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STATE

Littler on

Montana Employment Law

COVERAGE

Scope of Discussion. This publication is designed to help employers operating in a state to identify and apply various state employment law requirements. It follows the chronology of employment—tracking requirements from pre-hire, time of hire, during employment, and the end of employment. Because employers are subject to both federal and state employment laws, each section provides a brief overview of federal law and then summarizes applicable state law.

Although the major developments in Montana employment law are generally covered, this publication is not all-inclusive and the current status of any decision or principle of law should be verified by counsel. In addition:

- This publication focuses on requirements for private-sector employers; requirements applicable solely to public employers are not covered. Similarly, while some provisions applicable to government contractors may be covered, this publication is not designed to address requirements applicable only to government contractors.
- Local ordinances are generally excluded from this publication. Notwithstanding, local rules may be included to the extent they deal with ban-the-box or criminal history restrictions, local minimum wage, paid sick leave, or antidiscrimination provisions. A detailed discussion of these requirements, however, is outside the scope of this publication. Further, the focus of local ordinances is primarily on jurisdictions with populations of 100,000 or more residents, but laws in locations with populations below that threshold may also be included.
- State law may create special rules or provide exceptions to existing rules for certain industries—for example, the health care industry. This publication does not offer an exhaustive look at these industry-specific exceptions and should not be interpreted to cover all industry-specific requirements.
- Civil and criminal penalties for failure to follow any particular state employment law requirement may be covered to the extent the penalty is specifically included and discussed in the statute. Any penalty discussion that is included, however, is nonexhaustive and may only highlight some of the possible penalties under the statute. In many instances, an individual statute will not include its own penalty provision; rather, a general or catchall penalty provision will apply, and these are not covered here.

To adhere to publication deadlines, developments, and decisions subsequent to **October 11, 2024** are not covered.

DISCLAIMER

This publication is not intended to, and does not, provide legal advice or a legal opinion. It does not establish an attorney-client relationship between Littler Mendelson, P.C. and the user. It also is not a do-it-yourself guide to resolving employment issues or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation may find the information useful in understanding the issues raised and their legal context. This publication is not a substitute for experienced legal counsel and does not provide legal advice regarding any particular situation or employer, or attempt to address the numerous factual issues that arise in any employment-related dispute.

ACKNOWLEDGEMENTS

Erin M. Reid-Eriksen, Susie Papreck Wine, and Deanne Meyer would like to gratefully acknowledge the contributions of the attorneys who make this publication possible:

- Geetika Antani;
- Vincent Bates;
- Sebastian Chilco;
- Brittney Gibson;
- Maureen H. Lavery;
- Christine McDaniel Novak;
- Lilanthi Ravishankar;
- Rachel Simek;
- Mike Skidgel;
- Hannah Stilley; and
- Christine Sellers Sullivan.

Additional research and editing assistance was also rendered by Barb Olson.

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1.1(a) *Federal Guidelines on Classifying Workers*

A person providing services to another for payment generally can be classified either as an employee or an independent contractor. An independent contractor is considered self-employed, whereas an employee, as the term suggests, works for an employer. The choice between classifying a worker as an independent contractor or an employee is more than a question of terminology and can have many and far-reaching consequences for a company. A company's legal obligation to its workers under various employment and labor laws depends primarily on whether workers are employees. For example, a company using an independent contractor is not required to:

- withhold income taxes from payments for service;
- pay minimum wages mandated by state or federal law;
- provide workers' compensation coverage or unemployment insurance;
- provide protections for various leaves of absences required by law; or
- provide a wide range of employee benefits, such as paid time off or a 401(k) retirement plan, that are offered voluntarily to the employer's employees as part of the terms or conditions of their employment.

As independent contractor use increased, government officials began to scrutinize asserted independent contractor relationships with increasing skepticism. Courts have also proven willing to overturn alleged independent contractor relationships that fail to satisfy the increasingly rigorous standards applied by federal and state agencies for classifying workers as independent contractors.

For companies, misclassification of a worker as an independent contractor can carry significant tax, wage, and benefit liabilities, as well as unanticipated and perhaps under-insured tort liability to third parties for injuries caused by the worker.

There are four principal tests used to determine whether a worker is an employee or an independent contractor:

1. the common-law rules or common-law control test;[1]
2. the economic realities test (with several variations);[2]

[1] The common-law rules or common-law control test, informed in part by the Internal Revenue Service's 20 factors, focus on whether the engaging entity has the right to control the means by which the worker performs their services as well as the end results. *See generally* Treas. Reg. § 31.3121(d)-(1)(c); I.R.S., Internal Revenue Manual, *Technical Guidelines for Employment Tax Issues*, 4.23.5.4, *et seq*. (Nov. 22, 2017), *available at* https://www.irs.gov/irm/part4/irm_04-023-005r.html#d0e183.

[2] In addition to an evaluation of the right to control how the work is to be performed, the economic realities test also requires an examination of the underlying "economic realities" of the work relationship—namely, do the workers "depend upon someone else's business for the opportunity to render service or are [they] in business for themselves." *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988); *see also Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947).

3. the hybrid test, combining the common law and economic realities test;[3] and
4. the ABC test (or variations of this test).[4]

For a detailed evaluation of the tests and how they apply to the various federal laws, see LITTLER ON CLASSIFYING WORKERS.

1.1(b) *State Guidelines on Classifying Workers*

In Montana, as elsewhere, an individual who provides services to another for payment generally is considered either an independent contractor or an employee. For the most part, the distinction between an independent contractor and an employee is dependent on the applicable state law (see Table 1). However, in Montana, the Montana Department of Labor and Industry (MDLI) Independent Contractor Central Unit (ICCU) issues Independent Contractor Exemption Certificates (ICEC), which establishes independent contractor status under Montana's wage and hour, unemployment, workers' compensation, income tax, and fair employment practices laws:

> [A] person [except certain exempt officers and managers] who regularly and customarily performs services at a location other than the person's own fixed business location shall apply to the department for an independent contractor exemption certificate unless the person has elected to be bound personally and individually by the provisions of [workers'] compensation plan No. 1, 2, or 3.[5]

An individual who is granted an ICEC and works under the certificate is "conclusively presumed to be that of an independent contractor." Effective October 1, 2023, a person without an ICEC is rebuttably presumed to be an independent contractor if they state in writing that they have an ICEC, provide a forged or fraudulent ICEC, or their ICEC expires during the duration of the contract, before it is fully performed (for up to 120 days following expiration).[6]

The Statutory "AC" Test. To obtain an ICEC, an individual must swear to and acknowledge meeting the requirements of the independent contractor test set forth in the regulations, and provide sufficient documentation of meeting the criteria.[7] When the ICCU or another unit evaluates an individual's independent contractor status, per the Montana Administrative Rules, an "AC" test is used. Under this test, in order to determine if an individual is an independent contractor or an employee, the MDLI evaluates: "(a) whether the individual is and shall continue to be free from control or direction over the

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[3] Under the hybrid test, a court evaluates the entity's right to control the individual's work process, but also looks at additional factors related to the worker's economic situation—such as how the work relationship may be terminated, whether the worker receives yearly leave or accrues retirement benefits, and whether the entity pays social security taxes on the worker's behalf. *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). Because the hybrid test focuses on traditional agency notions of control, as a general rule, it results in a narrower definition of employee than under a pure economic realities test. *Hopkins v. Cornerstone Am.*, 545 F.3d 338, 347 (5th Cir. 2008).

[4] Under a typical formulation of the ABC test, a worker is an independent contractor if: (A) there is an ABSENCE of control; (B) the BUSINESS is performed outside the usual course of business or performed away from the place of business; and (C) the work is CUSTOMARILY performed by independent contractors.

[5] MONT. ADMIN. R. 39-71-417(1)(a)(i)(ii).

[6] MONT. ADMIN. R. 39-71-417(7)(a); (7)(d), as amended by S.B. 22 (Mont. 2023).

[7] MONT. ADMIN. R. 39-71-417(4)(a)(i)(ii), (5)(a).

performance of the services, both under contract and in fact; *and* (b) whether the individual is engaged in an independently established trade, occupation, profession, or business."[8]

Application of the "AC" Test. The MDLI maintains a separate regulation which provides general guidelines for determining whether a "hiring agent controls or retains the right to control the way the individual renders services;" the factors are evaluated on a case-by-case basis and "[a] combination of these factors may indicate control or the right to control."[9] The following nonexclusive factors are "general guidelines" as to whether control, the "A" factor, exists:

- the individual is required to follow written or oral instructions concerning when, where, or how work is to be done. Although some individuals, because of skill or expertise, work without receiving instructions, they may still be employees if the employer has the right to give instructions on work performance;
- the success or continuation of a business depends in great part upon the services performed by the individual;
- the hiring agent directs the hiring, supervising, or payment of the individuals assistants;
- the relationship between the individual and the hiring agent is on a frequent, recurring basis, even if irregular or part time;
- the individual is required to perform services at certain established times;
- the work is performed on the business premises or jobsite of the hiring agent. This factor is especially important if the work could be performed elsewhere;
- the hiring agent requires, or has the right to require, the individual to perform services in a certain manner, or in a certain order or sequence;
- the hiring agent requires the individual to submit oral or written reports;
- the individual is paid based on the time spent doing the work rather than a payment for a completed project or end result;
- the individual is paid or reimbursed for travel or other business-related expenses;
- the hiring agent furnishes the facilities, tools, materials, or other equipment to the individual;
- the individual may be discharged at the will of the hiring agent, including the right to discharge for the failure to follow specified rules or methods. A union contract or statute which restricts the right of discharge does not indicate a lack of control;
- training is provided to the individual by the hiring agent;
- the individual does not realize a profit or suffer a loss as a result of the services performed;
- the individual is prohibited or restricted from working for others or is required to devote primary attention to the hiring agent;
- the individual has signed an overly broad noncompetition clause in a contract with a hiring agent; or

[8] MONT. ADMIN. R. 24.35.202(1) (emphasis added).

[9] MONT. ADMIN. R. 24.35.302.

- other factors that indicate control of the individual by the hiring agent.[10]

Furthermore, the MDLI uses the following factors as general guidelines when determining whether an independently established business exists. The MDLI evaluates the circumstances in each case, noting that a combination of factors, may determine if the "B" factor exists:

- the individual has a place of business separate from the hiring agent's place of business;
- the individual supplies substantially all of the tools, equipment, supplies, or materials necessary to perform the services;
- the individual pays all expenses associated with performing the services, and is not reimbursed by the hiring agent;
- the individual has two or more effective contracts to perform services for several different hiring agents;
- the individual is paid based on a billing statement or invoice at completion of the services;
- the individual performs the services under a written contract that requires complete or partial payment after a certain amount of work is performed, and the contract terminates after a definite time period;
- the individual advertises services in telephone books, newspapers, or other media;
- the individual files federal or state business tax forms;
- the individual has the required customary licenses, registrations, or permits to maintain a business;
- the individual may realize a profit or suffer a loss from performing the services for the hiring agent. This factor may be shown if the individual:
  - hires or pays assistants to perform the services;
  - performs the services at facilities owned or leased by the individual;
  - has continuing or recurring liabilities associated with performing the services; or
  - agrees to perform specific jobs for prices agreed upon in advance and pays expenses associated with the performance of the services;
- the individual has an independent contractor exemption certificate;
- the individual may not end the relationship at will without incurring liability. An independent contractor agrees to complete a specific job, is responsible for its completion, and may be subject to liability for failing to complete the job in accordance with agreed upon specification;
- the individual is not prohibited or restricted from working for others; or
- another factor that indicates the existence of an independently established trade, occupation, profession, or business.[11]

[10] MONT. ADMIN. R. 24.35.302.

[11] MONT. ADMIN. R. 24.35.303.

Misclassification Initiative. The MDLI has also entered into a partnership with the U.S. Department of Labor (DOL), Wage and Hour Division to work cooperatively through information sharing, joint enforcement efforts, and coordinated outreach and education efforts in order to reduce instances of misclassification of employees as independent contractors.[12]

Table 1. State Tests for Classifying Workers

Purpose of Determining Employee Status	State Agency	Test to Apply
Fair Employment Practices Laws	MDLI, Human Rights Bureau	Statutory test. The definition of *employee* specifically exempts "an individual providing services for an employer if the individual has an [ICEC] . . . and is providing services under the terms of that certificate."[13] The procedures by which an individual may obtain an ICEC are set forth above. Where an individual's status is in dispute, the test for determining if an individual is an independent contractor under the fair employment practices laws is the "AC" test discussed above.
Income Taxes	Montana Department of Revenue	Statutory, "right to control" test. *Employee* is defined as "an individual who performs services for another individual or an organization *having the right to control* the employee as to the service to be performed and as to the manner of performance."[14] Under Montana's administrative rules, the most important factor is "[t]he power

[12] More information about the DOL Misclassification Initiative is available at https://www.dol.gov/whd/workers/misclassification/#stateDetails. The Memorandum of Understanding (MOU) with the MDLI is available at https://www.dol.gov/whd/workers/MOU/mt.pdf, and Amendment No. 1 to the MOU at https://www.dol.gov/whd/workers/MOU/mt_1.pdf.

[13] MONT. CODE ANN. § 49-2-101. In *Rogers v. Huntley Project School District Number 24*, the Montana District Court contended that Montana courts look to federal case law examining Title VII of the Civil Rights Act of 1964 to determine who is an employee under the Montana Human Rights Act, considering whether: (1) the individual must receive substantial financial benefits or the promise of such from an employer (*e.g.*, substantial salary, or other wages, and employee benefits); (2) the individual must, as a matter of economic reality, be dependent on the employer to whom service is rendered; (3) the individual must be subject to significant control by the employer; and (4) the employee must be entirely under the control and direction of the employer. 2004 Mont. Dist. LEXIS 3398, at **11-13 (Mont. Dist. Ct. Sept. 9, 2004).

[14] MONT. CODE ANN. § 15-30-2501(2)(a)(i) (emphasis added).

Table 1. State Tests for Classifying Workers		
		to control, rather than the actual exercise of control."[15] Further, the rules note that if an individual is considered an employee for purposes of workers' compensation, unemployment compensation, federal Social Security, or federal tax withholding, they will be considered an employee for purposes of state taxes.
Wage & Hour Laws	MDLI, Montana Labor Standards Bureau, Wage & Hour Unit	Statutory test. Under Montana's wage and hour regulations, to be considered an independent contractor, an individual must hold and be working under an ICEC, where required. Thus, the test for independent contractor status is the "AC" test, discussed above.[16]
Unemployment Insurance	MDLI, Unemployment Insurance Division	Statutory test. There is a presumption that "[s]ervice performed by an individual for wages is considered to be employment subject to [the unemployment provisions] until it is shown to the satisfaction of the department that the individual is an independent contractor."[17] The term *independent contractor* is defined in the statutes as an individual who receives an ICEC under the "AC" test as set forth above.[18]
Workers' Compensation	MDLI	Statutory test. The term *employee* is defined as "each person in this state, including a contractor other than an independent contractor, who is in the service of an employer . . . under any

[15] MONT. ADMIN. R. 42.2.304(19)(a).

[16] MONT. ADMIN. R. 24.35.203 ("…when a worker is required…to have an independent contractor exemption certificate and does not, the worker is conclusively determined to be an employee for purposes of wage and hour…"). The minimum wage and overtime provisions define *employee* as "an individual employed by an employer." MONT. CODE ANN. § 39-3-402. There is no express independent contractor exception. *See* MONT. CODE ANN. § 39-3-406. However, the "AC" test is applied for purposes of determining independent contractor status under the wage and hour provisions. *See* MONT. CODE ANN. § 39-3-201; MONT. ADMIN. R. 24.35.203.

[17] MONT. CODE ANN. § 39-51-203(4). Note: An individual cannot be determined to be an employee based solely on not having an ICEC.

[18] MONT. CODE ANN. § 39-51-201(15).

Table 1. State Tests for Classifying Workers		
		appointment or contract of hire, express or implied, oral or written."[19] The workers' compensation provisions do not apply to an individual who obtains an ICEC under the "AC" test as set forth above.[20]
Workplace Safety	Not applicable	There are no relevant statutory definitions or case law identifying a test for independent contractor status. Montana does not have an approved state plan under the federal Occupational Safety and Health Act.

1.2 Employment Eligibility & Verification Requirements

1.2(a) *Federal Guidelines on Employment Eligibility & Verification Requirements*

The federal Immigration Reform and Control Act of 1986 (IRCA) prohibits knowingly employing workers who are not authorized to work in the United States. Under IRCA, an employer must verify each new hire's identity and employment eligibility. Employers and employees must complete the U.S. Citizenship and Immigration Service's Employment Eligibility Verification form (Form I-9) to fulfill this requirement. The employer must ensure that: (1) the I-9 is complete; (2) the employee provides required documentation; and (3) the documentation appears on its face to be genuine and to relate to the employee. If an employee cannot present the required documents within three business days of hire, the employee cannot continue employment.

Although IRCA requires employers to review specified documents establishing an individual's eligibility to work, it provides no way for employers to verify the documentation's legitimacy. Accordingly, the federal government established the "E-Verify" program to allow employers to verify work authorization using a computerized registry. Employers that choose to participate in the program must enter into a Memorandum of Understanding with the Department of Homeland Security (DHS) which, among other

[19] MONT. CODE ANN. § 39-71-118(1)(a).

[20] MONT. CODE ANN. § 39-71-401(2)(x), (3); MONT. ADMIN. R. 39-71-417(1)(b); MONT. ADMIN. R. 24.35.302, and 24.35.303; *see also* Montana Dep't of Labor & Indus., Indep. Contractor Cent. Unit, *Becoming an Independent Contractor*, *available at* https://erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor; Montana Dep't of Labor & Indus., Mont. Workers' Comp. Regulations, *Independent Contractor Exemption Certificates*, *available at* https://erd.dli.mt.gov/work-comp-regulations/montana-contractor/independent-contractor. **Effective October 1, 2023**, a person without an independent contractor exemption certificate is rebuttably presumed to be an independent contractor when: (1) the person represents to a hiring entity or individual in writing that the person has an independent contractor exemption certificate; (2) the person provides the hiring entity or individual a forged or otherwise fraudulent independent contractor exemption certificate; or under the contract and prior to full performance of the contract, for a period not to exceed 120 days following the expiration of the certificate; or (3) the person's independent contractor exemption certificate expires while the person is working.

things, specifically prohibits employers from using the program as a screening device. Participation in E-Verify is generally voluntary, except for federal contractors with prime federal contracts valued above the simplified acquisition threshold for work in the United States, and for subcontractors under those prime contracts where the subcontract value exceeds $3,500.[21]

Federal legislative attempts to address illegal immigration have been largely unsuccessful, leading some states to enact their own immigration initiatives. Whether states have the constitutional power to enact immigration-related laws or burden interstate commerce with requirements in addition to those imposed by IRCA largely depends on how a state law intends to use an individual's immigration status. Accordingly, state and local immigration laws have faced legal challenges.[22] An increasing number of states have enacted immigration-related laws, many of which mandate E-Verify usage. These state law E-Verify provisions, most of which include enforcement provisions that penalize employers through license suspension or revocation for knowingly or intentionally employing undocumented workers, have survived constitutional challenges.[23]

For more information on these topics, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.

1.2(b) *State Guidelines on Employment Eligibility & Verification Requirements*

Employers in Montana are prohibited from knowingly employing aliens who are not lawfully authorized to accept employment.[24] However, Montana does not require employers to use E-Verify or another electronic verification method to verify the employment eligibility of new hires.

An employer that violates the law prohibiting the employment of undocumented workers can be fined. The Montana Department of Labor and Industry or any person harmed by a violation of the law may sue to enjoin an employer and to gain other appropriate relief.[25]

1.3 Restrictions on Background Screening & Privacy Rights in Hiring

1.3(a) *Restrictions on Employer Inquiries About & Use of Criminal History*

1.3(a)(i) *Federal Guidelines on Employer Inquiries About & Use of Criminal History*

There is no applicable federal law restricting employer inquiries into an applicant's criminal history. However, the federal Equal Employment Opportunity Commission (EEOC) has issued enforcement guidance pursuant to its authority under Title VII of the Civil Rights Act of 1964 ("Title VII").[26] While there is uncertainty about the level of deference courts will afford the EEOC's guidance, employers should

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[21] 48 C.F.R. §§ 22.1803, 52.212-5, and 52.222-54 (contracts for commercially available off-the-shelf items and contracts with a period of performance of less than 120 days are excluded from the E-Verify requirement). For additional information, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

[22] *See, e.g.*, *Lozano v. Hazelton*, 496 F. Supp. 2d 477 (E.D. Pa. 2007), *aff'd*, 724 F.3d 297 (3d Cir. 2013) (striking down a municipal ordinance requiring proof of immigration status for lease and employment relationship purposes).

[23] *See Chamber of Commerce of the U.S. v. Whiting*, 563 U.S. 582 (2011).

[24] MONT. CODE ANN. § 39-2-305.

[25] MONT. CODE ANN. § 39-2-305.

[26] EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e et seq.* (Apr. 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

consider the EEOC's guidance related to arrest and conviction records when designing screening policies and practices. The EEOC provides employers with its view of "best practices" for implementing arrest or conviction screening policies in its guidance. In general, the EEOC's positions are:

1. **Arrest Records.** An exclusion from employment based on an arrest itself is not job related and consistent with business necessity as required under Title VII. While, from the EEOC's perspective, an employer cannot rely on arrest records alone to deny employment, an employer can consider the underlying conduct related to the arrest if that conduct makes the person unfit for the particular position.
2. **Conviction Records.** An employer with a policy that excludes persons from employment based on criminal convictions must show that the policy effectively links specific criminal conduct with risks related to the particular job's duties. The EEOC typically will consider three factors when analyzing an employer's policy: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, and/or completion of the sentence; and (3) the nature of the job held or sought.

Employers should also familiarize themselves with the federal Fair Credit Reporting Act (FCRA), discussed in **1.3(b)(i)**. The FCRA does not restrict conviction-reporting *per se*, but impacts the reporting and consideration of criminal history information in other important ways.

For additional information on these topics, see **LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING**.

1.3(a)(ii) *State Guidelines on Employer's Use of Arrest Records*

Montana places no statutory restrictions on a private employer's use of arrest records. In addition, Montana has not implemented a state "ban-the-box" law covering private employers. However, the Montana Human Rights Commission (MHRC) takes the position that inquiries into criminal arrest records may raise suspicion that the employer intends to use the information to unlawfully discriminate and, therefore, should not be made at any time during the hiring process, including but not limited to during interviews or on application forms.[27]

With respect to preemployment inquiries in general, the MHRC has adopted the Uniform Guidelines on Employee Selection Procedures, including the appendix "Policy Statement on Affirmative Action," promulgated by the EEOC.[28]

Under Montana law, an employer will not be liable for negligent hiring or negligent employment for acts committed by an employee with a criminal record, should the employee act outside the scope of employment, under certain circumstances. An employer is protected when it hires an applicant with a criminal record if it acts reasonably and complies in good faith with the law, and:

- when the employer reviews an applicant's arrest record, the record indicates that the applicant was acquitted or dismissed, or the record shows no disposition of a case; or
- the applicant's arrest record shows that the applicant was convicted of a misdemeanor offense or an offense not related to the current employment; or

[27] MONT. ADMIN. R. 24.9.1406(1) and (2)(h).

[28] MONT. ADMIN. R. 24.9.1410.

- the employee with a criminal record is under the supervision of a probation and parole authority and the employment has been approved by the supervising officer.[29]

1.3(a)(iii) *State Guidelines on Employer's Use of Conviction Records*

Montana places no statutory restrictions on a private employer's use of conviction records. Moreover, the MHRC takes the position that an employer *may* lawfully inquire into an applicant's criminal conviction history.[30]

1.3(a)(iv) *State Guidelines on Employer's Use of Sealed or Expunged Criminal Records*

Montana places no statutory restrictions on a private employer's use of sealed or expunged criminal records.

1.3(b) *Restrictions on Credit Checks*

1.3(b)(i) *Federal Guidelines on Employer's Use of Credit Information & History*

The Fair Credit Reporting Act (FCRA). The FCRA[31] governs an employer's acquisition and use of virtually any type of information gathered by a "consumer reporting agency"[32] regarding job applicants for use in hiring decisions or regarding employees for use in decisions concerning retention, promotion, or termination. Preemployment reports created by a consumer reporting agency (such as credit reports, criminal record reports, and department of motor vehicle reports) are subject to the FCRA, along with any other consumer report used for employment purposes.

The FCRA establishes procedures that an employer must strictly follow when using a consumer report for employment purposes. For example, before requesting a consumer report from a consumer reporting agency, the employer must notify the applicant or employee in writing that a consumer report will be requested and obtain the applicant's or employee's written authorization before obtaining the report. An employer that intends to take an adverse employment action, such as refusing to hire the applicant, based wholly or partly on information contained in a consumer report must also follow certain notification requirements. For additional information on the FCRA, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

Many states have enacted their own version of the FCRA, referred to as "mini-FCRAs." While these laws often mirror the FCRA's requirements, there may be important distinctions between federal and state requirements.

Discrimination Concerns. While federal law does not prevent employers from asking about financial information provided they follow the FCRA, as noted above, federal antidiscrimination law prohibits employers from applying a financial requirement differently based on an individual's protected status—*e.g.*, race, national origin, religion, sex, disability, age, or genetic information. The EEOC also cautions that

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[29] MONT. CODE ANN. § 39-2-710.

[30] MONT. ADMIN. R. 24.9.1406(2)(h).

[31] 15 U.S.C. §§ 1681 *et seq*.

[32] A *consumer reporting agency* is any person or entity that regularly collects credit or other information about consumers to provide "consumer reports" for third persons. 15 U.S.C. § 1681a(f). A *consumer report* is any communication by a consumer reporting agency bearing on an individual's "creditworthiness, credit standing, character, general reputation, personal characteristics or mode of living" that is used for employment purposes. 15 U.S.C. § 1681a(d).

an employer must not have a financial requirement "if it *does not help the employer to accurately identify* responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular [protected category]."[33]

1.3(b)(ii) *State Guidelines on Employer's Use of Credit Information & History*

Under Montana's mini-FCRA law, employers may obtain consumer reports for employment purposes if certain procedures are followed.[34]

Consumer Report. A *consumer report* is any written, oral, or other communication of any information by a consumer reporting agency bearing on an individual's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living that is used or expected to be used or collected for the purpose of serving as a factor in establishing the individual's eligibility for employment purposes.[35] *Employment purposes*, when used in connection with a consumer report, means a report used for the purpose of evaluating an individual for employment, promotion, reassignment, or retention as an employee.[36] If employment is denied because of a consumer report, an employer must so advise the individual and supply the name and address of the consumer reporting agency that made the report.[37]

Investigative Consumer Report. Additional procedures must be followed if an employer wants to obtain an "investigative consumer report." An i*nvestigative consumer report* is a consumer report or portion of a consumer report in which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the individual or from other acquaintances. Information on an individual's credit record that is obtained directly from a creditor or from a consumer reporting agency is not included in this definition.[38]

Before procuring or causing to be prepared or distributed an *investigative consumer report* on an individual for employment purposes, the employer must clearly and accurately disclose that a report, including information as to the individual's character, general reputation, personal characteristics, and mode of living, whichever are applicable, may be made.[39] This disclosure must be made in writing, and mailed or otherwise delivered no later than three days after the report is requested.[40] The disclosure must include a statement informing the individual of the individual's right to request the additional disclosures.[41]

Upon an individual's request made within a reasonable period of time, an employer must make a complete and accurate disclosure of the nature, scope, and substance of the investigation requested. This

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[33] EEOC, *Pre-Employment Inquiries and Financial Information*, *available at* https://www.eeoc.gov/laws/practices/financial_information.cfm (emphasis in original).

[34] MONT. CODE ANN. § 31-3-111(3)(b).

[35] MONT. CODE ANN. § 31-3-102(3)(a)(ii).

[36] MONT. CODE ANN. § 31-3-102(5).

[37] MONT. CODE ANN. § 31-3-131(1).

[38] MONT. CODE ANN. § 31-3-102(7).

[39] MONT. CODE ANN. § 31-3-113(1)(a).

[40] MONT. CODE ANN. § 31-3-113(1)(a).

