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MONTANA

I. AT-WILL EMPLOYMENT

A. Statute:

At-will employment is the exception rather than the rule in Montana. The Montana Wrongful Discharge From Employment Act ("WDEA"), Mont. Code Ann. §§ 39-2-901 through 39-2-915, preempts all tort and express or implied contract claims arising from a discharge and provides the exclusive remedy for employees who believe they have been wrongfully discharged. Mont. Code Ann. § 39-2-913. In 1999, the Montana Supreme Court held "the WDEA has superseded and impliedly repealed" Montana's at-will statute. *Whidden v. John S. Nerison, Inc.*, 981 P.2d 271, 275, 294 Mont. 346, 352 (1999). Two years later, the legislature repealed the at-will statute and "essentially replaced" it with Mont. Code Ann.§ 39–2–904(2). *Blehm v. St. John's Lutheran Hosp.*, 246 P.3d 1024, 1028, 358 Mont. 300, 305 (2010). The statute reads: "During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason." Mont. Code Ann. § 39-2-904. So now, at-will employment exists only during a probationary period. In 2021, the Montana Legislature amended the WDEA to make the default probationary period 12 months and specified it may not be longer than 18 months.

The WDEA does not apply to employment governed by a collective bargaining agreement or a contract for a specific term. Mont. Code Ann. § 39-2-912.

B. Case Law

Montana is not an at-will jurisdiction, so there is limited case law other than cases outlining the exceptions to the WDEA. *See* Mont. Code Ann. §§ 39-2-901 through 39-2-915. The Montana Supreme Court held a contract for a specific term which allows the employer to terminate the employment without cause, trumps the contract's specific term and thus subjects the employment to the WDEA. *Brown v. Yellowstone Club Operations, LLC*, 255 P.3d 205, 206 (Mont. 2011). On the other hand, the United States District Court for the District of Montana held the WDEA did not apply to a termination where the employee was terminated within the first year of his employment under a 1-year contract specifying the employment would continue into the future if not terminated within the 1-year period. *Brodock v. Nevro Corp.*, No. CV 20-110-SPW-TJC, 2021 U.S. Dist. LEXIS 56577, at *6-7 (D. Mont. Mar. 24, 2021).

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

Montana is not an at-will jurisdiction. *See* Section I, above. Instead, under the WDEA, a discharge from employment is wrongful if: "(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (c) the employer violated the express provisions of its own written personnel policy." Mont. Code. Ann. § 39-2-904.

Under the WDEA, no liability attaches for terminating a non-probationary employee for "good cause." Mont. Code Ann. § 39-2-904. "Good cause" means any reasonable job-related grounds for an employee's dismissal based on: (a) the employee's failure to satisfactorily perform job duties; (b) the employee's disruption of the employer's operation; (c) the employee's material or repeated violation of an express provision of the employer's written policies; or (d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment. A "legitimate business reason" is "a reason that is neither false, whimsical, arbitrary or capricious," and logically related to the needs of the business. *Id.* Employers are afforded more discretion in termination decisions involving managerial employees as opposed to non-managerial employees. *Sullivan v. Contl. Const. of Montana, LLC*, 299 P.3d 832, 370 Mont. 8 (2013) (citing *McConkey v. Flathead Elec. Coop*, 125 P.3d 1121 (Mont. 2005)); *Myers v. Howmedica Osteonics Corp.*, No. CV 14-248-M-DLC, 2016 U.S. Dist. LEXIS 42583, at *4 (D. Mont. Mar. 30, 2016). An employee may prove her termination was without good cause either by showing the employer's given reason for the discharge is not good cause or the given reason is a pretext and not the honest reason for the discharge. *Peavler v. Rocky Mt. Supply, Inc.,* 2023 MT 12N (2023) (unpublished); *Becker v. Rosebud Operating Servs.,* 191 P.3d 435, 345 Mont. 368.

Where an employer of a managerial employee sets forth reasons for the termination logically related to the needs of the business and the employee "fails to provide evidence beyond mere speculation, that the given reasons for the termination are a pretext and not the honest reason," summary judgment is proper. *Putnam v. Central Mont. Med. Ctr.,* 460 P.3d 419, 425, 399 Mont. 241, 249-50 (2020) (citing *Moe v. Butte-Silver Bow Cty.*, 371 P.3d 415, 426, 383 Mont. 297, 312 (2016); *Howard v. Conlin Furniture No. 2, Inc.,* 901 P.2d 116, 119-21, 272 Mont. 433, 438-40 (1995)). In analyzing the termination of a managerial employee, the "good cause" analysis does not require fact-finding to determine "the truth of the allegations against [the employee]," unless there's credible evidence the reason for the termination was a pretext. *See Sullivan*, 299 P.3d at 836-38.

A. Implied Contracts

Montana law does not recognize any specific employment claim based on implied contracts. *See* Section I above.

1. Employee Handbooks/Personnel Materials

As noted above, a discharge is wrongful if the jury finds the employer violated the express provisions of its own written personnel policy. Written personnel policies may be embodied in documents other than the employee handbook, such as evaluation forms. *Williams v. Plum Creek Timber Co*., 264 P.3d 1090, 1097, 362 Mont. 368, 377-78 (2011). A District Court does not abuse its discretion by giving a wrongful discharge instruction that referred to an employer's violation of its written personnel policy when the evidence supports such a claim. *Hager v. J.C. Billion, Inc.*, 184 P.3d 340, 343, 343 Mont. 353 (2008).

In 2021, the Montana Legislature amended the WDEA to specify an employee's material or repeated violations of an express provision of the employer's written policies, is "good cause" for termination. *See generally Barthel v. Barretts Minerals Inc.,* 496 P.3d 451, 405 Mont. 345 (2021) (violation of an employer's written policies can be good cause to terminate the employee); *Jackson v. Costco Wholesale Corp.,* 429 P.3d 631, 393 Mont. 191 (2018) (same).

2. Provisions Regarding Fair Treatment

The WDEA and cases interpreting it establish what is "good cause" for termination under the Act and likewise establish wrongful discharge actions based on the employer's violation of its own express written personnel policies or a discharge based on the employee's refusal to violate public policy. Mont. Code Ann. § 39-2-904. An employee may recover punitive damages as otherwise allowed by Montana law if the employee establishes by clear and convincing evidence the employer engaged in actual fraud or actual malice in the discharge of the employee in retaliation for employee's refusal to violate public policy or for reporting a violation of public policy. Mont. Code Ann. § 39-2-905(2). The WDEA also recognizes claims for constructive discharge where the employer creates a situation a reasonable person would find so intolerable voluntary termination is the only reasonable alternative. Mont. Code Ann. § 39-2-903. *See also* Section II(4), Implied Covenants of Good Faith and Fair Dealing below.

3. Disclaimers

Montana law does not address disclaimers as an exception to at-will employment. *See, e.g., Chipman v. Northwest Healthcare Co.,* 317 P.3d 182, 187, 373 Mont. 360 (2014) ("Many applicable cases address whether policy and procedure handbooks can contractually change an employee's 'at-will' status, a consideration that does not exist in Montana employment law.").

4. Implied Covenants of Good Faith and Fair Dealing

The WDEA preempts tort claims related to a discharge, but the Montana Supreme Court has allowed an employee to proceed with a bad faith claim against a former employer based on alleged breaches of the employer's obligations concerning compensation occurring

prior to the discharge. *See Beasley v. Semitool, Inc.*, 853 P.2d 84, 258 Mont. 258 (1993). On the other hand, in *Dagel v. City of Great Falls*, 819 P.2d 186, 250 Mont. 224 (1991), and *Mysse v. Martens*, 926 P.2d 765, 279 Mont. 253 (1996), the Montana Supreme Court held employees could not bring bad faith claims because they had not stated facts to support their claims which were separate and distinct from the discharge.

However, the WDEA does not apply to written collective bargaining agreements or contracts for a specific term. Mont. Code Ann. § 39-2-912(2). Where there is an enforceable written contract, Montana law provides there is an "implied covenant" which "is a mutual promise that the contracting parties will not attempt, through dishonesty or abuse of discretion in performance, to deprive each other of *the benefits of the contract*.'" *Chipman v. Nw. Healthcare Corp.,* 2014 MT 15, ¶¶ 29-30, 373 Mont. 360, 370-71, 317 P.3d 182, 189 (quoting *Phelps v. Frampton*, 2007 MT 263, ¶ 38, 339 Mont. 330, 170 P.3d 474). In *Chipman*, the Montana Supreme Court held the employer's benefit policies did not constitute an enforceable written agreement to which the implied covenant could apply. *Id.*

B. Public Policy Exceptions

1. General

Under the WDEA, a discharge is wrongful if "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy." Mont. Code Ann. § 39-2-904. For example, the Montana Supreme Court held in *Wadsworth v. State,* 275 Mont. 287, 305, 911 P.2d 1165, 1175 (1996), an appraiser who was discharged by the State Department of Revenue for violating its conflict-of-interest rule was discharged wrongfully because the conflict-of-interest rule violated a public policy defined by the Montana Constitution, specifically the "fundamental right to pursue life's basic necessities." On the other hand, the United States District Court for the District of Montana held an employee who filed a workers' compensation claim and alleged he was fired for doing so, did not have a viable WDEA claim for termination in violation of public policy because the act of filing the claim does not qualify as a report of a public policy violation or a refusal by the employee to violate public policy. *Henrichs v. Safeway, Inc., No.* CV 13-80-BU-JCL, 2014 U.S. Dist. LEXIS 162705, at *12 (D. Mont. Nov. 20, 2014).

2. Exercising a Legal Right

No cases specifically address discharge for violating a legal right because that language is not used in the WDEA.

