

**EMPLOYMENT LAWS  
FREQUENTLY ASKED QUESTIONS**

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**Can part-time employees still receive UI benefits?**

**Is there any way that when I fire someone for something because that employee is at fault, I can make sure they don't collect UI?**

**Human Rights, ADA & Discrimination Related Questions:**

**As an employer when am I required to make a reasonable accommodation under the Americans With Disabilities Act?**

**Can I refuse to hire people who smoke?**

**General Human Resource Management Related Questions:**

**Have there been any recent changes in required postings?**

**May I call an applicant's former employers for references?**

**May I make my employees dress a certain way?**

**May I drug test my employees?**

**What information should be included in an employees' handbook?**

**Is it necessary that I give a discharged employee a reason for discharge?**

**How can I avoid a wrongful discharge suit?**

**Wage & Hour Related Questions:**

Contact ERD Wage & Hour Unit – 406-444-5600 or visit their website at [www.mtwagehourbopa.com](http://www.mtwagehourbopa.com) if you need more information.

**1. Question: When are wages due if an employee quits, is laid off or is discharged?**

**Answer:** Wages are not due to an employee who quits until the next regular payday for the period during which the employee was separated from employment or 15 days from the date of separation from employment, whichever occurs first, either through the regular pay channels or by mail if requested by the employee.

If an employee is laid off or discharged, all wages are due immediately upon separation **unless** the employer has a **written** personnel policy that extends the time for payment of final wages to the employee's next regular payday for the period or to within 15 days from the separation, whichever occurs first.

When an employee is discharged by reason of an allegation of theft connected to the employee's work, the employer may withhold from the employees' final paycheck an amount sufficient to cover the value of the theft if:

- a. The employee agrees in writing to the withholding; or
- b. The employer files a report of the theft with the local law enforcement agency within 7 days of the separation from employment.

If no charges are filed in a court of competent jurisdiction within 30 days of the filing of the report with local law enforcement, wages are due and payable upon expiration of the 30-day period. If the employee is found not guilty of the charges or if the employer withholds an amount in excess of the value of the theft, the court may order the employer to pay the employee the withheld amount plus interest.

**Reference:** [Section 39-3-205, MCA](#)

**2. Question: Is it okay for an employer to require that all keys and uniforms be returned before paying employees their final paycheck?**

**Answer:** No, you must still follow the law as explained in the preceding answer.

**3. Question: Can I withhold payment of wages to offset charges made by the employee at my business?**

**Answer:** Yes, provided there is a preexisting signed agreement with the employee prior to any charges.

**4. Question: Can I require that employees come to my business to get their final paycheck?**

**Answer:** No, you must pay through regular pay channels OR by mail if requested by the employee.

**5. Question: Can I deduct from wages the amount of damages caused by an employee?**

**Answer:** No, wages cannot be withheld for shortages, damages or mistakes.

**Reference:** [Section 39-3-204\(1\), MCA](#) and Attorney General Opinion 17, Volume 36 and Attorney General Opinion 25, Volume 11 at the following website:  
[http://erd.dli.mt.gov/images/stories/pdf/labor\\_standards/attorneygeneral\\_opinions/ag\\_opinionvol2511.pdf](http://erd.dli.mt.gov/images/stories/pdf/labor_standards/attorneygeneral_opinions/ag_opinionvol2511.pdf).

**6. Question: Can I pay my employee less than minimum wage during a training period?**

**Answer:** No, there is no training wage in Montana. Even if an employee signs an agreement to work for less than minimum wage, it is unenforceable because it is illegal.

**7. Question: I pay my hourly employees every 2 weeks so I just pay overtime for any hours worked over 80. Is this okay?**

**Answer:** No, each work week stands alone and cannot be averaged for minimum wage or overtime. A workweek is defined as a period of 168 hours during seven consecutive 24-hour periods.

**8. Question: I require my food servers to pool their tips and I disburse these tips among all my employees. Is this okay?**

**Answer:** No - Tips belong to the employees who provide the service and only the employees to whom the tips belong should arrange any tip pool agreements.

