



# THE INTERIM

April 2010

A monthly newsletter of the Montana Legislative Branch

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The Interim is published by:

### Legislative Services Division

Room 110, State Capitol  
PO Box 201706  
Helena, MT 59620-1706  
(406) 444-3064

For more information:

### Legislative Information Office

(406) 444-2957  
leginfo@mt.gov

The Interim, along with up-to-date information about interim committees, is also available on the Legislative Branch Website at [leg.mt.gov](http://leg.mt.gov).

## Countdown to 2010 Census: Liftoff

Every household in the state should have received a census form by mail or from a census worker by now. Forms should be returned as soon as possible to avoid a follow-up visit from census workers. Legislators should encourage their constituents to send in their forms.

The U.S. Census Bureau estimates that taxpayers will save \$85 million for each percentage point increase in the national mail-back participation rate. It is expensive to send census workers to households that fail to return their census form.

As of March 25, Montana led the nation with a 33 percent participation rate, according to the Census Bureau. The overall rate for the nation was 20 percent. You can track Montana's participation rate as it changes on the legislative website at [leg.mt.gov](http://leg.mt.gov) using the graphic in the lower lefthand corner.



## Hard-to-Count Areas

The state Census and Economic Information Center (CEIC) sent each legislator a packet that included "Hard to Count" maps and corresponding tables of census tracts for the counties and metropolitan areas within each legislator's district and the census-based federal funding county profiles for 2007. The maps will help legislators in outreach within their legislative districts. As the census progresses, response rates will be posted on the CEIC webpage at [www.2010.census.mt.gov](http://www.2010.census.mt.gov) so that legislators can see how their constituents are doing and can work with community leaders to encourage residents to return their forms.

More census information has been posted on the Montana Legislative Branch website under the "For Legislators" link. State and county profiles on 2007 census-based federal funding data are linked to the CEIC website. For more information contact CEIC at 406-841-2740 or contact Susan Byorth Fox, director of the Legislative Services Division, at 406-444-3066.

## Legislative Council Revises Policy on Reimbursement for Legislator Travel

The Legislative Council has revised the policy on reimbursing legislators for travel expenses. The new policy conforms the morning and evening travel times used to determine the “reasonableness” of claims. The travel times are similar to those in state travel policy and the statutory definition of “travel shift.”

The single change made by the council is underlined in the following paragraph. The rest of the policy remains unchanged.

1. Overnight lodging is reasonable when the member would be required to leave home earlier than 6:30 a.m. or arrive home later than 6:30 p.m. in order to have attended all of the meeting or have conducted all of the authorized legislative business. To compute whether this would be required, an average travel speed (overall, including incidental stops) of 50 miles an hour is used. The one-half hour immediately preceding and immediately following a meeting or legislative activity is an in-town travel shift and considered to be part of the total meeting schedule for the purposes of the reasonableness computation.
2. A legislator is entitled to a day’s salary when necessarily away from home for authorized legislative business. A member is considered necessarily away from home on the day of a meeting or other authorized legislative activity and on any other day when travel qualified under #1 above is required.
3. Subject to statute, a meal falling within reasonable travel times may be claimed.

Special circumstances are considered in determining reasonableness. Such circumstances may include inclement weather, a legislator’s health, variables related to flying instead of driving, and schedule conflicts which require a member to choose a more expensive mode of travel in order to participate in the legislative activity. Special circumstances should be clearly presented on the claim form.

For more information about legislator claims, contact Karen Berger ([kberger@mt.gov](mailto:kberger@mt.gov)) or Jen Simmons ([jsimmons@mt.gov](mailto:jsimmons@mt.gov)) or call the Financial Services Office at 406-444-3411.

## Teachers Institute on Representative Democracy Gets Humanities Montana Grant

Humanities Montana – an independent, nonprofit group dedicated to enriching the intellectual, cultural, and civic life of the state – has awarded a \$4,000 grant to help support the first-ever Montana Teachers Institute on Representative Democracy and the Legislative Process.

The Legislative Council is one of the primary sponsors of the event, which will take place June 14-16 at the state Capitol in Helena. Other sponsors are Project Citizen, a nationwide program of the Center for Civic Education; the Alliance for Teaching Representative Democracy; the National Conference of State Legislatures’ Trust for Representative Democracy; and the Montana Secretary of State’s Office.

The institute is open to up to 25 Montana teachers of government, social studies, civics, and history. An application form and preliminary agenda are available on the legislative website at [leg.mt.gov/teachers-institute](http://leg.mt.gov/teachers-institute).

The Humanities Montana grant will be used to cover the costs of lodging for teachers who travel to Helena to participate in the program.

A preliminary agenda calls for panel discussions by legislators on the topics “What Does It Mean to Be a Citizen Legislator” and “How Does a Legislator Represent Constituents.” A mock committee hearing and lunch with legislative leaders are also planned.

The keynote speaker will be Dr. Alan Rosenthal, professor of public policy at the Eagleton Institute of Politics at Rutgers University.

Legislators who would like to participate in the program should contact Gayle Shirley, legislative information officer, at 406-444-2957 or [gshirley@mt.gov](mailto:gshirley@mt.gov).

## Health Care Study, Medical Marijuana Slated for CFHHS Meeting in April

The Children, Families, Health, and Human Services Interim Committee will continue its health care study when it meets later this month. It also will review emerging issues related to Montana’s Medical Marijuana Act, which was enacted by voter initiative in 2004.

As part of the SJR 35 health care study, the committee will consider the following topics:

- childhood health, particularly school-related efforts to encourage children to eat right and lead healthy lifestyles;
- costs related to the practice of “defensive” medicine;
- information about medical malpractice insurance costs and claims in Montana; and
- recent efforts by and potential legislative proposals from the Montana Healthcare Forum, a network of stakeholders interested in health care policy issues.

The committee will also review a draft report on the HJR 39 study of community services for people with developmental disabilities and co-occurring mental illness. Based on its review, the committee will decide whether to pursue additional activities related to the study.

The committee added medical marijuana to its work plan because of significant increases in the number of people who have registered as medical marijuana patients and in the number of “caregivers” who are authorized to grow marijuana for patients. Some caregivers have opened businesses in communities around the state, prompting several cities and towns to place moratoriums on licensing those businesses as they sort through community concerns.

A panel of people knowledgeable about medical marijuana will discuss current laws and regulations, as well as questions and issues being raised by law enforcement, state and local government agencies, schools, and others.

The committee will meet April 26-27 in Room 137 of the Capitol. Keep an eye on the committee webpage ([leg.mt.gov/cfhhs](http://leg.mt.gov/cfhhs)) for more details about the meeting time and agenda.

## Districting and Apportionment Commission to Hold Public Hearings Across the State

The Districting and Apportionment Commission wants to involve Montana citizens in the process of reworking state legislative district boundaries.

In April the commission will conduct hearings across the

state to gather public comment on how it should redraw state legislative district boundaries based on population changes during the past ten years. Among other things, the commission wants to hear suggestions for what criteria it should use when drawing district boundaries.

The public hearings in April will not involve any maps. Instead, the hearings will allow Montanans to express their views on how the commission should approach the redistricting task. The commission plans to map new districts in 2011 and 2012, after 2010 census data are released.

### Public Hearing Schedule

The commission will meet in Helena, Missoula, and Billings to take public comment. Each hearing will have a videoconferencing location in at least one other Montana city, to allow as many people as possible to participate. In late April, the commission will meet in Helena to adopt redistricting criteria. The April meeting schedule is:

- Thursday, April 8, 6:30 pm.: Public hearing in Helena with videoconferencing locations in Great Falls and Havre
- Monday, April 12, 6:30 p.m.: Public hearing in Missoula with a videoconferencing location in Kalispell
- Monday, April 19, 6:30 p.m.: Public hearing in Billings with a videoconferencing location in Miles City
- Tuesday, April 27, 10:30 a.m.: Executive action by commission in Helena to adopt districting criteria

The Helena meetings will be broadcast online at [leg.mt.gov](http://leg.mt.gov) and on the state public access television network TVMT. To find the local TVMT channel, visit [leg.mt.gov/tvmt](http://leg.mt.gov/tvmt).

For details on meeting locations and to sign up for email updates about the commission, please visit [leg.mt.gov/districting](http://leg.mt.gov/districting).

If you cannot participate in any of the public meetings, the commission encourages written comments. They may be submitted by mail, email, or fax. Written correspondence will be distributed to all commissioners and will become part of the commission’s permanent record.

Send written comments to Districting and Apportionment Commission, Legislative Services Division, P.O. Box

201706, Helena, MT 59602-1706; by email to [rweiss@mt.gov](mailto:rweiss@mt.gov); or by fax to 406-444-3036.

