

EMPLOYMENT TORTS RELATED TO WRONGFUL DISCHARGE

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*NOTE: **Dated Material** -- This publication sets forth the general law on certain employment-related torts. The law discussed in this outline is subject to amendment and interpretation. Legal counsel should be consulted to apply the law to specific factual situation.

INTRODUCTION

Montana's Wrongful Discharge From Employment Act is the "exclusive remedy for a wrongful discharge from employment" with the exception of "a discharge that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute" and a discharge "of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term." MCA §§ 39-2-902 and 912. Further, under "the preemption of common-law remedies" provision of the Act, "no claim *for discharge* may arise from tort or express or implied contract." MCA § 39-2-913 (emphasis added).

The remedies available under the Act to a wrongfully discharged employee are limited: "There is no right under any legal theory to damages under [the Act] for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided in subsections (1) and (2)." MCA § 39-2-905(3). The amount a discharged employee may recover under the Act is capped: "If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge" MCA § 39-2-905(1).

Because the Wrongful Discharge Act precludes damage awards for emotional distress, pain and suffering and punitive damages, and caps awards at 4 years of lost wages and fringe benefits, discharged employees often look for and allege claims that are not preempted. Although the Wrongful Discharge Act is the exclusive remedy for claims arising from an employee's wrongful discharge, the Montana Supreme Court ruled that the Act "does not bar all tort or contract claims merely because they arise in the employment setting." *Beasley v. Semitool, Inc.*, 258 Mont. 258, 262, 853 P.2d 84, 86 (1993); *Basta v. Crago, Inc.*, ___ Mont. ___, 930 P.2d 78 (1996). Only those claims that are "completely and inextricably intertwined with and based upon [the employee's] discharge" are barred by the Act. *Beasley*, 853 P.2d at 87. Thus the door is open for

discharged employees to assert employment-related claims other than claims under the Wrongful Discharge Act.

The Montana Supreme Court has ruled that, although a plaintiff may not recover an award under both the Wrongful Discharge Act and another statutory remedy, a plaintiff may file claims concurrently under the Act and other state or federal statutes. *Tonack v. Montana Bank of Billings*, 258 Mont. 247, 255, 854 P.2d 326, 331 (1993); *Schultz v. Stillwater Mining Co.*, 277 Mont. 154, 920 P.2d 486, 487 (1996). Whether or not the employee's discharge "is subject to any other state or federal statute that provides a procedure for contesting the claim" is not known when the claims are filed. If the judge or jury determines that some other statute applies to the discharge, then the Wrongful Discharge Act may no longer be applied. *Id.*

In defending against claims of wrongful discharge, employers frequently must defend against other claims. Many of those claims relate to various types of employment discrimination such as claims of race, age, or gender discrimination, in addition to the claims discussed in this outline.

A. DEFAMATION

The Restatement of Torts defines defamation as follows: "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Restatement (Second) of Torts § 559 (1977). The statement may be either spoken, which is slander, or written, which is libel.

The Montana Legislature has defined libel as follows:

Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

MCA § 27-1-802.

The Montana Legislature has defined slander as follows:

Slander is a false and unprivileged publication other than libel which:

(1) charges any person with a crime or with having been indicted, convicted, or punished for a crime;

(2) imputes in him the present existence of an infectious, contagious, or loathsome disease;

(3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or

other occupation peculiarly requires or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

(4) imputes to him impotence or want of chastity; or

(5) by natural consequences causes actual damage.

MCA §27-1-803.

In many jurisdictions, a plaintiff must show a presence of malice to prevail on a defamation claim. *See* Restatement (Second) of Torts § 558 (1977). In Montana, however, the statutory definitions of libel and slander make no mention of malice. Generally, a plaintiff need not show the presence of malice to prevail on a defamation claim. *See Manley v. Harer*, 82 Mont. 30, 264 P. 937 (1928).

The presence or absence of malice, however, may become an issue in employment-related defamation cases. A full range of damages, including punitive damages, is available to a plaintiff who prevails on a defamation claim. To obtain punitive damages, the plaintiff must show clear and convincing evidence of actual fraud or actual malice. *See* § 27-1-221, MCA. Further, the absence of malice is required for some of the "privilege" defenses. *See* § 27-1-804, MCA.

