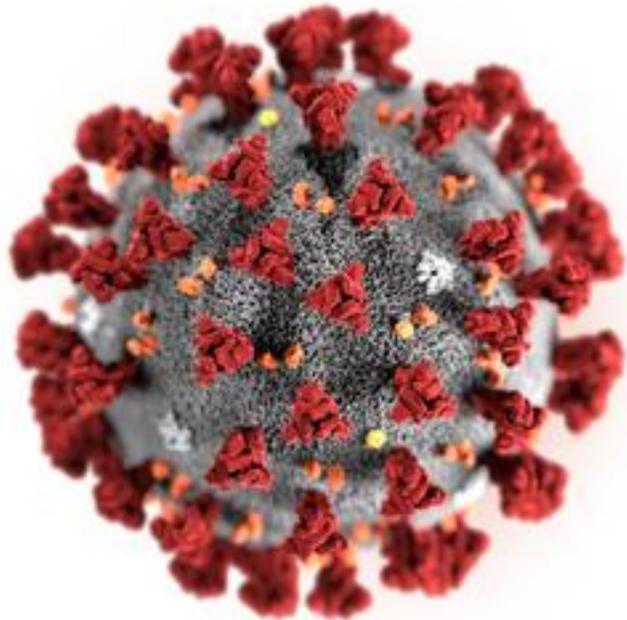


Employment Law Update - Return to Work, COVID-19 Issues, & Changes to Montana Law

COVID-19 Still Exists



Employees with COVID pose a direct threat and may be removed from the workplace

Require them to stay home until they can meet current CDC recommendations on quarantine

CDC Guidance for Vaccinated People

Summary of Recent Changes

- No longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance
- Can refrain from testing following a known exposure unless they are residents or employees of a correctional or detention facility or a homeless shelter

Updates as of May 13, 2021

CDC Guidance for Vaccinated People

Fully vaccinated people can:

- Resume domestic travel and refrain from testing before or after travel or self-quarantine after travel
- Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States
- Refrain from quarantine following a known exposure if asymptomatic
- Refrain from routine screening testing if feasible

CDC Guidance for Vaccinated People

For now, fully vaccinated people should continue to:

- Get tested if experiencing symptoms
- Follow CDC and health department travel requirements and recommendations

It is important to be aware of and monitor for updated CDC guidance.

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>

Choosing Safer Activities

Accessible link: <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/participate-in-activities.html>

	Unvaccinated People	Examples of Activities	Fully Vaccinated People
		Outdoor	
Safest		Walk, run, wheelchair roll, or bike outdoors with members of your household	
		Attend a small, outdoor gathering with fully vaccinated family and friends	
		Attend a small, outdoor gathering with fully vaccinated and unvaccinated people	
Less Safe		Dine at an outdoor restaurant with friends from multiple households	
Least Safe		Attend a crowded, outdoor event, like a live performance, parade, or sports event	
		Indoor	
Less Safe		Visit a barber or hair salon	
		Go to an uncrowded, indoor shopping center or museum	
		Attend a small, indoor gathering of fully vaccinated and unvaccinated people from multiple households	
Least Safe		Go to an indoor movie theater	
		Attend a full-capacity worship service	
		Sing in an indoor chorus	
		Eat at an indoor restaurant or bar	
		Participate in an indoor, high intensity exercise class	

Get a COVID-19 vaccine



Prevention measures not needed



Take prevention measures
Wear a mask, stay 6 feet apart, and wash your hands.

- Safety levels assume the recommended prevention measures are followed, both by the individual and the venue (if applicable).
- CDC cannot provide the specific risk level for every activity in every community. It is important to consider your own personal situation and the risk to you, your family, and your community before venturing out.



