LEGISLATION, LITIGATION AND LESSONS

Jean E. Faure
Faure Holden Attorneys at Law, P.C.
P.O. Box 2466
Great Falls, MT 49503
(406) 452-6500
jfaure@faureholden.com

I. Highlights from Montana's 2019 Legislative Session

"First do no harm"

A. Sampling of Bills Introduced/Considered--But Not Passed

- **Paid Family and Medical Leave--HB 208** (establish family medical leave insurance)

- **No Legal Liability for Hiring Employees with Criminal History--SB 294.** A private employer who substantially complies in good faith with this section may not be held liable regarding claims of negligent hiring or negligent employment for acts committed by an employee with a criminal record if the acts are committed outside the scope of the employment and: (1) the employer reviewed an arrest record prior to hiring that did not show a disposition of the case or that indicated an acquittal or a dismissal; (2) the conviction was for: (a) a misdemeanor offense; or (b) an offense that was not related to the employment; or (3) the employee with a criminal record is under the supervision of the probation and parole division of the department of corrections and the employment has been approved by the supervising officer."

- **Medical Marijuana--HB 445.** It would have prevented an employer from refusing to:

  (a) employ a person solely on the basis of the individual's status as a registered cardholder;
  (b) prohibit use of marijuana by a registered cardholder at the cardholder's place of employment; or
  (c) include in a contract a provision prohibiting the use of marijuana for a debilitating medical condition.

  But it would have allowed "An employer may place reasonable restrictions on the manner in which a registered cardholder may use marijuana at the cardholder's place of employment. Use of marijuana at a place of employment may not violate the provisions of Title 50, chapter 40, on smoking in public places and places of employment" and would not

"restrict an employer's ability to discipline a person for being under the influence of marijuana during work hours."

- **Prohibiting Inquiry About Applicant's Criminal History--SB 168.** This effectively was a "ban the box" legislation.

B. Employment-Related Bills Passed

- **HB 67** extends the time for non-disqualification for UI for individuals performing military service. The absence may now be up to 180 days versus the previous 6 weeks

  The individual may not be disqualified for any of the following reasons: The individual leaves employment because of being ordered to military service, as defined in 10-1-1003, for a period of less than 180 days and the individual upon checking with the employer finds that the individual's prior employment has terminated due to the military service or for other nondisqualifying reasons. Any benefits paid under this subsection (2)(c) are not chargeable to the account of an employer with an experience rating as provided in 39-51-1213.

- **HB 323** Following the SCOTUS decision in *Janus*, this legislation provides for free association by public employees and prohibits union dues and others assessment to be charged.

- **HB 439** Service Animals

  If a person has a service animal that provides assistance and the person wishes to access the places and accommodations mentioned in 49-4-211 accompanied by the animal in its capacity as a service animal: (a) the animal must be under the handler's control as required under 28 CFR 35.136 that is in effect as of [the effective date of this act]; and (b) the person may be asked by a representative of the place or accommodation: (i) whether the animal is a service animal that is required because of a disability; and (ii) to describe the work or task the animal is trained to perform.

  If the animal described in subsection (5) is not under the handler's control and the handler has not taken effective action to control the animal or the animal is not housebroken, the handler may be asked to remove the animal from the place or accommodation.

  A place or accommodation that asks that an animal be removed from the place or accommodation as provided in subsection (6)(a) shall give the animal's handler the opportunity to participate in the service, program, or activity without having the service animal on the premises.

If a place or accommodation mentioned in 49-4-211 posts a notice that dogs or other animals are prohibited on the premises, the place or accommodation must also indicate that a person may be accompanied by a service animal subject to the provisions of this chapter.

Misdemeanor to misrepresent an animal as a service animal.

