

1 SENATE BILL NO. 367

2 INTRODUCED BY S. MORIGEAU

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 4 A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LAWS RELATING TO THE
 5 INDEPENDENT CONTRACTOR CERTIFICATE; PROVIDING THAT THE DEPARTMENT OF LABOR AND
 6 INDUSTRY MAY NOT PRESUME AN EMPLOYMENT RELATIONSHIP BECAUSE A PARTY DOES NOT
 7 HOLD AN INDEPENDENT CONTRACTOR CERTIFICATE; APPLYING TO UNEMPLOYMENT INSURANCE
 8 AND WORKERS' COMPENSATION; AMENDING SECTIONS 39-51-203, ~~39-71-417~~, AND 39-71-419, MCA;
 9 AND PROVIDING AN APPLICABILITY DATE."

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 11 WHEREAS, the Department of Labor and Industry's rule ARM 24.35.203 provides that when a worker
 12 does not have an independent contractor certificate, the worker is conclusively determined by the Department
 13 to be an employee for the purposes of wages and hours, unemployment insurance, workers' compensation,
 14 and income tax; and

15 WHEREAS, this interpretation is overly broad, does not correctly consider Montana Supreme Court
 16 caselaw, leads to confusion, conflicts with established law, and results in unfair determinations.

17
 18 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

19
 20 **Section 1.** Section 39-51-203, MCA, is amended to read:

21 **"39-51-203. Employment defined.** (1) "Employment", subject to other provisions of this section,
 22 means service by an individual, by a manager or member of a limited liability company treated as a corporation
 23 pursuant to 39-51-207, or by an officer of a corporation, including service in interstate commerce, performed for
 24 wages or under any contract of hire, written or oral, express or implied.

25 (2) (a) The term "employment" includes an individual's entire service performed within or both within
 26 and outside this state if:

27 (i) the service is localized in this state; or

28 (ii) the service is not localized in any state but some of the service is performed in this state and:

1 (A) the base of operations or, if there is no base of operations, the place from which the service is
2 directed or controlled is in this state; or

3 (B) the base of operations or the place from which the service is directed or controlled is not in any
4 state in which some part of the service is performed, but the individual's residence is in this state.

5 (b) Service is considered to be localized within a state if:

6 (i) the service is performed entirely within the state; or

7 (ii) the service is performed both within and outside the state, but the service performed outside the
8 state is incidental to the individual's service within the state; for example, the out-of-state service is temporary
9 or transitory in nature or consists of isolated transactions.

10 (3) Service not covered under subsection (2) and performed entirely outside the state and on which
11 contributions are neither required nor paid under an unemployment insurance law of any other state or of the
12 federal government is considered to be employment subject to this chapter if the individual performing the
13 services is a resident of this state and the department approves the election of the employing unit for whom the
14 services are performed in order that the entire service of the individual is considered to be employment subject
15 to this chapter.

16 (4) Service performed by an individual for wages is considered to be employment subject to this
17 chapter until it is shown to the satisfaction of the department that the individual is an independent contractor.

18 ~~However the department may not presume that the absence of an independent contractor exemption certificate~~
19 ~~indicates an employment relationship~~ AN INDIVIDUAL MAY NOT BE DETERMINED TO BE AN EMPLOYEE BASED SOLELY
20 ON NOT HAVING AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE.

21 (5) The term "employment" includes service performed by an individual in the employ of this state or
22 any of its instrumentalities (or in the employ of this state and one or more other states or their instrumentalities)
23 for a hospital or institution of higher education located in this state. The term "employment" includes service
24 performed by all individuals, including those individuals who work for the state of Montana, its universities,
25 public schools, components or units of universities or public schools, or any local government unit and one or
26 more other states or their instrumentalities or political subdivisions whose services are compensated by salary
27 or wages.

28 (6) The term "employment" includes service performed by an individual in the employ of a religious,

1 charitable, scientific, literary, or educational organization.

