

SENATE BILL NO. 242

INTRODUCED BY J. BRENDEN

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4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING WORKERS' COMPENSATION LAW; REVISING THE  
5 DEFINITION OF "CASUAL EMPLOYMENT" TO INCLUDE WITH RESPECT TO AGRICULTURE EMPLOYMENT  
6 THAT IS IRREGULAR, UNPREDICTABLE, SPORADIC, AND BRIEF IN NATURE; PROVIDING THAT THE  
7 RENEWAL FEE FOR AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE MAY NOT EXCEED \$25  
8 FOR A 2-YEAR RENEWAL PERIOD; REVISING RENEWAL PROCEDURES FOR INDEPENDENT  
9 CONTRACTOR EXEMPTION CERTIFICATES; AMENDING SECTIONS 39-71-116 AND 39-71-417, MCA; AND  
10 PROVIDING AN EFFECTIVE DATE."

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12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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14 **Section 1.** Section 39-71-116, MCA, is amended to read:

15 **"39-71-116. Definitions.** Unless the context otherwise requires, in this chapter, the following definitions  
16 apply:

17 (1) "Actual wage loss" means that the wages that a worker earns or is qualified to earn after the worker  
18 reaches maximum healing are less than the actual wages the worker received at the time of the injury.

19 (2) "Administer and pay" includes all actions by the state fund under the Workers' Compensation Act  
20 necessary to:

- 21 (a) investigation, review, and settlement of claims;
- 22 (b) payment of benefits;
- 23 (c) setting of reserves;
- 24 (d) furnishing of services and facilities; and
- 25 (e) use of actuarial, audit, accounting, vocational rehabilitation, and legal services.

26 (3) "Aid or sustenance" means a public or private subsidy made to provide a means of support,  
27 maintenance, or subsistence for the recipient.

- 28 (4) "Beneficiary" means:
- 29 (a) a surviving spouse living with or legally entitled to be supported by the deceased at the time of injury;
- 30 (b) an unmarried child under 18 years of age;

1 (c) an unmarried child under 22 years of age who is a full-time student in an accredited school or is  
2 enrolled in an accredited apprenticeship program;

3 (d) an invalid child over 18 years of age who is dependent, as defined in 26 U.S.C. 152, upon the  
4 decedent for support at the time of injury;

5 (e) a parent who is dependent, as defined in 26 U.S.C. 152, upon the decedent for support at the time  
6 of the injury if a beneficiary, as defined in subsections (4)(a) through (4)(d), does not exist; and

7 (f) a brother or sister under 18 years of age if dependent, as defined in 26 U.S.C. 152, upon the decedent  
8 for support at the time of the injury but only until the age of 18 years and only when a beneficiary, as defined in  
9 subsections (4)(a) through (4)(e), does not exist.

10 (5) "Business partner" means the community, governmental entity, or business organization that provides  
11 the premises for work-based learning activities for students.

12 (6) "Casual employment" means employment that is:

13 (a) not in the usual course of the trade, business, profession, or occupation of the employer; or

14 (b) with respect to agriculture, irregular, unpredictable, sporadic, and brief in nature and with regard to  
15 which both the employer and employee have liability insurance.

16 (7) "Child" includes a posthumous child, a dependent stepchild, and a child legally adopted prior to the  
17 injury.

18 (8) (a) "Construction industry" means the major group of general contractors and operative builders,  
19 heavy construction (other than building construction) contractors, and special trade contractors listed in major  
20 group 23 in the North American Industry Classification System Manual.

21 (b) The term does not include office workers, design professionals, salespersons, estimators, or any  
22 other related employment that is not directly involved on a regular basis in the provision of physical labor at a  
23 construction or renovation site.

24 (9) (a) "Claims examiner" means an individual who, as a paid employee of the department, of a plan No.  
25 1, 2, or 3 insurer, or of an administrator licensed under Title 33, chapter 17, examines claims under chapter 71  
26 to:

27 (i) determine liability;

28 (ii) apply the requirements of this title;

29 (iii) settle workers' compensation or occupational disease claims; or

30 (iv) determine survivor benefits.