- **HB 566** requires background checks on employees of assisted living facilities

- **SB 218** exempts students who trade housing for supervision of dorm from OT

- **SB 286** prohibits microchipping of employees without written consent
(1) An employer is prohibited from requiring an employee to have a microchip implanted in the employee's body as a condition of employment.
(2) A microchip may be implanted in an employee's body at the request of an employer if the employee provides the employer with written consent.
(3) (a) An employee may request the removal of the microchip at any time.
(b) If an employee requests the removal of the microchip, the microchip must be removed within 30 days of the employee's request.
(4) If an employee receives a microchip at the request of an employer, the employer is required to: (a) pay all the costs associated with implanting and removing the microchip; (b) pay all the medical costs incurred by the employee as a result of any bodily injury to the employee caused by the implantation of the microchip or the presence of the microchip in the employee's body; and (c) disclose to the employee: (i) the data that may be maintained on the microchip; and (ii) how the data that is maintained on the microchip will be used by the employer.

Montana's minimum wage will increase to $8.50/hour on January 1, 2019 which increase is based on the Consumer Price Index. Mont. Code Ann. § 39-2-409.

II. EMPLOYMENT LITIGATION

A. Service/Emotional Support Animals

ADA regulations specify that a "service animal" "means any dog that is individually **trained to do work or perform tasks for the benefit of an individual with a disability**, including a physical, sensory, psychiatric, intellectual, or other mental disability." 28 C.F.R. § 36.104 (emphasis added); *see also* 42 U.S.C. § 12101 et seq. Montana law defines a "service animal" as "a dog or other animal **individually trained to provide assistance to an individual with a disability**." § 49-4-203(2), MCA (emphasis added); *see also* ARM § 37.90.449(6) ("a service animal is an animal **trained**

to undertake particular tasks on behalf of a recipient's needs for accessibility, independence, health, or safety." (Emphasis added)). Importantly, "the work or tasks performed by a service animal **must be directly related** to the individual's disability." 28 C.F.R. § 36.104 (emphasis added).

There are no requirements regarding the amount or type of training that a service animal must undergo, nor the type of work or assistance that a service animal must provide. However, it must be demonstrated by the individual that the animal is trained to perform tasks and do work for the employee's benefit. The employee must prove that the animal is a primary means of overcoming barriers to equal use and enjoyment of the facilities.

"Provision of emotional support, well-being, comfort, or companionship does not necessarily constitute work or tasks for a service dog." An animal that simply provides comfort or reassurance is equivalent to a household pet and does not qualify as a "service animal" under the ADA. *See Baugher v. City of Ellensburg, Wash.,* 2007 WL 858627, at *5 (E.D. Wash. Mar. 19, 2007) (finding that while an animal may provide the individual with a sense of comfort and help cope with anxiety, the ADA requires more for an animal to qualify as a service animal).

Not only does the employee have to demonstrate training of specific tasks and/or work, she must also demonstrate that such tasks are directly related to her disability. *See e.g.*, *Pruett v. Ariz.,* 606 F.Supp.2d 1065, 1071 (D.Ariz.2009) (finding chimpanzee that "sits with [the plaintiff] when she is home alone, retrieves candy or a beverage with sugar for her on command, turns lights on for her, picks up remote controls and telephones, sleeps with her, and gives her mental stimulation" did not qualify as service animal because tasks were unrelated to diabetic disability). There has to be some evidence of individual training--to set the service animal apart from the ordinary pet.

To qualify as a "service animal", it must be trained to take a specific action when needed, to assist the employee with her disability. For example, a person with diabetes may have a dog that is trained to alert her when her blood sugar reaches high or low levels. A person with depression may have a dog that is trained to remind her to take her medication. Or, a person who has epilepsy may have a dog that is trained to detect the onset of a seizure and help the person remain safe during a seizure. Furthermore, a dog may be trained to sense when an anxiety attack is about to happen and take specific action to help avoid the attack or lessen its impact. *See e.g.*, U.S. DOJ, Civil Rights Division, *Disability Rights Section*, Bulletin: "Frequently Asked Questions about Service Animals and the ADA", Q2.A, Q4.A. If the dog's mere presence, however, is to provide comfort that is not a "service animal." Id., Q4.A. Rather, "[s]ervice animals perform some functions and tasks that the individual with a disability cannot perform for him or herself." U.S. DOJ, Civil Rights Division, *Disability Rights Section*, Bulletin: "Commonly Asked Questions About Service Animals in Place of Business", Q2.A. Other examples include a dog that alerts her owner with hearing impairments to sounds or a dog that pulls a wheelchair or carries/picks up items for a person with mobility impairments. "A service animal is not a pet." Id. (emphasis in original).