3. Refusing to Violate the Law

Under the WDEA, a discharge is wrongful if "it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy." Mont. Code Ann. § 39-2-904. The WDEA's retaliatory discharge provision, Mont. Code Ann. § 39-2-904(1)(a), exists to protect the State's interest in enforcing State policies concerning the public health,

safety, or welfare established by constitutional provision, statute, or administrative rule. *Fenno v. Mountain West Bank*, 2008 MT 267, 345 Mont. 161, 192 P.3d 224, 230. The WDEA defines public policy 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." Mont. Code. Ann. § 39-2-903(7).

The United States District Court for the District of Montana held an employee who reported concerns relating to the comingling of gasoline to branded locations and the sale of diesel, in violation of Montana law, to his employer, had a cognizable claim for termination in retaliation for reporting violations of public policy under Mont. Code Ann. § 39-2-904(1)(a). *Roedocker v. Farstad Oil, Inc., No.* CV 16-29-BLG-SPW-CSO, 2016 U.S. Dist. LEXIS 80651, at *11-13 (D. Mont. June 21, 2016).

4. Exposing Illegal Activity (Whistleblowers)

The public policy provision of the WDEA has been called by the Montana Supreme Court a protection for "whistleblowers." *Dundas v. Winter Sports, Inc.,* 389 Mont. 223, ¶ 17, 410 P.3d 177 (2017). The public policy provision of the Act has been construed to protect an employee of an auto dealership who reported apparent illegal drug activities by several dealership employees to state authorities and, at their request, continued to provide information and to attempt to purchase illegal drugs. *Krebs v. Ryan Oldsmobile,* 843 P.2d 312, 255 Mont. 291 (1992). The Montana Supreme Court said the WDEA protects a good faith "whistle blower" and reversed a grant of summary judgment in favor of the employer.

III. CONSTRUCTIVE DISCHARGE

Under the MDEA, "discharge" is specifically defined to include "constructive discharge," which is in turn defined as: "the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer 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." Mont. Code Ann. § 39-2-903. Relying upon the definition of discharge as "a complete severance of the relationship of employer and employee by positive act on the part of either or both, the Montana Supreme Court held a demoted employee was not "constructively discharged". *Clark v. Eagle Systems, Inc.,* 279 Mont. 279, 927 P.2d 995, 999 (1996).

Whether constructive discharge occurred is "usually a question of fact determined by the totality of the circumstances." *Bellanger v. Am. Music Co.,* 2004 MT 392, ¶ 14, 325 Mont. 221, 225, 104 P.3d, 1075, 1077 (citations omitted). Summary judgment is inappropriate when a factual controversy exists as to whether the employer's actions were intolerable. Id. (quoting *Jarvenpaa v. Glacier Elec. Coop.,* 271 Mont. 477, 898 P.2d 690, 694 (1995)). However, when the employer presents undisputed facts demonstrating resignation was not the "only reasonable alternative," as required under the statute, summary judgment is

appropriate. *Ruffner v. Ken Blanchard Cos.,* No. CV 16-109-M-DWM, 2017 U.S. Dist. LEXIS 197219, *10-14 (D. Mont. Nov. 30, 2017 (citing *Childress v. Darby Lumber Inc.,* 126 F. Supp. 2d 1310, 1319 (D. Mont. 2001) (other citations omitted)).

IV. WRITTEN AGREEMENTS

The WDEA does not apply to the discharge of an employee covered by a written collective bargaining agreement or by a written contract of employment for a specific term. Mont. Code Ann. § 39-2-912; *Stowers v. Cmty. Med. Ctr., Inc.*, 172 P.3d 1252, 340 Mont 116 (2007). Collective bargaining agreements must be interpreted according to federal, not state law. *Winslow v. Mont. Rail Link, Inc.,* 16 P.3d 992, 997, 302 Mont. 289, 297 (2000). Other written employment contracts are governed by the general law of contracts as defined in Montana law. *See, e.g., Avery v. Flathead County*, 2005 MT 231N (2005).

In 2011, the Montana Supreme Court held "[i]f an employment contract for a specific term also allows the employer to terminate at will (after completion of the probationary period), it is not a 'written contract for a specific term' under [the WDEA]. A discharged employee covered by such a contract is not excluded by Mont. Code Ann. § 39-2-912 from bringing a claim under the Wrongful Discharge from Employment Act." *Brown v. Yellowstone Club Operations, LLC*, 2011 MT 155, 361 Mont. 124, 128, 255 P.3d 205, 208.

A. Standard "For Cause" Termination

A written contract permitting termination only for cause is understood in its ordinary and popular meaning as good cause. The term "good cause" is "largely relative in [its] connotation, depending upon the particular circumstances of each case." *Cole v. Valley Ice Garden, L.L.C.,* 113 P.3d 275, 280, 327 Mont 99, 107 (2005). It connotes "a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power." *Id*. The employer does not have a right to make an arbitrary or unreasonable decision about terminating an employee when there is an agreement to terminate only for good cause. *Id.* However, as a matter of law, it is not arbitrary or unreasonable for a minor league hockey team to fire a coach because of a losing record. *Id*. at 280-81, 327 Mont. at 107-08.

Where there is a written collective bargaining or employment agreement, the employee may assert claims for breach of the written agreement or for common law torts such as wrongful discharge, breach of the covenant of good faith and fair dealing, or infliction of emotional distress. *See, e.g., Firestone v. Oasis Telecomm., Data & Records,* 38 P.3d 796, 307 Mont. 469 (2001). A claim not dependent on the terms of the agreement itself will not be pre-empted either by the WDEA or by federal labor law. *Winslow v. Mont. Rail Link, Inc.,* 16 P.3d 992, 302 Mont. 289 (2000).

B. Status of Arbitration Clauses

Under the WDEA, either party may make a written offer to arbitrate within 60 days after service of the complaint. The offer must be accepted within 30 days. When a

discharged employee's offer to arbitrate is accepted and the employee prevails, the employer must pay the arbitrator's fee and all costs of arbitration. The arbitration is governed by Montana's Uniform Arbitration Act. Mont. Code Ann. §§ 39-2-914; 27-5-101, *et seq.*

Generally, arbitration agreements between employers and employees are valid and enforceable. Mont. Code Ann. § 27-5-113. In *Bucy v. Edward Jones & Co., L.P.,* 445 P.3d 812, 396 Mont. 408 (2019), the Montana Supreme Court enforce an arbitration agreement between a financial adviser and his employer under the Federal Arbitration Act. In *Kalispell Educ. Ass'n v. Bd. of Trs.,* 255 P.3d 199, 361Mont. 115 (2011), the Montana Supreme Court enforced an arbitration agreement in a teacher's collective bargaining agreement under Montana's Uniform Arbitration Act.

V. ORAL AGREEMENTS

A. Promissory Estoppel

Promissory estoppel has not been applied in employment cases, but it is recognized in other contexts under Montana law. *Keil v. Glacier Park, Inc.,* 614 P.2d 502, 188 Mont. 455 (1980). The elements are: (1) a promise clear and unambiguous in its terms; (2) reliance on the promise by the party to whom the promise is made; (3) reasonableness and foreseeability of the reliance; and (4) the party asserting the reliance must be injured by the reliance.

A claim of promissory estoppel is preempted by the WDEA if it is based on the employee's termination from employment. *Kulm v. Montana State Univ. – Bozeman*, 948 P.2d 243, 285 Mont. 328 (1997).

B. Fraud

The above analysis for promissory estoppel in Section V(A) is also applicable to fraud.

C. Statute of Frauds

Montana's Statute of Frauds requires any "agreement that by its terms is not to be performed within a year from the making thereof" be in writing. Mont. Code Ann. § 28-2-903(1)(a).

VI. DEFAMATION

A. General Rule

In the employment context, defamation suits most commonly arise when an employer makes a written or spoken statement about an employee's qualifications or performance, or gives a reason for some employment action, including discharge, which is

false. There have been large awards in Montana defamation claims, although the claims were not employment-related. *See Blue Ridge Homes, Inc. v. Thein*, 191 P.3d 374, 345 Mont. 125 (2008) (upholding $417,000 defamation jury award against homeowner that sent disparaging letters to various entities regarding construction contractor), *Gardner v. Stokes, Z-600 Inc., & Skyline Broadcasters Inc.*, *Flathead* DV-07-729, (Sept. 17, 2008) (district court jury award of $3.8 million for radio host's disparaging comments about neighbors). On the other hand, the Montana Supreme Court upheld the imposition of sanctions requiring the plaintiff to pay the defendant's attorneys' fees where the case was found to have been brought for improper purposes and without any basis in fact or law. *Hilten v. Bragg*, 358 Mont. 407, 418, 248 P.3d 282 (2010).

The Montana Supreme Court addressed the statute of limitations in an employment-based defamation case in which a University of Montana coach had his contract terminated and the results of an investigation involving his use of escort services, released to the public. The district court dismissed the claim on grounds it was in effect, a contract claim to which a one-year statute of limitations applied. The Montana Supreme Court reversed, holding the defamation claim was independent of the contract claim and therefore subject to the two-year statute of limitations for intentional torts. *Plakorus v. Univ. of Mont.,* 477 P.3d 311, 318 (Mont. 2020).

A claim for defamation in Montana must be founded in either libel or slander. Mont. Code Ann. § 27-1-801.

1. Libel

Libel is defined as:

[A] false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

Mont. Code Ann. § 27-1-802.

2. Slander

Slander is defined as:

[A] False and unprivileged publication other than libel which:

(1) Charges any person with crime or with having been indicted, convicted or punished for crime;
(2) Imputes in him the present existence of an infectious, contagious, or loathsome disease;

(3) Tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires or by imputing something with reference to his office, profession, trade or business that has a natural tendency to lessen its profit;
(4) Imputes to him impotence or want of chastity; or
(5) By natural consequence causes actual damage.

Mont. Code Ann. § 27-1-803.