Contact Rachel Weiss at 406-444-5367 or [rweiss@mt.gov](mailto:rweiss@mt.gov) for more information on the commission.

## Education, Local Govt. Subcommittee Reviews Education Policy Goals

An education subcommittee of the Education and Local Government Interim Committee has been reviewing shared policy goals of K-12 education (HJR 6), K-20 education (SJR 8), and postsecondary education. In March, three panels presented draft shared policy goals for public education in Montana.

### K-12 Goals

Joyce Silverthorne, Office of Public Instruction, and Steve Meloy, Board of Public Education, discussed draft shared policy goals and objectives for K-12 education:

**Goal 1:** Prepare students with the knowledge and skills necessary for success in the 21st century global society.

Objective: Increase Montana's high school graduation rate.

Objective: Review the administrative rules that govern accreditation, certification, and professional educator preparation programs on a regular basis.

**Goal 2:** Improve teaching and student learning by promoting data-driven policy decisions and increasing access to educational information.

Objective: Develop a statewide longitudinal data system to collect and report reliable and timely data on Montana K-12 students.

Objective: Improve access to K-12 education data by educators, policymakers, and the public.

**Goal 3:** Improve student achievement in struggling schools.

Objective: Provide support for learning and promote greater community engagement to increase student achievement in schools identified as struggling.

**Goal 4:** Increase public awareness of and engagement in the K-12 educational system recognizing the roles and

responsibilities of the state and local educational agencies and the Legislature.

Objective: Promote coordination and collaboration among the Legislature and K-12 education agencies recognizing the constitutional roles of the Board of Public Education, Legislature, and local school districts.

Objective: Increase accessibility and transparency of information and reporting to improve community awareness of K-12 education.

### K-20 Goals

Silverthorne and Meloy, as well as Sheila Stearns and Tyler Trevor from the Office of the Commissioner of Higher Education, presented the following draft shared policy goals and supporting objectives for K-20 education:

**Goal 1:** Align high school outcomes with college readiness expectations to facilitate the transition from high school to college.

Objective: Decrease remediation rates of entering freshman from Montana public high schools.

**Goal 2:** Increase college participation of Montana high school graduates.

Objective: Increase the percentage of Montana high school graduates who participate in accredited postsecondary education.

**Goal 3:** Expand distance learning opportunities.

Objective: Create easy access to distance learning opportunities through the development of a virtual academy and through improvements to current virtual college capabilities.

**Goal 4:** Utilize K-20 data to improve student access and achievement.

Objective: Link K-12 and Higher Education data systems.

Stearns and Trevor reviewed the shared policy goals and supporting objectives in the Board of Regents Strategic Plan.

The subcommittee voted to approve the K-12 and K-20 draft shared policy goals for presentation to the full Education and Local Government Interim Committee.

## Energy Committee to Continue Work on Revised State Energy Policy

Senate Bill 290, passed by the 2009 Legislature, required the Energy and Telecommunications Interim Committee to review and possibly revise Montana's energy policy. The committee has examined energy production, distribution, and consumption, and is working on a revised energy policy for the state. The committee will meet to continue this task on May 13 in Room 172 of the Capitol. The meeting time has not yet been finalized.

The committee began the interim study by learning more about the governor's energy policy as contained in "Tapping Montana's Power Potential: The Schweitzer Energy Policy." After discussing the background and premises of the governor's energy policy, the committee decided that a legislative energy policy can provide specific, long-term direction on how to protect Montana's energy interests.

The committee also examined the nine issues outlined in SB 290 in detail through panel discussions, staff reports, and public comments. Over the past six months, the committee has reviewed more than 440 pages of public comments from about 200 people.

Although the state's current "energy policy" is stated in 90-4-1001, MCA, other energy policy statements are contained in many other statutes. In May, the ETIC will examine existing energy policy statements to determine whether they duplicate or contradict existing policy. This review will help the committee to focus on proposed energy policy changes. Sen. Verdell Jackson, the sponsor of SB 290, has provided energy policy points for the committee's consideration.

The committee has reviewed the energy policies of other states – primarily Idaho, Texas, and Iowa. In 2007, the Idaho Legislature directed an energy interim committee to revise that state's energy policy. In late 2008, Iowa released an Energy Independence Plan, which is much like an energy policy. The Idaho and Iowa energy plans were reviewed because each plan was developed by a legislative committee, rather than by an executive branch agency. On the other hand, the "2008 Texas State Energy Plan" was produced by the Governor's Competitiveness Council in July 2008 and was reviewed by public and private leaders appointed by the Texas governor.

The committee is working on in-depth policy statements that promote a secure and well-maintained energy infrastructure, deal with technological developments in energy production and use, maximize the use of in-state sources of power, and promote energy efficiency and conservation.

Several draft energy policy statements have been approved for committee discussion in May. Those statements are available on the committee webpage ([leg.mt.gov/etic](http://leg.mt.gov/etic)) under the May 13 meeting materials. For more information about the committee and its work, contact Sonja Nowakowski at [snowakowski@mt.gov](mailto:snowakowski@mt.gov) or 406-444-3078.

## Environmental Quality Council Works on Biomass, Other Studies

The Environmental Quality Council met March 4-5 in Helena and made some preliminary decisions on how it will proceed with studies of biomass, fire suppression, recycling, and public access to private land for recreational and tourism-related activities. Meeting reports are available on the EQC webpage at [leg.mt.gov/eqc](http://leg.mt.gov/eqc).

### Biomass Study (HJR 1)

The Biomass Working Group presented a list of proposed policy findings and recommendations. The working group, administered by the state Department of Natural Resources and Conservation, includes representatives of environmental and economic development organizations; academics and research; state, federal, and tribal agencies; private landowners; and the wood products and forestry industries. The council will consider the working group's recommendations in May in conjunction with two Montana biomass feasibility studies conducted by Porter Bench Energy and NorthWestern Energy. Each company received funding for its study from the state Department of Commerce through HB 645. The council may incorporate findings from these studies into its biomass study report, which will be released for public comment this summer. The council may also draft biomass legislation based on the information it receives.

### Fire Suppression Study (HJR 30)

The council has postponed action on the fire suppression study until it sees how the 2010 fire season develops. Forecasters say weather and forest conditions may lead to a challenging fire season. The council thinks that some of its

findings and recommendations for the biomass study will relate to fire suppression and mitigation policies.

### Recycling Study (SJR 28)

Although the council has proposed several findings for the recycling study, it has decided against drafting legislation on the topic at this time. The proposed findings include:

- a recommendation to update Montana's solid-waste reduction targets;
- a recommendation that rural communities work together to create increased opportunities and networks for recycling and investigate a variety of collection methods to promote recycling in their communities; and
- recognition that long distances and high transportation costs are barriers to increased recycling and that developing local markets for recycled materials could help overcome those barriers.

### Public Access Study (HJR 15)

Given the state of Montana's economy and the likelihood of limited funding in the next legislative session, the council has decided not to draft any legislation to promote the concept of public access to private land for tourism and recreational activities at this time. The council will finalize its draft HJR 15 study report in May and then release it for public comment.

### Wolf Management

As part of its agency oversight function, the council heard a series of presentations from the state Department of Fish, Wildlife, and Parks regarding wolf management in Montana. The presenters responded to several questions raised by the council in January about the accuracy of Montana's wolf population count, the impact of wolves on ungulates, the presence of tapeworm in Montana wolves, and state and federal funding of wolf management. FWP Director Joe Maurier also reviewed the agency's revised protocol for responding to wolf depredation of livestock. The FWP reports are available at [leg.mt.gov/eqc](http://leg.mt.gov/eqc).

The council next meets May 6 and 7 in Room 172 of the Capitol. An agenda and meeting materials will be posted on the council webpage at least 10 days before the meeting. For more information, contact Todd Everts at 406-444-

3747 or [teverts@mt.gov](mailto:teverts@mt.gov), or Hope Stockwell at 406-444-1640 or [hstockwell@mt.gov](mailto:hstockwell@mt.gov).

### Audit Committee Reviews Audit Reports, Endorses Spending Cuts in Audit Division

In early March, the Legislative Audit Committee discussed 24 financial, information services, and performance audits completed by Legislative Audit Division staff.