The Montana Supreme Court has set forth a stringent test for defamation claims. For a plaintiff to prevail on a defamation claim, "it is not sufficient that the language is unpleasant and annoys or irks him, and subjects him to jests or banter, so as to affect his feelings," rather, to be actionable as a defamation claim, the language "must be of such a nature that the court can presume as a matter of law that they will tend to disgrace and degrade [the plaintiff], or cause him to be shunned and avoided." *Frigon v. Morrison-Maierle, Inc.*, 233 Mont. 113, 121, 760 P.2d 57 (1988). The Court further stated that as a basic principle of the law of defamation, "an expression of opinion is generally not actionable." *Id.*

Truth is a defense to a defamation action in that falsity of the publication is an element of both libel and slander. Privilege is a defense to a defamation action. Most "privileged publications" relate to statements made in the proper discharge of an official duty, in a legislative or judicial proceeding, or in a fair and true report of a judicial, legislative, or other public official proceeding. *See* § 27-1-804, MCA.

Defamation claims may arise in the employment context where an employer or former employer hampers an individual's future by providing false information to a prospective employer which prevents the plaintiff from procuring employment. Montana has a statutory tort of blacklisting which may apply in those circumstances. *See* 39-2-801, MCA. Blacklisting is related to, but distinct from, defamation.

Under the blacklisting statutes, an employer has a "duty" to furnish upon demand of a discharged employee, a written statement setting forth a "full, succinct, and complete statement" of the reasons for the employee's discharge from employment. If the

employer refuses to do so within a reasonable time, it is unlawful for the employer to later "furnish any statement of the reason for the discharge to any person or to in any way blacklist or prevent the discharged person from procuring employment elsewhere." MCA § 39-2-801. Truthful statements are not prohibited. An employer who violates, or allows its agents to violate, the blacklisting statutes is liable for punitive damages and is guilty of a criminal misdemeanor. MCA §§ 39-2-803 and 803.

B. INFLECTION OF EMOTIONAL DISTRESS

Whether a plaintiff could state a claim for infliction of emotional distress as an independent "stand alone" cause of action, as opposed to being an element of damages in some other tort claim, has been the subject of much discussion and controversy in Montana. In *Sacco v. High Country Independent Press, Inc.*, 271 Mont. 209, 896 P.2d 411 (1995), the Montana Supreme Court made it clear that an employee can state an independent claim for either negligent infliction of emotional distress or intentional infliction of emotional distress.

1. Negligent Infliction of Emotional Distress

Before the *Sacco* decision, negligent infliction of emotional distress was recognized in a very narrowly defined context, primarily as an element of damages, rather than a distinct tort. *Johnson v. Supersave Markets, Inc.*, 211 Mont. 465, 686 P.2d 209 (1984). The Court in *Sacco* concluded that an independent cause of action for negligent infliction of emotional distress may arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligence.

The Court adopted the following test to define "serious or severe emotional distress:"

Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is extreme that the liability arises. Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is part of the price of living among people. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity. Severe distress must be proved. . . .

The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar susceptibility to such distress of which the actor had knowledge.

Sacco, 896 P.2d at 426.

2. Intentional Infliction of Emotional Distress

Before the *Sacco* decision, the tort of intentional infliction of emotional distress required a showing of "extreme and outrageous conduct going beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Foster v. Albertsons, Inc.*, 254 Mont. 117, 835 P.2d 720 (1992). In *Sacco*, the Court abandoned that standard, stating that it makes little sense to allow a cause of action for negligent infliction of emotional distress where the plaintiff's "serious" or "severe" emotional distress was the reasonable foreseeable consequence of the defendant's negligent conduct, but to require the additional showing of "outrage" in cases of intentional infliction of emotional distress.

The Court concluded that the better approach was to require the same basic elements be proven in an action for intentional infliction of emotional distress as in an action for negligent infliction of emotional distress, and "that an independent cause of action for intentional infliction of emotional distress will arise under circumstances where serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's intentional act or omission." *Sacco*, 896 P.2d at 428. The Court reasoned that the requirement of a showing of "serious or severe emotional distress" would prevent opening the flood gates for emotional distress claims.

3. Summary of Emotional Distress Claims

The key to whether an employee or a former employee can successfully pursue a claim for infliction of emotional distress has shifted from the outrageousness of the conduct of the employer to the seriousness or severity of emotional distress experience by the plaintiff, and to whether severe or serious emotional distress was a reasonably foreseeable consequence of the employer's conduct.

