

SENATE BILL NO. 270

INTRODUCED BY HARRINGTON, SQUIRES, WANZENRIED

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE INDEPENDENT CONTRACTOR EXEMPTION LAWS TO REQUIRE A SOLE PROPRIETOR, A WORKING MEMBER OF A PARTNERSHIP, OR A WORKING MEMBER OF A LIMITED LIABILITY COMPANY WHO APPLIES FOR AN INITIAL INDEPENDENT CONTRACTOR EXEMPTION OR A RENEWAL OF AN INDEPENDENT CONTRACTOR EXEMPTION FROM COVERAGE UNDER THE WORKERS' COMPENSATION ACT TO INCLUDE IN THE REQUIRED APPLICATION PROOF OF A CURRENT LIABILITY INSURANCE POLICY, SUBJECT TO PERIODIC REVIEW BY THE DEPARTMENT OF LABOR AND INDUSTRY; CLARIFYING CLARIFY THE DEFINITION OF INDEPENDENT CONTRACTOR TO INCLUDE A CONTRACTOR WHO HAS RECEIVED AN EXEMPTION GRANTED BY THE DEPARTMENT OF LABOR AND INDUSTRY; IMPOSING A CIVIL PENALTY AND REQUIRING REPAYMENT OF UNEMPLOYMENT CONTRIBUTIONS AND WORKERS' COMPENSATION PREMIUMS AGAINST AN EMPLOYER WHO FALSELY MISREPRESENTS AN EMPLOYEE'S STATUS AS AN EXEMPT INDEPENDENT CONTRACTOR; REQUIRING THE DEPARTMENT OF LABOR AND INDUSTRY TO APPOINT AN INTERIM ADVISORY COMMITTEE TO STUDY ISSUES RELATED TO INDEPENDENT CONTRACTORS AND TO MAKE RECOMMENDATIONS TO THE 59TH LEGISLATURE; AMENDING ~~SECTIONS 39-71-120 AND~~ SECTION 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND AN APPLICABILITY DATE."

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

~~Section 1. Section 39-71-120, MCA, is amended to read:~~

~~"39-71-120. Independent contractor defined. (1) An "independent contractor" is one 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 the contract and in fact; and~~

~~(b) is engaged in an independently established trade, occupation, profession, or business; and~~

~~(c) has received an exemption granted under 39-71-401(3).~~

~~(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met."~~

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

"39-71-401. Employments covered and employments exempted. (1) Except as provided in subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to all employees, as defined in 39-71-118. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by the compensation plan that has been elected by the employer.

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

- (a) household and domestic employment;
- (b) casual employment as defined in 39-71-116;
- (c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;
- (d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);
- (e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;
- (f) employment as a direct seller as defined by 26 U.S.C. 3508;
- (g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;
- (h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;
- (i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;
- (j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;
- (k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "freelance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":

(i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles;
but

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

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

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

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

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

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

(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is 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 services that are 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.

(r) an officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company who qualifies under one or more of the following provisions:

(i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the limited liability company and does not receive any pay from the corporation or the limited liability company for performance of the duties;

(ii) the officer or manager is engaged primarily in household employment for the corporation or the limited liability company;

(iii) the officer or manager either:

(A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the limited liability company; or

(B) owns less than 20% of the number of shares of stock in the corporation or limited liability company if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or

(iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law, daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection (2)(r)(iii)(A) or (2)(r)(iii)(B).

(s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;

(t) 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.

(3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers' Compensation Act.

(b) The application must be made in accordance with the rules adopted by the department ~~and include proof that the applicant has a current liability insurance policy, which is subject to periodic review as required by the department.~~ There is a \$25 fee for the initial application. Any subsequent application renewal must be accompanied by a \$25 application fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset the costs of administering the program.

(c) When an application is approved by the department, it is conclusive as to the status of an independent contractor and precludes the applicant from obtaining benefits under this chapter.

(d) The exemption, if approved, remains in effect for 3 years following the date of the department's approval ~~unless the department determines that the contractor has failed to maintain the liability insurance policy required in subsection (3)(b).~~ To maintain the independent contractor status, an independent contractor shall ~~every 3 years~~ submit a renewal application every 3 years. ~~A renewal application must be submitted for all independent contractor exemptions approved on or after July 1, 1995.~~ The renewal application and the \$25 renewal application fee, ~~along with the proof of insurance required in subsection (3)(b),~~ must be received by the department at least 30 days before the anniversary date of the previously approved exemption.

(e) A person who makes a false statement or misrepresentation concerning that person's status as an

exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

(f) If an employer misrepresents an employee's status as an exempt independent contractor, the department may impose a civil penalty of \$1,000 in addition to any other penalties provided in law.

~~(f)~~(g) If the department denies the application for exemption, the applicant may, after mediation pursuant to department rules, contest the denial by petitioning the workers' compensation court.

(4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private corporation, or a manager-managed limited liability company may elect coverage for its corporate officers or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following manner:

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

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

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

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

(6) Each employer shall post a sign in the workplace at the locations where notices to employees are normally posted, informing employees about the employer's current provision of workers' compensation insurance. A workplace is any location where an employee performs any work-related act in the course of employment, regardless of whether the location is temporary or permanent, and includes the place of business or property of a third person while the employer has access to or control over the place of business or property for the purpose of carrying on the employer's usual trade, business, or occupation. The sign must be provided by the department, distributed through insurers or directly by the department, and posted by employers in

accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

NEW SECTION. SECTION 2. STUDY OF INDEPENDENT CONTRACTOR EXEMPTION. (1) THE COMMISSIONER OF LABOR AND INDUSTRY SHALL APPOINT AN ADVISORY COMMITTEE THAT WILL SERVE ON A VOLUNTEER BASIS TO DEFINE THE TERM "INDEPENDENT CONTRACTOR" AND STUDY THE ISSUES RELATED TO EXEMPTIONS OF INDEPENDENT CONTRACTORS FROM COVERAGE UNDER THE WORKERS' COMPENSATION ACT.

(2) THE ADVISORY COMMITTEE MUST CONSIST OF:

(A) MEMBERS REPRESENTING BUSINESS AND COMMUNITY INTERESTS;

(B) MEMBERS REPRESENTING WORKERS' COMPENSATION INSURERS;

(C) MEMBERS REPRESENTING BUILDING CONTRACTORS OF WHOM AT LEAST ONE-HALF MUST BE INDEPENDENT CONTRACTORS;

(D) MEMBERS REPRESENTING LABOR ORGANIZATIONS; AND

(E) A REPRESENTATIVE FROM THE DEPARTMENT OF LABOR AND INDUSTRY.

(3) THE COMMITTEE IS EXEMPT FROM THE REQUIREMENTS OF 2-15-122 OR 2-15-124.

(4) THE DEPARTMENT OF LABOR AND INDUSTRY SHALL PERIODICALLY REPORT ITS FINDINGS AND PROGRESS TO THE ECONOMIC AFFAIRS INTERIM COMMITTEE, INCLUDING ANY RECOMMENDATIONS FOR PROPOSED LEGISLATION TO THE 59TH LEGISLATURE REGARDING INDEPENDENT CONTRACTORS.

NEW SECTION. Section 3. Effective date -- applicability. [This act] is effective on passage and approval and applies to independent contractor exemptions issued or renewed on or after [the effective date of this act].

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