

## Managing in Montana

### An Introduction to Employment Rules in Montana

2009 Edition

Please work on your quiz while  
we are awaiting all participants

Presented by

**James A Nys**

Personnel Plus! Consulting Services, inc  
Helena

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## Managing Montana Employees

- Montana has many specific rules that are often unknown to employers.
- Many errors are made in good faith but that does not eliminate exposure to liability.
- We will discuss the areas that employers commonly misunderstand or where most questions arise.



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## Topics We Will Discuss

- What time off is legally protected?
- When is a discharge wrongful?
- What records must I keep and for how long?
- How should I respond to an Unemployment claim?
- When Can I lawfully require Drug and alcohol Tests?
- Who is exempt from overtime?
- When is an independent contractor really an employee?
- What is "Sexual harassment?"



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## FAQ's

- Breaks every hour or so.
- Refreshments throughout the day.
- We will break for lunch for an hour or so.
- Questions are encouraged as they occur or you may record the question and deposit it in the "Ask It Basket" for the round table discussion.
- Today's recommendations are based on Montana law as it exists today.
  - Because laws can change with no notice, check with a knowledgeable individual to determine if the rules have changed before applying the information.
  - We will discuss various state and federal laws and rules and discuss how employers need to operate to not violate the rules.



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## Employment Regulation

- There are many sources of rules for the employment relationship:
  - Legislative branch enacts statutes (laws) (MCA & USC)
  - Executive branch regulations (ARM & CFR)
  - Executive Orders (EO's) & Attorney General opinions
  - "Purse string" rules for government contractors
  - Case law and administrative agency decisions
    - Decisions of district & circuit courts binding only in district
    - Appellate courts review decisions of law only
    - Administrative decisions may be appealed to district court
    - Appeal may be de novo or administrative review



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## One Size Doesn't Fit All

- Many employment laws are of selective applicability.
  - Examples:
    - Title 2 and 7 MCA applies only to government in Montana.
    - Title 39 and 49 MCA apply to most employers.
    - Civil Rights Act applies only to employers with 15+ employees.
- Dozens of different definitions of "employer" and "employee" exist in federal and state law.
  - A person may be an employee for some purposes but not others.
- Many factors will influence determination of the correct/lawful course of action to address/resolve a particular HR related issue.



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## If There is a Conflict Between Laws...

- Federal and state laws often contain different standards.
- To decide which rule applies:
  - Decide if your organization is in fact covered by both laws
    - Federal laws often apply only to larger organizations or to organizations engaged in interstate commerce.
  - If covered by both laws determine if each law is permissive or mandatory.
    - If one is permissive and the other mandatory, follow the mandatory law.
    - If both are mandatory, generally you follow the law that provides the greatest benefit to the employee.
  - If both are mandatory but the standards are not reconcilable, determine precedence of the laws.



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## Employer - Worker Relationships

- Employment "At-Will" is the most common in other states:
  - The employment relationship exists and continues as long as both parties wish it to continue.
  - Employment "at-will" has undergone major changes in past 100+ years.
  - Montana allows "at-will" employment only during probationary period.
  - In Montana, probationary periods are automatically six months unless otherwise stated by the employer at the onset of employment.



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## Contract Employment

- Contract employment is the second most common.
  - Terms and conditions of employment are negotiated between the parties and reduced to contract:
    - Collective bargaining rights controlled by NLRA.
    - Mandatory, permissive and prohibited subjects.
  - Contract remedies apply if contract is breached.
  - Arbitration of disputes is common.
  - Not subject to certain laws like wrongful discharge act.
  - No expectation of continuation past contract end date exists unless an "evergreen clause" exists.



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## Temporary Employees

- **Temporary Services Contractors:**
  - Employee works for a temporary services contractor who treats them as an employee for all purposes.
  - Montana law limits temporary workers to assignments with a "finite ending date that support or supplement a workforce in situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and projects."
- **Short-term employees hired by organization**
  - Employers can hire employees temporarily on their own payrolls. Clearly stated status important.