[41] MONT. CODE ANN. § 31-3-113(1).

disclosure must be in writing, and mailed or otherwise delivered not later than five days after the disclosure request was received, or the date the report was first requested, whichever is later.[42]

Under state law, the investigative consumer report disclosure requirements does not apply to a consumer report to be used for employment purposes for which the individual has specifically applied.[43] However, if requested within a reasonable amount of time, the employer must still make the additional disclosures within five days.[44]

1.3(b)(iii) *State Enforcement, Remedies & Penalties*

An employer that willfully fails to comply with the requirements of the consumer reporting law is liable for actual damages sustained by the individual and punitive damages as the court may allow, as well as reasonable attorneys' fees in the case of a successful action.[45] An employer that negligently fails to comply with the law may be liable for actual damages, and in the case of a successful action, reasonable attorneys' fees.[46]

1.3(c) *Restrictions on Access to Applicants' Social Media Accounts*

1.3(c)(i) *Federal Guidelines on Access to Applicants' Social Media Accounts*

There is no federal law governing an employer's ability to request access to applicants' or employees' social media accounts. However, various federal laws, or federal agencies' interpretations and enforcement of these laws, may impact employer actions. For example:

- Preemployment action taken against an applicant, or post-employment action taken against an employee, based on information discovered via social media may run afoul of federal civil rights law (*e.g.*, Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).
- The National Labor Relations Board, which is charged with enforcing federal labor laws, has taken an active interest in employers' social media policies and practices, and has concluded in many instances that, regardless of whether the workplace is unionized, the existence of such a policy or an adverse employment action taken against an employee based on the employee's violation of the policy can violate the National Labor Relations Act.
- Accessing an individual's social media account without permission may potentially violate the federal Computer Fraud and Abuse Act or the Stored Communications Act.

For additional information on federal law related to background screening, see LITTLER ON BACKGROUND SCREENING & PRIVACY RIGHTS IN HIRING.

1.3(c)(ii) *State Guidelines on Access to Applicants' Social Media Accounts*

Montana law prohibits an employer or its agent from requiring an employee or applicant to:

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[42] MONT. CODE ANN. § 31-3-113(2).

[43] MONT. CODE ANN. § 31-3-113(1)(b).

[44] MONT. CODE ANN. § 31-3-113(2).

[45] MONT. CODE ANN. § 31-3-142.

[46] MONT. CODE ANN. § 31-3-143.

- disclose their personal social media account username or password so the employer or agent can access the account;
- access their personal social media in the employer or agent's presence; or
- disclose personal social media or information contained on personal social media.[47]

Personal social media is defined as a password-protected account "containing electronic content, including but not limited to email, 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."[48]

Adverse Action. An employer cannot threaten to or actually fire or discipline, or otherwise retaliate against, an employee or applicant for a legal expression of free speech by the employee or job applicant made on personal social media.[49] The protection for social media expressions will not apply if the employee's or job applicant's expression violates either an employer's written policy or the terms or conditions of the employee's employment contract.[50]

Exceptions. If requested, an employee must provide an employer or its agent the employee's personal social media username or password when an investigation is under way and the information requested is necessary to make a factual determination in the investigation, and any of the following apply:

- the employer has specific information about an employee activity indicating work-related employee misconduct or criminal defamation;
- the employer has specific information about the employee's unauthorized transfer to the employee's 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.[51]

However, an employee can seek injunctive relief in response to lawful, investigation-related employer requests.[52]

An employer can also create and maintain lawful workplace policies governing use of its electronic equipment, including a requirement that employees disclose to the employer their username, password, or other information necessary to access employer-issued electronic devices, including but not limited to cellphones, computers, and tablets, or to access employer-provided software or email accounts.[53] As well,

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[47] MONT. CODE ANN. § 39-2-307.

[48] MONT. CODE ANN. § 39-2-307(5)(a).

[49] MONT. CODE ANN. § 39-2-307(4); *see also* MONT. CODE ANN. § 39-2-904(1)(d) (a discharge is deemed wrongful if the employer terminated the employee solely based on the employee's legal expression of free speech, including but not limited to statement made on social media).

[50] MONT. CODE ANN. § 39-2-307(5).

[51] MONT. CODE ANN. § 39-2-307(2).

[52] MONT. CODE ANN. § 39-2-307(3)(b).

[53] MONT. CODE ANN. § 39-2-307(3)(a).

the statutory definition of *personal social media* excludes a social media account that is opened for or provided by an employer and intended solely for business-related purposes.[54] Thus, the provisions regarding prohibited requests do not apply to these types of accounts.

1.3(c)(iii) *State Enforcement, Remedies & Penalties*

An employee or applicant can file a small claims court suit against a noncompliant employer within one year.[55] Damages are capped at $500 or actual damages, up to the small claims court limit. The prevailing party may also be awarded legal costs.[56]

An aggrieved individual may have a separate cause of action under the privacy in communications statute, and an employer may be subject to criminal prosecution under that law as well.[57] 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.[58]

1.3(d) *Polygraph / Lie Detector Testing Restrictions*

1.3(d)(i) *Federal Guidelines on Polygraph Examinations*

The federal Employee Polygraph Protection Act (EPPA) imposes severe restrictions on using lie detector tests.[59] The law bars most private-sector employers from requiring, requesting, or suggesting that an employee or job applicant submit to a polygraph test, and from using or accepting the results of such a test.

The EPPA further prohibits employers from disciplining, discharging, or discriminating against any employee or applicant:

- for refusing to take a lie detector test;
- based on the results of such a test; and
- for taking any actions to preserve employee rights under the law.

There are some limited exceptions to the general ban. The exception applicable to most private employers allows a covered employer to test current employees reasonably suspected of involvement in a workplace incident that resulted in economic loss or injury to the employer's business. There is also a narrow exemption for prospective employees of security guard firms and companies that manufacture, distribute, or dispense controlled substances.

Notably, the EPPA prohibits only mechanical or electrical devices, not paper-and-pencil tests, chemical tests, or other nonmechanical or nonelectrical means that purport to measure an individual's honesty.

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[54] MONT. CODE ANN. § 39-2-307(5)(b)(ii).

[55] MONT. CODE ANN. § 39-2-307(6)(a).

[56] MONT. CODE ANN. § 39-2-307(6)(b).

[57] MONT. CODE ANN. §§ 39-2-307(3)(a), 45-8-213.

[58] MONT. CODE ANN. §§ 39-2-307, 30-14-142.

[59] 29 U.S.C. §§ 2001 to 2009; *see also* U.S. Dep't of Labor, *Other Workplace Standards: Lie Detector Tests*, *available at* https://webapps.dol.gov/elaws/elg/eppa.htm.

For more information on federal restrictions on polygraph tests, including specific procedural and notice requirements and disclosure prohibitions, see LITTLER ON EMPLOYMENT TESTING.

Most states have laws that mirror the federal law. Some of these state laws place greater restrictions on testing by prohibiting lie detector "or similar" tests, such as pencil-and-paper honesty tests.

1.3(d)(ii) *State Guidelines on Polygraph Examinations*

Employers are prohibited from requiring a person to take a polygraph test or any form of a mechanical lie detector test as a condition for employment or continued employment in Montana.[60]

1.3(e) *Drug & Alcohol Testing of Applicants*

1.3(e)(i) *Federal Guidelines on Drug & Alcohol Testing of Applicants*

Whether an employer must implement a drug testing program for its employees under federal law is often determined by the industry in which it operates. For example, the Omnibus Transportation Employee Testing Act requires testing certain applicants and employees in the transportation industries.[61] The Drug-Free Workplace Act of 1988 also requires some federal contractors and all federal grantees (but not subcontractors or subgrantees) to certify to the appropriate federal agency that they are providing a drug-free workplace.[62] Employers not legally mandated to implement workplace substance abuse and drug and alcohol testing policies may still do so to promote workplace safety, deter illegal drug use, and diminish absenteeism and turnover. For more information on drug testing requirements under federal law, see LITTLER ON EMPLOYMENT TESTING.

For the most part, workplace drug and alcohol testing is governed by state law, and state laws differ dramatically in this area and continue to evolve.

1.3(e)(ii) *State Guidelines on Drug & Alcohol Testing of Applicants*

Montana employers are not prohibited from drug and alcohol testing certain applicants or employees. Employers that choose to test must follow the procedures set forth in the Montana Workforce Drug and Alcohol Testing Act ("Testing Act").[63] Moreover, *only* employees involved in certain hazardous, security, safety, or fiduciary positions, as defined in the Testing Act, are subject to testing.[64] The Testing Act does not apply to independent contractors.[65]

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[60] MONT. CODE ANN. § 39-2-304.

[61] These industries are covered by the Federal Aviation Administration (FAA); the Federal Motor Carrier Safety Administration (FMSCA); the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA). In addition, the U.S. Department of Defense, the Coast Guard, and the Nuclear Regulatory Commission, as well as other government agencies, have adopted regulations requiring mariners, employers, and contractors to maintain a drug-free workplace.

[62] 41 U.S.C. §§ 8101 *et seq*.; *see also* 48 C.F.R. §§ 23.500 *et seq*.

[63] MONT. CODE ANN. §§ 39-2-205 *et seq.*

[64] MONT. CODE ANN. § 39-2-206(4)(a).

[65] MONT. CODE ANN. § 39-2-206(4)(b).

Procedural Requirements. Testing policies and procedures must meet the minimum statutory requirements for a qualified testing program, as set forth in the Testing Act.[66] An employer with a qualified testing program may test any prospective employee in a qualified position as a condition of hire.[67]

Under the Testing Act, employers must adopt the federal Department of Transportation drug and alcohol testing procedures for samples covered under the law, or for samples not covered, must have a testing program that contains equivalently stringent chain-of-custody and other procedural requirements.[68] The testing methodology must be cleared by the federal Food and Drug Administration.[69] All testing for drugs and alcohol must be conducted according to the terms of written policies and procedures adopted by the employer.[70] Relevant to applicants, an employer's policies and procedures must provide: identification of the types of controlled substance and alcohol tests to be used; a list of controlled substances for which the employer intends to test and the stated alcohol concentration level above which a tested employee must be sanctioned; a description of the employer's hiring policy with respect to prospective employees who test positive; a detailed description of the procedures that will be followed to conduct the testing program, including the resolution of a dispute as to test results; and information about the confidentiality of results.[71]

Before an employer may take any action based on a positive test result, the employer must have the results reviewed and certified by a medical review officer who is trained in the field of substance abuse. An employee or prospective employee must be given the opportunity to provide notification to the medical review officer of any medical information that is relevant to interpreting test results, including information concerning currently or recently used prescription or nonprescription drugs.[72]

Additionally, an employer must provide any employees tested under a qualified testing program with a copy of the test report, and at an employee's request, must obtain an additional test of a "spit sample" by an independent laboratory of the employee's choice. The employer pays for the additional tests if the additional test results are negative; the employee pays for the additional tests if the additional test results are positive. The employee must be given an opportunity to rebut and explain the results of any testing.[73]

Employers must notify tested applicants of the results of a preemployment controlled substance test within 60 days of being notified of their rejection or acceptance for employment, if the employee requests such results.[74]

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[66] MONT. CODE ANN. § 39-2-207.

[67] MONT. CODE ANN. § 39-2-208(1).

[68] MONT. CODE ANN. § 39-2-207.

[69] MONT. CODE ANN. § 39-2-207(1).

[70] *See* MONT. CODE ANN. § 39-2-207.

[71] MONT. CODE ANN. § 39-2-207(1).

[72] MONT. CODE ANN. § 39-2-207(5).

[73] MONT. CODE ANN. § 39-2-209.

[74] Montana Dep't of Labor & Indus., Workforce Servs. Div., *Employer Guide to Drug Testing Notification of Test Results*.

Notification Requirements. Written policies and procedures for testing must be made available for review by covered employees 60 days before implementation or any change in the testing procedures.[75]

Confidentiality. Except for information required to be provided by state or federal law, or in specific circumstances set forth in the Testing Act, all information, interviews, reports, statements, memoranda, or test results received by an employer through a qualified testing program are confidential.[76] Results and records may be disclosed to the tested employee or applicant.

1.3(f) *Additional State Guidelines on Preemployment Conduct*

1.3(f)(i) *State Restrictions on Job Application Fees, Deductions, or Other Charges*

Employers cannot require employees or job applicants to pay the cost of medical examinations or the cost of furnishing medical examination records as a condition of employment.[77]

2. TIME OF HIRE

2.1 Documentation to Provide at Hire

2.1(a) *Federal Guidelines on Hire Documentation*

Table 2 lists the documents that must be provided at the time of hire under federal law.

Table 2. Federal Documents to Provide at Hire

Category	Notes
Benefits & Leave Documents: Affordable Care Act (ACA)	Currently, employers covered under the Fair Labor Standards Act (FLSA) must provide to each employee, at the time of hire, written notice: • informing the employee of the existence of an insurance exchange, including a description of the services provided by such exchange, and the manner in which the employee may contact the exchange to request assistance; • that if the employer-plan's share of the total allowed costs of benefits provided under the plan is less than 60% of such costs, the employee may be eligible for a premium tax credit under section 36B of the Internal Revenue Code of 1986[78] and a cost-sharing reduction under section 1402 of the Patient Protection and Affordable Care Act[79] if the employee purchases a qualified health plan through the exchange; and • that if the employee purchases a qualified health plan through the exchange, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that

[75] MONT. CODE ANN. § 39-2-207(1).

[76] MONT. CODE ANN. § 39-2-211.

[77] MONT. CODE ANN. § 39-2-301.

[78] 26 U.S.C. § 36B.

[79] 42 U.S.C. § 18071.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	all or a portion of such contribution may be excludable from income for federal income tax purposes.[80] The U.S. Department of Labor's Employee Benefits Security Administration provides a model notice for employers that offer a health plan to some or all employees and a separate notice for employers that do not offer a health plan.[81]
Benefits & Leave Documents: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Employers or group health plan administrators must provide written notice to employees and their spouses outlining their COBRA rights no later than 90 days after employees and spouses become covered under group health plans. Employers or plan administrators can develop their own COBRA rights notice or use the COBRA Model General Notice.[82] Employers or plan administrators can send COBRA rights notices through first-class mail, electronic distribution, or other means that ensure receipt. If employees and their spouses live at the same address, employers or plan administrators can mail one COBRA rights notice addressed to both individuals; alternatively, if employees and their spouses do not live at the same address, employers or plan administrators must send separate COBRA rights notices to each address.[83]
Benefits & Leave Documents: Family and Medical Leave Act (FMLA)	In addition to posting requirements, if an FMLA-covered employer has any eligible employees, it must provide a general notice to each employee by including the notice in employee handbooks or other written guidance to employees concerning employee benefits or leave rights, if such written materials exist, or by distributing a copy of the general notice to each new employee upon hiring.[84] In either case, distribution may be accomplished electronically. Employers may use a format other than the FMLA poster as a model notice, if the information provided includes, at a minimum, all of the information contained in that poster.[85]

[80] 29 U.S.C. § 218b.

[81] Model notices are available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/affordable-care-act/for-employers-and-advisers/coverage-options-notice.

[82] The model notice is available in English and Spanish at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[83] 29 C.F.R. § 2590.606-1.

[84] 29 C.F.R. § 825.300(a).

[85] The U.S. Department of Labor's Wage & Hour Division's model FMLA poster, which satisfies the notice requirement, is available at https://www.dol.gov/WHD/fmla/index.htm.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	Where an employer's workforce is comprised of a significant portion of workers who are not literate in English, the employer must provide the general notice in a language in which the employees are literate. Employers furnishing FMLA notices to sensory-impaired individuals must also comply with all applicable requirements under federal or state law.[86]
Immigration Documents: Form I-9	Employers must ensure that individuals properly complete Form I-9 section 1 ("Employee Information and Verification") at the time of hire and sign the attestation with a handwritten or electronic signature. Also, individuals must present employers documentation establishing their identity and employment authorization. Within three business days of the first day of employment, employers must physically examine the documentation presented in the employee's presence, ensure that it appears to be genuine and relates to the individual, and complete Form I-9, section 2 ("Employer Review and Verification"). Employers must also, within three business days of hiring, sign the attestation with a handwritten or electronic signature. Employers that hire individuals for a period of less than three business days must comply with these requirements at the time of hire.[87] For additional information on these requirements, see LITTLER ON I-9 COMPLIANCE & WORK AUTHORIZATION VISAS.
Tax Documents	On or before the date employment begins, employees must furnish employers with a signed withholding exemption certificate (Form W-4) relating to their marital status and the number of withholding exemptions they claim.[88]
Uniformed Services Employment and Reemployment Rights Act (USERRA) Documents	Employers must provide to persons covered under USERRA a notice of employee and employer rights, benefits, and obligations. Employers may meet the notice requirement by posting notice where employers customarily place notices for employees.[89]
Wage & Hour Documents	To qualify for the federal tip credit, employers must notify tipped employees: (1) of the minimum cash wage that will be paid; (2) of the tip credit amount, which cannot exceed the value of the tips actually received by the employee; (3) that all tips received by the tipped employee must be retained by the employee except for a valid tip

[86] 29 C.F.R. § 825.300(a).

[87] *See generally* 8 C.F.R. § 274a.2. The form is available at https://www.uscis.gov/i-9.

[88] 26 C.F.R. § 31.3402(f)(2)-1. The IRS provides this form at https://www.irs.gov/pub/irs-pdf/fw4.pdf.

[89] 38 U.S.C. § 4334. This notice is available at https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

Table 2. Federal Documents to Provide at Hire	
Category	**Notes**
	pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit will not apply to any employee who has not been informed of these requirements.[90]

2.1(b) *State Guidelines on Hire Documentation*

Table 3 lists the documents that must be provided at the time of hire under state law.

Table 3. State Documents to Provide at Hire	
Category	**Notes**
Benefits & Leave Documents	No notice requirement located.
Fair Employment Practices Documents	No notice requirement located.
Tax Documents	The Montana Department of Revenue provides Form MW-4 for purposes of determining an employee's withholding allowances and withholding exemptions and should be completed by new employees.[91]
Wage & Hour Documents	No general notice requirement located. However, if a written demand is made before work commences, an employer must notify each employee in writing of the: (1) date of paydays; and (2) rate of wages to be paid, whether by the hour, day, week, month, or year. Notice may be provided to each employee in writing or by conspicuous posting.[92] Exceptions apply to employers that are party to collective bargaining agreements or operate in certain industries (*i.e.*, agriculture, stockraising).[93]

[90] 29 C.F.R. § 531.59.

[91] MONT. ADMIN. R. 42.17.131. See also the *Withholding Tax Guide*, available at https://mtrevenue.gov/publications/montana-employer-and-information-agent-guide/. The Montana Department of Revenue provides form MW-4 at https://mtrevenue.gov/taxes/wage-withholding/form-mw-4/.

[92] MONT. CODE ANN. § 39-3-201.

[93] MONT. CODE ANN. § 39-3-203.

2.2 New Hire Reporting Requirements

2.2(a) *Federal Guidelines on New Hire Reporting*

The federal New Hire Reporting Program requires all states to establish new hire reporting laws that comply with federal requirements.[94] State new hire reporting laws must include these minimum requirements:

1. employers must report to the appropriate state agency the employee's name, address, and Social Security number, as well as the employer's name, address, and federal tax identification number provided by the Internal Revenue Service;
2. employers may file the report by first-class mail, electronically, or magnetically;
3. if the report is transmitted by first-class mail, the report must be made not later than 20 days after the date of hire;
4. if the report is transmitted electronically or magnetically, the employer may report no later than 20 days following the date of hire or through two monthly transmissions not less than 12 days nor more than 16 days apart;
5. the format of the report must be a Form W-4 or, at the option of the employer, an equivalent form; and
6. the maximum penalty a state may set for failure to comply with the state new hire law is $25 (which increases to $500 if the failure to comply is the result of a conspiracy between the employer and the employee to not supply the required report or to supply a false or incomplete report).[95]

These are only the minimum requirements that state new hire reporting laws must satisfy. States may enact new hire reporting laws that, for example, require additional information to be submitted or require a shorter reporting timeframe. Many states have also developed their own reporting form; however, its use is optional.

Multistate Employers. The New Hire Reporting Program includes a simplified reporting method for multistate employers. The statute defines *multistate employers* as employers with employees in two or more states and that file new hire reports either electronically or magnetically. The federal statute permits multistate employers to designate one state to which they will transmit all of their reports twice per month, rather than filing new hire reports in each state. An employer that designates one state must notify the Secretary of the U.S. Department of Health and Human Services (HHS) in writing. When notifying the HHS, the multistate employer must include the following information:

- Federal Employer Identification Number (FEIN);
- employer's name, address, and telephone number related to the FEIN;
- state selected for reporting purposes;
- other states in which the company has employees;

[94] The New Hire Reporting Program is part of the Personal Responsibility and Work Opportunity Act of 1996. 42 U.S.C. §§ 651 to 669.

[95] 42 U.S.C. § 653a.

- the corporate contact information (name, title, phone, email, and fax number); and
- the signature of person providing the information.

If the company is reporting new hires on behalf of subsidiaries operating under different names and FEINs, it must list the names and FEINs, and the states where those subsidiaries have employees working.

Multistate employers can notify the HHS by mail, fax, or online as follows:

Table 4. Multistate Employer New Hire Information

Contact By Mail or Fax	Contact Online
Department of Health and Human Services Administration for Children and Families Office of Child Support Enforcement Multi-State Employer Registration Box 509 Randallstown, MD 21133 Fax: (410) 277-9325	Register online by submitting a multistate employer notification form over the internet.[96] Multistate employers can receive assistance with registration as a multistate employer from the Multistate Help Desk by calling (410) 277-9470, 9:00 A.M. to 5:00 P.M., Eastern Time.

2.2(b) *State Guidelines on New Hire Reporting*

The following is a summary of the key elements of Montana's new hire reporting law.

Who Must Be Reported. Employers must report employees newly hired or rehired and whom the employer anticipates paying income. Rehired employees do not include those terminated from employment for less than 60 days. Generally, if an employee returning to work is required to complete a new federal Form W-4, the employer must report the individual as a new hire. If, however, the returning employee was not formally terminated or removed from payroll records, the employer need not report the individual.[97]

Report Timeframe. New hires must be reported within 20 days of hiring date. If submitted electronically or magnetically, the report must be submitted twice per month if necessary, not less than 12 nor more than 16 days apart.[98]

Information Required. The report must include the employee's name, date of hire, Social Security number, and residential and mailing addresses, as well as the employer's name, address, and federal tax identification number. The statute also states that employees may report the employee's date of birth, whether the employer provides dependent medical insurance coverage and, if so, the date the employee becomes eligible for such coverage.[99]

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[96] HHS offers the form online at http://www.acf.hhs.gov/programs/css/resource/multistate-employer-registration-form-instructions.

[97] MONT. CODE ANN. §§ 40-5-901, 40-5-922.

[98] MONT. CODE ANN. § 40-5-922(2).

[99] MONT. CODE ANN. § 40-5-922(1)(b),(c).

Form & Submission of Report. A Form W-4, new hire form, or an equivalent form prepared by the employer must be used. The report may be submitted by first-class mail, telephone, fax, over the internet, or by using electronic or magnetic media such as CDs or diskettes.[100]

Location to Send Information.

Montana New Hire Reporting Program
P.O. Box 8013
Helena, MT 59604-8013
(888) 866-0327
(406) 444-9290
(406) 444-0745 (fax)
(888) 272-1990 (fax)
https://dphhs.mt.gov/cssd/employerinfo/newhirereporting

Multistate Employers. An employer that has employees in two or more states and transmits new hire reports electronically or magnetically may comply with the new hire law by designating one of the states in which there is an employee and transmitting the report of new hires to that state. A multistate employer that elects to report to only one state shall give written notice of the state to which the employer will transmit new reports as well as notice to the secretary of the department of health.[101]

2.3 Restrictive Covenants, Trade Secrets & Protection of Business Information

2.3(a) *Federal Guidelines on Restrictive Covenants & Trade Secrets*

Restrictive covenants are limitations placed on an employee's conduct that remain in force after the individual's employment has ended. Post-employment restrictions are designed to protect the employer and typically prevent an individual from disclosing the employer's confidential information or soliciting the employer's employees or customers. These restrictions may also prohibit individuals from engaging in competitive employment, including competitive self-employment, for a specific time period after the employment relationship ends. There is no federal law governing these types of restrictive covenants. Therefore, a restrictive covenant's ability to protect an employer's interests is dependent upon applicable state law and the type of relationship or covenant involved.

As a general rule, a covenant restraining competition (referred to as a "noncompete") is more likely to be viewed critically because restraints of trade are generally disfavored. The typical exception to this general rule is a reasonable restraint that has a legitimate business purpose, such as the protection of trade secrets, confidential information, customer relationships, business goodwill, training, or the sale of a business. Notwithstanding, state laws vary widely regarding which of these interests can be protected through a restrictive covenant. Even where states agree on the interest that can be protected, they may vary on what is seen as a reasonable and enforceable provision for such protection.

Protections against trade secret misappropriation are also available to employers. Until 2016, trade secrets were the only form of intellectual property (*i.e.*, copyrights, patents, trademarks) not predominately governed by federal law. However, the Defend Trade Secrets Act of 2016 (DTSA) now provides a federal court civil remedy and original (but not exclusive) jurisdiction in federal court for claims

[100] MONT. CODE ANN. § 40-5-922(2).

[101] MONT. CODE ANN. § 40-5-922(3).

of trade secret misappropriation.[102] As such, the DTSA provides trade secret owners a uniform federal law under which to pursue such claims. The DTSA operates alongside more limited existing protections under the federal Economic Espionage Act of 1996 and the Computer Fraud and Abuse Act, as well as through state laws adopting the Uniform Trade Secrets Act (UTSA).

For more information on these topics, see LITTLER ON PROTECTION OF BUSINESS INFORMATION & RESTRICTIVE COVENANTS.

2.3(b) *State Guidelines on Restrictive Covenants & Trade Secrets*

2.3(b)(i) *State Restrictive Covenant Law*

Under Montana law, any contract that restrains an individual from exercising a lawful profession, trade, or business of any kind is void.[103] Montana's statute does allow for two exceptions; the sale of goodwill of business and the dissolution of a partnership.[104] Under the law, a person who sells the goodwill of a business may agree with the buyer to refrain from carrying on similar business within the area so long as the buyer carries on a like business in the city, county, or an adjacent city or county.[105] The statute also allows partners, upon the dissolution of a partnership, to agree that one or more of them may not carry on a similar business in the city, county, or an adjacent city or county.[106]

Enforceability Following Employee Discharge. The general disfavor in Montana for noncompete covenants only heightens when an employer choses to end the employment relationship but seeks to enforce the agreement.[107] Montana courts will tolerate noncompete covenants under certain circumstances when the employee voluntarily leaves. A covenant that restrains trade only partially must meet the following elements in order to be considered reasonable:

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 on unreasonable burden on the employer, the employee, or the public.[108]

Montana courts have also upheld noncompete agreements provided that the covenant does not directly restrain the employee from engaging in a particular profession.[109]

2.3(b)(ii) *Consideration for a Noncompete*

Restrictive covenants require an employee to promise not to do something the employee would otherwise have been able to do. For example, by signing a noncompete agreement, an employee is giving up the right to open a competing business or work for an employer in a competing business. Therefore, employers need to provide an employee with "consideration" in return for the agreement to be binding.

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[102] 18 U.S.C. §§ 1832 *et seq.*

[103] MONT. CODE ANN. § 28-2-703.

[104] MONT. CODE ANN. §§ 28-2-703, 28-2-704.

[105] MONT. CODE ANN. § 28-2-704.

[106] MONT. CODE ANN. § 28-2-705.

[107] *Wrigg v. Junkermier, Clark, Companella, Stevens, P.C.*, 265 P.3d 646 (Mont. 2011).

[108] 265 P.3d at 649.

[109] *Daniels v. Thomas, Dean & Hoskins*, 804 P.2d 359, 370 (Mont. 1990).

Providing *consideration* means giving something of value—*i.e.*, a promise to do something that the employer was not otherwise obligated to do—such as extending an offer of employment to a new employee or providing a bonus for an existing employee.

In Montana, covenants signed at inception of employment are sufficient to support consideration.[110] Continued employment has been held to be insufficient consideration to uphold a noncompete.[111] However, continued employment plus a change in employment terms will likely have the requisite consideration required for an enforceable noncompete agreement.[112]

2.3(b)(iii) *Ability to Modify or Blue Pencil a Noncompete*

When a restrictive covenant is found to be unreasonable in scope, some states refuse to enforce its terms entirely (sometimes referred to as the "all-or-nothing" rule), while others may permit the court to "blue pencil" or modify an agreement that is unenforceable as written. *Blue penciling* refers to the practice whereby a court strikes portions of a restrictive covenant it deems unenforceable. *Reformation*, on the other hand, refers to a court modifying a restrictive covenant to make it enforceable, which may include introducing new terms into the agreement (sometimes referred to as the "reasonableness" rule). By rewriting an overly broad restrictive covenant rather than simply deeming it unenforceable, courts attempt to effectuate the parties' intentions as demonstrated by their agreement to enter into a restrictive covenant in the first place.