Highlights of audit discussions and other agenda items included:

- Accounting rules now require state agencies to report expected estimated outlays for future environmental mitigation. Most state-administered environmental mitigation focuses on past mining activities in Anaconda and Butte. Auditors informed legislators of this accounting change as part of the statewide audit, which is a snapshot of the financial condition of the state. (State of Montana Financial Audit, 08-01B)
- Forty findings were reported in the Montana Single Audit, which summarizes internal controls of how \$2.3 billion in federal funds were spent through 2,600 federal grants. (Montana Single Audit Report, 08-02)
- The Department of Administration will seek legislation to clarify state printing policies. The audit found that about half of sampled documents did not contain required cost disclosures; more than 80 percent did not include required circulation information. (State Printing of Public Documents, 09P-14)
- Jim Lynch, director of the state Department of Transportation, said that all executive branch agencies have implemented a comprehensive vehicle tracking program. The state owns more than 7,400 vehicles – including passenger cars, trucks, snowplows and other work vehicles – but will not purchase more vehicles for the state motor pool this spring. About 80 percent of the state's 119 Toyota hybrids were recalled and repaired. (State Vehicle Fleet Management, 09P-04)
- The workers' compensation "Old Fund" has \$65 million in claims liability, but only \$22 million in assets. (Montana State Fund, 08-05B)
- Standard & Poor's recently lifted a negative credit watch placed on the Montana Board of Housing. (Montana Board of Housing, 08-07B)

- State agencies should consider a centralized policy regarding disaster recovery planning for information technology systems. (Statewide Disaster Recovery Planning for Information Technology Systems, 10DP-01)
- Auditors determined that four state pension plans (Public Employees' Retirement System Defined Benefit Plan, Sheriffs' Retirement System, Game Wardens' and Peace Officers' Retirement System, and Teachers' Retirement System) are actuarially unsound. This means that contributions won't cover expected benefits over the next 30 years, as required by the Montana Constitution. (Teachers' Retirement System, 08-09B; Public Employees' Retirement Board, 08-08B)
- Regulation of the state's 55,000 livestock brands can be improved by formalizing policies and procedures, improving management information capabilities, and reevaluating methods for rerecording brand ownership. (Recording of Livestock Brand Ownership, 09P-12)
- Department of Corrections officials promised to develop adequate controls and to emphasize contract management for community facilities. (Contract Management, Department of Corrections, 09P-08)
- The committee is considering draft legislation addressing issues with loaning personnel between state agencies and the role of the audit committee in privatization plan review.
- The committee endorsed the audit division's participation in a 5-percent budget reduction for the coming year.

Audit reports and summaries are available at [leg.mt.gov/audit](http://leg.mt.gov/audit). Committee members are: Sens. Mitch Tropila (chair), Greg Barkus, John Brenden, Taylor Brown, and Mike Cooney, and Cliff Larsen, and Reps. Dee Brown (vice chair), Betsy Hands, Scott Mendenhall, Carolyn Pease-Lopez, Wayne Stahl, and Bill Wilson.

The Legislative Audit Division provides independent, objective, fact-based evaluations of the stewardship, performance, and cost of government policies, programs, and operations.

For more information about the Legislative Audit Committee or the Legislative Audit Division, call 406-444-3122 or go to [leg.mt.gov/audit](http://leg.mt.gov/audit). To report improper acts

committed by state agencies, departments, or employees, call the Audit Division's fraud hotline at 800-222-4446 or 444-4446 (in Helena).

## Legislative Council Approves Spending Cuts, Works on Strategic Initiatives

Spending reductions authorized by 17-7-140, MCA, do not apply to certain expenditures, including those of the legislative branch. However, the Legislative Audit Committee, the Legislative Council, and the Legislative Finance Committee have approved a 5-percent spending reduction for legislative branch agencies. The reductions were proposed by agency directors Tori Hunthausen (Legislative Audit Division), Amy Carlson, (Legislative Finance Committee), and Susan Fox (Legislative Services Division). The total spending reductions in the branch amount to \$536,000.

At a meeting in early March, the Legislative Council revised the legislator travel policy (see related article on p. 2) and requested a bill draft that would allow legislators to claim a half-day's salary during the legislative interim. Currently, legislators are entitled to a full-day's salary for each 24-hour period of time, or a portion of that time, spent away from home on authorized legislative business. The council is also sending letters to legislative leadership and to members of NCSL and CSG committees encouraging participation in training opportunities with the limited funds that are still available.

### Strategic Initiative Proposals

The Rules Subcommittee of the council has recommended several changes to legislative rules and has proposed ways to help legislators better understand the rules. The Legislative Space Subcommittee has developed a proposal for using legislative space that will be in effect until more information is received. The subcommittee will continue to work on legislative space matters in the Capitol and may consider undertaking a study of long-term needs.

The council has adopted a policy allowing the public to use legislative committee rooms during normal business hours. Legislative space is not available at other times because of concern about the use of audio and video equipment when staff is not present to assist.

### Media Accreditation

The council discussed the process of authorizing press

passes for legislative floor sessions. The council values the presence of the media and wants to develop a policy that assists the media in obtaining the privilege of access to the House and Senate chambers and that maintains decorum and order. Although the state Department of Administration now issues press passes, the council has identified concerns for security and decorum.

### Other Topics

The council also wants to improve interim activities and provide an opportunity for more legislators to participate. The council asked staff to develop a process for expanding the number of participating legislators and options for maintaining equality between the chambers.

The Senate Committees on Committees appointed Sen. Mitch Tropila to the Legislative Council to replace Sen. Jesse Laslovich, who has resigned his Senate seat.

The Legislator Training Day in early March was a great success, with about 100 legislators taking part. Links to audio and video recordings of the breakout sessions are available at [leg.mt.gov](http://leg.mt.gov). Click on "For Legislators" and then "Training."

The Legislative Council plans to meet June 2. For more information, visit the council webpage at [leg.mt.gov/legcouncil](http://leg.mt.gov/legcouncil), or contact Susan Byorth Fox at 406-444-3066 or [sfox@mt.gov](mailto:sfox@mt.gov).

Members of the Legislative Council are: Reps. Dennis Himmelberger (chair), Bob Bergren, Margaret Campbell, Tom McGillvray, Jesse O'Hara, and Mike Phillips, and Sens. Carol Williams (vice chair), John Brueggeman, Jeff Essmann, Mitch Tropila, Bob Story, and David Wanzenried.

### Legislative Finance Committee Responds to Governor's Proposed Spending Cuts

The Legislative Finance Committee met March 4-5. The agenda and meeting reports are available on the Legislative Fiscal Division webpage at [leg.mt.gov/fiscal](http://leg.mt.gov/fiscal). For more information, contact Amy Carlson, director of the fiscal division, at [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2986.

The committee spent most of its time reviewing the governor's proposed spending reductions. That review and other committee activities are summarized below.

### Proposed Spending Reductions

Section 17-7-140, MCA, directs the governor to reduce general fund spending when the projected ending general fund balance for the biennium drops below a specified level. On Jan. 29, the governor's budget director certified that the statutory "trigger" had been met and made recommendations to the governor for reducing expenditures. The governor is required to submit the proposed spending reductions to the Legislative Finance Committee for review and comment. The committee reviewed the proposals and received public testimony on March 4.

LFD staff told the committee that the plan maintains the required ending general fund balance if revenue estimates made by the Governor's Office of Budget and Program Planning are used. However, if LFD revenue estimates are used, the ending general fund balance would be \$5.3 million below the required amount.

OBPP proposed reducing agency expenditures by \$40.46 million, or about 4.2 percent of FY 2011 HB 2 and HB 13 appropriations. The largest reductions were proposed in the Department of Public Health and Human Services (\$17.4 million), in corrections (\$6.9 million), and in higher education (\$6.8 million). The proposed spending reductions in these three areas account for almost 77 percent of the total.

Of the total \$40.46 million, about \$13 million would also reduce 2013 biennium expenditures and \$6.7 million was reduced from appropriations made in HB 645 (the bill to appropriate federal stimulus funds). OBPP also proposed \$21 million in transfers that would require legislative action, and it included in its general fund balance calculation \$31.5 million anticipated as a result of increased federal Medicaid match rates (FMAP) through the end of this year.

The committee made the following recommendations:

- In ordering reductions in spending, the governor should evaluate: 1) whether the reduction is likely to result in a legal challenge to the action and the additional costs that an agency will incur because of a legal challenge; and 2) the likelihood of the success of a legal challenge preventing the reduction in spending. Specific examples include:

- a. Community Corrections Division of the Department of Corrections
- b. Physicians rate increases in the Department of Public Health and Human Services (DPHHS)
- If, as expected, Montana receives an extension of the enhanced FMAP, the committee asked that the governor consider using a portion of the estimated \$40 million in general fund savings to minimize cuts in DPHHS, including reconsideration of elimination of the 2 percent provider rate increase for FY 2011.

The committee also noted the following items of concern with the proposals.

- There are increased risks associated with the recommended plan:
  - a. Eliminating projects and reducing transfers from the general fund will require legislative action.
  - b. While the LFC recognizes the volatility and uncertainty of estimating revenue, the significant differences between the Legislative Fiscal Division staff analysis and the OBPP revenue estimate add significant risk to the ending fund balance assumed in the recommendations.
- A portion of the proposed spending reductions in the Office of Public Instruction may result in a property tax increase to school districts.
- The proposed reductions to state special and proprietary funds are not technically reductions in general fund spending under 17-7-140, MCA, but are within the management discretion of the executive.