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## Co-Employment

- **Professional Employer Organizations (PEOs or Leasing Companies)** hire employees and assign them to work for another person to staff and manage, or to assist in staffing and managing, a facility, function, project, or enterprise on an ongoing basis.
  - Leasing company shares employment responsibilities with day-to-day supervisor.
  - "Exclusive remedy" issues exist.
- **Joint employment relationships:**
  - Where two or more entities share control over an employee, both can have the responsibilities of an employer.



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## Full & Part-Time Employees

- **No universal standard for what is full-time and/or part-time.**
  - Determination is usually driven by benefits eligibility and nature of work load For example:
    - ERISA pension standards = 1000 hrs / three years
    - FMLA eligibility standard = 1250 hrs in one year
    - Health insurance contract may establish definition
  - Educational related organizations usually work 35 hour weeks.
  - Many retail stores consider individuals who work as few as 28 hours to be full-time.



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## Independent Contractors

(Page 2)

- **Independently engaged standard:**
  - Evidence that the contractor is in business separately from the entity for whom the work is being performed.
- **Free from control standard:**
  - Contractor operates independently on the job and employer controls only the final result.
- **Common-law rules used to determine proper worker classification.**
- **Does not include "main street businesses" where services are performed at contractor's site.**



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## IC Certification

- **Montana has an IC registration program for sole proprietors, partners and certain limited liability companies.**
- **Exemption limited to described employment relationship.**
- **ICs must have either certificate of exemption or proof of workers compensation policy.**
- **Corporate owners and manager managed LLCs are not independent contractors.**



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## Standards for Determining IC Relationship

- Instructions
  - Training
  - Integration
  - Services rendered personally
  - Hiring assistants
  - Continuing relationship
  - Set hours of work
  - Full-time work
  - Work done on premises
  - Order or sequence set
  - Reports
  - Payments
  - Expenses
  - Tools and materials
  - Investment
  - Profit or loss
  - Works for more than one person or firm
  - Offers services to general public
  - Right to quit / fire
- - Revenue ruling 87-41



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## Wages and Hours

- **Wage and hour statutes:**
  - Federal coverage (29 USC ch 8) generally applies where annual revenues exceed \$500,000 or where an individual employee is involved in interstate commerce.
  - All governments, hospitals and schools are covered by the FLSA.
  - Montana law (30-3-401 MCA) applies to nearly all employment.
- Includes child labor, FMLA, minimum wage, overtime, prevailing wage and wage payment laws.



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## Child Labor (Page 2)

- Youths 18+ may perform any job for unlimited hours.
- Youths age 16-17 may perform any non hazardous job for unlimited hours.
- Youths age 14 and 15 may work outside school hours in various non-hazardous jobs:
  - Up to 3 hrs on a school day/18 hrs in a school week,
  - 8 hrs on a non-school day, or 40 hrs in a non-school week
  - Not before 7 am nor work after 7 pm, except from June 1 through Labor Day, when evening hours are extended until 9 pm.



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## Prohibited occupations

- Individuals under 18 are prohibited from engaging in these occupations:
  - Driving\*, explosives, coal mining, logging, slicing machines, roofing, power cutting machines
    - There is a limited exception for 17 year olds to drive.
- Statutory restrictions on certain occupations (i.e, Peace Officer, bartender).



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## Montana Wage Payment Act (Page 3)

- **Timeliness of payments:**
  - Wages are due and payable within 10 days for continuing employees; 15 days for terminating employees;
  - Immediately for employees terminated for cause or laid off unless employer has adopted a written policy to delay final payment of wages.
- **Wages must be paid "free and clear":**
  - Where the employee directly or indirectly makes payments to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee and payment thus falls below minimum wage, a violation occurs Example: tools or uniforms required of employees.
  - USDOL enforces minimum wage, Montana enforces the wage agreement between the parties.



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## Withholding from Wages

- **No unilateral withholding for theft, breakage, shortages, waste, etc.**
  - May withhold for room, board, etc If agreed to in advance.
  - May deduct for certain advances like travel funds.
- **Accrued vacation is defined as wages.**



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## Other WPA Requirements

- **Direct Deposit:**
  - Must have employee's written permission to directly deposit wages (current legislation may change this).
- **Tips and Gratuities:**
  - Tips are defined as wages.
  - Employers may generally not require employees to involuntarily distribute tips.
  - Arbitrary service charges may be distributed only to those who prepare and serve food.
- **Special rule for theft:**
  - Employers may withhold final wages if charges are reported within 7 working days of discharge and filed with court within 30 days an the court approves withholding.