Regardless of whether the claim is the negligent or intentional variety, it is for the court to decide whether "severe or serious emotional distress" can be found from the evidence presented. It is for the jury to decide whether severe or serious emotional distress in fact existed. *Sacco*, 896 P.2d at 429.

Assuming the claim is not preempted by the Wrongful Discharge Act, a discharged employee may assert an independent claim for infliction of emotional distress if "serious or severe emotional distress to the plaintiff was the reasonably foreseeable consequence of the defendant's negligent or intentional act or omission." The only basic difference between a claim for negligent infliction of emotional distress and a claim for intentional infliction of emotional distress is "the nature and culpability" of the employer's conduct. In other words, whether the employer acted negligently or intentionally. If the employer acted intentionally, the plaintiff may be entitled to punitive damages upon a showing of clear and convincing evidence of actual fraud or actual malice as set forth in MCA § 27-1-220.

C. FRAUD

The Montana Legislature enacted a statute prohibiting employers from inducing employees to change from work locations by misrepresenting the character of employment, conditions of work, or the existence of a labor dispute. MCA § 39-2-303. An employer who violates that statute is liable for all damages that the employee sustained as a consequence of the employer's deception, misrepresentation, or false advertising. In addition, the employer will be liable for the employee's reasonable attorneys' fees. *Id.*

That statute applies if an employer in Montana induced an employee away from another job by misrepresenting the job duties, working conditions, or some other related matter in an effort to lure an employee away from another job.

D. NEGLIGENT RETENTION AND HIRING PRACTICES

The exclusive remedy provision of the Workers' Compensation Act, § 39-71-411, MCA, precludes lawsuits against employers for physical injuries incurred on the job. Claims of negligent retention and hiring practices, therefore, are more likely to be applied when a non-employee is physically injured by an employee than when an employee injures a co-worker.

Moreover, an employee may bring a claim of negligent retention or hiring if the employee incurred an injury that is not compensable under the Workers' Compensation Act. The Montana Supreme Court has held that the exclusive remedy provision of the Workers' Compensation Act does not prevent employees from suing their employers for mental injuries incurred on the job because mental injuries are not compensable under the Act. *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996). Claims of negligent retention and hiring practice, therefore, might arise when an employee mentally injures a co-worker and the employer knew or should have known that the employee created an unreasonable risk of harm to the co-worker's mental health.

The Montana Supreme Court has neither formally recognized nor set forth elements for the torts of negligent hiring or negligent retention. Nevertheless, the Montana Supreme Court implicitly recognized the tort of negligent hiring in dicta when it stated that "[a] party may be . . . held directly liable on the theory of negligent hiring and/or supervision." *McGuire v. State*, 254 Mont. 178, 183, 835 P.2d 755, 758 (Mont. 1992). Further, in a dissenting opinion, three justices indicated that they would recognize the tort of negligent retention in Montana, and another stated that he did not read the opinion as refusing to recognize the tort under different facts. *Bruner v. Yellowstone County*, 272 Mont. 261, 900 P.2d 901 (1995), Leaphart, J. (dissenting), Nelson, J. (specially concurring).

The dissent in *Bruner* stated that the basis of responsibility under the torts of negligent hiring and negligent retention is the employer's "own negligence in hiring or retaining in his employ an incompetent servant whom the [employer] knows or by the exercise of reasonable care should have known was incompetent or unfit and thereby creating an

unreasonable risk of harm to others." *Bruner*, 900 P.2d at 906 (quoting *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex.Civ.App. 1979)).

The dissent in *Bruner* stated that the tort of negligent retention arises when "during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his [or her] unfitness, and the employer fails to take further action such as investigating, discharge, or reassignment." *Bruner*, 900 P.2d at 906.

Although the Montana Supreme Court has not expressly adopted elements for the torts of negligent hiring and negligent retention in a majority opinion, employers should be wary of hiring or retaining an incompetent or unfit employee who creates an unreasonable risk of harm to others.

