...*

## THE EMPLOYMENT RELATIONSHIP

- Montana is the only state that does not recognize “at-will employment”
- Covered by Montana Wrongful Discharge From Employment Act
- Found at Mont. Code Annotated § 39-2-901 to -915



## PROBATION AND PERFORMANCE

- Montana law gives employers a 6 month period unless policy states a different length
  - Employer can only extend probationary period if employee was notified of that *at the time of hire*
  - Only time employment is “at-will” in Montana
- Monitor Progress (30, 60, 90 day rule)
  - Set Clear Expectations
  - If there are deficiencies, Take Action
  - Ask Employee – do they have a solution?
  - Goal is a Successful Employee
- If that doesn't happen, you can...*
- Counsel to termination (within Probation Period)
- However...*
- Don't terminate for illegal reasons



## WHY HAVE A HANDBOOK?

- Sets Ground Rules
- Gives Information about Programs & Benefits
- Helps ensure consistency
- May help with certain claims
- Laws may require a policy



## NON-DISCRIMINATION IN HIRING

• **Federal:** Title VII, ADEA, ADA, GINA, USERRA, PDA

• **State:** HRA, MT Maternity

What you **should not** do:

- Make hiring decisions based on appearance, accent, religion, ethnic origin
- Ask interview questions that could be considered discriminatory
- Refuse to hire a qualified individual because of age\* or disability
- **\*NOTE: ANY age is protected under Montana Law!**



## NON-DISCRIMINATION IN HIRING (CONT.)

What you **should** do:

- Make hiring decisions based on objective, job-related criteria
- Focus on essential functions of the job
- Keep detailed performance records
- Carefully document reasons for termination
- Follow policies



## JOB VACANCY FOLDER

The file should contain:

- (1) the job description for the position;
- (2) the job requisition form;
- (3) all job advertisements, with costs associated with
- (4) all applications and resumes received;
- (5) all interview notes;
- (6) all reference checks performed;
- (7) the offer letter; and
- (8) "position filled" letters sent to unsuccessful applicants.



- For the candidate who is hired, a *copy* of the application, resume, and cover letter should be kept in the job vacancy file along with the other documents listed above.
- The *original* application, resume, cover letter, job offer letter, background check results, and other relevant documents should be kept in the employee's personnel file.
- **RETENTION:** 2 years from when opening is filled (if Federal Contractor)
- If a complaint is ever made regarding your hiring decision, all supporting documents will be easily accessible by pulling the job vacancy file folder.

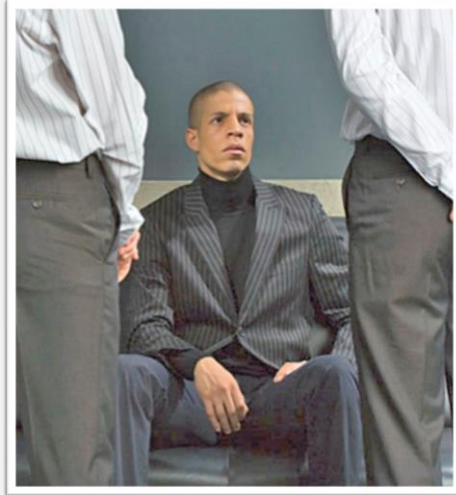
## SAMPLE - PERSONNEL FILE CONTENTS



- Section 1 – Pre-Employment
- Section 2 – Orientation
  - Checklists
  - Acknowledgements
- Section 3 - Performance
- Section 4 – Leaves & Absences
  - (Caution: if medical information is provided on any items in this section, REMOVE)
- Section 5 - Benefits (unless these forms contain medical information, in which case they should go in the medical file)
  - ✓ Enrollment Forms
  - ✓ Change Forms
  - ✓ Beneficiary Forms
- Section 6 – Payroll
  - Status Changes (Pay, position, etc.)
  - May have to duplicate some items if payroll records are maintained in a separate department