B. References

When giving references, employers need to be cognizant of Montana's blacklisting statutes, Mont. Code Ann. § 39-2-801 through § 39-2-804, as well as Montana defamation law. All statements made to or about an employee should be truthful. Information, other than dates of employment and perhaps positions held, should generally not be given to third parties absent a written authorization and release from the employee or former employee.

The Montana Supreme Court considered a libel claim from a former police officer against the police chief based upon a written reference the police chief provided to another police department the former employee was applying for employment with. *Wolf v. Williamson*, 269 Mont. 397, 401, 889 P.2d 1177, 1179 (1995). The Court held summary judgment for the police chief was appropriate because the letter was a privileged communication made by a public official in the course of his public duty. *Id*. The same privilege, however, may not apply to a private employer.

C. Privileges

Privileged communications are not defamatory. Mont. Code Ann. §§ 27-1-802 through 27-1-804; *Wolf v. Williamson*, 889 P.2d 1177, 1179, 269 Mont. 397, 401 (1995); *Mont. Bank of Circle, N.A. v. Ralph Meyers & Son, Inc.*, 769 P.2d 1208, 1213, 236 Mont. 236, 245 (1989); *Denny Driscoll Boys Home v. State*, 737 P.2d 1150, 1152, 227 Mont. 177, 180 (1987); *Storch v. Bd. of Dir. of E. Mont. Region Five Mental Health Ctr.*, 545 P.2d 644, 647, 169 Mont. 176, 181 (1976). Privileged communications are defined by statute.

A privileged publication is one made:

(1) In the proper discharge of an official duty;
(2) In any legislative or judicial proceeding or in any other official proceeding authorized by law;
(3) In a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;

(4) By a fair and true report without malice of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

Mont. Code Ann. § 27-1-804.

The official duty privilege, Mont. Code Ann. § 27-1-804 is an absolute privilege. An absolutely privileged communication cannot form the basis of a defamation claim. *Jones v. Mont. State Univ.,* 475 P.3d 763, 402 Mont. 428 (2020); *Wolf*, 889 P.2d at 1179, 269 Mont. at 401; *Small v. McRae*, 651 P.2d 982, 994, 200 Mont. 497, 591 (1982). Internal communications made as part of a supervisor's official duty regarding personnel issues generally are afforded an absolute privilege. *See Id.; Nye v. Dep't of Livestock*, 639 P.2d 498, 501 1196 Mont. 222 (1982); *Storch*, 545 P.2d at 648, 169 Mont. at 182. Although these decisions arose in the public official and public employee context, their reasoning concerning the absolute privilege is arguably applicable to non-public officials who make internal communications within the proper discharge of their official duties. *See, e.g., Ray v. Connell,* 371 P.3d 391, 383 Mont. 221 (2016) (applying absolute privilege to speaker at city council meeting who was a private citizen).

The "legislative or judicial proceeding" privilege was addressed by the Montana Supreme Court in a case where a legislator spoke during a point of personal privilege on the floor of the Montana House of Representatives about his neighbor. The legislator called the neighbor a "kook," said he had spent time in the state mental hospital, and was discharged from the military for threatening an officer. Although the statements were not made in the course of any official legislative business, the Montana Supreme Court held statements made on the floor of the legislature were absolutely privileged. *Cooper v. Glaser*, 355 Mont. 342, 346, 228 P.3d 443, 445 (2010).

A qualified privilege can form the basis of a defamation claim only if the employee proves such communications were made with malice. *Rasmussen v. Bennett*, 741 P.2d 755, 758, 228 Mont. 106, 110 (1987) (citation omitted). To prove malice, the employee must show the communications were made "'with knowledge that [they were] false or with reckless disregard of whether [they were] false or not.'" *Id*. (quoting *New York Times v. Sullivan*, 376 U.S. 254 (1964)).

In *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 271 Mont. 209 (1995), the plaintiff claimed her former employer falsely reported to police she had stolen photographs and proof sheets. The employer argued reports to law enforcement were privileged communications. The Montana Supreme Court disagreed, holding that unsolicited complaints to the police are not privileged under Mont. Code Ann. § 27-1-804.

D. Other Defenses

1. Truth

Slander and libel both require the statements are false. Thus, statements that are true, or believed to be true by the speaker are not actionable. *Rasmussen v. Bennett*, 741 P.2d 755, 758, 228 Mont. 106, 110 (1987).

2. No Publication

One of the elements of a defamation claim is the defamatory statement has to be "published." In the employment context, publication or public disclosure of defamatory remarks may occur in investigations, performance evaluations, references, or letters of recommendation. Generally speaking, however, statements made directly to the employee not otherwise publicly disseminated cannot form the basis of a defamation claim.

3. Self-Publication

As with all general rules, however, there are exceptions. For example, if an employer makes a false statement to an employee and the employee is forced to repeat or "self-publish" the statement, the communication may give rise to a defamation claim. Likewise, if an employer falsely accuses an employee of theft, or some other crime, and the employee is asked to disclose the reasons given for discharge to a third party, the employee's truthful publication of the false statements may be defamatory. *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 271 Mont. 209 (1995).

4. Invited Libel

No Montana cases or statutes discuss "invited libel."

5. Opinion

Statements of opinion cannot be defamatory. *McConkey v. Flathead Elec. Coop.*, 125 P.3d 1121, 1127, 330 Mont. 48, 55 (2005), *Frigon v. Morrison-Maierle, Inc.*, 760 P.2d 57, 62, 233 Mont. 113 (1988) (citations omitted), overruled on other grounds by *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d 411, 271 Mont. 209 (1995).

E. Job References and Blacklisting Statutes

Employers and their agents are prohibited from blacklisting discharged employees and from preventing or attempting to prevent any former employee from obtaining employment with another employer. The statute applies to all former employees, whether they left employment voluntarily or involuntarily. Violations of the blacklisting statute may result in an award of compensatory and punitive damages to the former employee. Violation

of the statute is also a misdemeanor offense. *See* Mont. Code Ann. §§ 39-2-802 through 39-2-804.

In the case of a discharged employee, the blacklisting statute does not prevent an employer from providing to a potential employer a truthful statement of the reason for discharge unless the former employee has demanded in writing a statement of the reasons for discharge. If the employer does not provide a written statement upon the employee's request within a reasonable time after the demand, it is unlawful for the employer to furnish a statement of the reasons for the discharge to any person. *See* Mont. Code Ann. §§ 39-2-801 through 39-2-802.

F. Non-Disparagement Clauses

There are no Montana cases or statutes discussing "non-disparagement clauses."

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

See discussion of "Negligent Infliction of Emotional Distress" below.

B. Negligent Infliction of Emotional Distress

Claims for negligent or intentional infliction of emotional distress are available to employees, despite the exclusivity of the WDEA, so long as the employee can show the infliction of emotional distress was separate from the conduct leading to the discharge. *Tomsu v. Univ. of Mont.*, 2020 MT 295N, ¶ 15, 402 Mont. 427, ¶ 15, 475 P.3d 763; *Klein v. State, ex rel. Dep't of Corr.*, 185 P.3d 986, 996, 343 Mont. 520, 535-36. 39 (2008), *Beasley v. Semitool, Inc.*, 853 P.2d 84, 86, 258 Mont. 258, 262 (1993). Employees may also assert emotional distress claims in connection with discrimination claims under the Montana Human Rights Act and federal anti-discrimination laws. *Stringer-Altmaier v. Haffner*, 138 P.3d 419, 332 Mont. 293 (2006); *Benjamin v. Anderson*, 112 P.3d 1039, 1051, 327 Mont. 173, 191-92 (2005) (citing *Vortex Fishing Sys., Inc. v. Foss*, 38 P.3d 836, 841, 308 Mont. 8, 16 (2001)).

A cause of action for intentional or negligent infliction of emotional distress may arise in the employment context when serious or severe emotional distress to the employee was the reasonably foreseeable consequence of an employer's negligent act or omission. *Puryer v. HSBC Bank USA, Nat'l Ass'n*, 2018 MT 124, ¶ 38, 391 Mont. 361, 419 P.3d 105; *Feller v. First Interstate Bancsystem, Inc.*, 2013 MT 90, ¶ 34, 369 Mont. 444, 299 P.3d 338. To be actionable, the emotional distress suffered must be serious or severe, explained as follows:

> Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the

> liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved.
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>
> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge.

Restatement (Second) of Torts § 46, cmt. j at 77-78; *Sacco v. High Country Indep. Press, Inc.*, 896 P.2d at 426. The Montana Supreme Court has, for example, found defendants' four years of unrelenting obscene gestures, offensive language, and surveillance of the plaintiffs, resulting in loss of sleep and weight, crying, and shaking, was sufficient for asserting emotional distress claims. *Czajkowski v. Meyers*, 2007 MT 292, ¶¶ 34-38, 339 Mont. 503, 172 P.3d 94. Whereas, the Court held an "'illegal taking and use' of [plaintiff's] personal property" – a 2006 CAT loader – was not a claim for distress "'no reasonable person could be expected to endure'" and, thus, plaintiff could not assert stand-alone claims for emotional distress. *Fitzpatrick v. Trail Creek Enters., LLC*, 2021 MT 32N, ¶ 13, 403 Mont. 545, 479 P.3d 992.

By comparison, emotional distress damages derivative of another claim (other than claims under the WDEA or for workers compensation) may be awarded even in the absence of "severe" distress. *Ammondson v. N.W. Corp.*, 353 Mont. 28, 220 P.3d 1 (2009) (reh'g denied). For instance, in *Ammondson*, a group of retirees sued their former employer for violating "top hat" contracts they entered at the time of their retirement which provided they would be paid certain monthly payments in addition to their regular pensions. *Id*. When the employer filed bankruptcy and ceased payments, the retirees sued claiming among other things, breach of contract, abuse of process, malicious prosecution and tortious interference with contract. *Id*. While the retirees did not state independent claims for intentional or negligent emotional distress, they sought emotional distress damages under their other claims. *Id*. The employer argued the retirees were not entitled to emotional distress damages because their distress was not "severe" under the *Sacco* standard. *Id*. The Montana Supreme Court clarified however, that derivative claims for emotional distress need not rise to the "severe" level set forth in *Sacco*. *Id.* The Court adopted the standard set forth in MPJI 25.02 for derivative emotional distress damages, as follows:

> Your award should include reasonable compensation for any mental and emotional suffering and distress experienced by plaintiff and reasonably probable to be experienced in the future.

