

HOUSE BILL NO. 490

INTRODUCED BY D. FERN

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A BILL FOR AN ACT ENTITLED: "AN ACT EXCLUDING CERTAIN COACHES INVOLVED IN NONPROFIT YOUTH SPORTS ORGANIZATIONS FROM DEFINITIONS OF "EMPLOYMENT" IN UNEMPLOYMENT AND WORKERS' COMPENSATION LAWS; AMENDING SECTIONS 39-51-204 AND 39-71-401, MCA; AND PROVIDING AN EFFECTIVE DATE."

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

**Section 1.** 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" means 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



1 employee's main duties, carries or delivers papers.

2 (d) services performed by qualified real estate agents, as defined in 26 U.S.C. 3508, or insurance  
3 salespeople paid solely by commission and without a guarantee of minimum earnings;

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

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

7 (ii) who contracts with a salon or shop, as defined in 37-31-101, and the contract must show that the  
8 cosmetologist or barber:

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

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

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

12 and

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

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

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

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

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

23 (iii) may perform service for anyone without limitation;

24 (iv) may accept or reject any job;

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

26 (vi) works under a written contract that:

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

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

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

1 from workers' compensation requirements;

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

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

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

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

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

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

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

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

17 (k) service performed in the employ of any other state or its political subdivisions or of the United States  
18 government or of an instrumentality of any other state or states or their political subdivisions or of the United  
19 States, except that national banks organized under the national banking law are not entitled to exemption under  
20 this subsection and are subject to this chapter the same as state banks, if the service is excluded from  
21 employment as defined in 5 U.S.C. 8501(1)(I) and section 3306(c)(6) of the Federal Unemployment Tax Act;

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

29 (m) service performed in the employ of a school or university if the service is performed by a student who  
30 is enrolled and is regularly attending classes at a school or university or by the spouse of a student if the spouse

1 is advised, at the time that the spouse commences to perform the service, that the employment of the spouse  
2 to perform the service is provided under a program to provide financial assistance to the student by the school  
3 or university and that the employment is not covered by any program of unemployment insurance;

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

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

13 (p) service performed by an alien as identified in 8 U.S.C. 1101(a)(15)(F), (a)(15)(H)(ii)(a), (a)(15)(J),  
14 (a)(15)(M), or (a)(15)(Q);

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

17 (r) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care  
18 for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the  
19 service is employed directly by a family member or an individual who is a legal guardian;

20 (s) service performed by an individual as an official, including a timer, referee, umpire, or judge, at an  
21 amateur athletic event or as a coach or coach assistant in a nonprofit youth sports organization; or

22 (t) service performed by a volunteer participant in a program funded under the National and Community  
23 Service Act of 1990, 42 U.S.C. 12501, et seq., or the Domestic Volunteer Service Act of 1973, 42 U.S.C. 4950,  
24 et seq.

25 (2) For the purposes of 39-51-203(5) and (6), the term "employment" does not include:

26 (a) service performed by an ordained, commissioned, or licensed minister of a church in the exercise  
27 of the church's ministry or by a member of a religious order in the exercise of duties required by the order;

28 (b) service performed by an individual receiving rehabilitation or remunerative work in a facility conducted  
29 for the purpose of carrying out a program of rehabilitation for individuals whose earning capacity is impaired by  
30 age or physical or mental deficiency or injury or providing remunerative work for individuals who, because of

1 impaired physical or mental capacity, cannot be readily absorbed in the competitive labor market;

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

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

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

9 (f) service performed by elected public officials; or

10 (g) services performed by an election judge appointed pursuant to 13-4-101 if the remuneration received  
11 for those services is less than \$1,000 in a calendar year.

12 (3) (a) Except as provided in subsection (3)(b), an individual found to be an independent contractor by  
13 the department under the terms of 39-71-417 is considered an independent contractor for the purposes of this  
14 chapter. An independent contractor is not precluded from filing a claim for benefits and receiving a determination  
15 pursuant to 39-51-2402.

16 (b) An officer or a manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) and who obtains an  
17 independent contractor exemption pursuant to 39-71-417(1)(a)(ii) is not considered an independent contractor  
18 for the purposes of this chapter.

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

22

23 **Section 2.** Section 39-71-401, MCA, is amended to read:

24 **"39-71-401. Employments covered and exemptions -- elections -- notice.** (1) Except as provided  
25 in subsection (2), the Workers' Compensation Act applies to all employers and to all employees. An employer  
26 who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written,  
27 shall elect to be bound by the provisions of compensation plan No. 1, 2, or 3 [unless the provisions of 39-71-442  
28 apply]. Each employee whose employer is bound by the Workers' Compensation Act is subject to and bound by  
29 the compensation plan that has been elected by the employer.

30 (2) Unless the employer elects coverage for these employments under this chapter and an insurer allows

