

SENATE BILL NO. 287

INTRODUCED BY J. KEANE

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A BILL FOR AN ACT ENTITLED: "AN ACT REQUIRING THAT CERTAIN CORPORATE OFFICERS AND MANAGERS OF MANAGER-MANAGED LIMITED LIABILITY COMPANIES WORKING IN THE CONSTRUCTION INDUSTRY BE COVERED BY WORKERS' COMPENSATION OR OBTAIN AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE; AMENDING SECTIONS 39-71-401 AND 39-71-417, MCA; AND PROVIDING AN EFFECTIVE DATE."

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

Section 1. Section 39-71-401, MCA, is amended to read:

"39-71-401. Employments covered and exemptions -- elections -- notice. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers and to all employees. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

(2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following:

- (a) household or domestic employment;
- (b) casual employment;
- (c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;
- (d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);
- (e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;
- (f) employment as a direct seller as defined by 26 U.S.C. 3508;



1 (g) employment for which a rule of liability for injury, occupational disease, or death is provided under
2 the laws of the United States;

3 (h) employment of a person performing services in return for aid or sustenance only, except employment
4 of a volunteer under 67-2-105;

5 (i) employment with a railroad engaged in interstate commerce, except that railroad construction work
6 is included in and subject to the provisions of this chapter;

7 (j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;

8 (k) employment of a person performing services as a newspaper carrier or freelance correspondent if
9 the person performing the services or a parent or guardian of the person performing the services in the case of
10 a minor has acknowledged in writing that the person performing the services and the services are not covered.

11 As used in this subsection (2)(k):

12 (i) "freelance correspondent" means a person who submits articles or photographs for publication and
13 is paid by the article or by the photograph; and

14 (ii) "newspaper carrier":

15 (A) means a person who provides a newspaper with the service of delivering newspapers singly or in
16 bundles; and

17 (B) does not include an employee of the paper who, incidentally to the employee's main duties, carries
18 or delivers papers.

19 (l) cosmetologist's services and barber's services as referred to in 39-51-204(1)(e);

20 (m) a person who is employed by an enrolled tribal member or an association, business, corporation,
21 or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted
22 solely within the exterior boundaries of an Indian reservation;

23 (n) employment of a jockey who is performing under a license issued by the board of horseracing from
24 the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out
25 after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that
26 the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;

27 (o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing
28 services under a license issued by the board of horseracing while on the grounds of a licensed race meet;

29 (p) employment of an employer's spouse for whom an exemption based on marital status may be
30 claimed by the employer under 26 U.S.C. 7703;

- 1 (q) a person who performs services as a petroleum land professional. As used in this subsection, a
2 "petroleum land professional" is a person who:
- 3 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating
4 a business agreement for the exploration or development of minerals;
- 5 (ii) is paid for services that are directly related to the completion of a contracted specific task rather than
6 on an hourly wage basis; and
- 7 (iii) performs all services as an independent contractor pursuant to a written contract.
- 8 (r) ~~except as provided in subsection (3)~~, an officer of a quasi-public or a private corporation or, EXCEPT
9 AS PROVIDED IN SUBSECTION (3), A manager of a manager-managed limited liability company who qualifies under
10 one or more of the following provisions:
- 11 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the
12 limited liability company and does not receive any pay from the corporation or the limited liability company for
13 performance of the duties;
- 14 (ii) the officer or manager is engaged primarily in household employment for the corporation or the limited
15 liability company;
- 16 (iii) the officer or manager either:
- 17 (A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the
18 limited liability company; or
- 19 (B) owns less than 20% of the number of shares of stock in the corporation or limited liability company
20 if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in
21 subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or
- 22 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,
23 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection
24 (2)(r)(iii)(A) or (2)(r)(iii)(B);
- 25 (s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;
- 26 (t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of
27 the church's ministry or by a member of a religious order in the exercise of duties required by the order;
- 28 (u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care
29 for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the
30 service is employed directly by a family member or an individual who is a legal guardian;

1 (v) employment of a person performing the services of an intrastate or interstate common or contract
 2 motor carrier when hired by an individual or entity who meets the definition of a broker or freight forwarder, as
 3 provided in 49 U.S.C. 13102;

4 (w) employment of a person who is not an employee or worker in this state as defined in 39-71-118(10);

5 (x) employment of a person who is working under an independent contractor exemption certificate;

6 (y) employment of an athlete by or on a team or sports club engaged in a contact sport. As used in this
 7 subsection, "contact sport" means a sport that includes significant physical contact between the athletes involved.
 8 Contact sports include but are not limited to football, hockey, roller derby, rugby, lacrosse, wrestling, and boxing.

9 (z) a musician performing under a written contract.

10 (3) (a) (i) A person who regularly and customarily performs services at locations other than the person's
 11 own fixed business location shall elect to be bound personally and individually by the provisions of compensation
 12 plan No. 1, 2, or 3 unless the person has waived the rights and benefits of the Workers' Compensation Act by
 13 obtaining an independent contractor exemption certificate from the department pursuant to 39-71-417.