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## Time Worked (Page 6)

- Breaks and lunches - if the rest break exceeds 30 minutes and the employee is relieved of all duty/responsibility, the time is not counted.
- Waiting and on-call time - if the employee is free to use the time for his/ her own purposes the time may not be working time.
- Travel time:
  - Home to work.
  - Time travelling during work day is counted.
  - Time travelling out of town is time worked even if travelling on non-scheduled work day.



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## Training and Meetings

- Time spent in meetings, training, etc is not working time if all four of the following rules are followed:
  - The meeting is outside regularly working hours.
  - Attendance is voluntary with no repercussions for non-attendance.
  - The subject matter does not relate to employee's job.
  - No productive work is performed.



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## Work Time Issues

- Working without permission:
  - If an employer knows, or has reason to know, an employee has worked and does not act to stop the employee from working, the time is constructively approved.
- Volunteers:
  - Employees cannot work "off the clock".
  - Volunteers can work only for a non-profit.
- Emergency call outs:
  - May be time worked including commuting time.



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## Working Time Issues

### • **Commuting:**

- Time spent commuting or involved in related incidental activities (like changing clothes) before and after reporting for work are generally not time worked unless required by employer.



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## Wage & Hour Group Exercise

### • **Calculate the Gross Pay for a two week pay check using the following information:**

- Pay agreement is \$5.00 plus commission.
  - Employee worked 50 hours in first work week.
  - Employee worked 30 hours in second work week.
  - Employee earned a \$1000 commission in work week one.
  - Employee earned no commissions in work week two.
- **What is the Total Gross pay for this individual.**
- Show your calculations



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- Calculate straight time (ST) earnings for each week.
  - Include various components of the regular rate.
- Calculate regular rate for each week.
- Determine if Minimum Wage is satisfied.
- Calculate Overtime (OT) premium.
  - Half of Regular Rate.
- Multiply OT premium by OT hours in each week.
  - Credit any premium pays towards OT if applicable.
- Add OT premium to ST earnings.



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## Minimum Wage (Page 4)

- Employers must ensure that employees receive at least minimum wage (\$7.25 hr) for all hours worked- regardless of the method of payment.
- Employers in Montana may not use tip credit to meet minimum wage requirement.
- Wages are not required to be paid in cash.



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## Minimum Wage

- **Federal Law:**
  - Currently \$7.25
- **Montana Law:**
  - Currently \$7.25 but will increase each January based on COLA changes August-August of each year.



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## Overtime Pay

- Overtime pay is required for all hours worked over 40 in a work week unless exempted.
- The "regular rate" is what is used to determine overtime rate:
  - Regular rate is straight time earnings divided by hours worked in the work week.
  - Regular rate includes most forms of compensation.
- Each workweek stands alone - you cannot balance one against another to avoid payment of overtime.
- Only time actually worked is counted in computation of overtime hours.



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## Minimum Wage and Overtime Exemptions (Page 5)

- White collar workers
- Immediate family members of employers
- Resident managers
- Direct sellers
- "Nannies" & certain domestic workers
- Foster parents
- Individuals who volunteer to non-profit organization they do not work for
- Approximately 15 others...



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## Overtime Exemption Only (Page 5)

- Certain DOT subject drivers
- Sales of parts or mechanics in auto, RV dealerships
- Sales persons selling radio, TV or newspaper ads
- Direct patient care (8 & 80)
- Certain employees of smaller radio stations
- Certain commissioned retail sales workers
- Certain logging industry workers
- Taxi drivers
- Ranch and farm hands in agriculture
- Approximately a dozen others



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## White Collar Exemptions

- The "white collar exemptions" (29 CFR 541) apply across all industries.
  - Apply to executive, administrative, professional and outside sales.
- Montana has its own regulations so employers must follow a set of rules that is a mix of federal and state provisions.



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## Five Exemption Factors

- To be exempt as an executive, administrative or professional employee under the 541 regulations.
- Minimum salary of \$455 a week.
- Salary basis form of payment.
- Predominate duty test.
- Nature of work.
- "Factor Five".