- 1 an election, the Workers' Compensation Act does not apply to any of the following:
- 2 (a) household or domestic employment;
- 3 (b) casual employment;
- 4 (c) employment of a dependent member of an employer's family for whom an exemption may be claimed  
5 by the employer under the federal Internal Revenue Code;
- 6 (d) employment of sole proprietors, working members of a partnership, working members of a limited  
7 liability partnership, or working members of a member-managed limited liability company, except as provided in  
8 subsection (3);
- 9 (e) employment of a real estate, securities, or insurance salesperson paid solely by commission and  
10 without a guarantee of minimum earnings;
- 11 (f) employment as a direct seller as defined by 26 U.S.C. 3508;
- 12 (g) employment for which a rule of liability for injury, occupational disease, or death is provided under  
13 the laws of the United States;
- 14 (h) employment of a person performing services in return for aid or sustenance only, except employment  
15 of a volunteer under 67-2-105;
- 16 (i) employment with a railroad engaged in interstate commerce, except that railroad construction work  
17 is included in and subject to the provisions of this chapter;
- 18 (j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event  
19 or as a coach or coach assistant in a nonprofit youth sports organization;
- 20 (k) employment of a person performing services as a newspaper carrier or freelance correspondent if  
21 the person performing the services or a parent or guardian of the person performing the services in the case of  
22 a minor has acknowledged in writing that the person performing the services and the services are not covered.
- 23 As used in this subsection (2)(k):
- 24 (i) "freelance correspondent" means a person who submits articles or photographs for publication and  
25 is paid by the article or by the photograph; and
- 26 (ii) "newspaper carrier":
- 27 (A) means a person who provides a newspaper with the service of delivering newspapers singly or in  
28 bundles; and
- 29 (B) does not include an employee of the paper who, incidentally to the employee's main duties, carries  
30 or delivers papers.

- 1 (l) cosmetologist's services and barber's services as referred to in 39-51-204(1)(e);
- 2 (m) a person who is employed by an enrolled tribal member or an association, business, corporation,
- 3 or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted
- 4 solely within the exterior boundaries of an Indian reservation;
- 5 (n) employment of a jockey who is performing under a license issued by the board of horseracing from
- 6 the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out
- 7 after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that
- 8 the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;
- 9 (o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing
- 10 services under a license issued by the board of horseracing while on the grounds of a licensed race meet;
- 11 (p) employment of an employer's spouse for whom an exemption based on marital status may be
- 12 claimed by the employer under 26 U.S.C. 7703;
- 13 (q) a person who performs services as a petroleum land professional. As used in this subsection, a
- 14 "petroleum land professional" is a person who:
- 15 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating
- 16 a business agreement for the exploration or development of minerals;
- 17 (ii) is paid for services that are directly related to the completion of a contracted specific task rather than
- 18 on an hourly wage basis; and
- 19 (iii) performs all services as an independent contractor pursuant to a written contract.
- 20 (r) an officer of a quasi-public or a private corporation or, except as provided in subsection (3), a
- 21 manager of a manager-managed limited liability company who qualifies under one or more of the following
- 22 provisions:
- 23 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or the
- 24 limited liability company and does not receive any pay from the corporation or the limited liability company for
- 25 performance of the duties;
- 26 (ii) the officer or manager is engaged primarily in household employment for the corporation or the limited
- 27 liability company;
- 28 (iii) the officer or manager either:
- 29 (A) owns 20% or more of the number of shares of stock in the corporation or owns 20% or more of the
- 30 limited liability company; or

- 1 (B) owns less than 20% of the number of shares of stock in the corporation or limited liability company  
2 if the officer's or manager's shares when aggregated with the shares owned by a person or persons listed in  
3 subsection (2)(r)(iv) total 20% or more of the number of shares in the corporation or limited liability company; or  
4 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,  
5 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who meets the requirements of subsection  
6 (2)(r)(iii)(A) or (2)(r)(iii)(B);
- 7 (s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;
- 8 (t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of  
9 the church's ministry or by a member of a religious order in the exercise of duties required by the order;
- 10 (u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care  
11 for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the  
12 service is employed directly by a family member or an individual who is a legal guardian;
- 13 (v) employment of a person performing the services of an intrastate or interstate common or contract  
14 motor carrier when hired by an individual or entity who meets the definition of a broker or freight forwarder, as  
15 provided in 49 U.S.C. 13102;
- 16 (w) employment of a person who is not an employee or worker in this state as defined in 39-71-118(8);
- 17 (x) employment of a person who is working under an independent contractor exemption certificate;
- 18 (y) employment of an athlete by or on a team or sports club engaged in a contact sport. As used in this  
19 subsection, "contact sport" means a sport that includes significant physical contact between the athletes involved.  
20 Contact sports include but are not limited to football, hockey, roller derby, rugby, lacrosse, wrestling, and boxing.
- 21 (z) a musician performing under a written contract.
- 22 (3) (a) (i) A person who regularly and customarily performs services at locations other than the person's  
23 own fixed business location shall elect to be bound personally and individually by the provisions of compensation  
24 plan No. 1, 2, or 3 unless the person has waived the rights and benefits of the Workers' Compensation Act by  
25 obtaining an independent contractor exemption certificate from the department pursuant to 39-71-417.
- 26 (ii) Application fees or renewal fees for independent contractor exemption certificates must be deposited  
27 in the state special revenue account established in 39-9-206 and must be used to offset the certification  
28 administration costs.
- 29 (b) A person who holds an independent contractor exemption certificate may purchase a workers'  
30 compensation insurance policy and with the insurer's permission elect coverage for the certificate holder.



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

2 (i) a sole proprietor;

3 (ii) a working member of a partnership;

4 (iii) a working member of a limited liability partnership;

5 (iv) a working member of a member-managed limited liability company; or

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

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

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

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

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

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

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

1 by the department, distributed through insurers or directly by the department, and posted by employers in  
2 accordance with rules adopted by the department. An employer who purposely or knowingly fails to post a sign  
3 as provided in this subsection is subject to a \$50 fine for each citation. (Bracketed language in subsection (1)  
4 terminates June 30, 2019--sec. 5, Ch. 315, L. 2015.)"

5

6 NEW SECTION. **Section 3. Effective date.** [This act] is effective July 1, 2017.

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