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Montana Legislature Changes Montana's Wrongful Discharge From Employment Act

By John M. Semmens

Employers should take note the Montana Legislature has made its most significant changes to Montana's Wrongful Discharge From Employment Act ("WDEA") since its enactment in 1987. On April 1, 2021, Montana Governor Greg Gianforte signed HB 254, An Act Revising The Wrongful Discharge Act ("the Act"). Pursuant to its terms, the Act is effective immediately.

The Act provides additional clarity on how Montana law governs the relationship between employers and employees, and resolves uncertainties that arose under the original WDEA. In relevant part, the Act: (i) establishes a default probationary period of 12 months from date of hire; (ii) provides additional guidance on what acts may constitute wrongful discharge;
(iii) codifies employers' broad discretion to discharge managerial employees; (iv) limits the monetary damages to which wrongfully discharged employees may be entitled; (v) establishes additional procedural requirements for discharged employees to pursue WDEA claims; and
(vi) identifies additional term contracts that are exempted from the WDEA.

I. The Act Provides Employers With Additional Flexibility To Evaluate New Hires During Probationary Periods.

The WDEA generally does not permit at-will employment. However, "[d]uring a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason." Mont. Code Ann. § 39-2-904(2)(a) (2019). Under the original WDEA, the default probationary period was "6 months from the date of hire" and employers were also permitted to set their own probationary periods. Mont. Code Ann. § 39-2-904(2)(b) (2019).

The Act expands upon the WDEA's existing probationary period provisions. Moving forward, the default probationary period is "12 months commencing on the date the employee begins work." The Act also clarifies employers are permitted to: (i) set their own probationary periods; and (ii) extend a probationary period prior to its expiration, provided that the total probationary period does "not exceed 18 months."

II. The Act Clarifies What Acts May Constitute Wrongful Discharge.

If an employer commits a "wrongful discharge," the terminated employee may be awarded certain damages under Montana law. Mont. Code Ann. § 39-2-905(1) (2019). Under the original WDEA, a discharge was considered wrongful if: "(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy; (b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or (c) the employer violated the express provisions of its own written personnel policy." Mont. Code Ann. § 39-2-904(1)(a)-(c) (2019). Originally, "good cause" was defined as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." Mont. Code Ann. § 39-2-903(5). The Act builds upon this existing language to provide additional clarity to employers and employees on what acts may constitute wrongful discharge.

First, the Act identifies additional instances in which an employer may have "good cause" to terminate an employee:

- (5) 'Good cause' means any reasonable job-related grounds for an employee's dismissal based on: (a) the employee's failure to satisfactorily perform job duties; (b) the employee's disruption of the employer's operation; (c) the employee's material or repeated violation of an express provision of the employer's written policies; or (d) other legitimate business reasons determined by the employer while exercising the employer's reasonable business judgment.

Importantly, if an employee violates an employer's written policies, a specific provision in the WDEA now states the employer may have good cause to terminate that employee. The Act also suggests an employer's exercise of its "reasonable business judgment" in terminating an employee may constitute good cause. Boiled down, the Act's expansive definition of "good cause" provides employers with additional discretion to terminate employees.

Second, the Act limits an employee's ability to argue a discharge was wrongful if an employer violated its own written policies. Under the original WDEA, it was not clear under what circumstances an employer's violation of its written policies would constitute wrongful discharge. *See* Mont. Code Ann. § 39-2-904(1)(c) (2019). The Act resolves those uncertainties by establishing a narrow set of circumstances under which an employer's violation of its written policies could constitute a wrongful discharge. Specifically, the employer must have "materially violated an express provision of its own written personnel policy prior to the discharge, and the violation [must have] deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer." Other employer violations of written policies likely could not serve as the basis for wrongful discharge claims.

III. The Act Codifies Employers' Broad Discretion To Terminate Managerial Employees.

Although not expressly referenced in the original WDEA, the Montana Supreme Court has long held that "[e]mployers have the broadest discretion" to terminate "managerial employees." *Moe v. Butte-Silver Bow Cty.*, 2016 MT 103, ¶ 54, 383 Mont. 297, 371 P.3d 415. The Act codifies that line of precedent by amending Montana Code Annotated § 39-2-904(3) to state: "The employer has the broadest discretion when making a decision to discharge any managerial or supervisory employee." Thus, the Act confirms employers' existing discretion to terminate managerial employees.

IV. The Act Limits The Remedies Wrongfully Discharged Employees May Receive.

Under the WDEA, wrongfully discharged employees may be awarded "lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge." Mont. Code Ann. § 39-2-905(1) (2019). Under the original WDEA, employees generally were required to mitigate their damages by pursuing alternate employment. *Id*. Any interim earnings the employee earned, or reasonably could have earned, "must be deducted from the amount awarded for lost wages." *Id*.