[cdc.gov/coronavirus](https://www.cdc.gov/coronavirus)

CS241536

Return to Work - OSHA Guidelines

- OSHA recommends employers implement COVID-19 Prevention Programs
 - Engage workers in the program's development
 - Include the following key elements:
 - Conducting a hazard assessment
 - Identifying a combination of measures that limit the spread of COVID-19 in the workplace
 - Adopting measures to ensure that workers who are infected or potentially infected are separated and sent home
 - Implementing protections from retaliation for workers who raise COVID-19 related concerns

Employees with COVID

<p>Unvaccinated EE has or thinks they might have COVID</p>	<p>Should isolate, whether or not have symptoms</p>	<p>Return to Work:</p> <p>Symptoms - after: @ least 10 days since symptoms first appeared AND @ least 24 hours no fever w/out fever-reducing meds AND Other symptoms improving</p> <p>Positive test, but no symptoms - can return to work after 10 days have passed since had positive test</p>
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Employees Close Contact

Unvaccinated EE has been in close contact* with someone who has the virus

- * W/in 6 ft for total 15 mins or more of someone who has COVID-19
- * Provided care at home to someone sick with COVID
- * Direct physical contact with person (hugged or kissed them)
- * Shared eating or drinking utensils
- * Person sneezed, coughed, or somehow got respiratory droplets on you

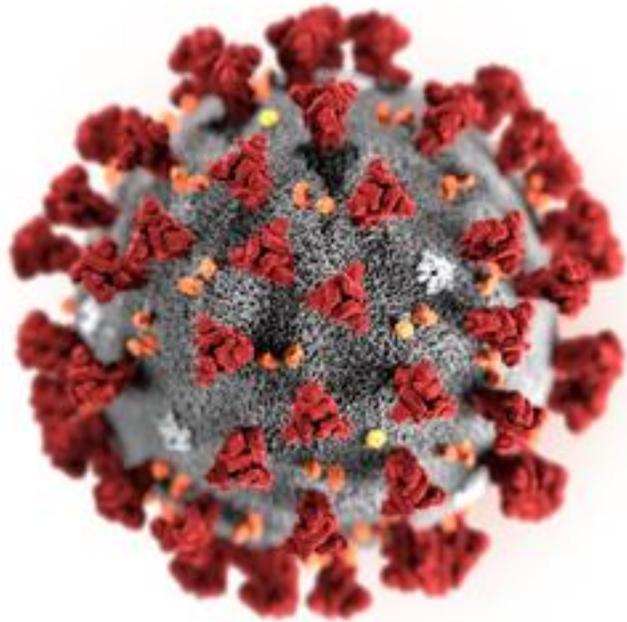
Should stay home and quarantine

Return to work:

After day 10 w/out testing

After day 7 after receiving negative test result (test must occur on day 5 or later)

COVID-19 & THE ADA



Even under COVID, the ADA is still the ADA

Usual rules still apply:

- Nondiscrimination

- Duty to accommodate

- Interactive process

- Limited medical inquiries

- Confidentiality

Refresher on Reasonable Accommodation

Remember reasonable accommodations intended to ensure **qualified** individuals with **disabilities** have rights in EQUAL (not superior) employment to individuals without disabilities

Reasonable accommodation is a:

- (1) Modification to a job, work environment, or way work is performed
- (2) That allows a disabled individual to apply for a job, perform the essential functions of the job, and enjoy equal access to benefits available to other individuals in the workplace.

What information can you seek when accommodation requested?

If necessary, ask questions of EE to help clarify why need accommodation and explore alternative accommodations

Disability isn't obvious - limited medical documentation to show covered under ADA

CANNOT ask for documentation unrelated to determining existence of disability & necessity of accommodation

i.e., Most situations cannot ask about other medical conditions might have or request complete medical records

Pandemic may in certain circumstances impede EEs access for ADA documentation

Consider whether you already have sufficient info on file about impairment & limitations for which accommodation needed (e.g., from previous request for same impairment)

Consider other means for obtaining information:

- Ask EE for specific information about impairment, limitations, and need for accommodations related to COVID (e.g., what is the underlying disability-related need for accommodation)
- Accept info from personal medical record from past visit that establishes impairment
- Accept a telemedicine consult with appropriate provider, a form/stamped note from clinic, or e-mail from a health-care provider that establishes impairment and need for accommodation
- Request authorization to communicate directly with EE's health-care provider for confirmation of impairment & clarification re: need for accommodation

Approve accommodation request w/out obtaining formal disability-related docs, if good reason to believe EE has the impairment for which they have requested accommodation - document disability-related documentation not be required at this time, given the current public health situation

When making an accommodation, Employers DO NOT....

Have to remove essential job functions

Lower production standards

Provide personal need items (hearing aids/wheelchairs)

Any accommodation that creates undue hardship

Provide EE's preferred accommodation as long as ER provides effective accommodation

COVID MAY = DISABILITY

Disability defin. broad - impairment substantially limits major life activity

“Long haulers” possibly disabled (next slide)

When determining whether EE has disability, need to know:

1. Does EE have an impairment? If yes,
2. Does the impairment affect major life activity? If yes,
3. Does the impairment substantially limit major life activity?