B. Wrongful Termination

Schulz v. JTL Group, Inc., 2018 MT 285N

The employee was terminated for insubordination after he refused directives to secure heavy equipment after it had been vandalized. Employer wins.

Why? The employer's policies provided that failure to carry out a supervisor's order or disobedience is cause for termination. The employee also acknowledged that he understood his supervisor's instructions. Employee not allowed to argue the reasonableness of the directive under the circumstances, especially because the employee acknowledged that it was reasonable for the employer to have assigned the employee responsibility for protecting the equipment.

Blodgett v. Montana, 2018 MT 243N

The employee was a deputy juvenile probation officer, subject to the Montana Judicial Branch Personnel Policy providing for a one-year probationary period. During his probationary period, he reported what he believed to be ethical and public policy violations involving his supervisor. His supervisor terminated him the same day for a number of reasons, including disruptive and defiant behavior. Court ruled that a whistleblower can be terminated during the probationary period. Employee's whistleblowing claims did not involve opposition to discrimination based on membership in a protected class.

C. Family and Medical Leave Act

Employee requests medical leave, for example, because of his uromysitisis poisoning (clearly, an FMLA-qualifying condition); but wants to use his accrued paid leave instead of tapping into FMLA?

He might even get indignant, insisting that the law allows him to *choose* either FMLA leave or ordinary sick leave to cover an absence clearly covered by the FMLA.

How do you respond? The regulations provide “once the employer has acquired knowledge that the leave is being taken for an FMLA-qualifying reason, the employer must [designate the absence as FMLA leave].” 29 C.F.R. 825.301(a) There is nothing in this regulation to suggest that the employee can influence this process. To the contrary, the regulation states that the employer designates once it knows the absence is for an *FMLA-qualifying reason*.

In a recent opinion letter, the U.S. Department of Labor addressed whether an employee could delay FMLA leave and instead utilize accrued paid leave when the absence clearly would qualify as FMLA leave. The DOL’s answer was swift and unequivocal:

> An employer is prohibited from delaying the designation of FMLA-qualifying leave as FMLA leave. Once an eligible employee communicates the need to take leave for an FMLA-qualifying reason, *neither the employee nor the employer may decline FMLA protection for that leave*. (My emphasis)

The employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation . . . [If] an employee substitutes paid leave for unpaid FMLA leave, the employee's paid leave counts toward his or her 12-week (or 26-week) FMLA entitlement and does not expand that entitlement.

Impact?

***It brings clarity*.** An employee doesn't get to choose whether or not an absence is covered by the FMLA. Now, when *any* absence qualifies as FMLA leave, the DOL has made clear that it must be designated as FMLA leave.

***It is Helpful to Unionized Employers and Public Sector Employers*.** This opinion letter may end up impacting these employers the most. It's not uncommon for collective bargaining provisions or public sector personnel policies to allow employees first to use paid leave, followed by FMLA leave. This opinion letter gives these employers the leverage they need to negotiate CBA provisions and establish policies designating FMLA leave at the earliest opportunity whenever FMLA applies.

***The Opinion Letter Creates Problems for us in the 9th Circuit*.** Several years ago, in *Escriba v. Foster Poultry Farms*, the 9th Circuit Court of Appeals decided that an employee actually can decline FMLA leave and use paid leave instead, even though the underlying reason for leave would have been FMLA-qualifying leave. Since this decision was issued in 2014, employers in the 9th Circuit have been left scratching their collective heads about whether and how they should designate FMLA leave when an employee declines it. In issuing this opinion letter, however, the DOL pulls no punches in noting its disagreement with the *Escriba* decision. 9th Circuit employer clients still should *designate the leave under the FMLA*.