The Act clarifies what remedies wrongfully discharged employees may receive in two important ways. First, the Act establishes the deduction for an employee's "interim earnings" must include all earnings that were earned, or reasonably could have been earned, "from any new kind, nature, or type of work, hire, contractor status, or employment that did not exist at the time of discharge." In short, the Act identifies additional income sources separate and apart from the traditional employment relationship that must be deducted from a wrongful discharge award.

Second, the Act requires for the first time that certain benefits an employee receives as a result of the termination—including unemployment benefits—also must be deducted from a wrongful discharge award. Specifically, a district court now is required to "consider any monetary payments, compensation, or benefits the employee received arising from or related to the discharge, including unemployment compensation or benefits and early retirement pay" and must "deduct those payments, compensation, and benefits from the amount awarded for lost wages before entering judgment." Thus, the Act reduces the total damages to which wrongfully discharged employees may be entitled.

V. The Act Establishes Additional Procedural Requirements For Discharged Employees To Pursue WDEA Claims.

Under the WDEA, a terminated employee has 1 year from the date of discharge to file a complaint. Mont. Code Ann. § 39-2-911(1) (2019). However, if an employer maintains internal policies and procedures that allow employees to appeal termination decisions by filing an internal grievance, the employee typically must exhaust its internal options prior to filing suit. Mont. Code Ann. § 39-2-911(2) (2019).

A terminated employee's obligation to exhaust their internal appeal options is triggered when the employer provides the employee with notice of those internal grievance procedures. Mont. Code Ann. § 39-2-911(3) (2019). Under the original WDEA, employers were required to provide employees with those internal procedures "within 7 days of the date of the discharge"; an employer's failure to do so eliminated an employee's obligation to pursue the internal grievance procedures. *Id*.

The Act provides employers with additional flexibility to notify employees of its internal grievance procedures. Employers now are required to provide employees with its internal grievance procedures "within 14 days of the date of the discharge." Additionally, the Act clarifies the employer can provide the employee with those procedures "in writing or electronically," including by constructively serving the employee by sending the procedures to the employee's "last known postal mailing address or electronic mailing address."

Although the Act does not change the WDEA's 1 year statute of limitations, it does require employees to serve WDEA complaints "no later than 6 months after filing the compliant." However, if a plaintiff fails to do so, the Act requires the Court to dismiss the complaint without prejudice. In such a situation, it is possible the plaintiff could re-file a WDEA complaint, provided the statute of limitations had not already run.

VI. The Act Identifies Additional Term Contracts That Are Exempted From The WDEA.

The WDEA does not apply to the discharge of "an employee covered by a . . . written contract of employment for a specific term." Mont. Code Ann. § 39-2-912(2). However, such a written contract

may not allow "the employer to terminate at will." *Brown v. Yellowstone Club Operations, LLC*, 2011 MT 155, ¶ 11, 361 Mont. 124, 255 P.3d 205.

The Act builds on the WDEA's existing language to clarify that "a contract for a specific term may contain a probationary period . . . and may contain an automatic renewal clause that automatically renews the contract of employment for one or more successive terms." In this way, the Act provides employers with additional flexibility to draft term contracts that still are exempted from the WDEA.

* * * * *

The Act represents the most significant changes ever made to the WDEA. As a general matter, the Act provides additional discretion to employers making employment decisions. The Act also clarifies various issues that were not addressed by the original WDEA. Although it is unclear how Montana's Courts will interpret the specific language of the Act, the Act should improve the business climate in Montana by providing employers with additional certainty about Montana employment law.

For Employers with Additional Questions

Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment law questions, including recent developments in Montana law. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

<u>Employers May Continue FFCRA Leave Programs Through September 30, 2021</u>

By: Scott D. Hagel

Although not required to do so, employers now have the option to continue providing paid emergency sick leave and paid family and medical leave in exchange for additional tax credits through September 30, 2021.

These paid leave programs initially were implemented in response to the COVID-19 pandemic under the Families First Coronavirus Response Act ("FFCRA"), which was set to expire on December 31, 2020. Under the Tax Relief Act of 2020 (the $900 billion stimulus bill enacted just prior to Christmas 2020), Congress also extended tax credits for employers who elected to voluntarily continue their emergency FFCRA leave programs through March 31, 2021. Congress' recent enactment of the $1.9 trillion American Rescue Plan Act of 2021 ("ARPA") on March 18, 2021, continues the payroll tax credit from April 1, 2021, through September 30, 2021 for employers who opt to continue to provide paid emergency sick leave and paid emergency family and medical leave. ARPA also provides additional qualifying reasons for both paid sick leave and paid family and medical leave.