In Montana, blue penciling to reduce geographic limitations has been approved in both the sale of business context and the dissolution of partnership context.[113]

2.3(b)(iv) *State Trade Secret Law*

Even without a written contract containing a restrictive covenant, an employer may protect a trade secret and prohibit the former employee from disclosing or using it, based on the employee's common-law duty not to do so. When an employee leaves a business, the employee will sometimes take valuable information of the business to use for competitive purposes. Montana has adopted the Uniform Trade Secrets Act, which protects trade secrets from misappropriation.[114]

Definition of a Trade Secret. Under the Montana Uniform Trade Secret Act, a *trade secret* is information or computer software, including a formula, pattern, compilation, program, device, method, technique, or process, that:

1. derives independent economic value, present or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

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[110] *Wrigg*, 2010 Mont. Dist. LEXIS 124, at **5-6 (Mont. Dist. Ct. Apr. 20, 2010), *rev'd on other grounds*, 265 P.3d 646 (Mont. 2011).

[111] *Access Organics, Inc. v. Hernandez*, 175 P.3d 899, 904-05 (Mont. 2008).

[112] 175 P.3d at 904-05.

[113] *Dumont v. Tucker*, 822 P.2d 96, 98 (Mont. 1991) (sale of business); *Treasure Chem., Inc. v. Team Lab. Chem. Corp.*, 609 P.2d 285 (Mont. 1980) (dissolution of a partnership).

[114] MONT. CODE ANN. §§ 30-14-401 *et seq*.

2. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[115]

Montana courts have balanced the "citizens' right to know" against the property interest in the trade secret.[116]

Misappropriation of a Trade Secret. Under the Montana Uniform Trade Secret Act, liability attaches if the trade secret is misappropriated. *Misappropriation* is defined as:

1. acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
2. disclosure or use of a trade secret of another without express or implied consent by a person who:
    a. used improper means to acquire knowledge of the trade secret; or
    b. at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
        i. derived from or through a person who had utilized improper means to acquire it;
        ii. acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
        iii. derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
    c. before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.[117]

Actual or threaten misappropriation may be enjoined. The injunction must be terminated when the trade secret has ceased to exist.[118] Damages including the actual loss and unjust enrichment may also be available.[119]

2.3(b)(v) *State Guidelines on Employee Inventions & Ideas*

Montana has no statutory guidelines addressing the ownership of employee inventions and ideas.

3. DURING EMPLOYMENT

3.1 Posting, Notice & Record-Keeping Requirements

3.1(a) *Posting & Notification Requirements*

3.1(a)(i) *Federal Guidelines on Posting & Notification Requirements*

Several federal employment laws require that specific information be posted in the workplace. Posting requirements vary depending upon the law at issue. For example, employers with fewer than 50

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[115] MONT. CODE ANN. § 30-14-402(4).

[116] *Great Falls Tribune Co., Inc. v. Great Falls Public Sch. Bd. Of Trustees, Cascade Co*., 841 P.2d 502, 508 (Mont. 1992).

[117] MONT. CODE ANN. § 30-14-402(2).

[118] MONT. CODE ANN. § 30-14-403.

[119] MONT. CODE ANN. § 30-14-404.

employees are not covered by the Family and Medical Leave Act and, therefore, would not be subject to the law's posting requirements. Table 5 details the federal workplace posting and notice requirements.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Employee Polygraph Protection Act (EPPA)	Employers must post and keep posted on their premises a notice explaining the EPPA.[120]
Equal Employment Opportunity (EEO) Act ("EEO is the Law" Poster)	Employers must post and keep posted in conspicuous places upon their premises, in an accessible format, a notice that describes the federal laws prohibiting discrimination in employment.[121]
Fair Labor Standards Act (FLSA)	Employers must post and keep posted a notice, summarizing employee rights under the FLSA, in conspicuous places in every establishment where employees subject to the FLSA are employed.[122]
Family & Medical Leave Act (FMLA)	Employers must conspicuously post, where employees are employed, a notice explaining the FMLA's provisions and providing information on filing complaints of violations.[123]
Migrant and Seasonal Agricultural Worker Protection Act (MSPA)	Farm labor contractors, agricultural employers, and agricultural associations that employ or house any migrant or seasonal agricultural worker must conspicuously post at the place of employment a poster setting forth the MSPA's rights and protections, including the right to request a written statement of the information described in 29 U.S.C. § 1821(a). The poster must be provided in Spanish or other language common to migrant or seasonal agricultural workers who are not fluent or literate in English.[124]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates must at all times display and make available to employees a poster explaining the conditions under which the special wage rate

[120] 29 C.F.R. § 801.6. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/eppa.htm.

[121] 29 C.F.R. §§ 1601.30 (Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act), 1627.10 (Age Discrimination in Employment Act). This poster is available in English, Spanish, Arabic, and Chinese at https://www1.eeoc.gov/employers/poster.cfm.

[122] 29 C.F.R. § 516.4. This poster is available in English, Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, Korean, Polish, and Haitian Creole at http://www.dol.gov/whd/regs/compliance/posters/flsa.htm.

[123] 29 C.F.R. § 825.300. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/fmla.htm.

[124] 29 C.F.R. §§ 500.75, 500.76. This poster is available in English, Spanish, Haitian Creole, Vietnamese, and Hmong at http://www.dol.gov/whd/regs/compliance/posters/mspaensp.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
	applies. Where an employer finds it inappropriate to post notice, directly providing the poster to its employees is sufficient.[125]
Occupational Safety and Health Act ("the Fed-OSH Act")	Employers must post a notice or notices informing employees of the Fed-OSH Act's protections and obligations, and that for assistance and information employees should contact the employer or nearest U.S. Department of Labor office.[126]
Uniformed Service Employment and Reemployment Rights Act (USERRA)	Employers must provide notice about USERRA's rights, benefits, and obligations to all individuals entitled to such rights and benefits. Employers may provide notice by posting or by other means, such as by distributing or mailing the notice.[127]
In addition to the federal posters required for all employers, government contractors may be required to post the following posters.	
"EEO is the Law" Poster with the EEO is the Law Supplement	Employers subject to Executive Order No. 11246 must prominently post notice, where it can be readily seen by employees and applicants, explaining that discrimination in employment is prohibited on numerous grounds.[128] The second page includes reference to government contractors.
Annual EEO, Affirmative Action Statement	Government contractors covered by the Affirmative Action Program (AAP) requirements are required to post a separate EEO/AA Policy Statement (in addition to the required "EEO is the Law" Poster), which indicates the support of the employer's top U.S. official. This statement should be reaffirmed annually with the employer's AAP.[129]
Employee Rights Under the Davis-Bacon Act Poster	Employers performing work covered by the labor standards of the Davis-Bacon and Related Acts must prominently post notice, where accessible to employees, summarizing the protections of the law.[130]
Employee Rights Under the Service Contract or	Employers performing work covered by the McNamara-O'Hara Service Contract Act ("Service Contract Act") or the Walsh-Healey Public Contracts Act ("Walsh-Healey Act") must prominently post notice,

[125] 29 C.F.R. § 525.14. This poster is available in English and Spanish at http://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[126] 29 C.F.R § 1903.2. This poster is available in English, Spanish, Arabic, Chinese, Russian, Nepali, Thai, Hmong, Vietnamese, Korean, Polish, Portuguese, and Haitian Creole at https://www.osha.gov/Publications/poster.html.

[127] 20 C.F.R. app. § 1002. This poster is available at http://www.dol.gov/vets/programs/userra/poster.htm.

[128] 41 C.F.R. § 60-1.42; *see also* 41 C.F.R. § 60-741.5(a) (requiring all agencies and contractors to include an equal opportunity clause in contracts, in which the contractor agrees to post this notice). This poster is available at https://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm.

[129] 41 C.F.R. §§ 60-300.44, 60-741.44.

[130] 29 C.F.R. § 5.5(a)(l)(i). This poster is available at https://www.dol.gov/whd/regs/compliance/posters/davis.htm.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Walsh-Healey Public Contracts Acts Poster	where accessible to employees, summarizing all required compensation and other entitlements. To comply, employers may notify employees by attaching a notice to the contract, or may post the notice at the worksite.[131]
E-Verify Participation & Right to Work Posters	The Department of Homeland Security requires certain government contractors, under Executive Order Nos. 12989, 13286, and 13465, to post notice informing current and prospective employees of their rights and protections. Notices must be posted in a prominent place that is visible to prospective employees and all employees who are verified through the system.[132]
Notice to Workers with Disabilities/Special Minimum Wage Poster	Employers of workers with disabilities under special minimum wage certificates authorized by the Service Contract Act or the Walsh-Healey Public Contracts Act must post notice, explaining the conditions under which the special minimum wages may be paid. Where an employer finds it inappropriate to post this notice, directly providing the poster to its employees is sufficient.[133]
Notification of Employee Rights Under Federal Labor Laws	Government contractors are required under Executive Order No. 13496 to post this notice in conspicuous locations and, if the employer posts notices to employees electronically, it must also make this poster available where it customarily places other electronic notices to employees about their jobs. Electronic posting cannot be used as a substitute for physical posting. Where a significant portion of the workforce is not proficient in English, the notice must be provided in the languages spoken by employees.[134]
Office of the Inspector General's Fraud Hotline Poster	Certain government contractors must prominently post notice, where accessible to employees, addressing fraud and how to report such misconduct.[135]

[131] 29 C.F.R. § 4.6(e); 29 C.F.R. § 4.184. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/sca.htm.

[132] U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., *E-Verify Memorandum of Understanding for Employers*, *available at* https://www.e-verify.gov/sites/default/files/everify/memos/MOUforEVerifyEmployer.pdf. The poster is available at https://preview.e-verify.gov/sites/default/files/everify/posters/IER_RightToWorkPoster%20Eng_Es.pdf. According to the U.S. Citizenship and Immigration Services, this poster must be displayed in English and Spanish.

[133] 29 C.F.R. § 525.14. This poster is available at https://www.dol.gov/whd/regs/compliance/posters/disab.htm.

[134] 29 C.F.R. § 471.2. This poster is available at https://www.dol.gov/olms/regs/compliance/EO13496.htm.

[135] 48 C.F.R. §§ 3.1000 *et seq*. This poster is available at https://oig.hhs.gov/documents/root/243/OIG_Hotline_Ops_Poster_-_Grant__Contract_Fraud.pdf.

Table 5. Federal Posting & Notice Requirements	
Poster or Notice	**Notes**
Paid Sick Leave Under Executive Order No. 13706	Certain government contractors must prominently post notice, where accessible to employees at the worksite, informing employees of their right to earn and use paid sick leave. Notice may be provided electronically if customary to the employer.[136] **Pay Period or Monthly Notice.** A contractor must inform an employee in writing of the amount of accrued paid sick leave no less than once each pay period or each month, whichever is shorter. Additionally, this information must be provided when employment ends and when an employee's accrued but unused paid sick leave is reinstated. Providing these notifications via a pay stub meets the compliance requirements of the executive order. **Pay Stub / Electronic.** A contractor's existing procedure for informing employees of available leave, such as notification accompanying each paycheck or an online system an employee can check at any time, may be used to satisfy or partially satisfy these requirements if it is written (including electronically, if the contractor customarily corresponds with or makes information available to its employees by electronic means).[137]
Pay Transparency Nondiscrimination Provision	Employers covered by Executive Order No. 11246 must either post a copy of this nondiscrimination provision in conspicuous places available to employees and applicants for employment, or post the provision electronically. Additionally, employers must distribute the nondiscrimination provision to their employees by incorporating it into their existing handbooks or manuals.[138]
Worker Rights Under Executive Order Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	Employers that contract with the federal government under Executive Order Nos. 13658 or 14026 must prominently post notice, where accessible to employees, summarizing the applicable minimum wage rate and other required information.[139]

[136] 29 C.F.R. § 13.26. This poster is available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm. Additional resources on the sick leave requirement are available at https://www.dol.gov/whd/govcontracts/eo13706/index.htm.

[137] 29 C.F.R. § 13.5.

[138] 41 C.F.R. § 60-1.35(c). This poster is available at https://www.dol.gov/agencies/ofccp/posters.

[139] 29 C.F.R. §§ 10.29, 23.290. The poster, referencing both Executive Orders, is available at https://www.dol.gov/whd/regs/compliance/posters/mw-contractors.htm.

3.1(a)(ii) *State Guidelines on Posting & Notification Requirements*

Table 6 details the state workplace posting and notice requirements. While local ordinances are generally excluded from this publication, some local ordinances may have posting requirements, especially in the minimum wage or paid leave areas. Local posting requirements may be discussed in the table below or in later sections, but the local ordinance coverage is not comprehensive.

Table 6. State Posting & Notice Requirements

Poster or Notice	Notes
Unemployment Compensation	All employers must post and maintain, where readily accessible, notice informing employees that the employer has secured unemployment coverage. If the employees do not work in a central location, the employer must send notice via mail or electronic means to all employees.[140]
Wages, Hours & Payroll: General	If a written demand is made before work commences, an employer must notify each employee in writing of the: (1) date of paydays; and (2) rate of wages to be paid, whether by the hour, day, week, month, or year. Notice may be provided to each employee in writing or by conspicuous posting.[141] Exceptions apply to employers that are party to collective bargaining agreements or operate in certain industries (*i.e.*, agriculture, stockraising).[142]
Wages, Hours & Payroll: Employee Rights Under the Little Davis-Bacon Act Poster (Government Construction)	The contractor performing work or providing construction services under public works contracts, as provided in this part, shall post in a prominent and accessible site on the project or staging area, not later than the first day of work and continuing for the entire duration of the project, a legible statement of all wages and fringe benefits to be paid to the employees.[143]
Wages, Hours & Payroll: Minimum Wage & Overtime	All employers must post and maintain conspicuous notice, where readily observable in every establishment where a covered employee is employed, summarizing the minimum wage and wage payments laws.[144]

[140] MONT. ADMIN. R. 24.24.40.1601; *see* MONT. CODE ANN. § 39-51-2401. This poster can be obtained from the insurance provider.

[141] MONT. CODE ANN. § 39-3-201.

[142] MONT. CODE ANN. § 39-3-203.

[143] MONT. CODE ANN. § 18-2-406

[144] MONT. ADMIN. R. 24.16.3019 (adoption of 29 C.F.R. § 516.4This poster is available in English at http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-poster and in Spanish at http://wsd.dli.mt.gov/employers/labor-law-posters?pk_vid=fba68c7b1a113d6f15847107873500bf.

Table 6. State Posting & Notice Requirements	
Poster or Notice	**Notes**
Workers' Compensation	All employers must post and maintain, where readily accessible, notice informing employees that the employer has secured workers' compensation coverage and identifying the carrier.[145]
Workplace Safety: Employee and Community Hazardous Chemical Act	Montana law requires some employers to post notice at adequate locations, where posters are normally displayed, informing them about their right to information about the presence of hazardous chemicals in the workplace (including material safety data sheets and workplace chemical lists) and any exposure thereto, and their right to training on such hazards and protective measures. Notice must cover all of the employees' rights under this law, which includes a right to protective equipment as well as job protection for exercising their rights. Numerous exceptions apply to the statute and the notice requirement; for example, it does not apply to employers covered by the Fed-OSHA standards.[146]
Workplace Safety: No Smoking Signs	Smoking is prohibited in enclosed places of work in Montana.[147] "No Smoking" signs must be posted conspicuously at all public entrances to workplaces.[148]

3.1(b) *Record-Keeping Requirements*

3.1(b)(i) *Federal Guidelines on Record Keeping*

Table 7 summarizes the federal record-keeping requirements.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Payroll Records	*Covered employers must maintain the following payroll or other records for each employee:* • employee's name, address, and date of birth; • occupation; • rate of pay; and • compensation earned each week.[149]	At least 3 years from the date of entry.

[145] MONT. CODE ANN. § 39-71-401(6). This poster can be obtained from the insurance provider.

[146] MONT. CODE ANN. § 50-78-201 *et seq.*; *see also* MONT. CODE ANN. §§ 50-78-103, 50-78-104 (setting out exceptions).

[147] MONT. CODE ANN. §§ 50-40-101 *et seq*.

[148] MONT. CODE ANN. § 50-40-104. Approved signs and other materials are available at https://dphhs.mt.gov/publichealth/mtupp/.

[149] 29 U.S.C. § 626; 29 C.F.R. § 1627.3(a).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Age Discrimination in Employment Act (ADEA): Personnel Records	*Employers that maintain the following personnel records in the course of business are required by the ADEA to keep them for the specified period of time:* • job applications, resumes, or other forms of employment inquiry, including records pertaining to the refusal to hire any individual; • promotion, demotion, transfer, selection for training, recall, or discharge of any employee; • job orders submitted by the employer to an employment agency or labor organization for recruitment of personnel for job openings; • test papers completed by applicants which disclose the results of any employment test considered by the employer; • results of any physical examination considered by the employer in connection with a personnel action; and • any advertisements or notices relating to job openings, promotions, training programs, or opportunities to work overtime.[150]	At least 1 year from the date of the personnel action to which any records relate.
Age Discrimination in Employment (ADEA): Benefit Plan Documents	*Employer must keep on file any:* • employee benefit plans, such as pension and insurance plans; and • copies of any seniority systems and merit systems in writing.[151]	For the full period the plan or system is in effect, and for at least 1 year after its termination.
Title VII & the Americans with Disabilities Act (ADA): Personnel Records	*Employers must preserve any personnel or employment record made, including:* • requests for reasonable accommodation; • application forms submitted by applicants; • other records having to do with hiring, promotion, demotion, transfer, lay-off, or termination; • rates of pay or other terms of compensation; and • selection for training or apprenticeship.[152]	At least 1 year from the date the records were made, or from the date of the personnel action involved, whichever is later.

[150] 29 C.F.R. § 1627.3(b).

[151] 29 C.F.R. § 1627.3(b).

[152] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Title VII & the Americans with Disabilities Act (ADA): Complaints of Discrimination	*When a charge of discrimination has been filed or an action brought against the employer, it must:* • make and keep such records relevant to the determination of whether unlawful employment practices have been or are being committed, including personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • retain application forms or test papers completed by unsuccessful applicants or candidates for the position.[153]	Until final disposition of the charge or action (*i.e.*, until the statutory period for bringing an action has expired or, if an action has been brought, the date the litigation is terminated).
Title VII & the Americans with Disabilities Act (ADA): Other	An employer must keep and maintain its Employer Information Report (EEO-1).[154]	Most recent form must be retained for 1 year.
Employee Polygraph Protection Act (EPPA)	*Records pertaining to a polygraph test must be maintained for the specified time period including, but not limited to, the following:* • a copy of the statement given to the examinee regarding the time and place of the examination and the examinee's right to consult with an attorney; • the notice to the examiner identifying the person to be examined; • copies of opinions, reports, or other records given to the employer by the examiner; • where the test is conducted in connection with an ongoing investigation involving economic loss or injury, a statement setting forth the specific incident or activity under investigation and the basis for testing the particular employee; and • where the test is conducted in connection with an ongoing investigation of criminal or other misconduct involving loss or injury to the manufacture, distribution, or dispensing of a controlled substance, records specifically identifying the loss or injury in question and	At least 3 years following the date on which the polygraph examination was conducted.

[153] 42 U.S.C. § 2000e-8c; 29 C.F.R. § 1602.14.

[154] 29 C.F.R. § 1602.7.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	the nature of the employee's access to the person or property that is the subject of the investigation.[155]	
Employee Retirement Income Security Act (ERISA)	Employers that sponsor an ERISA-qualified plan must maintain records that provide in sufficient detail the information from which any plan description, report, or certified information filed under ERISA can be verified, explained, or checked for accuracy and completeness. This includes vouchers, worksheets, receipts, and applicable resolutions.[156]	At least 6 years after documents are filed or would have been filed but for an exemption.
Equal Pay Act	Covered employers must maintain the records required to be kept by employers under the Fair Labor Standards Act (29 C.F.R. part 516).[157]	3 years.
Equal Pay Act: Other	*Covered employers must maintain any additional records made in the regular course of business relating to:* • payment of wages; • wage rates; • job evaluations; • job descriptions; • merit and seniority systems; • collective bargaining agreements; and • other matters which describe any pay differentials between the sexes.[158]	At least 2 years.
Fair Labor Standards Act (FLSA): Payroll Records	*Employers must maintain the following records with respect to each employee subject to the minimum wage and/or overtime provisions of the FLSA:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth, if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • regular hourly rate of pay for any workweek in which overtime compensation is due;	3 years from the last day of entry.

[155] 29 U.S.C. §§ 2001 *et seq.*; 29 C.F.R. § 801.30.

[156] 29 U.S.C. § 1027.

[157] 29 C.F.R. § 1620.32(a).

[158] 29 C.F.R. § 1620.32(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• basis on which wages are paid (pay interval); • amount and nature of each payment excluded from the employee's regular rate; • hours worked each workday and total hours worked each workweek; • total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation; • total premium pay for overtime hours; • total additions to or deductions from wages paid each pay period, including employee purchase orders or wage assignments; • total wages paid each pay period; • date of payment and the pay period covered by the payment; • records of retroactive payment of wages, including the amount of such payment to each employee, the period covered by the payment, and the date of the payment; and • for employees working on a fixed schedule, the schedule of daily and weekly hours the employee normally works (instead of hours worked each day and each workweek).[159] The record should also indicate for each week whether the employee adhered to the schedule and, if not, show the exact number of hours worked each day each week.	
Fair Labor Standards Act (FLSA): Tipped Employees	*Employers must maintain and preserve all Payroll Records noted above as well as:* • a symbol, letter, or other notation on the pay records identifying each employee whose wage is determined in part by tips; • weekly or monthly amounts reported by the employee to the employer of tips received (*e.g.*, information reported on Internal Revenue Service Form 4070); • amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable federal minimum wage);	

[159] 29 C.F.R. §§ 516.2, 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• hours worked each workday in which an employee does not receive tips, and total daily or weekly straight-time payment made by the employer for such hours; and • hours worked each workday in occupations in which the employee receives tips, and total daily or weekly straight-time earnings for such hours.[160]	
Fair Labor Standards Act (FLSA): White Collar Exemptions	*For bona fide executive, administrative, and professional employees and outside sales employees (e.g., white collar employees) the following information must be maintained:* • full name and any identifying symbol used in place of name on time or payroll records; • home address with zip code; • date of birth if under 19; • sex and occupation in which employed; • time of day and day of week on which the employee's workweek begins; • total wages paid each pay period; • date of payment and the pay period covered by the payment; and • basis on which wages are paid in sufficient detail to permit calculation for each pay period of the employee's total remuneration for employment including fringe benefits and prerequisites.[161]	3 years from the last day of entry.
Fair Labor Standards Act (FLSA): Agreements & Other Records	*In addition to payroll information, employers must preserve agreements and other records, including:* • collective bargaining agreements and any amendments or additions; • individual employment contracts or, if not in writing, written memorandum summarizing the terms; • written agreements or memoranda summarizing special compensation arrangements under FLSA sections 7(f) or 7(j); • certain plans and trusts under FLSA section 7(e); • certificates and notices listed or named in the FLSA; and • sales and purchase records.[162]	At least 3 years from the last effective date.

[160] 29 C.F.R. § 516.28.

[161] 29 C.F.R. §§ 516.2, 516.3. Presumably the regulation's reference to "prerequisites" is an error and should refer to "perquisites."

[162] 29 C.F.R. § 516.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Labor Standards Act (FLSA): Other Records	*In addition to other FLSA requirements, employers must preserve supplemental records, including:* • basic time and earning cards or sheets; • wage rate tables; • order, shipping, and billing records; and • records of additions to or deductions from wages.[163]	At least 2 years from the date of last entry.
Family and Medical Leave Act (FMLA)	*Covered employers must make, keep, and maintain records pertaining to their compliance with the FMLA, including:* • basic payroll and identifying employee data, including name, address, and occupation; • rate or basis of pay and terms of compensation; • daily and weekly hours per pay period; • additions to or deductions from wages and total compensation paid; • dates FMLA leave is taken by FMLA-eligible employees (leave must be designated in records as FMLA leave, and leave so designated may not include leave required under state law or an employer plan not covered by FMLA); • if FMLA leave is taken in increments of less than one full day, the hours of the leave; • copies of employee notices of leave furnished to the employer under the FMLA, if in writing; • copies of all general and specific notices given to employees in accordance with the FMLA; • any documents that describe employee benefits or employer policies and practices regarding the taking of paid and unpaid leave; • premium payments of employee benefits; and • records of any dispute between the employer and an employee regarding designation of leave as FMLA leave, including any written statement from the employer or employee of the reasons for the designation and the disagreement. *Covered employers with no eligible employees must only maintain the following records:* • basic payroll and identifying employee data, including name, address, and occupation;	At least 3 years.

[163] 29 C.F.R. § 516.6.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• rate or basis of pay and terms of compensation; • daily and weekly hours worked per pay period; • additions to or deductions from wages; and • total compensation paid. *Covered employers in a joint employment situation must keep all the records required in the first series with respect to any primary employees, and must keep the records required by the second series with respect to any secondary employees.* *Also, if an FMLA-eligible employee is not subject to the FLSA record-keeping requirements for minimum wage and overtime purposes (i.e., not covered by, or exempt from FLSA) an employer does not need to keep a record of actual hours worked, provided that:* • FMLA eligibility is presumed for any employee employed at least 12 months; and • with respect to employees who take FMLA leave intermittently or on a reduced leave schedule, the employer and employee agree on the employee's normal schedule or average hours worked each week and reduce their agreement to a written, maintained record. *Medical records also must be retained.* Specifically, records and documents relating to certifications, re-certifications, or medical histories of employees or employees' family members, created for purposes of FMLA, must be maintained as confidential medical records in separate files/records from the usual personnel files. If the ADA is also applicable, such records must be maintained in conformance with ADA-confidentially requirements (subject to exceptions). If the Genetic Information Nondiscrimination Act of 2008 (GINA) is applicable, records and documents created for purposes of FMLA containing family medical history or genetic information as defined in GINA must be maintained in accordance with the confidentiality requirements of Title II of GINA.[164]	

[164] 29 U.S.C. § 2616; 29 C.F.R. § 825.500.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Federal Insurance Contributions Act (FICA)	*Employers must keep FICA records, including:* • copies of any return, schedule, or other document relating to the tax; • records of all remuneration (cash or otherwise) paid to employees for employment services. The records must show with respect to each employee receiving such remuneration: ▪ name, address, and account number of the employee and additional information when the employee does not provide a Social Security card; ▪ total amount and date of each payment of remuneration (including any sum withheld as tax or for any other reason) and the period of services covered by such payment; ▪ amount of each such remuneration payment that constitutes wages subject to tax; ▪ amount of employee tax, or any amount equivalent to employee tax, collected with respect to such payment, and, if collected at a time other than the time such payment was made, the date collected; and ▪ if the total remuneration payment and the amount thereof which is taxable are not equal, the reason for this; • the details of each adjustment or settlement of taxes under FICA; and • records of all remuneration in the form of tips received by employees, employee statements of tips under section 6053(a) (unless otherwise maintained), and copies of employer statements furnished to employees under section 6053(b).[165]	At least 4 years after the date the tax is due or paid, whichever is later.
Immigration	Employers must retain all completed Form I-9s.[166]	3 years after the date of hire or 1 year following the termination of employment, whichever is later.

[165] 26 C.F.R. §§ 31.6001-1, 31.6001-2.

[166] 8 C.F.R. § 274a.2.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Income Tax: Accounting Records	*Any taxpayer required to file an income tax return must maintain accounting records that will enable the filing of tax returns correctly stating taxable income each year, including:* • regular books of account or records, including inventories, sufficient to establish the amount of gross income, deductions, credits, or other matters required to be shown by such person in any return of such tax or information.[167]	Required to be maintained for "so long as the contents [of the records] may become material in the administration of any internal revenue law;" this could be as long as 15 years in some cases.
Income Tax: Employee Payment Records	*Employers are required to maintain records reflecting all remuneration paid to each employee, including:* • employee's name, address, and account number; • total amount and date of each payment; • the period of services covered by the payment; • the amount of remuneration that constitutes wages subject to withholding; • the amount of tax collected and, if collected at a time other than the time the payment was made, the date collected; • an explanation for any discrepancy between total remuneration and taxable income; • the fair market value and date of each payment of noncash remuneration for services performed as a retail commissioned salesperson; and • other supporting documents relating to each employee's individual tax status.[168]	4 years after the return is due or the tax is paid, whichever is later.
Income Tax: W-4 Forms	Employers must retain all completed Form W-4s.[169]	As long as it is in effect and at least 4 years thereafter.
Unemployment Insurance	*Employers are required to maintain all relevant records under the Federal Unemployment Tax Act, including:*	At least 4 years after the later of

[167] 26 U.S.C. § 3402; 26 C.F.R. § 1.6001-1.