Employers Can Still Be Generous with Their Paid and Unpaid Leave Programs. This opinion letter doesn't mean you need to be stingy with the paid and unpaid leave programs you provide employees. In fact, the regulations explicitly tell us, "Nothing in FMLA supersedes any provision of State or local law that provides greater family or medical leave rights than those provided by FMLA." 29 CFR 825.701(a) So, there is nothing stopping you from providing *additional* leave when FMLA leave ends. As this opinion letter points out, however, you simply can't designate the additional leave as FMLA leave once an employee has exhausted 12 weeks of FMLA leave.

D. Equal Pay Act

Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018)

Employee of public-school system sued employer, alleging violations of the Equal Pay Act because her male counterparts earned more than her. The employer argued that the employee's pay was based on a "factor other than *sex,"* in that salaries were based on amounts employees earned before they were hired. The Ninth Circuit affirmed the District Court's decision that a pay structure based "exclusively on prior *wages"* violates the EPA because it "is not a legitimate measure of work experience, ability, performance, or any other job-related quality" and has only an attenuated relationship with "legitimate factors other than sex such as training, education, ability, or experience."

E. Medical Examinations

You can't require a current employee to have any type of medical examination unless the examination is job-related and consistent with business necessity, required by another federal law, or required in connection with a voluntary wellness program.

The ADA allows you as an employer to ask for any medical information post-offer, pre-employment, as long as you ask it of any person offered a position in the same job category. The medical questions at this stage do not have to be tailored to the job in any way. If you want, you can ask about childhood tonsillectomies and appendectomies, pregnancies and gynecological history, erectile dysfunction, and psychological problems.

As long as you don't use the information to keep the person out of the job (or withdraw the offer only if the condition prevents the person from performing the essential functions with or without a reasonable accommodation), then you are fine from an ADA standpoint. You cannot reject an applicant because of information about a disability revealed by the medical examination, unless the reasons for rejection are job-related and necessary for the conduct of its business. You also cannot refuse to hire an employee because of your disability if they can perform the essential functions of the job with an accommodation.

F. Working from Home

With technological advances and with market demand for flexible work arrangements constantly increasing, the question of working remotely now is a constant. The ADA does not require telecommuting programs. Remember that even if you take a strict approach, the Americans with Disabilities Act may require you to make exceptions. We long have argued that physical attendance was an essential function of the job. However, it is becoming a much weaker argument to claim that 100% physical attendance is an essential function of every position. Today, an employer may be hard-pressed to explain why it could not allow remote work on at least a temporary or part-

time basis. In fact, the request to work from home as a reasonable accommodation under the ADA has become so commonplace that the EEOC has developed a FAQ devoted to the specific request.

How should an employer determine whether someone may need to work at home as a reasonable accommodation?

This determination should be made through a flexible "interactive process" between the employer and the individual. The process begins with a request. An individual must first inform the employer that s/he has a medical condition that requires some change in the way a job is performed. The individual does not need to use special words, such as "ADA" or "reasonable accommodation" to make this request but must let the employer know that a medical condition interferes with his/her ability to do the job.

Then, the employer and the individual need to discuss the person's request so that the employer understands why the disability might necessitate the individual working at home. The individual must explain what limitations from the disability make it difficult to do the job in the workplace, and how the job could still be performed from the employee's home. The employer may request information about the individual's medical condition (including reasonable documentation) if it is unclear whether it is a "disability" as defined by the ADA. The employer and employee may wish to discuss other types of accommodations that would allow the person to remain full-time in the workplace. However, in some situations, working at home may be the only effective option for an employee with a disability.

How should an employer determine whether a particular job can be performed at home?

An employer and employee first need to identify and review all of the essential job functions. The essential functions or duties are those tasks that are fundamental to performing a specific job. An employer does not have to remove any essential job duties to permit an employee to work at home. However, it may need to reassign some minor job duties or marginal functions (i.e., those that are not essential to the successful performance of a job) if they cannot be performed outside the workplace and they are the only obstacle to permitting an employee to work at home. If a marginal function needs to be reassigned, an employer may substitute another minor task that the employee with a disability could perform at home in order to keep employee workloads evenly distributed.

