

HOUSE BILL NO. 579
INTRODUCED BY C. JUNEAU

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE UNEMPLOYMENT INSURANCE LAWS TO CONFORM WITH FEDERAL REQUIREMENTS RELATED TO EMPLOYMENT BY AN EMPLOYER THAT IS AN INDIAN TRIBE; AMENDING SECTIONS 39-51-201, 39-51-204, 39-51-1103, 39-51-1124, AND 39-51-1126, MCA; AND PROVIDING AN EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY DATE."

WHEREAS, on December 21, 2000, federal law changed regarding state law treatment of employment by recognized Indian tribes for the purposes of state unemployment insurance programs by mandating the formerly optional state unemployment insurance coverage of employment by those Indian tribes; and

WHEREAS, as of December 21, 2000, federal law now requires states in which recognized Indian tribes exist to offer to those tribes a choice of experience-rating or direct reimbursable unemployment insurance accounts; and

WHEREAS, Montana's unemployment laws do not conform to the new federal requirements, and nonconformity of the state's unemployment insurance laws with the new federal provisions will jeopardize the ability of all Montana employers to take credit on federal taxes for the amounts paid to Montana's unemployment insurance program and will further depress Montana's economy; and

WHEREAS, the Legislature finds that it is the best interests of all the people of Montana that Montana's unemployment insurance laws conform to those December 21, 2000, federal law changes with respect to the treatment of Indian tribes for unemployment insurance purposes.

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

NEW SECTION. Section 1. Liability of tribal units -- cancellation for failure to make payments.

(1) Each tribal unit of an Indian tribe is jointly and severally liable for all contributions or payments in lieu of contributions, including those under subsection (2), owed by any other tribal unit of the same Indian tribe.

(2) (a) An Indian tribe and its tribal units that make contributions are liable for reimbursing the department for 50% of any extended benefits paid pursuant to Title 39, chapter 51, part 24, that are chargeable to the account of the Indian tribe or one of its tribal units.

(b) An Indian tribe and its tribal units that elect to make payments in lieu of contributions are liable for

reimbursing the department for 100% of any extended benefits paid pursuant to Title 39, chapter 51, part 24, that are chargeable to the account of the Indian tribe or one of its tribal units.

(3) (a) The failure of an Indian tribe or any of its tribal units to make the required payments under this chapter within 90 days of being given notice that the Indian tribe or tribal unit is delinquent in payment cancels the participation of the Indian tribe and all of its tribal units in the unemployment insurance program provided by this chapter and removes service provided to the Indian tribe and all of its tribal units from being considered as employment, within the meaning 39-51-203.

(b) Payment in full of amounts that have been delinquent for more than 90 days reinstate the participation of the Indian tribe and its tribal units in Montana's unemployment insurance system, and service to the Indian tribe and its tribal units once again is considered to be employment within the meaning of 39-51-203. However, upon reinstatement, the Indian tribe and all of its tribal units no longer have the option of electing to make payments in lieu of contributions and, pursuant to 39-51-1126, are required to make contributions as provided in this chapter.

Section 2. Section 39-51-201, MCA, is amended to read:

"39-51-201. General definitions. As used in this chapter, unless the context clearly requires otherwise, the following definitions apply:

(1) "Annual payroll" means the total amount of wages paid by an employer, regardless of the time of payment, for employment during a calendar year.

(2) "Base period" means the first 4 of the last 5 completed calendar quarters immediately preceding the first day of an individual's benefit year. However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state. For an individual who fails to meet the qualifications of 39-51-2105 or a similar statute of another state because of a temporary total disability, as defined in 39-71-116, or a similar statute of another state or the United States, the base period means the first 4 quarters of the last 5 completed calendar quarters preceding the disability if a claim for unemployment benefits is filed within 24 months of the date on which the individual's disability was incurred.

(3) "Benefit year", with respect to any individual, means the 52-consecutive-week period beginning with the first day of the calendar week in which the individual files a valid claim for benefits, except that the benefit year is 53 weeks if filing a new valid claim would result in overlapping any quarter of the base year of a previously filed new claim. A subsequent benefit year may not be established until the expiration of the current benefit year.

However, in the case of a combined-wage claim pursuant to the arrangement approved by the secretary of labor of the United States, the base period is the period applicable under the unemployment law of the paying state.

(4) "Benefits" means the money payments payable to an individual, as provided in this chapter, with respect to the individual's unemployment.

(5) "Board" means the board of labor appeals provided for in Title 2, chapter 15, part 17.

(6) "Calendar quarter" means the period of 3 consecutive calendar months ending on March 31, June 30, September 30, or December 31.

(7) "Contributions" means the money payments to the state unemployment insurance fund required by this chapter but does not include assessments under 39-51-404(4).