**9. Question: We have a tip container for patrons to leave tips at our espresso bar. We donate all tips collected to local charities. Is this okay?**

**Answer:** Again, no. Tips belong to the employees and employers should not try to control them.

**10. Question: Can I require my employees to report to their workstations 15 minutes before their shift begins?**

**Answer:** Only if you pay them for the time. Any time an employer requires an employee to report to work, which includes preparatory and concluding activities is considered hours worked.

**11. Question: Can I require my employees to report to work and wait around to see if we are busy enough to need their services?**

**Answer:** Time spent waiting is hours worked.

**12. Question: Is it true that since I pay my employees on a salary basis, I don't need to be concerned about overtime?**

**Answer:** Paying employees on a salary basis is only one of many methods of payment. You still must pay overtime for all hours worked over 40 in a workweek unless the employee specifically meets an exemption from the overtime provisions of Montana statutes. For a list of exemptions request a Quick Reference Guide from the Wage & Hour Unit or visit their website at [www.mtwagehourbopa.com](http://www.mtwagehourbopa.com).

**13. Question: Do I need to pay employees for staff meetings held in the evenings, which are not during my employees' regular hours of work?**

**Answer:** All of the following criteria must be met in order for meetings and training not to be considered hours worked. Not work time if:

- i. attendance is outside of employee's regular working hours,
- ii. attendance is voluntary
- iii. not directly related to employee's job, AND
- iv. employee does not perform any productive work during attendance.

**14. Question: Must I pay unused vacation pay to an employee who quits?**

**Answer:** The wage and hour laws do not require that an employer provide vacation pay (private sector) but if promised and earned, it is due and payable. So whether or not vacation pay is due depends on your policies and how they are written and implemented.

**Reference:** Attorney General Opinion 56, Volume 23 at [http://erd.dli.mt.gov/images/stories/pdf/labor\\_standards/attorneygeneral\\_opinions/agopinvol5623.pdf](http://erd.dli.mt.gov/images/stories/pdf/labor_standards/attorneygeneral_opinions/agopinvol5623.pdf).

**15. Question: Must I give severance pay to departing employees?**

**Answer:** The wage and hour laws do not require severance pay.

**16. Question: Can I give compensatory time off to employees instead of paying them overtime?**

**Answer:** The private sector cannot substitute compensatory time for overtime unless the

employees are exempt from the overtime provisions of the law. Note: Use of comp time for Administrative, Executive or Professional employees may jeopardize exempt salary status.

**17. Question: If an employee actually works 40 hours during the workweek and I also pay him 8 hours of holiday pay, do I need to pay time and a half for 8 of these hours?**

**Answer:** No, wage and hour laws do not require that holiday pay, sick leave, or vacation hours be counted toward the 40 hours unless actually worked.

**18. Question: How often are breaks required to be given and how long must they be?**

**Answer:** Neither Federal nor State wage and hour laws require breaks be provided. However, if rest breaks are provided they are considered hours worked. Meal periods are also hours worked unless the following criterion is met:

- a. Completely relieved of duty **and**
- b. Are at least 30 minutes in duration.

Additionally, if your business is covered by a collective bargaining agreement and breaks and duty free mealtime are identified in the contract, they are to be honored.

**19. Question: What type of deductions can an employer make from a paycheck?**

**Answer:** In general, deductions from wages are lawful only under the following conditions:

- The employer is required to do so by law—for example, federal and state taxes, Social Security, or a garnishment order.
- The employee has authorized it in writing and the deduction is for the employee's benefit.

Employers must furnish itemized pay statements to each employee at the time of payment of wages showing all deductions for the pay period. If the employee has no deductions, the employer still needs to give a statement to the employee.

**20. Question: Can I hire 14 and 15-year-olds during the school year?**

**Answer:** Yes, as long as the specific employment is not prohibited and you adhere to the allowed hours of work. (I would include/encourage questions relating to Child Labor Law be directed to Wage and Hours website as well as the federal website.

**Reference:** [Section 41-2-106](#) and [41-2-108, MCA](#)

**21. Question: What hours can 14 and 15-year-old youths not be employed?**

**Answer:** Unless otherwise exempt, 14 and 15 year old youths may not work:

- ❖ During school hours;
- ❖ Before 7 a.m. or after 7 p.m., except until 9 p.m. during the summer months;
- ❖ More than 3 hours per day on a school day;
- ❖ More than 18 hours per week during school weeks;
- ❖ More than 8 hours per day on non-school days;
- ❖ More than 40 hours per week in non-school weeks.

