

CHAPTER III

HUMAN RESOURCE MANAGEMENT

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3.1 The Hiring Process

- 3.101 The Hiring Sequence
- 3.102 Job Description
- 3.103 Essential Functions
- 3.104 Federal and State Discrimination Laws
- 3.105 Interviewing and Hiring People with Disabilities
- 3.106 Veteran and Disability Preference
- 3.107 Setting Wage Rates

3.2 Screening Job Applicants

- 3.201 Job Applications
- 3.202 Checklist for Reviewing Job Applications and Resumes
- 3.203 Testing

3.3 Interviewing and Checking References

- 3.301 Interviewing Candidates
- 3.302 Preparing for the Interview
- 3.303 Screening/Interviewing Bias
- 3.304 Conducting the Interview

3.4 Reference and Background Checks

- 3.401 Checking References
- 3.402 What to Do When the Municipality is Called for A Reference Check
- 3.403 Why Conduct Background Checks on Potential Hires
- 3.404 Types of Background Checks
- 3.405 Model Policy for Pre-Employment Background Checks
- 3.406 Potential Obstacles to Conducting Background Checks
- 3.407 Background Check Resources

3.5 Making an Offer

- 3.501 Notice of Non-Selection
- 3.502 Hiring Process Resources

3.6 Nepotism

3.7 Collective Bargaining

- 3.701 Collective Bargaining Defined
- 3.702 Collective Bargaining Approaches
- 3.703 Unfair Labor Practices
- 3.704 Collective Bargaining Resources

3.8 Performance Evaluation

- 3.801 Performance Evaluation Defined
- 3.802 Conducting Performance Evaluation- Supervisor Guidelines
- 3.803 Providing Feedback- Supervisor Guidelines
- 3.804 Administration
- 3.805 Performance Evaluation Resources

3.806 Performance Evaluation Forms

3.9 Progressive Discipline

3.901 Probationary Period

3.902 Union Representation

3.903 Progressive Discipline

3.904 Essential Elements of Each Progressive Discipline Step

3.905 Due Process Required

3.906 The Montana Wrongful Discharge from Employment Act

3.907 Constructive Discharge

3.908 Legal Standards

3.10 Grievance Process

3.1001 Overview

3.1002 Role of Police Commission

3.1003 Grievance Policies and Procedures Resources

3.1004 Workplace Violence

3.11 Discrimination in the Workplace

3.1101 Harassment

3.1102 Investigating a Complaint of Harassment

3.1103 Initial Investigation Steps

3.1104 Interviewing the Complainant

3.1105 Interviewing the Accused

3.1106 Interviewing the Accused's Supervisor (When Applicable)

3.1107 Interviewing Witnesses

3.1108 Resolving the Complaint

3.12 Compensation

3.1201 Compensation Law

3.1202 Minimum Wages and Hours

3.1203 Frequently Asked Questions

3.1204 Travel Time

3.1205 Compensatory (Comp) Time

3.1206 Payroll Deductions

3.1207 Child Labor Laws

3.1208 Other Benefits

3.13 Reporting Requirements Related to Personnel Management

3.1301 New Hire Reporting

3.1302 Affirmative Action Plans

3.1303 EEO-4 Forms

3.1304 Employee Benefits Reports

3.14 Personnel Records Management

3.1401 Functions of a Personnel Record System

3.1402 Personnel Files

3.1403 Montana Occupational Safety and Health Act

3.1404 Safety in Mines Other than Coal mines

3.1405 Montana Safety Culture Act

3.1406 Links to Federal Safety and Health Standards

3.1407 Resources for Developing a Safer Workplace

3.1 Hiring Process

3.101 The Hiring Sequence

Hiring a new municipal employee is an important, yet time consuming process. Before advertising, the municipality should take the time to analyze what skills, education, and experience are essential for the position. Most employers rush to replace an employee who is leaving, but a vacant position is a great opportunity to slow down, review what role the position plays, and organize the process to ensure the best fit. It is important for employers to follow the hiring policies and collective bargaining agreements they have in place. Best practices to consider in the hiring process are highlighted below and are explored in depth throughout this chapter:

- **Review the job description.** Make sure it is current and accurately reflects the combination of skills and experience necessary to do the job effectively.
- **Create a recruitment plan.** Where will the municipality advertise the position and for how long? What will the application process be (application form, resume, letter, etc.)? Who will be conducting the interviews? Will a selection committee be used?
- **Advertise the opening.** If policy allows, the municipality may advertise the position internally first, but if it does not hire internally, it will need to publicly advertise the position. See ideas for where to post the job later in this section.
- **Develop application material screening criteria.** Using the job description, develop criteria for screening application materials. The same criteria should be used for all applications and often includes minimum qualifications (education/experience), special skills or licenses, years of directly related experience, etc.
- **Screen the application.** Use the same criteria for all applications to select the most qualified individuals to invite for an interview.
- **Develop a plan for the interview.** Prepare a list of interview questions that relate directly to the job description. Decide how the municipality will evaluate the candidates who interview.
- **Schedule and conduct the interview.** Use the same set of questions for each applicant and have the same selection committee present during each of (and all) the interviews. Be sure that the selection committee understands what they can and cannot ask in an interview.
- **Skills testing.** Will the municipality be testing the candidates for basic skills such as word processing, customer service, phone skills, excel spreadsheets? If so, all applicants must be given the same skills test.
- **Check references.** References are typically checked following an interview and only for the top candidate(s). Remember to ask only for job-related information during reference checks. See best practices for conducting reference checks in this section.
- **Conduct a criminal background check.** This check is required when hiring a police officer and strongly recommended for many other positions that may involve handling cash, working with youth and more. See best practices for conducting background screens in this section.
- **Make the job offer to the successful candidate.** Remember to notify all applicants that the position has been filled.
- **Welcome the new employee to the organization.** Have her/him complete required employment paperwork (For example, the W-4 form or I-9 Proof of Authorization to work in the U.S.).

3.102 Job Description

A job description is a summary of the important facts and essential functions of a specific job. The Montana Municipal Interlocal Authority (MMIA) has a number of model job descriptions available upon request. In addition, contacting other similarly-sized cities and towns might provide additional examples of quality job descriptions. It is important to remember that all job descriptions must be tailored to fit the individual position. No two municipalities will have identical job descriptions.

The job description can be used directly or indirectly to assign work, clarify mission, establish performance requirements, assign titles, compensation, recruit for vacancies, explore reasonable accommodations, train employees, check for compliance with legal requirements (related to equal opportunity, equal pay, overtime eligibility, etc.) and make decisions on job restructuring. A basic job description of essential elements may include the following areas:

Section of the Job Description	Description of What the Section Should Include
Job Title:	
Reports to:	
FLSA Status:	(Non-exempt/exempt from overtime)
Prepared by/Approved date:	
Position Summary:	
Essential Duties and Responsibilities:	This category includes a thorough summary of what the job entails, including essential duties the employee must be able to perform with or without a reasonable accommodation.
Qualifications/Knowledge, skills and abilities	List the qualifications, knowledge, skills and abilities that are required to perform this position. Include the following statement or something like it to clarify the intent of this section: <i>To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill and/or ability required. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions.</i>
Education and/or Experience:	List the minimum required education, years of experience or a combination of education and experience (equivalency statement). If the job could be performed without a college education, do not list a college education as a requirement for the position. Instead list the minimum combination of education and experience that prepares the applicant to be successful in the position.
Physical Demands and Work Environment	List minimum requirements to safely perform the essential functions of the job. Consider demands for every kind of position, not just for jobs typically associated with physical labor. Office positions may require extended hours on occasion, lifting of heavy boxes or processing large mailings. These tasks are essential to the job but physically demanding.

3.103 Essential Functions

Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation. When hiring a new employee, finalists for any position must be able to successfully perform the essential functions of the position which have been clearly defined in the job description.

Employers must be vigilant that the hiring process does not violate Title I of the Americans with Disability Act (ADA) which protects qualified individuals with disabilities from employment discrimination. Under the ADA, a person has a disability if he/she has a physical or mental impairment that substantially limits a major life activity. An individual with a disability must be qualified to perform the essential functions of a specific job with or without reasonable accommodation in order to be protected by the ADA. In the State of Montana, ADA applies to any employer with an employee. See information on the ADA process in section 3.201.4 or reach out to MMIA or your city attorney for guidance.

When considering an individual for an open position, municipalities should take the following items into consideration:

- The individual must satisfy the job requirements for educational background, employment experience, skills, licenses and any other qualification standards that are job related; and the individual must be able to perform those tasks that are essential to the job, with or without reasonable accommodation.
- The ADA does not interfere with the employer's right to hire the best qualified applicant. It simply prohibits employers from discriminating against a qualified applicant because of a disability.
- Questions regarding whether or not an aspect of a job is essential and should or should not be accommodated should be researched with the city/town attorney before a decision is made.

3.104 Federal and State Discrimination Laws

Throughout the hiring process, municipalities need to be aware of a number of federal and state statutes that protect employees from discrimination in the workplace, including the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967. The Montana Code Annotated [Title 49 Chapters 1-4](#) outlines basic rights, illegal discrimination, the Governmental Code of Fair Practices and rights of persons with disabilities within the State of Montana.

The Montana Human Rights Act and Governmental Code of Fair Practices make it unlawful to discriminate in state and local governmental employment and services. The following are protected classes for purposes of employment in Montana:

- Age (all ages are protected from discrimination in Montana)
- Marital status
- National origin
- Physical or mental disability
- Race/color
- Religion/creed
- Sex (including pregnancy, maternity and sexual orientation)
- Political beliefs or ideas (only public employees are protected from discrimination in Montana)
- Military/Veteran status
- Genetic Information

Additional information on laws regarding employment discrimination can be found at the [Montana Department of Labor and Industry's website](#) and at the [US Equal Employment Opportunity Commission's website](#).

Municipalities may also have non-discrimination ordinances which provide for additional protected classes. Please consult with legal counsel to learn more.

3.105 Interviewing and Hiring People with Disabilities

The following guidelines for interviewing help ensure that persons with disabilities are afforded a fair and equitable opportunity to present their job qualifications.

- The municipality's application and interviewing procedures should comply with the Americans with Disabilities Act (ADA). The ADA prohibits disability-related questions or medical exams before a job offer is made.
- Make sure the municipality's employment offices and interviewing location(s) are accessible to applicants with mobility, visual, hearing or cognitive disabilities.
- Be willing to make appropriate and reasonable accommodations to enable a job applicant with a disability to present him or herself in the best possible light. When setting up the interview, explain what the hiring process involves and ask the individual if he or she will need reasonable accommodations for any part of the interview process (ask all applicants, not just those who have identified themselves as needing accommodations). Do not include a rehabilitation counselor, social worker or other third party in an interview unless the applicant requests it.
- Make sure all questions asked during the interview are job related and the same for each applicant. All questions must be consistent among all applicants interviewed with the exception of clarifying questions about the application, work history or a follow-up question to an answer they gave to a set question.
- In the interview, speak to the essential job functions, as well as why, how, where, when and by whom each task or operation is performed. Do not ask if the individual needs an accommodation to perform these functions, because such information is likely to reveal whether or not the individual has a disability. This is an ADA requirement to ensure that an applicant with a disability is not excluded before a job offer is made.
- If the applicant has a known disability (because it is obvious, or it was revealed by the applicant), the employer may ask an applicant to describe how they would perform a certain job function if it is an essential part of the job. In addition, in the situation of a known disability, the employer may ask the individual if he or she needs reasonable accommodations and what type(s) of accommodations.
- Concentrate on the applicant's technical and professional knowledge, skills, abilities, experiences, and interests, not on the disability.
- Disability-related questions and medical examinations are prohibited under the ADA at the pre-employment offer stage. After a job offer has been made, the offer may be conditioned on the results of disability-related questions and/or medical examinations, but only if the examination or inquiry is required for all entering employees in similar jobs and only if all medical information is kept confidential. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job. However, if the offer is withdrawn, the employer must show that the individual could not perform the essential function of the position or would pose a direct threat.
- If testing is part of the interview process, make sure the test does not reveal information about physical or mental impairments. Make sure it is not a medical examination. Other tests, which demonstrate the applicant's ability to perform actual or simulated job tasks, are permitted under the ADA. Inform all applicants before the interview that a test will be part of the interview process. Any applicant can then

request an accommodation.

- An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it is effective and would not impose an “undue hardship” on the operation of the employer’s business. Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer’s size, financial resources, and the nature and scope of the position.
- Any question or concern regarding an applicant and their actual, perceived or potential disability and any possible reasonable accommodation should be carefully researched by legal counsel before any decision is made by the municipality.

3.106 Veteran and Disability Preference

Applicants must claim preference and provide supporting documentation at the time they apply for the job to be offered such preference, [MCA 39-29](#) and [MCA 39-30](#). Preference is given for an applicant’s initial hire into the municipality only. Internal applicants may not claim preference. Applicants must first meet minimum qualifications prior to any preference points being offered, unless the employer is offering a training position that does not require minimum requirements to be met.

If using a selection procedure other than a scored procedure for Veteran's Preferences or Disability (non-veteran) Preference, the employer shall give preference in this order, to a disabled veteran, a person with a disability, a veteran, an eligible relative and an eligible spouse as defined in the [MCA 39-30-103](#).

Veteran’s Preferences

If using a scored applicant selection procedure, an applicant must receive the following percentage points: 5 percentage points if the applicant is a veteran OR 10 percentage points if the applicant is a disabled veteran or an eligible relative. An applicant only receives one of the above percentage points, not both. For more information on veteran’s preferences, seek guidance from the city attorney or MMIA.

Disability (Non-veteran) Preference

If a job applicant claims disability preference or eligible spouse preference, they must be hired over any other applicant with substantially equal qualification who is not a preference-eligible applicant.

Preference is typically applied at both the application screening step and the interview step.

Example of preference using the scored method:

Name	Current CDL=1 pt.	Over 2 years PW=1pt	Total Points	Preference Status	With Preference
Bill Smith	0	1	1	Disabled vet	1.10
Stephanie K	1	1	2	None	2.0
Kelly Hill	1	1	2	Vet	2.10

3.107 Setting Wage Rates

An accurate job description is a useful tool in analyzing employee compensation in a municipality. Some municipalities have structured pay matrices, while others may have less formal compensation guidelines. It is important to note that wages for positions may vary from municipality to municipality, but any compensation structure should be able to demonstrate equal pay for equal work and fairness in application. Labor market information regarding wage rates in

Montana is available at <https://www.onetonline.org/>. The MT League of Cities and Towns publishes a salary survey specific to Montana municipalities at <https://www.mtleague.org/surveys/>.

3.2 Screening Job Applicants

3.201 Job Applications

An appropriate job application will assist a municipality in gathering the necessary information about an applicant's ability to do the job with or without a reasonable accommodation. In addition, the job application allows a municipality to gather unbiased information to utilize in the screening of applicants.

Municipalities should not rely on job application forms available through their office supply company. These generic application forms often do not comply with Montana employment law. Job applications are available at your local job service office. Please note that municipalities can require additional materials to be submitted with the application, including resumes, transcripts, licenses, certificates and answers to supplemental questions.

In addition to the application or resume, all public employers in the State of Montana must provide a Veteran's /Disability Preference form to external applicants. Applicants who wish to claim a preference for their initial hire must return this form, along with all required documentation prior to the closing date of the announcement. An example preference form can be obtained from MMIA or your local job service office.

Below are guidelines for particularly sensitive or protected personal information that municipalities should ensure are appropriately addressed in any job application and screening process:

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
Age	It is acceptable to require proof that the applicant is of legal working age but only after the person is offered the position. Do not include questions about the age of the applicant on the job application unless state or federal law requires a certain age—such as for a police officer to be age 18 or over.	It is not acceptable to ask for an applicant’s birth certificate. It is not acceptable to discriminate against applicants of any age.
Birthplace	Nothing	It is not acceptable to ask about an applicant’s birthplace.
Arrest or conviction	It is acceptable to inquire about convictions. Include a disclaimer on the job description that a conviction is not an automatic bar to employment.	It is not acceptable to inquire if the applicant has ever been arrested.
Children	It is not acceptable to ask any questions about children during the hiring process.	It is not acceptable to ask if an applicant has children, who cares for them, or if applicant has plans to have more children.
Citizenship	It is acceptable to ask if the applicant is legally eligible to work in the U.S. Employers cannot ask if applicants are citizens of the United States, except when hiring police officers.	It is not acceptable to ask for proof of citizenship or work permits before hire.
Disability	It is best not to ask any question related to any type of disability or how an applicant can do a particular and specific essential job function.	It is not acceptable to ask the applicant about their health or the health of their family which includes specific questions about disability, disease or pregnancy.

Personal Information About the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
Education	It is acceptable to inquire into the academic, vocational or professional education of the applicant and the schools they have attended.	It is not acceptable to require a high school diploma or other educational attainment when no relationship exists between the requirement and job performance. It is not acceptable to ask dates of attendance or dates of completion of high school education because it can reveal age.
Nepotism/Family Relations	It is acceptable to ask if an applicant is related to any current employee of the city/town—who and which department. This allows the municipality to avoid nepotism as defined in MCA 2-2-3 .	
Social Security Number	<p>It is acceptable to ask for an applicant’s social security number at the time of conducting a criminal or credit background check. Typically, this happens after a contingent offer of hire has been made.</p> <p>It is acceptable to ask the applicant to complete I-9 and W-4 on the first day of work but never before hiring.</p>	<p>It is not acceptable to ask for sensitive information until a valid reason requires it.</p> <p>Do not ask for social security number on the application.</p>
Race, color, religion, sex, national origin, marital status, political belief, age, physical or mental handicap	There are no questions regarding these qualities of an applicant that are acceptable to ask.	Any practice or inquiry that intentionally or unintentionally discriminates against these categories is unacceptable.