## HARASSMENT

- **Title VII**
- What you **should not** do:
  - Allow employees to make unwelcome sexual advances to coworkers
  - Tolerate environment in which employees feel threatened or abused
  - Ignore harassment or complaints



## HARASSMENT (CONT.)

What you **should** do:

- Explain the antiharassment policy to employees
- Encourage employees to come to you with harassment complaints
- Require employees to treat one another with respect
- Report and investigate complaints
- Take appropriate action



## DISABILITIES

### •Americans with Disabilities Act (ADA)

#### •What you **should not** do:

- Ask about disabilities at job interview
- Deny job opportunities because of disabilities
- Make assumptions about people's abilities
- Require applicant to take physical exam before making job offer



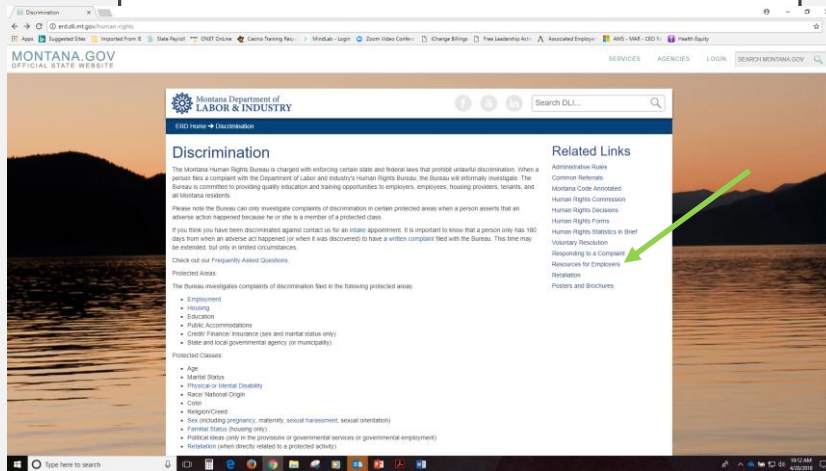
## DISABILITIES (CONT.)

#### •What you **should** do:

- Define a job's essential functions
- Ask all applicants if they can perform the essential functions of the job
- Provide reasonable accommodation
- Offer equal employment opportunities to workers with disabilities