No *per se* disability - no specific list - each case based on EE's specific limitations

Uncertain whether impairment meets definition? Err on the side of caution; process the accommodation request.

Temporary/episodic conditions may = disabilities if limitations severe enough

Accommodations in a COVID world

Those who have recovered & return to work may have long-term limitations that need to be addressed

Examples:	Shortness breath w/ exertion	Extreme fatigue	Brain fog
Insomnia	Tachycardia (fast heart rate)	Joint pain/body aches	Headaches

Possible accommodations

Telework	Rest breaks	Flexible schedule	Restructure position remove marginal job functions
Reduce workplace triggers	Change work environment (temperature, noise, lighting)	Time off for treatment	

Accommodations in a COVID world

If ER knows or has reason to know EE has disability or regards EE as having disability - ER affirmative obligation to engage in “interactive process” to determine if reasonable accommodation would allow EE to perform essential functions of their job

High risk employees (as identified by CDC) - older people & people with medical conditions (see next slide)

Possibly ADA-protected

May need accommodation due to COVID - avoid exposure

Possible accommodations:

Separate workspace, remote work, personal protective equipment, modified work hours, leave of absence, transfer to a different, safer position

Cancer

Chronic kidney disease

Chronic lung diseases

(COPD, emphysema and chronic bronchitis)

Asthma (moderate to severe)

Interstitial lung

disease (damaged/scarred lung tissue)

Cystic fibrosis &

pulmonary

hypertension

Dementia/other

neurological conditions

Type 1 & 2 Diabetes

Down syndrome

Heart conditions (heart failure, coronary artery disease, cardiomyopathies or hypertension)

HIV

Immunocompromised

state (weakened immune system)

Liver disease

Overweight & obesity

Pregnancy

Sickle cell disease or

thalassemia (blood disorder)

Smoking (current or former)

Solid organ or blood

stem cell transplant

Stroke/

cerebrovascular

disease

Substance use disorder

What is Undue Hardship?

EEOC defines as action requiring *significant* difficulty or expense related to the individual business

Generalized conclusions not enough - must be based on individualized assessment current circumstances

Determination should be based on several factors, including:

- Nature & cost of accommodation
- Overall financial resources of the organization making accommodation, taking into account # EEs & expenses.
- Impact of accommodation on the operations

When an accommodation = undue hardship

Modifications that are "unduly extensive or disruptive, or those that would fundamentally alter the nature or operation of the job or business"

Impact on EE morale NOT a reasonable undue hardship defense

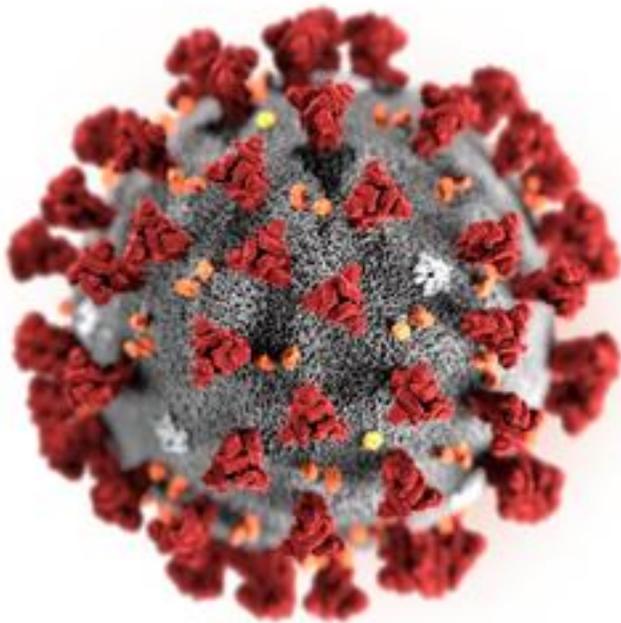
Wrongful Termination Claims

Montana Code Annotated § 39-2-901, et. Seq.

In 1987, Montana adopted the Wrongful Discharge from Employment Act, making Montana the only state to abolish “at-will” employment. A discharge is 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.