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
Marital Status	It is not acceptable to ask any questions regarding marital status.	It is not acceptable to ask marital status, name or occupation of spouse prior to hiring.
Military	It is acceptable to ask if military experience contributes to the applicant's ability to perform the duties of the job for which they are applying.	It is not acceptable to inquire into general military experience or the type of discharge they had.
Legal Name	It is acceptable to ask if an applicant has ever worked under a different name for reference and background checking purposes.	It is not acceptable to ask original name of applicant whose name was changed by court order or otherwise. It is not acceptable to ask the maiden name of married woman or to ask names or dates if an applicant worked under another name.
Organizations	It is acceptable to request information about the applicant's job-related professional organizations.	It is not acceptable to inquire about the applicant's non-work-related club or organizational memberships.
Photograph	It is acceptable to require a photo of the applicant for identification purposes, but only after the applicant is hired.	It is not acceptable to request photographs prior to employment.
Physical Characteristics	It is acceptable to explain manual labor, lifting or other requirements of the job. It is acceptable to show how the job is performed and to require a physical exam, at the employer's expense, but only after the job offer has been made	It is not acceptable to ask height or weight (except where it can be justified by business necessity).

Personal Information about the Applicant	What is Acceptable to Ask	What is Not Acceptable to Ask
Reference Checks	It is acceptable to ask the applicant’s references about their work experience and qualifications.	It is not acceptable to request religious or personal references from the applicant.
Reliability, attendance	It is acceptable to ask the applicant about his or her availability to meet business needs.	It is not acceptable to inquire about family size and status or health issues.
Religion	It is acceptable to inform the applicant of the scheduled work week for the position.	It is not acceptable to inquire into an applicant’s religious affiliation, church, pastor or holidays observed.
Sex	It is acceptable to ask an applicant’s sex, only if the employer has a bona fide occupational qualification for asking, or for EEO reporting if files are kept separate from personnel forms available to those who make the hiring decisions. Seek legal counsel for guidance.	It is not acceptable to make a pre-employment inquiry which expresses any limitation, specification or discrimination about sex unless based on bona fide occupational qualification
Skills Testing	It is acceptable to use skills tests for selecting the best qualified applicants when the skills tests accurately reflect the required skills for the position and when all applicants are required to take the same test.	It is not acceptable to use skills tests when no direct relationship exists between the test and the requirements of the position.

3.202 Checklist for Reviewing Job Applications and Resumes

Once a position has been advertised and job applications and resumes have been received, it is important that the municipality carefully screen these submissions. Some key areas for municipalities to consider include but are not limited to:

- Check that the application is complete, signed and includes proper documentation, particularly if the applicant is requesting preference.
- Review the job description for the open position. Note the minimum requirements and refer to them while reviewing resumes and job applications. If an applicant does not meet the minimum requirements, they normally will not be considered further.
- Check work experience for applicability to the open position, length of time in previous positions, promotions or awards received and reason for leaving each position. Length of time in a position does not always indicate level of expertise.
- Note gaps in employment, but do not assume they were caused by negative events. It is appropriate to inquire about why gaps exist. Your application can ask applicants to explain any/all gaps in employment.
- Check educational background of all applicants for the qualifications necessary to successfully perform the job.
- Note special skills of applicants (equipment operation, certifications such as a CDL, computer software proficiency, office equipment familiarity).

In the initial pre-screening process, it is useful to develop a guideline for scoring the applications based on the job description, prior to viewing any applications. A scoring guideline or tool allows the municipality to rate applicants against its initial screening criteria and to clearly document which applicants meet the criteria for attaining an in-person interview. A scoring guideline should be maintained as per the municipality's record retention guidelines. Questions regarding any and all screening or scoring guidelines or tools should be reviewed by legal counsel.

3.203 Testing

Municipalities may ask applicants to undergo testing as part of the application process. Carefully developed and administered employment tests can provide organizations with a way to decide systematically and accurately which people have the ability to perform well on the job. The local job service center may be able to provide certain skills testing such as typing and computer-based tests.

The [Montana Department of Labor and Industry has some good information on employer testing of job candidates](#) on their website.

Before a municipality utilizes testing in the application process, there are several areas to consider:

- Be certain that tests are directly related to the job.
- Have a current employee try the test before it is used with applicants to ensure the task is possible in the time allotted and relevant to the posted job.
- Only use tests that are valid and do not discriminate against any group of applicants. Validity testing can be quite complex. For this reason, home-grown testing is often discouraged. Instead, consider using a vendor who has performed validity testing.
- Administer the same tests under the same conditions to all applicants for the same position.
- Accommodate people with disabilities by modifying the test or testing conditions or eliminating the testing requirement for all the applicants.
- Do not rely solely on tests for making decisions about candidates; use them as one component of the overall selection procedure.

- Any physical fitness testing required of applicants (besides police and fire) must be carefully analyzed by legal counsel to ensure it is both valid and reliable.

3.3 Interviewing and Checking References

3.301 Interviewing Candidates

At the very heart of the ability to conduct an effective job interview, is a thorough knowledge of the job duties, skills, experience and aptitude necessary to do the job well. The cost of a poor hiring decision is more than lost time and money. A poor hiring decision can cause an unqualified person to be hired which can cause low morale, decreased productivity and poor customer service among existing employees.

3.302 Preparing for the Interview

The typical steps to prepare for conducting an interview include the following:

1. Review rules regarding preferences above and [MCA 39-29](#) and [MCA 39-30](#).
2. Review the job description and extract 6-10 major tasks of the job. From these major tasks, identify the most important qualifications for the position and then determine how the municipality will measure those qualifications through the interviewing process. (Refer to sample rating scales for interviewing later in this section).
3. Develop interview questions (typically no more than 12 questions for an hour interview) that relate to the required knowledge, skills and abilities of the job. For example: motivation, related job experience, team player, ability to learn, technical skills, attitude, availability, flexibility, communication skills, customer service skills, supervision of staff, integrity and cooperation. Make sure that the municipality is not asking illegal or discriminatory questions. See Examples in the Chart at end of this section.
4. Develop a scoring/rating matrix to evaluate candidates based on their responses to the questions.
5. Identify panel members who will conduct the interview. Interviewing one-on-one, as opposed to using a panel may create added risk. A panel helps to limit the risk of bias affecting interview decisions. The interview panel should include the hiring manager and other staff/managers who understand the position and can commit to interviewing all candidates. If a panelist is unable to attend all scheduled interviews, then select a different panelist. Consistency of the panel is important to ensure objectivity. Block time on everyone's calendars well in advance.
6. Train panelists on the interview process. Such training can include what not to ask—discriminatory questions, how to behave professionally during the interview, the importance of making objective decisions and refraining from subjectivity/biases and how to take legible and legally defensible notes during the interview.
7. Prior to the interview, identify any problems or unique requirements with the position and develop screening tools to address these concerns. If certain aspects of the job are causing turn-over, mention them during the interview. It is better to have a person turn down the position with an accurate picture of what the position requires, than to have someone start and then quit.

General topics interviewers are not allowed to ask about during an interview
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| <ul style="list-style-type: none"> a. Private organizations applicant belongs to b. Religious affiliations c. Native language or the manner in which a foreign language was acquired d. Date of birth (except when information is required for satisfying minimum age requirements) e. Lineage, ancestry, national origin, descent, parentage, or nationality f. Applicant's original name. (Unless you are inquiring about a change of name for the purposes of checking employment or education records.) g. Names and addresses of relatives other than a spouse and dependent children h. Sex or marital status i. Criminal arrests <ul style="list-style-type: none"> i. You may ask about convictions, but not arrests. j. Height, weight, eye or hair color k. Physical or mental disabilities l. Military armed forces history outside of the US. m. Never ask female applicants <ul style="list-style-type: none"> i. About plans for pregnancy or childbearing ii. Child-care arrangements |
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Note: None of these questions addresses the skills needed to perform a job. However, it is permissible to ask if the applicant has any disabilities that would prevent him or her from satisfactorily performing the job.

Examples of questions interviewers are not allowed to ask

- | |
|---|
| <ul style="list-style-type: none"> a. How many children do you have? Do you have a babysitter available if we need you on a weekend? b. Do you have a baby or small child at home? c. Are you a U.S. citizen? What country are you from? d. What's your native language? e. Have you ever been arrested? f. What kind of a discharge did you receive? g. When did you graduate? h. What was your maiden name? i. When were you born? j. When did you graduate from high school? k. What is your race? l. Do you have physical or mental disabilities? m. Would working on weekends conflict with your religion? n. Do you have a drug or alcohol problem? |
|---|

- o. Are you taking any prescription drugs?
- p. What country are you a citizen of?
- q. What language did you speak in your home when you were growing up?

Examples of questions interviewers can ask during an interview

- a. What days can you work? What hours can you work?
- b. This position requires regular travel. Will you be able to commit this?
- c. Are you legally eligible to work in the United States?
- d. Are you over 18? (if the position requires the candidate to be 18+)
- e. This job requires someone who speaks more than one language. What languages do you speak or write fluently?
- f. Have you ever been convicted of a crime or have you ever been convicted of a felony?
- g. You say on your application that you were in the military. What kind of education and experience did you get there?
- h. Do you have a high school diploma, or did you graduate from high school?
- i. Do you have a university or college degree?
- j. Can you perform [specific tasks pertinent to the job description]?
- k. Would you be able to meet the job's requirement to frequently work weekends?
- l. Are you bondable?
- m. Tell us about your experience serving difficult customers.
- n. Give us an example of a time when you were required to learn a new task. What steps did you take to ensure you retained the information and performed it correctly?
- o. Tell us about your experience using computer software for payroll.

3.303 Screening/Interviewing Bias

It is human nature to have biases. Keeping those biases in check during the application screening and interviewing stages of the selection process is of utmost importance. Hiring managers and interview panel members need to take precautions to ensure such biases don't influence their judgement of the job applicants.

Screening and interviewing as a panel can help to alleviate bias. It is important for panel members to address potential bias they see and hear with other panel members during the deliberation on the candidates for the job. Focusing on the facts regarding the candidate's responses or behaviors helps avoid bias.

The following are common biases found in screening and interviewing:

Stereotyping: Interviewers/managers form opinions about how people of a specific gender, religion, race, appearance, neighborhood, etc. think, act, feel or would perform the job without evidence of this. Example: Assuming that a woman will want to work at a desk, rather than outside or assuming candidates who live more than 50 miles from the workplace will have attendance issues.

First impression error: Making a snap judgement and allowing first impression-whether it is positive or negative, to cloud the entire interview or screening process. Example: A candidate is wearing an out of the ordinary outfit, has tattoos, drives a very nice car, was the valedictorian of their school, etc.

Halo/horn effect: Halo effect occurs when an interviewer allows a strong point about the candidate to affect the entire process. Candidate may have started the interview off very well or submitted a perfect resume and now they can do no wrong. Errors or missing information during the interview may not be noticed or not as important. Horn effect occurs when one weak point is allowed to influence the entire process.

Nonverbal bias: Undue emphasis is placed on nonverbal cues, unrelated to the position. Example: style of dress, handshake or manner of speech.

Contrast effect: Strong candidates who interview after weak ones may appear more qualified than they actually are because of the contrast effect.

Negative emphasis: Rejection of a candidate based on a small amount of negative information. Research indicates interviewers given unfavorable information about a candidate give that information about two times the weight of favorable information.

Cultural noise: Candidates answer questions with “politically correct” answers or provides information they assume the interviewer wants to hear, rather than the truth. Example: candidate saying they have no issue reporting to a younger manager, when in fact this is not the case. It is best to use probing questions to get examples rather than asking closed questions.

Similar to me error: Candidates are selected based on characteristics they share with the interviewer.

3.304 Conducting the Interview

Basic guidelines for conducting an interview include the following:

1. In addition to asking questions of the applicant, the interviewer should give the applicant information about the job and working conditions in the organization.
2. The interviewer should watch out for interview bias.
3. The interviewer should keep the applicant from volunteering information which has no bearing on the selection process. If an applicant volunteers information about a spouse, children, religion, etc., the interviewer should stop the flow of information and politely explain that the municipality does not base its hiring practices on that particular subject area and then move the interview back to job-related questions.
4. The interviewer should prepare open-ended questions to solicit longer responses from the candidates. This is the municipality’s opportunity to get to know the candidate, what skills she/he will bring to the organization, and if the candidate will be a good fit.
5. Treat all interview candidates the same. Offer the same list of questions, have the same people present, limit the interview to about the same period of time (this may vary in length based on the candidate’s responses and how many questions they answer).

- Two sample interview rating forms are offered here. Be careful that there are no discriminatory or illegal information written in interviewer’s notes. Interviewers should keep notes that are job-related only.

Regardless of the type of form a municipality chooses to use, the rating criteria must be clearly defined. In Sample Interview Rating Form #1, it would be helpful to define what the score of 5 means. This clarification can be given in an attached key.

Sample interview rating form #2 provides “look-for” (ideal answers). These answers represent the average rating, which would be marked as a check. Any answer that is above average would receive a plus and anything less would receive a minus. A plus, check, minus system can easily be converted to a 2, 1, 0 scoring system. A three-point system helps to alleviate subjectivity in the scoring process.

Sample Interview Rating Form # 1

Applicant Name:		Position applied for:			
Interviewer:	Date of Interview:				
<i>Please write job---related comments regarding each interview question below and rate the applicant’s response to the interview question (1 lowest – 5 highest)</i>					
Interview Question #1	1	2	3	4	5
Comments:					

Applicant Name:		Position applied for:			
Interview Question #2	1	2	3	4	5
Comments:					
Interview Question #3	1	2	3	4	5
Comments:					
Interview Question #4	1	2	3	4	5
Comments:					
Overall Rating	1	2	3	4	5
Recommended for Hire:	YES		NO		MAYBE

Sample Interview Rating Form #2

Tips for panel members:

Remember to take legible and legally defensible notes throughout the interview. Asking follow-up/drill down questions is highly suggested to learn more about the interviewee's answer to a particular question. However, panel members must not ask questions that are not related to the pre-established questions listed below.

+: above average answer, √ : average answer - :below average/may not have answered question

1. What helps you to be the best candidate in successfully communicating our message?

Look for: candidate's answer demonstrates a firm understanding of the position and/or organization. Candidate is able to successfully explain how their background directly aligns with what we are seeking in this position.

(+ √ -)

2. Describe a situation in which a crucial deadline was nearing, but you didn't want to compromise quality. How did you deal with it? (Decision making/problem solving)

Look for: candidate's answer demonstrates ability to manage work load, set priorities and solve problems on their own.

They did not rely heavily on the guidance of another, used a variety of tools to meet the deadline AND ensure high quality in the work.

(+ √ -)

3.4 Reference and Background Checks

3.401 Checking References

Verifying dates of employment and job duties can give the municipality credible information upon which to make a hiring decision. Reference checking is normally done only on the top candidates. Some key considerations when checking references include:

- Be consistent and fair in the treatment of all applicants to avoid discrimination claims. The interviewer could check references on all applicants, only the top candidates, or only the group who made it to the interview stage.
- Some applicants may not apply if the job announcement states that the municipality will be checking references. The municipality should get permission from applicants before contacting previous or current employers by asking for a written release on the job application form.
- Prepare reference questions ahead of time and ask the same questions of all references.
- Document the information received. Also document unsuccessful tries at gathering information to protect the municipality from negligent hiring claims.
- If the reference checker cannot obtain the requested information from the references, ask the job applicant for more information or additional references with whom the interviewer may speak.
- If the reference checker is told by a reference that they are only able to verify dates of employment, ask the reference if this is a company policy that would apply to all current and past employees. If the answer is yes, accept the information they provide. If the answer is no, this may be a red flag. There may be reasons why this reference is unwilling or unable to give a reference.
- Ask factual and objective questions – don't ask for opinions.

Do not make a job offer until the municipality has completed the reference checking process. When checking

references there are a number of questions the municipality should consider asking including but not limited to the following examples:

- Employment History. Ask about positions held, dates of employment, promotions, job duties, performance, attendance records and termination or separation reasons.
- Performance. Avoid subjective appraisal information. Base responses on written evaluations. How well did the employee perform? Overall, was performance satisfactory or unsatisfactory?
- Conduct. Did the employee have an acceptable attendance record? Does your file show any documented disciplinary problems? What was the nature of the problem? What was the resolution? Was it corrected?
- Termination or separation. Why did the employee leave? Is the employee eligible for rehire? If not, why not?
- Closing. Is there anything else we should know about this applicant as it relates to his/her ability to perform the job?
- Ask the references called if they have another individual, they would recommend you talk to.

If possible, conduct interview, background and reference checks in a timely manner. Prolonging the process results in the possibility of losing a good candidate to another position.

Sample Reference Check Form

Candidate's Name:		Date:
Position applied for:		
Reference's Name:	Phone Number:	
Persons Conducting Reference Check:		
<p>Script: This is (<i>your name</i>) from (<i>city/town</i>). This candidate (<i>name</i>) has applied for (<i>title of job</i>) position and has given your name as a reference. If this is a good time for you, we'd like to ask you a few questions (<i>if not, set up a better time to do the reference check</i>). With me is (<i>other people on committee</i>), and if it's all right with you, I'll put you on speakerphone.</p>		
<p>1. Please describe the nature of your working relationship with the candidate (supervisor, coworker, subordinate, etc.).</p>		
<p>2. What were (are) the candidate's duties and responsibilities? Dates of employment? How would you describe his/her performance?</p>		
<p>3. (<i>Describe the posted position</i>). Based on the description of these duties and responsibilities, how would you describe the candidate's overall ability to perform in this position?</p>		

4. Please rate the following areas (Check, Minus, Plus system) <i>(Use the following that are relevant to the position posted or substitute other position---specific criteria.</i>			
Area to be Rated	Score	Area to be Rated	Score
Ability to prioritize and meet deadlines		Willingness to take direction or suggestions	
Verbal and written communication skills		Honesty/Integrity	
Motivation and initiative		Reliability/Dependability	
Appropriate assertiveness		Customer Service Skills	
Judgment		Team work	
Please tell us about any work habits that affected the candidate's job performance such as punctuality, attendance, sense of responsibility, professionalism, attitude, etc.			
Please describe the candidate's working relations with co-workers, the public and supervisors. Were there any particular problems experienced?			
Is there anything else you feel we should be aware of in making this hiring decision?			