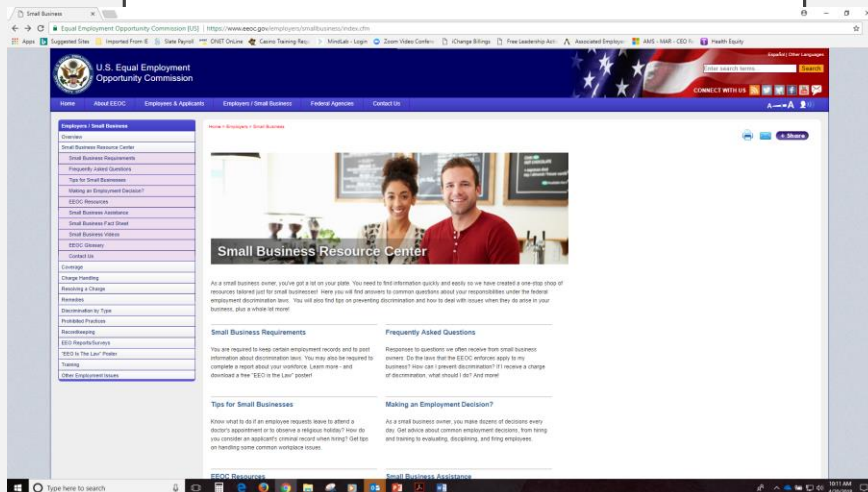


# MONTANA HUMAN RIGHTS ACT



<http://erd.dli.mt.gov/human-rights>

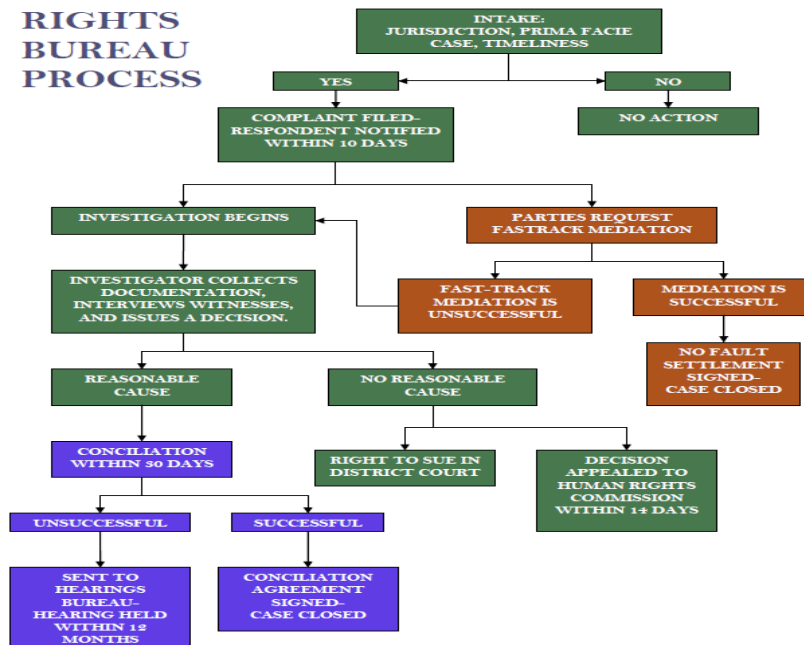
## HRB CLAIMS PROCESS



<https://www.eeoc.gov/employers/smallbusiness/index.cfm>



## HUMAN RIGHTS BUREAU PROCESS



## RETALIATION

• You **should not** take any adverse employment action against an employee who:

- Complains about discrimination
- Cooperates with an investigation
- Opposes discrimination or harassment



## RETALIATION (CONT.)

- What you **should** do:
  - Keep complaint and investigation confidential
  - Avoid harassment or negative treatment
  - Document



## ATTENDANCE AND TARDINESS: LEGAL CONSIDERATIONS

- Family and Medical Leave Act (FMLA)
- Title VII - Pregnancy
- Montana Maternity Leave Act
- Americans with Disabilities Act (ADA)
- Workers' compensation laws

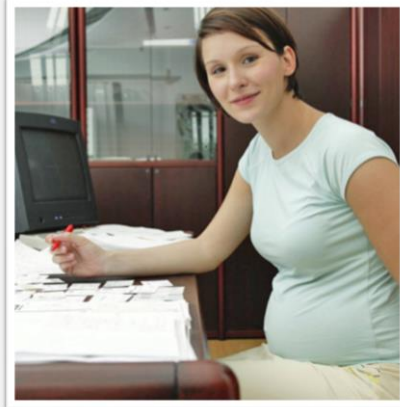


## PREGNANCY AND MATERNITY

### Pregnancy Discrimination Act (PDA)

What you **should not** do:

- Refuse to hire or promote because of pregnancy
- Ask applicants about pregnancy
- Deny pregnant workers benefits afforded to other workers
- Refuse to reinstate a worker returning from maternity leave



## PREGNANCY AND MATERNITY (CONT.)

What you **should** do:

- Base employment decisions on performance
- Treat pregnancy leave like any other temporary disability leave
- Permit extended maternity leave under FMLA
- Work with employees to avoid problems



### MONTANA MATERNITY

- An employer may not refuse to hire an applicant because she is pregnant or plans to become pregnant
- An employer may not fire or discharge an employee because of her pregnancy
- An employee is entitled to a reasonable leave of absence for the temporary disabilities associated with childbirth, delivery and related medical conditions



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### MONTANA MATERNITY

- The employer may not place restrictions on the leave which would not apply to leaves of absence for any other valid medical reason
- An employer may not require an employee to take a mandatory maternity leave for an unreasonable length of time
- A pregnant employee is entitled to use any disability benefits, sick leave, vacation time, annual leave or compensatory time accrued