E. VIOLATION OF THE AMERICANS WITH DISABILITIES ACT

Employers must be careful to avoid running afoul of state and federal laws prohibiting discrimination against handicapped or disabled employees and prospective employees. The Americans with Disabilities Act (ADA) prohibits employment-related discrimination against "qualified individuals with a disability." 42 U.S.C. § 12111(9). The ADA applies to all employers in industries affecting commerce, which encompasses virtually all employers in the U.S., with at least 15 employees for 20 or more weeks in the current and immediately previous years, as well as to employment agencies and labor unions. 42 U.S.C. § 12111(5)(B).

To prove that an employer violated the ADA, a plaintiff must prove that he or she is a "qualified individual" with a "disability," and that the employer excluded the individual because of the disability.

The definition of "disability" under the ADA expressly includes an individual with a physical or mental impairment that substantially limits one or more of the major life activities of such individual, or a record of such an impairment; or being regarded as having such an impairment. 42 U.S.C. § 12102(2)(A). The ADA expressly excludes certain conditions such as most sexual behaviors, compulsive gambling, kleptomania, pyromania, and current use of illegal drugs. 42 U.S.C. §§ 12208, 12210, 12211; 29 C.F.R. § 1630.3.

The phrases "major life activities" and "substantially limits" are critical in analyzing an ADA claim. The phrase "major life activities" is defined in the Code of Federal Regulations as functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(i).

The term "substantially limits" means the inability to perform a major life activity that the average person can perform, or a significant restriction in the condition, manner, or duration under which the individual can perform a particular major life activity. 29 C.F.R. § 1630.2(j). As it relates to the major life activity of *working*, the term

"substantially limits" means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working. 29 C.F.R. § 1630.2(j)(3)(i).

To be protected against discrimination under the ADA, an individual must be a "qualified individual" who has a "disability." A "qualified individual with a disability" is defined as an individual with a disability who, with or without reasonable accommodation, can perform the "essential functions" of the job he or she holds or desires. 42 U.S.C. § 12111(8). An individual need not be able to perform all marginal functions of the job to be a "qualified individual with a disability," but must be able to perform the "essential functions."

The federal regulations define what functions constitute "essential functions" and what evidence may be used to determine whether a function is essential. A job function may be considered essential for a variety of reasons including:

1. The position exists to perform that job function;
2. There are a limited number of employees among whom the performance of that job function may be distributed; and
3. The job function is highly specialized and the individual was hired because his or her ability to perform that function. 29 C.F.R. § 1630.2(n).

The typical ADA claim in the wrongful discharge context contends that the employer refused to make a "reasonable accommodation" so that a qualified individual with a disability could perform the essential functions of his or her job. To make a "reasonable accommodation" may require the employer to modify existing facilities used by employees making them more readily accessible by persons with disabilities. A "reasonable accommodation" may also require job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modifications of equipment, the provision of qualified readers or interpreters, or other similar accommodations. 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o).

A defense to a claim under the ADA is that the employee could not perform the essential functions of the job with or without reasonable accommodation. For example, it is doubtful that a pilot's job functions could be modified to accommodate an individual who is blind.

A second defense to an ADA claim is undue economic hardship. Although it appears that the law apparently requires employers to extend a great effort to make reasonable accommodations for a qualified individual with a disability, the employer need not accommodate the individual if it would impose an undue economic hardship on the employer. 29 C.F.R. § 1630.2(p). The burden is on the employer to prove that a

particular accommodation would impose an undue economic hardship. Some of the factors considered in determining whether an accommodation would impose an undue hardship include the nature and cost of the accommodation, the overall financial resources of the employer, the number of persons employed at the facility, the effect on the facility's expenses and resources, and the impact of the accommodation on the operation of the facility. 29 C.F.R. § 1630.2(p).

A third defense to an ADA claim is that the individual cannot meet the qualification standards necessary for the position held or desired. Qualification standards are the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the employer that an individual must meet in order to be eligible for the position. 29 C.F.R. § 1630.2(q).

A fourth defense to an ADA claim is that the individual poses a direct threat to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. In determining whether an individual would pose a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). This defense requires an assessment based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. *Id.*

A fifth defense to an ADA claim is that the individual's discharge from employment was justified by legitimate, nondiscriminatory business reasons. This defense is basically the same as arguing that the employer had "good cause" to discharge the employee. For example, the employee may have been discharged for poor job performance or for stealing from the company. The plaintiff's response to this defense will typically be that the employer's reason for the discharge was a pretext, and the true reason was because of a disability or a perception of a disability.