For more information, contact Taryn Purdy at [tpurdy@mt.gov](mailto:tpurdy@mt.gov) or 406-444-5383 or Amy Carlson at [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2986.

### Office of State Public Defender

The Legislative Finance Committee reviewed a request from the governor's budget director to transfer \$800,000 of general fund appropriations for the Office of State Public Defender from FY 2011 to FY 2010. The budget director's memo said the two main reasons for the transfer are: the imposition of increased vacancy savings (7 percent); and an across the board reduction in general fund support for agencies of 2 percent for the 2011 biennium.

The combined FY 2010 impact of these two items was a reduction of \$759,260 for the public defenders' office.

The agency is required by statute to implement a plan to reduce expenditures in the second year of the biennium so that expenditures are limited to the appropriation level for the biennium. The agency is working to mitigate expenditures in the 2011 biennium to avoid the need for a supplemental appropriation by the 2011 Legislature. The agency has identified four ways to mitigate expenditures including: 1) increasing funding sources, 2) reducing expenditures, 3) increasing productivity; and, 4) reducing services. Examples of items that fall into these categories are:

- Obtaining federal grant funds
- Reorganizing central office functions and creating a major crime unit to create greater efficiencies
- Using more internal resources and fewer contract resources
- Exploring ways to limit or minimize involvement in certain types of cases

The agency will continue to implement these mitigation efforts in an attempt to reduce expenditures for the 2011 biennium to the level of the appropriation available.

The LFC did not prepare a report to the governor, which means that the governor must wait 90 days before approving the transfer of funding between fiscal years. The 90-day period runs through June 3. For additional information, contact Pat Gervais at [pagervais@mt.gov](mailto:pagervais@mt.gov) or 406-444-1795.

### Public Defender System

Committee staff reported on the public defender system. The report included a discussion of:

- general fund expenditures and appropriations;
- the availability of caseload data;
- information the Office of Public Defender (OPD) is required to report under 47-1-201, MCA, including 1) caseload and cases remaining open at the end of the fiscal year, 2) the average number of days a case by type is open, and 3) summaries of judgments and assessments for services rendered (collection information);

- potential ways to impact caseload and costs; and
- selected recommendations from the American University report “Assessment of the Initial Period of Operations of the Montana Statewide Public Defender System.”

Key findings in the staff report included:

- OPD projects that 2011 biennium expenditures will exceed appropriation levels;
- the determination of caseload trends depends upon the statistics used to measure caseload. Data on new cases indicates that caseload is growing, but data on cases open at fiscal year end shows the caseload is decreasing;
- the largest volume of cases and costs are related to criminal cases and cases in courts of limited jurisdiction; and
- the average number of months between the opening of a criminal case and its closure is 8 months, while for cases in courts of limited jurisdiction it is 5.5 months.

The report included several action items for consideration by the committee, which decided to pursue two of them. One action item relates to items that the Legislature could consider that may affect caseloads and costs such as:

- Changes to the statutory definition of indigence (including increased statutory guidance on the criteria to be used to determine that someone does not have sufficient resources to hire a private attorney).
- Changes to the clientele that the agency is statutorily mandated to serve. For example, should the agency continue to represent parents and guardians in child removal and placement proceedings or should representation be provided only when termination of parental rights is sought?
- Agency staff and the Public Defender Commission have also expressed some interest in reviewing statutory penalties for some offenses where incarceration is possible but rarely ordered. In these cases, the potential for incarceration (loss of liberty) drives the need for a public defender to represent eligible individuals. If incarceration was not included in statute as a potential penalty, a public defender would not be required.

- Potential changes included in correspondence from Public Defender Commission Chairman Mike Sherwood, dated Jan. 29, 2010.

Action item E relates to a recommendation from the American University report to remove the statutory requirement that certain managerial positions (such as the chief public defender) have a minimal caseload. The Legislature could impact this issue by:

- Removing this requirement from statute as recommended by the AU report. However, it should be noted that removal may not change the practice within the system with regard to volume or complexity of casework completed by individuals in these positions.
- Amending statute to define the term “minimum client caseload.” The Legislature may also wish to go a step farther and define the maximum client caseload of these management positions. Client caseload could be defined in terms of number and type or complexity of cases assigned to managers.
- Providing comments, suggestions, and recommendations regarding management functions that should be achieved and client caseload limits for managers. Suggestions or recommendations by the Legislature that are not included in statute are not binding upon the agency and may or may not result in changes.
- Doing nothing at this time.

The LFC will take up these action items at a future meeting. For more information, contact Pat Gervais at 406-444-1795 or [pagervais@mt.gov](mailto:pagervais@mt.gov).

### Information Technology Update

Staff presented a report that reviewed the 2010 update of the state information technology strategic plan. The state Department of Administration updates the strategic plan every two years and submits the plan to the committee at its March meeting of every even year.

Staff said that there weren’t significant policy changes for how the state manages information technology assets in the updated strategic plan. However, two of the four strategic goals in the plan focused on state agencies with common business needs collaborating on the development

of information technology systems to effect economies of scale in their development and use. For more information, contact Greg DeWitt at [gcde Witt@mt.gov](mailto:gcde Witt@mt.gov) or 406-444-5392.

**ARRA Subcommittee**

On March 2, the American Recovery and Reinvestment Act (ARRA) Subcommittee discussed year-to-date HB 645 expenditures, specific agency projects, and the change in job estimation calculations. The subcommittee discussed the governor’s decision to hold back \$3.6 million of grants for cities and counties and \$3.6 million for historical preservation. Budget Director David Ewer said that the decision was made to ensure adequate general fund cash flow. The subcommittee received a list of affected grantees and will monitor the situation. Meeting documents are available on the LFD website at [leg.mt.gov/fiscal](http://leg.mt.gov/fiscal).

Subcommittee members are Sen. Carol Williams (chair), Sen. Dave Lewis, Rep. Janna Taylor, and Rep. Cindy Hiner. For more information about the subcommittee contact Barb Smith at [basmith@mt.gov](mailto:basmith@mt.gov) or 406-444-5347 or Matt Stayner at [mstayner@mt.gov](mailto:mstayner@mt.gov) or 406-444-5834.

**DPHHS Performance Measurement**

The LFC performance measurement workgroup for the Department of Public Health and Human Services reviewed 11 performance measures, including the work plan to identify reductions to implement the \$22 million in one-time appropriations for ongoing services in the 2013 biennium budget, as well as implementation of Healthy Montana Kids. The workgroup dealt with nine of the measures, recommending that several related to community mental health services initiatives and state hospital admissions be reviewed by the 2011 Health and Human Services Joint Subcommittee. For more information, contact Lois Steinbeck at [lsteinbeck@mt.gov](mailto:lsteinbeck@mt.gov) or 406-444-5391.

**Performance Measurement Subcommittee**

The Performance Measurement Subcommittee met March 3 to discuss legislative options to increase the use of performance information in budgetary decisions. The subcommittee worked from a staff report titled “Performance Measurement in the Legislative Appropriations Process,” which is on the LFD website at [leg.mt.gov/fiscal](http://leg.mt.gov/fiscal). The subcommittee focused on

increasing access to performance information and using a performance-based framework to analyze any proposed reductions to determine potential changes in outcomes.

The subcommittee endorsed refining the process to allow for performance information to be discussed at each step of the appropriations process and to integrate any legislative goals or reporting requirements into a companion bill to HB 2.

A final report on performance measurements will be presented to the full Legislative Finance Committee in June.

Subcommittee members are Sen. Dave Wazenried (chair), Sen. Rick Ripley, Rep. Janna Taylor, and Rep. Jon Sesso. For more information about the performance measurement initiative, contact Barb Smith at [basmith@mt.gov](mailto:basmith@mt.gov) or 406-444-5347 or Kris Wilkinson at [kwilkinson@mt.gov](mailto:kwilkinson@mt.gov) or 406-444-2722.

**General Fund Update: FY 2010 Revenue**

Total general fund revenue collections through February continue to lag the revenue estimates used by the Legislature for FY 2010. As shown in the table below, total general fund revenues are estimated to be \$349.9 million less than anticipated, or the same amount as estimated last month.