(8) "Department" means the department of labor and industry provided for in Title 2, chapter 15, part 17.

(9) "Domestic or household service" means employment of persons other than members of the household 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, but does not include employment beyond the scope of normal household or domestic duties, such as home health care or domiciliary care.

(10) "Employing unit" means any individual or organization (including the state government and any of its political subdivisions or instrumentalities or an Indian tribe or tribal unit), partnership, association, trust, estate, joint-stock company, insurance company, limited liability company or limited liability partnership that has filed with the secretary of state, or corporation, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or the trustee's successor, or legal representative of a deceased person that has or had in its employ one or more individuals performing services for it within this state, except as provided under 39-51-204(1)(a) and (1)(q). All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state are considered to be employed by a single employing unit for all the purposes of this chapter. Each individual employed to perform or assist in performing the work of any agent or employee of an employing unit is considered to be employed by the employing unit for the purposes of this chapter, whether the individual was hired or paid directly by the employing unit or by the agent or employee, provided that the employing unit has actual or constructive knowledge of the work.

(11) "Employment office" means a free public employment office or branch of an office operated by this state or maintained as a part of a state-controlled system of public employment offices or other free public employment offices operated and maintained by the United States government or its instrumentalities as the department may approve.

(12) "Fund" means the unemployment insurance fund established by this chapter to which all

contributions and payments in lieu of contributions are required to be paid and from which all benefits provided under this chapter must be paid.

(13) "Gross misconduct" means a criminal act, other than a violation of a motor vehicle traffic law, for which an individual has been convicted in a criminal court or has admitted or conduct that demonstrates a flagrant and wanton disregard of and for the rights or title or interest of a fellow employee or the employer.

(14) "Hospital" means an institution that has been licensed, certified, or approved by the state as a hospital.

(15) "Independent contractor" means an individual who renders service in the course of an occupation and:

(a) has been and will continue to be free from control or direction over the performance of the services, both under a contract and in fact; and

(b) is engaged in an independently established trade, occupation, profession, or business.

(16) "Indian tribe" means an Indian tribe as defined in the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450b(e).

~~(16)~~(17) (a) "Institution of higher education", for the purposes of this part, means an educational institution that:

(i) admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of a certificate;

(ii) is legally authorized in this state to provide a program of education beyond high school;

(iii) provides an educational program for which it awards a bachelor's or higher degree or provides a program that is acceptable for full credit toward a bachelor's or higher degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) is a public or other nonprofit institution.

(b) Notwithstanding subsection ~~(16)~~(a) (17)(a), all universities in this state are institutions of higher education for purposes of this part.

~~(17)~~(18) "State" includes, in addition to the states of the United States of America, the District of Columbia, Puerto Rico, the Virgin Islands, and Canada.

~~(18)~~(19) "Taxes" means contributions and assessments required under this chapter but does not include penalties or interest for past-due or unpaid contributions or assessments.

(20) "Tribal unit" means an Indian tribe and any subdivision, subsidiary, or business enterprise that is

wholly owned by that tribe.

~~(19)~~(21) "Unemployment insurance administration fund" means the unemployment insurance administration fund established by this chapter from which administrative expenses under this chapter must be paid.

~~(20)~~(22) (a) "Wages", unless specifically exempted under subsection ~~(20)(b)~~ (22)(b), means all remuneration payable for personal services, including the cash value of all remuneration paid in any medium other than cash. The reasonable cash value of remuneration payable in any medium other than cash must be estimated and determined pursuant to rules prescribed by the department. The term includes but is not limited to:

(i) commissions, bonuses, and remuneration paid for overtime work, holidays, vacations, and sickness periods;

(ii) severance or continuation pay, backpay, and any similar pay made for or in regard to previous service by the employee for the employer, other than retirement or pension benefits from a qualified plan; and

(iii) tips or other gratuities received by the employee, to the extent that the tips or gratuities are documented by the employee to the employer for tax purposes.

(b) The term "wages" does not include:

(i) the amount of any payment made by the employer for employees, if the payment was made for:

(A) retirement or pension pursuant to a qualified plan as defined under the provisions of the Internal Revenue Code;

(B) sickness or accident disability under a workers' compensation policy;

(C) medical or hospitalization expenses in connection with sickness or accident disability, including health insurance for the employee or the employee's immediate family; or

(D) death, including life insurance for the employee or the employee's immediate family; or

(ii) employee expense reimbursements or allowances for meals, lodging, travel, subsistence, or other expenses, as set forth in department rules.

~~(24)~~(23) "Week" means a period of 7 consecutive calendar days ending at midnight on Saturday.

~~(22)~~(24) An individual's "weekly benefit amount" means the amount of benefits that the individual would be entitled to receive for 1 week of total unemployment."