Although damages under the ADA for emotional distress, pain and suffering, and the like are subject to progressive caps, depending on the number of employees, the potential for damages under the ADA is much greater than the 4 years wages and benefits allowed under the Wrongful Discharge Act. Under the ADA, damages for back wages are not capped, and there is a potential for reinstatement. Further, the ADA provides for reasonable attorney fee, and there is a potential for punitive damages under the ADA upon a showing of malice.

Because of the potential for a greater monetary award, plaintiffs are increasingly seeking ways to claim discrimination under the ADA when they are discharged from employment. As a consequence of stress claims being excluded by the Workers' Compensation Act, there are an ever increasing number of stress related disability claims asserted under the ADA.

F. VIOLATION OF PUBLIC POLICY

The Wrongful Discharge Act contains a remedy for discharges in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy. MCA § 39-2-904(1). That remedy may be available unless the discharge is subject to another state or federal statute. MCA § 29-2-912. This portion of the outline discusses some of the other state and federal statutes that provide remedies for violation of public policy.

1. Retaliatory Discharge for Filing a Workers' Compensation Claim

Montana's Workers' Compensation Act prohibits employers from terminating an employee for filing of a claim under the Workers' Compensation Act or the Occupational Disease Act. When an injured worker is capable of returning to work within 2 years from the date of the injury and has received a medical release to return to work, the employer must give the worker preference over other applicants of a comparable position, which is consistent with the worker's physical and vocational ability. MCA § 39-71-317.

On its face, the preference statute provides neither a right, nor a remedy. Until 1993, it appeared that failure to give an injured worker a preference under that statute was merely evidence of a discharge without "good cause" under the Wrongful Discharge Act. In 1993, however, the Montana Supreme Court hinted that it would allow an independent claim for violation of the preference statute, and set forth the following elements necessary to prove a retaliatory discharge claim under the statute:

1. That the employee was discharged, and
2. That the employer's motive in discharging the employee was to retaliate for his filing a claim under the Workers' Compensation Act.

Lueck v. UPS, 258 Mont. 2, 8, 851 P.2d 1041, 1045 (1993).

The Court in *Lueck* did not expressly rule on the issue of whether the Workers' Compensation preference statute provides a remedy separate from the Wrongful Discharge Act. It is not clear, therefore, whether an employer who violates the preference statute is subject to damages above and beyond those allowed under the Wrongful Discharge Act. Until the Court clarifies the issue, it would behoove employers to evaluate their financial exposure in cases involving a retaliatory discharge claim under the assumption that they are not protected by the damage caps of the Wrongful Discharge Act.

2. Montana Human Rights Act

The Montana Human Rights Act applies to all employers in Montana, except for fraternal, charitable, or religious associations or corporations if the association or corporation is a not-for-profit organization that does not provide services to non-members. MCA §§ 49-2-101(8), (9). The Montana Human Rights Act prohibits numerous forms of discrimination, including employment discrimination.

The Act prohibits employers from discriminating against a person in compensation, condition, or privilege of employment because of race, creed, age, physical or mental disability, marital status, or sex when the reasonable demands of the job do not require a distinction based on age, physical or mental disability, marital status, or sex. MCA § 49-2-303(a). In addition, the Act prohibits employers from refusing to grant a reasonable leave of absence to an employee because of pregnancy and makes it unlawful to terminate a woman's employment because of her pregnancy. The Act makes it unlawful for an employer to deny an employee who is disabled as a result of pregnancy, and has medical verification of the disability, any disability benefits or leave benefits accrued pursuant to the employer's disability or leave plan. The Act prohibits employers from requiring an employee to take an unreasonably long maternity leave. MCA § 49-2-310. When an employee on maternity leave expresses an intent to return to work, the employer must reinstate her to her original job or to one with equivalent pay, benefits, and seniority, unless the private employer's circumstances have changed so that it is impossible or unreasonable to do so. MCA § 49-2-311.

3. Employees Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq.

ERISA is a comprehensive statute enacted to protect workers from abuses in the administration of and investment of **employee** benefit plans. With certain exceptions, ERISA applies to all employee welfare or pension plans. In general, ERISA preempts state law in the areas to which it applies.