Individual income tax collections are not keeping pace with the HJR 2 estimate and are lagging the estimate

<b>Estimated Revenue Changes from HJ 2 (in millions)</b>			
<b>Category</b>	<b>FY 2010</b>	<b>FY 2011</b>	<b>Biennium</b>
Individual income tax	(\$118.1)	(\$95.0)	(\$213.1)
Corporation income tax	(58.2)	(52.7)	(110.9)
Oil, gas production tax	21.3	12.3	33.6
TCA interest	(4.5)	(6.4)	(10.9)
Video gaming tax	(11.5)	(11.1)	(22.6)
Vehicle fees, taxes	(7.0)	(4.8)	(11.8)
Remaining sources	(4.1)	(10.1)	(14.2)
Current estimate	(\$182.1)	(\$167.8)	(\$349.9)
February estimate	(\$182.1)	(\$167.8)	(\$349.9)
<b>Total change from Feb</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.0</b>

## Legislative Fiscal Division - General Fund Outlook

(Figures in Millions)

	Revised FY 2010	Revised FY 2011	2009 Biennium	2011 Biennium	Biennial \$ Change
Beginning Fund Balance	\$391.964	\$138.285	\$543.541	\$391.964	(\$151.577)
Revenue					
LFD Revenue Estimate	1,590.833	1,661.583	3,761.508	3,252.416	(509.092)
Total Funds Available	\$1,982.797	\$1,799.868	\$4,305.049	\$3,644.380	(\$660.669)
Disbursements					
General Appropriations - HB2	1,498.930	1,565.832	3,398.123	3,064.762	(333.361)
Stimulus Approps. - HB645	53.069	57.052	-	110.121	110.121
Stimulus Transfers - HB645	79.247	38.209	-	117.456	117.456
Statutory Appropriations	179.451	181.379	422.348	360.830	(61.518)
Transfers	8.924	13.022	273.280	21.946	(251.334)
Other Appropriations	33.864	3.906	-	37.770	37.770
Feed Bill	2.929	10.608	-	13.537	13.537
Reversions	(5.193)	(7.105)	(164.732)	(12.298)	152.434
Total Disbursements	\$1,851.221	\$1,862.903	\$3,929.019	\$3,714.124	(\$214.895)
Fund Balance Adjustments	6.709	-	15.934	6.709	(9.225)
Ending Fund Balance Before Other Issues	\$138.285	(\$63.035)	\$391.964	(\$63.035)	(\$454.999)
Other Fiscal Issues					
Executive Spending Proposals					
Spending Reductions	11.063	28.706	-	39.769	39.769
Revenue Transfers	0.271	0.417	-	0.688	0.688
Reductions Requiring Legislation	-	20.960	-	20.960	20.960
Tier 3 FMAP Change	5.316	13.940	-	19.256	19.256
Tier 3 Revenue Change	1.094	2.790	-	3.884	3.884
Total Executive Proposals	\$17.744	\$66.813	\$0.000	\$84.557	\$84.557
Legislative Spending Proposals	-	0.586	-	0.586	0.586
Judicial Spending Proposals	0.002	0.617	-	0.619	0.619
Federal Clawback	6.331	2.032	-	8.363	8.363
Total Disbursements	<u>\$ 1,828.509</u>	<u>\$ 1,796.062</u>	<u>\$ 3,929.019</u>	<u>\$ 3,624.571</u>	<u>\$343.822</u>
Ending Fund Balance After Other Issues	\$162.362	\$31.090	\$391.964	\$31.090	(\$360.874)

### Other Fund Balance Issues

- Supplemental Appropriations
- Pending Litigation
- Otter Creek Coal Leases
- PPL Inc., River Bed Lease Payments
- Federal Enhanced FMAP Rate Extension

more each month. The statistical analysis suggests that the estimate should be adjusted downward based on the level of refund activity that occurred in February. However, because it is difficult to determine whether increased refund activity is due to electronic filing and the economic recession, an adjustment will not be considered until additional return processing is completed in March and April. Therefore, individual income tax collections could be below the HJR 2 estimate by \$118 million for FY 2010.

Corporation income tax collections are not keeping pace with the HJR 2 estimate but stabilized in February. This was not unexpected because revenue collections in February are minimal. Based on these trends, corporation income tax collections could be below the HJR 2 estimate by \$58 million for FY 2010.

When one combines the potential shortfall from individual and corporation income taxes, TCA interest earnings, video gaming taxes, vehicle fees and taxes, and remaining sources with the potential excess from oil and gas production taxes, FY 2010 general fund revenues could be below the HJR 2 revenue estimate by \$182.1 million.

Based on these trends and on recent economic and tax return data, FY 2011 general fund revenues could be below the HJR 2 revenue estimate by \$167.8 million. The total general fund 2011 biennium revenue shortfall could be \$349.9 million, or about 9.7 percent below the HJR 2 revenue estimates.

In 2009, the Legislature adopted a policy to maintain a higher ending general fund balance for the 2011 biennium (\$282.4 million) in the event of revenue shortfalls. The potential shortfalls discussed above would decrease this projected balance to negative \$63 million (*see table at left*) before the spending reduction proposals of the executive. This projected balance includes the additional \$5 million received in the FY 2009 ending balance but does not include any supplemental appropriations. Staff is currently researching the need for supplemental appropriations.

The projected balance of negative \$63 million becomes a positive \$31.1 million when the executive spending proposals are included. As of this writing, the governor has not notified the LFD of final spending reductions.

When the revenue estimates, as prepared by the executive, are included in the general fund balance sheet, the

projected balance at the end of the 2011 biennium is \$97.7 million. The main reason for the difference in the projected balance is the revenue estimates for individual and corporation income taxes prepared by the respective offices. The executive estimates are more optimistic than the legislative estimates for both of these tax sources during the 2011 biennium.

As previously discussed, revenue collections have progressively worsened during the past several months, at least through January. If 2011 biennium collections continue to lag the HJR 2 estimates, growth in subsequent months will need to be much greater to achieve the Legislature's estimates. As revenues fall below estimates, the structural imbalance (difference between ongoing revenues and ongoing expenditures) widens and leads to a significant 2013 biennium budget challenge for the next Legislature. For further information, contact Terry Johnson at [tjohnson@mt.gov](mailto:tjohnson@mt.gov) or 406-444-2952.

## Revenue and Transportation Committee, Subcommittees to Meet Again in April

The Revenue and Transportation Interim Committee will meet April 29-30. Its two subcommittees on Residential and Commercial Property Reappraisal and Agricultural Land and Forest Land Property Reappraisal are scheduled to meet the morning of April 29. The full committee will convene at 1 p.m. April 29 in Room 137 and at 8 a.m. April 30 in the same room.

Although the agendas have not been finalized, some topics the full committee will consider include:

- a presentation on maintaining Montana's alcohol regulatory system, by Pamela S. Erickson, president of Public Action Management;
- an update on state general fund collections and a discussion of the revenue estimating process for the next legislative session;
- a report on the SJR 16 study of uninsured and underinsured motorists;
- a report on methods for conducting sales assessment ratio studies for residential property and for commercial property from the property taxation consulting firm of Almy, Gloude-mans, Jacobs, & Denne;

- tax compliance reports by the Montana Department of Revenue on capital gains from the sale of real property and on income earned by pass-through entities; and
- committee discussion of property tax circuit breakers.

The agendas for the full committee and subcommittees will be available by mid-April on the committee webpage at [leg.mt.gov/rtic](http://leg.mt.gov/rtic). For more information, contact Jeff Martin at 406-444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov).

## SAVA Committee Hires Consultant, Begins Work on Redesign of Retirement Plans

Last month the State Administration and Veterans' Affairs Interim Committee contracted with Buck Consultants to help redesign the Teachers' Retirement System and possibly the Public Employees' Retirement System. During the next several months, Dave Slshinsky and Doug Fiddler from Buck will work with the committee on the retirement plans.

At a March 19 meeting of the committee, Slshinsky and Fiddler went through a lengthy packet of material on defined benefit plans and defined contribution plans, as well as characteristics of various hybrid plans. The consultants also described what other states are doing with their retirement plans, which were hit by the recent economic downturn. The packet, as well as other HB 659 study materials, are available on the SAVA webpage at [leg.mt.gov/sava](http://leg.mt.gov/sava).

After generating numerous questions for the consultants, reviewing the results of a survey of their retirement priorities, and hearing from members of the public, the committee narrowed its list of retirement plan design alternatives and asked the consultants to work up a comparison of a cash balance plan with the current TRS and PERS plans altered by each of the various committee's design alternatives.

### Bonus Payments

During the 2009 legislative session, the House State Administration Committee heard three bills that, in one fashion or another, responded to a situation in which an outgoing state officeholder awarded bonus payments to members of his exempt staff. A Department of Administration attorney stated that the bonus payments were illegal. The House committee killed each of the

bonus bills in favor of requesting a comprehensive study of the issue.

Dave Bohyer, research director for the Legislative Services Division, presented a white paper on bonus payments. The committee wanted to know more about best practices in awarding bonus pay. Bohyer said that best practices regarding bonus pay are almost non-existent.

