

## HOUSE BILL NO. 254

INTRODUCED BY R. FITZGERALD, L. JONES

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE WRONGFUL DISCHARGE ACT; REVISING PROVISIONS RELATING TO ELEMENTS OF WRONGFUL DISCHARGE AND THE EMPLOYMENT RELATIONSHIP; PROVIDING FOR PROBATIONARY PERIODS; PROVIDING DEFINITIONS; AMENDING SECTIONS 39-2-903, 39-2-904, 39-2-905, 39-2-911, AND 39-2-912, MCA; REPEALING SECTIONS 39-2-703 AND 39-2-704, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Probationary period.** (1) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time the employee begins work, there is a probationary period of 12 months commencing on the date the employee begins work.

(2) An employer may extend a probationary period prior to the expiration of a probationary period, but the original probationary period together with any periods of extension may not exceed 18 months.

(3) If an employee has one or more leaves of absence during the original probationary period or any extension of the probationary period, the time of each leave of absence may not be a part of the probationary period unless the employer affirmatively elects to include each leave of absence as part of the probationary period.

**Section 2.** Section 39-2-903, MCA, is amended to read:

**"39-2-903. Definitions.** In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means any reasonable job-related grounds for an employee's dismissal based on:

(a) 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 personnel policies; or

(d) or other legitimate business reason reasons determined by the employer while exercising the employer's reasonable business judgment. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

(6) "Leave of absence" means an employee's absence from work for a period of more than 5 consecutive working days for any reason other than holidays and vacations.

~~(6)~~(7) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on form W-2 and includes additional compensation deferred at the option of the employee.

~~(7)~~(8) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule."

**Section 3.** Section 39-2-904, MCA, is amended to read:

**"39-2-904. Elements of wrongful discharge --~~presumptive probationary period.~~** (1) A discharge is wrongful only 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 materially violated the express provisions of its an express provision of its own written personnel policy prior to the discharge, and the violation deprived the employee of a fair and reasonable opportunity to remain in a position of employment with the employer.

(2) ~~(a)~~ During 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.

~~(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.~~

(3) The employer has the broadest discretion when making a decision to discharge any managerial or supervisory employee.

**Section 4.** Section 39-2-905, MCA, is amended to read:

**"39-2-905. Remedies.** (1) 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, together with interest on the lost wages and fringe benefits. ~~Interim~~ The employee's interim earnings, derived from any new kind, nature, or type of work, hire, contractor status, or employment that did not exist at the time of discharge, including amounts the employee could have earned with reasonable diligence from the work, hire, contractor status, or employment, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) Following any verdict or award in favor of the discharged employee, the district court shall 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 shall deduct those payments, compensation, and benefits from the amount awarded for lost wages before entering

1 judgment.

2 (3) The employee may recover punitive damages otherwise allowed by law if it is established by clear  
3 and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the  
4 employee in violation of 39-2-904(1)(a).

5 ~~(3)~~(4) There is no right under any legal theory to damages for wrongful discharge under this part for  
6 pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of  
7 damages, except as provided for in subsections (1) and (2)."

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9 **Section 5.** Section 39-2-911, MCA, is amended to read:

10 **"39-2-911. Limitation of actions.** (1) An action under this part must be filed within 1 year after the  
11 date of discharge.

12 (2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under  
13 which an employee may appeal a discharge within the organizational structure of the employer, the employee  
14 shall first exhaust those procedures prior to filing an action under this part. The employee's failure to initiate or  
15 exhaust available internal procedures is a defense to an action brought under this part. If the employer's  
16 internal procedures are not completed within 90 days from the date the employee initiates the internal  
17 procedures, the employee may file an action under this part and for purposes of this subsection the employer's  
18 internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the  
19 procedures are exhausted. In no case may the provisions of the employer's internal procedures extend the  
20 limitation period in subsection (1) more than 120 days.

21 (3) If the employer maintains written internal procedures under which an employee may appeal a  
22 discharge within the organizational structure of the employer, the employer shall within ~~7~~14 days of the date of  
23 the discharge notify the discharged employee in writing or electronically of the existence of ~~such the internal~~  
24 procedures and, The timeframe for the employee to initiate the procedures, if any, begins to run from the date  
25 the employer sends or provides a copy of the internal procedures in writing or electronically. A copy of the  
26 procedures must be considered provided to the employee if the employer sends a copy of the procedures to the  
27 employee's last-known postal mailing address or electronic mailing address, or the employee's attorney shall  
28 supply the discharged employee with a copy of them. If the employer fails to comply with this subsection, the

discharged employee need not comply with subsection (2).

(4) If a plaintiff commences a civil action for wrongful discharge under this part, the plaintiff shall make service of process no later than 6 months after filing the complaint. If the plaintiff fails to make service of process within the 6-month period, the court, on motion or on its own initiative, shall dismiss the action without prejudice as to a defendant unless that defendant has made an appearance in the civil action. If the plaintiff fails to make service of process within the 6-month period, the remaining 1-year period of limitations for a civil action under this part resumes regardless of whether the civil action is dismissed."

**Section 6.** Section 39-2-912, MCA, is amended to read:

**"39-2-912. Exemptions.** (1) This part does not apply to a discharge:

(1)(a) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds.

(2)(b) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

(2) For the purposes of this section, a contract for a specific term may contain a probationary period as provided for in [section 1] and may contain an automatic renewal clause that automatically renews the contract of employment for one or more successive terms."

**NEW SECTION. Section 7. Repealer.** The following sections of the Montana Code Annotated are repealed:

39-2-703. Liability of railway corporation for negligence of fellow servants.

39-2-704. Liability of mining company for negligence of fellow servants.

**NEW SECTION. Section 8. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 39, chapter 2, part 9, and the provisions of Title 39, chapter 2, part 9, apply to [section 1].

1            NEW SECTION. **Section 9. Severability.** If a part of [this act] is invalid, all valid parts that are  
2    severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications,  
3    the part remains in effect in all valid applications that are severable from the invalid applications.

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5            NEW SECTION. **Section 10. Effective date.** [This act] is effective on passage and approval.

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