- 1 (b) The term does not include an adjuster as defined in 33-17-102.
- 2 (10) "Days" means calendar days, unless otherwise specified.
- 3 (11) "Department" means the department of labor and industry.
- 4 (12) "Fiscal year" means the period of time between July 1 and the succeeding June 30.
- 5 (13) (a) "Household or domestic employment" means employment of persons other than members of the  
6 household for the purpose of tending to the aid and comfort of the employer or members of the employer's family,  
7 including but not limited to housecleaning and yard work.
- 8 (b) The term does not include employment beyond the scope of normal household or domestic duties,  
9 such as home health care or domiciliary care.
- 10 (14) "Insurer" means an employer bound by compensation plan No. 1, an insurance company transacting  
11 business under compensation plan No. 2, or the state fund under compensation plan No. 3.
- 12 (15) "Invalid" means one who is physically or mentally incapacitated.
- 13 (16) "Limited liability company" has the meaning provided in 35-8-102.
- 14 (17) "Maintenance care" means treatment designed to provide the optimum state of health while  
15 minimizing recurrence of the clinical status.
- 16 (18) "Medical stability", "maximum healing", or "maximum medical healing" means a point in the healing  
17 process when further material improvement would not be reasonably expected from primary medical treatment.
- 18 (19) "Objective medical findings" means medical evidence, including range of motion, atrophy, muscle  
19 strength, muscle spasm, or other diagnostic evidence, substantiated by clinical findings.
- 20 (20) (a) "Occupational disease" means harm, damage, or death arising out of or contracted in the course  
21 and scope of employment caused by events occurring on more than a single day or work shift.
- 22 (b) The term does not include a physical or mental condition arising from emotional or mental stress or  
23 from a nonphysical stimulus or activity.
- 24 (21) "Order" means any decision, rule, direction, requirement, or standard of the department or any other  
25 determination arrived at by the department.
- 26 (22) "Palliative care" means treatment designed to reduce or ease symptoms without curing the  
27 underlying cause of the symptoms.
- 28 (23) "Payroll", "annual payroll", or "annual payroll for the preceding year" means the average annual  
29 payroll of the employer for the preceding calendar year or, if the employer has not operated a sufficient or any  
30 length of time during the calendar year, 12 times the average monthly payroll for the current year. However, an

1 estimate may be made by the department for any employer starting in business if average payrolls are not  
2 available. This estimate must be adjusted by additional payment by the employer or refund by the department,  
3 as the case may actually be, on December 31 of the current year. An employer's payroll must be computed by  
4 calculating all wages, as defined in 39-71-123, that are paid by an employer.

5 (24) "Permanent partial disability" means a physical condition in which a worker, after reaching maximum  
6 medical healing:

7 (a) has a permanent impairment established by objective medical findings;

8 (b) is able to return to work in some capacity but the permanent impairment impairs the worker's ability  
9 to work; and

10 (c) has an actual wage loss as a result of the injury.

11 (25) "Permanent total disability" means a physical condition resulting from injury as defined in this  
12 chapter, after a worker reaches maximum medical healing, in which a worker does not have a reasonable  
13 prospect of physically performing regular employment. Regular employment means work on a recurring basis  
14 performed for remuneration in a trade, business, profession, or other occupation in this state. Lack of immediate  
15 job openings is not a factor to be considered in determining if a worker is permanently totally disabled.

16 (26) "Primary medical services" means treatment prescribed by a treating physician, for conditions  
17 resulting from the injury, necessary for achieving medical stability.

18 (27) "Public corporation" means the state or a county, municipal corporation, school district, city, city  
19 under a commission form of government or special charter, town, or village.

20 (28) "Reasonably safe place to work" means that the place of employment has been made as free from  
21 danger to the life or safety of the employee as the nature of the employment will reasonably permit.

