

Montana's Business Environment and the Law

Do They Work Together?

by Jack Morton and Michael Harrington

Introduction

As faculty members in The University of Montana School of Business Administration, we are envious of Idaho and South Dakota business faculty who have a relatively large number of major in-state businesses to use as classroom examples and sources of employment for their students. We have often wondered why Montana hasn't attracted or grown as many national and international firms as Idaho and South Dakota – the authors' "states of envy."

Idaho can boast of the presence of Albertsons' national headquarters, Hewlett-Packard's printer division, Micron Technology (a leading global silicon chip manufacturer), Washington Group International (one of the world's leading industrial firms), Coldwater Creek Clothing headquarters, and J. R. Simplot (a global agribusiness firm). Similarly, South Dakota has attracted Citibank's credit card operations (with 3,200 employees), and it has grown Gateway Computer and Daktronics (a major firm specializing in electronic signs).

These major businesses generally didn't have to locate in those states – they could operate from any state. And while Montana has a number of significant businesses of which we can be proud, nearly all of them are tethered to the state's rich natural resources. Do the business laws of Idaho and South Dakota create legal environments more conducive to growing and attracting larger businesses?

In 1980, South Dakota put itself on the business map by eliminating its interest rate ceiling on credit cards. The result: Citibank moved much of its credit card operation from New York to South Dakota. That legal change focused attention on how a state's business laws can hinder or encourage economic development.



Could it be that Montana's business laws hinder the development of nationally-recognized businesses such as those found in Idaho and South Dakota, states that are otherwise quite similar to Montana?

Montana's economy has grown briskly in the past year, but that growth has been largely based on world prices for natural resources. We are thankful for our state's present economic situation, but realize that natural resource commodity prices often fluctuate dramatically. We also recognize that the natural resource industry typically hires relatively few of the state's college graduates. Attracting or growing several nationally-recognized businesses similar to those in Idaho and South Dakota could provide a stabilizing influence on Montana's economy, as well as employment opportunities for Montanans.

To learn more about the issues facing Montana businesses, we sent an open-ended "key-informant questionnaire" to several hundred Montana lawyers, CPAs, and businesspeople (i.e., individuals who possess significant insight into and experience with the underlying issues facing specific companies). The single-item questionnaire asked recipients to identify "any legal issues you feel could be addressed to improve our business environment." We were not attempting a quantitative analysis of Montana business leaders' attitudes and opinions. Rather, our approach was equivalent to focus groups, which marketing people have used for decades. Our "virtual focus group" provided a qualitative analysis of the range of opinions about the legal climate for business in Montana. In addition, the respondents' comments often provided specific examples of important issues and problems.

Note that the following discussion summarizes the views of the respondents. These issues were identified by business leaders who responded to the questionnaire; they are in no way meant to reflect the position of The University of Montana, the state of Montana, or the governor.

Wrongful Discharge Litigation

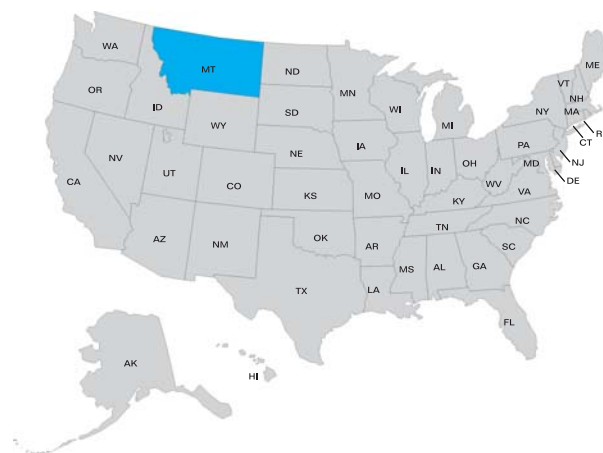
A recent *Forbes* article characterized Montana as the only state that doesn't recognize employment at will (Figure 1). Under the employment-at-will doctrine, either the employee or the employer may generally terminate the employment relationship without reason. Although the Legislature in the late 1800s specified that Montana was an "employment-at-will state," the state courts (and later the Legislature) imposed a "wrongful discharge" environment requiring employers to have "good cause" for terminating employees.

Respondents commented that:

- The difficulty of finding quality workers makes it highly unlikely that an employer will terminate a worker without good cause; and
- Giving the courts discretion to review whether a termination is for good cause imposes a unique legal burden upon Montana businesses.