COVID-19 & Wrongful Termination



Retaliation for refusal to violate public policy can mean a lot of things

Be mindful of this in dealing with concerns related to CDC guidelines, vaccine status checks, OSHA regs, and other public policies concerning COVID-19

Local health boards also have broad power to adopt regulations to protect public health (See MCA § 50-2-116)

Refusal to Violate Public Policy

Employee reported violation of County Charter and Code of Ethics re public participation and open meetings

- *Moe v. Butte-Silver Bow Cty.*, 2016 MT 103, ¶¶ 44-47

Union steward asserted wrongdoing by employer in administration of pension and profit-sharing plan

- *Kerchner v. Grimes Buick-Gmc*, 2011 Mont. Dist. LEXIS 96, *4-5

Employee contacted disability advocacy group when employer declined to follow her recommendations for a developmentally disabled client

- *Pritchard-Sleath v. Mont. Dep't of Pub. HHS*, 687 F. App'x 654 (9th Cir. 2017)

Employer refused to reinstate employee following employees successful wrongful discharge claim

- *Asper v. Costco Wholesale Corp.*, No. CV 13-50-M-DLC, 2013 U.S. Dist. LEXIS 190446, at *4 (D. Mont. July 8, 2013)

Employee filed a wage claim for unpaid commissions, then employer terminated employee

- *Jacques v. Haas Grp. Int'l, Inc.*, No. CV 14-135-BLG-SPW-CSO, 2016 U.S. Dist. LEXIS 8372, at *16-17 (D. Mont. Jan. 25, 2016)

Employee reported violation of federal “kick-back” laws re doctors paid by pharmaceutical company employer

- *Russell v. Daiichi-Sankyo, Inc.*, No. CV 11-34-BLG-CSO, 2012 U.S. Dist. LEXIS 67849, at *24-25 (D. Mont. May 15, 2012)

HB 254 - WDEA

Effective 3/31/21

Changes to Probationary Period

- Extends default probationary period from 6 months to 1 year. Allows employer to set probationary period up to 18 months.
- Allows employer to extend the probationary period for the time period an employee has taken a leave of absence.

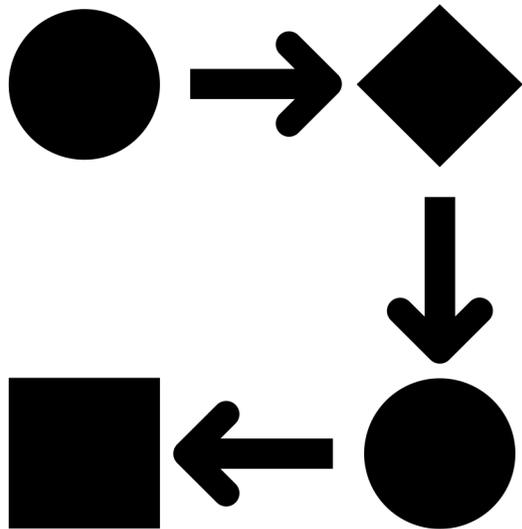
HB 254 -WDEA

Revises Good Cause

- “Good Cause” now includes an employee’s material or repeated violation of an express provision of the employer’s written policies.
- Codifies managerial exception. The employer now has the “broadest discretion when making a decision to discharge any managerial or supervisory employee.”

HB 254 -WDEA

Termination in Violation of Employer's Policies



Clarifies that wrongful discharge for violation of the employer's personnel policies must be:

- ✓ a material violation
- ✓ prior to discharge
- ✓ that deprived the employee of a fair opportunity to remain employed



Simplify the Handbook

HB 254 - WDEA

Grievance Procedure



- Prior and current law provides employee's WDEA claim is barred if the employer provides a copy of the internal grievance procedure, and the employee fails to utilize it.
- HB 254 extends deadline to provide grievance procedure from 7 to 14 days and allows it to be emailed.

HB 254- WDEA

Exceptions, Service of Lawsuit, & Damages

- Employees on certain contracts for a specified term are not subject to the WDEA. HB 254 clarifies that employment contracts for a specified term may contain a probationary period and a renewal clause without risk of losing the exception.
- The statute of limitations remains the same, but employees must now serve a WDEA complaint within 6 months of filing their complaint, as opposed to 3 years under the old law.
- Allows for damages to be offset by any interim earnings, including unemployment benefits.