22 (29) "Reasonably safe tools or appliances" are tools and appliances that are adapted to and that are  
23 reasonably safe for use for the particular purpose for which they are furnished.

24 (30) (a) "Secondary medical services" means those medical services or appliances that are considered  
25 not medically necessary for medical stability. The services and appliances include but are not limited to spas or  
26 hot tubs, work hardening, physical restoration programs and other restoration programs designed to address  
27 disability and not impairment, or equipment offered by individuals, clinics, groups, hospitals, or rehabilitation  
28 facilities.

29 (b) (i) As used in this subsection (30), "disability" means a condition in which a worker's ability to engage  
30 in gainful employment is diminished as a result of physical restrictions resulting from an injury. The restrictions

1 may be combined with factors, such as the worker's age, education, work history, and other factors that affect  
2 the worker's ability to engage in gainful employment.

3 (ii) Disability does not mean a purely medical condition.

4 (31) "Sole proprietor" means the person who has the exclusive legal right or title to or ownership of a  
5 business enterprise.

6 (32) "State's average weekly wage" means the mean weekly earnings of all employees under covered  
7 employment, as defined and established annually by the department before July 1 and rounded to the nearest  
8 whole dollar number.

9 (33) "Temporary partial disability" means a physical condition resulting from an injury, as defined in  
10 39-71-119, in which a worker, prior to maximum healing:

11 (a) is temporarily unable to return to the position held at the time of injury because of a medically  
12 determined physical restriction;

13 (b) returns to work in a modified or alternative employment; and

14 (c) suffers a partial wage loss.

15 (34) "Temporary service contractor" means a person, firm, association, partnership, limited liability  
16 company, or corporation conducting business that hires its own employees and assigns them to clients to fill a  
17 work assignment with a finite ending date to support or supplement the client's workforce in situations resulting  
18 from employee absences, skill shortages, seasonal workloads, and special assignments and projects.

19 (35) "Temporary total disability" means a physical condition resulting from an injury, as defined in this  
20 chapter, that results in total loss of wages and exists until the injured worker reaches maximum medical healing.

21 (36) "Temporary worker" means a worker whose services are furnished to another on a part-time or  
22 temporary basis to fill a work assignment with a finite ending date to support or supplement a workforce in  
23 situations resulting from employee absences, skill shortages, seasonal workloads, and special assignments and  
24 projects.

25 (37) "Treating physician" means a person who is primarily responsible for the treatment of a worker's  
26 compensable injury and is:

27 (a) a physician licensed by the state of Montana under Title 37, chapter 3, and has admitting privileges  
28 to practice in one or more hospitals, if any, in the area where the physician is located;

29 (b) a chiropractor licensed by the state of Montana under Title 37, chapter 12;

30 (c) a physician assistant licensed by the state of Montana under Title 37, chapter 20, if there is not a

- 1 treating physician, as provided for in subsection (37)(a), in the area where the physician assistant is located;
- 2 (d) an osteopath licensed by the state of Montana under Title 37, chapter 3;
- 3 (e) a dentist licensed by the state of Montana under Title 37, chapter 4;
- 4 (f) for a claimant residing out of state or upon approval of the insurer, a treating physician defined in
- 5 subsections (37)(a) through (37)(e) who is licensed or certified in another state; or
- 6 (g) an advanced practice registered nurse licensed by the state of Montana under Title 37, chapter 8.
- 7 (38) "Work-based learning activities" means job training and work experience conducted on the premises
- 8 of a business partner as a component of school-based learning activities authorized by an elementary, secondary,
- 9 or postsecondary educational institution.
- 10 (39) "Year", unless otherwise specified, means calendar year."

11

12 **Section 2.** Section 39-71-417, MCA, is amended to read:

13 **"39-71-417. Independent contractor certification.** (1) (a) (i) Except as provided in subsection (1)(a)(ii),

14 a person who regularly and customarily performs services at a location other than the person's own fixed

15 business location shall apply to the department for an independent contractor exemption certificate unless the

16 person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or

17 3.