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## Overtime Exemptions

	Executive	Administrative	Professional
Minimum Salary	\$455 a week	\$455 a week	\$455 a week
Method of pay	Salary Basis	Salary Basis	Salary Basis
Predominate Duty	50% or More of Working Time in Exempt Work	50% or More of Working Time in Exempt Work	50% or More of Working Time in Exempt Work
Nature of Work	Management of Enterprise	Administrative Staff Specialist	Advanced Technical Work
Other Tests	Hires/ Fires and Supervises 2+ FTE	Exercises Discretion & Independent Judgment	Exercises Discretion & Independent Judgment



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## Sales Exemption

- Employees who are regularly engaged away from the employer's place of business:
  - Making sales of goods and services or;
  - Obtaining orders or contracts for services or the use of facilities and;
  - Who 20 percent or less of their time in non-exempt work
  - This exemption does not apply to route delivery sales persons .
- Inside Sales in Retail Establishments where employees earn 1.5 x minimum wage in commissions.



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## Salary Basis

- **Must receive guaranteed wage if the employee works any portion of week subject to special rules (29 CFR 541):**
  - May be docked for absences related to personal issues (IE, Vacation) in full day increments only.
  - May not be docked for absences caused by employer or certain legal obligations like jury duty, military leave shutdowns, holidays, etc. lasting less than one workweek.
  - May suspend without pay only for safety violations.



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## Equal Employment Opportunity

- Title VII of the federal Civil Rights Act of 1964 (as amended) covers employers with 15 or more employees.
- The Montana Human Rights Act (49-2-101 MCA) covers nearly all employers with one or more employees.



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## Protected Classes

(Page 10)

- Race, Color or ethnicity
- Sex (but not sexual orientation /gender identity)
- Physical and/or mental handicap (Including history of disability or perception of disability)
- Religion / Creed
- Genetic History (If 15+ employees)
- Age (all ages in Montana)
- National Origin
- Marital Status in Montana- (including consideration of identity and/or occupation of spouse)
- Pregnancy
- Political Belief (Montana governmental employees)



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## Forms of Discrimination

- **Different Treatment:**
  - Treating individuals differently on account of a protected classification.
- **Adverse impact:**
  - Practices that disproportionately disqualify individuals of protected groups even though neutrally applied.
- **Retaliation:**
  - Adverse actions taken against individuals who exercise protected rights.
  - Six month rule of thumb.



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## Accommodation

- **Religious beliefs need to be accommodated:**
  - The employee must inform the employer of the need.
  - The employer must affirmatively accommodate.
  - If accommodation is refused, the employer must show undue hardship (more than minimal cost) on the organization's operations.
- **Disabilities must be reasonably accommodated:**
  - Employers must engage in interactive process to identify effective and reasonable accommodations.
  - Definition of disability has evolved over past decade and changed with recent ADA Restoration Act.



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## Harassment

(Page 10)

- Can be based on any protected characteristic.
- **Harassment is:**
  - Unwelcome sexual advances or requests for sexual favors that, by intent or not, result in a tangible loss (quid pro quo harassment) of a term or condition of employment,
  - Offensive or demeaning comments regarding a person's age, gender or other protected characteristic, or;
  - A hostile working environment.



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## Suspect Inquiries

- Questions That Tend to Reveal An applicant's Sex, Age Marital Status, The Existence, Nature or Severity of a Disability or Other Protected Class Membership.
  - Questions Asked Earlier Than Needed.
  - Question Regarding the Employee's or Applicant's Exercise of Protected Rights.
- Asking the question creates a presumption of use of the information to question reveals.



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## Employer's Obligation to Act

- Employers must investigate discrimination complaints when they have knowledge (should not wait for complaint).
- Corrective actions must be prompt but only after investigation reveals violation of standards of conduct.
- The refusal of the victim to cooperate in the process does not necessarily relieve the employer of the obligation to act.
- Failure to act implies approval of the behavior by the employer.
- Corrective action should make the victim "whole".
- Charging Party has 180/300 days to file complaint with EEOC/ HRB.
  - No private right of action.