However, studies done by the federal government and by certain areas of the private sector provided details on incentive pay practices. The committee asked for more information on whether workers close to retirement received more bonus payments than other workers, perhaps in an attempt to boost retirement benefits.

### Other Topics

Ross Johnson, Legislative Audit Division, discussed a performance audit of the retirement systems that will look at the practice known as "salary spiking," or inflating a retirement system member's salary toward the end of a career so the member can get higher benefits in retirement. Although the Audit Division team doesn't yet have a work plan or timeline, it will conduct the audit over the course of the year and wanted to keep SAVA up to date.

David Niss, SAVA staff attorney, presented an overview of the U.S. Supreme Court decision in *Citizens United* and a recently filed lawsuit challenging Montana's statutory ban on corporate contributions or expenditures in connection with a political candidate or committee that supports or opposes a candidate or political party (13-35-227(1), MCA).

Niss recommended that the committee ask the Commissioner of Political Practices for an update on whether Montana statutes and administrative rules could still be interpreted to require disclosure of corporate spending and disclaimers on political advertising.

After hearing from State Solicitor Anthony Johnstone that the current statutes should cover those topics, SAVA decided to ask the Commissioner of Political Practices to provide an update at its April meeting.

### Stakeholder Retirement Plans

Section 5-5-228, MCA, requires the SAVA committee to review legislative proposals from retirement plan stakeholders. The committee will review proposals at its

April 22-23 meeting. The proposals do not include those from state agencies; agency proposals will be considered at SAVA's June meeting.

Proposal forms are available at [leg.mt.gov/sava](http://leg.mt.gov/sava) and can be emailed, faxed, or mailed using the contact information available on the SAVA webpage.

Stakeholder proposals must be submitted by March 31 to give committee members time to review them before the April meeting.

Stakeholders should be prepared to present their proposals to SAVA on April 22 or 23. If you need to present on a specific day, please contact Rachel Weiss at 406-444-5367 to make arrangements.

### Next Meeting

SAVA will meet April 22-23 in Room 137 of the Capitol. The time has yet to be determined. The committee will continue its study of retirement systems, consider stakeholder proposals, and review current campaign-finance laws. An agenda will be available by mid-April.

To keep informed of SAVA activities, sign up for email updates at [leg.mt.gov/sava](http://leg.mt.gov/sava). For more information, contact Rachel Weiss at [rweiss@mt.gov](mailto:rweiss@mt.gov) or 406-444-5367.

## Water Policy Committee Creates Work Group to Tackle Exempt Wells, New Uses

The Water Policy Interim Committee has created a work group to tackle the issues of exempt wells and mitigation of new water uses.

At its March meeting, the WPIC reviewed a host of options for modifying the use of exempt wells, which are not subject to permitting. Exempt wells are defined as those that use less than 35 gallons a minute and 10 acre feet a year. Some are concerned that, in high-growth areas, the use of these wells, combined with the use of individual septic systems, is affecting water quantity and quality.

Ideas presented to the WPIC include mitigating the effects of exempt wells, as well as other, larger uses of ground water, by purchasing water from other users. The work group will likely meet in Helena in April and will include Rep. Walt McNutt, who chairs the WPIC, and Sen. Dave Wanzenried, the vice chair.

The full committee will meet May 11-12 in Room 152 of the Capitol. The time has yet to be determined. For more information, contact Joe Kolman at 406-444-9280 or [jkolman@mt.gov](mailto:jkolman@mt.gov). Or visit the committee webpage at [leg.mt.gov/water](http://leg.mt.gov/water).

## Can Government Be Held Liable for Actions of Volunteers?

The answer is likely yes, as determined on a case-by-case basis. Local and state governments in Montana are directly liable for their own actions and may be vicariously liable



for the actions of a volunteer under certain circumstances.

The doctrine of sovereign immunity traditionally protected governmental

entities in Montana from civil or criminal liability. The doctrine was premised on the notion that a sovereign could do no wrong. In 1972, the delegates to the Montana Constitutional Convention adopted a provision that abolished the protections of sovereign immunity. Pursuant to Article II, section 18, of the Montana Constitution, "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically

provided by law by a 2/3 vote of each house of the legislature."

Additionally, pursuant to the Montana Tort Claims Act, Title 2, chapter 9, MCA, the Legislature has provided that governmental entities, which include the state and any county, city, or municipal corporation, are liable for their torts and for the torts of their employees acting within the course and scope of their employment or duties.<sup>1</sup> An employee is defined as "an officer, employee, or servant of a governmental entity, including elected or appointed officials, and persons acting on behalf of the governmental entity in any official capacity temporarily or permanently in the service of the governmental entity whether with or without compensation."<sup>2</sup>

<sup>1</sup> Section 2-9-102, MCA.

<sup>2</sup> Section 2-9-101, MCA.

Generally, liability for damages can arise from a breach of a legal duty owed to another, a breach of a duty set forth in a contractual agreement, or a breach of a constitutional or statutory duty. Any entity may be directly liable for a breach of any of these duties. For example, the state (or any of its subdivisions) might be found directly liable for a breach of legal duty if damages result from the state's

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*“While Montana courts do not appear to have directly addressed whether a governmental entity is liable for the actions of a volunteer, courts in other states have found that governmental entities can be held vicariously liable for volunteers acting on their behalf.”*

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failure to provide proper training, adequate supervision, or a safe working environment to a volunteer. Whether direct liability is found ultimately depends on the facts as they relate to the alleged breach.

Additionally, in some cases, an entity may be vicariously liable for the wrongdoing of another. Under common law doctrines of agency and *respondeat superior*, an employer is vicariously liable for the acts of subordinates or for those individuals over which the employer has the right, ability, or duty to control. If a person is considered to be an employee, then the employer may be liable for the employee's actions, provided the action was committed during the course and scope of the employment. The same principles apply equally to both private and public employers in Montana.

Because a volunteer is not specifically included within the definition of an employee under section 2-9-101, MCA, an analysis of common law principles regarding whether a person may be considered an employee is necessary. A governmental entity cannot be held vicariously liable for a volunteer's negligent acts under the theory of *respondeat superior* unless an employment relationship between the parties existed when the action occurred. Even then, liability cannot attach unless the wrongful acts were committed within the course and scope of his or her employment.

A variety of factors will be considered to determine whether an individual is an employee. The most significant factor is the employer's right of control over the individual's duties and conduct. The question of compensation in the context of volunteers may also be an issue. One could argue that a volunteer cannot be an employee because the services are provided gratuitously. However, given that the Montana Tort Claims Act states that an employee relationship may be established with or without compensation, it is clear that the receipt of compensation is not determinative in the context of governmental liability.

As stated above, a governmental entity is liable for the torts of its employees acting within the course and scope of their employment. Whether a wrongful action occurred during the course and scope of employment also depends on various factors, including the following: 1) whether the activity was undertaken at the employer's request; 2) whether the employer, directly or indirectly, compelled the employee's attendance at the activity; 3) whether the employer controlled or participated in the activity; and 4) whether the employer and the employee mutually benefitted from the activity.<sup>3</sup>

While Montana courts do not appear to have directly addressed whether a governmental entity is liable for the actions of a volunteer, courts in other states have found that governmental entities can be held vicariously liable for volunteers acting on their behalf. These courts generally relied on a finding that a principle-agent relationship could reasonably extend to volunteers working on behalf of a governmental entity. It is likely that a Montana court would reach a similar conclusion. Ultimately, the question of a governmental entity's liability for the activities of a volunteer depends on the facts and circumstances of each case.

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<sup>3</sup> Courser v. Darby School District, 214 Mont. 13, 16-17, 692 P.2d 417, 419 (1984).

The Back Page

# Placing a Premium on Fixing Montana Workers' Compensation Woes

**By Pat Murdo**  
**Legislative Research Analyst**

Montana has the second highest rate in the nation for workers' compensation premiums, according to a nationwide study done by the Oregon Department of Consumer and Business Services. (*See table at right.*) That sort of news makes businesses and economic development specialists cringe. Some Montana members of the National Federation of Independent Businesses have said that they pay more in workers' compensation premiums than in any other taxes.

In every state except Texas, workers' compensation is mandatory for most businesses, although each state has exemptions. Montana's 2009 legislative session yielded a 26th exemption. When analysts try to figure out why Montana's premium ranking is so dismal, they sometimes point to other states exempting agricultural workers while Montana does not. Almost without exception, Montana has a higher frequency of injuries by industry than the corresponding national average. (*See table on p. 21.*) Perhaps surprisingly, one of the few industries where Montana's injury rate is less than the national average is in forestry and logging.