[168] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

[169] 26 C.F.R. §§ 31.6001-1, 31.6001-5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• total amount of remuneration paid to employees during the calendar year for services performed; • amount of such remuneration which constitutes wages subject to taxation; • amount of contributions paid into state unemployment funds, showing separately the payments made and not deducted from the remuneration of its employees, and payments made and deducted or to be deducted from employee remuneration; • information required to be shown on the tax return and the extent to which the employer is liable for the tax; • an explanation for any discrepancy between total remuneration paid and the amount subject to tax; and • the dates in each calendar quarter on which each employee performed services not in the course of the employer's trade or business, and the amount of the cash remuneration paid for those services.[170]	the date the tax is due or paid for the period covered by the return.
Workplace Safety / the Fed-OSH Act: Exposure Records	*Employers must preserve and retain employee exposure records, including:* • environmental monitoring or measuring of a toxic substance or harmful physical agent, including personal, area, grab, wipe, or other form of sampling, as well as related collection and analytical methodologies, calculations, and other background data relevant to an interpretation of the results obtained; • biological monitoring results which directly assess the absorption of a toxic substances or harmful physical agent by body specimens; and • Material Safety Data Sheets (MSDSs), or in the absence of these documents, a chemical inventory or other record reveling the identity of a toxic substances or harmful physical agent and where and when the substance or agent was used. *Exceptions to this requirement include:* • background data to workplace monitoring need only be retained for 1 year provided that the sampling results, collection methodology, analytic methods used, and a	At least 30 years.

[170] 26 C.F.R. § 31.6001-4.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	summary of other background data is maintained for 30 years; • MSDSs need not be retained for any specified time so long as some record of the identity of the substance, where it was used and when it was used is retained for at least 30 years; and • biological monitoring results designated as exposure records by a specific Fed-OSH Act standard should be retained as required by the specific standard.[171]	
Workplace Safety / the Fed-OSH Act: Medical Records	*Employers must preserve and retain "employee medical records," including:* • medical and employment questionnaires or histories; • results of medical examinations and laboratory tests; • medical opinions, diagnoses, progress notes, and recommendations; • first aid records; • descriptions of treatments and prescriptions; and • employee medical complaints. *"Employee medical record" does not include:* • physical specimens; • records of health insurance claims maintained separately from employer's medical program; • records created solely in preparation for litigation that are privileged from discovery; • records concerning voluntary employee assistance programs, if maintained separately from the employer's medical program and its records; and • first aid records of one-time treatment which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a nonphysician and maintained separately from the employer's medical program and its records.[172]	Duration of employment plus 30 years.
Workplace Safety: Analyses Using Medical	*Employers must preserve and retain analyses using medical and exposure records*, including any compilation of data, or other study based on information collected from individual employee exposure or medical records, or information	At least 30 years.

[171] 29 C.F.R. § 1910.1020(d).

[172] 29 C.F.R. § 1910.1020(d).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
and Exposure Records	collected from health insurance claim records, provided that the analysis has been provided to the employer or no further work is being done on the analysis.[173]	
Workplace Safety: Injuries and Illnesses	*Employers must preserve and retain records of employee injuries and illnesses, including:* • OSHA 300 Log; • the privacy case list (if one exists); • the Annual Summary; • OSHA 301 Incident Report; and • old 200 and 101 Forms.[174]	5 years following the end of the calendar year that the record covers.
Additional record-keeping requirements apply to government contractors. The list below, while nonexhaustive, highlights some of these obligations.		
Affirmative Action Programs (AAP)	*Contractors required to develop written affirmative action programs must maintain:* • current AAP and documentation of good faith effort; and • AAP for the immediately preceding AAP year and documentation of good faith effort.[175]	Immediately preceding AAP year.
Equal Employment Opportunity: Personnel & Employment Records	*Government contractors covered by Executive Order No. 11246 and those required to provide affirmative action to persons with disabilities and/or disabled veterans and veterans of the Vietnam Era must retain the following records:* • records pertaining to hiring, assignment, promotion, demotion, transfer, lay off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship; • other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications, resumes; and • any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases, records identifying job seekers contacted	3 years recommended; regulations state "not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later." If the contractor has fewer than 150 employees or does not have a contract

[173] 29 C.F.R. § 1910.1020(d).

[174] 29 C.F.R. §§ 1904.33, 1904.44.

[175] 41 C.F.R. § 60-1.12(b).

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	regarding their interest in a particular position, regardless of whether the individual qualifies as an internet applicant under 41 C.F.R. § 60–1.3, tests and test results, and interview notes; • for purposes of record keeping with respect to internal resume databases, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search; • for purposes of record keeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor). *Additionally, for any record the contractor maintains pursuant to 41 C.F.R. § 60-1.12, it must be able to identify:* • gender, race, and ethnicity of each employee; and • where possible, the gender, race, and ethnicity of each applicant or internet applicant.[176]	of at least $150,000, the minimum retention period is one year from the date of making the record or the personnel action, whichever occurs later.
Equal Employment Opportunity: Complaints of Discrimination	*Where a complaint of discrimination has been filed, an enforcement action commenced, or a compliance review initiated, employers must maintain:* • personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person; and • application forms or test papers completed by unsuccessful applicants and candidates for the same position as the aggrieved person applied and was rejected.[177]	Until final disposition of the complaint, compliance review or action.
Minimum Wage Under Executive	*Covered contractors and subcontractors performing work must maintain for each worker:*	3 years.

[176] 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

[177] 41 C.F.R. §§ 60-1.12, 60-741.80.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Orders Nos. 13658 (contracts entered into on or after January 1, 2015), 14026 (contracts entered into on or after January 30, 2022)	• name, address, and Social Security number; • occupation(s) or classification(s); • rate or rates of wages paid; • number of daily and weekly hours worked; • any deductions made; and • total wages paid. These records must be available for inspection and transcription by authorized representatives of the Wage and Hour Division (WHD) of the U.S. Department of Labor. The contractor must also permit authorized representatives of the WHD to conduct interviews with workers at the worksite during normal working hours.[178]	
Paid Sick Leave Under Executive Order No. 13706	*Contractors and subcontractors performing work subject to Executive Order No. 13706 must keep the following records:* • employee's name, address, and Social Security number; • employee's occupation(s) or classification(s); • rate(s) of wages paid (including all pay and benefits provided); • number of daily and weekly hours worked; • any deductions made; • total wages paid (including all pay and benefits provided) each pay period; • a copy of notifications to employees of the amount of accrued paid sick leave; • a copy of employees' requests to use paid sick leave (if in writing) or (if not in writing) any other records reflecting such employee requests; • dates and amounts of paid sick leave used by employees (unless a contractor's paid time off policy satisfies the EO's requirements, leave must be designated in records as paid sick leave pursuant to the EO); • a copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests; • any records relating to the certification and documentation a contractor may require an employee	During the course of the covered contract as well as after the end of the contract.

[178] 29 C.F.R. § 23.260.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	to provide, including copies of any certification or documentation provided by an employee; • any other records showing any tracking of or calculations related to an employee's accrual and/or use of paid sick leave; • the relevant covered contract; • the regular pay and benefits provided to an employee for each use of paid sick leave; and • any financial payment made for unused paid sick leave upon a separation from employment intended to relieve a contractor from its reinstatement obligation.[179]	
Davis-Bacon Act	*Davis-Bacon Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • hourly rates of wages paid (including rates of contributions or costs anticipated for *bona fide* fringe benefits or cash equivalents); • daily and weekly number of hours worked; and • deductions made and actual wages paid. *Contractors employing apprentices or trainees under approved programs must maintain written evidence of:* • registration of the apprenticeship programs; • certification of trainee programs; • the registration of the apprentices and trainees; • the ratios and wage rates prescribed in the program; and • worker or employee employed in conjunction with the project.[180]	At least 3 years after the work.
Service Contract Act	*Service Contract Act contractors or subcontractors must maintain the following records with respect to each employee:* • name, address, and Social Security number; • work classification; • rates of wage;	At least 3 years from the completion of the work records

[179] 29 C.F.R. § 13.25.

[180] 29 C.F.R. § 5.5.

Table 7. Federal Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• fringe benefits; • total daily and weekly compensation; • the number of daily and weekly hours worked; • any deductions, rebates, or refunds from daily or weekly compensation; • list of wages and benefits for employees not included in the wage determination for the contract; • any list of the predecessor contractor's employees which was furnished to the contractor by regulation; and • a copy of the contract.[181]	containing the information.
Walsh-Healey Act	*Walsh-Healey Act supply contractors must keep the following records:* • wage and hour records for covered employees showing wage rate, amount paid in each pay period, hours worked each day and week; • the period in which each employee was engaged on a government contract and the contract number; • name, address, sex, and occupation; • date of birth of each employee under 19 years of age; and • a certificate of age for employees under 19 years of age.[182]	At least 3 years from the last date of entry.

3.1(b)(ii) *State Guidelines on Record Keeping*

Table 8 summarizes the primary state record-keeping requirements. Additional requirements may apply to employers operating in certain industries, including, for example, public works contractors.[183]

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Fair Employment Practices:	*If a discrimination complaint has been filed, the respondent-employer must keep:*	Until final disposition of the complaint.

[181] 29 C.F.R. § 4.6.

[182] 41 C.F.R. § 50-201.501.

[183] *See, e.g.*, MONT. CODE ANN. § 18-2-422; MONT. ADMIN. R. 24.17.301.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
Complaint of Discrimination	• all personnel records relating to the charging party and to all other employees holding similar positions to that held or sought by the complainant; and • application or test forms completed by unsuccessful applicants and all other candidates for the same position.[184]	
Fair Employment Practices: Personnel Records	*All employers must keep adequate personnel records, including:* • applications and other records related to hiring, promotion, demotion, transfer, layoff, or termination; • rates of pay or other terms of compensation; and • records relating to selection for training or apprenticeship.[185] *Separate records must also be kept and include:* • race of employees, by indicating the number of employees falling into various specified categories; this information should be acquired by visual survey rather than by direct inquiry; • number of males and females in each racial group and job category; and • age of each employee in each job category.[186] This data must be kept separately from the personnel file and be maintained as total numbers, rather than identifying any individuals.[187]	2 years from the date of the record or the personnel action involved, whichever is later.
Income Tax	*Employers must keep employment records for each employee. Such records must include, for each pay period:* • beginning and ending dates; • total wages in the period; and • the number and date of weeks in which there was at least one employee. *Such records must also include, for each employee:* • full name and Social Security number;	5 years from the due date of the return or from the date of payment, whichever is later.

[184] MONT. ADMIN. R. 24.8.107(3), 24.9.805(5).

[185] MONT. ADMIN. R. 24.8.107(2), 24.9.805(4).

[186] MONT. CODE ANN. § 49-2-102; MONT. ADMIN. R. 24.9.805(1).

[187] MONT. ADMIN. R. 24.9.805(3).

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**

	• wages for each period showing separately money wages, reasonable cash value of noncash remuneration, estimated or actual gratuities, and special payments of any kind;
	• date of hire, rehire, or return to work after temporary layoff;
	• date and cause of termination;
	• method of payment—
	  ▪ whether paid by salary, commissions, by the hour, piece basis, etc.;
	  ▪ if the employee is paid on a fixed daily basis, daily rate and schedule; and
	  ▪ whether the employee is paid on a piece-rate or other variable basis;
	• documents supporting employee expense reimbursements;
	• evidence of business ownership including partnership agreements and documents issued or acknowledged by the secretary of state; and
	• other records necessary for the administration of the unemployment insurance law including tax returns, minutes of meetings, loan documentation, disbursement records, etc.[188]	

Unemployment Compensation	*Employers must keep employment and payroll records, including, for each pay period:* • beginning and ending dates; • total wages in pay period; and • number and date of weeks in which there were one or more employees.[189] *Such records must also include, for each employee:* • full name and Social Security number; • wages for each pay period showing separately money wages payable including special payments, reasonable cash value of remuneration in a medium other than cash, estimated or actual amount of gratuities and special payments of any kind; • date of hire, rehire, or return to work after a temporary layoff;	5 years.

[188] MONT. ADMIN. R. 42.2.305, 42.17.203.

[189] MONT. CODE ANN. § 39-51-603; MONT. ADMIN. R. 24.11.2704.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• date employment was terminated by layoff, quit, discharge, or death; • the cause of any termination; • method of payment (*e.g.*, salary, hourly commission, piece rate, etc.); and • documents supporting employee expense reimbursements.[190] *Employers must also keep any records evidencing business ownership, including partnership agreements and documents issued or acknowledgements by the secretary of state.*[191]	

Wages, Hours & Payroll: Nonexempt Employees	*With respect to employees subject to the wage and hour (and overtime) law, employers must maintain records containing following information:*
	• name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number used in place of name on any time, work or payroll records;
	• home address with zip code;
	• date of birth if under 19, sex, and occupation;
	• time and day the work week begins and for employees employed under section 7(k) of the Act, the starting time and length of each employee's work period;
	• regular hourly rate of pay for any workweek in which overtime compensation is due;
	  ▪ explain basis of pay by indicating the monetary amount paid on a per hour, day, week, piece. Commission, sales or other basis; and
	  ▪ the amount and nature of each payment which is excluded from the regular rate.
	• hours worked each workday and total hours worked each work week;
	• total daily or weekly straight-time earnings exclusive of premium overtime compensation;
	• total premium pay for overtime hours; and
	• total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the
		3 years.

[190] MONT. CODE ANN. § 39-51-603; MONT. ADMIN. R. 24.11.2704.

[191] MONT. CODE ANN. § 39-51-603; MONT. ADMIN. R. 24.11.2704.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	dates, amounts and nature of the items which make up the total additions or deductions(total wages paid each period, date of payment, and pay period covered by payment. Other requirements apply to records of retroactive payment of wages and employees working under fixed schedules.[192]	
Wages, Hours & Payroll: Retroactive Payments	• record and preserve, as an entry on the pay records, the amount of such payment to each employee, the period covered by such payment, and the date of payment; • prepare a report of each such payment on a receipt form provided or authorized by the Wage and Hour Division and: (1) preserve a copy as part of the records; (2) deliver a copy to the employee; and (3) file the original, as evidence of payment by the employer and receipt by the employee, with Administrator or an authorized representative within 10 days after payment is made.[193]	3 years.
Wages, Hours & Payroll: Employees working on fixed schedules	• an employer may maintain records showing instead of hours worked each day and each workweek. the schedule of daily and weekly hours the employee normally works: ▪ in weeks an employee adheres to this schedule, indicate by checkmark, statement or other method that such hours were in fact actually worked; and in weeks in which more or less than the scheduled hours are worked, the exact number of hours worked each day and week.[194]	3 years.
Wages, Hours & Payroll: Supplemental Records	*Employers must also maintain the following supplementary basic employment and earning records:* • all basic time and earnings cards or sheets showing the daily starting and stopping time of individual employees or of separate work forces, or the amounts of work accomplished by individual employees on a daily, weekly, or pay period basis , (*e.g.*, units produced) when those amounts determine in whole or in part the employee's earnings;	3 years from date of last entry.

[192] MONT. ADMIN. R. 24.16.3019.

[193] MONT. ADMIN. R. 24.16.3019.

[194] MONT. ADMIN. R. 24.16.3019.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• wage rate tables. From their last effective dates, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight time earnings, wage or salary or overtime computation; • order, shipping and billing records. From the last date of entry, the originals or true copies of all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers which the employer retains in the usual course of business operations; • records of additions to or deductions from wages paid; and • records of individual employee accounts for total additions to or deductions from wages paid each pay period and all records used by the employer in determining the original cost, operating and maintenance cost, depreciation and interest charges if such costs and charges are involved in the additions to or deductions from wages. Additional items are required for: (1) employees subject to more than one minimum wage; and (2) apprentices, learners, students, and handicapped workers.[195] With respect to the above, employers must maintain and preserve records containing the same information and data required with other employees in the same occupations. Segregation or designation on payroll and use of identifying symbol. Employers must also segregate on pay records the names and required information and data with respect to those employed under Special Certificates. A symbol or letter before each name must indicate the person is a learner, apprentice, student-employee, messenger, student or worker with disabilities.	
Wages. Hours and Payroll: Employees paid for overtime on the basis of	• each hourly piece rate at which the employee is employed, basis on which wages are paid, and the amount and nature of each payment which is excluded from the regular rate;	3 years.

[195] MONT. ADMIN. R. 24.16.3019.

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
"applicable rates"	• the number of overtime hours worked in the workweek at each applicable hourly rate or the number of units of work performed in the workweek at each applicable piece rate during the overtime hours; • total weekly overtime compensation at each applicable rate which is over and above all straight-time earnings or wages earned during overtime worked; and • the date of the agreement or understanding to use this method of compensation and the period covered.	
Wages. Hours and Payroll: Employees paid for overtime at premium rates computed on a "basic" rate	• in addition to information required to be retained for employees subject to the minimum wage and over time requirements; • the hourly rates, piece rates, or commission rates applicable to each type of work performed by the employee; • the computation establishing the basic rate at which the employee is compensated for overtime hours; • the amount and nature of each payment which is excluded from the regular rate; • identity of representative period for computing the basic rate, the period during which the established basic rate is to be used computing overtime, information which establishes that there is no significant difference between pertinent terms, conditions and circumstances of employment in the period selected for the computation of the basic rate and those in the period for which the basic rate is used for overtime compensation, which could affect the representative character of the period from which the basic rate is derived; and • a copy of the written agreement or a memo summarizing the terms of and showing the date and period covered by the oral agreement to use this method of computation.[196]	3 years.
Wages. Hours and Payroll: Board, lodging, or other facilities	An employer who makes deductions from the wages of employees for "board, lodging, or other facilities" must maintain and preserve records substantiating the cost of furnishing each class of facility with some exceptions.	3 years.

[196] MONT. ADMIN. R. §24.16.3019

Table 8. State Record-Keeping Requirements		
Records	**Notes**	**Retention Requirement**
	• Itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost and must contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount accumulated depreciation on such assets. • If additions to or deductions from wages paid so affect the total cash wages due in any workweek as to result in the employee receiving less in cash than the applicable minimum hourly wage, or if the employee works in excess of the applicable maximum hours standard, and any additions to the wages are a part of wages or any deductions made are claimed as allowable deductions, the employer must maintain records showing on a workweek basis those additions to or deductions from wages.[197]	
Workers' Compensation	Books, records, and payrolls pertinent to the administration of the workers' compensation law must be open to inspection by the department.[198]	None specified.
Workplace Safety: Employee and Community Hazardous Chemical Act	*Montana law requires some employers to compile and maintain a workplace chemical list, containing:* • material safety data sheets (MSDS); • chemical and common name used for each hazardous chemical in the workplace; • for chemical mixtures, the chemical name of each hazardous constituent indicated on the MSDS; • chemical abstracts service registry number, if available from the MSDS; and • the work area where the chemical is normally stored or used.[199] Numerous exceptions apply to the statute and the record-keeping duties; for example, it does not apply to employers covered by the Fed-OSHA standards.[200]	None specified.

[197] MONT. ADMIN. R. §24.16.3019

[198] MONT. CODE ANN. § 39-71-304.

[199] MONT. CODE ANN. §§ 50-78-202, 50-78-203.

[200] MONT. CODE ANN. § 50-78-201 *et seq.*; *see also* MONT. CODE ANN. §§ 50-78-103, 50-78-104 (setting out exceptions).

3.1(c) *Personnel Files*

3.1(c)(i) *Federal Guidelines on Personnel Files*

Federal law does not address access to personnel files for private-sector employees.

3.1(c)(ii) *State Guidelines on Personnel Files*

Montana law does not address access to personnel files for private-sector employees.

3.2 Privacy Issues for Employees

3.2(a) *Background Screening of Current Employees*

3.2(a)(i) *Federal Guidelines on Background Screening of Current Employees*

For information on federal law related to background screening of current employees, see **1.3**.

3.2(a)(ii) *State Guidelines on Background Screening of Current Employees*

For information on state law related to background screening of current employees, see **1.3**.

3.2(b) *Drug & Alcohol Testing of Current Employees*

3.2(b)(i) *Federal Guidelines on Drug & Alcohol Testing of Current Employees*

For information on federal laws requiring drug testing of current employees, see **1.3(e)(i)**.

3.2(b)(ii) *State Guidelines on Drug & Alcohol Testing of Current Employees*

For information on the Montana Workforce Drug and Alcohol Testing Act, see **1.3(e)**.

3.2(c) *Marijuana Laws*

3.2(c)(i) *Federal Guidelines on Marijuana*

Under federal law, it is illegal to possess or use marijuana.[201]

3.2(c)(ii) *State Guidelines on Marijuana*

Montana has a recreational marijuana law.[202]

Under the recreational marijuana law, employers can discipline an employee for violation of a workplace drug policy or for working while intoxicated by marijuana, and can decline to hire, discharge, discipline, or otherwise take adverse employment action against an individual with respect to hire, tenure, terms,

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[201] 21 U.S.C. §§ 811-12, 841 *et seq*.

[202] MONT. CODE ANN. § 16-12-108. As of January 1, 2022, Montana's medical marijuana law was mostly repealed. That notwithstanding, some provisions involving medical marijuana remain. For example, disqualification from benefits for a discharge connected to a failure to pass, or refusal to take, a drug test in violation of an employer's written drug policy that complies with federal and state drug testing laws does not apply to a drug test for marijuana or marijuana products involving a registered medical marijuana cardholder. MONT. CODE ANN. § 39-51-2302(3). Additionally, the medical marijuana law does not prevent the imposition of a civil penalty or a disciplinary action by a professional licensing board or the department of labor and industry if a registered cardholder's use of marijuana impairs the cardholder's job-related performance. MONT. CODE ANN. § 16-12-515(4)(a).

conditions, or privileges of employment because of the individual's violation of a workplace drug policy or intoxication by marijuana while working. Employers need not permit or accommodate conduct otherwise allowed by the law in any workplace or on the employer's property, and can prohibit or otherwise regulate consumption, cultivation, distribution, processing, sale, or display of marijuana, marijuana-infused products, and marijuana paraphernalia on private property they own, lease, occupy, or manage. Additionally, the law does not permit conduct that endangers others or undertaking any task while under the influence of marijuana if doing so would constitute negligence or professional malpractice.

Employers can include in any contract a provision prohibiting the use of marijuana for a debilitating medical condition.[203] Also, the law does not permit a cause of action against an employer for discrimination or wrongful discharge.[204] Finally, most notably, under Montana's law prohibiting discrimination for using lawful products during nonworking hours law, a "lawful product" includes marijuana.[205] For more information, see **3.11(a)(iv)**.

3.2(d) *Data Security Breach*

3.2(d)(i) *Federal Data Security Breach Guidelines*

Federal law does not contain a data security breach notification statute. However, of interest to employers that provide identity theft protection services to individuals affected by a data security breach, whether voluntarily or as required by state law:

- An employer providing identity protection services to an employee whose personal information may have been compromised due to a data security breach is not required to include the value of the identity protection services in the employee's gross income and wages.
- An individual whose personal information may have been compromised in a data breach is not required to include in their gross income the value of the identity protection services.
- The value of the provided identity theft protection services is not required to be reported on an information return (such as Form W-2 or Form 1099-MISC) filed with respect to affected employees.[206]

The tax relief provisions above do not apply to:

- cash provided in lieu of identity protection services;
- identity protection services provided for reasons other than as a result of a data breach, such as identity protection services received in connection with an employee's compensation benefit package; or

[203] MONT. CODE ANN. § 16-12-108(5).

[204] MONT. CODE ANN. § 16-12-108(5).

[205] MONT. CODE ANN. § 39-2-313(1).

[206] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015), *available at* https://www.irs.gov/pub/irs-drop/a-15-22.pdf.

- proceeds received under an identity theft insurance policy.[207]

3.2(d)(ii) *State Data Security Breach Guidelines*

Any person or business that conducts business in Montana and that owns or licenses computerized data that includes personal information must disclose any breach of the data system security and notify any Montana resident whose unencrypted personal information was or is reasonably believed to have been acquired by an unauthorized person.[208] A *breach of the security of the data system* means the unauthorized acquisition of computerized data that materially compromises the security, confidentiality, or integrity of personal information maintained by the person or business and causes or is reasonably believed to cause loss or injury to a Montana resident.[209]

Covered Entities & Information. Any person or business that conducts business in Montana and that owns or licenses computerized data that includes personal information is considered a covered entity.[210] Under the statute, *personal information* includes an individual's first name or first initial and last name in combination with any one or more of the following data elements:

- Social Security number;
- driver's license number or Montana identification number, or tribal identification card number;
- 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;
- medical record information;
- taxpayer identification number; or
- an identity protection personal identification number issued by the Internal Revenue Service (IRS).[211]

Exceptions include data that is encrypted and information which is lawfully available publicly through federal, state, or local government records.

Content & Form of Notice. Notice may be in one of the following formats:

- written notice;
- electronic notice, if it is compliant with the federal e-sign act;
- telephonic notice; or
- substitute notice if the covered entity demonstrates that:
  - the cost of providing notice would exceed $250,000;

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[207] I.R.S. Announcement 2015-22, *Federal Tax Treatment of Identity Protection Services Provided to Data Breach Victims* (Aug. 14, 2015).

[208] MONT. CODE ANN. § 30-14-1704.

[209] MONT. CODE ANN. § 30-14-1704(4)(a).

[210] MONT. CODE ANN. § 30-14-1704(1).

[211] MONT. CODE ANN. § 30-14-1704(4)(b)(i).

- the affected class of persons to be notified exceeds 500,000; or
- the covered entity does not have sufficient contact information.[212]

Substitute notice must consist of the following:

- email notice when the covered entity has an electronic mail address for the subject persons and;
- conspicuous posting of the notice on the website of the covered entity if the covered entity maintains a website; or
- notification by statewide media.[213]

Exceptions include a covered entity that maintains and complies with a notification procedure as part of an information security policy for the treatment of personal information. The policy must afford the same or greater protection to the affected individuals as this statute.

Timing of Notice. Notice must be given without unreasonable delay**.** However, notification may be delayed if:

- A law enforcement agency indicates that notification will impede a criminal investigation and requests a delay.
- A covered entity needs time to determine the scope of the breach.
- A covered entity needs time to restore the reasonable integrity of the data system.[214]

Additional Notice Requirements. Any person or business that is required to issue a notification pursuant to this section 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. The notification 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, a single copy of the notification must be submitted that indicates the number of individuals in the state who received notification. Businesses that are licensees or insurance-support organizations that conduct business in Montana must also submit the notification to the state insurance commissioner.[215]

3.3 Minimum Wage & Overtime

3.3(a) *Federal Guidelines on Minimum Wage & Overtime*

The primary source of federal wage and hour regulation is the Fair Labor Standards Act (FLSA). The FLSA establishes minimum wage, overtime, and child labor standards for covered employers. The FLSA applies to businesses that have: (1) annual gross revenue exceeding $500,000; and (2) employees engaged in commerce or in the production of goods for commerce, or employees that handle, sell, or otherwise work on goods or material that have been moved in or produced for commerce. For more information on this topic, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

[212] MONT. CODE ANN. § 30-14-1704(5)(a).

[213] MONT. CODE ANN. § 30-14-1704(5)(b).

[214] MONT. CODE ANN. § 30-14-1704(1), (3).

[215] MONT. CODE ANN. § 30-14-1704(8).

As a general rule, federal wage and hour laws do not preempt state laws.[216] Thus, an employer must determine whether the FLSA or state law imposes a more stringent minimum wage, overtime, or child labor obligation and, if so, apply the more stringent of the two standards. If an employee is exempt from either federal or state law, but not both, then the employee must be paid for work in accordance with whichever law applies.

3.3(a)(i) *Federal Minimum Wage Obligations*

The current federal minimum wage is $7.25 per hour for most nonexempt employees.[217]

Tipped employees are paid differently. If an employee earns sufficient tips, an employer may take a maximum tip credit of up to $5.12 per hour. Therefore, the minimum cash wage that a tipped employee must be paid is $2.13 per hour. Note that if an employee does not make $5.12 in tips per hour, an employer must make up the difference between the wage actually made and the federal minimum wage of $7.25 per hour. An employer bears the burden of proving that it is not taking a tip credit larger than the amount of tips actually received by the employee.[218]

An employer cannot keep tips received by employees for any purpose, including allowing managers or supervisors to keep a portion of employees' tips, regardless of whether the employer takes a tip credit.[219]

3.3(a)(ii) *Federal Overtime Obligations*

Nonexempt employees must be paid one-and-a-half times their regular rate of pay for all hours worked over 40 in a workweek.[220] For more information on exemptions to the federal minimum wage and/or overtime obligations, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.3(b) *State Guidelines on Minimum Wage Obligations*

3.3(b)(i) *State Minimum Wage*

The minimum wage in Montana is $10.30 per hour for most nonexempt employees. State law requires payment of the state or federal minimum wage, whichever is greater (currently, Montana's rate is greater than the federal minimum wage rate). The minimum wage is adjusted every January 1 based on increases to the cost of living, *e.g.*, on January 1, 2025, it will increase to $10.55.[221]

3.3(b)(ii) *Tipped Employees*

Montana does not allow employers to take a tip credit from an employee's tips;[222] similarly, employers cannot use a service charge to make up any part of an employee's wages.[223]

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[216] 29 U.S.C. § 218(a).