> Mental and emotional suffering and distress passes under various names, such as mental anguish, nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. The law does not set a definite standard by which to calculate compensation for mental and emotional suffering and distress. Neither is there any requirement that any witness express an opinion about the amount of compensation that is appropriate for this kind of loss. The law does require, however, that when making an award for mental and emotional suffering and distress, you shall exercise calm and reasonable judgment. The compensation must be just and reasonable.

Id. (*citing Jacobsen v. Allstate Ins. Co*., 351 Mont. 464, 215 P.3d 649 (2009)).

VIII. PRIVACY RIGHTS

A. Generally

There are many different scenarios in which an employee may allege a violation of his common law right to privacy. Generally, invasion of privacy is an umbrella term for four common causes of action: (1) intrusion upon seclusion; (2) appropriation of name or likeness; (3) public disclosure of private facts; and (4) publicity placing a person in false light. The Montana Supreme Court has not addressed intrusion upon seclusion or appropriation of name or likeness. It rejected a claim for public disclosure of private facts in a non-citable opinion saying, "it is not invasion of privacy 'to communicate a fact concerning the plaintiff's private life to a single person or even to a small group of persons.'" *Jergens v. Marias Med. Ctr.*, 2019 MT 109N, ¶ 8, 396 Mont. 547, 459 P.3d 214 (quoting Restatement (Second) of Torts, § 652D cmt. a). The Montana Supreme Court defined the elements of false light invasion of privacy as: "(1) the publicizing of a matter concerning another that (2) places the other before the public in a false light, when (3) the false light in which the other is placed would be highly offensive to a reasonable person, and (4) the actor knew of or acted in reckless disregard as to the falsity of the publicized matter." *Bd. of Dentistry v. Kandarian*, 268 Mont. 408, 413, 886 P.2d 954, 957 (1994).

For public employees, the Montana Constitution requires a balancing test between the public's right to know and the individual's right to privacy. *Great Falls Tribune v. Sheriff*, 775 P.2d 1267, 1269, 238 Mont. 103, 107 (1989); *Moe v. Butte-Silver Bow Cnty.,* 2016 MT 103, ¶ 21, 383 Mont. 297, 303-04, 371 P.3d 415, 421. In the *Great Falls Tribune*, the Court held the release of disciplinary information regarding three police officers did not violate their individual rights of privacy because they held positions of public trust and the public's right to know outweighed their individual privacy rights. *Id*. *See contra*, *Billings Gazette v. City of Billings*, 2013 MT 334, 313 P.3d 129 (finding the public had no right to know the names of five City employees disciplined for accessing pornography on their government computers).

B. New Hire Processing

1. Eligibility Verification and Reporting Procedures

There are no Montana cases or statutes covering eligibility verification and reporting procedures.

2. Background Checks

In Montana, some past criminal justice information is confidential. The Montana Criminal Justice Information Act of 1979 defined confidential criminal justice information as: criminal investigative information, criminal intelligence information, fingerprints and photographs, criminal justice information or records made confidential by law, and any other criminal justice information not clearly defined as public criminal justice information. Mont. Code Ann. § 44-5-103(3). Public criminal justice information includes information made public by law; information of court records and proceedings; information of convictions, deferred sentences, and deferred prosecutions; information of post-conviction proceedings and status; information originated by a criminal justice agency, including initial offense reports, initial arrest records, bail records, and daily jail occupancy rosters; information considered necessary by a criminal justice agency to secure public assistance in the apprehension of a suspect; or statistical information. Mont. Code Ann. § 44-5-103(13).

The Montana Supreme Court adopted a two-part test to determine whether the person on whom a background check is run has a constitutionally protected privacy interest in this information: (1) whether the person involved had a subjective or actual expectation of privacy, and (2) whether society is willing to recognize that expectation as reasonable. *Jefferson County v. Mont. Std.*, 2003 MT 304, ¶15, 318 Mont. 173, 79 P.3d 805.

Reading the statute and case law in concert, an initial arrest record constitutes public information anyone can access and therefore parties have no subjective or actual expectation of privacy in the information and usage of such information in a background check does not breach the Montana Criminal Justice Information Act of 1979. *Barr v. Great Falls Int'l Airport Auth.*, 2005 MT 36, 107 P.3d 471.

The civil remedy provision of the federally enacted Privacy Act only applies to actions against a federal agency. *See Dittman v. California*, 191 F.3d 1020, 1026 (9th Cir. 1999) (holding the Privacy Act applies only to federal agencies and that state agencies are immune from liability under the Act).

An applicant for the Missoula Police Department had no right to review background check materials cited as the reason he was not hired when he had signed a release stating he realized he would not be allowed to review the background materials. *Lee v. City of Missoula Police Dep't,* 2008 MT 186, ¶15, 187 P.3d 609.

C. Specific Issues

1. Workplace Searches

There are no Montana cases or statutes covering employer searches of employees in the workplace.

2. Electronic Monitoring

Whether an employee has a right to expect her electronic mail messages (voice mail and e-mail) are private is a topic of concern. The United States Court for the Ninth Circuit affirmed a decision from a United States District Court for the District of Montana holding an employee does not have a reasonable expectation of privacy in his workplace computer where the employer had a known policy of monitoring the computer. *United States v. Ziegler*, 474 F.3d 1184 (9th Cir. 2007). In *Ziegler*, the employer contacted the FBI when it discovered an employee had received child pornography on his workplace computer. *Id*. Although no search warrant was issued, the employer made a copy of the hard drive and turned it over to the FBI, who used it to prosecute the employee. *Id*. In an en banc re-hearing on the matter, the Ninth Circuit held although the employee had a reasonable expectation of privacy in his office space, he did not have the same reasonable expectation of privacy in his workplace computer because the employer had a known practice of monitoring employee computers. *Id*.

In an unpublished decision, the Montana Supreme Court considered common law and constitutional privacy claims stemming from video surveillance from a health club provided to a workers compensation insurer in connection with an employee's claim for benefits. *Miller v. Great Falls Athletic Club, LLC*, 2010 MT 171N. Although the Court upheld summary judgment in favor of the health club on grounds the employee did not have a reasonable expectation of privacy at a public workout facility and because the club was not a state actor, a concurring opinion made clear the decision was specific to the facts of the case and left open the possibility similar claims may be entertained by the Court in the future. *Id*.

A Montana District Court decision determined a public employee had no expectation of privacy in anything on his computer based on the County's express policy informing him the computer system and emails could be intercepted, monitored, and disclosed to others. *See Fasbender v. Lewis & Clark Bd. of Cty. Comm.,* 2007 Mont. Dist. LEXIS 399 (Oct. 9, 2007).

Employers should implement a policy and inform employees they do not have an expectation of privacy when using the e-mail and voice mail systems. If employers do monitor voice and electronic communications, they must comply with Mont. Code Ann. § 45-8-213 which makes it illegal to "purposely intercept an electronic communication." An employer also violates Mont. Code Ann. § 45-8-213 if it knowingly or purposely "records or causes to be recorded a conversation by use of a hidden electronic or mechanical device that reproduces a human conversation without the knowledge of all parties to the conversation." But the latter prohibition does not apply to (1) elected or appointed public officials or to

public employees when the transcription or recording is done in the performance of official duty; (2) persons speaking at public meetings; (3) persons given warning of the transcription or recording; or (4) a health care facility recording a health care emergency call.

Employers and employees should also be aware of the federal laws governing electronic monitoring. Those laws include the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq*., the Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 *et seq*., and the Stored Communications Act, 18 U.S.C. §§2701 *et seq*. Generally, the Wiretap Act prohibits the unauthorized interception of electronic communications, the Stored Communications Privacy Act prohibits the unauthorized access of stored electronic communications, and the Computer Fraud and Abuse Act prohibits the intentional and unauthorized accessing of a protected computer to gain something of value. There are no reported cases involving these Acts in Montana, but an unreported case in United States District Court for the District of Montana involved claims between an employer and its former employee for violations of these Acts and for common law invasion of privacy. (*Bernhart v. Zip Wireless Products, Inc.*, CV:00074-RFC-CSO).

3. Social Media

A 2015 Montana law restricts employer access to employee and applicant social media accounts and protects employees from retaliation for refusing to provide social media information in certain circumstances. The law prohibits employers from requiring employees to:

> (a) disclose a user name or password for the purpose of allowing the employer or employer's agent to access a personal social media account of the employee or job applicant;
>
> (b) access personal social media in the presence of the employer or employer's agent; or
>
> (c) divulge any personal social media or information contained on personal social media.

Mont. Code Ann. § 39-2-307.

Exceptions are provided where the employer has "specific information" indicating work-related misconduct, criminal defamation, or disclosure of protected or proprietary information. Another exception is provided when "an investigation is under way and the information requested of the employee is necessary to make a factual determination in the investigation." Employers are subject to criminal and civil penalties for violating the law.

In case law, a criminal defendant's Facebook page postings are cited as support for her mental state when she attended mediation in a civil suit and pulled a gun on opposing counsel. *McCulley v. Eighteenth Judicial Dist. Ct*., 368 Mont. 413 (2012). The City of Bozeman, Montana made national news for briefly requiring job applicants to disclose

passwords to their social media accounts. Although no legal actions were taken, the City of Bozeman quickly reversed that policy as a result of public criticism.

4. Targeting of Employees

See Section VIII(C)(2) above and its discussion of "Electronic Monitoring."