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## Employee Privacy

(Page 13)

- Montana law (39-2-205 MCA) prohibits the administration of blood and urine tests for the purpose of detecting drug or alcohol use except for employees:
  - Who are covered by a mandatory federal testing requirement, or;
  - Where the position is in a hazardous work environment, or;
  - In positions involving public safety, fiduciary responsibility or security.
- Polygraphs tests are prohibited (39-2-304 MCA)



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## Drug Testing Policy

- 39-2-207 MCA requires that if the employer is authorized and wishes to test, they must have a written policy that incorporates the testing requirements of 49 CFR 40 and Montana law and must make the policy available to those being tested at least 60 days prior to testing.
- Employers may, for covered employments:
  - Test New Hires
  - Conduct Random testing is allowed if certain rules are followed.
  - Conduct Post Accident Testing if property damage in excess of \$1500, loss of life or bodily injury and there exists a reason to believe the drug or alcohol use contributed
  - Conduct reasonable suspicion testing if supervisors are trained per statute



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## Smoking in the Workplace

- Montana law (39-2-313 MCA) prohibits an employer from discriminating against an employee where the employee uses a lawful substance during non-working hours:
  - Allows smoking prohibition at work.
- Montana Clean Indoor Air Act (50-40-101 MCA) prohibits smoking in all enclosed areas used as work places, restaurants, transportation, employer vehicles, etc.
  - No Smoking notices required at entrances.
  - Penalties for managers who do not enforce and employees who do not comply with ban.



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## Unemployment Insurance

- UI is a federal/state program. (39-51-101 MCA)
- Monetary eligibility is established based on base period:
  - First four of last five completed quarters is base period
  - New alternate base period allows workers to use more recent wages to qualify
- Non-monetary qualification:
  - If Employer terminates- Usually Qualified.
  - If Employee quits - Usually Disqualified.
  - Last employer generally determines eligibility.
  - All employers may share liability depending on reason for termination.



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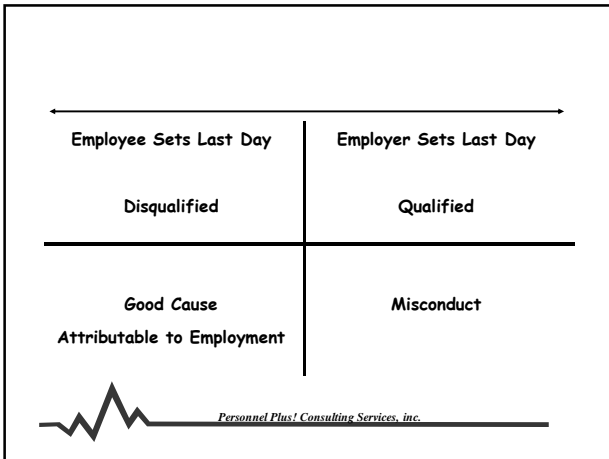
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### Special UI Issues

- Gross Misconduct equals one yr disqualification.
- Once qualified, must be "able and available" to work:
  - No medical restrictions that limit availability
  - Be willing to accept the standard wage for the locality and be willing to work all hours and days normal to the occupation.
  - Be willing to accept part-time work.
  - Cannot refuse suitable work.
- Part-time benefits available if claimant works less than 40 hours per week and earns less than two times their weekly benefit amount.

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### Mandatory Time Off

- Maternity Leave:
  - Employer must grant LWOP for period of physical inability to perform job due to maternity or complications of maternity.
  - Mandatory reinstatement after leave unless circumstances have so changed as to make it unreasonable (IE, position no longer exists).
- Jury Duty:
  - Employer must grant LWOP for period of jury duty.
    - Need not pay hourly employees.
    - May not deduct partial week absences for exempt employees.

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## Veteran's Re-employment

- The Uniformed Services Employment and Re-employment Rights Act (USERRA- 38 U.S.C. 4301) covers those who:
  - Held a civilian job;
  - Gave notice of leaving the job for service in the uniformed services;
  - Have not been absent more than five years (not counting weekend drills or summer camps or involuntary extensions);
  - Was released from service under honorable conditions; And
  - Reported back to the civilian job in a timely manner or have submitted a timely application for re-employment.
- Montana has a similar law (10-1-1001 MCA) for employees called to state active duty with National Guard.