Section 510 of ERISA is the anti-discrimination provision. It operates as a federal exception to the "employment at-will" doctrine by protecting an employment relationship that gives rise to pension rights and welfare benefit rights. The anti-discrimination provision provides that it is unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he or she is entitled under an employee benefit plan. Section 510 also provides that it is unlawful to discriminate against a worker because he or she provided information or testified in an inquiry relating to ERISA.

Section 511 of ERISA provides that if the employer engages in prohibited conduct in the form of force, fraud, or threats, then the employer is subject to criminal penalties of up to a \$10,000 fine, or imprisonment for up to a year.

4. **Mine Safety and Health Act (MSHA), 30 U.S.C. § 801 et seq.**

MSHA contains an anti-discrimination/anti-retaliation provision that protects miners from discrimination by their employers. This provision is found at 30 U.S.C. Section 815.

Under that statute, a mining employer is prohibited from discharging, discriminating against, or interfering with the statutory rights of miners, or applicants for mining jobs because that person filed or made a complaint related to MSHA. The complaint need not

be formal, it may consist of notifying the company or a miner's representative of an alleged safety or health violation at the mine.

Section 815 incorporates a shifting burden of proof. If an employee can show that a motivating factor behind the employer's conduct was a health or safety complaint, the burden shifts to the employer. The employer then must show that it had a legitimate non-discriminatory reason for its actions.

A miner who prevails on a Section 815 claim is entitled to reinstatement with back pay and interest or other appropriate remedy. If the miner prevails, the employer must pay the miner's attorney fees incurred in prosecuting the action.

5. Occupational Safety and Health (OSHA), 29 U.S.C. § 651 et seq.

OSHA contains an anti-discrimination/anti-retaliation provision that protects employees from discrimination by their employers. This provision applies if the employee has made an OSHA complaint or plans to make an OSHA complaint. This provision is found at 29 U.S.C. Section 660(c).

If the Secretary of State determines that the employer violated this statute, he or she will bring an action in United States District Court against the employer. The remedy includes rehiring or reinstatement of the employee to his former position with back pay, or other appropriate relief.

6. National Labor Relations Act (NLRA), 29 U.S.C. § 141 et seq.

Section 7 of the NLRA guarantees employees the right to freely organize and to assist labor organizations and the right to refrain from these activities. Section 7 also guarantees employees the right to engage in "concerted activities" for mutual aid or protection. 29 U.S.C. Section 157.

Section 8 of the act makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7. Thus, employees who attempt to organize a union or who engage in other concerted activities are entitled to be free from interference from their employers.

Examples of unfair labor practices by employers include:

1. threatening employees with loss of jobs or job benefits if they join or vote for a union;
2. threatening to close down the plant if the employees join a union;
3. granting deliberate wage increases or other benefits to discourage employees from joining or voting for a union;

4. taking an active part in organizing a union;
5. discharging an employee for joining a union or for urging others to join; and
6. refusing to hire a qualified applicant because he belongs to a union.

An employer guilty of an unfair labor practice is subject to penalties and other equitable remedies.

7. Fair Labor Standards Act, 29 U.S.C. § 201 et seq.

Section 215 of the Fair Labor Standards Act prohibits an employer from discriminating against any employee because the employee filed a complaint or instituted a proceeding related to the Act. The court has equitable powers to fashion an appropriate remedy for discrimination under the Act.

8. Immigration Reform and Control Act, 8 U.S.C. § 1324b

As a general rule for employers with more than three employees,

[I]t is an unfair immigration-related employment practice for a person or other entity to discriminate against any individual (other than an unauthorized alien) with respect to the hiring, or recruitment or referral for a fee, of the individual for employment or the discharging of the individual from employment (A) because of such individual's national origin, or (B) in the case of a citizen or intending citizen, because such individual's national origin.

8 U.S.C. 1324b(a).

The penalties for an unfair immigration-related employment practice include:

1. a requirement that the employer hire the individuals adversely affected, with or without back pay;
2. a civil penalty of up to \$1,000 per individual discriminated against; and
3. up to \$2,000 per individual discriminated against, if the employer was found to have previously violated the Act.

In addition, the court can, in its discretion, award attorney fees to the prevailing party if the losing party's argument is without reasonable foundation in law and fact. 8 U.S.C. § 1324b (g) and (h).