5. Release of Personal Information on Employees

The Montana Supreme Court has stated where employment records are concerned, ". . . [while] we are aware that much of the information contained in employment files and records is harmless or is already a matter of general knowledge, we are not persuaded that the records are entirely free of damaging information which the individuals involved would not wish and in fact did not expect to be disclosed." *Montana Human Rights Division v. City of Billings*, 199 Mont. 434, 440, 649 P.2d 1283, 1287 (1982). The Court also emphasized some of the areas which would be on pre-employment and employment files, including family and health problems, employers' criticisms, employees' criticisms of the employers, interpersonal relationships, and subjective view of employers. *Missoulian v. Board of Regents of Higher Education*, 207 Mont. 513, 675 P.2d 962 (1984). These must all be protected under constitutional privacy interests. *Id*. Mont. Code. Ann § 44-5-103 specifically declares what information can be publicly disseminated.

See Section VIII(B)(2) above and its discussion of "Background Checks."

6. Medical Information

Generally, medical records are private and "deserve the utmost constitutional protection." *State v. Nelson*, 941 P.2d 441, 448, 283 Mont. 231, 242 (1997). Article II, Section 10, of the Montana Constitution guarantees informational privacy in the sanctity of one's medical records. *Nelson*, 941 P.2d at 448, 283 Mont. at 242.

Within the context of litigation, a plaintiff also enjoys statutory privileges including the physician-patient privilege and the psychologist-client privilege. Mont. R. Evid. 805 and 807. An exception to these rules exists when a party claims damages for physical or mental injury, he or she places the extent of that physical or mental injury at issue and waives his or her statutory right to confidentiality to the extent necessary for a defendant to discover whether plaintiff's current medical or physical condition is the result of some other cause. *State ex rel.* Mapes *v. District Court*, 822 P.2d 91, 94, 250 Mont. 524, 530 (1991). But the waiver is limited – a defendant may only discover records related to prior physical or mental conditions if they relate to currently claimed damages. *Id*. at 94-95, 250 Mont. at 530. A plaintiff's right to confidentiality is balanced against the defendant's right to defend itself in an informed manner. *Id*. A defendant "is not entitled to unnecessarily invade plaintiff's privacy by exploring totally unrelated or irrelevant matters." *Id*.

Montana has addressed the related subject of suspension of a treating doctor's hospital privileges and the reporting of a doctor's conduct to national licensing boards. *Doe v. Community Med. Ctr., Inc.*, 353 Mont. 378, 391, 221 P.3d 651, 661 (2009). In *Doe*, the Court upheld an injunction preventing the hospital from revoking the doctor's hospital's privileges and reporting him to national boards. *Id*. The Court noted the injunction was appropriate because the doctor's right of privacy was implicated and there was serious risk to his livelihood and reputation and there was no counter balancing concern regarding public safety. *Id*.

Montana law precludes an employer from requiring any employee to pay the costs for either a medical examination or furnishing medical records for any examination or medical records review imposed by the employer as a condition of employment. Mont. Code Ann. § 39-2-301.

7. Restrictions on Requesting Salary Information

There are no Montana laws restricting an employer from requesting salary history from potential employees.

IX. WORKPLACE SAFETY

Montana generally requires an employer to maintain a safe workplace. Mont. Code Ann. § 50-71-201.

A. Negligent Hiring/Supervisions/Retention

Although the Montana Supreme Court has discussed the tort of negligent hiring, retention and supervision, it has never explicitly recognized it or specified the elements a party would have to prove. *See Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.*, 179 P.3d 481,494, 342 Mont. 29, 47 (2008); *Hoffman v. Austin*, 147 P.3d 177, 181-82, 334 Mont. 357, 364-65 (2006) (overruled on other grounds); *Stafford v. State*, 2004 Mont. 96N, ¶21, 22 (2004) (non-cite opinion) (citing *Pablo v. Moore*, 995 P.2d 460, 298 Mont. 393 (2000)); *Brookins v. Mote*, 2012 MT 283, ¶ 59, 367 Mont. 193, 212-13, 292 P.3d 347, 361 (recognizing "negligent credentialing" as a claim that is "the natural extension of well-established common law rights" such as "negligent hiring."). However, the Court has referenced the claim, and stated in dicta that the plaintiff could have held the defendant liable by stating a claim for negligent hiring because it "fail[ed] its duty of due diligence to investigate the contractor before hiring ..." *Paull v. Park County*, 352 Mont. 465, 484, 218 P.3d 1198, 1211 (2009).

B. Interplay With Worker's Compensation Bar

The Workers' Compensation Act generally provides the exclusive remedy for an employee who suffers an injury in the scope of his or her employment. Mont. Code Ann. § 39-71-411. An employee may bring an action against an employer or fellow employee,

however, "[i]f an employee is intentionally injured by an intentional and deliberate act of the employee's employer or by the intentional and deliberate act of a fellow employee." Mont. Code Ann. § 39-71-413(1). The statute defines intentional injury as "an injury caused by an intentional and deliberate act that is specifically and actually intended to cause injury to the employee." Mont. Code Ann. § 39-71-413(3). The standard of proof clause states that "intentional and deliberate" requires "clear and convincing evidence." Mont. Code Ann. § 39-71-413(1)(b).

C. Firearms in the Workplace

Montana allows anyone with a permit to carry a concealed weapon, with some limitations on who can apply for the permit. Mont. Code Ann. § 45-8-321. There are few limitations on where a permitted carrier can carry a gun. Mont. Code Ann. § 45-8-328.

D. Use of Mobile Devices

There is no Montana statute or case law regarding use of cell phones at work. Sometimes citizens have a reasonable expectation of privacy in their cell phone conversations under Art. II, sec. 10 and 11, Mont. Const. *See St. v. Allen*, 2010 MT 214, 357 Mont. 495, 241 P.3d 1045. *See also*, Briana Schwandt, *Is the Government in My Pocket? An Overview of Government Location Tracking of Cell Phones Under the Federal System and in Montana,* 72 Mont. L. Rev. 261 (2011). Many Montana cities have laws which ban the use of handheld mobile devices while driving. Employers are free to require compliance with those laws.

X. TORT LIABILITY

A. Respondeat Superior Liability

Montana recognizes the concept of respondeat superior where there was an employment relationship between the defendant and the tortfeasor when the injury to the third party occurred and the defendant was acting within the course and scope of his duties. *Gentry v. Douglas Hereford Ranch, Inc.,* 1998 MT 182, ¶¶ 35-38, 290, Mont. 126, 136, 962 P.2d 1205, 1211. Distinctions between the terms employer and employee, master and servant, and principal and agent are immaterial for respondeat superior purposes. *Id.* (citing 27 Am. Jur. 2d Employment Relationship § 461 (1996)). Further, the employment relationship is contractual in nature and requires the mutual assent of the parties and consideration. *Id.* The Montana Supreme Court has held a defendant's "gratuitous offer to help his wife's grandmother open the garage door, and his willingness to help start the furnace so that his wife and her friend would be warmer while they painted the walls of the 'new house' did not make him the ranch's employee." *Id.*

The Montana Supreme Court declined to modify the presently accepted version of the doctrine by adopting the exception, set out in § 214 of Restatement (Second) of Agency, that a master or other principal who is under a duty to provide protection for or to have care used to protect others or their property and who confides the performance or duty to a servant or other person is subject to liability to others for harm caused to them by the failure of the agent to perform the duty. *Maguire v. St.,* 254 Mont. 178, 835 P2d 755 (1992).

Dismissal of a defendant "with prejudice" does not release other defendants who may be liable under a theory of respondeat superior, unless the document intends to do so, or the payment is full compensation, or the release expressly so provides. *Cantrell v. Henderson*, 221 Mont. 201, 206, 718 P.2d 318 (1986).

B. Tortious Interference With Business/Contractual Relations

To prove a claim for tortious interference, whether with business or contractual relations or prospective economic advantage, the plaintiff must show the defendant committed acts that: (1) were intentional and willful; (2) were calculated to cause damage to the pleader in his or her business; (3) were done with the unlawful purpose of causing damage or loss, without right or justifiable cause on the part of the actor; and (4) resulted in actual damages and loss. *Hughes v. Lynch*, 164 P.3d 913, 920, 338 Mont. 214, 223 (2007); *Pospisil v. First Nat'l Bank*, 37 P.3d 704, 707, 307 Mont. 392, 396-97 (2001); *Farrington v. Buttrey Food & Drug Stores Co.*, 900 P.2d 277, 272 Mont. 140 (1995).

The factors to be considered in determining whether an actor's conduct is improper include: (1) the nature of the actor's conduct; (2) the actor's motive; (3) the interests of the other with which the actor's conduct interferes; (4) the interests sought to be advanced by the actor; (5) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (6) the proximity or remoteness of the actor's conduct to the interference, and (7) the relation between the parties. *Farrington,* 900 P.2d at 279*; Pospisil*, 37 P.3d at 707, 307 Mont. at 396, *Emmerson v. Walker*, 357 Mont. 166, 173, 236 P.3d 598, 604 (2010).

In *Miske v. Mont. Dep't of Nat. Res. & Co.,* 539 P.3d 1133, 414 Mont. 242 (2023), the Montana Supreme Court addressed the requirement the individual or entity allegedly interfering with the contract needed to be a "stranger" to the contractual relationship. Because the Department of Natural Resources and Conversation was not a stranger to the contractual relationship there was no viable intentional interference claim.

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS

A. General Rule

"Montana law strongly disfavors covenants not to compete." *Wrigg v. Junkermier, Clark, Campanella, Stevens, P.C.*, 2011 MT 290, ¶11, 362 Mont. 496, 498, 265 P.3d 646, 648 (citing *Access Organics, Inc. v. Hernandez*, 2008 MT 4, ¶17, 341 Mont. 73, 175 P.3d 899; and

Mont. Code Ann. § 28-2-703). As a result, the Montana Supreme Court has generally strictly construed covenants not to compete and read them in a light most favorable to the employee. *Wrigg*, 2011 MT 290 at ¶11, citing *Dumont v. Tucker*, 250 Mont. 417, 421, 822 P.2d 96, 98 (1991).