3.402 What to do When the Municipality is Called for a Reference Check

The municipality should have a policy specifying who in the organization can give employment references and what information can be released on employees. When a reference request is received, the municipality should verify who is calling and only provide facts that are supported by the employee's personnel file. It is also good practice for the municipality to maintain records in the individual personnel files documenting who contacted the city or town for the reference, what questions were asked and that they were answered.

3.403 Why Conduct Background Checks on Potential Hires?

Municipalities can lose up to 2.5 times an employee's salary by failing to adequately conduct background checks on a potential hire. Those costs include direct expenses related to replacing and retraining an employee and indirect expenses such as employee violence, theft, and substance abuse. Research has shown that at least one in four job candidates is willing to falsify information to get a job including college degrees, employment history and reasons for leaving previous jobs. It is critical for public entities to validate information provided by candidates to reduce the chance of hiring the wrong employee.

3.404 Types of Background Checks

The most common types of background checks a municipality can perform include:

- **Reference checks** - References can be valuable in determining a potential employee's work habits and may include information from previous employers, educational institutions or personal references.
- **Motor Vehicle Record (MVR) checks** - Giving keys to a municipal car to an employee with a poor driving record can subject an employer to significant liability in the event of an accident. Negligent Entrustment occurs when the employer allows a driver to use a vehicle knowing or having reason to believe that the person creates a risk or harm to others. All states make motor vehicle records available to employers for

employment purposes.

- **Criminal background checks** - Hiring an employee with a criminal history can pose a danger to fellow employees and the public. Unfortunately, there isn't a common national database that employers can access for employee criminal histories. In general, arrest records cannot be used, and state and federal laws differ on the extent that an employer may consider an applicant's criminal history in making hiring decisions.
- **Child abuse checks (sexual and violent offenders)** - Public entity employees who will be working with children as part of their employment such as those assigned to the parks and recreation programs, protective services, daycare operations, volunteers and coaches should have their records checked for child abuse incidents.
- **Credit checks** - Credit checks, though seldom used, should be conducted on job candidates who will be working with money.

3.405 Model Policy for Pre-Employment Background Checks

The first step in establishing a program for pre-employment background checks is to develop a written policy with legal counsel. This policy can ensure a consistent approach is taken in the hiring process in all departments:

The policy should consider and/or cover:

- A description of the types of background investigations that will be conducted for different positions;
- The kind of information needed from the candidate, including the candidate's consent; and specification of how the background information will be used.
- The type and depth of background checks should be based on the position and job duties. For example, the background check process for a laborer in the public works department may be less intense than that for a recreation supervisor who works with children. Checking references and the driving record for the laborer may be sufficient. For the recreation department candidate, checking references, the driving record, criminal history and child abuse records will probably be necessary.
- If the employment application states that the entity plans to conduct a thorough background investigation, a candidate with a questionable background may remove himself/herself from consideration for a position. The application should send a clear message to potential job candidates that the municipality will use stringent screening and selection criteria.
- Most employers cannot have a "no felony allowed" policy for all positions. The conviction must have a direct connection to the position. For example, a conviction of theft may very likely prohibit a candidate from being selected for the Clerk/Treasurer position but may not necessarily for a lifeguard position. The [Equal Employment Opportunity Commission has information that can be of assistance when developing policy for background checks](#) on their website.
- A legal authorization form must be signed by the applicant granting the municipality permission to run criminal, driving and/or credit reports.
- Adverse action notices must be issued to any candidate that is not selected based on results from any of the above-mentioned reports. The Fair Credit Reporting Act has very strict guidelines on what this form must contain and the timeliness of its delivery. Using a third-party vendor will increase the employer's odds of following all of these federal requirements.

In addition, the employment application should include the following to support the pre-employment background investigation process:

1. A statement indicating that providing false information on the application form will be grounds for dismissal and a requirement for the applicant's signature. The "dismissal" wording should apply to

false information provided or detected during the pre-hiring process or if false information is uncovered post-hire.

2. A statement indicating that a background check will be required of all applicants prior to a job offer. An area that requests an explanation of “gaps” in the candidate’s employment history other than gaps relating to pregnancy, child care, a disability or any other protected activity.
3. Public entities should also consider including a release form with the employment application. A release form signed by the candidate authorizes the entity (or another outside organization) to conduct various types of background investigations.

3.406 Potential Obstacles to Conducting Background Checks

Public entities need to determine who will conduct the criminal background screen (internal or external), where to find the information, the quality of the information and how to handle the restrictions on use of the gathered information. Here are some obstacles public entities may face during the process:

Criminal background checks - Courts have ruled that information about prior criminal convictions are a matter of public record and can be used as a tool in the hiring process. Unfortunately, there is no nationwide repository for criminal records and the reporting of convictions varies across jurisdictions. In order to ensure the accuracy of gathered information, research may need to be done at the local, county or regional level. Laws vary from state to state on whether and how a criminal conviction may be used in the hiring process. For example, arrest records without a conviction generally can’t be used. State laws vary on the use of misdemeanor convictions. Most states don’t allow juvenile convictions to be released. Therefore, working with legal counsel to better understand state requirements in using criminal information is essential.

Child abuse checks (sexual and violent offender check) - Public entities that have staff members who interact with children such as those involved in recreation programs, organized sports programs and child care represent a significant potential exposure to liability. Many entities have become more aware of the importance of screening prospective workers and volunteers before they are allowed to work with children in part because of the potential high-profile liability exposure of child abuse. A public entity’s background investigation policy should include child abuse checks when the new employee will interact with youth.

Using internal or external resources to conduct investigations - Many arguments can be made to support either an internal background investigation or using an external source to do the investigation. There are a number of independent vendors who specialize in background investigations—everything from motor vehicle record checks to criminal histories and child abuse checks. Not all vendors operate the same way. For this reason, it is important to screen vendors prior to signing contracts for their services. MMIA can offer guidance on questions to ask and possible vendors to consider.

While many municipalities have easy access to criminal justice information via their own police department, it is not always wise to use the internal department for criminal background checks beyond those for police officer positions. The Criminal Justice Information Network (CJIN) cannot be used for background checks outside those positions that have access to or use CJIN. This limits the information an internal department can gather on an applicant, especially those who have lived outside the state of Montana.

Legal issues - Implementing a process to conduct criminal background investigations may sound simple enough but there are legal issues to consider including adherence to the Fair Credit Reporting Act (FCRA). Public entities need

consent from the candidate for a background check. The signed authorization on the application is not normally enough to be considered a consent form. In addition, the entity is required to inform the candidate, using a legal Adverse Action notice, if he or she is not hired based on information contained in the background investigation. The candidate has the right to contest the information.

Federal Civil Rights Laws - In general, these laws prohibit denial of employment solely on the basis of a prior criminal record that is unrelated to job performance. Care must be taken to weigh the offense against the requirements of the position. The hiring process should include considerations of the nature and gravity of the offense, the relationship between the incident and the type of job; the amount of time that has passed since the conviction or completion of the sentence; the applicant's efforts and success at rehabilitation and factors indicating the incident may be repeated.

Negligent hiring liability - Although the costs involved in hiring the wrong employee should be an impetus for public entities to conduct pre-employment background investigations, there are several other compelling reasons. Negligent hiring arises under tort law when the employer knows of a dangerous condition or propensity toward activity such as a previous criminal history or a poor driving record but hires the applicant anyway or fails to perform a reasonable background investigation. The background check process should be developed in conjunction with legal counsel and the process should be consistent across all positions. Investigation inquiries must be job-related and include implications and restrictions for using gathered information.

3.407 Background Check Resources

Resources available to municipalities include:

1. Montana Department of Justice, Division of Criminal Investigation, (406) 444-3625.
2. The [CONWEB service](#), provided by the Montana Department of Corrections, provides records information for convicted felons in Montana.
3. [Sexual and Violent Offender Registry](#).
4. MMIA can provide information on possible vendors.

3.5 Making an Offer

Once the municipality has decided to hire an individual, it needs to contact that individual as soon as possible. The municipality should be prepared to discuss salary, benefits and other job-related issues. It is common to make a contingent offer of employment until results of reference and background checks are received.

Once all background screening is complete, a firm offer of employment should be made in writing. Offer letters should include the name of the position, Fair Labor Standards Act (FLSA) status (exempt or nonexempt), wage/hour or month (do not list annual salary on letter), probationary period and benefits information. The candidate will sign to accept the offer. A signed copy of the letter should be placed into the personnel file.

3.501 Notice of Non-Selection

A letter, email, or a personal telephone call should be made to all applicants letting them know that they were not selected for the position. When writing a non-selection letter to external candidates, the municipality should not refer to the candidate hired or to her or his qualifications. It is important to let the applicant know that she or he had been

considered for the position, but that another more qualified candidate was selected.

3.502 Hiring Process Resources

Job service centers can assist with the recruitment process. [A listing of job service centers can be found at the Montana Department of Labor and Industry website.](#)

MMIA can provide assistance with interview questions, templates for rating/scoring sheets, webinars on the entire hiring process and individual consultation on the process.

Ideas for places to advertise job postings will vary based on your location, but may include:

- Job service center
- Local newspaper
- Town/City website
- Town/City Hall bulletin board
- Other locations throughout the community
- MT League of Cities and Towns website
- Local Government Center list serves
- University/college job boards
- Indeed.com; ziprecruiter.com or other job-related websites
- Linked In and other social media sites
- Craigslist
- Associations related to the position such as:
 - [International Association of Chief of Police](https://www.theiacp.org/jobs) <https://www.theiacp.org/jobs>
 - [International Association of Fire Chiefs](https://careers.iafc.org/) <https://careers.iafc.org/>
 - [Public Works Careers](https://www.publicworkscareers.com/) <https://www.publicworkscareers.com/>

3.6 Nepotism

Nepotism is defined by Montana Code as “the bestowal of political patronage by reason of relationship rather than of merit” [MCA 2-2-301](#). The aim of Montana’s nepotism statute is to “prevent favoritism and conflicts of interest by public agencies in hiring, and to concentrate on the applicant’s merit and qualifications.” Montana’s nepotism law covers any “person or member of any board, bureau, or commission or employee at the head of a department of this state or any political subdivision of this state” [MCA 2-2-302](#). Cities and towns are considered political subdivisions of the state. A public official may not vote on the appointment of an individual who is related to an official within the fourth degree by consanguinity (relationships by blood) or by affinity within the second degree (relationships by marriage). The following tables indicate degrees of consanguinity and affinity:

Relationship of Consanguinity				
Person	1st Degree	2nd Degree	3rd Degree*	4th Degree*
	Father Mother Sons Daughters	Brothers Sisters Grandparents Grandchildren	Great- - grandparents Uncles* Aunts* Nephews Nieces Great-grandchildren	First cousins Great-great-grandparents Great uncle* Great aunt* Grandnephew Grandniece Great-great-grandchildren

* An aunt, uncle, great aunt or great uncle is related to a person by consanguinity only if he or she is the sibling of the person's parent or grandparent.

Relationship of Affinity				
Person	1st Degree	2nd Degree		
	Spouse Father-in-law Mother-in-law Son-in-law Daughter-in-law	Stepson Stepdaughter Stepmother Stepfather	Brother-in-law Sister-in-law Spouse's grandparent Spouse's grandchild	Grandchild's spouse Spouse of grandparent

The nepotism statutes prohibit a public official from appointing a close relative of certain public officials to a “position of public trust or emolument” [MCA 2-2-302](#). A public office is a public trust. The word “emolument...is a comprehensive term meaning the profit arising from any office or employment, whether received in the form of salary, fees or other advantage.” In summary, any question regarding nepotism in hiring, appointment, supervision and/or contracting for services should be reviewed by legal counsel as there are a few exceptions to the general prohibition.

Sample Nepotism Policy

No employees will be appointed in a manner inconsistent with the nepotism laws and definitions as outlined in [2-2-3, MCA](#), [ALSO INSERT LOCAL ORDINANCES IF RELEVANT].

3.7 Collective Bargaining Defined

3.701 Collective Bargaining Defined

Many municipalities throughout Montana work with employees represented by unions. The heart of labor relations is collective bargaining. Early labor struggles centered on the right of workers to force employers to negotiate a collective agreement. Most labor agreements are negotiated uneventfully, with little public awareness, and at only a small cost to either party.

Collective bargaining basically consists of management and union representatives coming together to reach an agreement that will be acceptable to their constituents. The process can be smooth and uncomplicated if both parties are willing to negotiate cooperatively to reach an agreement. However, the process can also be complex and time consuming. The major issues surrounding collective bargaining include:

- Who will represent the workers?
- Which issues will be negotiated in the contract?
- What strategies will be used in bargaining?
- How will bargaining impasses be resolved?
- How will the contract be administered?

Mandatory items – Mandatory bargaining items include wages or salaries, hours of work, subcontracting, stock purchase plans, profit-sharing plans, pension and employee welfare plans, Christmas bonuses, workloads and production standards, and plant rules. Labor and management must bargain in good faith on these mandatory items, and they may bargain to an impasse without violating the unfair labor practice provisions. Unions may strike to obtain mandatory items, and employers may refuse to sign a contract unless their version of these items is included in the contract.

Voluntary items (also known as permissive) – Voluntary items are issues that may be discussed at the bargaining table but may not be bargained to an impasse. Employers cannot make voluntary items a condition for signing a labor contract, such as demanding that the union withdraw fines on members who crossed picket lines during a strike. Unions may not strike over voluntary items. The Supreme Court has ruled that employers may legally demand that promotions, discipline, and production scheduling be matters of exclusive management control and not subject to arbitration. This decision appears to make these items voluntary.

The labor agreement – A labor agreement can cover many issues or only a few. The wording of an agreement should be carefully considered so that misinterpretation leading to costly grievances may be avoided. Most labor agreements cover seven major bargaining issues: compensation and benefits, working conditions, job security, discipline procedures and individual rights, union security, management prerogatives, and contract duration.

Good faith bargaining – The conditions for good-faith bargaining as defined by the courts and the National Labor Relations Board (NLRB) include the following:

1. Both parties must be willing to meet at reasonable times, in reasonable places, to discuss each party's bargaining issues. A serious attempt must be made to adjust differences and to reach an acceptable common ground.

2. A counterproposal must be offered when another party's proposal is rejected. This must involve the "give and take" of an auction system.
3. A position on contract terms may not be constantly changed.
4. Evasive behavior during negotiations is not permitted.
5. There must be a willingness to incorporate oral agreements into a written contract.

3.702 Collective Bargaining Approaches

1. Conjunctive / Distributive Bargaining refers to an approach where "wins" and "losses" (or concessions) are the focus. [The Harvard Law School Blog has a helpful summary of this approach.](#)
2. Cooperative / Integrative / Interest Based Bargaining refers to an overall approach best characterized as win-win. The [Blaney McMurtry Law firm has a helpful summary of cooperative, integrative, or interest-based bargaining](#) on their website.

3.703 Unfair Labor Practices

Many of the unfair labor practice charges submitted to the NLRB arise from improper campaign activities. The NLRB has established a lengthy list of guidelines for fair elections.

1. **Interference, restraint, and coercion** - It is an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights to form, join, or assist a labor organization or to bargain collectively. Supervisors are representatives of management; therefore, they are not allowed to discriminate in the employment, tenure, or working conditions of their employees or to encourage or discourage membership in a union. Nor are they allowed to interfere with, restrain, or coerce employees in the exercise of their rights to form or join a labor union.
2. **Threats of reprisal** - Employers are free to express their views concerning union organizations provided that there is "no threat of reprisal or force or promise of benefit." This provision allows employers to tell their employees why they think unions are worthless, dangerous to the economy, or corrupt, provided that the employers avoid threats, promises, coercion, and libelous slander.
3. **Promise of benefit** - During an election campaign, employers generally are not free to grant wage increases or benefits improvements unless they can demonstrate that these changes are completely unrelated to the campaign. Such practices appear to imply an incentive to defeat the union by showing that the union is not needed to obtain better wages or benefits.
4. **Solicitation of grievances** - Employers may not solicit grievances from employees and offer to settle them informally as a way to circumvent the authority of a union. The Taft-Hartley Act allows employees to submit grievances directly to supervisors, however, without union interference. Employers may work to eliminate undesirable working conditions, but they must not do so in ways designed to persuade employees that the union is not needed.
5. **Restricting employee activity** - Employers may not restrict employees in the exercise of their rights to form, join, or assist a labor organization. Nor can an employer prevent employees from engaging in concerted activities for collective bargaining purposes or other mutual aid or protection.
6. **Surveillance and interrogation of employees** - The NLRB has ruled that an election is invalid when an employer visits employees in their homes or assembles them in a manager's office for the purpose of urging them to reject the union. Employers cannot single out certain employees and talk with them individually or in small groups, nor can an employer question employees about their union sentiments.
7. **Inciting antiunion activity** - Employers may not incite anti-union activity by paying employees to defeat a

union or campaign against it. Firms cannot recommend, circulate, or assist in preparing a petition for decertification. During a decertification campaign stage, employers can provide only minimal assistance and cannot allow employees to work for decertification during working hours.

8. **Discrimination for exercising rights** - Companies are not allowed to discriminate against employees by hiring, firing, or altering their conditions of employment in a manner designed to encourage or discourage membership in any labor union. An employer may still fire employees for disciplinary reasons, such as disobedience, drinking on the job, or careless work, but an employer should be prepared to show that employment decisions are not intended to discourage union membership or activity.
9. **Discipline/discharge for union activity** - Employers may not discharge or otherwise discriminate against an employee because the employee has filed charges or given testimony under the NLRA. Nor can an employer discipline or discharge employees for expressing profound sentiments or encouraging other employees to join a union. As a general rule, employers may not prohibit union members from wearing union insignia, buttons, or pins; unless it interferes with work performance or it could reasonably be construed to be offensive or profane.
10. **No-solicitation rules** - Employers can generally prohibit the distribution of campaign literature in work areas during work hours. However, rules prohibiting the distribution of written materials in non-work areas during non-work time are generally illegal. Non-work areas include such places as cafeterias, rest rooms, parking lots, hallways, locker rooms, and break areas.