Section 3. Section 39-51-204, MCA, is amended to read:

"39-51-204. Exclusions from definition of employment. (1) The term "employment" does not include:

(a) domestic or household service in a private home, local college club, or local chapter of a college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to this chapter and has domestic or household service employment, all employees engaged in domestic or household service must be excluded from coverage under this chapter if the employer:

(i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the subject wages attributable to domestic or household service; and

(ii) keeps separate books and records to account for the employment of persons in domestic or household service.

(b) service performed by a dependent member of a sole proprietor for whom an exemption may be claimed under 26 U.S.C. 152 or service performed by a sole proprietor's spouse for whom an exemption based on marital status may be claimed by the sole proprietor under 26 U.S.C. 7703;

(c) service performed as a freelance correspondent or newspaper carrier if the person performing the service, or a parent or guardian of the person performing the service in the case of a minor, has acknowledged in writing that the person performing the service and the service are not covered. As used in this subsection:

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

(ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.

(d) service performed as a real estate broker or salesperson who is licensed pursuant to Title 37, chapter 51;

(e) service performed by a cosmetologist who is licensed under Title 37, chapter 31, or a barber who is licensed under Title 37, chapter 30, and:

(i) who has acknowledged in writing that the cosmetologist or barber is not covered by unemployment insurance and workers' compensation;

(ii) who contracts with a cosmetology salon, as defined in 37-31-101, or a barbershop, as defined in 37-30-101, which contract must show that the cosmetologist or barber:

(A) is free from all control and direction of the owner in the contract;

(B) receives payment for service from individual clientele; and

(C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or knowledge;

and

(iii) whose contract gives rise to an action for breach of contract in the event of contract termination. The existence of a single license for the cosmetology salon or barbershop may not be construed as a lack of freedom from control or direction under this subsection.

(f) casual labor not in the course of an employer's trade or business performed in any calendar quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service. "Regularly employed" means that the service is performed during at least 24 days in the same quarter.

(g) service performed by sole proprietors, working members of a partnership, members of a member-managed limited liability company that has filed with the secretary of state, or partners in a limited liability partnership that has filed with the secretary of state;

(h) service performed for the installation of floor coverings if the installer:

(i) bids or negotiates a contract price based upon work performed by the yard or by the job;

(ii) is paid upon completion of an agreed-upon portion of the job or after the job is completed;

(iii) may perform service for anyone without limitation;

(iv) may accept or reject any job;

(v) furnishes substantially all tools and equipment necessary to provide the service; and

(vi) works under a written contract that:

(A) gives rise to a breach of contract action if the installer or any other party fails to perform the contract obligations;

(B) states that the installer is not covered by unemployment insurance; and

(C) requires the installer to provide a current workers' compensation policy or to obtain an exemption from workers' compensation requirements;

(i) service performed as a direct seller as defined by 26 U.S.C. 3508;

(j) service performed by a petroleum land professional. As used in this subsection, "petroleum land professional" means a person who:

(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;

(ii) is paid for service that is directly related to the completion of a contracted specific task rather than on an hourly wage basis; and

(iii) performs all services as an independent contractor pursuant to a written contract.

(k) service performed by an ordained, commissioned, or licensed minister of a church in the exercise

of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

(l) service performed by an individual receiving rehabilitation or remunerative work in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;

(m) service performed as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by a federal agency ~~or~~ any agency of a state or political subdivision of the state, or an Indian tribe by an individual receiving work relief or work training;

(n) service performed for a state prison or other state correctional or custodial institution by an inmate of that institution;

(o) service performed by an individual who is sentenced to perform court-ordered community service or similar work;

(p) service performed by elected public officials;

(q) agricultural labor, except as provided in 39-51-202(2), (4), or (6). If an employer is otherwise subject to this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded from coverage under this chapter if the employer:

(i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the monetary amount or number of employees and days worked for the subject wages attributable to agricultural labor; and

(ii) keeps separate books and records to account for the employment of persons in agricultural labor.

(r) service performed in the employ of any other state or its political subdivisions or of the United States government or of an instrumentality of any other state or states or their political subdivisions or of the United States, except that national banks organized under the national banking law are not entitled to exemption under this subsection and are subject to this chapter the same as state banks, if the service is excluded from employment as defined in section 3306(c)(7) of the Federal Unemployment Tax Act;

(s) service in which unemployment insurance is payable under an unemployment insurance system established by an act of congress if the department enters into agreements with the proper agencies under an act of congress and those agreements become effective in the manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter, acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential rights to unemployment insurance under the act of congress,

acquired rights to benefits under this chapter;

(t) service performed in the employ of a school or university if the service is performed by a student who is enrolled and is regularly attending classes at a school or university or by the spouse of a student if the spouse is advised, at the time that the spouse commences to perform the service, that the employment of the spouse to perform the service is provided under a program to provide financial assistance to the student by the school or university and that the employment is not covered by any program of unemployment insurance;