The Montana Supreme Court distinguishes restraints on trade that are "partial" from those considered "full" or "absolute." When a covenant "acts as a full restraint on trade," the Court need not reach the issue of reasonableness; such a covenant is simply void and unenforceable. *Id*., at ¶11 (*citing Mungas v. Great Falls Clinic, LLP,* 2009 MT 426, ¶¶ 39-40, 354 Mont. 50, 221 P.3d 1230 and *Dobbins, De Guire & Tucker, P.C. v. Rutherford, MacDonald & Olson*, 218 Mont. 392, 396, 708 P.2d 577, 579 (1985)). A full restraint on trade is one purporting to prohibit the employee from competing with the employer. *Mont. Mt. Prods. v. Curl,* 2005 MT 102, ¶¶ 17 & 20, 327 Mont. 7, 12-13, 112 P.3d 979, 982. In *Montana Mountain Products*, the Court found "Curl's only option to practice her trade in the vicinity of where she resides [wa]s to work in some way for a subcontractor of Montana Silversmiths [, but that was] exactly what her covenant not to compete prohibit[ed]." *Id.* Because the covenant prohibited Curl from engaging in her profession, the Court concluded it was an "absolute" restraint on trade and held it unenforceable as a matter of law. *Id.*

On the other hand, a partial restraint on trade might, for example, permit a former employee to compete so long as she pays her former employer a percentage of revenue she generates by competing. *See*, e.g., *Wrigg*, 2011 MT 290 at ¶¶ 5 & 12. A covenant restraining trade only partially is reviewed for reasonableness. *Id*. at ¶ 12. A covenant that restrains trade only partially is not enforceable unless it meets a three-part test for reasonableness: (1) the covenant should be limited in operation either as to time or place; (2) the covenant should be based on some good consideration; and (3) the covenant should afford reasonable protection for and not impose an unreasonable burden upon the employer, the employee, or the public. *Wrigg*, 2011 MT 290 at ¶12. A covenant that fails any one of these parts is unreasonable and unenforceable.

Furthermore, a partial restraint serving no legitimate business interest necessarily is oppressive and invalid. *Wrigg,* 2011 MT 290, ¶19 (citing Richard A. Lord, Williston on Contracts Vol. 6, § 30:4, 164-75 (4th ed.,West 2009)). The Montana Supreme Court requires an employer must establish a legitimate business interest as a threshold step to its analysis of the reasonableness of a covenant. *Id.* at ¶22. An employer has no legitimate business interest in restricting an employee's post-employment activities unless the restriction is necessary to protect an employer's good will, customer relationships, or trade information. *Wrigg,* 2011 MT 290 at ¶29 (internal citations omitted).

In *Wrigg*, the Montana Supreme Court held an accounting firm could not enforce a covenant not to compete against an accountant the firm had fired without describing any cause. However, a few years later, the Court affirmed a judgment exceeding $2.3 million in favor of the same accounting firm against a group of accountants who signed a non-compete when they joined the firm, but received no compensation for the clients they brought with

them. When the same clients followed their accountants to another firm, the Court found that reasonable. Suffice to say, the enforceability of non-competes in Montana is murky.

B. Blue Penciling

The Montana Supreme Court has upheld blue penciling of overbroad restrictive covenants in two contracts for the sale of businesses and one dissolution of a partnership. *Dumont v. Tucker*, 822 P.2d 96, 250 Mont. 417 (1991); *W. Media, Inc. v. Merrick*, 727 P.2d 547, 224 Mont. 28 (1980); *Treasure Chem., Inc. v. Team Lab. Chem. Corp.,* 609 P.2d 285, 187 Mont. 200 (1980). The Court has never applied the blue pencil approach to a restrictive covenant in an employment agreement.

C. Confidentiality Agreements

The enforceability of contracts not to disclose trade secrets or customer lists is assessed using the three-part *Dobbins* test to determine whether the contract is an unreasonable restraint on trade. *See State Med. Oxygen & Supply, Inc. v. Am. Med. Oxygen Co.,* 782 P.2d 1272, 1275, 240 Mont. 70, 74 (1989); *First Am. Ins. Agency v. Gould,* 661 P.2d 451, 454, 203 Mont. 217, 223 (1983). The burden of establishing the covenant not to disclose does not violate Montana's statute prohibiting restraints on trade (Mont. Code Ann. § 28-2-703), falls on the party seeking to enforce the covenant. *State Med. Oxygen*, 782 P.2d at 1275, 240 Mont. at 75; *First Am. Ins. Agency*, 661 P.2d at 454.

Generally, an employee, having left her employment, is free to make use of her experience as long as she does not violate her employer's confidence. *First Am. Ins. Agency,* 661 P.2d at 454. In *First Am. Ins. Agency,* an insurance agent who had signed a covenant not to compete or disclose left and started her own insurance agency. The Court held both covenants void. It said a covenant not to disclose customer information can be valid if the information is "confidential and not readily accessible to competitors," but affirmed the trial court's finding that the agent took no property from the agency and violated no confidences.

Similarly, in *State Med. Oxygen*, an oxygen service company brought an action against three former employees who left to work for a competitor and also against the competitor. The Court held the employees' agreement not to divulge trade secrets or customer lists was not reasonable because it was not restricted as to either time or place. 782 P.2d at 1275, 240 Mont. at 74.

D. Trade Secrets Statute

Montana adopted the Uniform Trade Secrets Act in 1985. Mont. Code Ann. §§ 30-14-401, *et seq*. The Montana Supreme Court has applied the Act only once. The Court affirmed summary judgment for an employer whose former employee claimed software he had created independently was misappropriated; the Court found the employee had failed to prove 'improper acquisition, independent economic value based on knowledge not generally

known or readily ascertainable, and damages.' *Associated Mgmt. Servs. v. Ruff*, 2018 MT 182, ¶ 63, 392 Mont. 139, 167, 424 P.3d 571, 594.

The United States Court of Appeals for the Ninth Circuit has held exemplary damages and attorney's fees are allowable under Montana's Uniform Trade Secrets Act. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.,* 259 F.3d 1101 (9th Cir. 2001). The United States District Court for the District of Montana held an employer stated a plausible claim under the Act where they alleged former employees used their trade secrets to help their new employer copy their products. *Mont. Silversmiths, Inc. v. Taylor Brands, LLC,* 850 F. Supp. 2d 1172, 1180 (D. Mont. 2012). Moreover, the court said:

> it is well-settled that one of the implied covenants of employment is that an employee will hold sacred trade secrets acquired during employment. And even after employment terminates, employees have an implied obligation to not use trade secrets for the benefit of a rival and to the detriment of the former employer.

Id.

E. Fiduciary Duties and Other Considerations

Breach of fiduciary duty is a separate cause of action in Montana, often brought together with breach of contract, bad faith and unjust enrichment. The duty an employee owes to his or her employer in Montana is the duty of good faith and fair dealing. The duty of loyalty from an employee to an employer has been suggested in lower court cases, but has not been vetted by the Montana Supreme Court or the legislature. *See e.g., Mountain Peaks, Inc. v. Pohle,* Montana 13th Judicial District Court, Yellowstone County, DV 05-1199.

1. Injunctive Relief

A Montana statute prohibits a court from entering an injunction "to prevent the breach of a contract the performance of which would not be specifically enforced." Mont. Code Ann. § 27-19-103(5). Another statute lists the contracts that cannot be specifically enforced, the first of which is "an obligation to render personal service or to employ another therein." Mont. Code Ann. § 27-1-412. Applying those statutes, the Montana Supreme Court held a court may not use injunctive relief to prevent a party to a personal services contract from performing services elsewhere during the life of the contract because that would have the effect of forcing the employee to perform the contract, thereby accomplishing indirectly a result the court could not accomplish directly. *Reier Broad. Co., Inc., v. Kramer,* 72 P.3d 944, 948, 316 Mont. 301, 307 (2003).

2. Forum Selection Clauses

The Montana Supreme Court analyzes contractual choice of law provisions by applying the Restatement (Second) Conflict of Laws § 187. *Casarotto v. Lombardi*, 268 Mont. 369, 886 P.2d 931, 935 (Mont. 1994), *rev'd on other grounds sub nom. Doctor's Assocs.*

Inc. v. Casarotto, 517 U.S. 681, 116 S. Ct. 1652, 134 L. Ed. 2d 902 (1996). Applying that standard, the United States District Court for Montana held an employment contract provision specifying Washington law was not enforceable because: (1) in the absence of the provisions, Montana law would apply to an employee working in Montana; (2) Montana has a materially greater interest because it was the place of negotiation, the place of performance, and the plaintiff's domicile, and "applying Washington law to the employment contract contravenes Montana's employment policies," specifically the WDEA.

In *Barber v. Bradford Aquatic Grp., LLC,* 539 P.3d 648, 414 Mont. 170 (2023), the Montana Supreme Court determined by the choice of law and forum selection clauses of the employment agreement with a Montana employee of a North Carolina company were valid and enforceable.

3. Enforcement by Successors and Assigns

The Montana Supreme Court has not addressed whether successors or assigns of an employer may or may not enforce restrictive covenants.

XII. DRUG TESTING LAWS

A. Public Employees

See Section XII(B) and the discussion of the Montana Workforce Drug and Alcohol Testing Act below.

B. Private Employers

Montana enacted the Workforce Drug and Alcohol Testing Act in 1997. *See* Mont. Code Ann. §§ 39-2-205 through 39-2-211. According to this Act, only the following employees may be subjected to drug and alcohol testing:

> [A]n individual engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position for an employer and does not include independent contractor. The term includes an elected official.