2 (7) (a) The term "employment" includes the service of an individual who is a citizen of the United
3 States performed outside the United States, except in Canada, in the employ of an American employer, other
4 than service that is considered employment under the provisions of subsection (2) or the parallel provisions of
5 another state's law, if:

6 (i) the employer's principal place of business in the United States is located in this state;

7 (ii) the employer has no place of business in the United States, but:

8 (A) the employer is an individual who is a resident of this state;

9 (B) the employer is a corporation that is organized under the laws of this state; or

10 (C) the employer is a partnership or a trust and the number of the partners or trustees who are
11 residents of this state is greater than the number who are residents of any other state; or

12 (iii) none of the criteria of subsections (7)(a)(i) and (7)(a)(ii) are met, but the employer has elected
13 coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a
14 claim for benefits based on the service under the law of this state.

15 (b) An "American employer", for purposes of this subsection (7), means a person who is:

16 (i) an individual who is a resident of the United States;

17 (ii) a partnership if two-thirds or more of the partners are residents of the United States;

18 (iii) a trust if all of the trustees are residents of the United States; or

19 (iv) a corporation organized under the laws of the United States or of any state."
20

21 **Section 2.** Section ~~39-71-417~~, MCA, is amended to read:

22 ~~"39-71-417. Independent contractor certification. (1) (a) (i) Except as provided in subsection~~
23 ~~(1)(a)(ii), a person who regularly and customarily performs services at a location other than the person's own~~
24 ~~fixed business location shall apply to the department for an independent contractor exemption certificate unless~~
25 ~~the person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2,~~
26 ~~or 3.~~

27 ~~(ii) An officer or manager who is exempt under 39-71-401(2)(r)(iii) or (2)(r)(iv) may apply, but is not~~
28 ~~required to apply, to the department for an independent contractor exemption certificate.~~

1 ~~(b) A person who meets the requirements of this section and receives an independent contractor~~
 2 ~~exemption certificate is not required to obtain a personal workers' compensation insurance policy.~~

3 ~~(c) For the purposes of this section, "person" means:~~

4 ~~(i) a sole proprietor;~~

5 ~~(ii) a working member of a partnership;~~

6 ~~(iii) a working member of a limited liability partnership;~~

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

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

10 ~~(2) The department shall adopt rules relating to an original application for or renewal of an~~
 11 ~~independent contractor exemption certificate. The department shall adopt by rule the amount of the fee for an~~
 12 ~~application or certificate renewal. The application or renewal must be accompanied by the fee.~~

13 ~~(3) The department shall deposit the application or renewal fee in an account in the state special~~
 14 ~~revenue fund to pay the costs of administering the program.~~

15 ~~(4) (a) To obtain an independent contractor exemption certificate, the applicant shall swear to and~~
 16 ~~acknowledge the following:~~

17 ~~(i) that the applicant has been and will continue to be free from control or direction over the~~
 18 ~~performance of the person's own services, both under contract and in fact; and~~

19 ~~(ii) that the applicant is engaged in an independently established trade, occupation, profession, or~~
 20 ~~business and will provide sufficient documentation of that fact to the department.~~

21 ~~(b) For the purposes of subsection (4)(a)(i), an endorsement required for licensure, as provided in 37-~~
 22 ~~47-303, does not imply or constitute control.~~

23 ~~(5) (a) An applicant for an independent contractor exemption certificate shall submit an application~~
 24 ~~under oath on a form prescribed by the department and containing the following:-~~

25 ~~(i) the applicant's name and address;~~

26 ~~(ii) the applicant's social security number;~~

27 ~~(iii) each occupation for which the applicant is seeking independent contractor certification; and~~

28 ~~(iv) other documentation as provided by department rule to assist in determining if the applicant has an~~

1 ~~independently established business.~~

2 ~~(b) The department shall adopt a retention schedule that maintains copies of documents submitted in~~
 3 ~~support of an initial application or renewal application for an independent contractor exemption certificate for a~~
 4 ~~minimum of 3 years after an application has been received by the department. The department shall, to the~~
 5 ~~extent feasible, produce renewal applications that reduce the burden on renewal applicants to supply~~
 6 ~~information that has been previously provided to the department as part of the application process.~~

7 ~~(c) An applicant who applies on or after July 1, 2011, to renew an independent contractor exemption~~
 8 ~~certificate is not required to submit documents that have been previously submitted to the department if:~~

9 ~~(i) the applicant certifies under oath that the previously submitted documents are still valid and~~
 10 ~~current; and~~

