

HR 101

An Introduction to Employment Rules in Montana

Sponsored by:
Montana State Council

Presented by
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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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Employer - Worker Relationships

- **Employment "at-will":**
 - The employment relationship exists and continues as long as both parties wish it to continue.
 - Montana does not recognize "at will" employment.
- **Contract Employment:**
 - Terms and conditions of employment are negotiated between the parties and reduced to contract.
 - No expectation of continuation past contract end date exists unless an "evergreen clause" exists.



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Contingent & Co-Employment

- Temporary Employees from a TSC are limited 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.
- Co-Employment - Professional Employer Organizations 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.
- Joint employment relationships may exist where two or more entities share control over an employee - both can have the responsibilities of an employer.



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Independent Contractors

- **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 the person and the type of work described.
- ICs must have either certificate of exemption or proof of workers compensation policy.
- Corporate owners and manager managed LLCs are exempt from registration process.



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Determining IC Relationships

- 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

- Federal coverage 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 applies to nearly all employment- small business have lower minimum wage.
- Includes child labor, FMLA, minimum wage, overtime, prevailing wage and wage payment laws.



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Working Time Issues

- Breaks and Meal Periods
- Suffered or Permitted to Work
- Working without Permission
- Travel Time
- Training and Meetings
- Recording Time Worked
- Montana and federal rules are similar



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Montana Wage Payment Act

- **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".
- USDOL enforces minimum wage, Montana enforces the wage agreement between the parties.



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Wage Payments

- No unilateral withholding for theft, breakage, shortages, waste, etc allowed.
- Accrued vacation is defined as wages.
- Must have employee's written permission to directly deposit wages in employee's bank account.
- Tips and Gratuities are defined as wages.
 - Tip Pools and Service Charges cannot be mandated by employer.
- Employers may withhold thefts from final wages only if charges are filed with local law enforcement within 7 business days of discharge and with the court within 30 days and the court approves withholding.



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Minimum Wage

- Employers must ensure that employees receive at least minimum wage for all hours worked- regardless of the method of payment.
- Employers in Montana may not use tip credit to meet minimum wage requirement.
- Most "inside" commission sales persons are not automatically exempt from minimum wage requirement.
- Wages are not required to be paid in cash.



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Minimum Wage

- Since 7/24/2009 - \$7.25 an hour
 - Montana minimum wage increases each January based on August-August COLA changes.



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Forms of Wage Payments

- There are several forms of payment, all of which are converted to equivalent hourly "regular rate":
 - Salaries (unless in exempt position)
 - Hourly
 - Piece work
 - Commissions (unless exempt)
 - Bonuses (unless discretionary)
 - Discretionary means both fact and amount unknown to recipient until near when bonus given.
 - Wages need not be in cash



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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.
 - Blended rate calculations.
 - 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

- White collar exemptions
- 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

- 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" apply across all industries
 - Apply to executive, administrative, professional and outside sales.
 - Montana has its own law (that mirrors pre-2004 federal law) so employers must follow a set of rules that is a mix of federal and state provisions. Federal Highly compensated test and hourly computer exemption do not apply.
 - Montana has proposed to adopt federal rules except for computer test, outside sales and salary level.
 - Montana has proposed adopting the average weekly wage (currently \$626 a week) as the minimum salary to be exempt in Montana.



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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 (51%) 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 Exemptions

- 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 over a representative period of time of at least 30 days.



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Salary Basis

- Must receive guaranteed wage if the employee works any portion of week subject to special rules:
 - May be docked for absences related to personal issues (i.e., 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. (Would change under proposed state regs to include disciplinary suspensions.)



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Special Overtime Issues

- **Comp time**
 - Permitted only in public employment or for exempt staff.
- **Deferred payments**
 - If wages are paid at a later date, the employer must go back, re-compute the new total amount due, and pay the difference between what was paid and the correct total.



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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 covers nearly all employers with one or more employees.



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Protected Classes

- Race or ethnicity
- Sex (but not sexual orientation /gender identity)
- Color
- Physical and/or mental handicap (Including history of disability or perception of disability) ADA Restoration Act applies to ADA covered employers
- Religion / Creed
- Age- All Ages in Montana
- National Origin
- Marital Status- (including consideration of identity and/or occupation of spouse)
- Pregnancy
- Political Belief (governmental employees only)
- Genetic History (effective November of 2009)



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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.
- Aiding and Abetting
- Workplace harassment
- Discriminatory pay, benefits or terms and conditions of employment.
 - Ledbetter Fair Pay Act



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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.
 - New ADA Restoration Act.



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Harassment

- 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.
- Perpetrators can include, supervisors, co-workers, visitors or customers.
- Sexual Favoritism also prohibited.



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Suspect Inquiries

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



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Employer's Obligation to Act

- Employers must investigate discrimination complaints when they have knowledge (should not wait for formal complaint).
- Corrective actions must be prompt but only after thorough and fair investigation.
- 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 HRB/EEOC.
 - No private right of action in most cases.



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Employee Privacy

- Montana has a constitutional right of privacy that affects:
 - Drug and Alcohol Testing
 - Audio Recording of employees
 - Polygraph Tests
 - Releases of Information



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Drug and Alcohol Testing

- Montana law prohibits the administration of blood, urine or oral fluid (saliva) 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.



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Drug Testing Policy

- 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.
 - Random testing is allowed if certain rules are followed.
 - Post Accident Testing Allowed if property damage is in excess of \$1500, loss of life or bodily injury.
 - Pre-employment testing allowed for authorized employees.
 - Follow up testing.
 - Reasonable suspicion testing if supervisor is trained.



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Smoking in the Workplace

- Montana law 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 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.
- Montana law does not require smokers to maintain minimum distance to doors, windows, etc.



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Termination Letters

- Upon demand, employers must provide written statement of reasons for discharge:
 - Written demand must advise of the possibility that the statements may be used in litigation.
 - Response may be modified at any time and does not limit ability to present a full defense.
- "Blacklisting" is prohibited.



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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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FMLA

- Applies to employers with 50+ employees during 20+ weeks in current or prior year.
- Applies to employees with 12 months of service and 1250 hours time worked who work at a covered worksite.
- A covered worksite has 50+ employees within 75 mile radius.
- Provides leave for:
 - Personal or family serious health condition.
 - Care for a new child.
 - Military related exigency leave.
 - Service member care leave.
- Employers must provide leave and continue group health benefits, and restore to old position at end of leave.



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Veteran's Re-employment

- The Uniformed Services Employment and Re-employment Rights Act 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 for employees called to state active duty with National Guard.



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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

- 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.



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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 employees 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.



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Recent Changes

- Health Care Reform Act
 - Tax credits for small employers begin now.
 - Business "mandate" to offer coverage.
 - Individual mandate to have insurance.
- HIRE Act tax credit for all employers hiring new workers
 - Employers share of social security tax (6.2%) waived from 3/19 until 12/31 for:
 - All new hires after 2/3/10
 - Working for private sector or public university employers.



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Workshop Wrap Up

- 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
- For information on this summers full-day seminars or our webinar series or to subscribe to Jim's email lists, visit www.personnel-plus.com



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