Mont. Code Ann. § 39-2-206(4). A hazardous work environment is further defined in the statute. § 39-2-206(6).

Employers may only test these categories of employees in accordance with a "qualified testing program." Mont. Code Ann. § 39-2-207. This entails adopting and implementing testing pursuant to written policies and procedures which must be in place for at least 60 days prior to testing. The testing procedures must conform to the procedures set forth in the federal Department of Transportation regulations governing drug and alcohol

testing procedures (49 C.F.R. Part 40). Mont. Code Ann. § 39-2-207(1). These are very specific and detailed regulations.

The Act sets forth other specific provisions that must be contained in the policies and procedures, including confidentiality provisions, medical review requirements, employee explanation and second test procedures, and description of programs about which employees must be informed. Only five types of tests are permitted under the Act – prospective employee tests, random, reasonable suspicion, follow-up tests, and post-accident tests. Mont. Code Ann. § 39-2-208. Any employer considering drug or alcohol testing should carefully review this Act to ensure full compliance.

The Montana Supreme Court has not addressed the issue of employee drug testing under the Workforce Drug and Alcohol Testing Act.

Montana used to have a medical marijuana statute which was "essentially a decriminalization statute that protects qualifying patients … for using … medical marijuana." *Johnson v. Columbia Falls Aluminum Co., LLC*, 2009 MT 108N (citing MCA, §§ 50–46–101 through –210). That law has since been significantly tightened. *See* Mont Code Ann. §§ 50-46-301, et seq. (2013). Even under the earlier medical marijuana law however, the Montana Supreme Court made clear the Medical Marijuana Act does not provide an employee with an express or implied private right of action against an employer and cannot be construed to require employers "to accommodate the medical use of marijuana in any workplace." *Johnson*, 350 Mont. 562. In 2013, the continued existence of medical marijuana in Montana was brought into question when U.S. Attorney Cotter led a task force against providers, resulting in 33 convictions.

In 2020, Montanans passed a legislative initiative legalizing marijuana for adults over the age of 21, requiring license and regulation by the Montana Department of Revenue, and allowing taxation of marijuana.

XIII. STATE ANTI-DISCRIMINATION STATUTES

Title 49, Chapter 2 of the Mont. Code Ann., known as the Montana Human Rights Act (MHRA), contains the anti-discrimination statutes in Montana. These statutes prohibit all types of employment discrimination based upon race, creed, religion, color, national origin, age, disability, marital status and sex and afford additional protections for pregnancy. Montana anti-discrimination statutes closely mirror federal law, except Montana's laws apply to all employers regardless of the number of employees, Montana's age discrimination statute covers all ages, Montana law prohibits discrimination on the basis of marital status (which invalidates some anti-nepotism provisions), and the Montana pregnancy discrimination provisions afford greater protection than the Family and Medical Leave Act or the federal Pregnancy Discrimination Act.

A. Employers/Employees Covered

"'Employee' means an individual employed by an employer." "The term does not include an individual providing services for an employer if the individual has an independent contractor exemption certificate issued under 39-71-417 and is providing services under the terms of that certificate." Mont. Code Ann. § 49-2-101(10).

"'Employer' means an employer of one or more persons or an agent of the employer but does not include a fraternal, charitable, or religious association or corporation if the association or corporation is not organized either for private profit or to provide accommodations or services that are available on a non-membership basis." Mont. Code Ann. § 49-2-101(11).

B. Types of Conduct Prohibited

As noted above, Montana's anti-discrimination statutes prohibit several types of conduct, including:

1. Retaliation against a person supporting the anti-discrimination laws. Mont. Code Ann. § 49-2-301.

2. Aiding or coercing in or attempting to do an act forbidden under the chapter. Mont. Code Ann. § 49-2-302.

3. Discrimination in employment based on race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex. Mont. Code Ann. § 49-2-303.

4. Discrimination by state or political subdivisions. Mont. Code Ann. § 49-2-308.

5. Discrimination in insurance and retirement plans. Mont. Code Ann. § 49-2-309.

6. Discrimination against pregnant women. Mont. Code Ann. § 49-2-310 and 311.

Because the MHRA is modeled after Title VII of the Civil Rights Act, the Montana Supreme Court refers to federal case law in construing it. *Williams v.* Lowther *Ins. Agency Inc.,* 177 P.3d 1018, 401-04, 341 Mont. 394, 1024-25 (2008). In *Williams,* the employer argued for application of a test that placed more requirements on an employee to make a prima facie case of quid pro quo sexual harassment when the sexual relationship was consensual. *Id*. at 402-03, 341 Mont. at 1024. The Court declined to adopt the proposed test, and instead held it would follow EEOC guidelines and federal case law in determining whether illegal sexual discrimination had occurred. *Id*. at 403-04, 341 Mont. at 1025. The

Court held the employer had illegally discriminated against the employee in *Williams* where he specifically conditioned her continued employment on her resuming a sexual relationship with him. *Id*. at 404, 341 Mont. at 1025.

The MHRA is the exclusive remedy for discrimination claims under Montana law. However, it does not foreclose a claim under federal law and specifically 42 U.S.C. § 1983 even when the claim is based on the same allegations. *Clark v. McDermott,* 518 P.3d 76, 410 Mont. 174. Although, the Court also determined the Section 1983 claims was precluded by claim preclusion based on the unappealed and final agency decision on the MHRA claim.

C. Administrative Requirements

Title 49, Chapter 2, Part 2 allows the Montana Human Rights Commission to enact rules to handle complaints and enforce the anti-discrimination laws. Administrative Rules of Montana (ARM) 24.9.101 through 1719. The Montana Human Rights Bureau under administration of the Montana Department of Labor and Industry also has adopted rules governing investigation and hearings of human rights complaints. Mont. Code Ann. ARM 24.8.101 through 767. Complaints are processed and filed initially with the Montana Human Rights Bureau. The Montana Human Rights Commission is an appellate administrative body that reviews appeals of proposed

D. Remedies Available

An aggrieved party may file a complaint within 180 days of any alleged discrimination or within 180 days after exhausting any internal employer procedures. Mont. Code Ann. § 49-2-501. A complainant, the department or the commission may seek a preliminary injunction through the district court. Mont. Code Ann. § 49-2-503.

After the complaint is filed, the Montana Human Rights Bureau conducts its investigation and first tries to resolve the complaint through conference or conciliation, Mont. Code Ann. § 49-2-504. After the investigation, the Bureau issues either a finding of "reasonable cause to believe" a preponderance of evidence supports a finding of discrimination, or if no reasonable cause is found, may provide a notice of dismissal. The notice of dismissal is appealable to the Commission. Or, if reasonable cause is found, the parties may proceed to an administrative contested case hearing. Mont. Code Ann. § 49-2-505. A party may appeal the decision of the hearings officer to the Commission. *Id.*

The hearing officer's order may: (a) prescribe conditions on the accused's future conduct relevant to the type of discriminatory practice found; (b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person discriminated against; (c) require a report on the manner of compliance. Mont. Code Ann. § 49-2-506. If the order or conciliation agreement is not obeyed, a party may apply to the district court to obtain an order to enforce it. Mont. Code Ann. § 49-2-508. If the department dismisses a complaint for one of the various reasons outlined in Mont. Code Ann. §§ 49-2-507 and -509, a complainant may file a complaint in

district court within 90 days of receipt of the dismissal document. All claims arising out of the alleged discriminatory conduct must be brought before the Human Rights Bureau as a precondition to filing suit in the District Court. *Edwards v. Cascade County Sheriff's Dept.,* 354 Mont. 307, 321-22, 223 P.3d 893, 903 (2009). Claims which are not brought before the HRB will be barred for failure to comply with the MHRA. *Id*.

This procedure is the exclusive remedy for discrimination. Mont. Code Ann. § 49-2-509(7). However, the Montana Supreme Court held a claim arising from sexual intercourse between a supervisor and a mentally-disabled employee was not barred by the exclusivity of the MHRA. *Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.,* 179 P.3d 481, 497, 342 Mont 29, 52 (2008). The Court held that sexual intercourse without consent (which was presumed because the employee had a disability that would likely make her incapable of consent under the criminal statutes) goes far beyond what is contemplated in the state's anti-discrimination statutes and thus sounds in tort claims not barred by the MHRA. *Id.* at 496, 342 Mont. at 50-51. Similarly, the Court held that a WDEA claim is not barred by the exclusivity of the MHRA where the underlying facts of the complaint are not based on allegations of discrimination. *See Vettel-Becker v. Deaconess Med. Ctr. of Billings, Inc.,* 177 P.3d 1034, 1041, 341 Mont. 435, 444 (2008) (holding hospital deacon's WDEA claim was not barred even though he previously brought a discrimination claim based on the MRHA).

In *Norval Elec. Coop., Inv. v. Lawson,* 523 P.3d 5, 411 Mont. 77 (2022), the Montana Supreme Court interpreted the MHRA reaching several important decisions. First, the Court applied both the subjective and objective tests for a hostile work environment claim based on sexual harassment concluding they were both met. *Id.* at 16-17. Second, the Court concluded the actions of the supervisor/harasser which were attributable to the employer were sufficient in their totality to constitute an adverse employment action for purposes of the retaliation claim. *Id.* at 17-19. Third, the Court reversed the District Court's increase of the front pay award beyond what was awarded by the administrative agency ($1.3 Million vs. $505,957) based on the conclusion the WDEA's four-year damages cap was not controlling and the decision by the hearing officer and the agency was not arbitrary and capricious. *Id.* at 19-20.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

Private employers are not obligated by Montana law to provide any special leave for jurors or witnesses. However, terminating an employee for complying with a subpoena or summons could give rise to liability under the WDEA.

Mont. Code Ann. § 2-18-619 governs jury duty for state employees.

B. Voting

Montana law does not require private employers to provide time off or leave for employees to vote.

