CUT AND PASTE POST
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Recreational Marijuana, Drug Testing, and UI and WC

There's one more bill that was passed by the 2021 Montana legislature of interest to HR professionals: HB-655. Among other things, this bill revised modified Montana's unemployment and workers' compensation law in light of the passage of the recreational marijuana initiatives. Specifically:

1. HB-655 expanded the definition of Misconduct under the Unemployment Compensation code to include:

   ".. a failure to pass, or refusal to take, a drug test in violation of an employer's written workplace drug policy, if the testing procedures comply with federal drug testing statutes and administrative regulations applicable to private sector employers and employees as provided in Title 39, chapter 2.

   Keep in mind that if an employee is found to have committed misconduct, s/he is ineligible for UI benefits.

2. HB-655 limits an employer/insurer's workers' compensation liability if the employee refuses to test. Specifically Section 39-71-407, MCA, is amended to read:

   "**39-71-407. (Temporary) Liability of insurers – limitations…**
   (5) (a) Except as provided in subsection (6), an employee is not eligible for benefits otherwise payable under this chapter if the employee's use of alcohol or drugs not prescribed by a physician is the major contributing cause of the accident.

   (5) (b) (New Language): For the purposes of this subsection, if an employee fails or refuses to take a drug test after the accident and if the testing procedures comply with federal drug testing statutes and administrative regulations applicable to private sector employers and employees as provided in Title 39, chapter 2, there is a presumption that the major contributing cause of the accident was the employee's use of drugs not prescribed by a physician.

   As a reminder, this limitation in liability only applies if the employer takes action to address an employee's known alcohol/substances abuse issues.

The UI and WC-related provisions of HB-655 do not apply to an individual registered as a medical marijuana cardholder under MCA 50-46-3.

Inside

Montana Attorney General Opines on Critical Race Theory, Expands Authority to Private Sector

The Past:

In September 2020, then-President Donald Trump issued Executive Order 13950 (EO-13950), "Combating Race and Sex Stereotyping" which, among other things, prohibited federal contractors and subcontractors from providing certain workplace diversity training and programs addressing "Divisive Concepts", "Race or Sex Stereotyping," and "Race or Sex Scapegoating." Among training content considered "divisive" is Critical Race Theory (CRT).

Whether intended or not, EO-13950 directly impacted implicit bias and other workplace diversity programs. Its effects rippled through corporate America, academia and the government. It was reported that over 300 diversity and inclusion trainings were canceled as a result of EO-13950.

For more about EO-13950, see the: December 2020 Cut N Paste Post, and go to this link for a great summary.

In January of 2021, President Biden rescinded EO-13950.

The Present:

On May 12, 2021, Montana Superintendent of Public Instruction Elsie Arntzen asked Montana's Attorney General Austin Knudsen to address the following issue:

> *Whether the teaching of Critical Race Theory or so-called "antiracism" in Montana schools violates the U.S. Constitution, Title VI of the Civil Rights Act of 1964, Article II, Section 4 of the Montana Constitution, or the Montana Human Rights Act.*

Last week, Attorney General Knudsen issued a 25 page Opinion which, in many ways, mirrors the rationale behind EO-13950. In AG 58-1, Knudsen held that the use of "Critical Race Theory" (CRT) and "antiracism" programming may, in many instances be discriminatory and a violation of federal and state law. Knudsen went on to list some examples of behaviors (none of which had occurred in Montana) that might violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution; Title VI of the Civil Rights Act of 1964; Article II, Section 4 of the Montana Constitution; and the Montana Human Rights Act.

The Opinion specifically prohibits schools, employers and governmental entities from taking actions that segregate, stereotype or scapegoat based on race. Prohibited actions include but are not limited to:

- **Segregating students in any capacity based on race.** This extends to every aspect of a school's program or activity including classes, seminars, lectures, trainings, athletics, clubs, orientations, award ceremonies, graduations, or other meetings. This includes segregation that occurs in an online or virtual format;
- **Government entities and employers segregating employees** along racial lines or treating them differently based on their race
- **Using race when administering academic programs,** including grading students differently or having students complete assignments on the basis of race
- **All exercises that ascribe specific characteristics or qualities to all members of a racial group** particularly when participation is compulsory or acceptance of certain stereotypes is required as part of the grading criteria
- **Using materials that assert one race is inherently superior or inferior to another.**

- **Forcing an individual to admit privilege or punishing them for refusing to do so,** forcing individuals to "reflect," "deconstruct," or "confront" their racial identities – including instructing them to be "less white
- **Asking students or employees to engage, or not engage, with the class in a specific manner based on race;**
- **Engaging in "race scapegoating,"** which means assigning fault, blame, or bias to a race or members of a race on the basis of their race. This includes claims that by virtue of race, a person is inherently racist or inclined to oppress others; and
- **Trainings, exercises, or assignments forcing students or employees to admit, accept, affirm, or support controversial concepts** such as racial privilege, culpability, identity, or status as this constitutes compelled speech.

Complaints alleging violations go to the Montana Human Rights Commission, the EEOC or the U.S. Department of Education.

Several groups have challenged the validity of the AG's opinion. For example, the Montana Indian Caucus (a group of indigenous lawmakers) has said this ruling could undermine decades of progress in the Indian Education for All Act, and the American Civil Liberties Union has said the opinion is flawed in that:

- Knudsen went far beyond the question raised by Superintendent Arntzen;
- Knudsen applied his decision to entities he has no power to address (higher education institutions, other governmental agencies, and non-public-school employers); and
- The AG does not and cannot change federal law. Specifically, the ACLU said, "In using Equal Protection claims and other false legal assertions, Attorney General Knudsen perverts landmark civil rights laws and Supreme Court decisions that were specifically intended to mitigate and address systemic racism - not perpetuate it".

The Future:

- Until now, Attorney General Opinions have only been binding on Montana's state and local government entities. This Opinion seems to expand the impact of these decisions to private sector and other employers who were not previously subject to them.
- Compared to previous AG opinions, 58-1 is long on verbiage, but short on clear guidance. A lack of clarity on a 'binding' decision using results in litigation. In addition, given the strong backlash, it is likely this opinion will be subjected to Court review. At a minimum, the courts will need to evaluate whether this Opinion applies to all of Montana's employers, to state and local government employers, to K-12 employers, and/or to post-secondary institutions.
- AG Opinions carry the force of law until replaced by a new law, or overturned in the Courts.

Professional Pointer: Depending on the content of their training programs, Montana's employers may now be faced with the "Hobson's Choice" of violating state law to comply with federal law, or vice versa. Montana's HR professionals need to read AG 58-1 and evaluate their anti-harassment and diversity training programs in the context of that opinion. **Click here to read the full Attorney General Opinion.** We will keep you updated as the issue becomes clearer.