There are many reasons for high premiums in Montana, and finding solutions is not simple. For more than three years, the Labor Management Advisory Council, spearheaded by the state Department of Labor and Industry and chaired by Lieutenant Governor John Bohlinger, has been working on solutions to high premiums. The advisory council includes representatives of employers and representatives of employees, mostly union representatives. It will likely take at least two years before data reveals whether any solutions proposed by LMAC actually lower workers' compensation premiums.

The Economic Affairs Interim Committee is working parallel to the LMAC, waiting for recommendations from the LMAC on some issues and considering whether to take the lead on other issues. The committee's work comes under the directives in Senate Joint Resolution 30, a study

National Workers' Compensation Rankings of Premiums to Payroll*			
Worst-Ranked States	Premium Rate Index/\$100 Payroll	Best-Ranked States	Premium Rate Index/\$100 Payroll
Alaska	\$3.97	North Dakota	\$1.08
Montana	\$3.50	Indiana	\$1.23
Ohio	\$3.32	Massachusetts	\$1.39
Vermont	\$3.14	Virginia	\$1.43
Maine	\$3.04	Arkansas	\$1.61
Delaware	\$2.96	Utah	\$1.63
Kentucky	\$2.96	Arizona	\$1.67
Alabama	\$2.90	Maryland	\$1.72
Oklahoma	\$2.89	Colorado	\$1.76
Illinois	\$2.79	Kansas	\$1.77
Louisiana	\$2.76	Iowa	\$1.86
South Carolina	\$2.74	West Virginia	\$1.86
California	\$2.72	Oregon	\$1.88
New Hampshire	\$2.70	Washington	\$1.98
Pennsylvania	\$2.68	Wyoming	\$2.06
New Jersey	\$2.66	South Dakota	\$2.08
Texas	\$2.61	Hawaii	\$2.08
Nevada	\$2.58	Idaho	\$2.12

Source: Oregon Dept. of Consumer & Business Services, "2008 Oregon Workers' Compensation Premium Ranking Summary," revised March 2009. The median value was \$2.26. [http://www4.cbs.state.or.us/ex/imd/reports/rpt/index.cfm?fuseaction=version\\_view&version\\_tk=181097&ProgID=FEARA012](http://www4.cbs.state.or.us/ex/imd/reports/rpt/index.cfm?fuseaction=version_view&version_tk=181097&ProgID=FEARA012)

of workers' compensation, which was the top-ranked legislative study of the 2009-2010 interim. One area the committee is studying on its own is regulation and the interplay of self-insurers (Plan 1), private insurers (Plan 2), and the Montana State Fund (Plan 3).

What is clear from the work of the LMAC, the committee's work, and a new private-public partnership called WorkSafeMT is that the first step toward lower

\* An individual company's premium varies based on job classification and experience rating. The data is adjusted for characteristics of each state's residual market. The rates also reflect different effective dates in states, ranging from April 1, 2007, through Jan. 1, 2008. Montana's was July 1, 2007.

premiums starts with the involvement of every employer, employee, workers' compensation insurer, and medical provider.

### A Matter of Being Responsible

There are a lot of technical details related to workers' compensation that take more than a little background to understand, but a few common-sense ideas underscore the shared responsibilities behind the compact between workers and employers that has been in effect in Montana since workers' compensation became the exclusive remedy for most Montana workers injured in the workplace. These include responsibilities of:

- the employer to provide a safe workplace and to help workers who are injured at work get back on the job and to avoid recriminations against an injured employee. While an employee may not be fired for a work-related injury, an employer may find another cause to lay off the injured worker who then is entitled to workers' compensation benefits, including wage replacement benefits that might be paid until an equivalent job is found.
- the employee to practice safe working habits, such as asking for help when objects are too heavy and paying attention to hazards. Employees also can help by reporting injuries when they occur (because delayed treatment may delay recovery) and getting treatment for a workers' compensation injury without recriminations against the employer.
- the insurer to deal with injured workers fairly by not denying necessary treatment and not adding more bureaucracy or reserves than necessary to handle claims and provide a reasonable profit (for private insurers); and
- the medical provider to not overtreat because of fear of malpractice lawsuits and to deal as well as possible with an increased flow of paperwork and contacts with workers' compensation claims examiners and, ideally, employers interested in getting a worker back to work.

Although workers' compensation attorneys play an important role for some injured workers, they are not included in the list because their activities are circumscribed by various statutes. The public policy contained in 39-71-105(4), MCA, states that the workers' compensation system is intended to be primarily self-

administering with minimal reliance on attorneys and courts. A study commissioned in 2006 by the Department of Labor and Industry found that Montana had less attorney involvement than many other states. The Workers Compensation Research Institute (WCRI) referenced data from 2003 indicating that 17.6 percent of claims in Montana involved an attorney compared with a range in other states of 10 percent to nearly 44 percent attorney involvement.<sup>1</sup>

Common-sense approaches are among the reasons that most workers' compensation cases are resolved relatively quickly. However, employers may wonder why their premiums rise in a year when no employees were injured or employees reported relatively minor injuries.

### Factors Behind Increasing Premiums

There are many factors that contribute to premium increases. Some are directly related to the number of claims filed and the severity of those claims, including the length of time that an injured worker is away from the job. Other factors include the cost of medical care and the level of competition in the workers' compensation insurance market. All – or even one – of these factors can lead to higher premiums.

**Frequency of Injuries.** In 2007 there were 1,857 lost-time claims at work in Montana because of injury for every 100,000 workers. That compared to 1,039 lost-time claims nationally. In developing premiums for an individual employer, insurers use the last three years of experience. So even if there were no accidents in the past two years, a bad experience three years ago can still affect premiums this year. Moreover, a bad injury rate for the industry and for job classifications within that industry can have an adverse effect on an employer with a good record.

**Severity of Injuries.** There are two components to severity. A bad injury, such as an amputation, may affect the employer's premiums for the three-year period. A less tangible injury may cause a person to be away from work because of pain or the inability to perform the time-of-injury job. The length of time the injured person is away from work can affect the employer's premium experience rating. In addition, a worker who is otherwise capable of

1 Duncan Ballantyne, "Workers' Compensation in Montana: Administrative Inventory" Workers Compensation Research Institute, March 2007.

working but waits to see a medical provider may drive up premiums. An employer who is aware of the importance of getting an employee back to work without causing additional harm may be able to offer sympathy, restructure work hours to aid in recovery, or provide the injured worker some other type of work while awaiting treatment. (This approach is not relevant to severe, tangible injuries. Also, pressuring an injured worker to return to work may be counterproductive if the injured worker feels that the injury is being dismissed as unimportant.)

Statistics show Montana with an average duration for temporary disability ranging from 12.3 weeks for those in a self-insured plan to 15 weeks under the Montana State Fund plan. However, those statistics have little direct impact on premiums for the individual employer. What is more relevant for the employer are studies that show the benefits of getting an injured worker back to work as soon as possible, which means that an employer might affect premiums by providing an injured employee some form of work.

**Medical Costs.** In the same way that health care premiums rise faster than the cost of living, many workers' compensation premium increases are due to the cost of medical care. Medical care as a share of workers' compensation benefits ranges from nearly 57 percent up to 73 percent, depending on the measurement. The rest of the cost is for lost wages at a percentage of the state's average weekly wage or, for those who are permanently injured, a payment for an impairment rating.

**Competition.** Market share can be determined by a number of measures: benefits paid out, premiums paid as a percentage of payroll, share of policyholders, or share of direct written premium. No matter which measure is used, the Montana State Fund has at least a 50 percent market share. A calculation by the State Auditor's Office to determine market competitiveness indicated that Montana's workers' compensation market is highly concentrated – almost halfway to being a single insurer market.

While private insurers and self-insurers are active in Montana's market, some private insurer representatives have said that there might be more competition if there were changes in state law regarding how insurers operate or compete. While insurers use similar rating criteria, with their base charges dependent on a national calculation

and employment classification, there are variations that can be applied. A case study of a nonprofit program that serves runaway teenagers in Billings indicated that there may be benefits to shopping for a competitive rate. The study, prepared by a staff member of the Legislative Fiscal Division, is available on the Economic Affairs Committee webpage at [leg.mt.gov/eaic](http://leg.mt.gov/eaic) under the January 2010 meeting material (Case Study of Tumbleweed Runaway Program Insurance Costs).