18 (ii) An officer or manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) may apply, but is not

19 required to apply, to the department for an independent contractor exemption certificate.

20 (b) A person who meets the requirements of this section and receives an independent contractor

21 exemption certificate is not required to obtain a personal workers' compensation insurance policy.

22 (c) For the purposes of this section, "person" means:

- 23 (i) a sole proprietor;
- 24 (ii) a working member of a partnership;
- 25 (iii) a working member of a limited liability partnership; or
- 26 (iv) a working member of a member-managed limited liability company.

27 (2) The department shall adopt rules relating to an original application for or renewal of an independent

28 contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or

29 certificate renewal. The renewal fee must be for a 2-year period and may not exceed \$25. The application or

30 renewal must be accompanied by the fee.

1 (3) The department shall deposit the application or renewal fee in an account in the state special revenue  
2 fund to pay the costs of administering the program.

3 (4) (a) To obtain an independent contractor exemption certificate, the applicant shall swear to and  
4 acknowledge the following:

5 (i) that the applicant has been and will continue to be free from control or direction over the performance  
6 of the person's own services, both under contract and in fact; and

7 (ii) that the applicant is engaged in an independently established trade, occupation, profession, or  
8 business and will provide sufficient documentation of that fact to the department.

9 (b) For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in  
10 37-47-303, does not imply or constitute control.

11 (5) (a) An applicant for an independent contractor exemption certificate shall submit an application under  
12 oath on a form prescribed by the department and containing the following:

13 (i) the applicant's name and address;

14 (ii) the applicant's social security number;

15 (iii) each occupation for which the applicant is seeking independent contractor certification; and

16 (iv) other documentation as provided by department rule to assist in determining if the applicant has an  
17 independently established business.

18 (b) The department shall adopt a retention ~~schedule program for maintaining that maintains~~ copies of  
19 documents submitted in support of an initial application or renewal application for an independent contractor  
20 exemption certificate ~~for a minimum of 3 years after an application has~~ after the documents have been received  
21 by the department. The department shall, ~~to the extent feasible,~~ produce renewal applications that reduce the  
22 burden on renewal applicants to supply information that has been previously provided to the department as part  
23 of the application process.

24 (c) An applicant who applies on or after July 1, 2011, to renew an independent contractor exemption  
25 certificate is not required to submit documents that have been previously submitted to the department if:

26 ~~\_\_\_\_\_~~ (i) the applicant certifies under oath on the renewal application that the previously submitted documents  
27 are still valid and current; ~~and~~

28 ~~\_\_\_\_\_~~ (ii) the department, if it considers it necessary, independently verifies a specific document or decides that  
29 a document has not expired pursuant to the document's own terms and is therefore still valid and current.

30 (6) The department shall issue an independent contractor exemption certificate to an applicant if the

1 department determines that an applicant meets the requirements of this section.

2 (7) (a) When the department approves an application for an independent contractor exemption certificate  
3 and the person is working under the independent contractor exemption certificate, the person's status is  
4 conclusively presumed to be that of an independent contractor.

5 (b) A person working under an approved independent contractor exemption certificate has waived all  
6 rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the  
7 person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or  
8 3.

9 (c) For the purposes of the Workers' Compensation Act, a person is working under an independent  
10 contractor exemption certificate if:

11 (i) the person is performing work in the trade, business, occupation, or profession listed on the person's  
12 independent contractor exemption certificate; and

13 (ii) the hiring agent and the person holding the independent contractor exemption certificate do not have  
14 a written or an oral agreement that the independent contractor exemption certificate holder's status with respect  
15 to that hiring agent is that of an employee.

16 (8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:

17 (a) suspended or revoked pursuant to 39-71-418; or

18 (b) canceled by the independent contractor.

19 (9) If the department's independent contractor central unit denies an application for an independent  
20 contractor exemption certificate, the applicant may contest that decision as provided in 39-71-415(2)."

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22 NEW SECTION. **Section 3. Effective date.** [This act] is effective July 1, 2011.

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