

## Montana

### Employment Law Workbook Addendum

(Update on legislation enacted from Jan. 1, 2015- Dec. 31, 2016)

#### Topics

##### **I. Discrimination**

The Montana Military Service Employment Rights Act (“Act”) provides a job-protected leave of absence to members of the Montana national guard when they are ordered to state military duty, and prohibits discrimination against state national guard members based on their membership or their taking a protected leave of absence. The new law makes the Act applicable to members of other states’ national guard forces who are employed within the state of Montana. Accordingly, the new law defines “member” as a member of the state’s organized militia or a member of the national guard of another state. “State military duty” is defined as duty performed by a member when a disaster or an emergency has been declared by the proper authority of the state of Montana or pursuant to the authority of the governor of any other state. The definition also includes the time period, if any, required pursuant to a licensed physician’s certification to recover from an illness or injury incurred while performing the active duty.

In addition, the new law provides that job reinstatement after returning from state military duty is not guaranteed if the employee failed to notify the employer of his or her national guard membership. An employer is not obligated to reinstate a national guard member to his or her former job position if:

- the employee did not inform the employer at the time of hire that the employee was a member of the state’s organized militia or the national guard of another state; or
- the employee enlisted in the state’s organized militia or another state’s national guard during the course of employment and did not inform the employer of the enlistment.

10-1-1002, MCA, 10-1-1003, MCA, 10-1-1005, MCA, 10-1-1007, MCA, and 10-1-1009, MCA (Effective Date 04/29/2015).

##### **II. Pre-Employment Inquiry Guidelines**

Under a new law, private employers can adopt a policy in which they give hiring preference to a veteran. Moreover, the law will not be interpreted to violate any other state or local equal employment opportunity law.

39-29-201, MCA et. seq. (Effective Date 10/01/2015).

##### **III. Family and Medical Leave**

Montana law allows members of the state National Guard to take a protected leave of absence from work during periods of active military service. The amendment clarifies what duty status is considered eligible for protected leave under the Montana National Guard Civil Relief Act and the Montana Military Service Employment Rights Act. These laws refer to “state active duty.” The amendment updates the terminology used throughout both laws to “state military duty,” and defines state military duty as duty performed by a member, including active operations or administrative functions, exercises, training, coordination, or planning that is conducted for the purposes of preparing the Montana national guard for active duty. State military duty also

includes the time period, if any, required pursuant to a licensed physician's certification to recover from an illness or injury incurred while performing the military duty. Federally-funded military duty is not included within the definition.

10-1-902, MCA, 10-1-1002, MCA, 10-1-1003, MCA, 10-1-1006, MCA, 10-1-1007, MCA, 10-1-1201, MCA, 19-2-707, MCA, and 20-25-421, MCA (Effective Date 04/13/2015).

#### **IV. Wage and Hour Laws**

The Montana Department of Labor & Industry announced that effective January 1, 2017, the state minimum wage will increase from \$8.05 to \$8.15 per hour for non-exempt employees. Montana does not permit employers to take a tip credit and pay tipped employees less than the state minimum wage, nor does the state permit employers to pay a training wage.

Montana's minimum wage law is codified 39-3-404, MCA. The statute directing the state labor department to annually evaluate and adjust the minimum wage appears at 39-3-409, MCA (Effective Date 01/01/2017).

##### **Drug Testing**

No new laws or regulations enacted in 2015 or 2016.

#### **V. Noncompete and Other Employment Agreements**

No new laws or regulations enacted in 2015 or 2016.

#### **VI. Workplace Safety**

No new laws or regulations enacted in 2015 or 2016.

#### **VII. Workers' Compensation**

A new law addresses workers' compensation coverage when a Montana-resident employee performs "work solely in North Dakota," which means s/he does not perform job duties in Montana and workers' compensation coverage is required by North Dakota. The law provides that an employee is not performing job duties in Montana when s/he commutes to or from a job site in North Dakota from a location in Montana, even if the employer pays all or a portion of travel costs or if the employee is paid travel time. Moreover, the employee is exempt from coverage under Montana law when s/he is commuting to and from North Dakota. Accordingly, such an employee will not be considered an employee under Montana's workers' compensation law if: 1) s/he is employed to work solely in North Dakota; 2) coverage of the employee under North Dakota workers' compensation laws is required; and 3) the employer maintains such coverage. Note, however, that the law provides that an employee will not be exempt if his or her usual job duties begin in Montana and the employee is otherwise covered under Montana workers' compensation laws.

The new law will be codified at 39-71-401, MCA and will expire on June 30, 2019 (Effective Date July 1, 2015).

#### **VIII. Miscellaneous**

##### **A. Unemployment Benefits for Domestic Violence Victims**

Montana has amended its unemployment insurance law to protect victims of domestic violence, sexual assault, or stalking whose separation from employment is a result of their

status as crime victims. An individual who is otherwise eligible for unemployment benefits may not be denied benefits because s/he left work or was discharged due to circumstances resulting from his or her status, or his or her child's status, as a victim of domestic violence, sexual assault, or stalking. Likewise, benefits may not be denied because the individual left work or was discharged because of an attempt on the individual's part to protect him or herself or his or her child from domestic abuse, sexual assault, or stalking.

An individual must be treated as being a victim of domestic violence, sexual assault, or stalking if the individual provides one or more of the following:

- An order of protection or other documentation of equitable relief issued by a court of competent jurisdiction;
- A police record documenting the domestic violence, sexual assault, or stalking;
- Medical documentation of domestic violence or a sexual assault; or
- Other documentation or certification of domestic violence, sexual assault, or stalking provided by a social worker, clergy member, shelter worker, or other professional who has assisted the individual in dealing with domestic violence, a sexual assault, or stalking.