3.704 Collective Bargaining Resources

1. [39-31-401, MCA, Unfair Labor Practices of a Government Employer](#)
2. [39-31-402, MCA, Unfair Labor Practices of a Labor Organization](#)
3. [National Public Employers Labor Relations Association](#)

3.8 Performance Evaluation

3. 801 Performance Evaluation Defined

A performance evaluation allows for direct communication of performance issues, identifies areas for employee development and training, and can serve as a motivating event for employees to continue excellent performance or

to enhance their performance. Feedback from the employee to the employer during an evaluation can help to identify ways to improve the organization. The performance evaluation meeting provides documentation to support other management decisions including corrective action and discipline and ensures that job/position descriptions are up to date and accurate.

3. 802 Conducting Performance Evaluation – Supervisor Guidelines

- Establish a positive and supportive atmosphere. Find a private, neutral place where interruptions and phone calls are unlikely. Seating arrangements for the meeting are an important consideration. Two comfortable chairs side by side at a conference table creates an atmosphere conducive to an open and honest conversation. Avoid a situation where the employer sits behind their desk as it emphasizes the power imbalance and lowers the comfort-level of the employee to share feedback about the organization

and it may reduce the employer's ability to empathize with the employee.

- Choose the right time. Look at your work schedule as well as the employee's. While mid-morning is often considered an ideal time, Fridays can be bad days if you are dealing with a marginal performer and anticipate delivering negative feedback during the meeting. If the employee receives negative feedback before a weekend, they are likely to focus on the negative feelings over the weekend rather than just getting back to work and focusing on improvement. Select a time other than lunch as the participants will be able to focus on the appraisal rather than the distraction of the meal and the server.
- Be in the right frame of mind. Don't attempt to conduct an appraisal session if you are not feeling well or if the staff person is not well. Both of you need to be in a positive frame of mind for the session.
- Make sure you are well prepared for the meeting with a plan for how the conversation will go as well as all of the necessary information at hand such as a self-appraisal by the employee if using, a calendar and peer appraisals of the employee if you are using those.
- Review the position description with the employee in advance of the evaluation with particular emphasis on the performance evaluation factors included in the description. This is a good time to determine if the duties of the job have changed.
- Evaluate each performance factor independently of all other factors.
- Emphasize good performance and be specific about any unsatisfactory performance so that it is related to behaviors rather than a personal attack of the employee. The performance evaluation should be friendly but formal and future focused.
- If unsatisfactory performance is noted, specify the expected corrective actions and set a date in the near future for follow up with set measurable goals.
- Emphasize that an unsatisfactory rating is your appraisal of job performance, not of the person. Such a rating should never be based on one event, but instead a pattern of behavior observed over the review period.
- The performance evaluation should also have an area for development of skills and expertise into the next year with measurable goals that are discussed and mutually agreed upon.
- Brief your supervisor on the strong and weak performance evaluations of those employees you supervise.
- Beware of "Halo and Horns" effect – a general impression colors the rating on all factors. Treat each factor separately.
- Beware of the "Recency" effect – incorrectly creating an evaluation that is based upon the last three or four weeks of performance rather than the totality of the evaluation period.
- Beware of "Central Tendency" – this is fence-straddling by an evaluator who is unwilling to assign appropriate high or low ratings.
- Beware of "Rater Bias" – personal prejudice against the employee.

Consider making continuous observations during the year with written notation, dating, and describing specific examples of good and poor performance. This feedback should be shared with the employee throughout the course of the year as a means to have continuous open dialogue about performance. Giving feedback only once a year during a performance evaluation is not as effective because employees tend to focus on the negative feedback and often are demoralized by the experience.

By sharing performance feedback throughout the year, hearing specific feedback about negative performance should not be a surprise for the employee. A performance evaluation should never come as a surprise.

3. 803 Providing Feedback – Supervisor Guidelines

Performance feedback needs to be constructive in order for it to be productive. Sometimes employees just don't measure up to the city/town's performance standards. Some managers try to avoid this experience. They hope the employee's performance will improve with time, experience, or just luck although the result is often just the opposite. Employees conclude that their performance is acceptable, and no one tells them differently until they are fired (worst case scenario). In a case like that, a successful wrongful discharge claim could be filed because appraisals didn't reflect the actual performance.

Feedback to an employee on their performance can reinforce the positive and change the negative by:

- Identifying specific actions or behaviors that were done well or poorly so the employee knows to continue on or stop doing those things.
- Explaining the effects of the observed behavior, whether positive or negative.
- Focusing the feedback on the behavior, and not the person.
- Avoiding attacks or judgments on the individual.
- Encouraging the employee to listen rather than be defensive.
- Letting the employee know what behavior is expected and how inadequate behavior should be changed.
- Taking time to point out positive behaviors that can be repeated and working with the employee to come up with ways to repeat those behaviors.
- Following up with more feedback and action plans as needed.

3. 804 Administration

An employee's signature on the evaluation form does not imply agreement with the evaluation, only that the employee has participated in the evaluation. Written memoranda documenting performance throughout the year should be attached to the evaluation report. Performance appraisals should be signed by the supervisor. The signed report and the employee's comments and other documents must be filed in the employee's personnel folder and stored in a secure place not readily accessible by employees. The personnel file should be made available to the employee upon request but under controlled circumstances to prevent loss of critical documentation.

3. 805 Performance Evaluation Resources

Montana Municipal Interlocal Authority (MMIA) can provide resources to help municipalities with performance evaluations.

If the municipalities policy states an evaluation will be conducted annually, then the city/town must adhere to this policy. If there is concern about this being conducted, the city/town may want to consider revising the policy to state "will normally be conducted on an annual basis" or "may be conducted on an annual basis". Consulting with MMIA and the City/Town attorney is important when revising any policy.

Sample Performance Evaluation Policy

Employee performance evaluations are provided at least annually to non-probationary employees. The evaluations recognize employee strengths and special abilities, report progress and allow correction of any deficiencies, as well as provide an opportunity to discuss areas that need improvement. Annual appraisals and evaluations should provide an ongoing performance record. This may be used as a supportive document for personnel actions such as promotions or demotions. They also provide employees an opportunity to discuss personal goals, [CITY/TOWN] goals and means for improvement. Annual evaluations provide an opportune time to formulate or update the employees' job descriptions.

Probationary employees will receive informal feedback throughout their probationary period. The supervisor or the [MAYOR/CITY MANAGER] and/or their designee will formally evaluate the probationary employee at the end of the probationary period or as soon as is feasible, at which time the employee will be advised of his or her status (regular or terminated.)

The employee's immediate supervisor or the [MAYOR/CITY MANAGER] and/or their designee will complete the evaluation using their job description and the [CITY/TOWN] personnel policy manual as the appraisal basis. The employee is encouraged to complete a preliminary self-appraisal to prepare for the evaluation meeting. The employee and the evaluator shall schedule a conference to discuss the employee's job performance and the job description. The conference will provide the opportunity for the employee to work with their supervisor or the [MAYOR/CITY MANAGER] and/or their designee to develop the employee's understanding of the position, annual goals, training needs, budget restraints/needs and improvement plan. If the employee, their supervisor or the [MAYOR/CITY MANAGER] and/or their designee do not agree on an evaluation result, the employee may respond in writing within 10 working days and attach the statement to the performance evaluation form.

The employee, their supervisor or the [MAYOR/CITY MANAGER] and/or their designee will sign and date the evaluation form. If the employee refuses to sign the evaluation form, documentation of their refusal will be added to their evaluation. The employee's signature will indicate that the employee has reviewed the evaluation with their supervisor or the [MAYOR/CITY MANAGER] and/or their designee and understands the comments contained within the evaluation.

3. 806 Performance evaluation forms

Performance evaluations can be as simple as a written summary of successes and challenges for the year, to more complex computerized systems that gather feedback from co-workers, weigh certain competencies and tie performance to compensation. Cities and towns should choose a format that works well for their needs. Regardless of the form selected, it is important that it ties directly to the work of the position, that criteria for each rating level is clearly defined, that employees know what they are being evaluated on prior to the evaluation period beginning and that justification can be given for any rating level.

Sample Performance Evaluation Tool #1

Employee:		Position:	
Supervisor:		Department:	
Date of Evaluation:		Start date in position:	
SECTION I --- GENERAL PERFORMANCE STANDARDS <i>Consider each standard separately. Mark an X in the appropriate box which most reflects the evaluator's response. A substandard performance rating on any performance standard must be supported by specific comment in the space provided. Use additional sheets if necessary.</i>			
1. JOB KNOWLEDGE, SKILLS, AND ABILITIES: The employee demonstrates the knowledge, skills and abilities necessary to perform work satisfactorily.			
<input type="checkbox"/> Does not have the basic knowledge, skills and abilities to perform work satisfactorily.	<input type="checkbox"/> Has the basic knowledge, skills, and abilities to perform work satisfactorily.	<input type="checkbox"/> Has exceptional knowledge, skills, and abilities to perform work.	
COMMENTS:			
2. QUALITY OF WORK: The employee demonstrates accuracy, attention to detail and effectiveness in completion of work.			
<input type="checkbox"/> Work is sometimes inaccurate or incomplete; fails to meet departmental standards.	<input type="checkbox"/> Work is usually accurate and thorough; work meets departmental standards.	<input type="checkbox"/> Work is consistently of excellent quality, accuracy, and detail.	
COMMENTS:			

3. **PRODUCTIVITY: Employee performs work with efficiency, consistency and timeliness.**

<input type="checkbox"/> Works slower than expected; <input type="checkbox"/> Work is of substandard consistency and timeliness.	<input type="checkbox"/> Completes work on time, with consistency and efficiency; <input type="checkbox"/> Meets departmental standards.	<input type="checkbox"/> Quickly completes work, often ahead of schedule; effectively prioritizes works; exceeds departmental standards.
COMMENTS:		

4. **RELIABILITY:** The employee exhibits dependability and conscientiousness in performing work and in willingness to accept responsibilities.

<input type="checkbox"/> Sometimes is not dependable and conscientious in performing work; <input type="checkbox"/> Unwilling to accept responsibilities.	<input type="checkbox"/> Consistently dependable and conscientious; usually accepts responsibilities; meets departmental standards.	<input type="checkbox"/> Extremely dependable; follows through promptly on all tasks; accepts responsibilities; exceeds job goals; show high level of initiative.
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COMMENTS:

5. **COMMUNICATION:** The employee demonstrates the appropriate level of written and verbal communication skills necessary to satisfactorily perform the job.

<input type="checkbox"/> Communication skills impair work performance.	<input type="checkbox"/> Possesses the required communication skills and is effective in the position; meets departmental standards.	<input type="checkbox"/> Has excellent communication skills; very effective in verbal and written interactions.
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COMMENTS:

5. **WORK RELATIONSHIPS:** The employee possesses the ability to maintain effective and productive working relationships with fellow employees, supervisors and the public.

<input type="checkbox"/> Has trouble getting along with other employees, supervisors, and the public.	<input type="checkbox"/> Has a generally positive approach in assisting others; maintains effective working relationships; meets departmental standards.	<input type="checkbox"/> Exceeds departmental standards; highly cooperative; works hard to promote positive work relationships.
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COMMENTS:

7. **SAFETY:** The employee adheres to the rules and regulations to ensure safety standards are met.

Fails to follow safety rules and regulations; falls below departmental

Follows safety rules and meets departmental standards.

Exceeds departmental standards for safety.

COMMENTS:

SECTION II: OVERALL WORK PERFORMANCE: *Check the standard which matches the employee's OVERALL work performance. An overall work performance rating which does not meet "Job Requirements" requires specific explanation in the comment section. Explanation must include the specific job performance areas requiring improvement. Attach additional sheets as necessary.*

Performance needs improvement to meet Job Requirements.

Performance meets Job Requirements

Performance exceeds Job Requirements.

COMMENTS:

SECTION III -- EMPLOYEE COMMENTS: *Comments are encouraged either agreeing, disagreeing or acknowledging the supervisor's evaluation. Attach additional information if needed.*

Supervisor's signature:

Date:

Employee's signature:

Date:

Chief Administrator's signature:

Date:

NOTE: By signing this form, the employee acknowledges only that this evaluation was discussed, and a copy has been received by the employee. The employee's signature does not signify agreement with the evaluation.

Sample Performance Evaluation Tool #2

Section A
Employee Information- Name
Employee ID
Job Title
Date
Department
Supervisor
Review Period
Using the checklist, the supervisor should place either an S (Satisfactory) or N (Needs Improvement) or O (Other) or NA (Not Applicable) in each of the sub-category boxes confirming they have discussed each of the performance criteria with the employee. Articulate how the employee has performed during the evaluation period in each of the categories. <i>Any category marked with an "N" or "O" will require an explanation below in Section C.</i>
Section B
Supervisor
WORK HABITS:
Dependability/ Attendance/ Punctuality:
Safety & Housekeeping:
Initiative/ Versatility/ Adaptability:
Personal Appearance:
Compliance with Policies & Procedures:
JOB KNOWLEDGE, SKILLS & ABILITIES KSA'S & QUALITY & QUANTITY (PRODUCTIVITY) OF WORK:
Job Knowledge, Skills & Abilities (KSA's):
Quality of Work:
Quantity (productivity) of work:
INTERPERSONAL SKILLS:
Interpersonal Skills:
Work Relationships (teamwork):
Communication Skills:
LEADERSHIP, JUDGEMENT AND STRESS TOLERANCE:
Leadership:

Judgement:

Stress Tolerance:

BUDGET &/OR FINANCIAL RESPONSIBILITY:

Budget &/or Financial Responsibility

Section C

"Other/ Needs Improvement' & Overall Impression of Employee Performance

Section D

Goals & Objectives

1. Did the employee meet their goals and strategic objectives established for the previous year?
2. Agreed upon goals, training and objectives for upcoming year.
3. What suggested areas of improvement (Training & Development) are required?

MANAGEMENT & SUPERVISION:

Decision making & problem solving:

Planning, organization & delegation of resources:

Performance management:

Section E

Verification of Review-

By signing this form, you confirm that you have discussed this review in detail with your supervisor. Signing this form does not necessarily indicate that you agree with this evaluation.

Employee Signature:

Date:

Supervisor's Signature:

Date:

Employee Self- Evaluation Form

PART I – IDENTIFICATION	
Name:	Title:
PART II – INSTRUCTIONS	
<p>Please complete the following self-evaluation form by responding to the questions listed in each section as appropriate, as well as providing any additional information you wish to share that is not specifically addressed below.</p> <p>This self-evaluation will be used by your supervisor as part of your annual review to evaluate your performance in some or all of the following areas: Knowledge, Dependability, Communication, Interpersonal Skills, Independent Action (or initiative), Professional Development, Leadership, Supervisory Skills, and Teamwork. Please address these areas of performance as appropriate in your responses below. Submit a copy of your self-evaluation to your supervisor prior to your annual review. A copy of your self-evaluation and performance evaluation will be kept in your personnel file. You will be provided with a copy of your performance evaluation.</p> <p>This self-evaluation form is based on the following four areas: (1) positive areas of job performance, (2) areas that need improvement, (3) feedback for supervisor or department in general, and (4) goals for next year. The goals you set for next year will be part of your next annual review.</p>	
PART III – RESPONSE	
<p>POSITIVE AREAS OF JOB PERFORMANCE Summarize your accomplishments this year. What do you like most about your job? What parts of your job do you feel strongest in? What were some of your “successes” this past year?</p>	
Response:	
<p>AREAS THAT NEED IMPROVEMENT What do you like least about your job? What parts of your job do you feel less confident about? What frustrates you or has made meeting goals difficult? What were some of your “challenges” this past year?</p>	
Response:	
<p>FEEDBACK FOR SUPERVISOR OR DEPARTMENT IN GENERAL Is your current level of supervision meeting your needs? How could it be better? How well is teamwork going for you? What do you still need to learn? What resources would help you do a better job? Do you have any ideas for the department to consider?</p>	
Response:	
<p>TRAINING ATTENDED THIS YEAR</p>	

Response:

GOALS FOR NEXT YEAR What are the major points of focus for you in the next 12 months? In what areas are you interested in developing new expertise?

Response:

3.9 Progressive Discipline

One of the most difficult aspects of managing a municipality is the occasional need to discipline and/or terminate an employee. In order to better understand this process, it is important to understand the concepts of probationary period, progressive discipline, wrongful discharge and constructive discharge.

3.901 Probationary Period

Montana is a unique state in that it does not have what is commonly referred to as “employment at will”. Employment at will means an employee can be discharged at nearly any time with or without cause. In Montana, the only time an employee may be terminated *without cause* is during her or his probationary period. Cities and Towns should develop a probationary period policy that sets this initial probationary period at any length up to a maximum of one year. If the probationary period is not stated, Montana law defaults to a six-month probationary period (39-2-904 MCA). Public Safety officers typically serve 1-year probationary periods.

Municipal policy sets the probationary period and it must be followed for all staff. Employees may only serve one probationary period. It is common for an employee who is transferred to a new position to serve a trial period which is typically 30 to 90 days. A trial period is different from a probationary period. A trial period is used when an employee who has already served a probationary period is transferred to a new position in which the employer wishes to “test” them out. If such an employee were not to successfully complete a trial period, they would normally be placed back into their prior position or a similar position.

Sample Probationary Period Policy

All employees will serve a [INSERT TIME] month probationary period. [PROBATIONARY PERIODS FOR POLICE/FIRE WILL DIFFER—list what their probationary period is]. The probationary period allows time for the employee to learn the position as well as time for the supervisor to evaluate an employee’s potential and performance. During the established probationary period, [CITY/TOWN] reserves the right to terminate an employee with or without cause. An evaluation will be completed prior to completion of the period to notify the employee of their status (regular, terminated or extended probation when applicable).