[217] 29 U.S.C. § 206.

[218] 29 U.S.C. §§ 203, 206.

[219] 29 U.S.C. § 3(m)(2)(B).

[220] 29 U.S.C. § 207.

[221] MONT. CODE ANN. § 39-3-409.

[222] MONT. CODE ANN. § 39-3-409.

[223] MONT. ADMIN. R. 24.16.1508.

Employers can require tip pooling.[224] Employers may control an employee's tips only to distribute tips to the employee who received them or when the employer facilitates tip pooling by collecting and distributing tips to employees in a tip pool. A tip pooling arrangement may include employees involved in providing customer service or food preparation, including but not limited to servers, hosts, bussers, dishwashers, cooks, or other employees; however, an employer cannot participate in a tip pool or include exempt salaried supervisors or managers in a tip pool. Notwithstanding these restrictions, employers, supervisors, or managers can keep tips they receive directly from customers based on the service directly provided by them. The tip pooling statute does not impose a minimum or maximum contribution percentage on mandatory tip pools; however, employers cannot require employees to contribute to a tip pool more than the amount received in tips. An employer must notify its employees of any required tip pooling arrangement. Employers that facilitate tip pooling by collecting and redistributing employees' tips must fully distribute any tips the employer collects no later than the regular payday for the workweek in which the tips were collected. An employer that collects tips received by the employees to operate a mandatory tip pooling arrangement must maintain and preserve payroll or other records evidencing tips received and distributed pursuant to the tip pool.

A service charge must be distributed directly to the nonmanagement employee preparing or serving the food or beverage or to any other employee involved in related services, pursuant to a tip pool agreement.[225] Per regulations that pre-date 2021 statutory tip pooling amendments, a valid tip pool agreement may be created by management for the distribution of a service charge. The tip pool agreement is valid for the purpose of distribution of service charges so long as it distributes all service charge monies to nonmanagement employees.[226]

3.3(b)(iii) *Minimum Wage Exceptions & Rates Applicable to Specific Groups*

Montana's minimum wage provisions do not apply with respect to:

- students participating in a distributive education program established under an accredited educational agency;
- people employed in private homes whose duties consist of menial chores, such as babysitting, mowing lawns, and cleaning sidewalks;
- people employed directly by the head of a household to care for children dependent upon the head of the household;
- immediate members of the family of an employer or persons dependent upon an employer for half or more of their support in the customary sense of being a dependent;
- people who are not regular employees of a nonprofit organization and who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;
- people with disabilities engaged in work that is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they are unable to engage in competitive employment;

[224] MONT. CODE ANN. § 39-3-201(6)(a).

[225] MONT. CODE ANN. § 39-3-402.

[226] MONT. ADMIN. R. 24.16.1508.

- apprentices or learners, who may be exempted by the state labor commissioner for a period not to exceed 30 days of their employment;
- learners under the age of 18 who are employed as farm workers, who may receive a subminimum wage of not less than 50% of the minimum wage rate for the first 180 days of employment;
- retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;
- an individual employed in a *bona fide* executive, administrative, or professional capacity as defined under Montana law, a computer systems analyst, computer programmer, software engineer, network administrator, or other similarly skilled computer employee who earns not less than $27.63 an hour as defined under the FLSA, or an individual employed in an outside sales capacity as defined under the FLSA;
- an individual employed by the United States;
- resident managers employed in lodging establishments or assisted living facilities who, under the terms of their employment, live in the establishment or facility;
- a direct seller as defined under federal law;
- a participant in a public assistance program placed into a work setting for the purpose of developing employment skills with either a public or private employer;
- a person licensed as a foster care provider who is providing care without wage compensation to no more than six foster children in the provider's own residence;
- an employee employed in domestic service employment to provide companionship services or respite care for individuals who, because of age or infirmity, are unable to care for themselves as defined under the FLSA, when the person providing the service is employed directly by a family member or an individual who is a legal guardian; or
- an employee of a seasonal nonprofit establishment that is an organized camp or religious or educational conference center.[227]

3.3(c) *State Guidelines on Overtime Obligations*

Montana employees must be paid one-and-one-half times their regular rate for all hours worked over 40 in a week.[228]

3.3(d) *State Guidelines on Overtime Exemptions*

Montana excludes numerous employees from its overtime requirements. In addition to the types of workers listed in **3.3(b)(iii)**, the overtime requirements do not apply to:

- an employee who falls under the federal Motor Carrier Act;
- an employee of an employer subject the federal Interstate Commerce Act;

[227] MONT. CODE ANN. § 39-3-406(1).

[228] MONT. CODE ANN. § 39-3-405.

- an individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state;
- a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily engaged in the business of selling the vehicles or implements to ultimate purchasers;
- a salesperson primarily engaged in selling trailers, boats, or aircraft if the salesperson is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;
- a salesperson paid on a commission or contract basis who is primarily engaged in selling advertising for a radio or television station employer;
- an employee employed as a driver or driver's helper making local deliveries who is compensated for the employment on the basis of trip rates or other delivery payment plan subject to the state labor commissioner's approval;
- an employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways that are not owned or operated for profit, that are not operated on a sharecrop basis, and that are used exclusively for supply and storing of water for agricultural purposes;
- an employee employed in agriculture by a farmer, notwithstanding other employment of the employee in connection with livestock auction operations in which the farmer is engaged as an adjunct to the raising of livestock, either alone or in conjunction with other farmers, if the employee is:
  - primarily employed during a workweek in agriculture by a farmer; and
  - paid for employment in connection with the livestock auction operations at a wage rate not less than the effective state minimum wage rate;
- an employee of an establishment commonly recognized as a country elevator, including an establishment that sells products and services used in the operation of a farm if no more than five employees are employed by the establishment;
- a driver employed by an employer engaged in the business of operating taxicabs;
- an employee who is employed with the employee's spouse by a nonprofit educational institution to serve as the parents of children who are orphans or one of whose natural parents is deceased or who are enrolled in the institution and reside in residential facilities of the institution so long as the children are in residence at the institution and so long as the employee and the employee's spouse reside in the facilities and receive, without cost, board and lodging from the institution and are together compensated, on a cash basis, at an annual rate of not less than $10,000;
- an employee employed in planting or tending trees; cruising, surveying, or felling timber; or transporting logs or other forestry products to a mill, processing plant, railroad, or other transportation terminal if the number of employees employed by the employer in the forestry or lumbering operations does not exceed eight;

- an employee of a sheriff's office who is working under an established work period in lieu of a workweek;
- an employee of a municipal or county government who is working under a work period that does not exceed 40 hours in a seven-day period established through a collective bargaining agreement;
- an employee of a hospital or other establishment primarily engaged in the care of the sick, disabled, aged, or mentally ill or disordered who is working under a work period not exceeding 80 hours in a 14-day period established through either a collective bargaining agreement or by mutual agreement of the employer and employee;
- a firefighter who is working under a work period established in a collective bargaining agreement entered into between a public employer and a firefighters' organization or its exclusive representative;
- an officer or other employee of a police department in a city of the first or second class who is working under a work period established by the chief of police;
- an employee of a department of public safety working under a work period established by the department pursuant to state law;
- an employee of a retail establishment, if the employee's regular rate of pay exceeds one and one-half times the minimum hourly rate applicable under the FLSA, and if more than half of the employee's compensation for a period of not less than one month is derived from commissions on goods and services;
- a person employed as a guide, cook, camp tender, or livestock handler by a licensed outfitter;
- a radio announcer, news editor, or chief engineer in a second- or third-class city or a town;
- an employee of the consolidated legislative branch of the state;
- an employee of the state or its political subdivisions employed, at the employee's option, on an occasional or sporadic basis in a capacity other than the employee's regular occupation; or
- an employee of an air carrier subject to the federal Railway Labor Act, whose hours worked in excess of 40 hours in a workweek were not required by the air carrier but were arranged through a voluntary agreement among employees to trade scheduled work hours.[229]

Before turning to some of the overtime exemptions under Montana law, it is important to reiterate that federal wage and hour laws do not preempt state laws[230] and that the law most beneficial to the employee will apply. Therefore, even if an employee meets one of the exemptions discussed below under state law, if the employee does not meet the requirements of the federal exemption (or vice versa), including the salary thresholds, then the employee will not qualify as exempt.

[229] MONT. CODE ANN. § 39-3-406(2).

[230] 29 U.S.C. § 218(a).

3.3(d)(i) *Executive, Administrative, Professional & Outside Sales Exemptions*

Montana incorporates the federal regulations concerning the executive, administrative, professional, and outside sales exemptions as they existed on October 27, 2023.[231]

3.3(d)(ii) *Computer Employee Exemption*

A computer systems analyst, computer programmer, software engineer, network administrator, or other similarly skilled computer employee who earns not less than $27.63 an hour pursuant to the federal FLSA is exempt from overtime under Montana law.[232]

3.3(d)(iii) *Commissioned Sales Exemption*

Montana's overtime provisions do not apply to an employee of a retail establishment if:

- the employee's regular rate of pay exceeds 1.5 times the federal minimum wage; and
- more than half the employee's compensation for a period of not less than one month is derived from commissions on goods and services.[233]

3.4 Meal & Rest Period Requirements

3.4(a) *Federal Meal & Rest Period Guidelines*

3.4(a)(i) *Federal Meal & Rest Periods for Adults*

Federal law contains no generally applicable meal period requirements for adults. Under the FLSA, *bona fide* meal periods (which do not include coffee breaks or time for snacks and which ordinarily last 30 minutes or more) are not considered "hours worked" and can be unpaid.[234] Employees must be completely relieved from duty for the purpose of eating regular meals. Employees are *not* relieved if they are required to perform any duties—active or inactive—while eating. It is not necessary that employees be permitted to leave the premises if they are otherwise completely freed from duties during meal periods.

Federal law contains no generally applicable rest period requirements for adults. Under the FLSA, rest periods of short duration, running from five to 20 minutes, must be counted as "hours worked" and must be paid.[235]

3.4(a)(ii) *Federal Meal & Rest Periods for Minors*

The FLSA does not include any generally applicable meal and rest period requirements for minors. The principles described above as to what constitutes "hours worked" for meal and rest periods applies to minors as well as to adults.

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231 MONT. CODE ANN. § 39-3-406; MONT. ADMIN. R. 24.16.3007.

232 MONT. CODE ANN. § 39-3-406.

233 MONT. CODE ANN. § 39-3-406.

234 29 C.F.R. § 785.19.

235 29 C.F.R. § 785.18.

3.4(a)(iii) *Lactation Accommodation Under Federal Law*

The Providing Urgent Maternal Protections for Nursing Mothers Act ("PUMP Act"), which expands the FLSA's lactation accommodation provisions, applies to most employers.[236] Under the FLSA, an employer must provide a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth, each time the employee needs to express milk. The employer is not required to compensate an employee receiving reasonable break time for any time spent during the workday for the purpose of expressing milk unless otherwise required by federal, state, or local law. Under the PUMP Act, break time for expressing milk is considered hours worked if the employee is not completely relieved from duty during the entirety of the break.[237] An employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.[238] Exemptions apply for smaller employers and air carriers.[239]

The Pregnant Workers Fairness Act (PWFA), enacted in 2022, also impacts an employer's lactation accommodation obligations. The PWFA requires employers of 15 or more employees to make reasonable accommodations for a qualified employee's known limitations related to pregnancy, childbirth, or related medical conditions.[240] Lactation is considered a related medical condition.[241] Reasonable accommodation related to lactation includes, but is not limited to breaks, space for lactation, and accommodations related to pumping and nursing during work hours.[242] For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.4(b) *State Meal & Rest Period Guidelines*

3.4(b)(i) *State Meal & Rest Periods for Adults*

There are no generally applicable meal or rest period requirements for adults in Montana. The state labor department contends online that this is a benefit employers may choose to provide, but if a break is offered, break time is considered paid time. If the employer provides a meal period that is half an hour or longer and the employee is completely relieved of duty, however, that is not considered paid time.[243]State Meal & Rest Periods for Minors

There are no independent meal or rest period requirements for minor employees in Montana—the adult standards apply.

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[236] 29 U.S.C. § 218d.

[237] 29 U.S.C. § 218d(b)(2).

[238] 29 U.S.C. § 218d(a).

[239] 29 U.S.C. § 218d(c), (d).

[240] 42 U.S.C. § 2000gg–1.

[241] 29 C.F.R. § 1636.3.

[242] 29 C.F.R. § 1636.3.

[243] Montana Dep't of Lab., *Wage and Hour Frequently Asked Questions*, available at: https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq.

3.4(b)(ii) *Lactation Accommodation Under State Law*

An individual has a right to breast feed their child in public or any place where the individual is permitted to be.[244] Although the law does not specifically mention employers, it can be construed to include places of employment.[245]

3.5 Working Hours & Compensable Activities

3.5(a) *Federal Guidelines on Working Hours & Compensable Activities*

In contrast to some state laws that provide for mandatory days of rest, the FLSA does not limit the hours or days an employee can work and requires only that an employee be compensated for "all hours" worked in a workweek. Ironically, the FLSA does not define what constitutes hours of work.[246] Therefore, courts and agency regulations have developed a body of law looking at whether an activity—such as on-call, training, or travel time—is or is not "work." In addition, the Portal-to-Portal Act of 1947 excluded certain preliminary and postliminary activities from "work time."[247]

As a general rule, employee work time is compensable if expended for the employer's benefit, if controlled by the employer, or if allowed by the employer. All time spent in an employee's principal duties and all time spent in essential ancillary activities must be counted as work time. An employee's *principal duties* include an employee's productive tasks. However, the phrase is expansive enough to encompass not only those tasks an employee is employed to perform, but also tasks that are an "integral and indispensable" part of the principal activities. For more information on this topic, including information on whether time spent traveling, changing clothes, undergoing security screenings, training, waiting or on-call time, and sleep time will constitute hours worked under the FLSA, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.5(b) *State Guidelines on Working Hours & Compensable Activities*

There are a number of issues considered when determining whether activities constitute work. This publication looks more closely at pay requirements for reporting time, on-call time, and travel time. Montana law addresses the compensability of all three.

Reporting Time. There is no reporting time pay requirement in Montana. Employees are only required to be paid for actual time worked.[248]

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[244] MONT. CODE ANN. § 50-19-501.

[245] *See* MONT. CODE ANN. § 50-19-501.

[246] The FLSA states only that to employ someone is to "suffer or permit" the individual to work. 29 U.S.C. § 203(g).

[247] *See, e.g.*, *Integrity Staffing Solutions, Inc. v. Busk*, 135 S. Ct. 513, 519 (2014) (in determining whether certain preliminary and postliminary activities are compensable work hours, the question is not whether an employer requires an activity (or whether the activity benefits the employer), but rather whether the activity "is tied to the productive work that the employee is employed to perform").

[248] Montana Dep't of Labor & Indus., *Frequently Asked Questions*, *available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq. Montana incorporates by reference the federal regulation on this matter, 29 C.F.R. § 778.220. Federal regulations recognize that employers and employees may enter into agreements guaranteeing that an employee be paid a specified number of hours' pay at an applicable straight time or overtime rate on "infrequent and sporadic occasions" when an employee arrives at work at his or her scheduled time but is not provided the expected amount of work. Only actual hours worked under this agreement are credited as straight time or overtime pay when calculating overtime. "Show-up" or "reporting time"

On-Call Time. If employees are required to remain on-call on the employer's premises or so close to the premises that they cannot use the time effectively for their own purposes, the on-call time is compensable. However, if employees are not required to remain on the employer's premises, but are merely required to leave word at their home or with company officials where they may be reached, the on-call time is not compensable.[249]

Travel Time. Normal travel between home and work before and after the regular workday that is a normal part of employment is not compensable. This is true whether the employee works at a fixed location or at different jobsites.[250] Travel that is part of an employee's principal work activities, however, such as travel from jobsite to jobsite during the workday, is compensable. Where an employee is required to report to a specified meeting place to receive instructions or pick up equipment before traveling to a worksite, travel from the meeting place to the worksite is compensable, regardless of contract, custom or practice. However, travel home from the last jobsite is not compensable.[251]

If an employee regularly works in one city but must travel for a special one-day assignment to another, required travel time to the new location is compensable (except that meal periods are unpaid). Time spent commuting from the employee's home to the departure point (*e.g.*, train station) for the special travel is not compensable. Travel that keeps an employee away from home overnight is travel away from home, and is clearly worktime when it cuts across the employee's work day. The employee is simply substituting travel for other duties. The time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. Thus, if an employee regularly works from 9:00 A.M. to 5:00 P.M. from Monday through Friday, the travel time during these hours is worktime on Saturday and Sunday as well as on other days. Regular meal time is not counted as hours worked.[252]

If employees are offered public transportation but request permission to drive their own car, an employer may compensate either the time spent driving the car or the time the employees would have used on public transportation.[253]

Travel to an employee's place of business and back home outside of an employee's regular work hours is compensable if an employer requires such travel in an emergency call. Travel is also compensable if the employee is called out to travel a substantial distance to perform an emergency assignment for a customer.[254]

Time spent on work an employee is required to perform while traveling is always compensable. An employee who drives a truck, bus, automobile, boat or airplane or an employee who is required to ride as

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pay for hours not worked is excluded from an employee's regular rate when calculating overtime. MONT. ADMIN. R. 24.16.3016.

[249] MONT. ADMIN. R. 24.16.3010

[250] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses*, *available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/travel-time.

[251] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses*.

[252] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses.*

[253] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses.*

[254] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses.*

an assistant or helper, is working while riding, except during bona fide meal periods or when the employee is permitted to sleep in adequate facilities furnished by the employer.[255]

3.6 Child Labor

3.6(a) *Federal Guidelines on Child Labor*

The FLSA limits the tasks minors, defined as persons under 18 years of age, can perform and the hours they can work. Occupational limits placed on minors vary depending on the age of the minor and whether the work is in an agricultural or nonagricultural occupation. There are exceptions to the list of prohibited activities for apprentices and student-learners, or if an individual is enrolled in and employed pursuant to approved school-supervised and school-administered work experience and career exploration programs.[256] Additional latitude is also granted where minors are employed by their parents.

Considerable penalties can be imposed for violation of the child labor requirements, and goods made in violation of the child labor provisions may be seized without compensation to the employer. Employers may protect themselves from unintentional violations of child labor provisions by maintaining an employment or age certificate indicating an acceptable age for the occupation and hours worked.[257] For more information on the FLSA's child labor restrictions, see LITTLER ON FEDERAL WAGE & HOUR OBLIGATIONS.

3.6(b) *State Guidelines on Child Labor*

Like federal law, Montana's Child Labor Standards Act restricts the employment of minors under age 18 by age and by the type of job.

3.6(b)(i) *State Restrictions on Type of Employment for Minors*

General Restrictions. Table 9 summarizes the state restrictions on type of employment by age. All of the restrictions noted below do not apply to: minors under age18 that have received a high school diploma or a passing score on the general education development examination; minors age 16 or older that are enrolled in a registered state or federal apprenticeship program; or to minors employed by their parent(s) or legal guardian; or to minors employed as models or legislative pages. Additionally, exemptions exist for minors age 14 or 15 who are student learners in certain agricultural positions, and to minors age 16 or 17 who are student learners or student-employees.[258]

Table 9. State Restrictions on Type of Employment by Age

Age Range	Restrictions
Ages 16 & 17	*In Montana, minors age 16 and 17 cannot work in or in connection with:* • manufacturing or storing explosives; • logging; • saw, lath, and shingle mills; • operation of power-driven machinery;

[255] MONT. ADMIN. R. 24.16.3010; Montana Dep't of Labor & Indus., *Travel Time and General Travel Expenses.*

[256] 29 C.F.R. §§ 570.36, 570.50.

[257] 29 C.F.R. § 570.6.

[258] MONT. CODE ANN. §§ 41-2-103, 41-2-104, 41-2-109, and 41-2-110.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	• occupations exposing minors to radioactive substances or ionizing radiation; • operation of freight elevators or other power-hoisting apparatus; • mining (includes coal mining operations); • meat slaughtering, packing, processing, or rendering; • brick, tile or similar product manufacturing; • operation of circular or band saws, guillotine shears; • wrecking or demolition; • excavation or roofing; or • riding outside a motor vehicle to assist in transporting or delivering goods.[259]
Ages 14 & 15	*In Montana, minors age 14 and 15 cannot work in or in connection with:* • manufacturing and processing; • workrooms where goods are manufactured, mined, or processed; • the operation of hoisting apparatus; • transporting persons or property by rail, highway, air, water, pipeline, or other means; • warehousing or storage; • communication and public utilities; • construction and repair; or • occupations in a retail, food service, or gasoline establishment, including: ▪ work in boiler or engine rooms; ▪ work in connection with the maintenance or the repair of an establishment, machine, or equipment; ▪ outside window washing that involves working from windowsills and all work requiring the use of ladders, scaffolds, or their substitutes at a height of more than 20 feet; ▪ operating, assembling, adjusting, cleaning, oiling, or repairing power-driven food slicers and grinders, food choppers and cutters, or bakery-type mixers; ▪ work in freezers and meat coolers and all work preparing meat for sale (does not include except wrapping, scaling, labeling, weighing, pricing, and stacking when performed in other areas); ▪ loading or unloading goods to and from a truck, railroad car, or conveyor; or ▪ warehouse occupations (does not include office or clerical work).[260]

[259] MONT. CODE ANN. §§ 41-2-107, 41-2-110.

[260] MONT. CODE ANN. § 41-2-106.

Table 9. State Restrictions on Type of Employment by Age	
Age Range	**Restrictions**
	In Montana, minors age 14 or 15 can be employed outside school hours in the following occupations in retail, food service, and gasoline service establishments: • office and clerical work, including the operation of an office machine; • cashiering, selling, modeling, art work, work in an advertising department, window trimming, and comparative shopping; • price marking and tagging by hand or by machine, assembling orders, packing, and shelving; • bagging and carrying out a customer's order; • errand and delivery work by foot, bicycle, or public transportation; • clean-up work, including the use of a vacuum cleaner and a floor waxer, and grounds maintenance (does not include the use of a power-driven mower or cutter); • kitchen work and other work involved in preparing and serving food and beverages, including the operation of machines and devices used to perform work, which may include but is not limited to a dishwasher, toaster, dumbwaiter, popcorn popper, milkshake blender, and coffee grinder; or • work in connection with cars and trucks if confined to dispensing gasoline and oil, courtesy service, car cleaning, washing, and polishing. Additionally, minors age 14 and 15 can be employed in sales and delivery of newspapers and magazines.[261]
Under Age 14	In Montana, minors under age 14 cannot be employed in any occupation, with limited exceptions.[262]

Restrictions on Selling or Serving Alcohol. In Montana, individuals under age 18 cannot work as a bartender, waiter, or waitress if their duty is to serve customers alcohol.[263]

3.6(b)(ii) *State Limits on Hours of Work for Minors*

In Montana, minors age 14 and 15 cannot work:

- more than three hours per day on a school day;
- more than eight hours per day on a nonschool day;
- more than 18 hours a week in a school week;
- more than 40 hours per week in a nonschool week; or

[261] MONT. CODE ANN. § 41-2-108.

[262] MONT. CODE ANN. §§ 41-2-104, 41-2-105.

[263] MONT. CODE ANN. § 39-2-306.

- between 7:00 P.M. and 7:00 A.M., except that minors may work until 9:00 P.M. outside of the school year.

However, minors age 14 and 15 that are enrolled in an approved school-administered work experience or exploration program may be employed up to 23 hours per week when the program is in session. Moreover, work can be performed during school hours.[264]

3.6(b)(iii) *State Child Labor Exceptions*

Montana's child labor provisions do not apply to a minor who is employed:

- in an agricultural occupation not otherwise prohibited and who has received written consent from the minor's parents or guardian who works on a farm or ranch where the parent or guardian is also employed;
- in domestic service or an agricultural pursuit performed outside school hours in connection with a home or a farm owned or operated by the minor's parent or guardian;
- by the minor's parent or guardian;
- during periods of school vacations on a campsite of a nonprofit corporation engaged in citizenship training and character building;
- as an actor, model, or performer;
- outside school hours by a homeowner in casual work usual to the home of the homeowner and not in connection with the homeowner's business, trade, or profession;
- by the legislature as a legislative aide or page;
- in the distribution or sale of or in the collection for newspapers, periodicals, or circulars; or
- as an official or referee for a nonprofit athletic organization, except that a minor who is under the age of 14 may not officiate at adult events or activities.[265]

The restrictions on certain occupations for 16 and 17 year olds as set forth in Table 9 do not apply to apprentices or student-learners, under certain conditions.[266]

3.6(b)(iv) *State Work Permit or Waiver Requirements*

Montana does not have a work permit or waiver requirement.

3.6(b)(v) *State Enforcement, Remedies & Penalties*

The Montana Department of Labor and Industry enforces the Child Labor Standards Act. The department may enter and inspect an employer's premises and file a complaint against an employer that violates the provisions of the Act.[267] An employer that violates any of the provisions is guilty of a misdemeanor punishable by imprisonment not to exceed six months in the county jail or a fine not to exceed $500, or both. Each day during which a violation of this part continues constitutes a separate offense, and the

[264] MONT. CODE ANN. § 41-2-115.

[265] MONT. CODE ANN. § 41-2-104.

[266] MONT. CODE ANN. §§ 41-2-107, 41-2-110.

[267] MONT. CODE ANN. § 41-2-116.

employment of a minor in violation of the Act constitutes, with respect to each minor employed, a separate offense.[268]

3.7 Wage Payment Issues

3.7(a) *Federal Guidelines on Wage Payment*

There is no federal wage payment law. The FLSA covers minimum wage and overtime requirements, but would not generally be considered a "wage payment" law as the term is used in state law to define when and how wages must be paid.

3.7(a)(i) *Form of Payment Under Federal Law*

Authorized Instruments. Wages may be paid by cash, check, or facilities (*e.g.*, board or lodging).[269]

Direct Deposit. Neither the FLSA, nor its implementing regulations, address direct deposit of employee wages. The U.S. Department of Labor (DOL) has briefly considered the permissibility of direct deposit by stating:

> The payment of wages through direct deposit into an employee's bank account is an acceptable method of payment, provided employees have the option of receiving payment by cash or check directly from the employer. As an alternative, the employer may make arrangements for employees to cash a check drawn against the employer's payroll deposit account, if it is at a place convenient to their employment and without charge to them.[270]

According to the Consumer Financial Protection Bureau (CFPB), an employer may require direct deposit of wages by electronic means if the employee is allowed to choose the institution that will receive the direct deposit. Alternatively, an employer may give employees the choice of having their wages deposited at a particular institution (designated by the employer) or receiving their wages by another means, such as by check or cash.[271]

Payroll Debit Card. Employers may pay employees using payroll card accounts, so long as employees have the choice of receiving their wages by at least one other means.[272] The "prepaid rule" regulation defines a *payroll card account* as an account that is directly or indirectly established through an employer and to which electronic fund transfers of the consumer's wages, salary, or other employee compensation such

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[268] MONT. CODE ANN. § 46-18-212.

[269] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf; *see also* 29 C.F.R. § 531.32 (description of "other facilities").

[270] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c00.

[271] Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013), *available at* http://files.consumerfinance.gov/f/201309_cfpb_payroll-card-bulletin.pdf.

[272] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *CFPB Bulletin 2013-10: Payroll Card Accounts (Regulation E)* (Sept. 12, 2013) and Consumer Fin. Prot. Bureau, *Ask CFPB: Prepaid Cards, If my employer offers me a payroll card, do I have to accept it?* (Sept. 4, 2020), *available at* https://www.consumerfinance.gov/ask-cfpb/if-my-employer-offers-me-a-payroll-card-do-i-have-to-accept-it-en-407/.

as commissions are made on a recurring basis, whether the account is operated or managed by the employer, a third-party payroll processor, a depository institution, or any other person.[273]

Employers that use payroll card accounts must comply with several requirements set forth in the prepaid rule. Employers must give employees certain disclosures before the employees choose to be paid via a payroll card account, including a short-form disclosure, a long-form disclosure, and other information that must be disclosed in close proximity to the short-form disclosure. Employees must receive the short-form disclosure and either receive or have access to the long-form disclosure before the account is activated. All disclosures must be provided in writing. Importantly, within the short-form disclosure, employers must inform employees in writing and before the card is activated that they need not receive wages by payroll card. This disclosure must be very specific. It must provide a clear fee disclosure and include the following statement or an equivalent: "You do not have to accept this payroll card. Ask your employer about other ways to receive your wages." Alternatively, a financial institution or employer may provide a statement that the consumer has several options to receive wages or salary, followed by a list of the options available to the consumer, and directing the consumer to tell the employer which option the customer chooses using the following language or similar: "You have several options to receive your wages: [list of options]; or this payroll card. Tell your employer which option you choose." This statement must be located above the information about fees. A short-form disclosure covering a payroll card account also must contain a statement regarding state-required information or other fee discounts or waivers.[274] As part of the disclosures, employees must: (1) receive a statement of pay card fees; (2) have ready access to a statement of all fees and related information; and (3) receive periodic statements of recent account activity or free and easy access to this information online. Under the prepaid rule, employees have limited responsibility for unauthorized charges or other unauthorized access, provided they have registered their payroll card accounts.[275]

The CFPB provides numerous online resources regarding prepaid cards, including Frequently Asked Questions. Employers that use or plan to use payroll card accounts should consult these resources, in addition to the prepaid card regulation, and seek knowledgeable counsel.[276]

3.7(a)(ii) *Frequency of Payment Under Federal Law*

Federal law does not specify the timing of wage payment and does not prohibit payment on a semi-monthly or monthly basis. However, all wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned. FLSA regulations state that if an employer cannot calculate how much it owes an employee in overtime by payday, it must pay that employee overtime as soon as possible and no later than the next payday.[277]

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[273] 12 C.F.R. § 1005.2(b)(3)(i)(A).

