



## Economic Affairs Interim Committee

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### 61st Montana Legislature

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June 25, 2010

### Memo

**To: Economic Affairs Committee Members**  
**From: Pat Murdo, staff**  
**Re: Implications for Exemptions in Montana Workers' Compensation**

Senate Joint Resolution No. 30 included a request that the appropriate interim committee conducting the study of workers' compensation include an examination of exemptions. This requirement can be met either on a narrow basis by looking at certain exemptions and whether they are appropriate or on a broad basis of whether there ought to be more exemptions or no exemptions whatever in workers' compensation. The liability associated with being exempt may help to determine the broad or narrow approach. Workers' compensation, which is known as the exclusive remedy, essentially provides "no fault" insurance, regardless of who might be at fault. Without that "no fault" approach, those who are exempt face other options. This memo describes the liability associated with being exempt. Then the memo provides: an overview of Montana's 26 exemptions ranging from household workers (a) to musicians performing under a contract (z); a review of exemptions in relation to the independent contractor exemption certificate; and concerns about certain exemptions expressed before the Economic Affairs Interim Committee during the SJR 30 study.

- **Liability Associated with Being Exempt.**

The following situations could apply if an exempt person becomes involved in a work-related injury. That person might:

- ▶ **tap regular health insurance benefits and sick leave/vacation.** An exempt person (such as a musician working on evenings with a "day job") might be covered by health insurance and have sick leave or vacation from another job; if so, health insurance and leave benefits from that other job are available (but not the work comp benefits). If the exempt person's spouse has family health insurance coverage through work, then the exempt person might at least get health insurance but no loss of wages for any time required off the job. In some cases, health insurance policies provide that the insurance is secondary to any other insurance, including workers' compensation or perhaps general liability policies, and will not kick in until the other insurance has been exhausted.
- ▶ **turn to a liability policy.** However, liability policies are not workers' compensation coverage. Workers' compensation policies often are sold in conjunction with employer liability coverage. On top of that, many employers have general liability coverage. Confusion enters when a nonwork comp policy has terms that overlap those of workers' compensation. For example, a policy explanation for employer's liability insurance states that the insurance "applies to bodily injury by accident or bodily injury by disease to employees of the insured, unless otherwise excluded". Sounds like workers' compensation. But the employer's liability insurance is for workers exempt from the mandated workers'

compensation coverage and may pay up to policy limits but no more, regardless of injury. Insurance agents note that employer's liability coverage might be included with a general liability or workers' compensation policy to provide coverage for claims attempting to circumvent the exclusive remedy of work comp. According to Chuck Mazurek of Payne Financial Group, "in order for employer's liability coverage to be applicable, separate workers' compensation coverage must be in place". (emphasis in original) Most, if not all, general liability policies clearly exclude workers' compensation for the holder of the policy or that person's employees and only cover damage to others. Mr. Mazurek notes that the absence of the underwriting required to code jobs and set workers' compensation premiums indicates there is no intent to include work comp in a general liability or employer's liability insurance contract. The concern for the hiring entity is that, if damages are substantial, the exempt person may turn to the work site where the injury took place and -- if hired for the job by another person -- sue. The hiring entity might be a homeowner, a business, a motor vehicle owner involved in an accident with the exempt person, or any other entity who could be sued. The lawsuit hinges on negligence and may involve determining contributory negligence (see liability statutes below).

- ▶ **use a "gap" policy.** An exempt person might have a gap policy, such as supplemental disability insurance or coverage (like AFLAC insurance) that pays regardless of whether workers' compensation is available.

- **Costs/Benefits of Being Exempt.**

An employer of an exempt worker avoids the cost of workers' compensation insurance but gambles that no injurious action, caused by the exempt worker or another, will occur. However, if an accident occurs at a work site, the employer or contracting entity can be sued -- for example, for an unsafe work site -- by the exempt worker for wage loss and medical expenses, which would have been covered by workers' compensation insurance. Plus the exempt worker can sue for pain and suffering, loss of consortium, and other losses or sufferings not allowed under workers' compensation. The cost for both employer and exempt worker is the expense in time and money of going to court. The exempt worker risks finding that his or her own negligence might be a significant element that will be weighed to determine if the exempt worker contributed to the accident or contributed more than the "combined negligence of all persons against whom recovery is sought" (see 27-1-701 and 27-1-702, MCA below). The employer or contracting entity faces higher liability insurance premiums and the risk that insurance may not cover all the damages that a court may find compensable, particularly if negligence is involved.