3.902 Union Representation

Different employees may have different disciplinary processes/steps/procedures if they are covered by a collective

bargaining agreement and may need to be disciplined in different ways. Municipalities should be aware of, and utilize, the disciplinary steps provided in the collective bargaining agreements.

If employees covered under a collective bargaining agreement believe that meeting with a supervisor or being questioned during an investigation may result in disciplinary action against them, they have the right to have a union representative at the meeting. Employees should be afforded a reasonable time to obtain a representative if they would like to have one at a meeting. This right is called the Weingarten Rule. It is recommended that management have a witness in the room.

Employees should also be advised that failure to cooperate in an investigation when being compelled to do so could result in discipline up to and including termination.

3.903 Progressive Discipline

Progressive discipline is the process of using increasingly severe steps or measures when an employee fails to correct a problem after being given a reasonable opportunity to do so. The underlying principle of progressive discipline is to use the least severe action that is necessary to correct the undesirable situation. Increase the severity of the action only if the condition is not corrected. Not all disciplinary policies are progressive in nature. Many municipality policies allow the manager to determine the proper level of discipline based on the violation and past practice. Reference the applicable municipal discipline policy to learn specifics of the municipality's requirements for disciplining employees.

Some guidelines to consider regarding disciplinary action are:

- Thoroughly investigate the situation which includes obtaining the employee's explanation or response prior to administering discipline.
- Document the process and results of your investigation.
- It is acceptable to repeat a step if you feel that it will correct the problem. This may be the case if some time has passed since it was last necessary to address the issue and the situation has only recently reappeared.
- Be aware that an employee may be led to believe that nothing worse will happen if you continually repeat a step.
- The goal is to modify the unacceptable behavior to improve the performance. The goal is not to punish the employee but to more clearly communicate with the employee of the need to correct the problem.
- There is no rigid set of steps nor is there an inflexible rule that all steps must be followed before terminating an employee. In most instances, discipline will be used in progressively escalating steps that eventually lead to termination.
- Early, less stringent, measures could possibly be skipped for more serious offenses such as theft, fighting, drug or alcohol use or sale.
- All steps are typically used for attendance or general work performance problems.
- Though not required, it is strongly encouraged and considered best practice to have a witness or note taker present when meeting with the employee during the progressive discipline process. Your witness/note taker should never be a peer of the employee. Most cities or towns permit the employee to have a witness at such meetings if he or she wishes.
- Utilize the Employee Assistance Program (EAP), that is typically part of the employee benefits package to assist with disciplinary matters. Managers can mandate EAP services when coaching and disciplining staff.
- All steps of corrective coaching should normally be done prior to entering into formal disciplinary action.

- Your City/Town mayor/manager is normally the final decision maker for termination and often for other forms of disciplinary action. Refer to your policy for guidance.
- Your city attorney should be consulted when termination is the step being taken.
- Employees should always have access to the grievance process if they feel discipline is unwarranted.

3.904 Essential Elements of Each Progressive Discipline Step

Disciplinary actions are often overturned completely or reduced to a lesser level when any of the essential elements of progressive discipline are missing. Essential elements to be considered include:

- Explicitly inform the employee of the unacceptable behavior or performance using specific work-related examples. One must not assume that the employee knows what the problem is, rather, the problem must be fully explained with a solution given.
- Explain acceptable behavior or performance standards using examples and set a reasonable time for the employee to comply.
- Inform the employee of the consequences of failing to comply. This is not a threat, rather it gives the employee reasonable expectations of the consequences if change does not occur.
- Specify exactly which step of the municipality's progressive discipline policy the employee is currently in.

Sample Corrective Action Steps Include:

1. Verbal warning

- Conduct the oral warning session as the initial step in a "low-key" manner. Be friendly, yet firm.
- Tell the employee the purpose for the discussion. Identify the problem.
- Have documentation available to serve as a basis for the discussion. Such documentation should include written description of behavior being addressed and the municipal policies that are allegedly being violated.
- Seek input from the employee about the cause of the problem.
- Clarify that the employee understands expectations concerning the situation by asking the employee to state in their own words the preferred behaviors.
- Inform the employee that additional disciplinary action may follow if the problem persists.
- Try to get a commitment from the employee to resolve the problem.
- Schedule a follow-up meeting date with the employee to review changes in behavior. At this meeting, provide feedback to the employee on how she or he is progressing on solving the problem.
- This step may be repeated with stronger consequence statements. Examples range from a statement that failure to correct this situation "may lead to further disciplinary action" to a statement that "this is a final warning and failure to correct the problem will lead to discharge."
- Document the verbal conversation with the employee in the form of a memo, have the employee sign the documentation and place a copy in the employee's personnel file.

2. Written warning

- A written warning is the next step in the progressive discipline following a verbal warning and follow-up. The written warning is warranted when the employee has received the verbal warning, but the behavior has not changed.
- The written warning should include:
 - A statement about the past, reviewing the employee's history with respect to the problem. Make sure the statement focuses on observable behaviors rather than general statements that are difficult to document or prove such as attitudes or feelings. Refrain from any personal judgements.

- A statement about the present, describing the who, what, when, etc. of the current situation, including the employee's explanation.
- A statement of the future, describing your expectations and the consequences of continued failure.
- The warning should be addressed to the employee.
- This step may be repeated with stronger consequence statements. Examples range from a statement that failure to correct this situation "may lead to further disciplinary action" to a statement that "this is a final warning and failure to correct the problem will lead to discharge."
- Have the employee sign the written warning to acknowledge that they have received the document. Place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes, with a witness in the room, write, "employee name refuses to sign this document" sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.

3. Suspension with or without pay

- The length of the suspension is not as critical as the step of suspension. One to three days emphasizes the seriousness of the situation.
- Under the Fair Labor Standards Act, exempt/salaried employees must be suspended in week long (40 hour) blocks of time.
- The written record of the suspension is prepared after discussion with the employee. It specifies the start and end dates, emphasizes that it is a final warning, states the reason, and is given to the employee at the start of the suspension so that the reasons for not working are clearly understood.
- Document the discipline in writing, have the employee sign that they received the document, and place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes, with a witness in the room, write, "employee name refuses to sign this document" sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.
- [MCA 7-33-4123](#) and [4124](#) address suspension of municipal fire fighters. If a fire fighter is suspended from duty, they may request that the charges be presented to the City Council/Commission for a hearing. This right is separate from any grievance process. It is important to seek guidance from the City/Town attorney in how to handle such circumstances.

4. Termination

- This is the last step of any progressive discipline system and is used when earlier steps have not produced the needed results.
- Inform the employee about the nature of the problem. See sequence described under an oral warning and written warning.
- Clearly document the nature of the problem in the written termination letter and (where appropriate) list the previous steps of progressive discipline that were utilized leading up to the termination.
- Have the employee sign a copy of the termination letter and place a copy in the employee's personnel file.
- If the employee refuses to sign the document, have a witness in the room and then clarify verbally, "am I understanding correctly, that you are refusing to sign the receipt of this document?" If they answer yes,

with a witness in the room, write, “employee name refuses to sign this document” sign your name, have the witness sign their name and then make a copy for the employee before filing the document in the personnel file.

- The termination letter should specify that the municipality has a grievance process and the employee has the right to utilize the grievance process.
- Attach a copy of the grievance process to the termination letter.

3.905 Due Process Required

Due process, within the context of corrective action, is essentially a process that involves management, HR and the employee for whom corrective action is being considered. Specifically, due process can be viewed as a process by which:

1. The performance and behavior standard have been established and communicated to the employee and documentation of that communication exists.
2. The performance or behavior discrepancy has been identified and persuasive evidence of the employee’s culpability or negligence has been obtained.
3. The employee is informed that his performance and/or behavior do not meet standards.
4. The employee is given an opportunity to present his viewpoint. Often referred to as a “what say you” meeting.
5. Corrective action is imposed that is fair and consistent with other similarly situated employees.
6. Communication of expected standards is repeated.
7. The consequences of failing to meet expected standards are communicated.
8. Appropriate action is taken if standards continue to not be met.

If the investigation may lead to criminal charges and the employee is compelled to participate in the employment investigation, the findings are not admissible against them in a criminal matter. This is the Garrity Rule. Employees **MUST** be given a Garrity Notice to sign prior to participating in any investigation that involves a potential criminal matter. *Consultation with the City/Town attorney is important when it comes to these matters.*

Sample Progressive Disciplinary Policy

Upon suspected violation of federal, state or local laws, (CITY/TOWN) rules and/or regulations, employee conduct/ behavior/ performance standards, or (CITY/TOWN) policies, the employee may be subject to disciplinary action. The supervisor of the employee in question shall notify the (MAYOR/CITY MANAGER) and/or their designee. The (MAYOR/CITY MANAGER) and/or their designee will task the supervisor and/or the Clerk/Personnel Director to fully investigate and document situations that may require disciplinary action.

Employees may be placed on administrative leave (with or without pay) pending investigation. The employee will be interviewed during the investigation process. Prior to the investigation review, the (MAYOR/CITY MANAGER) and/or their designee will inform the employee of the suspected violation and in general terms what the interview will be regarding.

(The supervisor, (MAYOR/CITY MANAGER) and/or their designee, as well as the employee, may request an attendee to accompany them in the interview, if desired. The attendee, however, will be permitted for observation only and will not be permitted to participate in the interview.)

The supervisor, the employee being investigated, the Clerk/Personnel Director (if it is determined that they should attend) and the (MAYOR/CITY MANAGER) and /or their designee will meet and conduct the interview. The employee being interviewed may request an attendee of their choosing to e present at the interview; however, they will be permitted for observation only and will not be permitted to participate in the interview.

Upon conclusion of the investigation, it will be decided whether or not discipline needs to occur. The (MAYOR/CITY MANAGER) and /or their designee shall inform the employee of the results of the investigation. If deemed necessary, the Clerk/Personnel Director shall be present to document the hearing. During the hearing, the employee will be able to respond to the findings of the investigation.

Upon completion of the hearing, the (MAYOR/CITY MANAGER) and/or their designee will write a letter to the employee documenting the investigation and noting the hearing process has been completed, stating the findings and declaring the appropriate form of discipline as determined by the (CITY/TOWN).

If the employee doesn't agree that the discipline was warranted or if they consider the disciplinary action inappropriate, the employee may follow the grievance procedure. Appropriate discipline, as determined by the (CITY/TOWN), will be rendered in one of the following forms:

1. Oral reprimand

The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee and explain the problem as well as the necessary action required to correct the problem. The (MAYOR/CITY MANAGER) and/or their designee will also outline the time period in which the employee must correct the problem and the consequences should the employee not conform or comply with the necessary action. The (MAYOR/CITY MANAGER) and/or their designee will summarize the conversation with the employee in writing to document the disciplinary procedure as an oral reprimand. The employee and the (MAYOR/CITY MANAGER) and/or their designee will sign the summary which attests that the meeting took place, that the employee understood the problem and the corrective action required. The summary will be placed in the employee's personnel file.

2. Written reprimand

The (MAYOR/CITY MANAGER) and/or their designee will document the problem in a letter to the employee. The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee, present the letter, and explain the problem. During the meeting the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action, and the consequences should the employee not satisfactorily complete the necessary action. The letter to the employee will clarify that the employee is receiving a written reprimand as the disciplinary procedure. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required, and received the written reprimand.

3. Suspension (with or without pay)

The (MAYOR/CITY MANAGER) and/or their designee will document the problem in a letter to the employee and indicate whether the employee is being suspended with or without pay. The (MAYOR/CITY MANAGER) and/or their designee will meet with the employee, present the letter, explain the problem and inform the employee of the severity of the discipline received. During the meeting the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action, and the consequences should the employee not do the necessary action. The letter to the employee will clarify the effective dates of the suspension (with or without pay) and the date and work schedule and the date that the employee is to return to work. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required, and that the form of discipline was suspension (with or without pay).

4. Demotion- loss of duty

The (MAYOR/CITY MANGER) and/or their designee will document the problem in a letter to the employee and indicate the specific conditions of the demotion to include modified job duties and compensation, as warranted. The (MAYOR/CITY MANGER) and/or their designee will meet with the employee, present the letter, explain the problem and inform the employee of the severity of the discipline received. During the meeting, the (MAYOR/CITY MANAGER) and/or their designee will clarify the necessary corrective action, the time period to conform or comply with the corrective action and the consequences should the employee not do the necessary action. The (MAYOR/CITY MANAGER) and/or their designee will determine if the demotion is a temporary disciplinary measure or a permanent job modification. In the event the demotion is a permanent job modification, the employee's job description will be updated to reflect such. A copy of the letter must be signed by the employee that attests the employee participated in the meeting, understood the problem and the corrective action required and that the form of discipline was a temporary or permanent demotion and loss of job duties/responsibilities. If the employee's job description was updated, the employee must sign the updated job description to reflect that the employee has had the modified duties communicated to the employee.

5. Termination

If the appropriate disciplinary action is termination, a letter to the employee will document the problem and summarize the results of the investigation and hearing. The letter will detail the effective cause and date of discharge. The letter shall also include a copy of the Grievance Procedure Policies advising the employee of their right to use the procedures and to have the termination reviewed by the appropriate municipal authority.

3.906 The Montana Wrongful Discharge from Employment Act

Montana's wrongful discharge statute provides the following:

1. An employee can be discharged only for good cause after completing the employer's probationary period; however, during an employee's probationary period, employment may be terminated for any reason considered sufficient by the terminating party;
2. Employers that have written personnel policies must follow those policies in making a discharge;
3. An employee who wins a wrongful discharge suit may collect lost wages and fringe benefits for a period of up to four years from the date of discharge; and
4. Arbitration is encouraged to save the expense of lawsuits, and an employer may benefit if it offers arbitration to a discharged employee. Arbitration is not typically used for non-unionized employees. If arbitration is to be used, it must be stated as such in the grievance policy and be understood that it is final and binding.

A discharged employee must be notified of the internal grievance policy and be given a copy of the policy, within 7 days of termination and exhaust the grievance process, prior to filing a Wrongful Discharge from Employment claim. If an employer fails to provide a copy of the grievance policy within 7 days, the terminated employee need not exhaust their internal grievance process prior to filing a claim.

The Wrongful Discharge from Employment Act does not apply to unionized or contracted employees. For unionized employees, the grievance process found in the collective-bargaining agreement is the exclusive remedy for a wrongful discharge.

By enacting this statute, Montana has *eliminated employment-at-will* as to discharges, since an employee can no longer be terminated merely at the will of the employer. Wrongful discharge will exist in three types of situations:

1. If the discharge is in retaliation for refusing to violate public policy or reporting a violation by the employer;
2. If the discharge is not for good cause and the employee has completed the probationary period;
3. If the discharge involved an employer's violation of its own written personnel policies.

The good cause requirement for discharges means that employers must be prepared to document all terminations. Good cause is defined as reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason, [MCA 39-2-9](#).

3.907 Constructive Discharge

Constructive discharge occurs when employees are forced or coerced into quitting, rather than voluntarily choosing to terminate the employment relationship. This can happen when an employer does not wish to go through the standard process of progressive discipline and attempts to force an employee to quit or resign their position.

When alleging constructive discharge, employees may claim that the resignation was the result of the employer's actions or the employer's failure to correct an intolerable work environment. For example, an employee who is victimized by a supervisor's constant sexual harassment may feel compelled to quit. The employee's leaving under such circumstances may be a constructive discharge.

Other than harassment, employees may be constructively discharged due to any of the following:

- Discrimination
- Dangerous duties
- Hazardous situations
- Demeaning or malicious assignments
- Employer's repeated and extensive failure to provide employee with work

3.908 Legal Standards

In order to sue successfully on the basis of constructive discharge, an employee must prove in court that the working conditions he or she experienced were intolerable. In addition, the employee must prove that the employer either created the intolerable conditions intentionally or allowed them to exist.

3.10 Grievance Process

3.1001 Overview

An established grievance process can be an effective tool for minimizing claims of wrongful or constructive discharge/termination against Montana's municipalities. Grievances from the employees can come from a wide range of areas including work rule or regulation, policy or procedure, health and safety regulation, wage, disciplinary action and non-probationary termination. The grievance process should be part of the municipality's written Personnel Policy Manual and all employees and supervisors should be instructed in its use upon hire.

Municipalities must provide terminating employees, even employees who are voluntarily leaving, a copy of the grievance process upon discharge and document in writing in the employee's personnel file that the employee was provided a copy of the grievance process. If the employee left employment and does not return to the city or town, a return receipt (or delivery confirmation) letter should be sent to the employee outlining the employee's rights under the municipality's grievance process.

An employee must first exhaust their internal grievance process prior to filing an action under the Wrongful Discharge Act. Mayors, managers and supervisors must be aware of the importance of the grievance process and their role in maintaining favorable relations with employees. Effective grievance handling is an essential part of cultivating good employee relations and running a fair, successful, and productive workplace.

The above comments are largely intended for employees who are not covered by a Collective Bargaining Agreement (CBA). Employees covered by a CBA may have negotiated grievance processes that are different from other non-union employees. In fact, some municipalities may have three or four different grievance processes; those for the individual unions represented in the city or town, the non-union employees and one for the Police Department.

3.1002 Role of Police Commission

Police officer grievances are brought before the Police Commission, which is governed by [MCA 7-32-4151](#) through [7-32-4164](#). The Police Commission is designed to provide a forum that is separate and independent from the police department and acts as an appeal board for police officers. Specifically, [MCA 7-32-4155](#) sets forth the role of the police commission in hearing and deciding appeals brought by police officers, as follows:

1. The police commission shall hear and decide appeals brought by any member or officer of the police department who has been disciplined, suspended, removed, or discharged by an order of the mayor, city manager, or chief executive.
2. The police commission shall, at the time set for hearing an appeal of a police officer, hear and determine the appeal according to the rules of evidence applicable to courts of record in the state.

More information can be attained by reading the [Montana Police Commission Handbook](#), which has been prepared by the Montana Board of Crime Control. A copy of the handbook can be found here or contact the [Montana Law Enforcement Academy](#) (406) 444-9950 or visit their website.