[274] 12 C.F.R. § 1005.18; *see also* Consumer Fin. Prot. Bureau, *Guide to the Short Form Disclosure* (Mar. 2018), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_guide-to-short-form-disclosure.pdf; *Prepaid Disclosures* (Apr. 1, 2019), *available at* https://files.consumerfinance.gov/f/documents/102016_cfpb_PrepaidDisclosures.pdf.

[275] 12 C.F.R. § 1005.18.

[276] *See* Consumer Fin. Prot. Bureau, *Prepaid Cards*, *available at* https://www.consumerfinance.gov/ask-cfpb/category-prepaid-cards/ and *Prepaid Rule Small Entity Compliance Guide* (Apr. 2019), *available at* https://files.consumerfinance.gov/f/documents/cfpb_prepaid_small-entity-compliance-guide.pdf.

[277] 29 C.F.R. § 778.106; *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30b04, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

3.7(a)(iii) *Final Payment Under Federal Law*

Federal law does not address when final wages must be paid to discharged employees or to employees who voluntarily quit. However, as noted in **3.7(a)(ii)**, wages that are required by the FLSA are generally considered to be due on the payday for the pay period in which the wages were earned.

3.7(a)(iv) *Notification of Wage Payments & Wage Records Under Federal Law*

Federal law does not generally require employers to provide employees wage statements when wages are paid. However, federal law does require employers to furnish pay stubs to certain unique classifications of employees, including migrant farm workers.

Federal law does not address whether electronic delivery of earnings statements is permissible.

3.7(a)(v) *Changing Regular Paydays or Pay Rate Under Federal Law*

There are no general notice requirements under federal law should an employer wish to change an employee's payday or wage rate. However, it is recommended that employees receive advance written notice before a change in regular paydays or pay rate occurs.

3.7(a)(vi) *Paying for Expenses Under Federal Law*

The FLSA does not have a general expense reimbursement obligation. Nonetheless, it prohibits employers from circumventing minimum wage and overtime laws by passing onto employees the cost of items that are primarily for the benefit or convenience of the employer, if doing so reduces an employee's wages below the highest applicable minimum wage rate or cuts into overtime premium pay.[278] Because the FLSA requires an employer to pay minimum wage and overtime premiums "free and clear," the employer must reimburse employees for expenses that are primarily for the benefit of the employer if those expenses would reduce the applicable required minimum wage or overtime compensation.[279] Accordingly, among other items, an employer may be required to reimburse an employee for expenses related to work uniforms,[280] tools and equipment,[281] and business transportation and travel.[282] Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employer, the reimbursement cannot be included in the employee's regular rate.[283]

3.7(a)(vii) *Wage Deductions Under Federal Law*

Permissible Deductions. Under the FLSA, an employer can deduct:

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[278] *See* 29 U.S.C. §§ 203(m), 206; 29 C.F.R. §§ 531.2, 531.32(a), and 531.36(a); U.S. Dep't of Labor, Wage & Hour Div., *Fact Sheet #16: Deductions From Wages for Uniforms and Other Facilities Under the Fair Labor Standards Act (FLSA)* (rev. July 2009).

[279] 29 C.F.R. §§ 531.35, 531.36, and 531.37.

[280] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c12.

[281] 29 U.S.C. § 203(m); 29 C.F.R. §§ 531.3, 531.35; U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA 2001-7 (Feb. 16, 2001).

[282] 29 C.F.R. § 531.32; U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c04.

[283] 29 C.F.R. § 778.217.

- state and federal taxes, levies, and assessments (*e.g.*, income, Social Security, unemployment) from wages;[284]
- amounts ordered by a court to pay an employee's creditor, trustee, or other third party, under garnishment, wage attachment, trustee process, or bankruptcy proceedings (the employer or anyone acting on its behalf cannot profit from the transaction);[285]
- amounts as directed by an employee's voluntary assignment or order to pay an employee's creditor, donee, or other third party (the employer or agent cannot directly or indirectly profit or benefit from the transaction);[286]
- with an employee's authorization for:
  - the purchase of U.S. savings stamps or U.S. savings bonds;
  - union dues paid pursuant to a valid and lawful collective bargaining agreement;
  - payments to the employee's store accounts with merchants wholly independent of the employer;
  - insurance premiums, if paid to independent insurance companies where the employer is under no obligation to supply the insurance and derives, directly or indirectly, no benefit or profit from it; or
  - voluntary contributions to churches and charitable, fraternal, athletic, and social organizations, or societies from which the employer receives no profit or benefit, directly or indirectly;[287]
- the reasonable cost of providing employees board, lodging, or other facilities by including this cost as wages, if the employer customarily furnishes these facilities to employees;[288] or
- amounts for premiums the employer paid while maintaining benefits coverage for an employee during a leave of absence under the Family and Medical Leave Act if the employee fails to return from leave after leave is exhausted or expires, if the deductions do not otherwise violate applicable federal or state wage payment or other laws.[289]

Additionally, while the FLSA contains no express provisions concerning deductions relating to overpayments made to an employee, loans and advances, or negative vacation balance, informal guidance from the DOL suggests such deductions may nonetheless be permissible. While this informal guidance may be interpreted to permit a deduction for loans to employees, employers should consult with counsel before deducting from an employee's wages. An employer can deduct the principal of a loan or wage advance, even if the deduction cuts into the minimum wage or overtime owed. However, deductions for

[284] 29 C.F.R. § 531.38.

[285] 29 C.F.R. § 531.39. The amount subject to withholding is governed by the federal Consumer Credit Protection Act. 15 U.S.C. §§ 1671 *et seq*.

[286] 29 C.F.R. § 531.40.

[287] 29 C.F.R. § 531.40.

[288] 29 U.S.C. § 203. However, the cost cannot be treated as wages if prohibited under a collective bargaining agreement.

[289] 29 C.F.R. § 825.213.

interest or administrative costs on the loan or advance are illegal to the extent that they cut into the minimum wage or overtime pay. Loans or advances must be verified.[290]

An employer may also be able to deduct for wage overpayments even if the deduction cuts into the employee's FLSA minimum wage or overtime pay. The deduction can be made in the next pay period or several pay periods later. An employer cannot, however, charge an administrative fee or charge interest that brings the payment below the minimum wage.[291] Finally, if an employee is granted vacation pay before it accrues, with the understanding it constitutes an advance of pay, and the employee quits or is fired before the vacation is accrued, an employer can recoup the advanced vacation pay, even if this cuts into the minimum wage or overtime owed an employee.[292]

Deductions During Non-Overtime v. Overtime Workweeks. Whether an employee receives overtime during a given workweek affects an employer's ability to take deductions from the employee's wages. During non-overtime workweeks, an employer may make qualifying deductions (*i.e.*, the cost is reasonable and there is no employer profit) for "board, lodging, or other facilities" even if the deductions would reduce an employee's pay below the federal minimum wage. Deductions for articles that do not qualify as "board, lodging, or other facilities" (*e.g.*, tools, equipment, cash register shortages) can be made in non-overtime workweeks if, after the deduction, the employee is paid at least the federal minimum wage.[293]

During overtime workweeks, deductions can be made on the same basis in overtime weeks as in non-overtime weeks if the amount deducted does not exceed the amount which could be deducted if the employee had not worked overtime during the workweek. Deductions that exceed this amount for articles that are not "facilities" are prohibited. There is no limit on the amount that can be deducted for qualifying deductions for "board, lodging, or other facilities." However, deductions made only in overtime weeks, or increases in prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade FLSA overtime requirements.[294]

Prohibited Deductions. The FLSA prohibits an employer from making deductions for administrative or bookkeeping expenses incurred by an employer to the extent they cut into the minimum wage and overtime owed an employee.[295]

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[290] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10, *available at* https://www.dol.gov/whd/FOH/FOH_Ch30.pdf.

[291] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-19NA (Oct. 8, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[292] U.S. Dep't of Labor, Wage & Hour Div., Op. Ltr. FLSA2004-17NA (Oct. 6, 2004); *see also* U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

[293] 29 C.F.R. § 531.36.

[294] 29 C.F.R. § 531.37.

[295] U.S. Dep't of Labor, Wage & Hour Div., FIELD OPERATIONS HANDBOOK, § 30c10.

3.7(b) *State Guidelines on Wage Payment*

3.7(b)(i) *Form of Payment Under State Law*

Authorized Instruments. In Montana, wages may be paid by cash, check, or electronic funds transfer or similar means of direct deposit if the employee has agreed in writing or electronically.[296]

Direct Deposit. Mandatory direct deposit is not permitted in Montana. An employee cannot be required to use electronic funds transfer or similar means of direct deposit as a method for payment of wages. According to the state labor department: "Electronic payment of wages is an 'opt in' proposition in Montana, not an 'opt out' where an employee has to affirmatively take steps to prevent electronic payment of wages."[297]

An employer can pay wages by electronic funds transfer or similar means of direct deposit if the employee has consented in writing or electronically to be paid in this manner. The employer must retain a record of the employee's written consent.[298] An employee can agree to receive electronic wage payments, but change their mind at a later date and go back to receiving a regular nonelectronic paycheck and "[a]n employer must honor the change as promptly as is feasible, although it may take one or two pay cycles before the change becomes effective."[299]

Payroll Debit Card. An employer cannot require payment of wages via payroll debit card, because as discussed above, an employee cannot be required to use electronic funds transfer or similar means of direct deposit as a method for payment of wages.[300] An employer can pay wages by payroll debit card if all of the following conditions are met:

- the employee has the option to receive the full amount of the wages with a check or cash, if the employer prefers, without requiring the employee take extraordinary steps to obtain the check;
- the employee consents to the use of the debit card;
- the employer provides clear, understandable guidelines identifying the charges associated with the use of the debit card;
- the full amount of the wages can be accessed, in cash, without incurring a fee in the initial withdrawal; and
- the employee receives (either in writing or electronically) an itemized list of the deductions and authorized withholdings from the wages.[301]

Debit cards that are honored only at ATMs are not a permitted form of wage payment in Montana "unless the ATM can disburse the full amount of the wages in a single, no-fee withdrawal. Because ATMs do not

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[296] MONT. CODE ANN. § 39-3-204(1).

[297] Montana Dep't of Labor & Indus., *Electronic Payment FAQs*, *available at* https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/electronic-payments; *see also* MONT. CODE ANN. § 39-3-204(2).

[298] MONT. CODE ANN. § 39-3-204(2).

[299] Montana Dep't of Labor & Industry, *Electronic Wage Payment FAQs*.

[300] MONT. CODE ANN. § 39-3-204.

[301] Montana Dep't of Labor & Indus., *Electronic Payment FAQs.*

dispense odd amounts (no coins, no one dollar bills, etc.), an employer would have to 'round up' the amount of the wages so that the full amount of the wages could be disbursed by the ATM."[302]

Additionally, according to the state labor department, "Montana law does not authorize an employer to assess a fee or impose a forfeiture of wages simply because of a delay in the employee trying to obtain the funds." However, if an employee decides not to withdraw or transfer the full amount of wages in an initial transaction, a bank or debit card issuer can impose a fee for subsequent transactions. "The amount of the per-transaction fee(s) should be disclosed to the employee at the time the employee authorized use of the electronic funds transfer. The failure to make an appropriate disclosure of fees may invalidate the employee's consent to participate in electronic fund transfers."[303]

An employer or debit card issuer can cancel or discontinue the use of the debit card, but only with reasonable advance notice to the employee, and where there are reasonable means for the employee to withdraw all of the funds in the account. A cancellation provision which purports to work a forfeiture of some or all of the employee's funds is not allowed.[304]

3.7(b)(ii) *Frequency of Payment Under State Law*

Wages must be paid no later than 10 business days after the end of the pay period. *Business days* include Saturdays, but not Sundays or legal holidays. If an employer has not established a schedule for regular wage payment, the pay period is presumed to be semi-monthly.[305]

If an employee submits a timesheet after an employer's established deadline for processing timesheets and the employer does not pay the employee within the ten-business-day period, an employer can pay the employee the wages due in the next pay period. An employer cannot withhold payment beyond the next pay period.[306]

An employer may pay its employees on a semi-monthly basis or once a month on a regularly established schedule, provided that payment is made no later than 10 business days after the end of the pay period.[307]

3.7(b)(iii) *Final Payment Under State Law*

Discharge. When an employee is discharged for cause or laid off from employment, unpaid wages are due and payable immediately upon separation unless the employer has a written personnel policy that extends the time for payment of final wages to the employee's next regular payday for the pay period or to within 15 days of the separation, whichever occurs first. Any reason an employer gives when firing an employee constitutes firing the employee "for cause." Special rules apply when employees are terminated due to allegations of theft.[308]

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[302] Montana Dep't of Labor & Indus., *Electronic Payment FAQs.*

[303] Montana Dep't of Labor & Indus., *Electronic Payment FAQs*, *available at* https://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/electronic-payments.

[304] Montana Dep't of Labor & Indus., *Electronic Payment FAQs.*

[305] MONT. CODE ANN. § 39-3-204(3).

[306] MONT. CODE ANN. § 39-3-204(3).

[307] MONT. CODE ANN. § 39-3-204(1).

[308] MONT. CODE ANN. § 39-3-205.

Payment of wages is "immediate" if:

- wages are paid to the employee by the close of business or four hours from the time the employee is notified they have been discharged, whichever is earlier; or
- the employer mails the employee a check or money order for the wages, and the envelope containing the payment is postmarked the same day as the discharge.[309]

If payment is made by mail and there is a dispute over when payment was made, the employer bears the burden of proof to show payment was timely mailed, which includes, but is not limited to, a receipt issued by the U.S. Postal Service showing the envelope addressed to the employee was mailed on that date.[310]

Resignation. Upon separation of employment, final wages become due on the next regular payday or 15 days from the date of separation, whichever occurs first.[311]

3.7(b)(iv) *Notification of Wage Payments & Wage Records Under State Law*

When wages are paid, employers must provide employees an itemized wage statement showing wages deducted because of state and federal income taxes, Social Security, or any other deductions, together with the amount of each deduction. When no deductions have been made, an employer must provide employees a statement stating that no deductions were made.[312] Montana law does not specify whether an employer may provide wage statements electronically.

3.7(b)(v) *Wage Transparency*

Montana law does not address whether an employer may prohibit employees from disclosing their wages or from discussing and inquiring about the wages of other employees.

3.7(b)(vi) *Changing Regular Paydays or Pay Rate Under State Law*

Changing Regular Paydays. There are no general notice requirements. However, it is recommended that employees receive advance written notice before a change occurs.

However, upon an employee's written demand, and before work begins, an employer must notify the employee, in writing or by a conspicuously posted notice, about the date of paydays. However, this requirement does not apply if a signed collective bargaining agreement exists covering employment conditions, wages, and work hours.[313]

Changing Pay Rate. Employers must give employees notice of a change in pay rate and tell them what their new pay rate will be. Wage decreases are permitted, but cannot occur retroactively.[314]

Upon an employee's written demand, and before work begins, an employer must notify the employee, in writing or by a conspicuously posted notice, about the rate of wages to be paid, whether by the hour, day,

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[309] MONT. ADMIN. R. 24.16.7511.

[310] MONT. ADMIN. R. 24.16.7511.

[311] MONT. CODE ANN. § 39-3-205.

[312] MONT. CODE ANN. § 39-3-101.

[313] MONT. CODE ANN. § 39-3-203.

[314] Montana Dep't of Labor & Indus., *Wage and Hour FAQs, available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq.

week, month, or year. However, this requirement does not apply if a signed collective bargaining agreement exists covering employment conditions, wages, and work hours.[315]

3.7(b)(vii) *Paying for Expenses Under State Law*

In 2024, Montana repealed several of its wage and hour regulations and adopted by reference portions of the Code of Federal Regulations as it existed on October 27, 2023, in order to harmonize Montana's rules with federal regulations implementing the FLSA and to clarify the practices and policies for administering and enforcing the state's wage and hour laws. In the realm of expenses, the adopted federal regulations include those discussed below.[316]

General Indemnification Obligation. Montana law requires an employer to indemnify employees for everything employees necessarily expend or lose as a direct consequence of the discharging of duties or obeying employer directions. However, indemnification is not required for losses suffered by the employee in consequence of the ordinary risks of the business in which the employee is employed.[317] The Montana Supreme Court has held that indemnification rights under this provision cannot be waived. Additionally, the court held that expense reimbursements under section 39-2-701 are "similar" to wages due under state minimum wage and overtime provisions.[318]

If an employee incurs expenses on his or her employer's behalf, or must expend sums solely for the employer's convenience, reimbursement thereof is not included in an employee's regular rate.[319]

Travel. Reimbursement for the actual or reasonably approximate amount spent by an employee who is traveling "over the road" on employer business for transportation (private care or common carrier) and living expenses away from home, other travel expenses (*e.g.*, taxi fares), incurred while traveling on employer business is not considered part of an employee's regular rate. However, if the reimbursement amount if disproportionately large, the excess amount is included in the regular rate. Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employee (*e.g.*, normal travel to and from work), the reimbursement must be included in the employee's regular rate.[320]

Transportation. Transportation charges, where transportation is an incident of and necessary to employment (e.g., maintenance-of-way employees of a railroad) are considered a "facility" that primarily benefits and employer and cannot be included when computing wages.[321]

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[315] MONT. CODE ANN. § 39-3-203.

[316] For a full list of the pertinent adopted regulations, see MONT. ADMIN. R. 24.16.3016 and 24.16.3016.

[317] MONT. CODE ANN. § 39-2-701.

[318] *Rothwell v. Allstate Ins. Co.*, 976 P.2d 512 (Mont. 1999) (office expenses). Although not binding precedent, the dissent in *Rothwell* observed that the court's conclusion that indemnification of expenses was similar to minimum wage and overtime wages contradicted its earlier holding, in *Johnston v. K&T Manufacturing*, 625 P.2d 66 (Mont. 1981), that such expenses did not qualify as "wages" for purposes of instituting a penalty under the state's wage payment provisions governing timely wage payments. *Rothwell*, 976 P.2d at 516 (dissent).

[319] MONT. ADMIN. R. 24.16.3016 (adopting 29 C.F.R. § 778.217 (except for subsections (c)(2)-(3)).

[320] MONT. ADMIN. R. 24.16.3016 (adopting 29 C.F.R. § 778.217 (except for subsections (c)(2)-(3)).

[321] MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.32).

Uniforms. The costs of uniforms, uniform rental, and uniform laundering, where the nature of the business requires an employee to wear a uniform, is considered a "facility" that primarily benefits an employer.[322] These costs cannot be included when computing wages.[323] Reimbursement for the actual or reasonably approximate amount spent by an employee purchasing, laundering, or repairing uniforms or special clothing an employer requires be worn is not considered part of an employee's regular rate. However, if the reimbursement amount is disproportionately large, the excess amount is included in the regular rate. Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employee (clothing worn for the job that does not constitute a uniform), the reimbursement must be included in the employee's regular rate.[324]

Tools & Equipment. "[T]tools of the trade and other materials and services incidental to carrying on the employer's business" are considered "facilities" that primarily benefit an employer.[325] If an employee is required to provide tools of the trade to be used in or specifically required for performing an employer's particular work, an employer would violate the law in any workweek when the tools' cost cuts into the minimum or overtime wages an employee must be paid.[326]

Reimbursement for the actual or reasonably approximate amount spent by an employee purchasing tools or equipment on an employer's behalf is not considered part of an employee's regular rate. However, if the reimbursement amount is disproportionately large, the excess amount is included in the regular rate. Additionally, if an employee is reimbursed for expenses normally incurred by an employee that primarily benefit the employee, the reimbursement must be included in the employee's regular rate.[327]

3.7(b)(viii) *Wage Deductions Under State Law*

As noted above, in March 2024, Montana repealed several of its wage and hour regulations, including those pertaining to deductions, and adopted by reference portions of the Code of Federal Regulations as it existed on October 27, 2023.

Permissible Deductions. In Montana, reasonable deductions can be made for board, room, and other incidentals supplied by the employer, whenever deductions are a part of the conditions of employment, or as otherwise provided for by law.[328] The general wage deduction statute is "designed to prevent an employer from depriving an employee of wages at the employer's instigation, or for the benefit of the employer. . . . Deductions voluntarily requested by the employee in his own behalf do not violate statutes such as [the general wage deductions statute]."[329] The state labor department "highly recommends" that deductions for board, lodging, or other incidentals be in writing.

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322 MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.3).

323 MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.32).

324 MONT. ADMIN. R. 24.16.3016 (adopting 29 C.F.R. § 778.217).

325 MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.3).

326 MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.35).

327 MONT. ADMIN. R. 24.16.3016 (adopting 29 C.F.R. § 778.217 (except for subsections (c)(2)-(3)).

328 MONT. CODE ANN. § 39-3-204.

329 *Christiansen v. Taylor Bros., Inc.*, 732 P.2d 841, 843 (Mont. 1987) (self-imposed savings plan, in which employer agreed to withhold certain wages for payment at a later date, was not unlawful; "contract provisions providing for the deductions at issue are valid.").

The term *wage* includes the employer's reasonable cost of providing an employee with lodging or any other facility if customarily provided by the employer to employees (which cannot exceed 40% of the total wages paid to an employee). The term "wage" does not include the employer's cost of providing meals or meal allowances to employees. The cost of furnishing "facilities" primarily for the employer's benefit or convenience are not reasonable and cannot be included in computing wages.[330]

Under the adopted federal regulations, the cost of furnishing "facilities" primarily for the employer's benefit or convenience are not reasonable and cannot be included in computing wages.[331] The following items are primarily for an employer's benefit or convenience:

- tools of the trade and other materials and services incidental to carrying on the employers business;
- the cost of any construction by and for the employer; and
- the cost of uniforms and their laundering, where the nature of the business requires the employee to wear a uniform.[332]

This list is not exhaustive.

The following items are considered "other facilities:"

- meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees;
- meals, dormitory rooms, and tuition furnished by a college to its student employees;
- housing furnished for dwelling purposes;
- general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects);
- fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee; and
- transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the FLSA and the transportation is not an incident of and necessary to the employment.[333]

If excluded by a CBA, the cost of board, lodging, or other facilities cannot be included as part of employee wages.[334]

[330] MONT. CODE ANN. § 39-3-204; MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. §§ 531.3, 531.32).

[331] MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. §§ 531.3, 531.32).

[332] MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. §§ 531.3, 531.32).

[333] MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.32).

[334] MONT. ADMIN. R. 24.16.3013 (adopting 29 C.F.R. § 531.2).

Prohibited Deductions. According to the state labor department, an employer "cannot withhold wages or make an employee pay for damages, mistakes or shortages."[335] Moreover, an employer is prohibited from withholding wages due and owing to an employee, and apply such wages for:

> damages caused by employee negligence during the course of his employment, for truck mileage which was not authorized by the employer, for both costs in retrieving property abandoned by the employee during the course of his employment and per diem fines therefor, for costs of avoidable cargo losses caused by employee poor judgment and for liability insurance deductible costs occasioned by employee negligence, which the employee has contracted to have deducted as a condition to the employment.[336]

However, if an employee is fired due to an allegation of theft of property or funds connected to the employee's work, an employer can withhold from final wages an amount sufficient to cover the property's value if:

- the employee agrees in writing to the withholding; or
- the employer files a report of the theft with the local law enforcement agency within seven business days of the separation from employment, subject to the following conditions:
  - if no charges are filed in court against the employee for the alleged theft within 30 days of the filing of the report, wages are due and payable upon the expiration of the 30-day period; or
  - if charges are filed against the employee for theft, a court may order the withheld wages to be offset by the value of the theft. If the employee is found not guilty or if the employer withholds an amount that exceeds the value of the theft, a court may order the employer to pay the employee the withheld amount plus interest.[337]

3.7(b)(ix) *Wage Assignments & Wage Garnishments*

Orders of Support. In Montana, both the state courts and the Department of Public Health and Human Services have the authority to issue income withholding orders for child support. Upon receiving an income withholding order against an employee's wages from a court, an employer must begin withholding from the employee's wages with the first pay period that occurs after 14 days from the date the order was served on the employer and must remit the amount withheld within seven working days of payday.[338] The employer may also deduct an administrative fee of $5 per withholding.[339] The total amount to be deducted cannot exceed the maximum amount permitted under the federal Consumer Credit Protection Act.[340]

Employers that receive an administrative withholding order from the Department of Public Health and Human Services must begin withholding immediately in the first pay period after the order is served on

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[335] Montana Dep't of Labor & Indus., *Wage and Hour FAQs, available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq.

[336] Mont. Op. Att'y Gen. Vol. 25, No. 11 (Mar. 28, 1953). Mont. Op. Att'y Gen. Vol. 36, No. 17 (Aug. 27, 1975).

[337] MONT. CODE ANN. § 39-3-205.

[338] MONT. CODE ANN. § 40-5-312.

[339] MONT. CODE ANN. § 40-5-309.

[340] MONT. CODE ANN. § 40-5-309; 15 U.S.C. § 1673(b).

the employer and must remit the amount withheld within seven working days of payday.[341] The employer must also respond to the order by providing the following information about the employee:

- last-known address;
- Social Security number;
- dates of employment;
- amounts of wages, salaries, commissions, contract proceeds, and other earnings or amounts paid;
- whether health insurance coverage is or was available through the employer and, if so, certain policy information; and
- the names, telephone numbers, and addresses of current and former employers.[342]

The employer may also deduct an administrative fee of $5 per withholding. The total amount to be deducted cannot exceed the maximum amount permitted under the federal Consumer Credit Protection Act.[343] An employer may not discharge, discipline, or refuse to hire a person because the person has a child support obligation or a withholding order has been issued for the person's wages.[344]

Debt Collection. An employer must also comply with a writ of garnishment against an employee's wages to enforce collection of a debt. The maximum amount of disposable earnings subject to garnishment is the lesser of 25% of the employee's disposable earnings, or the amount by which the employee's disposable earnings exceed 30 times the federal minimum hourly wage in effect at the time the earnings are payable.[345] The employer must remit the withheld amounts within five days of payday.[346] A writ of garnishment remains in effect for 120 days from the date of service or until the debt is satisfied, whichever occurs first.[347]

An employer is prohibited from discharging or laying off an employee whose wages are subject to garnishment.[348]

3.7(b)(x) *State Enforcement, Remedies & Penalties*

The Montana Department of Labor and Industry enforces the state's wage and hour laws. The Department is authorized to investigate violations and institute actions to recover wages.[349] Minimum wage and overtime claims are treated as wage claims and follow the same procedure as wage payment claims.[350]

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341 MONT. CODE ANN. § 40-5-421.