An individual may receive unemployment benefits awarded under this provision for a maximum of 28 weeks in the 12-month period after filing a claim. Notably, the amendment provides that an individual who is otherwise eligible for benefits under its provisions becomes ineligible if the individual remains in or returns to the abusive situation that caused the individual to leave work or be discharged.

In addition, the amendment provides that the employer's account may not be charged for the payment of benefits to an individual who left work or was discharged because of circumstances resulting from domestic violence, a sexual assault, or stalking.

39-51-2111, MCA (Effective Date 07/01/2015).

## **B. Employer Access to Social Media**

Montana has enacted an employer access to social media law. "Personal social media" is defined as "password-protected electronic service or account containing electronic content, including but not limited to e-mail, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, internet website profiles or locations, and online services or accounts, including password-protected services or accounts to which an employee may post information, data, or pictures" but does not include a social media account that is opened for or provided by an employer and intended solely for business-related purposes.

Under the new law:

- An employer or its agent cannot require an employee or applicant to:
  - Disclose his or her personal social media account user name or password so the employer or agent can access the account;
  - Access his or her personal social media in the employer's or agent's presence; or
  - Disclose personal social media or information contained in the personal social media account.

- An employer cannot threaten to or actually fire or discipline, or otherwise retaliate against, an employee or applicant for not complying with an employer's request or demand that violates the law.

If an employer gains information improperly and subsequently is involved in a computer security breach, it is subject to penalties under the Consumer Protection Act (Mont. Code Ann. § 30-14-142).

However, if requested, an employee must provide an employer or its agent his or her personal social media user name or password when an investigation is under way, the information requested is necessary to make a factual determination in the investigation, and the following applies:

- The employer has specific information about an employee's activity indicating work-related employee misconduct or criminal defamation;
- The employer has specific information about the employee's unauthorized transfer to his or her personal online account or service of the employer's proprietary information, confidential information, trade secrets, or financial data; or
- The employer is required to ensure compliance with applicable federal laws or regulatory requirements, or with rules of a self-regulatory organization under the federal Securities and Exchange Act of 1934 (15 U.S.C. § 78c(a)(26)).

The law specifies that it does not:

- Limit an employer's right to create and keep lawful workplace policies governing use of its electronic equipment, including a requirement that employees disclose to the employer his or her user name, password, or other information necessary to access employer-issued electronic devices – including but not limited to cell phones, computers, tablets – or to access employer-provided software or email accounts;
- Prevent an employee from seeking injunctive relief in response to lawful, investigation-related employer requests; or
- Prevent prosecution of an individual for violating the criminal statute concerning privacy in communications (Mont. Code Ann. § 45-8-213).

An employee or applicant can file a small claims court suit against a non-compliant employer within 1 year. Damages are limited to \$500 or actual damages up to the small claims court limit (see Mont. Code Ann. § 3-10-1004), and legal costs may be awarded to the prevailing party. Additionally, the individual may have a separate cause of action under the privacy in communications statute.

39-2-307, MCA (Effective Date 04/23/2015).

### **C. Excluded Employment, Refunds, and Classification & Contribution Rate**

Montana has made various amendments to its unemployment statutes. Of interest to private employers are amendments concerning covered employment, refunds, and an employer's classification and contribution rate.

#### **Exclusions from Definition of Employment**

Before the amendments, generally excluded from the definition of “employment” were services performed by various individuals, i.e., religious ministers, individuals receiving rehabilitation or remunerative work via rehab programs / facilities, persons performing unemployment work-relief or work-training programs, inmates, court-ordered community service participants, elected public officials, and appointed election judges. However, the amendments provide they are only excluded from the definition of employment related to the following: 1) service performed by an individual in the employ of the State of Montana or any of its instrumentalities for a hospital or institution of higher education located in Montana; 2) service performed by an individual in the employ of a religious, charitable, scientific, literary, or educational organization.

### **Refunds to Employers**

State law provides refunds may be available to an employer concerning unemployment benefits charged to its account. An amendment provides that the state labor department may not adjust wages used to establish unemployment benefit eligibility after the statute of limitations has expired, and a credit or refund may not be made with respect to those wages.

### **Classification & Contribution Rate**

The state labor department determines an employer's classification and contribution rate. An amendment provides that an employer's request for a determination or redetermination of classification or contribution rate pertains only to the experience factors or the major industrial classification that determines the classification and contribution rate, and that the rate schedules and method of calculation set by statute are not subject to appeal.

39-51-204, MCA, 39-51-110, MCA and 39-51-1206, MCA (Effective Date 07/01/2015).

## **D. Data Security Breach Notification**

Montana law requires any employer that conducts business in Montana and that owns or licenses computerized data that includes personal information to notify affected individuals in the event of a data security breach. The statute defines “personal information” as an individual's first name or first initial and last name in combination with any one or more of the following data elements when the name and the data elements are not encrypted:

- Social security number;
- Driver's license number, state identification card number, or tribal identification card number; or
- Account number or credit or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account.

This amendment adds to the types of personal information included within the definition of “personal information.” In addition to the categories listed above, the following are also included:

- Medical record information;
- Taxpayer identification number; or
- Identity protection PIN issued by the IRS.

The amendment also adds the requirement that, in addition to notifying individuals affected by a data security breach, businesses must simultaneously submit an electronic copy of the notification and a statement providing the date and method of distribution of the notification to the state attorney general's consumer protection office. Businesses that are licensees or insurance-support organizations that conduct business in Montana must also submit the

notification to the state insurance commissioner. These notifications must exclude any information that personally identifies any individual who is entitled to receive notification. If a notification is made to more than one individual, the notification must indicate the number of individuals in the state who are receiving the notification.

30-14-1704, MCA (Effective Date 10/01/2015).