3.1003 Grievance Policies and Procedures Resources

The Montana Municipal Interlocal Authority (MMIA) has a template Personnel Policy Manual available. Any policy or procedure that a city or town is contemplating adopting should be reviewed by the city attorney prior to implementation. In addition, as detailed earlier, the [Montana Human Rights Bureau has sample policies on grievance policies and](#) procedures available through their website.

Sample Grievance Policy

Employees are allowed to use the grievance procedure without penalty, harassment or retaliation for doing so. Each grievance will be fully processed until the employee receives a satisfactory decision/explanation or until the employee's right of appeal is exhausted.

Employees should attempt to resolve all disputes prior to involving the (MAYOR/CITY MANAGER) and/or their designee. Employees are encouraged to discuss disputes with their supervisors informally and in a timely fashion. The Clerk/Personnel Director may attend meetings between the supervisor and employee if necessary. In the event a dispute cannot be resolved informally, the employee should file a grievance, in writing, to the supervisor and/or their designee within ten working days of the occurrence of the disputed issue. The written grievance should outline the disputed issue, relevant facts, and appropriate remedy. Upon receipt of the written grievance, the supervisor and/or their designee will investigate the dispute and respond to the grievance within ten working days of receipt of the grievance.

If the response is not acceptable to the employee, the employee may proceed to the next step. The employee may forward the written grievance and/or their designee's response to the (MAYOR/CITY MANAGER) and/or their designee with 14 calendar days from the date of the supervisor and/or their designee's response. The (MAYOR/CITY MANAGER) and/or their designee will investigate the grievance. The (MAYOR/CITY MANAGER) and/or their designee shall conclude their investigation and write a report within 30 calendar days from receipt of the grievance appeal. This step concludes the final appeal process for the employee.

Information concerning employee grievances is confidential information and is to be discussed only with individuals involved in the investigation or on a need-to-know basis. Management decisions on grievances will not set precedent and are at the discretion of the (MAYOR/CITY MANAGER) and/or their designee so long as it does not violate any laws, regulations or policies set forth in this manual. Management decisions are not binding on future grievances unless they are officially stated as a policy.

3.1004 Workplace Violence

Workplace violence is considered any act or threat of physical violence, harassment, intimidation or other threatening, disruptive behavior that occurs at the work site. Municipalities are strongly encouraged to create a policy stressing zero tolerance for such behavior. An example policy follows.

Sample Workplace Violence Policy

The Town of XYZ is committed to preventing workplace violence and to maintaining a safe work environment. XYZ has adopted the following guidelines to deal with intimidation, harassment or other threats of or actual violence that may occur onsite or offsite during work-related activities.

All employees, citizens, vendors and business associates should be treated with courtesy and respect at all times. Employees are expected to refrain from fighting, "horseplay" or other conduct that may be dangerous to others.

Conduct that threatens, intimidates, or coerces another employee, citizen, vendor or business associate will not be tolerated. The Town resources may not be used to threaten, stalk or harass anyone at or outside the workplace, in person or via electronic communication such as email, social media, etc. The Town treats threats coming from an abusive personal relationship as it does other forms of violence.

Indirect or direct threats of violence, incidents of actual violence and suspicious individuals or activities should be reported as soon as possible to a supervisor, the HR specialist, or the Mayor/City Manager. When reporting a threat or incident of violence, the employee should be as specific and detailed as possible. Employees should not place themselves in peril, nor should they attempt to intercede during an incident.

The Town will promptly and thoroughly investigate all reports of threats of violence or incidents of actual violence and of suspicious individuals or activities. The identity of the individual making a report will be protected as much as possible. The Town will not retaliate against employees making good-faith reports of violence, threats or suspicious individuals or activities. To maintain workplace safety and the integrity of its investigation, the Town may suspend employees suspected of workplace violence or threats of violence, either with or without pay, pending investigation.

Anyone found to be responsible for threats of or actual violence or other conduct that is in violation of these guidelines will be subject to disciplinary action up to and including termination of employment.

The Town encourages employees to bring their disputes to the attention of their supervisor or the HR Specialist before the situation escalates. The Town will not discipline employees for raising such concerns.

This policy prohibits employees from bringing firearms or other weapons (including pepper spray, stun guns, batons, etc.) onto city/town premises. Law enforcement is exempt from this requirement. Employees are also prohibited from carrying firearms or other weapons in Town vehicles or in personal vehicles if conducting Town business.

3.11 Discrimination in the Workplace

Employment discrimination can take a number of forms, including illegal hiring and firing, on-the-job harassment, denial of a worker's promotions or raises and unequal pay. There are a number of federal and state statutes that

protect employees from discrimination in the workplace, including the Civil Rights Act of 1964, the Americans with Disabilities Act, and the Age Discrimination in Employment Act of 1967. Montana Code Annotated, [Title 49 Chapters 1-4](#) outline basic rights, illegal discrimination, the governmental code of fair practices and rights of persons with disabilities within the state of Montana.

As specified by the state of Montana Human Rights Bureau, it is unlawful for an employer to treat an employee or applicant for employment differently because of his or her race, creed, religion, color, national origin, age, physical or mental disability, marital status, or sex. Montana's public employers are further prohibited from treating an employee or applicant differently because of his or her political ideas.

The Human Rights Bureau strongly encourages all Montana employers to develop effective discrimination policies and grievance procedures. Effective policies and procedures will protect your employees from discrimination and may prevent liability for violations of those laws. Sample policies and procedures, guidance and some consulting on these issues can be obtained by contacting the Human Rights Bureau at 1-800-542-0807. [A guide to Montana's Human Rights Laws](#) can be found on their website.

In order for a discrimination policy to be effective, it must be adequately disseminated and consistently applied. The policy should indicate what the consequences are for a violation of the policy and be referenced and incorporated into other business-related documentation such as job announcements, job descriptions, or corrective action materials. The policy must clearly identify appropriate and current contact information for discrimination complaints, including alternate contacts in case the harasser is the contact. After it has been developed, the policy should guide the development and implementation of all aspects of people management and provide a clear explanation of the responsibilities of both management and the applicant or employees.

The Governmental Code of Fair Practices requires local governments to conduct continuing orientation and training programs with emphasis on human relations and fair employment practices. An annual discrimination and harassment prevention training for all staff will normally meet this requirement.

3.1101 Harassment

The Equal Employment Opportunity Commission (EEOC) defines harassment as unwelcome conduct that is based on a protected class. It is unlawful when any or all of the following occur:

- Enduring the offensive conduct becomes a condition of employment,
- The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile or abusive, or
- The conduct is retaliation for filing a discrimination claim, participating in an investigation or opposing employment practices that the employee believes discriminates against people.

Municipalities should do their best to create a harassment free work environment as the impact of sexual harassment and other forms of harassment can alter the working environment if people feel intimidated or uncomfortable. This environment should include mandatory harassment awareness training, appropriate policies and procedures that have clear reporting requirements and prompt investigation of harassment complaints. Managers are mandatory reporters and must report any harassment claim that is witnessed or reported to them.

Harassment does not include the conduct or actions of supervisors intended to provide employee discipline, such as deficiency notices, performance evaluations, oral warnings, reprimands or other supervisory actions intended to promote positive performance.

3.1102 Investigating a Complaint of Harassment

Here are some general investigative guidelines to consider:

- Limit the number of persons who have access to information related to the investigation.
- While complete confidentiality may not be possible, keep the investigation and the facts under a strict "need to know" basis. Emphasize to all those involved in the investigation, including the complainant, the accused and witnesses, that it is the policy to keep discussions strictly confidential and that disciplinary consequences may result from a breach of this confidence.
- Avoid needless disclosure of information to witnesses. For example, instead of asking "Did you see Joe touching Joan?" ask "Have you seen anyone at work touch Joan in an offensive way?"
- If there is more than one allegation, treat each incident separately.
- To avoid liability for defamation, never broadcast the facts of a given situation or the results of your investigation to others or as part of a training exercise.
- During an investigation, every witness should be told that retaliation will not be tolerated. If retaliatory actions are taking place, notify supervisor.

3.1103 Initial Investigation Steps

1. Listen attentively and take the complaint seriously, even if the complaint initially appears questionable. Treat it as valid until the facts have been established. If the employee quits because she or he felt the complaint wasn't taken seriously, liability may be compounded. Avoid comments like "Maybe you're overreacting," or "I'm sure she/he didn't mean anything by it."
2. Set a professional tone for the interview and try to put the complainant at ease as it may be difficult and stressful for the employee to come forward. Keep a neutral perspective and maintain a professional demeanor.
3. Gather facts, don't make judgments. Stay away from comments such as, "Most people would be complimented by that" or "Maybe you shouldn't dress that way for work." Speak in a matter-of-fact, but supportive way, not one in which you appear to be "cross examining" the complainant.
4. Get answers to: "who, what, when, where, why and how." Encourage the complainant to be as specific as possible. Find out who did what to whom, when did events happen, why and how did they occur, and were there any witnesses. At this stage it would also be wise to ask the employee if he or she is concerned about retaliation, which is often a concern of harassment victims.
5. Try to avoid leading questions, such as: "Did she/he tell offensive jokes?" Instead, ask open-ended questions, such as: "What did she/he say?" or "Where did she/he touch you?"
6. Get a sense of what the employee views as an acceptable outcome to resolve the problem.

3.1104 Interviewing the Complainant

Explain to the complainant that the charges are serious, and that a thorough investigation needs to be completed before reaching any conclusions. Restate the policy against taking any adverse action against the employee for bringing the charge and ask the complainant to notify you promptly if any such actions occur.

Elicit specific details regarding the alleged harassment. Include questions on the type and frequency of conduct and what was said or done. Also, where it occurred, where the complainant was touched, the dates that the conduct occurred, the time period over which the conduct occurred, whether there was a pattern of previous episodes and

whether the complainant is aware of similar behavior by the accused toward other employees. Keep in mind that a complainant may have difficulty remembering exact events and dates. The investigator must persist in helping the complainant be as specific as possible.

Obtain the specific context in which the conduct occurred, including the nature and general description of the work area and location. Did the conduct occur at a work-related function, during working time, or after hours?

Determine the effect of the conduct on the complainant. Try to identify the type of effect (e.g. economic, non-economic and/or psychological). Was the conduct received as a joke, was it really unwelcome, did it embarrass, frighten or humiliate the complainant? Often, complainants contend that, while they may have given in to the demands made of them, they did so out of fear or because they felt threatened. It is important to remember that the real issue is whether the behavior was unwelcome.

Determine the time relationship between the occurrence of the alleged conduct, its effect on the complainant, and the time when the complainant made the report. If there was a time lag, find out why the complainant waited so long before reporting the situation. A plausible reason might be fear of retaliation. Prepare a chronology of events. Analyze if certain events may have triggered the complaint, for example, a denial of promotion, pay raise or transfer.

Find out what the complainant wants and how the situation might be resolved. Can the complainant continue to work for or with the accused? Will productivity be adversely affected? Will it be embarrassing or awkward? Ask the complainant if they might need counseling. Make no statements about the complainant's character, job performance or family life. This may result in liability for defamation.

3.1105 Interviewing the Accused

Repeat the initial statement made to the complainant about the seriousness of the charge and the concern that no adverse action be taken against the complainant for bringing the complaint. Then, obtain a position statement from the accused. Identify the relationship of the accused to the complainant. Was the accused an agent of the employer, a supervisory employee, a co-worker or a non-employee? Remind employees of rights under both Weingarten (if they are unionized) and Garrity (if the investigation could lead to criminal charges made against them). Work with your city attorney for a written Garrity Notice for the employee to sign.

Discern whether there was any prior consensual relationship between the parties. How long have the parties known each other? Is there a history of group or individual socializing? Determine whether the accused directed, or had responsibility for, the work of other employees or the complainant, had authority to recommend employment decisions affecting others (for example, hiring, firing, promoting), or was responsible for the records of others.

Expect the accused to deny the charges. Observe the reaction. Note whether or not there is surprise, anger or disbelief. Describe the details of the allegation and note the areas of disagreement between the testimonies of both parties. If the accused denies the allegations, probe further to determine with the accused the background, reasons, and motivation that could possibly have triggered the complaint.

3.1106 Interviewing the Accused's Supervisor (When Applicable)

Talk with the supervisor to learn about any discipline problems and behavior patterns of either party and to

determine if the supervisor knows anything about the relationship between the parties. Find out if the complainant reported the conduct to the supervisor. Was the supervisor in a position to observe the conduct? Should the supervisor have been alerted to the conduct? For example, was the conduct discussed in the presence of the supervisor or were there any rumors circulating? Determine if there is any documentation available such as letters, memos, reports or statements supporting the conclusion that the supervisor knew or had reason to know of the conduct.

3.1107 Interviewing Witnesses

Obtain statements, from any witnesses that support or deny any of the complainant's allegations. This evidence is very critical to the investigation. Be aware that witnesses are often reluctant to come forward out of fear of reprisal. Assure witnesses that their cooperation is important and that their testimony will be kept as confidential as possible. Reaffirm the policy and the law's protection against retaliation against a person who assists in an investigation.

3.1108 Resolving the Complaint

Prepare a written report of findings. Determine steps to be taken based on this report.

When trying to remedy the conduct, don't "punish the complainant" by moving her or him to less desirable hours or to a less desirable location. If the complainant is offered a transfer, it should be voluntary and the position transferred to should be equal to or better than the prior position.

Consider the severity, frequency and pervasiveness of the conduct when imposing discipline on the harasser. Be sure to follow your city's corrective action and discipline policies and procedures. There may be several options available up to and including discharge. Any form of discipline short of discharge should be accompanied with a warning that similar misconduct in the future might result in immediate discharge.

Be sure to allow the harasser the opportunity to follow the city's grievance policy. Conduct follow-up interviews with the parties to inform them of resulting actions. Provide follow-up after the conclusion of the investigation regardless of the outcome. A good rule of thumb is to follow-up at one, three, and six months.

Sample Equal Employment Opportunity and Americans with Disabilities Policy

The [CITY/TOWN] is an equal opportunity employer. The [CITY/TOWN] shall comply with all relevant federal and state laws, to include rules and regulations put forth by the Equal Employment Opportunity Commission, (EEOC). The [CITY/TOWN] shall adhere to all relevant provisions of the Americans with Disabilities Act, (ADA). The [CITY/ TOWN] ensures equal employment opportunity regardless of race, religion, color, creed, national origin, sex, marital status, political belief, age, or mental/physical disability, (as defined by the ADA), unless such disability effectively prevents the performance of the essential duties required of the position and which are bona fide occupational qualifications that cannot be accommodated without undue hardship to the [CITY/TOWN].

If an employee believes that they have been subjected to discrimination, including harassment, based upon any of these factors, they should immediately contact their supervisor and pursue corrective action. If the employee feels they need to resolve the problem by filing a grievance, they should pursue action through the Grievance Procedure stated within the [CITY'S/TOWN'S] policy manual.

Sample Harassment Prevention Policy

It is the policy of the [CITY/TOWN] that harassment, based on a protected class will not be tolerated. Each individual has a right to work in a professional atmosphere that promotes equal employment opportunities and prohibits unlawful discriminatory practices, including harassment. Therefore, employees are expected to act in a professional, cooperative and respectful manner to all contacts.

It is the policy of the [CITY/TOWN] to ensure equal employment opportunity without discrimination or harassment on the basis of race, color, religion, national origin, creed, sex, marital status, veteran/military status, genetic history, political belief, age or disability both in or outside the workplace, on or off shift, in person or via electronic communication such as email, social media, etc.

Any employee who perceives a conversation or event as harassment, whether the employee is involved or merely observing, should explain to the offender in a calm, but firm manner that the action is perceived as inappropriate and the employee wishes the behavior to stop. Should the behavior continue, the employee should report the activity to their supervisor, or the mayor, city manager or their designee.

The [CITY/TOWN] encourages reporting of all perceived incidents of discrimination or harassment. It is the policy of the [CITY/TOWN] to promptly and thoroughly investigate such reports with due regard to confidentiality. The results of the investigation will be communicated to the complainant and the offender. Discipline will follow guidance found in the Discipline Policy.

A follow up review will be completed if harassment allegations have been made to ensure the harassment has discontinued and all parties involved are not subjected to retaliatory behaviors.

Definitions of Harassment

Sexual Harassment: According to the EEOC and Montana Human Rights Bureau, sexual harassment may include, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical advances of a sexual nature. For example:

- Occasions when such conduct, either explicitly or implicitly, is a term or condition of employment
- Submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such individuals
- Such conduct has the purpose or effect of interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

Sexual harassment may include a range of subtle and not-so-subtle behaviors and may involve individuals of the same or different gender. Examples may include unwanted sexual advances or requests for sexual favors; sexual jokes or innuendo; verbal abuse of a sexual nature; commentary about an individual's body, sexual prowess or sexual deficiencies; gestures; suggestive objects or pictures or other physical, verbal or visual conduct of a sexual nature.

Other Harassment: Harassing behavior based on any other protected characteristic. For example: verbal, written or physical conduct that denigrates or shows hostility or aversion toward another because of his/her race, color, religion, national origin, creed, sex, marital status, genetic history, sexual orientation, political belief, age or disability.

*Sample Harassment Prevention Policy Continued***Retaliation**

No hardship, no loss or benefit, and no penalty may be imposed on an employee as punishment for:

- a) Filing or responding to a bona fide complaint of discrimination or harassment;
- b) Appearing as a witness in the investigation of a complaint; or
- c) Serving as an investigator.

Please report any retaliation to your supervisor, mayor, city manager or designee. Any report of retaliatory conduct will be objectively, timely and thoroughly investigated in accordance with the [CITY/TOWN] investigation procedure. Retaliation or attempted retaliation is a violation of this policy and anyone who does so will be subject to disciplinary actions, up to and including termination.

3.12 Compensation

3.1201 Compensation Law

In addition to the broad authority of the city council to determine the compensation of all elected and appointed officials and city employees ([MCA 7-4-4201](#)), municipal compensation must comply with Montana's Wage and Hour Labor Laws, [MCA 39-3](#).