342 MONT. CODE ANN. § 40-5-443.

343 MONT. CODE ANN. § 40-5-416; 15 U.S.C. § 1673(b).

344 MONT. CODE ANN. §§ 40-5-313, 40-5-422.

345 MONT. CODE ANN. § 25-13-614.

346 MONT. CODE ANN. § 25-13-402.

347 MONT. CODE ANN. § 25-13-402.

348 MONT. CODE ANN. § 39-2-302.

349 MONT. CODE ANN. § 39-3-209.

350 MONT. CODE ANN. § 39-3-407.

An employee may file a wage claim with the Department or file a civil action against the employer.[351] The employee must file the complaint within 180 days of the alleged violation.[352]

The employee may recover wages and penalties for a period of two years before the complaint filing date, if still employed, or from the last date of employment if no longer employed. If an employer engaged in repeated violations, the employee may recover wages and penalties for a period of three years before the complaint filing date, if still employed, or from the last date of employment if no longer employed.[353]

An employer that fails to pay an employee as provided in the wage payment provisions commits a misdemeanor punishable by a penalty in an amount not to exceed 110% of the wages due and unpaid.[354] Although enforcement of the minimum wage and overtime provisions is treated as a wage claim, the latter penalty provision does not apply to minimum wage and overtime claims that are subject to the FLSA, in which case liquidated damages are determined under the FLSA.[355]

3.8 Other Benefits

3.8(a) *Vacation Pay & Similar Paid Time Off*

3.8(a)(i) *Federal Guidelines on Vacation Pay & Similar Paid Time Off*

To the extent an "employee welfare benefit plan" is established or maintained for the purpose of providing vacation benefits for participants or their beneficiaries, it may be governed under the federal Employee Retirement Income Security Act (ERISA).[356] However, an employer program of compensating employees for vacation benefits out of the employer's general assets is not considered a covered welfare benefit plan.[357] Further, the U.S. Supreme Court, in *Massachusetts v. Morash*, noted that extensive state regulation of vesting, funding, and participation rights of vacation benefits may provide greater protections for employees than ERISA and, as a result, the court was reluctant to have ERISA preempt state law in situations where it was not clearly indicated.[358]

3.8(a)(ii) *State Guidelines on Vacation Pay & Similar Paid Time Off*

Montana law does not require an employer to offer employees other benefit compensation such as vacation pay, holiday pay, personal time off, bonuses, severance pay, or pensions. However, once an employer establishes a policy and promises vacation pay and other types of additional compensation, the employer may not arbitrarily withhold or withdraw these fringe benefits retroactively. It is important to

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[351] MONT. CODE ANN. § 39-3-207.

[352] MONT. CODE ANN. § 39-3-207.

[353] MONT. CODE ANN. § 39-3-207.

[354] MONT. CODE ANN. § 39-3-206.

[355] MONT. CODE ANN. § 39-3-408.

[356] 29 U.S.C. § 1002.

[357] 29 C.F.R. § 2510.3-1; *see also* U.S. Dep't of Labor, *Advisory Opinion 2004-10A* (Dec. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-1; U.S. Dep't of Labor, *Advisory Opinion 2004-08A* (July 2, 2004), *available at* https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2004-08a; U.S. Dep't of Labor, *Advisory Opinion 2004-03A* (Apr. 30, 2004), *available at* https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/2004-03a.

[358] 490 U.S. 107, 119 (1989).

draft clear, precise, and complete policies and procedures regarding these benefits, as they can become contractual obligations and subject the employer to liability if withheld or reduced without notice.

In Montana, "if provided, once vacation has been earned according to the employer's policy, it is then considered wages and is due and payable in the same manner as regular wages[.]"[359] If an employee satisfies the conditions under an employer's policy for earning vacation, the vacation becomes a vested right.[360]

While courts will follow the terms of an employer's vacation policy in order to determine whether an employee's right to vacation has vested, certain policy provisions are prohibited. Notably, "'use it or lose it' policies are not permitted in Montana. However, caps, or maximum accumulation amounts can be instituted which effectively prevent additional vacation to accrue until existing time is utilized."[361] Moreover, because of the principle that vested vacation is considered wages, a Montana vacation policy cannot require forfeiture of accrued vacation and payout is required when employment ends.[362] By contrast, "[p]rivate sector employers are not required to pay out . . . sick leave or paid time off (PTO). These are considered benefits and may be paid based on the employer's policies. There is no requirement in state law to provide these benefits. In the case of a PTO benefit, payout of this benefit is dependent on the employer's policy."[363]

3.8(b) *Holidays & Days of Rest*

3.8(b)(i) *Federal Guidelines on Holidays & Days of Rest*

There is no federal law requiring that employees be provided a day of rest each week, or be compensated at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(b)(ii) *State Guidelines on Holidays & Days of Rest*

Montana does not require employers to provide employees with a day of rest each week, or compensate employees at a premium rate for work performed on the seventh consecutive day of work or on holidays.

3.8(c) *Recognition of Domestic Partnerships & Civil Unions*

3.8(c)(i) *Federal Guidelines on Domestic Partnerships & Civil Unions*

Federal law does not regulate or define domestic partnerships and civil unions. States and municipalities are free to provide for domestic partnership and civil unions within their jurisdictions. Thus, whether a couple may register as domestic partners or enter into a civil union depends on their place of residence. States may also pass laws to regulate whether employee benefit plans must provide coverage for an employee's domestic partner or civil union partner.

Whether such state laws apply to an employer's benefit plans depends on whether the benefits are subject to ERISA. Most state and local laws that relate to an employer's provision of health benefit plans

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[359] Montana Dep't of Labor & Indus., *Wage and Hour FAQ*, *available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq.

[360] Mont. Op. Att'y Gen. 56 (Sept. 17, 1949).

[361] Montana Dep't of Labor & Indus., *Wage and Hour FAQ*, *available at* http://erd.dli.mt.gov/labor-standards/wage-and-hour-payment-act/wage-and-hour-faq.

[362] Montana Dep't of Labor & Indus., *Wage and Hour FAQ*.

[363] Montana Dep't of Labor & Indus., *Wage and Hour FAQs.*

for employees are preempted by ERISA. Self-insured plans, for example, are preempted by ERISA. If the plan is preempted by ERISA, employers may not be required to comply with the states' directives on requiring coverage for domestic partners or parties to a civil union.[364] ERISA does not preempt state laws that regulate insurance, so employer health benefit plans that provide benefits pursuant to an insurance contract are subject to state laws requiring coverage for domestic partners or civil union partners.

The federal Comprehensive Omnibus Budget Reconciliation Act (COBRA) requires group health plans to provide continuation coverage under the plan for a specified period of time to each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event (*e.g.*, the employee's death or termination from employment).[365] However, under COBRA, only an employee and the employee's spouse and dependent children are considered "qualified beneficiaries."[366] Here again, states may choose to extend continuation coverage requirements to domestic partners and civil union partners under state mini-COBRA statutes.

3.8(c)(ii) *State Guidelines on Domestic Partnerships & Civil Unions*

Couples may register as domestic partners in the city of Missoula. However, state law does not address the issue of whether an employee's domestic partner would be considered an eligible dependent for purposes of employee benefits offered by a private-sector employer.

3.9 Leaves of Absence

3.9(a) *Family & Medical Leave*

3.9(a)(i) *Federal Guidelines on Family & Medical Leave*

The federal Family and Medical Leave Act (FMLA) requires covered employers to provide eligible employees up to 12 weeks of unpaid leave in any 12-month period:

- for the birth or placement of a child for adoption or foster care;[367]
- to care for an immediate family member (spouse, child, or parent) with a serious health condition;[368]
- to take medical leave when the employee is unable to work because of a serious health condition;[369]
- for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty or called to covered active duty status as a member of the

[364] 29 U.S.C. § 1144.

[365] 29 U.S.C. § 1161.

[366] 29 U.S.C. § 1167(3).

[367] 29 C.F.R. §§ 825.102, 825.112, 825.113, 825.120, and 826.121.

[368] 29 C.F.R. §§ 825.102, 825.112, and 825.113; *see also* U.S. Dep't of Labor, Wage & Hour Div., *Administrator's Interpretation No. 2010-3* (June 22, 2010), *available at* https://www.dol.gov/whd/opinion/adminIntrprtn/FMLA/2010/FMLAAI2010_3.pdf (guidance on who may take time off to care for a sick, newly-born, or adopted child when the employee has no legal or biological attachment to the child).

[369] 29 C.F.R. §§ 825.112, 825.113.

National Guard, armed forces, or armed forces reserves (see **3.9(k)(i)** for information on "qualifying exigency leave" under the FMLA); and

- to care for a next of kin service member with a serious injury or illness (see **3.9(k)(i)** for information on the 26 weeks available for "military caregiver leave" under the FMLA).

A *covered employer* is engaged in commerce or in any industry or activity affecting commerce and has at least 50 employees in 20 or more workweeks in the current or preceding calendar year.[370] A *covered employee* has completed at least 12 months of employment and has worked at least 1,250 hours in the last 12 months at a location where 50 or more employees work within 75 miles of each other.[371] For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(a)(ii) *State Guidelines on Family & Medical Leave*

Montana law does not address family and medical leave for private-sector employees.

3.9(b) *Paid Sick Leave*

3.9(b)(i) *Federal Guidelines on Paid Sick Leave*

Federal law does not require private employers (that are not government contractors) to provide employees paid sick leave. Executive Order No. 13706 requires certain federal contractors and subcontractors to provide employees with a minimum of 56 hours of paid sick leave annually, to be accrued at a rate of at least one hour of paid sick leave for every 30 hours worked.[372] The paid sick leave requirement applies to certain contracts solicited—or renewed, extended, or amended—on or after January 1, 2017, including all contracts and subcontracts of any tier thereunder. For more information on this topic, see LITTLER ON GOVERNMENT CONTRACTORS & EQUAL EMPLOYMENT OPPORTUNITY OBLIGATIONS.

3.9(b)(ii) *State Guidelines on Paid Sick Leave*

Montana law does not address paid sick leave for private-sector employees.

3.9(c) *Pregnancy Leave*

3.9(c)(i) *Federal Guidelines on Pregnancy Leave*

Three federal statutes are generally implicated when handling leave related to pregnancy: the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act of 1964 ("Title VII") in 1978; the Family and Medical Leave Act; and the Americans with Disabilities Act. For additional information, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

Pregnancy Discrimination Act (PDA). Under the PDA, which as part of Title VII applies to employers with 15 or more employees, disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions must be treated the same as disabilities caused or contributed to by other medical conditions under an employer's health or disability insurance or sick leave plan.[373] Policies and practices involving such matters as the commencement and duration of leave, the availability of extensions, reinstatement, and payment under any health or disability insurance or sick leave plan must be applied to disability due

[370] 29 U.S.C. § 2611(4); 29 C.F.R. §§ 825.104 to 825.109.

[371] 29 U.S.C. § 2611(2); 29 C.F.R. §§ 825.110 to 825.111.

[372] 80 Fed. Reg. 54,697-54,700 (Sept. 10, 2015).

[373] 42 U.S.C. § 2000e(k); *see also* 29 C.F.R. § 1604.10.

to pregnancy, childbirth, or related medical conditions on the same terms as they are applied to other disabilities.

An employer must allow individual with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. However, an employer may not compel an employee to take leave because the employee is pregnant, as long as the employee is able to perform their job. Moreover, an employer may not prohibit employees from returning to work for a set length of time after childbirth. Thus, employers must hold open a job for a pregnancy-related absence for the same length of time as jobs are held open for employees on sick or disability leave.

Family and Medical Leave Act (FMLA). A pregnant employee may take FMLA leave intermittently for prenatal examinations or for their own serious health condition, such as severe morning sickness.[374] FMLA leave may also be used for the birth or placement of a child; however, the use of intermittent leave (as opposed to leave taken on an intermittent or reduced schedule) is subject to the employer's approval.

Americans with Disabilities Act (ADA). Pregnancy-related impairments may constitute disabilities for purposes of the ADA. The federal Equal Employment Opportunity Commission (EEOC) takes the position that leave is a reasonable accommodation for pregnancy-related impairments, and may be granted in addition to what an employer would normally provide under a sick leave policy for reasons related to the impairment.[375] An employee may also be allowed to take leave beyond the maximum FMLA leave if the additional leave would be considered a reasonable accommodation.

Several states provide greater protections for employees with respect to pregnancy. For example, states may have specific laws prohibiting discrimination based on pregnancy or providing separate protections for pregnant individuals, including the requirement that employers provide reasonable accommodations to pregnant employees to enable them to continue working during their pregnancies, provided that no undue hardship on the employer's business operations would result. These protections are discussed in **3.11(c)**. To the extent that a state law focuses primarily on providing job-protected leave for employees with disabling pregnancy-related health conditions, that state law is discussed below.

3.9(c)(ii) *State Guidelines on Pregnancy Leave*

The Montana Human Rights Act requires an employer with one or more employees to grant a "reasonable" maternity leave of absence for pregnancy. *Maternity leave* means any leave of absence granted to or required of an employee because of such employee's disability due to pregnancy.[376]

The employer may require medical certification that the employee is not able to perform her employment duties. Upon return, the employee must be reinstated to her original job or an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits, etc. unless the employer's circumstances have so changed as to make it impossible to do so.[377]

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[374] 29 C.F.R. § 825.202.

[375] EEOC, Notice 915.003, *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (June 25, 2015), *available at* https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* EEOC, *Facts About Pregnancy Discrimination* (Sept. 8, 2008), *available at* https://www.eeoc.gov//facts/fs-preg.html.

[376] MONT. ADMIN. R. 24.9.1201, 24.9.1203.

[377] MONT. CODE ANN. §§ 49-2-310, 49-2-311; MONT. ADMIN. R. 24.9.1201 *et seq.*

No employer may require an employee to take a mandatory maternity leave for an unreasonable length of time. The reasonableness of the length of time for which an employee is required to take a mandatory maternity leave shall be determined on a case-by-case basis. However, the employer has the burden of proving that a maternity leave for a period of time other than that prescribed by the employee's medical doctor is reasonable. In addition, an employer may not require that an employee take an uncompensated maternity leave for a longer period of time than a medical doctor who has actually examined the employee certifies that the employee is unable to perform her employment duties.[378]

3.9(d) *Adoptive Parents Leave*

3.9(d)(i) *Federal Guidelines on Adoptive Parents Leave*

An eligible employee may take time off to care for a newly-adopted child as part of the employee's leave entitlement under the FMLA. For information on the FMLA, see LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES.

3.9(d)(ii) *State Guidelines on Adoptive Parents Leave*

Montana law does not address adoptive parents leave for private-sector employees.

3.9(e) *School Activities Leave*

3.9(e)(i) *Federal Guidelines on School Activities Leave*

Federal law does not address school activities leave for private-sector employees.

3.9(e)(ii) *State Guidelines on School Activities Leave*

Montana law does not address school activities leave for private-sector employees.

3.9(f) *Blood, Organ, or Bone Marrow Donation Leave*

3.9(f)(i) *Federal Guidelines on Blood, Organ, or Bone Marrow Donation*

Federal law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(f)(ii) *State Guidelines on Blood, Organ, or Bone Marrow Donation*

Montana law does not address blood, organ, or bone marrow donation leave for private-sector employees.

3.9(g) *Voting Time*

3.9(g)(i) *Federal Voting Time Guidelines*

There is no federal law concerning time off to vote.

3.9(g)(ii) *State Voting Time Guidelines*

Montana law does not address time off to vote for private-sector employees.

[378] MONT. CODE ANN. § 49-2-310; MONT. ADMIN. R. 24.9.1204.

3.9(h) *Leave to Participate in Political Activities*

3.9(h)(i) *Federal Guidelines on Leave to Participate in Political Activities*

Federal law does not address leave for private-sector employees to participate in political activities.

3.9(h)(ii) *State Guidelines on Leave to Participate in Political Activities*

Montana law does not address leave for private-sector employees to participate in political activities.

3.9(i) *Leave to Participate in Judicial Proceedings*

3.9(i)(i) *Federal Guidelines on Leave to Participate in Judicial Proceedings*

The Jury System Improvements Act prohibits employers from terminating or disciplining "permanent" employees due to their jury service in federal court.[379] Employers are under no federal statutory obligation to pay employees while serving on a jury.

Employers may verify that an employee's request for civic duty is legally obligated by requiring the employee to produce a copy of the summons, subpoena, or other documentation. Also, an employer can set reasonable advance notice requirements for jury duty leave. Upon completion of jury duty, an employee is entitled to reinstatement.

An employer also may be required to grant leave to employees who are summoned to testify, to assist, or to participate in hearings conducted by federal administrative agencies, as required by a variety of additional federal statutes.[380] For more information, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

3.9(i)(ii) *State Guidelines on Leave to Participate in Judicial Proceedings*

Leave to Serve on a Jury. Montana law does not address time off to serve on a jury for private-sector employees, nor is there a requirement that an employer compensate an employee while the employee is serving on a jury.

3.9(j) *Leave for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

3.9(j)(i) *Federal Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Federal law does not address leave for private-sector employees who are victims of crime or domestic violence.

3.9(j)(ii) *State Guidelines on Leaves for Victims of Domestic Violence, Sexual Assault, Stalking, or Victims of Crime*

Leaves for Victims of Crime in General. Montana law addresses leave for victims of crime in general. There are no specific requirements regarding victims of domestic abuse, sexual assault, or related crimes. An employee is eligible for leave if the employee is:

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[379] 28 U.S.C. § 1875.

[380] *See, e.g.*, 29 U.S.C. § 660(c) (Occupational Safety and Health Act); 29 U.S.C. § 215(a)(3) (Fair Labor Standards Act); 42 U.S.C. § 2000e 3(a) (Title VII); 29 U.S.C. § 623(d) (Age Discrimination in Employment Act).

- the victim of the crime at issue in the proceedings; or
- the victim's spouse, child by birth or adoption, stepchild, parent, stepparent, or sibling.

An employee is not eligible for leave if the employee is accountable for the crime at issue in the proceedings a crime arising from the same transaction.[381]

An eligible employee may take time off from work to participate at the prosecuting attorney's request in preparation for or attendance at a criminal justice proceeding.[382] There is no requirement that the employee be compensated for absences taken pursuant to the statute.

3.9(k) *Military-Related Leave*

3.9(k)(i) *Federal Guidelines on Military-Related Leave*

Two federal statutes primarily govern military-related leave: the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Family and Medical Leave Act (FMLA). For more detailed information on these statutes, including notice and other requirements, see LITTLER ON LEAVES OF ABSENCE: MILITARY & CIVIC DUTY LEAVES.

USERRA. USERRA imposes obligations on all public and private employers to provide employees with leave to "serve" in the "uniformed services." USERRA also requires employers to reinstate employees returning from military leave who meet certain defined qualifications. An employer also may have an obligation to train or otherwise qualify those employees returning from military leave. USERRA guarantees employees a continuation of health benefits for the 24 months of military leave (at the employee's expense) and protects an employee's pension benefits upon return from leave. Finally, USERRA requires that employers not discriminate against an employee because of past, present, or future military obligations, among other things.

Some states provide greater protections for employees with respect to military leave. USERRA, however, establishes a "floor" with respect to the rights and benefits an employer is required to provide to an employee to take leave, return from leave, and be free from discrimination. Any state law that seeks to supersede, nullify, or diminish these rights is void under USERRA.[383]

FMLA. Under the FMLA, eligible employees may take leave for: (1) any "qualifying exigency" arising from the foreign deployment of the employee's spouse, son, daughter, or parent with the armed forces; or (2) to care for a next of kin servicemember with a serious injury or illness (referred to as "military caregiver leave").

1. **Qualifying Exigency Leave.** An eligible employee may take up to 12 weeks of unpaid leave in a single 12-month period if the employee's spouse, child, or parent is an active duty member of one of the U.S. armed forces' reserve components or National Guard, or is a reservist or

[381] MONT. CODE ANN. § 46-24-205.

[382] MONT. CODE ANN. § 46-24-205.

[383] USERRA provides that: (1) nothing within USERRA is intended to supersede, nullify, or diminish a right or benefit provided to an employee that is greater than the rights USERRA provides (38 U.S.C. § 4302(a)); and (2) USERRA supersedes any state law that would reduce, limit, or eliminate any right or benefit USERRA provides (38 U.S.C. § 4302(b)).

member of the National Guard who faces recall to active duty if a qualifying exigency exists.[384] An eligible employee may also take leave for a qualifying exigency if a covered family member is a member of the regular armed forces and is on duty, or called to active duty, in a foreign country.385 Notably, leave is only available for covered relatives of military members called to active federal service by the president and is not available for those in the armed forces recalled to state service by the governor of the member's respective state.

2. **Military Caregiver Leave.** An eligible employee may take up to 26 weeks of unpaid leave in a single 12-month period to care for a "covered servicemember" with a serious injury or illness if the employee is the servicemember's spouse, child, parent, or next of kin.

3.9(k)(ii) *State Guidelines on Military-Related Leave*

Military Leave. A "member" ordered to state military duty is entitled to a leave of absence from their employment during the period of that state military duty.[386] A *member* includes a member of the national guard of another state who is employed in Montana, and *state military duty* includes duty performed pursuant to the property authority of the state of Montana or pursuant to the authority of the governor of any other state.[387]

Employees who take military leave are to be treated as having been on a leave of absence. As such, they are entitled to all insurance and benefits offered to other employees on leaves of absence. A leave of absence for state active duty may not be deducted from any sick leave, vacation leave, military leave, or other leave accrued by the member unless the member desires the deduction.[388] Additionally, a person ordered to federally-funded military duty is entitled to all of the employment and reemployment rights and benefits provided pursuant to the federal USERRA and other applicable federal law.[389]

An employee must notify their employer at the time of hire that the employee is a member of the National Guard of Montana or of another state, or notify the employer if the employee enlists in the National Guard during the course of employment. Failure to do so impacts the employee's reinstatement rights.[390]

Accrual of Benefits. An employer may decide whether or not to authorize an employee to accrue sick leave, vacation leave, military leave, or other leave benefits during a leave of absence for state military duty. However, the member may not be provided with lesser leave accrual benefits than are provided to all other employees of the employer in a similar but nonmilitary leave status.[391]

An employer's health plan must provide that a member may elect:

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[384] 29 C.F.R. § 825.126(a).

[385] Deployment of the member with the armed forces to a foreign country means deployment to areas outside of the United States, the District of Columbia, or any Territory or possession of the United States, including international waters. 29 C.F.R. § 825.126(a)(3).

[386] MONT. CODE ANN. § 10-1-1006(1).

[387] MONT. CODE ANN. § 10-1-1003.

[388] MONT. CODE ANN. § 10-1-1006(2).

[389] MONT. CODE ANN. § 10-1-1004.

[390] MONT. CODE ANN. § 10-1-1007(e).

[391] MONT. CODE ANN. § 10-1-1007(2)(b).

- not to remain covered under the employer's health plan while on state military duty but that when the member returns, the member may resume coverage as if continuously employed; and
- to remain on the employer's health plan while the member is on state military duty without being required to pay more than the regular employee share of the premium.[392]

However, if the state military duty qualifies the member for coverage under the state of Montana's health insurance plan as an employee of the department of military affairs, the employer's health plan may require the member to pay up to 102% of the full premium for continued coverage. The health insurance plan is not required to cover any illness or injury caused or aggravated by state military duty.[393] An employer's pension plan must provide that a period of state military duty may constitute service with the employer, and if the member elects to receive credit and make-up contributions required to accrue the pension benefits they would have accrued but for the state military duty, the employer must pay the amount of the employer contribution.[394]

Reinstatement. After a leave of absence for state military duty, a member is entitled to return to employment with the same seniority, status, pay, health insurance, pension, and other benefits as the member would have accrued if the member had not been absent.[395] If a member was a probationary employee when ordered to state military duty, the employer may require the member to resume the probationary period from the date the leave began.[396]

An employer is not obligated to allow an employee to return to employment after absence for state military duty if:

- the employee is no longer qualified to perform the duties of the position;
- the member's position was temporary and has expired;
- the member's request to return to employment was not done in a timely manner;
- the employer's circumstances have changed so significantly that the member's continued employment with the employer cannot reasonably be expected;
- the member's return to employment would cause the employer an undue hardship; or
- the member did not inform the employer at the time of hire that the member was a member of the state's organized militia or the national guard of another state, or that the employee enlisted during the course of employment.[397]

Unless there are extenuating circumstances that preclude timely reporting to work, through no fault of the member, *timely manner* means for state active duty:

[392] MONT. CODE ANN. § 10-1-1007(2)(c).

[393] MONT. CODE ANN. § 10-1-1007(2)(c).

[394] MONT. CODE ANN. § 10-1-1007(2)(d).

[395] MONT. CODE ANN. § 10-1-1007(1).

[396] MONT. CODE ANN. § 10-1-1007(2)(a).

[397] MONT. CODE ANN. § 10-1-1007(2)(e).

- if the active duty lasted up to 30 days, the member should report to work the next regular work shift following safe travel time plus eight hours;
- if the active duty lasted from 30 to 180 days, the member should report to work within 14 days of termination of state active duty; and
- for active duty lasting more than 180 days, the member should report to work within 90 days of termination of state active duty.[398]

Other Military-Related Protections: Spousal Unemployment. An individual may not be disqualified from benefits if the individual leaves employment because of being ordered to military service for a period of less than six weeks and the individual, upon checking with the employer, finds that the individual's prior employment has terminated due to the military service or for other nondisqualifying reasons. An employee who leaves employment because of the mandatory military transfer of the employee's spouse is eligible for unemployment benefits. Any benefits paid are not chargeable to the employer's account.[399]

3.9(l) *Other Leaves*

3.9(l)(i) *Federal Guidelines on Other Leaves*

There are no federal statutory requirements for other categories of leave for private-sector employees.

3.9(l)(ii) *State Guidelines on Other Leaves*

There are no statutory requirements for other categories of leave for private-sector employees in Montana.

3.10 Workplace Safety

3.10(a) *Occupational Safety and Health*

3.10(a)(i) *Fed-OSH Act Guidelines*

The federal Occupational Safety and Health Act ("Fed-OSH Act") requires every employer to keep their places of employment safe and free from recognized hazards likely to cause death or serious harm to employees.[400] Employers are also required to comply with all applicable occupational safety and health standards.[401] To enforce these standards, the federal Occupational Safety and Health Administration ("Fed-OSHA") is authorized to carry out workplace inspections and investigations and to issue citations and assess penalties. The Fed-OSH Act also requires employers to adopt reporting and record-keeping requirements related to workplace accidents. For more information on this topic, see LITTLER ON WORKPLACE SAFETY.

Note that the Fed-OSH Act encourages states to enact their own state safety and health plans. Among the criteria for state plan approval is the requirement that the state plan provide for the development and enforcement of state standards that are at least as effective in providing workplace protection as are

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[398] MONT. CODE ANN. § 10-1-1007(1)-(3).

[399] MONT. CODE ANN. § 39-51-2302(2)(c), (d).

[400] 29 U.S.C. § 654(a)(1). An *employer* is defined as "a person engaged in a business affecting commerce that has employees." 29 U.S.C. § 652(5). The definition of employer does not include federal or state agencies (except for the U.S. House of Representatives and Senate). Under some state plans, however, state agencies may be subject to the state safety and health plan.

[401] 29 U.S.C. § 654(a)(2).

comparable standards under the federal law.[402] Some state plans, however, are more comprehensive than the federal program or otherwise differ from the Fed-OSH Act.

3.10(a)(ii) *State-OSH Act Guidelines*

Montana, under agreement with Fed-OSHA, operates its own state occupational safety and health program in accordance with section 18 of the Fed-OSH Act.[403] Thus, Montana is a so-called "state plan" jurisdiction, with its own detailed rules for occupational safety and health that parallel, but are separate from, Fed-OSHA standards. However, Montana's Occupational Safety and Health Act applies only to public-sector employers.[404]

By statute, all Montana employers must provide a place of employment that is safe for each of its employees.[405] However, other than this general requirement, Montana does not provide safety regulations for private-sector employers, and employers must abide by the Fed-OSH Act.

3.10(b) *Cell Phone & Texting While Driving Prohibitions*

3.10(b)(i) *Federal Guidelines on Cell Phone & Texting While Driving*

Federal law does not address cell phone use or texting while driving.

3.10(b)(ii) *State Guidelines on Cell Phone & Texting While Driving*

Montana law does not address cell phone use and texting while driving.

3.10(c) *Firearms in the Workplace*

3.10(c)(i) *Federal Guidelines on Firearms on Employer Property*

Federal law does not address firearms in the workplace.

3.10(c)(ii) *State Guidelines on Firearms on Employer Property*

Montana permits an owner of private property or the person who possesses or is in control of the property, including a tenant or lessee of the property, to expressly prohibit firearms from being carried on the property.[406] Accordingly, an employer may adopt a company policy that prohibits employees and the general public from carrying a firearm on the employer's premises.

3.10(d) *Smoking in the Workplace*

3.10(d)(i) *Federal Guidelines on Smoking in the Workplace*

Federal law does not address smoking in the workplace.

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[402] 29 U.S.C. § 667(c)(2).

[403] 29 U.S.C. § 667.

[404] MONT. CODE ANN. § 50-71-115.

[405] MONT. CODE ANN. § 50-71-201.

[406] MONT. CODE ANN. § 45-8-356(6).

3.10(d)(ii) *State Guidelines on Smoking in the Workplace*

Smoking is prohibited in enclosed places of work in Montana.[407] "No smoking" signs must be posted conspicuously at entrances to workplaces.

3.10(e) *Suitable Seating for Employees*

3.10(e)(i) *Federal Guidelines on Suitable Seating for Employees*

Federal law does not address suitable seating requirements for employees.