The general liability statute states:

**27-1-701. Liability for negligence as well as willful acts.** Except as otherwise provided by law, each person is responsible not only for the results of the person's willful acts but also for an injury occasioned to another by the person's want of ordinary care or skill in the management of the person's property or person except so far as the person has willfully or by want of ordinary care brought the injury upon the person.

Contributory negligence, a subject of many court cases, is spelled out in 27-1-702:

**27-1-702. (Temporary) Comparative negligence -- extent to which contributory negligence bars recovery in action for damages.** Contributory negligence does not bar recovery in an

action by a person or the person's legal representative to recover damages for negligence resulting in death or injury to the person or property if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought, but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering.<sup>1</sup>

**Bottom line** - An exempt worker may hope for no accidents, but if there is one, that worker is dependent on some other form of health insurance, liability insurance, gap insurance (such as AFLAC), or trying to recover under the liability policy of a business or home where the injured person is working or through a tort claim. A worker employed by an exempt person is required to be covered by workers' compensation insurance unless separately exempt. The hiring entity is exposed to liability if an accident is caused by the employer or someone else at the employer's work site.

- **An overview of Montana exemptions.**

Montana has 26 exemptions -- "a" through "z" of 39-71-401(2). Some of these recognize that federal law supercedes state law (for example, for certain railroad workers). Others parallel exemptions in the unemployment insurance (UI) laws, which provides some uniformity in the treatment of an employee. (UI exclusions must be vetted by federal UI officials prior to seeking legislative exclusion.) Most states exclude from mandatory workers' compensation coverage: domestic employees, casual employees, sole proprietors, and active partners or corporate officers.

In an effort presumably to limit the number of exemptions and clarify the impacts of exemptions, the 2009 Legislature enacted a new set of criteria, recommended by the Labor-Management Advisory Council, that must precede the filing of a bill draft request for a new exemption (see 2-8-501, MCA).

- **Exemptions in relation to the independent contractor exemption certificate.**

The oft-repeated joke in relation to independent contractors is that a worker climbs a ladder to a roof as an independent contractor but falls off as an employee. An independent contractor is exempt from having to obtain workers' compensation insurance if that independent contractor has obtained an exemption certificate from the Department of Labor and Industry. The exemption certificate is considered conclusive presumption that the holder is an independent contractor, exempt from workers' compensation insurance. (Stated in the public policy workers' compensation statute, 39-71-105, MCA.)

A study committee spent the 2005-2006 interim trying to make sure that the conditions for becoming an independent contractor and the statutory references were significant enough to withstand court review. After enactment of Senate Bill No. 108 in the 2005 session, the Department of Labor and Industry revised its process for providing independent contractors with exemption certificates. Now, if an independent contractor with an exemption certificate is injured on the job, that person has the same recourse as other exempt persons under workers' compensation: covering medical costs and lost

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<sup>1</sup>The temporary designation is contingent on the statute being found unconstitutional. A substitute statute is very similar but references "comparative fault".

wages from savings or using liability insurance or lawsuits (mentioned above).

- **Concerns about certain exemptions.**

Economic Affairs Committee members have indicated an interest in the following exemptions or workers' compensation coverage specifications:

**Domestic employees** - As mentioned above, most states exempt domestic employees, although some states specify exemptions up to a certain amount of quarterly or annual payroll. Montana's exemption under 39-71-401(2)(a), MCA, is blanket -- all domestic or household employees. The definition of an employee in 39-71-116, MCA, notes that a household or domestic employee is a person other than a member of a household employed "for the purpose of tending to the aid and comfort of the employer or members of the employer's family, including but not limited to housecleaning and yard work". These are not domiciliary workers who are in a household to help with medical tasks.

**Volunteer firefighters** - Volunteer firefighters (in cities with populations between 5,000 and 10,000 people) are listed as employees under 39-71-118(1)(g). Under that subsection a volunteer firefighter is someone "as described in 7-33-4109<sup>2</sup> or a person who provides ambulance services under Title 7, chapter 34, part 1". Other volunteer firefighters are not required to have workers' compensation insurance, but subsection (4) of 39-71-118 explains how to handle workers' compensation coverage for volunteer firefighters in rural districts. That subsection also specifically excepts volunteer firefighters listed in 7-33-4109 (considered employees, and thus covered) but includes all other enrolled and active members of "a governmental fire agency organized under Title 7, chapter 33...". Then subsection (4)(b) explains how to calculate premium by providing that "volunteer hours" means "all the time spent by a volunteer firefighter in the service of an employer, including but not limited to training time, response time, and time spent at the employer's premises". The concern expressed to committee members is whether a rural fire district premium includes as a basis the hours that a volunteer firefighter might be asleep at the firehouse, because that is time spent on the employer's premises. There is a concern that volunteer hours, including sleeping hours, may be used to determine premiums and benefits under a formula given in subsection (7)(b) of 39-71-118: "... the number of volunteer hours of each firefighter times the average weekly wage divided by 40 hours, subject to a maximum of 1 1/2 times the state's average weekly wage".<sup>3</sup>