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## MONTANA MATERNITY



- An employer may not treat an employee disabled due to pregnancy less favorably than an employee with any other temporary disability under any health, medical or temporary disability plan or sick leave maintained by the employer
- An employee returning from maternity leave must be reinstated to her original job or equivalent position with equivalent pay, accumulated seniority, retirement, fringe benefits
- Exception:
  - For private employers where the circumstances have changed so much that it is impossible or unreasonable to do so



## MONTANA'S WORKFORCE DRUG AND ALCOHOL TESTING ACT

- **Voluntary** program for employers in Montana
- Balances employee's right to privacy against employer's right for safe workplace
- MCA §§ 39-2-205 through -211
- Allows testing of employees who engage in the performance, supervision, or management of work in:
  - A Hazardous Work Environment
  - A Security Position/Position Affecting Public Safety
  - A Fiduciary Position for the Employer

## QUALIFIED TESTING PROGRAM

**MT Requirements  
(Also Applies to DOT)**



- Mont. Code Ann. §39-2-207
- Must be available for review by all employees subject to it, at least 60 days before implementation
- Must have testing procedures that conform with 49 CFR part 40
- Must have a separate written policy and procedures that include:
  - Describe legal sanctions
  - Program for educating employees on health risks
  - Standard of conduct
  - EAP
  - Sanctions for policy violation
  - Identify testing program & drugs tested for
  - Describe hiring policy
  - Confidentiality

## FIRST STEPS:



1. Determine which employees can be subject to testing under MT law, and which will be subject to testing under your policy
2. Determine type of testing to be conducted (pre-employment, random, etc.)
3. Determine if rehab/treatment are options
4. Select a lab to perform the actual testing
5. Adopt a qualified, written testing program



## Medical Marijuana in Montana

- While updates to drug and alcohol policies will be needed, the basic principles regarding impairment in the workplace continue-
- e.g. Employees are not permitted to be impaired at work or pose a safety risk to their co-workers or the public, regardless of whether they have a prescription and regardless of whether marijuana is legal
- Note: Anti-smoking laws will apply to marijuana the same way as regular cigarettes

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## COMMON MISTAKES IN DISCIPLINING

- ▶ Inconsistency -- over reaction to this incident, but overlooked similar instances in the past
- ▶ Failure to listen (get the other person's side of the story)
- ▶ Lose perspective, fail to see big picture -- remember extenuating circumstances
- ▶ Other Mistakes...
  - Overreact; react in anger; react in haste before gathering facts; react to effects, not to causes; being overly emotional
  - Name calling, abusive reactions, attacking the individual in degrading manner, forgetting the other person's dignity
  - Trying to punish or retaliate, as if something personal against us had been done by the individual
  - Make a big show out of the discipline, rather than disciplining in private

## KEYS TO DOCUMENTING EFFECTIVELY

- Clarify and confirm facts prior to sharing documentation with an employee
- Make effective use of your calendar to document
  - Be specific relative to dates, times, observations, etc.
- Emphasize any statements where the employee admits to failing to meet the stated expectations

## DISCIPLINE & TERMINATION

*If corrective action becomes necessary, did you...*

- Give notice to the employee?
- Engage in due process?
- Issue equal treatment?
- Apply the correct penalty?
- Avoid a “knee jerk” termination?





## TERMINATIONS IN MONTANA



- ▶ Montana is the only state that does not recognize “at-will employment.”
- ▶ Found at Mont. Code Ann. §§39-2-901 to -915
- ▶ Covered by Montana Wrongful Discharge From Employment Act (MWDEA)

## OVERVIEW OF MWDEA

- MCA §39-2-905 – Remedies & Limitations of Action
  - If an employer has committed a wrongful discharge, the employee may be awarded 4 years wages & benefits, plus interest, less interim earnings from reasonable diligence
  - Employee may recover punitive damages if discharge is as a result of fraud or malice or refusal to violate public policy
  - No damages for pain & suffering
  - 1 year window to file
  - **When employer has established internal policies, employee must follow first**
  - **Employer has 90 days to resolve internally**
  - **Employer has 7 days after discharge to provide discharged employee with internal written policy**