A recent example involved a car dealer's employee who told a customer that a used car was a "piece of s..." because the doors stuck.¹ The employee had failed to observe a factory service bulletin specifying the procedure for correcting the problem. The employer had repeatedly reprimanded the employee for making similar comments to customers. The employee was terminated and sued the car dealer, arguing that the discharge was not for good

Figure 1
States Generally Not Recognizing
Employment-At-Will Laws



Source: "The Right to Fire," *Forbes*, 11/10/2003, Vol. 172, Issue 10, p. 126.

cause. Although both the district court and the Montana Supreme Court held that the employer had good cause for terminating the employee, the dealer had to incur the legal expense of defending the claim over a two-year period.

Employers pointed out that the risk of such wrongful discharge litigation makes employee termination lawsuits a greater threat in Montana than in any other state. Employee termination is one of the most difficult decisions made by employers, and it is a decision rarely undertaken lightly. Although all states have some limitations on the discharge of workers (e.g., because of race or religion), Montana seems to have gone further than any other state in terms of restricting management discretion in dealing with termination issues. Reducing the threat of such time-consuming and expensive litigation would signal that Montana is willing to return to the mainstream of employment law.

Costly Workers' Compensation

The cost associated with workers' compensation is a significant expense closely examined by all businesses. Workers' compensation legislative issues are challenging because the obligation to provide generous benefits to the injured worker must be balanced with the financial burden the insurance premiums impose on the employer – all while guarding against abuse by either party.

Montana ranked eighth highest in the nation in workers' compensation costs in 2004 (Table 1). The problem could be exacerbated, as the Montana Supreme Court is soon expected to hear a case asking whether age discrimination laws require injured workers to receive lifelong compensation for lost wages. Respondents expressed fear that our relatively high workers' compensation rates will encourage existing businesses to leave and discourage other businesses from moving to Montana – while making Montana businesses less competitive than those in other states.

Table 1
2004 Workers' Compensation
Premium Rate Ranking

2004 Ranking	2002 Ranking	State
1	1	California
8	10	MONTANA
34	27	Idaho
41	48	South Dakota
51	51	North Dakota

Source: Department of Consumer and Business Services, Salem, Oregon.

Noncompete Agreements

Employers in most states are allowed to use “noncompete agreements” to prevent key employees from either starting a similar business or seeking employment with a competitor. This protection will be of increasing importance as proprietary technology becomes a more integral part of business operations. At best, Montana has a contradictory view of noncompete agreements.

By statute, Montana appears to clearly ban the use of noncompete provisions in employment contracts. Although the Montana Supreme Court has rarely reviewed this issue, it recently refused to uphold a noncompete agreement. In a decision that adds further legal uncertainty to the issue, the court indicated that it would be willing to contradict the legislative prohibition in an appropriate circumstance.²

The difficulty of enforcing a noncompete agreement signals that, with reference to this issue, Montana appears to be more willing than other states to reject business needs. This approach will not serve as an enhancement for attracting new businesses to Montana. Indeed, an Idaho economic development group has used this issue in promotional materials designed to lure Montana businesses to Idaho.

Legal Uncertainty in Indian Country

Everyone seems to recognize that the lack of a clear set of business laws that apply to doing business in Indian Country delays the availability of better job opportunities. Any attempt to ascertain the business laws applicable to various Montana reservations is frustrating at best. Respondents expressed the hope for clarification regarding whether tribal, federal, or state laws/courts govern the wide variety of commercial transactions in Indian Country. The business community welcomes a clear signal whether such basic commercial laws as the Uniform Commercial Code apply. Protecting the unique culture of Indian Country and maintaining tribal

sovereignty, while enhancing employment and economic development opportunities, are certainly tasks worthy of further attention.

Right to Work (RTW)

In “Right to Work” states, workers in a unionized business cannot be required to join or financially support a union. Montana is a non-RTW state, but must compete with surrounding RTW states when attempting to attract new businesses (Figure 2).

Business groups tend to favor RTW legislation, although unions abhor it. Both sides plead equity: Business interests contend it is unfair to force all workers to financially support unions, and unions claim it is unfair for workers who do not join to reap the benefits of union negotiations. Conflicting studies exist regarding whether RTW legislation has a positive or negative effect on a state’s economy. RTW legislation has at least a minimal negative impact on union membership. It is likely that business interests will continue to argue for RTW legislation as a means of attracting businesses, while unions will strongly oppose such laws in an attempt to protect union membership.

Constitutional Protection for the Environment

Nearly all Montanans recognize the importance of environmental protection. Like all other states, Montana protects its environment through a series of statutes and regulations. In most states, the courts’ oversight role is limited to a determination of whether the government has correctly applied the statutes and regulations. In those states, developers are generally assured their projects will be allowed to proceed if the projects meet statutory and regulatory constraints.