Discrimination & Harassment



Vaccination Issues - Vaccination Status Now a Protected Class

HB 702 - Effective 5/7/21

- Cannot discriminate in employment or in providing goods and services based on a person's vaccination status or whether a person has an immunity passport
- Can still recommend employees get vaccinated.
- Exceptions apply to school and day care vaccination requirements

Vaccination Issues - Vaccination Status Now a Protected Class

HB 702 - Effective 5/7/21

- Health care facilities may ask employees to volunteer their vaccination status to determine if a reasonable accommodation is needed and must implement reasonable accommodation measures for those not vaccinated
- Nursing homes, long-term care, and assisted living facilities are exempt if compliance would result in violation of Medicare or CDC regulations or guidance

Vaccination Issues - Return to Work

AVOID the following:

- Polling employees about their vaccination status
- Circulating employees' vaccination status
- Refusing government services for unvaccinated citizens

Common Law & Vaccine Mandates

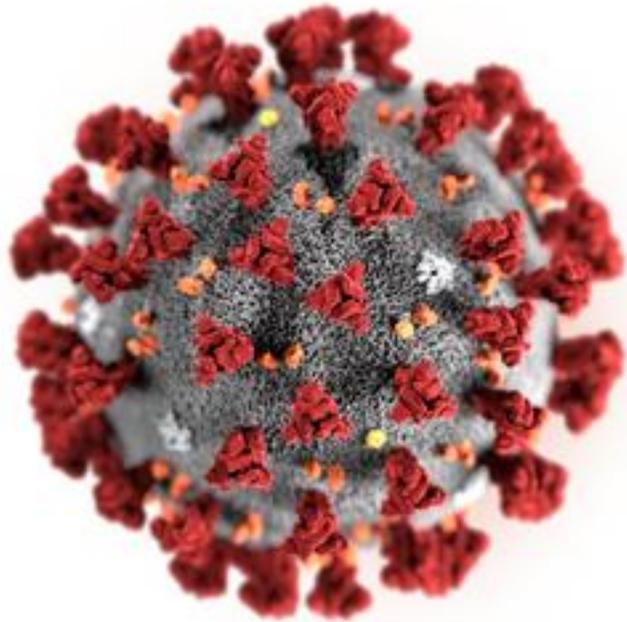
There is U.S. Supreme Court precedent holding that states may mandate vaccinations in response to epidemics and public health emergencies.

- *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905)

As recently as 2019, New York City relied on public health emergency laws to require all people living, working, or attending school in certain areas to be vaccinated for measles. Parents of unvaccinated children sued, but the New York trial court ruled in favor of the NYC.

- *C.F. v. N.Y.C. Dep't of Health & Mental Hygiene*, 2020 NY Slip Op 07867, 191 A.D.3d 52, 139 N.Y.S.3d 273 (App. Div. 2nd Dept.)

RACE AND NATIONAL ORIGIN DISCRIMINATION



Be on the lookout ... and



Discrimination in the time of COVID

Increase in harassment of Asian & Asian-American people

“Chinese Virus”

“China Virus”

Need to clearly communicate it is inappropriate to project the COVID-19 pandemic onto individuals because of their race, national origin, or other protected class

Family First Coronavirus Response Act (FFCRA) - Now Voluntary

- Provided for emergency paid sick leave and emergency family and medical leave
- Mandated leave expired 12/31/20
 - Covered employers can choose to continue to provide the same paid sick leave and paid family leave, but they are not required to do so
- Provisions applied to certain public employers and private employers with fewer than 500 employees.
- *All employees* of covered employers are eligible for two weeks of paid sick time for specified reasons related to COVID-19.
- *Employees employed for at least 30 days* are eligible for up to an additional 10 weeks of paid family leave to care for a child under certain circumstances related to COVID-19.

SB 65 - Civil Liability during COVID-19 - Effective 2/10/2021

- Provides liability protections for employers and healthcare providers, and limits products liability claims in response to COVID-19
- Provides protections from civil damages for injuries or death related to COVID-19 exposure - exceptions in extreme circumstances
- Affirmative defense for employers who took reasonable measures consistent with applicable federal or state laws, regulations and guidelines



HB 289 - Public Employee Union Dues - Effective 10/1/21



- For public employees - allows nonmembers to opt out of paying union dues

Questions?

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