3.10(e)(ii) *State Guidelines on Suitable Seating for Employees*

In Montana, employers in any manufacturing, mechanical, or mercantile establishments, laundries, hotels, or restaurants, or other establishments employing any person must provide suitable seats for all employees and must permit employees to use seats when they are not employed in active duties of employment.[408]

3.10(f) *Workplace Violence Protection Orders*

3.10(f)(i) *Federal Guidelines on Workplace Violence Protection Orders*

Federal law does not address employer workplace violence protection orders. That is, there is no federal statute addressing whether or how employers might obtain a legal order (such as a temporary restraining order) on their own behalf, or on behalf of their employees or visitors, to protect against workplace violence, threats, or harassment.

3.10(f)(ii) *State Guidelines on Workplace Violence Protection Orders*

Montana law does not address employer workplace violence protection orders.

3.11 Discrimination, Retaliation & Harassment

3.11(a) *Protected Classes & Other Fair Employment Practices Protections*

3.11(a)(i) *Federal FEP Protections*

The federal equal employment opportunity laws that apply to most employers include: (1) Title VII of the Civil Rights Act of 1964 ("Title VII");[409] (2) the Americans with Disabilities Act (ADA);[410] (3) the Age Discrimination in Employment Act (ADEA);[411] (4) the Equal Pay Act;[412] (5) the Genetic Information Nondiscrimination Act of 2009 (GINA);[413] (6) the Civil Rights Acts of 1866 and 1871;[414] and (7) the Civil

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[407] MONT. CODE ANN. §§ 50-40-101 *et seq*.

[408] MONT. CODE ANN. § 39-2-201.

[409] 42 U.S.C. §§ 2000e *et seq.* Title VII applies to employers with 15 or more employees. 42 U.S.C. § 2000e(b).

[410] 42 U.S.C. §§ 12101 *et seq.* The ADA applies to employers with 15 or more employees. 42 U.S.C. § 12111(5).

[411] 29 U.S.C. §§ 621 *et seq*. The ADEA applies to employers with 20 or more employees. 29 U.S.C. § 630.

[412] 29 U.S.C. § 206(d). Since the Equal Pay Act is part of the FLSA, the Equal Pay Act applies to employers covered by the FLSA. *See* 29 U.S.C. § 203.

[413] 42 U.S.C. §§ 2000ff *et seq*. GINA applies to employers with 15 or more employees. 42 U.S.C. § 2000ff (refers to 42 U.S.C. § 2000e(f)).

[414] 42 U.S.C. §§ 1981, 1983.

Rights Act of 1991. As a result of these laws, federal law prohibits discrimination in employment on the basis of:

- race;
- color;
- national origin (includes ancestry);
- religion;
- sex (includes pregnancy, childbirth, or related medical conditions, and pursuant to the U.S. Supreme Court's decision in *Bostock v. Clayton County, Georgia*, includes sexual orientation and gender identity);[415]
- disability (includes having a "record of" an impairment or being "regarded as" having an impairment);
- age (40); or
- genetic information.

The Equal Employment Opportunity Commission (EEOC) is the agency charged with handling claims under the antidiscrimination statutes.[416] Employees must first exhaust their administrative remedies by filing a complaint within 180 days—unless a charge is covered by state or local antidiscrimination law, in which case the time is extended to 300 days.[417]

3.11(a)(ii) *State FEP Protections*

Montana law protects employees against discrimination based on the following characteristics:

- race;
- color;
- creed;
- religion;
- sex (including sexual harassment);[418]
- pregnancy (includes childbirth and related disabilities and medical conditions);[419]
- physical or mental disability;
- age;

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[415] 140 S. Ct. 1731 (2020). For a discussion of this case, see LITTLER ON DISCRIMINATION IN THE WORKPLACE: RACE, NATIONAL ORIGIN, SEX, AGE & GENETIC INFORMATION.

[416] The EEOC's website is available at http://www.eeoc.gov/.

[417] 29 C.F.R. § 1601.13. Note that for ADEA charges, only state laws extend the filing limit to 300 days. 29 C.F.R. § 1626.7.

[418] *Stringer-Altmaier v. Haffner*, 138 P.3d 419, 422 (Mont. 2006) ("…sexual harassment is sexual discrimination under the Montana Human Rights Act.").

[419] MONT. CODE ANN. § 49-2-310.

- national origin (including ancestry);
- marital status;[420] and
- vaccination status or possessing immunity passport (some healthcare facilities are exempt from this requirement when compliance would result in a violation of regulations or guidance issued by the Centers for Medicare and Medicaid or CDC).[421]

Montana's antidiscrimination protections cover employers with one or more employees. There are exceptions, however, for nonprofit fraternal, charitable, or religious associations or corporations.[422]

3.11(a)(iii) *State Enforcement Agency & Civil Enforcement Procedures*

The Montana Human Rights Bureau enforces the state's fair employment practices laws. An employee must file a verified complaint with the Bureau within 180 days after the alleged act of discrimination occurred or was discovered.[423] The Bureau will notify the employer within 10 days of the filing of the compliant, and advise the parties to preserve all personnel records relevant to the complaint, among other things.[424] The Bureau will then conduct an investigation into the complaint and may issue subpoenas relating to the matter in the course of its investigation.[425] The Bureau has procedures in place to achieve a voluntary resolution of the case. However, if a resolution cannot be reached, the complaint remains pending.[426]

The Bureau will issue a final investigative report and written finding within 180 days. If the Bureau issues a finding of reasonable cause, the complaint will be certified for hearing. The Bureau will then attempt to resolve the case through conciliation, if possible.[427] If there is no reasonable cause, the complaint will be dismissed and a right to sue letter issued to the complainant. The charging party may then file objections with the Bureau or commence proceedings in district court.[428]

Confidentiality. The Bureau has procedures in place to ensure that information for which an individual right of privacy has been asserted or might be asserted will not be released without notifying the relevant parties and providing an opportunity to be heard.[429]

3.11(a)(iv) *Additional Discrimination Protections*

National Guard. An employer may not deny employment, reemployment, reinstatement, retention, promotion, or any benefit of employment or obstruct, injure, discriminate against, or threaten negative consequences against a person with regard to employment because of the person's membership, application for membership, or potential application for membership in the National Guard of Montana

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[420] MONT. CODE ANN. §§ 49-2-101, 49-2-303, and 49-4-101.

[421] MONT. CODE ANN. §§ 49-2-312 *et seq*.

[422] MONT. CODE ANN. § 49-2-101.

[423] MONT. ADMIN. R. 24.8.201, 24.8.203.

[424] MONT. ADMIN. R. 24.8.207.

[425] MONT. ADMIN. R. 24.8.214.

[426] MONT. ADMIN. R. 24.8.301.

[427] MONT. ADMIN. R. 24.8.301.

[428] MONT. ADMIN. R. 24.8.220.

[429] MONT. ADMIN. R. 24.8.210.

or any other state or because the person may exercise or has exercised a right or may claim or has claimed a benefit under the military protections.[430]

Vaccine Status. Montana has enacted a law prohibiting discrimination against individuals based on their vaccination status or whether the person has an immunity passport. An employer cannot refuse employment or discriminate against a person in compensation or terms of employment based on a person's vaccination status or whether the person holds an immunity passport. The law also provides that an individual may not be required to receive any vaccination whose use is permitted under an emergency use authorization or any vaccine undergoing safety trials. However, a licensed nursing home, long term care facility, or assisted living facility is exempt from compliance with this law when compliance would result in a violation of regulations or guidance issued by the U.S. Centers for Disease Control or the Centers for Medicare and Medicaid services.

Under this law, *recommending* that employees receive a vaccine is not considered unlawful discrimination. In addition, a healthcare facility does not unlawfully discriminate if the facility asks an employee to volunteer the employee's immunization status for the purpose of determining and proceeding to implement reasonable accommodation measures to protect the safety and health of employees, patients, visitors, and other persons who are unvaccinated or not immune from communicable diseases.[431]

Use of Lawful Products. Under Montana's Off-Duty Conduct Discrimination statutes, an employer may not refuse to employ or license, and may not 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 off the employer's premises during nonworking hours.[432] A *lawful product* is a product that is legally consumed, used, or enjoyed, and includes food, beverages, tobacco, and marijuana.[433]

This provision does not apply to use of a lawful product that:

- affects in any manner an individual's ability to perform job-related employment responsibilities or the safety of other employees; or
- conflicts with a *bona fide* occupational qualification that is reasonably related to the individual's employment.[434]

The law applies to all employers, except for nonprofit organizations that, as one of its primary purposes or objectives, discourage the general public's use of one or more lawful products are covered under state statute. Also protected are employees and applicants.[435] Likewise, the law does not apply to an individual who, on a personal basis, has a professional service contract with an employer and the unique nature of

[430] MONT. CODE ANN. § 10-1-1005.

[431] MONT. CODE ANN. § 49-2-312(3)(b)(i).

[432] MONT. CODE ANN. § 39-2-313(2).

[433] MONT. CODE ANN. § 39-2-313(1).

[434] MONT. CODE ANN. § 39-2-313(3).

[435] MONT. CODE ANN. §§ 39-2-313(3), 39-2-314.

the services provided authorizes the employer, as part of the service contract, to limit the use of certain products.[436]

An employer may offer, impose, or have in effect a health, disability, or life insurance policy that makes distinctions between employees for the type or price of coverage based on the employee's use of a lawful product, provided:

- the differential rates reflect actuarially justified differences in providing employee benefits;
- the employer provides the employee with written notice delineating the differential rates used by the employer's insurance carriers; and
- the distinctions in type or price are not used to expand, limit, or curtail the rights or liability of a party in a civil cause of action.[437]

An employer will not violate this section if it takes action believing that its actions are permissible under an established substance abuse or alcohol program or policy, professional contract, or collective bargaining agreement.[438]

3.11(b) *Equal Pay Protections*

3.11(b)(i) *Federal Guidelines on Equal Pay Protections*

The Equal Pay Act requires employers to pay male and female employees equal wages for substantially equal jobs. Specifically, the law prohibits employers covered under the federal Fair Labor Standards Act (FLSA) from discriminating between employees within the same establishment on the basis of sex by paying wages to employees at a rate less than the rate at which the employer pays wages to employees of the opposite sex for equal work on jobs—"the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[439] The prohibition does not apply to payments made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on a factor other than sex.

An employee alleging a violation of the Equal Pay Act must first exhaust administrative remedies by filing a complaint with the EEOC within 180 days of the alleged unlawful employment practice. Under the federal Lilly Ledbetter Fair Pay Act of 2009, for purposes of the statute of limitations for a claim arising under the Equal Pay Act, an unlawful employment practice occurs with respect to discrimination in compensation when: (1) a discriminatory compensation decision or other practice is adopted; (2) an individual becomes subject to such a decision or practice; or (3) an individual is affected by application of such decision or practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.[440]

3.11(b)(ii) *State Guidelines on Equal Pay Protections*

It is unlawful for an employer to employ women in any occupation within Montana for compensation less than that paid to men for equivalent service or for the same amount or class of work or labor in the same

[436] MONT. CODE ANN. § 39-2-313(3).

[437] MONT. CODE ANN. § 39-2-313(5).

[438] MONT. CODE ANN. § 39-2-313(4).

[439] 29 U.S.C. § 206(d)(1).

[440] 42 U.S.C. § 2000e-5.

industry, establishment, office, or place of employment of any kind or description.[441] The statute does not specify any exceptions to the rule and does not provide a private right of action to redress violations. Only criminal penalties are available.[442]

3.11(c) *Pregnancy Accommodation*

3.11(c)(i) *Federal Guidelines on Pregnancy Accommodation*

As discussed in **3.9(c)(i)**, the federal Pregnancy Discrimination Act (PDA), which amended Title VII, the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA) may be implicated in determining the extent to which an employer is required to accommodate an employee's pregnancy, childbirth, or related medical conditions.

Additionally, the Pregnant Workers Fairness Act (PWFA) makes it an unlawful employment practice for an employer of 15 or more employees to:

- fail or refuse to make reasonable accommodations for the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on its business operations;
- require a qualified employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation other than any reasonable accommodation arrived at through the interactive process;
- deny employment opportunities to a qualified employee, if the denial is based on the employer's need to make reasonable accommodations for the qualified employee;
- require a qualified employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided; or
- take adverse action related to the terms, conditions, or privileges of employment against a qualified employee because the employee requested or used a reasonable accommodation.[443]

A *reasonable accommodation* is any change or adjustment to a job, work environment, or the way things are usually done that would allow an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other employees. Reasonable accommodation includes:

- modifications to the job application process that allow a qualified applicant with a known limitation under the PWFA to be considered for the position;
- modifications to the work environment, or to the circumstances under which the position is customarily performed;
- modifications that enable an employee to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated employees without known limitations; or

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[441] MONT. CODE ANN. § 39-3-104.

[442] MONT. CODE ANN. § 39-3-104.

[443] 42 U.S.C. § 2000gg-1. The regulations provide definitions of *pregnancy*, *childbirth*, and *related medical conditions*. 29 C.F.R. § 1636.3.

- temporary suspension of an employee's essential job function(s).[444]

The PWFA also provides for reasonable accommodations related to lactation, as described in **3.4(a)(iii)**.

An employee seeking a reasonable accommodation must request an accommodation.[445] To request a reasonable accommodation, the employee or the employee's representative need only communicate to the employer that the employee needs an adjustment or change at work due to their limitation resulting from a physical or mental condition related to pregnancy, childbirth, or related medical conditions. The employee must also participate in a timely, good faith interactive process with the employer to determine an effective reasonable accommodation.[446] An employee is not required to accept an accommodation. However, if the employee rejects a reasonable accommodation, and, as a result of that rejection, cannot perform (or apply to perform) an essential function of the position, the employee will not be considered "qualified."[447]

An employer is not required to seek documentation from an employee to support the employee's request for accommodation but may do so when it is reasonable under the circumstances for the employer to determine whether the employee has a limitation within the meaning of the PWFA and needs an adjustment or change at work due to the limitation.

Reasonable accommodation is not required if providing the accommodation would impose an undue hardship on the employer's business operations. An *undue hardship* is an action that fundamentally alters the nature or operation of the business or is unduly costly, extensive, substantial, or disruptive. When determining whether an accommodation would impose an undue hardship, the following factors are considered:

- the nature and net cost of the accommodation;
- the overall financial resources of the employer;
- the number of employees employed by the employer;
- the number, type, and location of the employer's facilities; and
- the employer's operations, including:
  - the composition, structure, and functions of the workforce; and
  - the geographic separateness and administrative or fiscal relationship of the facility where the accommodation will be provided.[448]

The following modifications do not impose an undue hardship under the PWFA when they are requested as workplace accommodations by a pregnant employee:

- allowing an employee to carry or keep water near and drink, as needed;
- allowing an employee to take additional restroom breaks, as needed;

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444 29 C.F.R. § 1636.3.

445 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1636.3.

446 29 C.F.R. § 1636.3.

447 29 C.F.R. § 1636.4.

448 42 U.S.C. § 2000gg-1; 29 C.F.R. § 1630.2(p).

- allowing an employee whose work requires standing to sit and whose work requires sitting to stand, as needed; and
- allowing an employee to take breaks to eat and drink, as needed.[449]

The PWFA expressly states that it does not limit or preempt the effectiveness of state-level pregnancy accommodation laws. State pregnancy accommodation laws are often specific in terms of outlining an employer's obligations and listing reasonable accommodations that an employer should consider if they do not cause an undue hardship on the employer's business.

Where a state law focuses primarily on providing job-protected leave for pregnancy or childbirth—as opposed to a pregnancy accommodation—it is discussed in **3.9(c)(ii)**. For more information on these topics, see **LITTLER ON LEAVES OF ABSENCE: FAMILY, MEDICAL & PREGNANCY LEAVES**.

3.11(c)(ii) *State Guidelines on Pregnancy Accommodation*

The Montana Human Rights Act requires an employer with one or more employees to grant a reasonable maternity leave of absence for pregnancy (see **3.9(c)(ii)**).[450]

3.11(d) *Harassment Prevention Training & Education Requirements*

3.11(d)(i) *Federal Guidelines on Antiharassment Training*

While not expressly mandated by federal statute or regulation, training on equal employment opportunity topics—*i.e.*, discrimination, harassment, and retaliation—has become *de facto* mandatory for employers.[451] Multiple decisions of the U.S. Supreme Court[452] and subsequent lower court decisions have made clear that an employer that does not conduct effective training: (1) will be unable to assert the affirmative defense that it exercised reasonable care to prevent and correct harassment; and (2) will subject itself to the risk of punitive damages. EEOC guidance on employer liability reinforces the important role that training plays in establishing a legal defense to harassment and discrimination claims.[453] Training for all employees, not just managerial and supervisory employees, also demonstrates an employer's "good faith efforts" to prevent harassment. For more information on harassment claims and employee training, see **LITTLER ON HARASSMENT IN THE WORKPLACE** and **LITTLER ON EMPLOYEE TRAINING**.

3.11(d)(ii) *State Guidelines on Antiharassment Training*

There are no antiharassment training and education requirements mandated for private employers in Montana.

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[449] 29 C.F.R. § 1636.3.

[450] MONT. CODE ANN. § 49-2-310.

[451] Note that the Notification and Federal Employee Anti-Discrimination and Retaliation ("No FEAR") Act mandates training of federal agency employees.

[452] *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526 (1999).

[453] EEOC, *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html; see also EEOC, *Select Task Force on the Study of Harassment in the Workplace: Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

3.12 Miscellaneous Provisions

3.12(a) *Whistleblower Claims*

3.12(a)(i) *Federal Guidelines on Whistleblowing*

Protections for whistleblowers can be found in dozens of federal statutes. The federal Occupational Safety and Health Administration ("Fed-OSHA") administers over 20 whistleblower laws, many of which have little or nothing to do with safety or health. Although the framework for many of the Fed-OSHA-administered statutes is similar (*e.g.*, several of them follow the regulations promulgated under the Wendell H. Ford Aviation Investment and Reform Act (AIR21)), each statute has its own idiosyncrasies, including who is covered, timeliness of the complaint, standard of proof regarding nexus of protected activity, appeal or objection rights, and remedies available. For more information on whistleblowing protections, see LITTLER ON WHISTLEBLOWING & RETALIATION.

3.12(a)(ii) *State Guidelines on Whistleblowing*

Montana's Wrongful Discharge from Employment Act protects whistleblowers by preventing an employer from discharging an employee in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy.[454] The law defines *public policy* as a policy in effect at the time of the discharge that concerns the public health, safety, or welfare and is established by a constitutional provision, statute, or administrative rule.[455]

The state Whistleblower Award and Protection Act permits the Securities Commissioner to give monetary awards to whistleblowers who voluntarily provide original information that leads to successful enforcement of an administrative or judicial action under applicable securities regulations. Under the law, an employer is prohibited from taking any adverse action or retaliating against an employee that:

- provides information to the state or other law enforcement agency concerning a possible violation of state or federal securities laws, including any rules or regulations thereunder, that has occurred, is ongoing, or is about to occur;
- initiates, testifies in, or assists in any investigation or administrative or judicial action of the commissioner, the office of the state auditor, or other law enforcement agency based upon or related to information concerning a possible violation of state or federal securities laws, including any rules or regulations;
- makes disclosures that are required or protected under the Sarbanes-Oxley Act of 2002, the Securities Act of 1933, the Securities Exchange Act of 1934, any other law, rule, or regulation subject to the jurisdiction of the United States Securities and Exchange Commission (SEC) or the Montana Securities Act or rule; or
- makes disclosures to a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) regarding matters subject to the jurisdiction of the commissioner, the office of the state auditor, or the United States SEC.[456]

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[454] MONT. CODE ANN. § 39-2-904.

[455] MONT. CODE ANN. § 39-2-903.

[456] MONT. CODE ANN. § 30-10-1101 *et seq.*; MONT. CODE ANN. § 30-10-1111.

However, the law also provides that an employee is not protected if:

- the individual knowingly makes a false, fictitious, or fraudulent statement or misrepresentation;
- the individual uses a false writing or document knowing that the writing or document contains false, fictitious, or fraudulent information; or
- the individual knows that the disclosure is of original information that is false, fictitious, or fraudulent.[457]

3.12(b) *Labor Laws*

3.12(b)(i) *Federal Labor Laws*

Labor law refers to the body of law governing employer relations with unions. The National Labor Relations Act (NLRA)[458] and the Railway Labor Act (RLA)[459] are the two main federal laws governing employer relations with unions in the private sector. The NLRA regulates labor relations for virtually all private-sector employers and employees, other than rail and air carriers and certain enterprises owned or controlled by such carriers, which are covered by the RLA. The NLRA's main purpose is to: (1) protect employees' right to engage in or refrain from *concerted activity* (*i.e.*, group activities attempting to improve working conditions) through representation by labor unions; and (2) regulate the collective bargaining process by which employers and unions negotiate the terms and conditions of union members' employment. The National Labor Relations Board (NLRB or "Board") enforces the NLRA and is responsible for conducting union elections and enforcing the NLRA's prohibitions against "unfair" conduct by employers and unions (referred to as *unfair labor practices*). For more information on union organizing and collective bargaining rights under the NLRA, see LITTLER ON UNION ORGANIZING and LITTLER ON COLLECTIVE BARGAINING.

Labor policy in the United States is determined, to a large degree, at the federal level because the NLRA preempts many state laws. Yet, significant state-level initiatives remain. For example, *right-to-work laws* are state laws that grant workers the freedom to join or refrain from joining labor unions and prohibit mandatory union dues and fees as a condition of employment.

3.12(b)(ii) *Notable State Labor Laws*

Montana has not passed any right-to-work laws and, other than collective bargaining statutes related to nurses and employers employing only immediate family members, the state has not passed other notable laws pertaining to private-sector unions or union activities.

3.12(c) *At-Will Employment*

Montana is unique in that its Wrongful Discharge from Employment Act prevents an employer from discharging an employee that has finished the employee's probationary period without good cause.[460] In every other state, employment is presumed to be at-will, and employers may discharge an employee at any time for any nonprohibited reason.

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[457] MONT. CODE ANN. § 30-10-1111.

[458] 29 U.S.C. §§ 151 to 169.

[459] 45 U.S.C. §§ 151 *et seq*.

[460] MONT. CODE ANN. § 39-2-904.

Probationary Period. When a Montana employee begins work for an employer, the employee is typically placed in a probationary period. Unless the employer establishes a different policy or provide that there is no probationary period at the time the employee begins to work, there is a probationary period of 12 months from the date the employee begins work. Employers may extend this period before it expires, but the total probationary period may not exceed 18 months.[461] Depending on an employer's policies, seasonal employees may begin their probationary period anew each season they are employed, regardless of whether they have worked for over six months in the aggregate.[462] During the probationary period, employment is considered to be at-will, meaning that the employer may discharge the employee at any time for any reason or no reason.[463]

Good Cause. Once this probationary period is over, the employer may only discharge the employee for good cause. The statute defines *good cause* as any "reasonable job-related grounds for an employee's dismissal based on…failure to satisfactorily perform job duties…disruption of the employer's operation…material or repeated violation of an express provision of the employer's written policies; or…other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment." **Effective October 1, 2023**, *good cause* includes "the employer terminated the employee solely based on the employee's legal expression of free speech, including but not limited to statements made on social media."[464] The definition specifically excludes the legal use of a lawful product (see **3.11(a)(iv)**). Employers have broadest discretion when deciding to discharge any managerial or supervisory employee.[465]

4. END OF EMPLOYMENT

4.1 Plant Closings & Mass Layoffs

4.1(a) *Federal WARN Act*

The federal Worker Adjustment and Retraining Notification (WARN) Act requires a covered employer to give 60 days' notice prior to: (1) a *plant closing* involving the termination of 50 or more employees at a single site of employment due to the closure of the site or one or more operating units within the site; or (2) a *mass layoff* involving either 50 or more employees, provided those affected constitute 33% of those working at the single site of employment, or at least 500 employees (regardless of the percentage of the workforce they constitute).[466] The notice must be provided to affected nonunion employees, the representatives of affected unionized employees, the state's dislocated worker unit, and the local government where the closing or layoff is to occur.[467] There are exceptions that either reduce or eliminate notice requirements. For more information on the WARN Act, see LITTLER ON REDUCTIONS IN FORCE.

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[461] MONT. CODE ANN. § 39-2-910.

[462] *Dundas v. Winter Sports, Inc.*, 410 P.3d 177 (Mont. 2017). This decision was reached when the default probationary period was six months.

[463] MONT. CODE ANN. § 39-2-904.

[464] MONT. CODE ANN. § 39-2-903(5), as amended by S.B. 270 (Mont. 2023).

[465] MONT. CODE ANN. § 39-2-904(3).

[466] 29 U.S.C. § 2101(1)-(3). Business enterprises employing: (1) 100 or more full-time employees; or (2) 100 or more employees, including part-time employees, who in aggregate work at least 4,000 hours per week (exclusive of overtime) are covered by the WARN Act. 20 C.F.R. § 639.3.

[467] 20 C.F.R. §§ 639.4, 639.6.

4.1(b) *State Mini-WARN Act*

Montana does not have a mini-WARN law requiring advance notice to employees of a plant closing.

4.1(c) *State Mass Layoff Notification Requirements*

Montana does not require that an employer notify the state unemployment insurance department or another department in the event of a mass layoff.

4.2 Documentation to Provide When Employment Ends

4.2(a) *Federal Guidelines on Documentation at End of Employment*

Table 10 lists the documents that must be provided when employment ends under federal law.

Table 10. Federal Documents to Provide at End of Employment

Category	Notes
Health Benefits: Consolidated Omnibus Budget Reconciliation Act (COBRA)	Under COBRA, the administrator of a covered group health plan must provide written notice to each covered employee and spouse of the covered employee (if any) of the right to continuation coverage provided under the plan.[468] The notice must be provided not later than the earlier of: • the date that is 90 days after the date on which the individual's coverage under the plan commences or, if later, the date that is 90 days after the date on which the plan first becomes subject to the continuation coverage requirements; or • the first date on which the administrator is required to furnish the covered employee, spouse, or dependent child of such employee notice of a qualified beneficiary's right to elect continuation coverage.
Retirement Benefits	The Internal Revenue Service requires the administrator of a retirement plan to provide notice to terminating employees within certain time frames that describe their retirement benefits and the procedures necessary to obtain them.[469]

4.2(b) *State Guidelines on Documentation at End of Employment*

Table 11 lists the documents that must be provided when employment ends under state law.

[468] 29 C.F.R. § 2590.606-1. Model notices and general information about COBRA is available from the U.S. Department of Labor's Employee Benefits Security Administration at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra.

[469] See the section "Notice given to participants when they leave a company" at https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-topics-notices.

Table 11. State Documents to Provide at End of Employment	
Category	**Notes**
Health Benefits: Mini-COBRA, etc.	No notice requirement located.
Unemployment Notice	**Generally.** Montana does not require that employees be provided notice about unemployment benefits when employment ends. Nonetheless, all employers must post and maintain, where readily accessible, notice informing employees that the employer has secured unemployment coverage.[470] Accordingly, it is recommended that an employer provide a copy of the unemployment notice when employment ends. **Multistate Workers.** Montana similarly does not require that employees be notified as to the jurisdiction under whose unemployment compensation law services have been covered.[471] It is recommended, however, that an employer provide notice of the jurisdiction where services will be covered for unemployment purposes. Additionally, employers should follow that state's general notice requirement, if applicable.

4.3 Providing References for Former Employees

4.3(a) *Federal Guidelines on References*

Federal law does not specifically address providing former employees with references.

4.3(b) *State Guidelines on References*

Reasons for Firing. Upon demand by a discharged employee, an employer must furnish the employee a written statement of the reasons for the employee's discharge. The employee's written demand must advise the employer of the possibility that the statements may be used in litigation.

If an employer refuses to provide the letter within a reasonable time after the demand, the employer may not provide any explanation for the discharge to any person, or in any way to blacklist or to prevent the employee from procuring employment elsewhere.

The employer's response to the demand may be modified at any time and may not limit an employer's ability to present a full defense in any action brought by the employee. Likewise, an employer's failure to provide a letter upon request will not limit an employer's ability to present a full defense to any action.[472]

Blacklisting. Blacklisting is the intentional prevention of the future employment of an employee by the former employer. Blacklisting usually occurs when the former employer makes representations to prospective employers that an individual should not be hired. It should be distinguished from a reference,

[470] MONT. ADMIN. R. 24.40.1601; *see* MONT. CODE ANN. § 39-51-2401. This poster can be obtained from the insurance provider.

[471] *See* MONT. CODE ANN. § 39-51-504 (Reciprocal Benefit Arrangements).

[472] MONT. CODE ANN. § 39-2-801.

which is essentially a request for information about job performance. Blacklisting is prohibited in Montana. Specifically, an employer that fires an employee cannot prevent or attempt to prevent, by word or writing of any kind, the employee from obtaining employment with any other person. An employer is not prohibited from informing, by word or writing, any person to whom the employee has applied for employment a truthful statement of the reason for discharge.[473]

[473] MONT. CODE ANN. § 39-2-802.