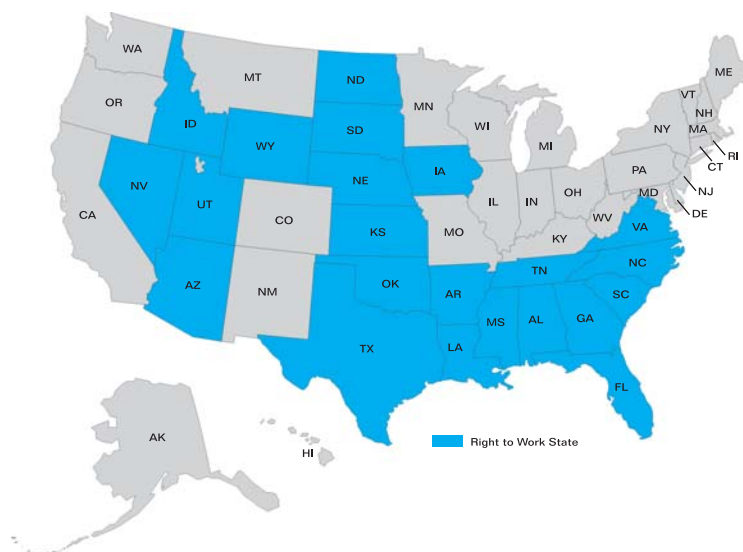
Several states – including Montana – give the courts a much broader role by elevating environmental protection to the state constitutional level. Of all the states, Montana arguably has the strongest constitutional safeguards for the environment. The result, respondents recognized, is that natural resource and other major business development in Montana may proceed more slowly than expected.

Proposed projects may be subject to a double layer of review. Any project will, of course, have to meet the statutory and regulatory requirements. There is also the significant likelihood that any major project will have to wait while the Montana Supreme Court determines whether the statutory and regulatory requirements themselves meet the standards of the Montana Constitution. A business faced with a relocation decision may be inclined to avoid the few states, including Montana, which provide that double layer of review.

The Montana Constitution recognizes “the right to a clean and healthful environment,”³ and requires that “the state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.”⁴ It continues, “The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.”⁵

It is also important to recognize that Montana’s Constitution, unlike those in some other states, provides no mandate that the courts balance the need for environmental protection with the need

Figure 2
Right to Work States



Source: www.nrtw.org/rtws.htm.

for jobs and economic development. Montanans will recall the analogous situation in which the school-funding formula met legislative and statutory requirements yet failed to comply with the Montana Supreme Court's view of the Constitution. Respondents acknowledged that similar scrutiny and delay may encumber future resource development and other economic projects in Montana.

Conclusion

Respondents identified a number of broad-based business law issues that may inhibit business growth in Montana. (Respondents also addressed numerous industry-specific issues beyond the scope of this article.)

It is noteworthy that the authors' "states of envy" – Idaho and South Dakota – each has a more business-friendly approach with respect to nearly all of the key issues our respondents addressed:

- Both Idaho and South Dakota are employment-at-will states – neither is a "wrongful discharge" state.
- Both Idaho and South Dakota ranked substantially lower than Montana in 2004 in workers' compensation premium rates.
- Both Idaho and South Dakota are more receptive than Montana to the use of employee noncompete agreements as a means of encouraging business growth.
- Both Idaho and South Dakota are Right to Work states.
- Neither Idaho nor South Dakota elevates environmental protection to a constitutional mandate.

These issues are often significant when attempting to attract

businesses to Montana. Just as there is little likelihood of change in Montana's climate or geographic location, we doubt that Right to Work or constitutional protection for the environment will change – we recognize that they are part of the legal landscape.

The impediments suggested by our respondents create a situation in which Montana may be viewed unfavorably by those looking to relocate a business. Perhaps more significant is the impact these business laws may have on Montana's viability as an incubator for start-up businesses.

Any discussion of change in the legal environment carries the risk of controversy. A refusal to even discuss mainstreaming our business laws is shortsighted – it avoids debate regarding the question of why Montana lacks the nationally-recognized businesses founded or located in the authors' "states of envy," Idaho and South Dakota. □

References

- ¹ *Sterrett v. Tilleman Motors*, Montana Supreme Court, November 15, 2005
- ² *Montana Mountain Products v. Curl*, Montana Supreme Court, April 26, 2005
- ³ Article II, Section 3, Montana Constitution
- ⁴ Article IX, Section 1 (1), Montana Constitution
- ⁵ Article IX, Section 1 (3), Montana Constitution

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