ARPA's notable changes to employer leave programs include:

- An additional 10 days (two weeks) of paid sick leave;
- Three additional qualifying reasons for paid sick leave: (a) the employee is obtaining a COVID-19 vaccine; (b) the employee is recovering from any injury, illness, disability or condition related to their vaccination; or (c) the employee is seeking or awaiting the results of a diagnostic test or medical diagnosis of COVID-19, and such employee has been exposed to COVID-19 or the employer has requested such a test or diagnosis.
- All of the qualifying reasons for paid sick leave under the original FFCRA, as well as the three new reasons, are now qualifying reasons for paid Emergency Family and Medical Leave ("EFMLA"). Under the FFCRA-version of the paid family and medical leave, the only qualifying reason was to

care for a child whose school or childcare facility was closed for a reason related to COVID-19, when an employee was unable to telework.
- The first two weeks of EFMLA will now be paid. Under the FFCRA, the first two weeks were unpaid (but were generally covered as paid sick leave).

ARPA's changes to these leave programs did not appear to result in any additional paid EFMLA leave, however. ARPA is silent as to whether employees are now entitled to another 12-week bank of paid EFMLA leave. However, under the FFCRA, employees were limited to 12 weeks of FMLA leave during a defined FMLA leave year, even if some of the FMLA leave was provided in the form of paid EFMLA leave. This does not appear to have changed. Employees are still limited to a maximum of 12 weeks of any type of FMLA leave (both traditional and paid EFMLA leave) within any given FMLA leave year. Therefore, if an employee used all of his FMLA leave (whether it was taken as paid EFMLA leave or traditional FMLA leave) prior to March 31, 2021, and the employer opted to continue the program through September 30, 2021, the employee would not be entitled to additional FMLA leave, unless or until the employee started a new FMLA leave year. In that case, an employee would be entitled to another 12 weeks of FMLA leave, which could include paid EFMLA leave under ARPA if it is taken prior to September 30, 2021.

Of major significance is that the number of qualifying reasons for emergency paid sick leave and paid EFMLA leave have been significantly expanded. When it enacted FFCRA a little over a year ago, Congress provided six qualifying reasons under which an employee could take emergency sick leave:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to COVID-19;
- The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- The employee is caring for an individual who is subject to a federal state or local quarantine or isolation order related to COVID-19 or has been advised by health care provider to self-quarantine for COVID-19;
- The employee is caring for his/her child whose school or place of care is closed or childcare provider is unavailable due to COVID-19 related reasons; or
- The employee is experiencing any other substantially similar condition specified by the Secretary of the United States Department of Health and Human Services.

With the three additional qualifying reasons for emergency paid sick leave noted above, an employee whose employer opts to continue these FFCRA benefits under ARPA now has nine qualifying reasons to take emergency paid FMLA – provided the employee has time remaining in his yearly FMLA-leave entitlement.

ARPA also specifies the maximum amount of the tax credit available for various qualifying reasons. Employers providing paid sick leave will receive a tax credit of up to 100% of an employee's rate of pay (up to $511 per day) for the following reasons:

- The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
- The employee has been advised by a health care provider to self-quarantine due to COVID-19;
- The employee is experiencing COVID-19 symptoms and seeking a medical diagnosis;
- The employee is seeking or awaiting the results of a diagnostic test or a medical diagnosis of COVID-19, and such employee has been exposed to COVID-19 or the employee's employer has requested such a test or diagnosis;
- The employee is obtaining a COVID-19 vaccine; or
- The employee is recovering from any injury, illness, disability or condition related to such vaccination.

For any of the other qualifying reasons for emergency paid sick leave (caring for an individual who is subject to a federal, state or local quarantine or isolation order related to COVID-19, or who has been advised by a health care provider to self-quarantine for COVID-19; caring for a child whose school or place of care is closed or childcare provider is unavailable due to COVID-19 related reasons; or experiencing any other substantially similar condition specified by the Secretary of the United States Department of Health and Human Services), employers will receive a tax credit at two-thirds of an employee's regular rate of pay, up to a cap of $200 per day.

Employers who now provide paid EFLMA leave for any of the qualifying reasons for such leave will receive a tax credit calculated at two-thirds of the employee's regular rate of pay and capped at $200 per day. However, the cap on the aggregate paid leave has been increased from $10,000 to $12,000, which gives the employer an additional $2,000 in potential tax credits per employee receiving the leave.

ARPA also imposed new non-discrimination rules. The tax credit will be available only to those employers who provide leave to all employees without discriminating against certain categories of workers. The tax credit will not be available to employers who discriminate in favor of highly compensated employees, full-time employees or on the basis of length of employment tenure.

Because of the expanded reasons for paid emergency sick leave and paid EFMLA leave, employers who voluntarily opt to continue taking the tax credit could potentially be required to provide up to 14 weeks of paid leave to certain employees (those who had not previously taken any FMLA leave during the current FMLA year). Employers should carefully evaluate whether the benefits of the continuing tax credit outweigh any potential staffing drawbacks of providing the leave.

For Employers with Additional Questions

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