9. Bankruptcy, 11 U.S.C. § 525(b)

Private employers may not fire or discriminate with respect to the employment against an individual solely because that person went through bankruptcy proceedings or associated with a person who went through bankruptcy proceedings. 11 U.S.C. § 525 (b).

10. Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. §§ 4321(b)(3); 4324(d) [formerly 2021(b)(3); 2024(d)]

The Vietnam Era Veterans' Readjustment Assistance Act provides that employers may not fire, refuse to hire, refuse to promote, or deny any other incident or advantage of employment to a person because of that person's obligations as a member of a Reserve component of the Armed Forces. 38 U.S.C. § 4321(b)(3). The Act also requires employers to grant leaves of absence to employees who must attend reserve training. The employee is entitled to the period required to perform active duty for training or inactive duty training in the Armed Forces. 38 U.S.C. § 4324(d).

Section 4324(d) was added in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months. This section requires that employers grant employees a leave of absence for training and, upon their return, be restored to their position "with such seniority, status, pay, and vacation" as they would have had if they had not been absent for training. 38 U.S.C. § 4324(d); *Monroe v. Standard Oil Co.* (1981), 452 U.S. 549, 555, 101 S. Ct. 2510, 69 L.Ed. 2d 226, 232-33.

The United States Supreme Court ruled that § 4324(d) places no explicit limit on the length of tour after which an Armed Forces member may enforce re-employment rights. *King v. St. Vincent's Hospital* (1991), 116 L. Ed. 2d 578. The circumstances dictate what length of time is reasonable.

11. Family and Medical Leave Act

The Family and Medical Leave Act (FMLA) requires employers to allow eligible employees 12 work-weeks of unpaid leave per year for the birth of a child, the adoption of a child, the placement of a child with the employee for foster care, the care of a family member with a serious health condition, or because of the employee's own serious health condition. 29 U.S.C. § 2601-2654.

The FMLA applies to employers with 50 or more employees for at least 20 weeks in the current or preceding year. The Act applies to public employers, such as the state, a state agency, or any political subdivision of the state. 29 U.S.C. § 2611(4).

To be eligible for leave under the FMLA, an employee must have worked for the employer for at least 12 months, and have worked at least 1250 hours during the year preceding the start of the leave. Whenever the leave is foreseeable, the employee must give 30 days notice of intent to take leave, and the employer may deny leave until 30 days after the employee gives notice. 29 U.S.C. § 2611(2)(A); 29 C.F.R. § 825.302. Certification from a health care provider is required, and the employer can require and

pay for a second opinion. 29 C.F.R. § 2613 (a form for the medical certification is set forth in 29 C.F.R. § 825, App. B.)

Where both spouses are employed by the same employer, the total amount of leave they can take for the birth or adoption of a child or to take care of a sick parent is limited to 12 weeks. If the leave requested is for the employee's own serious health condition, or the couple's child, each employee is entitled to up to 12 weeks of leave. 29 U.S.C. § 2612(f).

An employee may elect, or an employer may require, that certain accrued leave provided as an employment benefit be substituted for unpaid FMLA leave. In the case of leave for the birth or adoption of a child or the serious health condition of a family member, an employee may substitute, or the employer may require the employee to substitute, any accrued vacation leave, personal leave, or family leave for any part of the leave provided under the FMLA. In the case of the employee's own serious health condition or the serious health condition of a family member, the employee may elect, or the employer may require, the substitution of paid vacation leave, personal leave or sick leave under the FMLA. The employer, however, is not required to provide paid leave in any situation where it would not normally provide paid leave. In addition to the leave identified above, many employers provide short-term disability, which is considered sick or medical leave. 29 U.S.C. § 2612(d)(2)(A).

Employees returning from leave have the right to return to the same job position they held when they went on leave or to an equivalent position with equivalent benefits. The exception to reinstatement rights is for a highly compensated employee, who may be denied reinstatement to his or her former position under certain circumstances, including that the denial is necessary to prevent grievous economic injury to the employer's operations.

The penalties for violation of the FMLA include equitable relief such as reinstatement or a promotion, compensatory damages for lost wages and benefits and the like, prejudgment interest and attorney fees.

The FMLA has an anti-retaliation provision making it unlawful for an employer to discriminate against or discharge an employee for exercising his or her rights under the FMLA or cooperating in connection with a FMLA proceeding.