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## Vets Return To Work Time Limits

- Time limits for returning to work:
  - Less than 31 days service: by the beginning of the first regularly scheduled work period after the end of the calendar day of duty plus time required to return home safely.
  - 31 to 180 days: application for re-employment must be submitted not later than 14 days after completion of a person's service.
  - 181 days or more: application for re-employment must be submitted no later than 90 days after completion of a person's military service.
  - Up to two years for persons who are hospitalized or convalescing due to service connected disabilities.



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## Wrongful Discharge From Employment Act (Page 15)

- Montana law establishes a very limited form of employment "at will".
- The act provides for constructive discharge.
- The act provides for a presumed probationary period of six months if not otherwise stated.
  - Probationary status only affects good cause requirement... It does not authorize an employer to terminate in violation of written policies or public policy.



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## Wrongful Discharge Remedies

- The act limits the damages available to a wrongfully discharged employee to back pay and benefits and expressly prohibits awards for pain and suffering, emotional distress, compensatory, punitive and "any other form" of damages.
- Punitive damages may, however, be awarded in cases of actual fraud or actual malice involving public policy violations covered by the act.
- The wrongful discharge from employment act limits damages to a maximum of four years lost wages and benefits plus interest offset by any interim earnings.
- The act provides for several forms of dispute resolution.
  - Grievance Procedure, Arbitration, Court.



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## Dispute Resolution

- Disputes may be resolved through:
  - Arbitration if initiated within 60 days of filing case
  - District Court if filed within one year of termination
  - Through Grievance procedure if provided to employee within seven days of termination.
    - If provided within seven days and not responded to by employee, employee likely precluded from filing an action in district court



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## The Standards of Good Cause

- Forewarning - The employee had forewarning the behavior was disapproved by the organization.
- Appropriate rules - The rule, action or employment standard is "appropriate" and is related to safe, orderly and efficient operation of company.
- Investigation - An appropriate and thorough investigation has occurred and it established - prior to the discipline- proof of misconduct to support the disciplinary action.



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## Good Cause

- Equal application - Employer applied rules equally where two or more employee are similarly situated.
- Appropriate response - Employer took the actions reasonably calculated to cause the behavior to stop and not reoccur in the future.
- Documentation - documentation exists that demonstrates the "guilt" of an employee.



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## Documentation

- Documentation of discharge must be retained at least two years.
- Informal documentation- supervisor's log:
  - Include name, place, date, brief statement of what happened.
  - Not given to employee or put in personnel file unless: used in decision, shared with another person or treated as permanent record (beyond periodic review).
  - Should contain both positive and negative comments.



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## Formal Documentation

- Used written warnings up through terminations:
  - Date and time of incident
  - Detailed description of the problem (don't generalize)
  - Implications- why is the problem important to the company?
  - Prior record - does employee have a record of similar behavior in the past?
  - Prior communications - Indicate prior discussions or written communications to the employee
  - Improvements (or lack thereof) noted since previous communications
  - Expected solutions - Be specific as to your expectations of change - Don't discuss attitude or initiative or other "traits", instead describe expected solutions in terms of observable behaviors



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- **Action** - If you are taking an action, clearly say so
  - **Consequences** - Inform the employee of the consequences of not conforming with the expected solution outlined above
    - Sample language: "appropriate disciplinary action up to and including discharge from employment"
  - **Follow-up** - If you have established a follow-up date when you will review the employee's record, include that information in the memo
    - If you have agreed to give three weeks to see improvement, do not take further action on this problem until that period has elapsed
  - **Acknowledgment** - An indication that the employee has seen and received a copy



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## On the Horizon

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- **Health Care Reform**
    - Provide health care or pay fee on payroll
  - **Employee Free Choice Act**
    - Mandatory Contracts after 120 days
  - **Healthy Families Act**
    - One hour of sick leave for 30 hrs worked
  - **FMLA Expansion**
    - Reduce coverage threshold
    - Provide for paid FMLA leave similar to a UI benefit



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## Workshop Wrap Up

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- Please complete your workshop evaluation and leave it on the tables
  - For information about Personnel Plus! services, call 406-443-7787 or visit [personnel-plus.com](http://personnel-plus.com)
  - To subscribe to Jim's email lists, visit [www.personnel-plus.com](http://www.personnel-plus.com)



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