### Ideas for Improving the System

The LMAC and the Economic Affairs Committee are looking at ways to reduce costs without upending a system that seems to work well. The following topics have been considered by LMAC, the Department of Labor and Industry, or the Economic Affairs Committee:

**Attention to Safety and Injury Prevention.** LMAC, the Department of Labor and Industry, and the Legislature (through start-up funding) supported creation of WorkSafeMT, an organization aimed at helping employers and employees make safety a key value on any job or worksite. What employers say about safety may vary in practice among large and small employers. In response to a survey conducted by the Department of Labor and Industry, more than 50 percent of employers in most industries said they provided safety training, with only the finance, insurance, and real estate industries lagging below 50 percent. However, in a report to the Economic Affairs Committee in July, Carl Kochman, chair of WorkSafeMT, said that roughly 85 percent of small employers contacted by Montana State Fund expressed no interest in safety training. The Montana Safety Culture Act, enacted in 1993 in Title 39, chapter 71, part 15, MCA, encouraged "creation of a safety culture" that requires employers to provide training and education about safety awareness. The Department of Labor and Industry provides safety training and consultations through its Safety and Health Bureau. Insurers also offer safety training options.

**Return to Work.** LMAC and the Economic Affairs Committee are learning about some of the problems related to getting an injured worker back to work.

- Small businesses often have no other type of work that an injured worker could do without further strain.
- Some injured workers are in unions that specify which jobs they can or cannot do.

- Some injured workers may not see the link between lost time on the job and their recovery prospects and their long-term wage loss.
- There may be misunderstanding or lack of communication between an employee and a medical provider regarding how much effort the injured workers can expend without further injury.
- Complicating the communication between medical providers and injured workers about return-to-work status is a concern among medical providers about how much information they can provide to employers – who in fact may never be in contact with the medical provider or even the worker.
- Options being discussed to get an injured worker back to work include ways to use charitable organizations as transitional employment for employers that have no alternate jobs for the injured worker.
- Also under consideration is having vocational rehabilitation specialists involved earlier in the process than is typical now.

### **Introduction of Utilization and Treatment Guidelines.**

Since last August, a panel of medical providers has provided input on medical treatment guidelines that the Department of Labor and Industry plans to adopt by administrative rule. Medical providers following the guidelines would be allowed to provide treatment without getting approval from an insurer. Because the guidelines are considered evidence-based medicine and best practices, an insurer that has accepted responsibility for a claim is unlikely to reject accepted treatment for the injury.

The guidelines are one way of speeding up the treatment process while still requiring experimental treatment or treatment not within the guidelines to have an insurer's approval to proceed. The department obtained approval in the 2007 session to adopt utilization and treatment guidelines under 39-71-704(3), MCA.

In other states that have adopted utilization and treatment guidelines, medical costs for workers' compensation cases have shrunk. California's medical costs for workers' compensation dropped 40 percent, while Ohio's dropped 64 percent, according to information provided by the Department of Labor and Industry to the Economic Affairs Committee. In North Dakota, a state where the

government handles all workers' compensation insurance, premiums dropped 40 percent after implementation of utilization and treatment guidelines.

**Claim Closure.** Montana has more open claims than other states, which means that insurers have unknown costs for handling those claims – both from the indemnity (lost wages) and medical perspectives. Uncertainty can lead to higher premiums as insurers seek to cover claims for as long as 60 years. A report by the National Council on Compensation Insurance, Inc., to the Economic Affairs Committee in July showed that Montana had closed only 58 percent of its claims at the first reporting period compared with Idaho's closure of 69 percent of claims, Utah's 80 percent rate, and Colorado's 71 percent rate. Montana had closed only 90 percent of its claims by the fifth reporting year, compared with 99 percent in Colorado. However, the report did not show how many of Colorado's claims were reopened, nor did it address criteria in each state for reopening these claims. LMAC is working on various options to close claims and provide criteria for reopening them.

**Benefits and Coverage.** Also under study by both LMAC and the Economic Affairs Committee are options related to benefits and coverage. The workers' compensation system is geared to getting an injured worker back to work and to paying for injuries and lost time at work in a no-fault system so that an injured worker and employer are not in court fighting over liability. Benefits are either for medical care, regardless of whether a person is off work, and indemnity, which covers both lost wages and impairment ratings.

Both LMAC and the Economic Affairs Committee are working to ensure that workers get needed benefits but not necessarily more or less than they would get in another state. Similarly, coverage under workers' compensation is not always obvious. Is a person who trips in the parking lot on the way into work eligible for workers' compensation insurance? (If the person is an employee of the business, then yes.) But what about a person who gets injured while playing softball on a team sponsored by that person's employer? Is that a work-related injury? (Probably not.) A new proposal under what is called "course and scope" of employment is attempting to clarify those situations.

**Competition.** LMAC is not examining competition among insurers, but the Economic Affairs Committee heard various concerns related to competition among

insurers at its January meeting. Among options the committee is studying are whether to:

- change how Montana State Fund operates, perhaps providing more regulation or oversight; and
- revise how private insurers receive assistance in investigating or prosecuting fraud.

By May, the Economic Affairs Committee expects to

decide whether to support some of the proposals before the LMAC and to propose legislation in areas not being considered by LMAC. Whether any of the proposals will lower premiums may not be known for several years. But the effects on injured workers and employers may be known sooner. And in the short term, efforts to implement safety would pay off by preventing the injuries in the first place.

<b>Incidence of Occupational Injuries &amp; Illnesses in Montana &amp; Nationwide, 2008</b>						
	Montana - Total Recorded Cases			Nation - Total Recorded Cases		
	Rate for 100 FTE	of which days away from work	of which job transfer or restriction occurred	Rate for 100 FTE	of which days away from work	of which job transfer or restriction occurred
All industry, including state & local government	6.4	2.0	0.7	4.2	1.2	0.8
Crop production, excluding farms with fewer than 11 employees	9.0	data set too small & would identify employer	data set too small & would identify employer	5.3	1.7	1.3
Forestry & logging	3.2	data too small	data set too small	4.0	2.3	0.4
Mining*	4.0	1.7	0.4	2.9	1.3	0.7
Heavy construction	7.3	2.8	0.7	4.2	1.4	0.8
Food manufacturing	9.0	3.1	1.7	6.2	1.4	2.6
Wood product manufacturing	9.7	3.3	1.8	7.2	2.0	1.8
Trade, utilities & transportation	6.6	2.3	1.1	4.4	1.4	1.1
Retail trade	6.6	2.2	1.2	4.4	1.2	1.1
Transportation & warehousing	6.8	2.9	0.9	5.7	2.5	1.4
Utilities	6.3	1.8	0.9	3.5	1.1	0.8
Publishing (excluding Internet)	3.9	1.4	1.0	1.6	0.5	0.3
Finance & insurance	2.1	1.1	data set too small	0.9	0.2	0.1
Professional & business services	2.9	1.1	0.2	1.9	0.6	0.3
Health care & social assistance	7.9	2.3	1.1	5.4	1.4	1.1
Leisure & hospitality	6.0	1.3	0.6	4.2	1.0	0.7

Source: U.S. Bureau of Labor Statistics, <http://www.bls.gov>

\* Mining does not include Occupational and Safety Administration changes that other industries have incorporated, so the data estimates are not comparable.

All interim committee meetings are held in the Capitol in Helena unless otherwise noted.

April 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
				1	2	3
4	5 Law & Justice Comm, 8 am, Rm 137	6 Law & Justice Comm, 8 am, Rm 137  MEPA Training for State Employees, 8 am, Rm 317	7 MEPA Training for State Employees, 8 am, Rm 317	8 Districting Comm Public Hearing, 6:30 pm, Helena, Great Falls, Havre  State-Tribal Relations Comm, 10 am, Rm 137	9	10
11	12 Districting Comm Public Hearing, 6:30 pm, Missoula, Kalispell	13	14	15	16	17
18	19 Districting Comm Public Hearing, 6:30 pm, Billings, Miles City	20	21	22 State Admin & Veterans' Affairs Comm, time TBA, Rm 137	23 State Admin & Veterans' Affairs Comm, time TBA, Rm 137	24
25	26 Children & Families Comm, time TBA, Rm 137	27 Children & Families Comm, time TBA, Rm 137  Districting Comm, 10:30 am, Rm 102  Legislative Computer System Planning Council, 9 am, Rm 172	28	29 Residential & Commercial Property Reappraisal Subcomm, time & place TBA  Agricultural & Forest Land Property Reappraisal Subcomm, time & place TBA  Revenue & Transportation Comm, 1 pm, Rm 137	30 Revenue & Transportation Comm, 8 am, Rm 137	

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May 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						1
2	3	4	5	6 Environmental Quality Council, time TBA, Rm 172	7 Environmental Quality Council, time TBA, Rm 172	8
9	10	11 Water Policy Comm, time TBA, Rm 152	12 Water Policy Comm, time TBA, Rm 152	13 Energy & Telecomm Comm, time TBA, Rm 172	14	15
16	17 Law & Justice Comm, time & place TBA	18 Law & Justice Comm, time & place TBA	19	20	21	22
23	24	25	26 Energy & Telecomm Comm, time & place TBA	27	28	29
30	31					

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Legislative Services Division  
PO Box 201706  
Helena, MT 59620-1706