C. Family/Medical Leave

No Montana statute addresses family or medical leave generally, but it is unlawful discrimination for an employer to: (1) terminate a woman's employment because of her pregnancy; (2) refuse to grant a reasonable leave of absence for a pregnancy; (3) deny to an employee who is disabled as a result of pregnancy any compensation to which she is entitled under disability or leave plans; or (4) require an employee to take mandatory maternity leave for an unreasonable length of time. Mont. Code Ann. § 49-2-310.

D. Pregnancy/Maternity/Paternity Leave

The Montana Supreme Court found while a company's no-leave policy for employees with less than one year with the company was facially neutral, the fact it applied to both sexes did not prevent it from creating a disparate impact on women, because women can become pregnant and men cannot, subjecting pregnant women to job termination on a basis not faced by men. The Court found the no-leave policy was gender-based discrimination by an employer in violation of Title VII of the Civil Rights Act of 1964 and the federal Pregnancy Discrimination Act (PDA). The Supreme Court stated the Montana Maternity Leave Act (MMLA) is consonant with Title VII and the PDA and is not preempted by either. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Industry*, 214 Mont. 238, 692 P2d 1243 (1984); on appeal to the Supreme Court of the United States, judgment vacated and case remanded, 479 US 1048, 93 L Ed 2d 972, 107 S Ct 919 (1987); judgment reinstated and remanded to the District Court for determination of appropriate attorney fees and costs, 228 Mont. 505, 744 P.2d 871, 44 St. Rep. 1718 (1987).

E. Day of Rest Statutes

Montana has no statute imposing a day of rest. Each Sunday is a legal holiday. Mont. Code Ann. § 1-1-216.

F. Military Leave

The 2005 Montana legislature enacted the Montana Military Service Employment Rights Act. Mont. Code Ann. §§ 10-1-1001, *et seq.* The Act prohibits discrimination based on membership in the state militia, authorizes leaves of absence for militia members, and defines the right of militia members to return to employment without loss of specified benefits. It provides for enforcement, including administrative remedies and a private right of action for equitable relief, damages, liquidated damages, and attorney's fees. Mont. Code Ann. § 10-1-1021. The legislature made minor amendments to the Act in 2015.

G. Sick Leave

Montana law does not require employers to provide employees with sick leave benefits either paid or unpaid.

H. Domestic Violence Leave

Montana law does not require employers to provide employees who have suffered from domestic violence with domestic abuse leave.

I. Other Leave Laws

Montana law does not require employers to provide employees with holiday, vacation or other leave.

XV. STATE WAGE AND HOUR LAWS

A. Current Minimum Wage in State

The Montana minimum wage equals the greater of the minimum hourly wage rate established by the federal Fair Labor Standards Act or the rate set by Montana statute ($8.75 per hour as of January 1, 2021). Mont. Code Ann. § 39-3-409. The minimum wage is $4.00 per hour for businesses with gross annual sales of $110,000 or less. There are exclusions from minimum wage requirements for the value of tips received by the employee, and special provisions for training wages. *Id.*

B. Deductions from Pay

Employees must be paid in lawful money of the United States, by check, or by electronic funds transfer. Mont. Code Ann. § 39-3-204. Electronic funds transfer can only be used if the employee consents in writing or electronically, if a record is retained. *Id.* An employer who fails to pay the full amount due an employee is guilty of a misdemeanor, and also is liable for the unpaid wages plus a penalty not to exceed 110% of the wages due and unpaid. Mont. Code Ann. § 39-3-206.

C. Overtime Rules

Employees other than farm workers and seasonal recreation workers may not be employed for a workweek longer than 40 hours unless paid time and a half for the overtime. Mont. Code Ann. § 39-3-405. Employees in a number of occupations, such as hoisting engineers, drivers, miners, and telephone operators are subject to particular overtime restrictions. Mont. Code Ann. §§ 39-4-101, *et seq.*

D. Time for Payment Upon Termination

An employee who separates from employment must receive all unpaid wages on the earlier of the next regular payday or fifteen days from the date of separation. There are two exceptions. One, an employee who is laid off or separated for cause must be paid immediately -- unless the employer has a written personnel policy extending the time for final payment. Two, an employer who discharges an employee based on an allegation of theft may withhold from an employee's final paycheck an amount sufficient to cover the theft so long as either the employee agrees in writing to the withholding, or the employer files a report of theft with law enforcement within seven days and other conditions are met. Mont. Code Ann. § 39-3-205.

E. Breaks and Meal Periods

There is no Montana law requiring employers to provide breaks or meal periods, or pay for such time.

F. Employee Scheduling Laws

There are no Montana cases regarding employee scheduling.

XVI. MISCELLANEOUS STATUTES REGARDING EMPLOYMENT PRACTICES

A. Smoking in the Workplace

The Montana Clean Indoor Air Act prohibits smoking in public places and places of employment. Mont. Code Ann. § 50-40-101, et seq. There are limited exceptions listed in Mont. Code Ann. § 50-40-104, including designated hotel rooms and sites used in connection with American Indian cultural activities. Similarly, the use of tobacco products in public school buildings or on public school property is prohibited. Mont. Code Ann. § 20-1-220. Violations of these statutes may result in a warning or up to a $500 fine. Mont. Code Ann. § 50-40-115.

B. Health Benefit Mandates for Employers

Montana law does not independently require employers to pay for employee health insurance. An employer may not require an employee to pay the cost of a medical examination as condition of employment. Mont. Code Ann. § 39-2-301.

C. Immigration Laws

An employer may not knowingly employ an alien who is not lawfully authorized to accept employment. Mont. Code Ann. § 39-2-305.

D. Right to Work Laws

Montana is not a right to work state. Montana limits the right to work to the right of sole proprietorships or two-partner partnerships to have people in their immediate family (owner, spouse, children under 18 years old) work at that retail or amusement establishment without interference by any union, the statute doesn't apply to establishments selling liquor or beer, and the fine is only $50. Mont. Code Ann. §39-33-101, *et seq*.

E. Lawful Off-Duty Conduct (Including Lawful Marijuana Use)

An employer may not refuse to employ an individual or 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, including food, beverages, or tobacco, off the employer's premises during nonworking hours, unless the product affects job performance or fits other exceptions added because of medical marijuana. Mont. Code Ann. § 39-2-313.

Medical marijuana is legal in Montana. Mont. Code. Ann §§ 16-12-501 *et seq.*

Recreational marijuana was also legalized in Montana by the voters in 2020, with an effective date of January 1, 2021. Recreational marijuana was legalized for a small amount of marijuana for personal use.

F. Gender/Transgender Expression

The Montana Supreme Court found any organization adopting an administrative procedure to provide employment benefits to opposite-sex partners who may not be in a legal marital relationship must do the same for same-sex couples. *Snetsinger v. Mont. Univ. Sys.,* 2004 MT 390, P35, 325 Mont. 148, 160, 104 P.3d 445, 453. The City of Bozeman has made it unlawful to discriminate against someone on the basis of their gender expression. Bozeman, Montana Code of Ordinances Sec. 24.10.010. The Montana Supreme Court recently affirmed a district court's decision to dismiss a case challenging the ordinance on grounds the petitioners were seeking what amounted to an advisory opinion. *Arnone v. City of Bozeman*, 2016 MT 184, ¶ 6, 384 Mont. 250, 253, 376 P.3d 786, 789. The 2021 Montana Legislature passed Senate Bill 215 amendments to Montana's Religious Freedom Restoration Act, Mont. Code Ann. §§ 27-33-101 *seq.* The amendments invalidate any state action that "substantially burdens" a person's right to the free exercise of religion. The statute is designed to statutorily "restore the compelling governmental interest test and to guarantee its application in all cases in which the exercise of religion is substantially burdened by state action" and "to provide a claim or defense to a person or persons whose exercise of religion is substantially burdened by state action." Mont. Code Ann. § 27-33-103(1) and (2). It is anticipated this law may be used to challenge local government protections of LGTBQ rights.

G. Other Key State Statutes

Employers must notify employees in writing before commencing work of the rate of wages to be paid and of the date of paydays. Mont. Code Ann. § 39-3-203.

Employers may not induce workers to change work places by deception, misrepresentation, or false advertising concerning the kind or character of the work, the sanitary or other conditions of employment, or the existence of a strike or other labor trouble. Mont. Code Ann. § 39-2-303.

An employer may not require a person to take a lie detector test as a condition of employment. Mont. Code Ann. § 39-2-304.

With respect to employees with criminal records, an employer is not liable regarding claims of negligent hiring or negligent employment for acts committed by the employee if: (1) the acts are outside the scope of employment; (2) the employer had previously reviewed the arrest record which didn't show disposition of the case or acquittal; the conviction was for a misdemeanor officer or an offense that was unrelated to the employment; or (3) the employee is under state supervision for probation or parole.

With respect to state agencies operating on an Indian reservation, hiring preferences must be given to an Indian resident of the reservation who has substantially equal qualifications for the position. Mont. Code Ann. § 2-18-111.

1. Lie Detector Tests

Mont. Code Ann. §39-2-304 prohibits an employer from requiring a person to take a lie detector test as a condition for employment or continuation of employment.

2. Volunteer Activities and Reports

Mont. Code Ann. § 39-71-118, MCA, distinguishes employee from volunteer and what volunteer activities are exempt from employment laws.

3. Commission Sales Representatives

Rule 24.16.2514, ARM. describes types of commission payments that fall under the Montana wage and hour laws.

4. Local Ordinances

A number of Montana cities have passed local nondiscrimination ordinances regarding gender identity and orientation. The 2021 Montana Legislature passed Senate Bill 215 amendments to Montana's Religious Freedom Restoration Act that invalidates any state

action that “substantially burdens” a person’s right to the free exercise of religion. It is anticipated this law will be used to challenge local LGBTQ non-discrimination ordinances.