The Montana Municipal Interlocal Authority covers about 3,000 volunteers along with 602 paid firefighters, according to Thom Danenhower of MMIA. As a Plan 1 "self-insurer", MMIA has chosen the 7704 class code to apply to payroll estimates "whether the firefighter is at the station 24/7 or just shows up for calls", according to Mr. Danenhower.

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<sup>2</sup>Firefighters described in 7-33-4109, MCA, are firefighters outside of paid departments but recognized by a local government in cities of a second class (cities with populations of less than 10,000 and more than 5,000 people). Volunteers must be enrolled members of the volunteer fire department. They assist the paid fire department. The city's governing body may levy a fire district property tax to buy disability income insurance coverage, which has a limit of the lesser of 1 year or the time that "the treating physician determines that the beneficiary is no longer disabled". (7-6-621, MCA)

<sup>3</sup>Some volunteer firefighters have other jobs or may own their own business. If so, an "assumed wage" or wage based on the other job is to be used to calculate benefits. A volunteer firefighter who has an independent contractor exemption certificate for the other job, however, has not elected workers' compensation coverage and would not receive indemnity benefits based on the independent contractor wages.

The premium does not use the same "volunteer hours" formula as in statute. Instead, MMIA requires members "to declare a \$50 per month or \$150 per quarter, per volunteer" for "wages", on which the premium is based, according to Ann Komac, MMIA's claims manager. The set amount removes the issue about hours spent sleeping on premises.

Mike Taylor, with the National Council on Compensation Insurance, Inc. (NCCI), which provides classification services for Montana insurers, notes that any Plan 2 insurers would cover volunteers for public or municipal fire departments under class code 7711. He said that unless state statutes provide otherwise (as Montana does), "premium for volunteers must be determined on the basis of the payroll normally received by non volunteer employees doing the same or similar work." He noted that "in no case should the payroll of any such volunteer be less than \$300 per volunteer per year".<sup>4</sup>

***Managing members of a limited liability company*** - A working member of a member-managed limited liability company (LLC) is exempt under 39-71-401(2)(d) and has been since 1995. The rationale is that a member-managed LLC allows each member to be an owner, who in sole proprietorships or limited liability partnerships also is provided an exemption. A member manager may elect coverage. However, if a member manager of an LLC works at a location "other than the person's own fixed business location" that person must be covered by either a workers' compensation policy or an independent contractor exemption certificate, as provided in 39-71-401(3)(a). Montana State Fund notes that it has 2,792 active policies identified as member-managed LLCs that are purchasing coverage for their employees. Of the total, 181 LLCs have at least one member-manager covered.

***Volunteers*** - Except for municipal volunteer firefighters, volunteers are not considered employees under 39-71-118(2)(a) through (c), provided they receive no wages as defined in 39-71-123. The definition of wages is sufficiently broad to include "housing if it constitutes a part of the employee's remuneration and is based on its actual value" or the "cash value of all remuneration paid in any medium other than cash" or tips or other gratuities if the employee documents those to the employer for tax purposes.

***Musicians performing under a written contract*** - This newest exemption, enacted in 2009 and codified under 39-71-401(2)(z), is intended to limit the liability of those who hire musicians as well as limit the costs of musicians to buy their own workers' compensation insurance or an independent contractor exemption certificate.

## **Summary**

The only state that has no requirement for workers' compensation coverage, Texas, still sees employers providing coverage. Whether that is an indication that employers see the benefit of no-fault work comp insurance regardless of a mandate is not clear. Neither is it clear that Montana's numerous exemptions are any more or less detrimental to the system than other states' allowing businesses with few employees or certain amount of payroll to be exempt. What more exemptions do provide, however, is less clarity on to whom and how the system applies -- for both employers and employees.

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<sup>4</sup>Emails from April 29, 2010, from Thom Danenhower, Ann Komac, and Mike Taylor.