After determining what functions are essential, the employer and the individual with a disability should determine whether some or all of the functions can be performed at home. For some jobs, the essential duties can only be performed in the workplace. For example, food servers, cashiers, and truck drivers cannot perform their essential duties from home. But, in many other jobs some or all of the duties can be performed at home.

Several factors should be considered in determining the feasibility of working at home, including the employer's ability to supervise the employee adequately and whether any duties require use of certain equipment or tools that cannot be replicated at home. Other critical considerations include whether there is a need for face-to-face interaction and coordination of work with other employees; whether in-person interaction with outside colleagues, clients, or customers is necessary; and whether the position in question requires the employee to have immediate access to documents or other information located only in the workplace. An employer should not, however, deny a request to work at home as a reasonable accommodation solely because a job involves some contact and coordination with other employees. Frequently, meetings can be conducted effectively by telephone and information can be exchanged quickly through e-mail.

If the employer determines that some job duties must be performed in the workplace, then the employer and employee need to decide whether working part-time at home and part-time in the workplace will meet both of their needs. For example, an employee may need to meet face-to-face with clients as part of a job, but other tasks may involve reviewing documents and writing reports. Clearly, the meetings must be done in the workplace, but the employee may be able to review documents and write reports from home.

How frequently may someone with a disability work at home as a reasonable accommodation?

An employee may work at home only to the extent that his/her disability necessitates it. For some people, that may mean one day a week, two half-days, or every day for a particular period of time (e.g., for three months while an employee recovers from treatment or surgery related to a disability). In other instances, the nature of a disability may make it difficult to predict precisely when it will be necessary for an employee to work at home. For example, sometimes the effects of a disability become particularly severe on a periodic but irregular basis. When these flare-ups occur, they sometimes prevent an individual from getting to the workplace. In these instances, an employee might need to work at home on an "as needed" basis, if this can be done without undue hardship.

As part of the interactive process, the employer should discuss with the individual whether the disability necessitates working at home full-time or part-time. (A few individuals may only be able to perform their jobs successfully by working at home full time.) If the disability necessitates working at home part-time, then the employer and employee should develop a schedule that meets both of their needs. Both the employer and the employee should be flexible in working out a schedule so that work is done in a timely way, since an employer does not have to lower production standards for individuals with disabilities who are working at home. The employer and employee also need to discuss how the employee will be supervise

Note too workers compensation concerns. Florida court has ruled an employee working from home who was hurt when she tripped over her dog while reaching for a coffee cup in her kitchen was not entitled to workers' compensation benefits because her injury did not "arise" out of her employment

G. Medical Marijuana

Carlson v. Charter Communications, LLC, 742 Fed. Appx. 344 (9th Cir., Nov. 9, 2018) Employee held a medical marijuana card issued pursuant to Montana law. While he was operating a company-owned vehicle at work, he hit a pole and was required to undergo two urinalysis tests following the accident. Both times he tested positive for THC. He was terminated. He sued, alleging wrongful discharge and discrimination. Challenge to no obligation on the part of the employer to accommodate the use of marijuana and prohibits causes of action against employers for wrongful discharge and discrimination.

III. LESSONS

A. Opioid epidemic and its effect on employment.

Pattern of absenteeism or employees with impaired or decreased job performance

1. Spotting an addiction

Symptoms of opioid addiction are not as obvious as are those of other drugs subject to abuse, such as alcohol. Rather than stumbling or slurred speech, an opioid addict might just seem overly tired. They're also often fairly functional; many are gainfully employed.

It is not difficult to include opioids in a workplace drug testing program, whether pre-employment or otherwise. What can be difficult, however, is determining whether a positive result on that test indicates that the worker or applicant is using an illicit drug or is simply taking an opioid medication as prescribed by a doctor. In order to avoid discriminating against disabled individuals taking prescribed opioids, employers should give those who test positive an opportunity to produce a prescription.

