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HB 237

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MEMORANDUM

TO: House Business and Labor Committee

FROM: Steve Bullock (on behalf of MEA-MFT)

RE: House Bill 237

DATE: January 20, 2004

On behalf of MEA-MFT, I am submitting this memorandum regarding House Bill 237, specifically addressing (a) the conformity of House Bill 237 with federal law; and (b) potential legal impediments to Mont. Code Ann. § 30-51-2108 if HB 237 is not passed.

I. Removing Obstacles to Non-instructional Employees Applying for UI Benefits

A. Current Law

Montana Code Ann. § 30-51-2108 denies non-instructional employees from applying for or receiving unemployment benefits between academic terms, and provides in relevant part:

> (2) Benefits based on services in any other capacity for an educational institution must be denied to any individual for any week which commences during a period between 2 successive academic years or terms if the individual performs the services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the services in the second of the academic years or terms. If any individual is denied benefits and was not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, the individual is entitled to a retroactive payment of the benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of the denial provided for in this section.

The statutory language of Mont. Code Ann. § 39-51-2108 is nearly identical to provisions found in federal law. *See* 26 U.S.C. § 3304(a)(6). Presumably, it is similar because federal law requires that the U.S. Secretary of Labor approve the state statutes in order for businesses to receive a federal tax credit for state employment insurance taxes paid. *See* 26 U.S.C. §§ 3302 and 3304(a); *see also Berland v. Employment Sec. Dept.*, 760 P.2d 959 (Wash. Ct. App. 1988) ("The purpose of RCW 50.44.050 is to bring Washington into compliance with federal law, specifically 26 U.S.C. § 3304, in order to obtain federal funds for unemployment compensation.").

Accordingly, states have a powerful incentive to adhere to federal law. However, this "incentive" does not equate to unlawful federal coercion. *See Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937) ("Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation.").

B. Proposed Amendment: Allowing Application for Benefits Unless Contrary to Federal Law

Understanding the origin of the Montana statute and the overshadowing role that the federal government has played in shaping the terms of this debate is critical to moving forward. As Sen. Harrington explained last session, benefits were provided to non-instructional employees until 1983 when Congress made the denial of those benefits a precondition to receiving the Federal Tax Credit. *See Minutes, Senate Educ. & Cultural Res. Comm.* (58th Leg., Jan. 15, 2003); *see also Pub.L. 98-21, § 521(a)(2)* (1983 Amendments to § 3304 (a)(6)(A)(ii)(I), (iii), (iv) substituting "shall be denied" for "may be denied"). Congress reversed course in 1991, making the provisions relating to non-instructional employees directory rather than mandatory. *See Pub.L.102-164, § 302(a)(1)*. And, although federal law now permits states to elect to provide unemployment benefits to non-instructional employees and still receive the federal tax credit, any change in state law must still conform with federal law in order to maintain the tax benefits. *See* 26 U.S.C. §§ 3301-3304.

As a result, the proposed amendments as reflected by HB 237 closely follow language adopted by other states. Specifically, HB 237 amends § 30-51-2108(2) as follows:

> (2) Benefits based on services in any other capacity for an educational institution ~~must~~ shall not be denied to any individual for any week which commences during a period between 2 successive academic years or terms if the individual performs the services in the first of the academic years or terms and there is a reasonable assurance that the individual will perform the services in the second of the academic years or terms, unless a denial is required as a condition for full tax credit against the tax imposed by the federal unemployment tax act, chapter 23 of subtitle C of the internal revenue code of 1986, 26 U.S.C. 3301 to 3311. ~~If any individual is denied benefits and was not offered an opportunity to perform the services for the educational institution for the second of the academic years or terms, the individual is entitled to a retroactive payment of the benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely by reason of the denial provided for in this section.~~

Additionally, HB 237 adds definitions of instructional, research and administrative capacity, to lessen any ambiguities regarding the applicability of the provisions. Of most importance, the provision, as proposed with Rep. Juneau's amendments, defines "instructional service" as

> a service performed for an educational institution or educational service agency either on a full-time or part-time basis and consists of teaching in formal classroom or seminar situations, tutoring, or lecturing for the purpose of imparting knowledge, or counseling, advising, or otherwise determining curriculum, courses, and academic pursuits for students.

House Bill 237 presents several foreseeable advantages over simply striking the section, as has been proposed in the past. First, it is patterned after provisions drawn from current Michigan law and Illinois and Iowa administrative rules, thereby ensuring that there will be no federal compliance issues. *See Mich. Stat. Ann. § 421.27; 56 Ill. Adm. Code 2915.1.*

Additionally, by referencing the federal statute, it is ensures continuing consistency with that law. The federal tax credit for employers is and will remain an overwhelmingly forceful incentive to maintain consistency with the federal requirements. Expressly acknowledging that Montana will adhere to the federal guidelines, even at the expense of providing benefits to the non-instructional employees, removes any concern that we might place all Montana employers in jeopardy for the benefit of these public employees.

C. Proposed Amendment Eliminates Potential Constitutional Problems with the Current Law.

In addition to reasons of equity and federal conformity, HB 237 should also be enacted to limit exposure to the legal infirmities of the current state law. As an overview, the ability to successfully challenge a statute turns largely on the level of scrutiny that will be applied:

> A determination regarding the constitutionality of a statute begins with an analysis of the particular rights involved and the corresponding level of scrutiny to apply to the legislation. We review the constitutionality of statutes under one of three recognized levels of scrutiny--strict scrutiny, middle-tier scrutiny and the rational basis test. Strict scrutiny is the most stringent standard and it is applied when the challenged legislation infringes on a fundamental right or discriminates against a suspect class. Middle-tier scrutiny is used only in limited circumstances where the right at issue has some origin in the Montana Constitution but is not a fundamental right. Finally, the rational basis test is applied when the right under examination is not fundamental and does not warrant middle-tier scrutiny.