(u) service performed by an individual who is enrolled at a nonprofit or public educational institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on, as a student in a full-time program taken for credit at an institution that combines academic instruction with work experience if the service is an integral part of the program and the institution has certified that fact to the employer, except that this subsection (1)(u) does not apply to service performed in a program established for or on behalf of an employer or group of employers;

(v) service performed as an officer or member of the crew of a vessel on the navigable waters of the United States; or

(w) service performed by an alien admitted to the United States to perform agricultural labor pursuant to sections 214(c) and 1101(a)(H)(ii)(a) of the Immigration and Nationality Act; or

(x) service performed in a fishing rights-related activity of an Indian tribe by a member of the tribe for another member of that tribe or for a qualified Indian entity, as defined in 26 U.S.C. 7873.

(2) An individual found to be an independent contractor by the department under the terms of 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to 39-51-2402.

(3) This section does not apply to a state or local governmental entity, an Indian tribe or tribal unit, or a nonprofit organization defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from employment ~~as defined in~~ for purposes of the Federal Unemployment Tax Act."

Section 4. Section 39-51-1103, MCA, is amended to read:

"39-51-1103. Contributions by employers required -- payments in lieu thereof of contributions authorized for certain employers. (1) Contributions shall accrue and become payable by each employer for each calendar year in which ~~he~~ the employer is subject to this chapter with respect to wages, as defined in 39-51-201, paid for employment, as defined in this chapter, occurring during ~~such~~ the calendar year.

(2) ~~Such~~ The contributions ~~shall~~ become due and must be paid by each employer to the department for the fund in accordance with ~~such regulations as~~ rules adopted by the department may prescribe and ~~shall~~ may not be deducted in whole or in part from the wages of individuals ~~in his employ~~ employed by the employer.

(3) In the payment of any contributions, a fractional part of a cent ~~shall~~ must be disregarded unless it amounts to one-half cent or more, in which case it ~~shall~~ must be increased to 1 cent.

(4) Nonprofit organizations defined in section 501(c)(3) of the ~~federal~~ Internal Revenue Code and ~~which~~ that are exempt from tax under section 501(a) of ~~such code~~ the Internal Revenue Code, may elect to make payments in lieu of contributions.

(5) The state and its political subdivisions, ~~effective January 1, 1977,~~ may elect to make payments in lieu of contributions or pay under a special contributions plan established for governmental entities only.

(6) An Indian tribe may make a separate election to make payments in lieu of contributions for each tribal unit and may elect to combine all or some tribal units into group reimbursement accounts."

Section 5. Section 39-51-1124, MCA, is amended to read:

"39-51-1124. Procedure for election to make payments in lieu of contributions. (1) Any nonprofit organization defined in 39-51-1103, tribal unit, or governmental entity electing to become liable for payments in lieu of contributions ~~must~~ shall file a written notice of its election with the department not later than 30 days immediately following the date of the determination of subjectivity to this chapter. This election ~~shall~~ must be for a period of not less than 2 years.

(2) Any nonprofit organization defined in 39-51-1103, tribal unit, or governmental entity ~~which~~ that has been paying contributions for at least 2 ~~taxable tax~~ years may change to payments in lieu of contributions by filing a written notice to that effect with the department within 30 days before the beginning of the ~~taxable tax~~ year for which the change is effective."

Section 6. Section 39-51-1126, MCA, is amended to read:

"39-51-1126. Termination of election to make payments in lieu of contributions. (1) Any nonprofit organization, tribal unit, or governmental entity may terminate its election to make payments in lieu of contributions after 2 years from the effective date of ~~such an~~ election by filing a written notice with the department not later than 30 days prior to the beginning of the ~~taxable tax~~ year for which the termination is effective.

(2) If a nonprofit organization, tribal unit, or governmental entity is delinquent in making payments in lieu of contributions, the department may terminate the election to make payments in lieu of contributions as of the

beginning of the next ~~taxable tax~~ year, and the termination is effective for that and the next ~~taxable tax~~ year."

NEW SECTION. **Section 7. Codification instruction.** [Section 1] is intended to be codified as an integral part of Title 39, chapter 51, part 11, and the provisions of Title 39, chapter 51, part 11, apply to [section 1].

NEW SECTION. **Section 8. Notification to tribal governments.** The secretary of state shall send a copy of [this act] to each tribal government located on the seven Montana reservations and to the Little Shell band of Chippewa.

NEW SECTION. **Section 9. Effective date -- retroactive applicability.** [This act] is effective July 1, 2001, and applies retroactively, within the meaning of 1-2-109, to employment by recognized Indian tribes occurring on or after December 21, 2000.

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