HEALTH CARE & BENEFITS DIVISION

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Employee Right to Privacy

- Employee has a right of privacy under Montana Constitution Article II, Section 10
- Employees have a subjective and objectively reasonable expectation of privacy in the non-disclosure of sensitive personal information to third parties.
  - Does employee have a subjective and/or actual expectation of privacy in employment records?
  - Is that expectation reasonable?
- Employers have sensitive personal information on employees, such as drug testing results, FMLA or disability documentation, notes about employee illness, and work injury documentation.
  - Employees generally expect their medical information to be kept confidential.
  - Reasonable expectation? Yes.

Employee Right to Privacy

Do HIPAA privacy rules apply to medical information on an employee's work injury?

- No. HIPAA privacy rules do not apply to workers compensation insurers, workers compensation administrative agencies, or employers (except for employers that are healthcare providers).
- But see 50-16-527(4),MCA. Health care providers can disclose medical information about a claimant's condition to the work comp insurer or the work comp insurer's agent – with a signed claim for workers compensation or occupational disease benefits.
    - 39-71-116, MCA defines an insurer as an employer that self-funds, the Montana State Fund, and other work comp insurers. An insurer does not include an employer like a state agency.

Employee Right to Privacy

No Montana law permits a healthcare provider to disclose medical information to an employer without the employee's prior authorization.

Employee Right to Privacy

If the employee shares medical information about his or her condition with the employer, is that information protected?

- Not under the HIPAA privacy rules.
- But an employee has a subjective or actual expectation of privacy in the employee's medical records, and society considers that expectation reasonable. The employee's medical information should be handled confidentially by the employer.

Employee Right to Privacy

- Questions?