Estate of McCarthy v. Montana Second Judicial Dist. Court, 297 Mont. 212, 217, 994 P.2d 1090, 1093-94 (Mont. 1999) (internal citations omitted). As currently in force, under either a rational basis or a strict scrutiny review, Mont. Code Ann. § 30-51-2108(2) raises significant questions of legality.

i. Rational Basis Review

In other states, statutes comparable to Mont. Code Ann. § 30-21-2108(2) have been challenged on equal protection grounds, asserting that it is unconstitutional to provide one class or group benefits, while denying another group. However, because teachers are not a "suspect class" and a fundamental right is not involved, the rational relation standard has been applied in those instances. "A statute is constitutional under the rational basis test if the objective of the statute is legitimate and bears a rational relationship to the classification used by the legislature, meaning that the statute will withstand constitutional scrutiny if it is rationally related to a legitimate public purpose." *Id.*

With that said, those cases holding that the statutes are rationally related to a legitimate government purpose contain reasoning calling into question the legality of the Montana statute. In many instances, the courts have partially based their holding on the fact that the challenged statutes are uniform in application. As the court explained in *Michigan State Employees Ass'n,* 290 N.W.2d 729, "It appears that the legislature has uniformly excluded some seasonal employees from unemployment benefits for the purpose of protecting the fiscal integrity". Similarly, in upholding the denial of benefits to a tenured teacher, the Massachusetts Supreme Court explained that the teacher "introduced no evidence whatever to show that the application of [the state statute] results in any invidious discrimination against teachers, in the sense that other types of employees similarly situated are treated differently." *Cusack v. Division of Employment Security*, 378 N.E.2d 992, 994 (Mass. 1978). The Massachusetts court concluded that the statute was rationally related to a legitimate governmental purpose and explained that because "[t]he record suggests no other 'discrimination' occurred here than a discrimination between employees who are still under contract of employment and those whose employment relationship has been severed." *Id.*

While the policy may have uniform and nondiscriminatory application when the review is limited to educators, the same does not hold true as it relates to non-instructional employees. When considering the bus drivers, janitors and many other categories of school employees with private sector analogues, often performing the exact same tasks for similar employers, a forceful argument can be made that Mont. Code Ann. § 30-51-2108 does result in invidious discrimination by treating other similarly situated employees differently.

ii. Strict Scrutiny Review

The statute is also subject to challenge on the grounds that it impedes upon the fundamental right to pursue life's basic necessities, as guaranteed by Mont. Const. Art. II,sec. 3.[1]

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[1] Mont. Const. Art. II, sec 3 provides:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.

In *Wadsworth v. State*, 275 Mont. 287, 299, 911 P.2d 1165, 1172, the Montana Supreme Court held that "[t]he inalienable right to pursue life's basic necessities is . . . a fundamental right [and] the opportunity to pursue employment is, nonetheless, necessary to enjoy the right to pursue life's basic necessities." *Wadsworth* dealt with a Department of Revenue real estate appraiser that was discharged for violating an agency policy precluding DOR appraisers from engaging in appraisals, real estate sales or brokerage activities during their off hours. The Court explained the relation between employment and pursuing life's basic necessities as follows:

> As a practical matter, employment serves not only to provide income for the most basic of life's necessities, such as food, clothing, and shelter for the worker and the worker's family, but for many, if not most, employment also provides their only means to secure other essentials of modern life, including health and medical insurance, retirement, and day care. We conclude that without the right to the opportunity to pursue employment, the right to pursue life's basic necessities would have little meaning, because it is primarily through work and employment that one exercises and enjoys this latter fundamental constitutional right.

Wadsworth, 275 Mont. at 300, 911 P.2d at 1172. The Court then held that the rule was subject to strict scrutiny and that the State was unable to demonstrate either a compelling state interest or that the Rule was "the least onerous path that [could] be taken to achieve the state objective." *Id.*, 275 Mont. at 302-305, 911 P.2d at 1173-1175.

Similar to *Wadsworth*, even if Mont. Code Ann. § 30-51-2108(2) is not facially unconstitutional, it may "implicate [the non-instructional employee]'s fundamental right of the opportunity to pursue employment." *Id.* 275 Mont. at 303, 911 P.2d at 1174. As the Montana Supreme Court explained, "The constitutionality of the conflict-of-interest rule itself is not the issue, but rather whether the State has infringed Wadsworth's fundamental right without providing a compelling interest for doing so." *Id.; see also Montana Envtl. Info. Ctr. v. Department of Envtl. Quality*, 296 Mont. 207, 225, 988 P.2d 1236, 1246 (Mont. 1999) ("the right to a clean and healthful environment is a fundamental right. . . and that any statute or rule which implicates that right must be strictly scrutinized."). Hence, while applying this line of cases to the instant matter is an extension of the reasoning of *Wadsworth* and *Montana Envtl. Info. Ctr.*, it is logical to assume that a statute that impacts the opportunity to work and make a living for some more than others similarly situated ***implicates*** fundamental rights contained Mont. Const. Art. II, sec. 3.

Accordingly, no matter which standard of review is applied, there is reason to carefully consider whether Mont. Code Ann. § 30-51-2108 would survive judicial review once challenged.

II. CONCLUSION

HB 237 provides the Legislature an opportunity to (a) remove current inequities in law; ensure continuity and cost-effective employment practices in our districts; (c) ensure continued compliance with federal law; and (d) eliminate the susceptibility of the current statute to legal challenge.