## ELEMENTS OF WRONGFUL DISCHARGE



- Retaliation for refusal to violate public policy
- No “good cause” after probation completed
  - If no probationary period is established by the employer, then 6 months will be the standard
- Employer violates own written personnel policy

## DUE PROCESS



### Establish “Good Cause”

- Failure to perform duties
- Disruption of business operations
- Other legitimate business reason

## ENSURE THAT DUE PROCESS IS...

### Part of the disciplinary process

- Ongoing communication
- Documentation
- Meetings
- Handbook/signed release
- Performance appraisal/signature of employee
- Consultation with company's legal and Human Resources Departments prior to taking any action

## IMMEDIATE TERMINATION?



- Not a good idea in Montana
- Remember -- an employer needs "good cause"
- *Better idea – suspend pending investigation*



## PAYING WAGES

- Employers must notify employees of the pay cycle
- Wages are due within 10 business days
- Earned and available paid vacation is considered earned wages under MT law; must be paid out at termination
- Direct Deposit – voluntary
- Payroll deductions – those required by law and those for the employee's benefit to which employee has authorized in writing

## FINAL WAGES – NEEDS WRITTEN POLICY

- Voluntary termination – due at next regular payday or 15 days from date of separation



- Involuntary termination – due immediately (within 4 hours or by end of day, whichever occurs first), unless company has final pay policy, then due at next regular payday or 15 days from date of separation

## EXIT PROCESS

### **Termination Checklist**

- Reason for Leaving
- Termination Date
- Eligibility for Rehire

### **Exit Interview**

- Return of Company Property/Equipment
- Benefits
- Company's Internal Grievance Policy issued
- Final Pay
- Employee signs acknowledgement



## TERMINATION CHECKLIST

### Exit Interview Checklist:

- \_\_\_\_\_ Accrued, unused vacation due
- \_\_\_\_\_ If so, how many days? \_\_\_\_\_
- \_\_\_\_\_ Last Paycheck
- \_\_\_\_\_ Date processed \_\_\_\_\_
- \_\_\_\_\_ COBRA Letter and explanation
- \_\_\_\_\_ Life/Disability Insurance Conversion forms
- \_\_\_\_\_ 401(k) Withdrawal/Rollover information
- \_\_\_\_\_ Return of Company Property
  - \_\_\_\_\_ Employee Handbook
  - \_\_\_\_\_ Keys and/or remote access device to building/vehicle
  - \_\_\_\_\_ Uniforms/Clothing
  - \_\_\_\_\_ Company Credit Cards
  - \_\_\_\_\_ Any other items \_\_\_\_\_
- \_\_\_\_\_ Outstanding Expense Reports/Advances
- \_\_\_\_\_ **Employee given copy of company Internal Grievance Procedure**



This is a correct record of the items we discussed and the items that were returned to me or by me.

\_\_\_\_\_  
Signature of Departing Employee

\_\_\_\_\_  
Date Signed

\_\_\_\_\_  
Human Resources

\_\_\_\_\_  
Date Signed

## INTERNAL GRIEVANCE POLICY

- Employees in Probationary Employment Period **DO NOT** have access
- Departing Employee must receive a copy of the policy
- Have Employee sign acknowledgement of receipt
- If cannot meet face-to-face, **mail** with “Proof of Mailing” date **within 7 days of termination**



## COMPLIANCE GUIDELINES FOR CONDUCTING A TERMINATION MEETING

- Make sure you have legitimate grounds and adequate proof before terminating workers
- Take the requirements of employment laws into consideration
- Make sure you've documented your case for termination accurately and completely
- Use termination as a last resort
- Remember that it is easier to make good hiring decisions than resort to firing

## EMPLOYMENT LAWS - RESOURCES

- <http://dli.mt.gov/resources/laws>



## QUESTIONS?

*Thank you!*



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**www.associatedemployers.org**