Drug testing is another area requiring careful consideration. The law allows employers to test applicants for illegal drugs before making a job offer as long as the test doesn't show the use of legal prescription drugs. Post offer, employers may require applicants to take another drug test that encompasses prescription drugs. At that point, if an applicant tests positive, you may ask for proof of a valid prescription.

Protections under the Americans with Disabilities Act (ADA) for those who test positive can apply to a broad range of scenarios, particularly for individuals in treatment for addiction. For example, the Equal Employment Opportunity Commission (EEOC) is

currently suing a Texas company it says fired a worker who was taking prescribed methadone as part of a drug treatment program, and has pursued cases against other employers for firing workers whose positive results stem from prescribed medications

2. Does an addicted employee pose a safety hazard?

Not everyone who uses prescription opioids is a danger to themselves or to the workplace. But how can an employer know for sure? 86% of employers think taking prescription opioids can impair job performance. At the same time, only half of those surveyed believe they have the appropriate human resource policies to address opioids in the workplace. The majority of employers do not have a policy requiring employees to let their employer know when they are using a prescription opioid, and nearly 80% of employers do not feel confident spotting warning signs of opioid misuse.

Anyone with a lawful prescription for an opioid medication is likely to have a disability as disability is defined in the law. If such workers are able to perform the essential functions of the job with or without a reasonable accommodation, the ADA protects them from discrimination. Likewise, an employee with a history of addiction or rehabilitation is protected by the ADA. However, the ADA does not protect employees who use illegal drugs or legal drugs not prescribed for them.

Spelling out a position's essential functions in a job description is critical to making sure job actions, including termination, are permissible under the law. You cannot ask applicants about their medical history or whether they may have a disability, but you may ask whether applicants can meet your attendance requirements and otherwise fulfill the essential functions of the position with or without an accommodation.

B. Social media

1. Use of social media in screening

Using Facebook, Twitter, LinkedIn or other means to see what is publicly available about a candidate can help you confirm a few of the facts the applicant mentioned in the interview but also learn some other undisclosed background info--perhaps, that she is in a same-sex relationship or is planning to adopt a baby from another country and take as much maternity time as possible, or the applicant is considering being a stay-at-home mom while her partner serves as the breadwinner.

You may also learn other details about this candidate--such as religious beliefs, political opinions, race, ethnicity, age and medical conditions--that cannot be used to make an employment-based decision under federal, state and local laws. And even if a company would wholeheartedly welcome an individual with the background and plans of this candidate, she could challenge an adverse employment decision made for a legitimate, nondiscriminatory reason because of the information the employer obtained.

It is much easier for an organization to defend against a discrimination claim when it never knew of the discriminatory grounds in the first place. The frank reality is, once this knowledge has been learned, it cannot be forgotten. Once the bell has rung, it is impossible to un-ring it.

In a recent case a person claimed that an employer discriminated against him based on his age. Some social media sites, such as LinkedIn, permit the site owner to see who has viewed the site. In this instance the applicant discovered that the employer had viewed his LinkedIn page, and he knew that the employer was able to determine his age from the site. This knowledge, among other arguments, allowed the applicant to present a case for discrimination and file a lawsuit. Even though the employer was found to have acted for a legitimate, nondiscriminatory reason and was thus not liable, the company may think twice before finding out all it can about future candidates.

To minimize the risks of doing informal Internet searches on applicants, some employers have sought to allow only non-decision-makers to do such searches. In these cases, the searcher will gather the online information and pass on to the decision-makers only that which is permissible for consideration. This strategy provides the organization with the legitimately helpful facts while arguably protecting it from a discrimination claim.

2. Policies

Employers are advised to avoid from these policy provisions:

- Blanket rules prohibiting employees from making disparaging remarks or criticizing the employer;
- Blanket rules requiring employees to keep wages, benefits or working conditions confidential; and
- Blanket rules prohibiting employees from making false or inaccurate statements (although the guidance suggests employers may be able to ban “defamatory statements”).