**Reference:** Section [41-2-115, MCA](#)

**22. Question: I have a written policy that requires employees to get written permission before they are allowed to work any overtime; however, I have one employee who comes in early and stays late without approval. Must I pay him overtime?**

**Answer:** Unless the employee is exempt from overtime, you must pay the employee overtime for all hours worked over 40 in a workweek. If an employee does not follow your established rules and policies,

you should address these problems through disciplinary measures.

### **General Guidelines:**

#### **Wage and Hour Laws Do Not Require**

- Vacation pay (private sector) – if promised and earned, is due and payable
- Holiday or sick pay (private sector)
- Severance pay
- Rest breaks or meal periods
- Holidays off
- Pay raises or fringe benefits
- Time clocks to be used

The Wage & Hour Unit has no jurisdiction over scheduling employees, disciplinary actions or termination.

#### **Hours Worked Includes**

- All the times an employee is required to be on duty or on the employer's premises or at a prescribed work place and all the time during which they are suffered or permitted to work for the employer.
- Meal periods unless certain criteria are met: 1) completely relieved of duty and 2) at least 30 minutes in duration.
- Staff/business meetings and training. Not work time if: 1) attendance is outside of employee's regular working hours; 2) attendance is voluntary; 3) not directly related to employee's job, and 4) employee does not perform any productive work during attendance.
- Sleeping time on a shift of less than 24 hours
- Preparatory and concluding activities
- Rest breaks
- Time spent waiting
- Travel time

### **Independent Contractor Related Questions:**

Contact ERD Independent Contractor Central Unit at 406-444-9029 or visit their website at <http://erd.dli.mt.gov/workers-comp-regulations/montana-contractor/independent-contractor-central-unit.html> for more information.

#### **23. Question: I sometimes hire independent contractors. How is independent contractor status defined?**

**Answer:** According to the law, "independent contractor" means: a person who renders **service** in the course of an occupation and:

- A. Has been and will continue to be free from control and direction over the performance of the services, both under the contract and in fact; and
- B. Is engaged in an independently established trade, occupation, profession or business.

If the above requirements are not met, an individual performing services for payment is presumed to be an employee. Prior to working as an independent contractor in any trade, occupation, profession or business, a person must obtain an Independent Contractor Exemption Certificate (ICEC) from the Independent Contractor Central Unit. State law requires ALL independent contractors to obtain Worker's Compensation for him/herself **OR** obtain an ICEC from the Department of Labor & Industry.

**Reference:** [Section 39-71- 417](#) and [39-71-419, MCA](#)

**24. Question: What are the legal requirements for contractor registration and exemption?**

**Answer:** All contractors and subcontractors **in the construction and building industry**, whether they have employees or not, must register. Contractor registration does not apply to other industries.

Contractor Registration for the construction and building industry is separate and distinct from the Independent Contractor Exemption Certificate (ICEC). An individual must obtain an ICEC prior to working as an independent contractor in ANY and **ALL** industries, not just building and construction.

**Reference:** [Section 39-9-201, MCA](#)

**Business Start-Up Questions**

Contact the Secretary of State office at 406-444-2034 or visit their website at <http://sos.mt.gov> for more information.

**25. Question: I'm starting a business and the bank says I need a business plan, where can I get help for that?**

**Answer:** Information for developing a business plan is available from your local Small Business Development Center (SBDC); from the Small Business Administration and SCORE at [www.score.org](http://www.score.org) and through online resources available on Job Service websites or Internet searches.

**26. Question: How do I start my own business, and where do I access UI coverage and worker's compensation coverage?**

**Answer:** Information for starting a business is available on the website of the Secretary of State, <http://sos.mt.gov>; on your local Job Service website, your local Small Business Development Center or Job Service office. Unemployment insurance is purchased through the Department of Labor (406) 444-3834 and Worker's Compensation Insurance is available through individual insurance providers or the Montana State Fund [www.montanastatefund.com](http://www.montanastatefund.com).