Official statements of policy and procedure are contained in the regulations formally adopted by the Wage and Hour Unit of the Montana Department of Labor and Industry. Inquiries about the Montana Minimum Wage laws and other Montana labor laws and their application will be answered by mail, telephone or personal interview at the Department of Labor and Industry Wage and Hour Unit, PO Box 201503, Helena, MT 59620-1503, (406) 444-5600, <http://erd.dli.mt.gov/labor-standards>. Sections of [MCA 39-3-401](#) to [39-3-409](#) provide for minimum wage and hours for workers in the state of Montana, delegating to the Commissioner of Labor and Industry the duty of administering the act, and providing enforcement.

3.1202 Minimum Wages and Hours

General Provisions of the Wage and Hour Laws – The Montana Minimum Wage Law of 1971 establishes minimum wage, maximum hours and overtime pay for all employment covered under the law – unless specifically exempted. The Montana Minimum Wage Law applies to all workers in Montana. Employees covered by the Fair Labor Standards Act must be paid at least the federal minimum wage but in no case can they be paid less than the wage required by Montana law – unless the law provides for a specific exemption. Montana's minimum wage is determined by [MCA 39-3-409](#). The minimum wage is subject to a cost-of-living adjustment based on the Consumer Price Index no later than September 30 of each year, which becomes effective January 1 of the following year. The [current Montana minimum wage can be found at the Montana Department of Labor and Industry's](#) website.

Overtime Payment – Unless specifically exempt by Montana law, all employees must be paid at least one-and-one-half times the employee's regular rate of pay for all hours worked in excess of 40 hours in a work week.

Application of the overtime provisions of subsection (1) to the employment of firefighters and law enforcement

officers by the state must be consistent with the Fair Labor Standards Act of 1938, as amended, and consistent with regulations promulgated under the act. Executives, administrative, and professionals who are paid on a salary basis are exempt from overtime. (Salaried workers who do not meet the definition of executive, administrative, or professional must be paid overtime in addition to their salary.) The [definitions of these exemptions can be located at the Department of Labor and Industry’s](#) website or contact the Wage and Hour Unit at (406)444-6543 for more information on the exemptions from overtime.

Avoiding the Salary Trap – Employers must realize that even if they pay an employee a salary versus an hourly wage, they are still subject to the requirements of state and federal minimum wage and/or overtime laws. Payment of a salary by itself does not exempt an employee unless the business or the individual is exempted from the law.

Holiday, Vacation, Sick and Severance Pay – Overtime or premium pay is not required for working on holidays or weekends unless those hours are in excess of 40 for the workweek (or part of a collective bargaining agreement). Holiday pay is a benefit that may be paid at the employer’s discretion. Overtime is based on actual hours worked, absent practice or contract. Even though the total hours (work hours plus holiday, vacation, or sick pay) for the week might exceed 40, overtime pay is not required unless an employee actually worked more than 40 hours. Refer to the collective bargaining agreement and policy to determine what pay counts as hours worked.

3.1203 Frequently Asked Questions

Employers can pay minimum wage for a certain period of time for training.	False
An employee is paid a monthly salary and performs clerical duties. This employee is not eligible to receive overtime pay.	False
An employee conducts a mandatory staff meeting after regular work hours. The time spent at the meeting is not during their scheduled work time, so the non-exempt employees need not be paid for that time.	False
A non-exempt employee lives in Helena and is traveling to Bozeman to attend a training seminar. The employee will leave at 7:00 a.m. and return to Helena at 6:30 p.m. on the same day. The employee normally works an 8-hour day. This employee only needs to be compensated for a regular 8-hour day.	False
The employer’s policy handbook indicates work hours are from 8:00 a.m. to 5:00 p.m. and will not pay any unauthorized overtime. A non-exempt employee works until 5:30 p.m. (without approval) to finish a project in order to be ready to begin a new project in the morning. Based on the fact the policy indicates overtime must be approved before being compensated, the employee does not need to be paid for the extra ½ hour worked.	False
The work week can begin any day of the week at any hour of the day as established by the employer.	True
It is the employee’s responsibility to keep track of all hours worked and to provide that information to the employer.	False

3.1204 Travel Time

Time spent traveling throughout Montana is a time-consuming endeavor and may or may not be considered work time. The following is a breakdown to the variations stated in the Administrative Rules of Montana (ARM, 24.16.1010):

- **Home to work** - Normal travel from home to work is not work time. This is true whether employee works at a fixed location or at different job sites.
- **Home to work/emergency call** - Travel to the job and back home by an employee who receives an emergency call outside of his regular hours to report back to his regular place of business to do a job is working time.
- **Home to work in another city** - All time spent traveling to another city would be considered work time except for the travel from home to public transportation, such as a bus depot, this would be the normal home to work travel. The usual mealtime would be deductible also.
- **Travel all in the day's work** - Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. If the employee goes home instead of returning to the employer's premises from last job site, this travel is home-to-work-travel and is not hours worked. If an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel time from the designated place to the work place must be counted as hours worked.
- **Travel away from home community** - Travel that keeps an employee away from home overnight is travel away from home and is clearly work time when it cuts across the employee's workday (employee is simply substituting travel for other duties). This time is not only hours worked on regular working days during normal working hours but also during the corresponding hours on nonworking days. For example, if an employee normally works 8 a.m. to 5 p.m. Monday through Friday, the travel time during these hours on Saturday and Sunday are also counted as work time. If the employee requests to drive his car in place of public transportation that has been offered, this travel time is counted as hours worked or the time it would have been using public transportation.
- **Work performed while traveling** - Any work which an employee is required to perform while traveling must be counted as work time. One who drives and is required to ride as assistant/helper is working while riding. Sleep in adequate furnished facilities would not be counted as hours worked.

3.1205 Compensatory (Comp) Time

Non-exempt staff - Many municipalities have struggled with the appropriate use of compensatory or "comp" time with its hourly or non-exempt staff. In basic terms, comp time is utilized as an alternative to overtime pay for non-exempt employees. The Fair Labor Standards Act (FLSA) defines compensatory time off as paid time away from the job that is earned and accrued by an employee in lieu of a cash payment for overtime compensation, at the rate of no less than one and one-half hours of compensatory time for each hour of overtime worked. Under the Act, only government agencies may legally allow their non-exempt employees time off in place of wages.

Who is eligible for overtime? Under the FLSA and Montana wage and hour law, non-exempt employees must receive overtime pay for all time worked in excess of 40 hours per workweek. Overtime pay must be at least one and one-half times the employee's normal hourly wage rate. Municipalities subject to collective bargaining agreements may have an obligation to pay overtime after eight hours a day if it is specified in the union/employer contract.

Too much of a good thing? Compensatory time in lieu of overtime pay may minimize the immediate costs associated with extended workweeks, but it does not come without risk. It is important that employers consider the maximum liability associated with "banked" compensatory time. Any time on the books is considered compensation at termination – including compensatory time. It is important to not only limit the maximum accrual, but also the maximum time to use the accrued compensatory time to ensure a balanced accrual and use

relationship.

Do we need a written policy? It is recommended that municipalities establish a written policy that limits the number of comp time hours that can be accumulated in a fiscal year. If an employee reaches the limit before the end of the fiscal year, the municipality should switch to paying overtime until the comp time balance is reduced. In addition, if an employee is unable to take their comp time by the end of the fiscal year, one solution is for the municipality to pay the employee the amount due at the appropriate one and one-half rate and return the employee's comp time balance back to zero. These steps will help a municipality avoid staff building up thousands of comp time hours over the course of several years. Although an employer may allow an employee to choose between comp time and overtime pay, it is the municipality's obligation to ensure that the non-exempt employee is compensated for all time worked in excess of 40 hours per workweek.

Exempt staff - Municipalities may also establish a comp time policy for exempt employees, although it is not required under the Fair Labor Standards Act. Some factors municipalities may wish to consider as they design their comp time policy for exempt employees are:

- How many hours will an employee work in a workweek before they are eligible to earn comp time?
- Does the municipality want to limit the total amount of comp time that an employee can accrue at any given time?
- At what rate will employees earn comp time? One hour of comp time for each eligible hour worked?
- The policy should specify that comp time earned by exempt staff has no cash value upon termination or the end of the accrual period.
- At the end of the accrual period, does the municipality want to include a "use it or lose it" clause. An example would be that at the end of the accrual period (possibly fiscal year end), all comp time balances will be returned to zero.

In many cases, exempt staff may work in excess of 40 hours per week. They tend to be management staff, committed to the organization and critical to the organizations' mission. Many municipalities allow these exempt staff to earn and use compensatory time in a more flexible manner than non-exempt staff.

It is a challenge to employers when employees pose the idea that they are misclassified exempt, and were treated as non-exempt, therefore creating overtime and pay obligations for the municipality. It is critical that exempt positions are reviewed and classified exempt with the greatest of caution and are treated exempt in all possible scenarios. Keep good documentation as to why you made the position exempt. Delineating through policy the way the two different categories of employees earn time and use time is one way to ensure differentiation that successfully defends the municipality.

After considering these issues, if the employer elects to allow employees the option to earn comp time, document a compensatory time policy and communicate it to municipal employees. Employers must remember that employees who are subject to union contracts may be subject to different rules and policy implementation processes if specified by a collective bargaining agreement.

3.1206 Payroll Deductions

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

1. The employer is required to do so by law – for example, federal and state taxes, Social Security, or a

garnishment order.

2. The employee has authorized 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. The employer cannot withhold wages or make an employee pay for damages, mistakes or shortages. See [Attorney General Opinion 17, Volume 36 and Attorney General Opinion 25, Volume 11](#) at the following [website](#).

3.1207 Child Labor Laws

The Montana Child Labor Standards Act of 1993 establishes the hours children may work and hazardous occupations in which they may not work - unless specifically exempted. The Montana Child Labor Laws apply to all children, migrant as well as resident children. It is the intent of these laws to protect young workers from employment possibly interfering with their educational opportunities or be detrimental to their health or well-being. These laws parallel, but do not supersede the federal child labor laws. The federal law is similar to the Montana law but is more restrictive in certain areas.

In addition to safety concerns, it is also important that municipalities understand how to deal with child labor standards, as seasonal employees are frequently minors. The Montana Child Labor Standards Act [MCA, 41-2 Part 1](#) should be reviewed to make sure that children/minors are not subjected to prohibited employment conditions.

Sections [41-2-106](#) through [41-2-108 MCA](#), address conditions that affect the employment of minors ages 14- 15; Section [41-2-110](#) addresses exemptions from prohibited employment of minors who are 16-17 years old. [Employment of minors standards can be found at the Department of Labor and Industry](#) website. Please contact MMIA or the Montana Department of Labor and Industry for more information on the employment of minors.

3.1208 Other Benefits

One of the draws to employment with a government agency is the reliability of benefits. Government agencies, whether it be federal, state, county or city, are normally in the forefront of progress and stability for benefits. Following is a brief overview of some of the most commonly provided benefit options for government agencies. Utilizing the benefits as part of the draw to employment can offset the salary issue that is normally present due to budget constraints.

Health benefits include medical, dental and vision plans. There are standard offerings available that include a plan administered through a pool, self-funding, or fully-insured group.

A pool is a group of similar entities that "pool" their resources in order to spread the risk. MMIA is an example of a health plan pool. Each member entity contributes a certain amount per employee, and the pool works with a Third-Party Administrator (TPA) who receives, and processes claims according to the plan designed by the pool/member entity. The biggest cost in a pool is actual claims dollars.

A self-funded group is an entity or employer forming their own plan and contracting with a TPA to administer the claims. The risk is higher with a self-funded group because they absorb the claims as well as the administrative fees (just like a pool) but are restricted to spreading the risk with the amount of people insured from just their entity. A self-funded group is not subject to many of the same regulations as a fully insured group. Often, a self-funded group

(as well as a pool) will contract with a re-insurer. A re-insurer is, essentially, insurance for claims above a set amount. The group pays premiums and then if they have the need to pay on a high dollar claim that reaches the agreed upon threshold, they submit it to the re-insurer.

A *fully insured group* is the more traditional product when insurance is considered. The costs for a fully insured plan can be higher because the risk is not spread through a pool. Funds are directed to claims and administrative fees as well as components such as overhead, taxes, inflation, profit (for the insurance company), etc.

Determining which plan is best depends on many things such as eligibility to belong to a pool, entity size, needs of the municipality, financial solvency, and many more factors. Once that is determined, the actual plans themselves must be designed or chosen. Plan variables include the following:

- *Deductible* - Specified dollar amount that must be incurred before the plan will pay for each benefit period.
- *Co-insurance* - Set percentage amounts that indicate how the plan and covered employee share responsibility of allowable charges.
- *Out of Pocket Maximum (OOP Max)* - The maximum amount of co-insurance that an employee will pay before the plan begins paying 100%. This sometimes includes deductibles and copayments but not always.
- *Copayment* - Specified dollar amount payable by the employee for specific charges, often seen as an “office visit charge”. This amount is charged regardless of if the deductible has been met. It does not apply toward the deductible and usually not toward the Out of Pocket Maximum. The plan pays for any allowable amounts above the copayment.
- *Limitations & Maximums* - These can be visits, treatments, therapies, services or even dollar amounts. For example, a plan may set a limit of 30 chiropractic visits per year.
- *Allowable Amount* - Almost all TPAs utilize provider networks. There may be benefit differentials when utilizing in-network and out-of-network providers. However, the biggest reason to utilize an in-network provider is that those providers accept the set allowable amount as the amount of reimbursement and will not bill the difference between their charge and the allowable amount.

Catching conditions early on is a great preventive measure. Most plans include services that do just that, including, but not limited to, wellness programs, large case management, employee assistance programs, nurse lines, and wellness/preventive screenings.

Flexible Spending Accounts, also referred to as Cafeteria Plans, are pre-tax benefits available under Section 125 of the IRS. It is a tax-advantaged financial account that allows employees to set aside pre-tax earnings for qualified expenses. Qualified expenses include out-of-pocket medical expenses such as deductibles and copayments, dental and vision expenses, and many over-the-counter health items like aspirin or bandages. Dependent child care (daycare) can also qualify as an eligible expense on some Flex Plans. Any portion of health coverage premiums that an employee is responsible for can also be run through the Flex Plan so that premium payments are tax-free too.

Although there are obvious advantages to the employee as they are not paying taxes on these expenses, there are also benefits to the employer. The employer’s share of FICA tax (6%) is saved on every dollar an employee contributes to a Flex Plan. There are fees assessed to the employer to make the plan available. However, the fees are nominal compared to the FICA savings and the benefits made available to the employees.

Other Benefits to Consider

- *Life insurance* for the employee and their spouse and/or dependents - Most employers break this up into an automatic Basic Life policy and a Voluntary Life Policy to which the employee contributes.
- *Accidental Death & Dismemberment (AD&D)* - These premiums are nominal and yet it is insurance for future use if something were to occur. This is usually a supplement to traditional Life Insurance.
- *Short/Long Term Disability* - This is essentially paycheck insurance. Premiums are paid to purchase a policy that ensures ongoing paychecks in case of an extended illness that prohibits the employee from working. This is not Workers' Compensation Insurance that is required for the employer to provide. This is a supplemental policy paid for by the employee.
- *Voluntary Employee Beneficiary Association (VEBA)* - This is another pre-tax benefit available to employees under section 501 of the IRS Code. It is a voluntary group of employees that share an employment-related common bond, such as under the same collective bargaining agreement. This association of employees provides certain specified benefits to its members or their designated beneficiaries. It can be funded by the employer or the employee. Funds are contributed and held in a trust for payment of benefits that typically include health related expenses. The funds are not taxable, nor is the interest earned, however the benefits paid out may or may not be taxable depending upon the benefit.

3.13 Reporting Requirements Related to Personnel Management

3.1301 New Hire Reporting

All new hires must be reported in a timely manner. [The Montana Department of Public Health and Human Services has information regarding reporting new hires](#) on their website.

3.1302 Affirmative Action Plans

Affirmative action plans are required for all federal contractors and subcontractors with over 50 employees and contracts of \$50,000 or more. Such plans require tracking the recruiting efforts to advance qualified minorities, women, persons with disabilities and covered veterans and typically include training programs as well. Requirements on tracking and filing affirmative action plans can be complex. Most larger organizations hire outside consultants to assist with the process.

Affirmative action plans can also be required by a court as a remedy for discrimination or as a voluntary remedy for past patterns of discrimination and are often required as part of receiving grant funds.

3.1303 EEO-4 Forms

All local governments with 15 or more employees are required to keep records and to make reports to the Equal Employment Opportunity Commission. Political jurisdictions with 100 or more employees must file biennially and those with 15-99 employees may be selected as a sample of the employers to submit. [To learn more about how to file visit the US Equal Employment Opportunity Commission's](#) website.

3.1304 Employee Benefits Reports

The Affordable Care Act (ACA) and other regulations may require reporting of information related to the employee benefits a city/town offers. It is important that a city/town work closely with their benefits provider to understand reporting requirements.

3.14 Personnel Records Management

3.1401 Functions of a Personnel Record System

Employee personnel files are a well-constructed layout of an employee's employment history that provide an at-a-glance insight into an individual's work performance, benefits history, prior work performance, criminal and background history, training and development, and numerous other documented employment facts. Personnel records bridge past performance with future opportunities and establish a foundation of documented accounts to be utilized in facilitating references, employment verifications and background inquiries. Each employer may design their own compliant recordkeeping systems. The design of each system must lay a firm foundation and structure supported by concrete policies and practices that assist in the maintenance, retention and safeguarding of employee records. The blueprint for this layout must factor in the employee's privacy, state and federal compliance laws, such as retention and recordkeeping, and employee accessibility to records. In addition, this system must facilitate mandated compliance reporting needs.