14 (ii) Application fees or renewal fees for independent contractor exemption certificates must be deposited
 15 in the state special revenue account established in 39-9-206 and must be used to offset the certification
 16 administration costs.

17 (b) A person who holds an independent contractor exemption certificate may purchase a workers'
 18 compensation insurance policy and with the insurer's permission elect coverage for the certificate holder.

19 (c) For the purposes of this subsection (3), "person" means:

20 (i) a sole proprietor;

21 (ii) a working member of a partnership;

22 (iii) a working member of a limited liability partnership; ~~or;~~

23 (iv) a working member of a member-managed limited liability company; OR

24 ~~(v) an officer of a quasi-public or a private corporation that is engaged in the work of the construction~~
 25 ~~industry as defined in 39-71-116; or~~

26 ~~(vi)~~(v) a manager of a manager-managed limited liability company that is engaged in the work of the
 27 construction industry as defined in 39-71-116.

28 (4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its
 29 employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private
 30 corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or

1 managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

2 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by delivering
3 the notice to the board of directors of the corporation or to the management organization of the
4 manager-managed limited liability company; or

5 (ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by
6 delivering the notice to the board of directors of the corporation or to the management organization of the
7 manager-managed limited liability company and to the insurer.

8 (b) If the employer changes plans or insurers, the employer's previous election is not effective and the
9 employer shall again serve notice to its insurer and to its board of directors or the management organization of
10 the manager-managed limited liability company if the employer elects to be bound.

11 (5) The appointment or election of an employee as an officer of a corporation, a partner in a partnership,
12 a partner in a limited liability partnership, or a member in or a manager of a limited liability company for the
13 purpose of exempting the employee from coverage under this chapter does not entitle the officer, partner,
14 member, or manager to exemption from coverage.

15 (6) Each employer shall post a sign in the workplace at the locations where notices to employees are
16 normally posted, informing employees about the employer's current provision of workers' compensation
17 insurance. A workplace is any location where an employee performs any work-related act in the course of
18 employment, regardless of whether the location is temporary or permanent, and includes the place of business
19 or property of a third person while the employer has access to or control over the place of business or property
20 for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided
21 by the department, distributed through insurers or directly by the department, and posted by employers in
22 accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign
23 as provided in this subsection is subject to a \$50 fine for each citation."
24

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

26 **"39-71-417. Independent contractor certification.** (1) (a) (i) Except as provided in subsection (1)(a)(ii),
27 a person who regularly and customarily performs services at a location other than the person's own fixed
28 business location shall apply to the department for an independent contractor exemption certificate unless the
29 person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or
30 3.

1 (ii) An officer or manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) may apply, but is not
2 required to apply, to the department for an independent contractor exemption certificate.

3 (b) A person who meets the requirements of this section and receives an independent contractor
4 exemption certificate is not required to obtain a personal workers' compensation insurance policy.

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

6 (i) a sole proprietor;

7 (ii) a working member of a partnership;

8 (iii) a working member of a limited liability partnership; ~~or~~

9 (iv) a working member of a member-managed limited liability company; OR

10 ~~(v) an officer of a quasi-public or a private corporation that is engaged in the work of the construction~~
11 ~~industry as defined in 39-71-116; or~~

12 ~~(vi)~~(v) a manager of a manager-managed limited liability company that is engaged in the work of the
13 construction industry as defined in 39-71-116.

14 (2) The department shall adopt rules relating to an original application for or renewal of an independent
15 contractor exemption certificate. The department shall adopt by rule the amount of the fee for an application or
16 certificate renewal. The application or renewal must be accompanied by the fee.

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

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

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

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

25 (b) For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in
26 37-47-303, does not imply or constitute control.

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

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

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

1 (iii) each occupation for which the applicant is seeking independent contractor certification; and
2 (iv) other documentation as provided by department rule to assist in determining if the applicant has an
3 independently established business.

4 (b) The department shall adopt a retention schedule that maintains copies of documents submitted in
5 support of an initial application or renewal application for an independent contractor exemption certificate for a
6 minimum of 3 years after an application has been received by the department. The department shall, to the extent
7 feasible, produce renewal applications that reduce the burden on renewal applicants to supply information that
8 has been previously provided to the department as part of the application process.

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

11 (i) the applicant certifies under oath that the previously submitted documents are still valid and current;
12 and

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

15 (6) The department shall issue an independent contractor exemption certificate to an applicant if the
16 department determines that an applicant meets the requirements of this section.

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

20 (b) A person working under an approved independent contractor exemption certificate has waived all
21 rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the
22 person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or
23 3.

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

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

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

- 1 (8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:
- 2 (a) suspended or revoked pursuant to 39-71-418; or
- 3 (b) canceled by the independent contractor.
- 4 (9) If the department's independent contractor central unit denies an application for an independent
- 5 contractor exemption certificate, the applicant may contest that decision as provided in 39-71-415(2)."

6

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

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