**Workers' Compensation Related Questions:**

Contact ERD Workers Compensation Assistance 406-444-6541 or visit their website at <http://erd.dli.mt.gov/wcca-bureau.html> for more information.

**27. Question: If I hire someone with a previous injury, am I responsible for the injury?**

**Answer:** If an employee has an injury from a previous employment, the previous employers' workers' compensation insurance is responsible for any costs associated with that injury. If the employee re-injures himself or herself or sustains another injury while working for you, then your workers' compensation insurance is responsible for the injury.

**Reference:** Department of Labor & Industry Employment Relations Division  
(406)-444-6543

**Unemployment Insurance Related Questions:**

Contact the Unemployment Insurance Division at 406-444-3834 or visit their website at <http://uid.dli.mt.gov>.

**28. Question: My employer told me he's deducting UI and/or Worker's Compensation premiums from my pay check because it's required. Is that true?**

**Answer:** Generally, an employer must provide those benefits to their employees, except in very few instances.

**29. Question: Can part-time employees still receive UI benefits?**

**Answer:** Generally they can but it depends on a person's earnings and work history. Section 39-51-2115 MCA allows claimants, who are limited to part-time work, to receive unemployment benefit if the majority of the weeks they worked in their base period were in part-time work and they are willing/able to work the same number of part-time hours as in their base period. If someone has a disability (meets ADA definition) that prevents them from working the same number of hours they were working in their base period, UI can allow benefits if they are willing/able to work at least 50% of the hours they worked in the base period.

**30. Question: Is there any way that when I fire someone for something because that employee is at fault, I can make sure they don't collect UI?**

**Answer:** In order to insure a fair determination, employers should follow good personnel practices such as:

- Document personnel policies and adhere to them;
- Make sure employees are aware of the policies;
- Make sure you give employees a chance to improve poor performance;
- Provide specific separation information to the Unemployment Insurance Division. For example, don't say "poor performance," say "he ruined a batch of milk by dumping lye in it". In other words, be specific;
- Provide copies of any disciplinary actions (related to the reason for separation) and the policies that were violated;
- Provide witness statements for collaboration when it is your word against the claimant's; and
- Make sure to date any warnings or notes about conduct. Be specific as to the date the behavior occurred.

**Human Rights, ADA & Discrimination Related Questions:**

Contact ERD Human Rights Bureau at 406-444-2884 or visit their website at <http://erd.dli.mt.gov/human-rights-bureau.html> for more information.

**31. Question: As an employer when am I required to make a reasonable accommodation under the Americans With Disability Act?**

**Answer:** Reasonable accommodation is any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate in the application process or to perform essential job functions. Reasonable accommodations also include adjustments to assure that a qualified individual with a disability has rights and privileges in employment equal to those of employees without disabilities.

An employer is only required to accommodate a "known" disability of a qualified applicant or employee. The requirement generally will be triggered by a request from an individual with a disability, who frequently will be able to suggest an appropriate accommodation. Accommodations must be made on an individual basis, because the nature and extent of a disabling condition and the requirements of a job will vary in each case. If the individual does not request an accommodation, the employer is not obligated to provide one except where an individual's known disability impairs his/her ability to know of, or effectively communicate a need for, an accommodation that is obvious to the employer. If a person with a disability requests, but cannot suggest an appropriate accommodation, the employer and the individual should work together to identify one.

The individual with a disability requiring the accommodation must be otherwise qualified, and the disability must be known to the employer. In addition an employer is not required to make an accommodation if it would impose an “undue hardship” on the operation of the employers’ business. “Undue Hardship” is defined as an “action requiring significant difficulty or expense” when considered in light of a number of factors. These factors include the nature and cost of the accommodation in relation to the size, resources, nature and structure of the employers’ operation. Undue hardship is determined on a case- by-case basis. In general, a larger employer with greater resources would be expected to make accommodations requiring greater effort or expense than would be required of a smaller employer with fewer resources.

If a particular accommodation would be an undue hardship, the employer must try to identify another accommodation that will not pose such a hardship. Also, if the cost of an accommodation would impose an undue hardship on the employer, the individual with the disability should be given the option of paying that portion of the cost which would constitute an undue hardship of providing the accommodation.