12. Discrimination Prohibited for Use of Lawful Product During Non-Working Hours

It is unlawful for an employer to refuse to employ or to discriminate against an individual because he or she uses a lawful product off the employer's premises during non-working hours. MCA § 39-2-313. That statute includes discrimination in compensation, promotion, or the terms, conditions, or privileges of employment.

Certain exceptions apply to the law:

1. The law does not apply to use of a lawful product that affects the individual's ability to perform job-related tasks or the safety of other employees, or conflicts with the bona fide occupational qualification that is reasonably related to the individual's employment.
2. The law does not apply to an individual who has a professional service contract with an employer and the unique nature of the services authorizes the employer, as part of the service contract, to limit the use of certain products.
3. The law does not apply to an employer that is a nonprofit organization that, as one of its primary purposes, discourages the use of one or more lawful products by the general public.
4. An employer does not violate the law if the employer takes action believing that they are permissible under an established substance abuse or alcohol program or contract.
5. An employer may offer a health, disability or life insurance policy that distinguishes between employees based on use of a product for the type or price of coverage under certain circumstances.

MCA § 39-2-313. The court may require any reasonable measure to correct the harm caused by discrimination based on an employee's use of a lawful product and may award reasonable attorney fees to the prevailing party. The employee has one year from the date of the alleged violation to file an action in court. If the employer has an internal grievance procedure, the employee has 120 days from the date of the alleged violation to initiate the grievance procedure. MCA § 39-2-314.

The statute was intended to protect smokers, drinkers, overweight people, and people who ride motorcycles and play contact sports because employers may be inclined to discriminate against them in an effort to reduce the cost of health care benefits.

G. INVASION OF PRIVACY

There are four types claims for invasion of privacy: (1) unauthorized appropriation of a person's name or picture for a commercial advantage; (2) intrusion into a person's affairs; (3) publicizing facts about a person in a false light (similar to defamation); and (4) public disclosure of private facts about the person.

An invasion of privacy by intrusion is defined as "a wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." *State Bd. of Dentistry v. Kandarian*, 268 Mont. 408, 413, 886 P.2d 954, 957 (1994). Privacy issues related to intrusion into the employee's personal affairs may arise during an employer's investigation into employee misconduct such as sexual harassment, searches of areas which the employee reasonably expects to be private such as a desk or locker, and investigation into off duty conduct. The Montana

Supreme Court has held that phone tapping of private, confidential conversations constitutes a wrongful intrusion into one's private activities in a manner likely to cause outrage, mental suffering, shame, or humiliation to an ordinary person. *Rucinsky v. Hentchel*, 266 Mont. 502, 881 P.2d 616 (1994).

Invasion of privacy through public disclosure of private facts about the person may arise if the employer fails to maintain the confidentiality of employee records, including personnel, health, and safety records. The Restatement of Torts discusses public disclosure of private facts as follows:

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his [or her] privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

Kandarian, 886 P.2d at 957 (quoting The Restatement (Second) of Torts, § 562D).

Damages for emotional distress may be available for violation of an employee's right to privacy in addition to any other damages caused by the employer's violation of the employee's right to privacy.

Consent is a defense to a claim for violation of the right of privacy. Truth is not a defense.

Drug and alcohol testing of employees involves privacy issues, and Montana law restricts drug and alcohol testing to specific circumstances involving safety, fiduciary, and security issues. MCA § 39-2-304. The 1997 Montana Legislature limited drug and alcohol testing to specified categories of employees, including those who are "engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary positions"

The following types of tests are authorized under the law as amended in 1997:

1. pre-employment testing;
2. reasonable suspicion/reasonable belief testing (applies when the employer has a reasonable belief or suspicion that the employee is impaired on the job);
3. random testing (subject to specified protective procedures required by law);
4. post-accident testing;

5. follow up testing (after an employee has tested positive for a controlled substance).

Each of those categories is specifically defined, and drug and alcohol testing are subject to specific procedures and are allowed in limited circumstances. Employers, therefore, should consult legal counsel before implementing a drug and alcohol testing program and before testing an employee. Drug testing will no doubt benefit some employers by reducing safety and security risks, but they should be aware that drug test results may saddle them with obligations under the Americans with Disabilities Act in certain situations.