11 ~~(ii) the department, if it considers it necessary, independently verifies a specific document or decides~~
 12 ~~that a document has not expired pursuant to the document's own terms and is therefore still valid and current.~~

13 ~~(6) The department shall issue an independent contractor exemption certificate to an applicant if the~~
 14 ~~department determines that an applicant meets the requirements of this section.~~

15 ~~(7) (a) When the department approves an application for an independent contractor exemption~~
 16 ~~certificate and the person is working under the independent contractor exemption certificate, the person's status~~
 17 ~~is conclusively presumed to be that of an independent contractor. However, the absence of an independent~~
 18 ~~contractor exemption may not be considered by the department as conclusive proof that the person is not an~~
 19 ~~independent contractor.~~

20 ~~(b) A person working under an approved independent contractor exemption certificate has waived all~~
 21 ~~rights and benefits under the Workers' Compensation Act and is precluded from obtaining benefits unless the~~
 22 ~~person has elected to be bound personally and individually by the provisions of compensation plan No. 1, 2, or~~
 23 ~~3.~~

24 ~~(c) For the purposes of the Workers' Compensation Act, a person is working under an independent~~
 25 ~~contractor exemption certificate if:~~

26 ~~(i) the person is performing work in the trade, business, occupation, or profession listed on the~~
 27 ~~person's independent contractor exemption certificate; and~~

28 ~~(ii) the hiring agent and the person holding the independent contractor exemption certificate do not~~

1 have a written or an oral agreement that the independent contractor exemption certificate holder's status with
 2 respect to that hiring agent is that of an employee.

3 ~~(8) Once issued, an independent contractor exemption certificate remains in effect for 2 years unless:~~

4 ~~(a) suspended or revoked pursuant to 39-71-418; or~~

5 ~~(b) canceled by the independent contractor.~~

6 ~~(9) If the department's independent contractor central unit denies an application for an independent
 7 contractor exemption certificate, the applicant may contest that decision as provided in 39-71-415(2)."~~

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9 **Section 2.** Section 39-71-419, MCA, is amended to read:

10 **"39-71-419. Independent contractor violations -- penalty.** (1) A person may not:

11 (a) perform work as an independent contractor without first:

12 (i) obtaining from the department an independent contractor exemption certificate unless the
 13 individual is not required to obtain an independent contractor exemption certificate pursuant to 39-71-417(1)(a);
 14 or

15 (ii) electing to be bound personally and individually by the provisions of compensation plan No. 1, 2, or
 16 3;

17 (b) perform work as an independent contractor when the department has revoked or denied the
 18 independent contractor's exemption certificate;

19 (c) transfer to another person or allow another person to use an independent contractor exemption
 20 certificate that was not issued to that person;

21 (d) alter or falsify an independent contractor exemption certificate; or

22 (e) misrepresent the person's status as an independent contractor. A person who falsely claimed,
 23 either in writing or through credible evidence, to have an independent contractor certification may not be
 24 considered to be an employee solely based on not actually having an independent contractor exemption
 25 certificate. THE BURDEN OF PROOF THAT AN INDEPENDENT CONTRACTOR IS CERTIFIED RESTS WITH THE INDEPENDENT
 26 CONTRACTOR AND NOT THE HIRING ENTITY.

27 (2) An employer may not:

28 (a) require an employee through coercion, misrepresentation, or fraudulent means to adopt

1 independent contractor status to avoid the employer's obligations to provide workers' compensation coverage;

2 or

3 (b) exert control to a degree that causes the independent contractor to violate the provisions of 39-71-
4 417(4).

5 (3) In addition to any other penalty or sanction provided in this chapter, a person or employer who
6 violates a provision of this section is subject to a fine to be assessed by the department of up to \$1,000 for each
7 violation. The department shall deposit the fines in the uninsured employers' fund. The lien provisions of 39-71-
8 506 apply to any assessed fines.

9 (4) A person or employer who disputes a fine assessed by the department pursuant to this section
10 may file an appeal with the department within 30 days of the date on which the fine was assessed. If, after
11 mediation, the issue is not resolved, the issue must be transferred to the workers' compensation court for
12 resolution."

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14 NEW SECTION. Section 3. Applicability. [This act] applies to employment determinations for the
15 purposes of unemployment insurance and workers' compensation on or after [the effective date of this act].

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