Each municipality should include a Personnel File Management Policy in their Personnel Policy Manual. For organizational purposes as well as legal protection, it is recommended that municipalities maintain separate, up-to-date, personnel files for each staff member. Specific questions about what to retain in a municipality's personnel files, especially those addressing confidentiality and public access, should be addressed to legal counsel.

Sample Personnel Management File Policy

The (CITY/TOWN) maintains records on every employee related to their employment with the (CITY/TOWN). The employee's personnel file will contain information such as employment application/resume or cover letter, performance evaluations, training records, commendations and awards, disciplinary records, and resignation/termination records.

Such information will be obtained from the employee or from others with the employee's authorization. Any information obtained for EEOC compliance (Form EEO-4) and/or any medical information will be kept in separate, confidential files and accessed only on a need-to-know basis as authorized by the (MAYOR/CITY MANAGER) and/or their designee so long as it does not violate any laws, regulations or policies set forth in this manual.

Personnel files are confidential and only accessible to others on a need-to-know basis for personnel actions. Upon request to the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director and with the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director present, employees may inspect and make copies of their personnel records. Employees should contact the (MAYOR/CITY MANAGER) and/or their designee or the Clerk/Personnel Director to establish a convenient review time.

3.1402 Personnel Files

All personnel related documents need to be filed in one of the following files:

Main Personnel File— all employees	Medical/ADA File— if applicable— (not to be viewed by supervisor)	Payroll File—all employees	I-9 File—all employees PLUS terminated for 1 year from term OR 3 years from hire (whichever is longer)	Safety Training File
Employment Application/Resume/Cover Letter	Worker's Compensation Information	W4	Separate from personnel file and divided by Active Employees and Terminated Employees	Safety meeting sign-in sheets & materials (i.e. toolbox talks, etc.)
Offer Letter	Medical/Doctor notes	Time Sheets	Suggest keeping a binder or file folder.	Safety training sign-in sheets & materials (i.e. lockout/tagout, HAZCOM, etc.)
Signed Job Description	ADA information	Attendance Records		Task specific training sign-in sheets & materials (i.e. skid steer, mower, chain saw, etc.)
Performance Evaluations	Drug Testing Information	Garnishments/R ecords		
Disciplinary Documents/Letters	EEO Survey	Direct Deposit Information		
Personnel Policy Handbook Receipt		Death Warrant		
New Employee Orientation Checklist- signed		Any other payroll related files		
Promotion Letters or Pay Increase Notices				
Emergency Contact (can keep in a separate file)				
Training and Development Summaries/Certificates (see comment below regarding safety training)				
Grievances from employee				

Personnel file access - Each municipality should develop a policy that identifies who has access to personnel records and for what reasons, as well as develop a records retention guide. Areas to consider in such a policy include the employee, human resources, supervisors, management, and regulatory agencies. Always balance freedom of information with the right to privacy laws. These guidelines should include when and where the file can be accessed, if the contents can be copied and if items can be added, etc. To maintain the integrity of the personnel file, access should be permitted only under some type of supervision. The confidential investigation file should only be accessed by management and HR unless court subpoenaed, then reviewed by legal counsel for release.

Personnel file storage and record retention - Personnel files should be maintained in locked file cabinets in a central location (as opposed to multiple drawers and cabinets in various departments). A good place to start in regard to developing a records retention schedule would be to visit the [Montana Secretary of State's](#) records retention guidelines on their website.

Confidentiality and right to privacy - In regard to the confidentiality of employee personnel files, it is the employee, not the municipality, who has the right to privacy of the information in the file. If a third party requests an employee's personnel records, inform the employee of the request in writing. Allow the employee to review his/her personnel records and identify which items he/she wishes to release. If any right to privacy is exercised, have the employee document in writing which records he/she is willing to release and which he/she wishes to maintain as confidential. Legal counsel should be consulted if there is any question as to what personnel documents should or should not be released to a requesting third party. No federal or state law requires an employer to maintain personnel records; however, various federal and state laws mandate that certain records be kept. For organizational purposes as well as legal protection, keep separate, up-to-date personnel files. The chances of becoming involved in legal actions related to hiring, supervision or firing decrease when personnel records are maintained correctly.

3.1403 Montana Occupational Safety and Health Act

Municipal employers have the legal and moral responsibility to create and maintain a safe and healthful work environment for their employees. The protection of employees is required by law and is essential to the success of the municipality. This section will provide an overview of the occupational safety and health requirements for public sector employers and resources available for improving workplace safety. This section includes some full text references from the Montana Code Annotated and the Administrative Rules of Montana (ARM) because they include very clear direction to municipalities regarding legal obligations for occupational safety and health.

Public sector employers Montana are subject to occupational safety and health rules similar to private sector employers. However, whereas private sector is regulated, and enforcement jurisdiction is held by the federal Occupational Safety and Health Administration (OSHA), public sector is regulated, and enforcement jurisdiction is held by the Montana Department of Labor & Industry.

These rules are the minimum standards that an employer must implement and follow to protect the life, health and safety of employees. These rules are collectively known as the Montana Occupational Safety and Health Act. For complete details of the act, please review MCA Title 50 Chapter 71 Part 1 and ARM 24.30.102 through 24.30.107.

MCA 50-71-114. Rulemaking – variances

- (1) The department may adopt appropriate standards for safety and health by administrative rule, including:
 - (a) any safety or health regulations promulgated by the federal occupational safety and health administration; and
 - (b) standards that are not inconsistent with federal safety and health regulation but that provide for a greater level of protection for employees.
- (2) The department may adopt other rules that are reasonably necessary to implement this part.
- (3) (a) The department may by rule:
 - i) provide a procedure to grant a temporary variance from the particular provisions of a standard; and
 - ii) permit the temporary use of other or different devices or methods than provided by the standard.
- (b) A temporary variance may be granted only if the public sector employer:
 - i) has an effective program for complying with the standard as quickly as practicable;
 - ii) is taking all available steps to safeguard public sector employees against the hazards covered by the standard; and
 - iii) is unable to comply with the standard because:
 - (A) professional or technical personnel needed to implement compliance with the standard are temporarily unavailable;
 - (B) material or equipment needed to comply with the standard is temporarily unavailable; or
 - (C) necessary construction or alternation of facilities cannot be completed by the effective date of the standard.

MCA 50-71-115. Applicability of Standards – exceptions

- (1) The standards for safety and health and the enforcement rules adopted pursuant to this part apply to all public sector employers in this state and to public sector employees.

MCA 50-71-116. Duties of public sector employers and public sector employees

- (1) Each public sector employer shall:
 - (a) Furnish a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm to public sector employees;
 - (b) Adopt and use practices, means, methods, operations, and processes that are adequate to render the workplace safe; and
 - (c) Take appropriate actions necessary to protect the life, health, and safety of public sector employees.
- (2) Each public sector employee shall comply with the safety and health standards, rules, and orders issued pursuant to this part as they apply to the public sector employee's own actions and conduct.

MCA 50-71-11 Public sector employer records and reports.

- (1) Each public sector employer shall maintain records of occupational injuries, illnesses, and deaths as the department may require by rule.
- (2) The department may inspect those records or require that the public sector employer submit those records to the department for its review.
- (3) Except as otherwise provided by rule, a public sector employer complies with the requirements of this section if the public sector employer completes and submits a first report of injury form to the department or to the public sector employer's worker's compensation insurer within 30 days of the public sector employer becoming

aware of an occupational injury, illness, or death.

For additional details on recordkeeping requirements, please reference ARM 24.30.107.

ARM 24.30.102. Occupational Safety and Health Code for Public Sector Employment

- (1) [Section 50-71-114, MCA](#), of the Montana Occupational Safety and Health Act provides that the Department of Labor and Industry may adopt, amend, repeal, and enforce rules for the prevention of accidents to be known as “safety codes” in every employment and place of employment, including the repair and maintenance of such places of employment to render them safe. The federal Occupational Safety and Health Act of 1970 does not include safety standards coverage for employees or political subdivisions of this state. It is the intent of this rule that public sector employees and political subdivisions of this state shall be protected to the greatest extent possible by the same safety standards for employments covered by the federal Occupational Safety and Health Act of 1970. The department is therefore adopting by reference certain occupational safety and health standards, adopted by the United States Secretary of Labor under the federal Occupational Safety and Health Act of 1970. The department has determined, with the assent of the Secretary of State, that publication of the rules would be unduly cumbersome and expensive. Copies of the rules adopted by reference are available and may be obtained at cost from the Montana Department of Labor and Industry, P.O. Bo 1728, Helena, Montana 59624-1728, or the Superintendent of Documents, United States Government Printing Office, 941 North Capitol Street, Washington, D.C. 20401.
- (2) As used in the rules adopted by reference in (3) and (4) (a), unless the context clearly requires otherwise, the following definitions apply:
 - (a) "Act" means the Montana Occupational Safety and Health Act (50-71-111 through 50-71-128, MCA).
 - (b) "Assistant secretary of labor" or "secretary" means the commissioner of the Montana Department of Labor and Industry.
 - (c) "Employee" or "public sector employee" means every person in this state, including a contractor other than an independent contractor, who is in the service of a public sector employer, as defined below, under any appointment or contract of hire, expressed or implied, oral, or written.
 - (d) "Employer" or "public sector employer" means this state and each county, city and county, city school district, irrigation district, all other districts established by law, and all public corporations and quasi-public corporations and public agencies therein who have any person in service under any appointment or contract of hire, expressed or implied, oral or written.
 - (e) “Establishment” means a single physical location where business is conducted or where services or industrial operations are performed. For activities where employees do not work at a single physical location, such as construction, transportation, communications, electric, gas and sanitary services, and similar operations, an establishment exists as each main or branch office, terminal, station, etc. that either supervise such activities or are the base from which personnel carry out these activities.
 - (f) “Injury or illness” means an abnormal condition or disorder.
 - (i) An injury includes cases such as, but not limited to a cut, fracture, sprain, or amputation.
 - (ii) An illness includes both acute and chronic illnesses, such as, but not limited to a skin disease, respiratory disorder, or poisoning.
- (3) The Department of Labor and Industry adopts a safety code for every place of employment conducted by a public sector employer. This safety code adopts by reference the following occupational safety and health standards found in the Code of Federal Regulations, as of July 1,2018:
 - (a) Title 29, Part 1910; and
 - (b) Title 29, Part 1926.
- (4) The Department of Labor and Industry adopts reporting requirements related to occupational safety and health

for every place of employment conducted by a public sector employer.

- (a) The reporting requirements adopted by reference are the following occupational safety and health reporting requirements found in the Code of Federal Regulations, as of July 1, 2018:
 - (i) 29 CFR 1904.4 through 1904.11;
 - (ii) 29 CFR 1904.29 through 1904.33;
 - (iii) 29 CFR 1904.35 and 1904.36; and
 - (iv) 29 CFR 1904.39 through 1904.42
 - (b) For the purposes of reporting fatalities, hospitalizations, amputations, and loss of an eye pursuant to 29 CFR 1904.39, the employer is to contact the Montana Department of Labor and Industry safety bureau by:
 - (i) electronic submission to the reporting application at the safety bureau's public web site at <http://erd.dli.mt.gov/safety-health>; or
 - (ii) telephone at 1-844-669-5461 (toll free).
- (5) All sections adopted by reference are binding on every public sector employer even though the sections are not separately printed in a separate state pamphlet and even though they are omitted from publication in the Montana Administrative Register and the Administrative Rules of Montana. The safety standards adopted above and printed in the Code of Federal Regulations, Title 29, as of July 1, 2014, are considered under this rule as the printed form of the safety code and shall be used by the department and all public sector employers, employees, and other persons when referring to the provisions of the safety code. All the provisions, remedies, and penalties found in the Montana Occupational Safety and Health Act apply to the administration of the provisions of the safety code adopted by this rule.
- (6) For convenience, the federal number of a particular section found in the Code of Federal Regulations should be used when referring to a section in the safety code adopted in (3). The federal number is to be preceded by the term (5). Thus, when section 1910.27 of the Code of Federal Regulations pertaining to fixed ladders is to be referred to or cited, the correct cite would be "subsection (5) 1910.27 of section 24.30.102 ARM" or "ARM 24.30.102(5) 1910.27".

3.1404 Safety in Mines Other Than Coal Mines

Municipalities that have mining operations, such as sand and gravel operations, have additional standards for safety and health in the workplace as it relates to those operations. Mining operations are governed by the Federal Mine Safety and Health Act of 1977, with regulation and enforcement held jointly by the federal Mine Safety and Health Administration (MSHA) and the Montana Department of Labor & Industry. These rules are the minimum standards that an employer must implement and follow to protect the life, health and safety of employees in mining operations.

MCA 50-72-101 Applicability of Chapter

This chapter shall apply to all mines (except coal and lignite) and individuals, owners, lessors, lessees, agents, partnerships, corporations, managers, operators, or employers operating any surface or underground metal or nonmetallic mines in this state. These individuals, owners, lessors, lessees, agents, partnerships, corporations, managers, operators, or employers operating any surface or underground metal or nonmetallic mines (excluding coal and lignite) shall report the same to the department, state the name of the mine, the location of the same, the name of the company, person, or persons owning or operating the same, post-office address, and number of persons employed.

ARM 24.30.1311. INCORPORATION BY REFERENCE OF RULES REGARDING EMPLOYEE HEALTH AND SAFETY IN MINES OTHER THAN COAL MINES

- (1) The department of labor and industry adopts and incorporates by reference the United States department of labor, mine safety and health administration's regulations, Title 30, Code of Federal Regulations, Parts 46, 47, 48,49, 50, 56, 57, 58, and 62, revised as of July 1, 2004.
- (2) The regulations incorporated by reference in (1) relate to the following:
 - (a) Training and retraining of miners engaged in shell dredging or employed at sand, gravel, surface stone, surface clay, colloidal phosphate, or surface limestone mines;
 - (b) Hazard communication (HAZCOM);
 - (c) Training and retraining of miners;
 - (d) Mine rescue teams;
 - (e) Notification, investigation, reports and records of accidents, injuries, illnesses, employment and production in mines;
 - (f) Safety and health standards – surface metal and nonmetal mines;
 - (g) Safety and health standards – underground metal and nonmetal mines;
 - (h) Health standards for metal and nonmetal mines; and
 - (i) Occupational noise exposure.
- (3) Copies of the regulations incorporated by reference in (1) may be obtained at cost from the Montana Department of Labor and Industry, P.O. Box 1728, Helena, Montana 59624-1728, or the Superintendent of Documents, United States Government Printing Office, 941 North Capitol Street, Washington, D.C. 20401.

3.1405 Montana Safety Culture Act

In addition to the requirements found in Montana Code Annotated Title 50 Health and Safety, Chapter 71 Occupational Safety and Health that are listed above, all employers of Montana are subject to the Montana Safety Culture Act, found under Title 39 Labor, Chapter 71 Workers' Compensation.

MCA 39-71-502 Purpose

The purpose of this part is to reduce the incidence of occupational injury and illness by promoting safety in the workplace in order to control the costs of claims for workers' compensation insurance. The creation of a safety culture requires employers to provide training and education to make safety awareness part of the requirement for each

worker's satisfactory job performance and requires the department to promote safety awareness for the public through education and preparation of each student for entrance into the labor market. A reduction in workplace injuries, illnesses, and deaths through enhanced safety on the job benefits the public as well as the employers and the employees by lowering both financial and physical costs. Ensuring immunity to insurers in the provision of safety consultation services encourages and promotes safety in the workplace and improves the relationship between employers and employees.

MCA 39-71-1505 Rulemaking authority.

The department shall adopt rules, including but not limited to rules that require:

- (1) Each employer to conduct an educational- based safety program, including but not limited to:
 - (a) A safety program to provide:

- (i) New employee general safety orientation;
 - (ii) Job or specific safety training; and
 - (iii) Continuous refresher safety training, including periodic safety meetings;
 - (b) Periodic hazard assessment, with corrective actions identified; and
 - (c) Appropriate documentation of performance of the activities; and
- (2) An employer of more than five employees to have a comprehensive and effective safety program, including but not limited to:
- (a) Subject to subsection (3), a safety committee composed of employee and employer representatives that holds regularly scheduled meetings;
 - (b) Procedures of reporting and investigation for all work-related incidents, accidents, injuries, and illnesses; and
 - (c) Policies and procedures that assign specific safety responsibilities and safety performance accountability.

For additional details on requirements for employer safety programs and the Montana Safety Culture Act, please reference ARM 24.30.2521, ARM 24.30.2541, and ARM 24.30.2542.

3.1406 Links to Federal Safety & Health Standards

Reference the links below to review the federal standards that have been incorporated by reference into the Montana Occupational Safety and Health Act.

Federal Occupational Safety and Health Act of 1970

[Code of Federal Regulation Title 29, Part 1910](#)

[Code of Federal Regulation Title 29, Part 1926](#)

The Federal Mine Safety and Health Act of 1977

[Mine Safety and Health Act website](#)

[Code of Federal Regulation Title 30, Parts 46,47,48,49](#), [Part 50](#); [Parts 56,57,58](#); and [Part 62](#)

3.1407 Resources for Developing a Safer Workplace

Resources available to municipalities for developing a safer workplace include:

- (1) **Montana Municipal Interlocal Authority (MMIA)** - Members of the MMIA have access to onsite and telephone consultations to review operations and exposures; on-site training; custom webinars; regional group training opportunities, quarterly newsletters; risk management bulletins; video libraries; sample policies; and, self-audit tools. Visit www.mmia.net or call (406) 443-0907 for more information.
- (2) **Montana Department of Labor and Industry** – DOL provides consulting services for employers with less than 250 employees.
 - [DOL consulting can be accessed through their website](#) or by calling (406) 494-0324.
 - DOL provides several training opportunities:
 - Safety First is free general safety and health training open to all employers. Find out more at <http://safetyfestmt.com/>.
 - A range of mine safety and health training opportunities are offered to all. Find out more at [DOL's Mine Safety and Health website](#) or by calling (406) 444-6401.

- (3) **Insurance carriers-** For municipalities that are not members of the MMIA self-funded coverages, contact your workers' compensation insurance carrier for a list of services.