**References:** Montana Human Rights Act, Title 49, Chapters 1-6, MCA;-Americans with Disabilities Act, Chapter 3 sections 3.1-3.9. Helpful resource: ADA Services Unit, EEOC 1-800-0669-4000

**32. Question: Can I refuse to hire people who smoke?**

**Answer:** You can implement smoking and nonsmoking policies during work hours; however—generally, discrimination is prohibited for the use of lawful products during nonworking hours.

**General Human Resource Management Related Questions:**

**33. Question: Have there been any recent changes in required postings?**

**Answer:** There are intermittent changes in required posters when changes have been made in the laws. Generally your local Job Service will know about these changes.

**34. Question: May I call an applicant’s former employers for references?**

**Answer:** Yes

**35. Question: May I make my employees dress a certain way?**

**Answer:** You may have a policy on personal appearance and hygiene expectations for your employees as long as it doesn’t discriminate against a protected class.

**36. May I drug test my employees?**

**Answer:** Refer to the Montana Drug Testing in Employment Act and/or a private employment law attorney. For additional information see “An Employer’s Guide to Drug Testing in Montana” on-line at <http://wsd.dli.mt.gov/service/drugmanual.asp> or the Department of Public Health and Human Services frequently asked questions at <http://www.dphhs.mt.gov/medicalmarijuana/frequentlyaskedquestions.shtml>.

**Reference:** [Section 39-2-205, et seq., MCA](#)

**37. Question: What information should be included in an employees’ handbook?**

**Answer:** Employee handbooks should include clearly written and defined major policies of your company. Having clearly written policies that are shared with and signed off by your employees will help them to understand and follow them. It gives supervisors a tool to use when dealing with

employee problems. Furthermore, it may be of assistance to you in dealing with disciplinary problems and issues of discharge.

Policies may include, but are not limited to: Discrimination, Absences, Alcohol/Drugs, Discipline, Breaks and Meal Times, Payroll and Benefits, Hiring and Promotions etc.

**38. Question: Is it necessary that I give a discharged employee a reason for discharge?**

**Answer:** When a discharged employee demands in writing to know why he or she was fired, the employer must furnish the discharged employee with a written statement of the reasons for the discharge within a reasonable time after the demand. The employer may not “blacklist” or prevent the discharged employee from procuring employment elsewhere.

**Reference:** [Section 39-2-801, et. seq. MCA](#)

**39. Question: How can I avoid a wrongful discharge suit?**

**Answer:** Any former employee can file a wrongful discharge suit, but some up-front work by the employer can make the difference in court. Some suggestions include:

- ✓ Keep documentation on all your employees' performance (not just on problem employees). Enter dates of problems and document all actions taken.
- ✓ Be aware of any protected group that your employees belong to, such as, minority or disabled.
- ✓ Enforce company policy in the same manner for each of your employees.
- ✓ Communicate and apply uniform standards of performance to all employees.
- ✓ Communicate company policies regarding behavior, dress, and off-duty conduct to all employees.
- ✓ Avoid making negative (or any) remarks about an employee's age, gender, religion, race, or ethnic origin.
- ✓ Refrain from complaining about employees' personality flaws when giving termination notice.
- ✓ Avoid terminating any employee based on absences due to serving on jury duty, serving in the military or fulfilling any other civic duty.
- ✓ Don't terminate any employee to avoid paying benefits that he or she would be entitled to.
- ✓ Avoid terminating an employee for any political or social behavior done outside the office for which there is no stipulated company policy.

**Reference:** [Section 39-2-901, et seq., MCA](#)

**General Guidelines:**

**Records required to be kept include:**

- Name in full
- Social Security Number
- Home address
- Date of birth
- Time of day and day of week employee's workweek begins
- Regular hourly rate of pay and length of pay period
- Hours worked each work day and total hours worked each workweek
- Date of payment and pay period covered by payment
- Total daily or weekly straight time earnings or wages
- Total weekly overtime compensation
- Total additions to or deductions from wages
- Total wages paid each pay period

Records required for exempt employees differ from those for nonexempt workers. Also, special information is required on employees under uncommon pay arrangements or to whom board, lodging or other facilities are furnished. Records of the required information must be preserved for 3 years.