

HOUSE BILL NO. 490

INTRODUCED BY S. GIST, M. MALONE, J. COHENOUR, S. ESSMANN, J. HINKLE, S. GALLOWAY, R.

MARSHALL, R. MINER, B. PHALEN, L. DEMING

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO INDEPENDENT CONTRACTOR TAX EVASION AND FRAUD; CLARIFYING BUSINESS PRACTICES FOR HIRING AGENTS AND EMPLOYERS WHO HIRE INDEPENDENT CONTRACTORS; REVISING INSPECTIONS FOR CONSTRUCTION SITES; REQUIRING THE DEPARTMENT OF LABOR AND INDUSTRY TO ORDER AN UNINSURED EMPLOYER TO CEASE OPERATIONS; AND AMENDING SECTIONS 39-9-301, 39-71-419, 39-71-507, AND 39-71-522, MCA."

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

Section 1. Section 39-9-301, MCA, is amended to read:

"39-9-301. Business practices -- penalty. (1) Except as provided in 39-9-205, a person who has registered under one name as provided in this chapter may not engage in the business or act in the capacity of a construction contractor or a home inspector under any other name unless that name also is registered under this chapter.

(2) Use of a falsified registration number in connection with a solicitation or identification as a construction contractor or a home inspector is prohibited.

(3) A partner, associate, agent, salesperson, solicitor, officer, or employee of a construction contractor or a home inspector shall use a true name and address at all times while engaged in the business or capacity of a construction contractor or a home inspector or in activities related to a construction contractor or a home inspector.

(4) A hiring agent or employer may not:

(a) hire an unregistered independent contractor;

(b) hire an independent contractor when the department has suspended, revoked, or denied the independent contractor's exemption certificate;

1 (c) hire an independent contractor to work outside the scope listed on the independent contractor's
2 registration;

3 (d) allow an independent contractor to perform work outside the scope listed on the independent
4 contractor's registration; or

5 (e) misclassify an employee as an independent contractor.

6 (4)(5) (a) The finding of a violation of this section by the department at a hearing held in accordance
7 with the Montana Administrative Procedure Act subjects the person who commits the violation to a penalty of
8 not more than \$5,000, as determined by the department. The required hearing may be held by telephone or by
9 videoconference. A penalty collected under this section must be deposited in the state special revenue account
10 to the credit of the department for administration and enforcement of this chapter.

11 (b) Penalties under this section do not apply to a violation that is determined to be an inadvertent
12 error."

13

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

15 **"39-71-419. Independent contractor violations -- penalty.** (1) A person may not:

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

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

20 (ii) electing to be bound personally and individually by the provisions of compensation plan No. 1,
21 2, or 3;

22 (b) perform work as an independent contractor when the department has ~~revoked~~ suspended,
23 revoked, or denied the independent contractor's exemption certificate;

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

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

27 (e) misrepresent the person's status as an independent contractor. A person who falsely claimed,
28 either in writing or through credible evidence, to have an independent contractor certification may not be

1 considered to be an employee solely based on not actually having an independent contractor exemption
 2 certificate. The burden of proof that an independent contractor is certified rests with the independent contractor
 3 and not the hiring entity.

4 (2) An employer may not:

5 (a) require an employee through coercion, misrepresentation, or fraudulent means to adopt
 6 independent contractor status to avoid the employer's obligations to provide workers' compensation coverage;
 7 or

8 (b) exert control to a degree that causes the independent contractor to violate the provisions of 39-
 9 71-417(4).

10 (3) (a) In addition to any other penalty or sanction provided in this chapter, a person or employer
 11 who violates a provision of this section is subject to a fine to be assessed by the department of up to ~~\$1,000~~
 12 \$5,000 for each violation as follows:

13 (i) \$1,000 for the first offense, of which \$1,000 may be waived if the person or employer
 14 completes a department-directed education program;

15 (ii) \$2,500 for the second offense;

16 (iii) \$5,000 for the third offense;

17 (iv) \$5,000 for the fourth and any subsequent offense. In addition to the fine, the department shall
 18 suspend or revoke the person's or employer's license for up to 12 months.

19 (b) The department shall deposit the fines in the uninsured employers' fund. The lien provisions of
 20 39-71-506 apply to any assessed fines.

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

25

26 **Section 3.** Section 39-71-507, MCA, is amended to read:

27 **"39-71-507. Department to order uninsured employer to cease operations -- noncompliance**
 28 **with order a misdemeanor -- coordination of remedies.** (1) When the department discovers an uninsured

1 employer, it shall order the employer to cease operations until the employer has elected to be bound by a
2 compensation plan.

3 (2) When the department discovers a person, business, or other entity functioning as a prime
4 contractor that has subcontracted for the services of an uninsured employer, it ~~may~~shall order the person,
5 business, or other entity functioning as a prime contractor to cause all operations performed by the uninsured
6 employer to cease at worksites controlled by the prime contractor until the uninsured employer has elected to
7 be bound by a compensation plan. If after 3 business days following the order by the department the person,
8 business, or other entity functioning as a prime contractor has not complied with the order, the department may
9 order the prime contractor to cease all operations at the affected worksites.

10 (3) An employer who does not comply with the department's order to cease operations is guilty of
11 a misdemeanor. Each day of violation is a separate offense. The county attorney may prosecute a criminal
12 action under this subsection in the county in which the violation occurs. Prosecution under this subsection does
13 not bar the department from enforcing its order by a civil action.

14 (4) A person, business, or other entity functioning as a prime contractor that does not comply with
15 the department's order to cease all operations is guilty of a misdemeanor. Each day of violation is a separate
16 offense. The county attorney may prosecute a criminal action under this subsection in the county in which the
17 violation occurs. Prosecution under this subsection does not bar the department from enforcing its order by a
18 civil action. In addition, the department may assess a penalty against the person, business, or other entity
19 functioning as a prime contractor of not more than \$1,000 per day for each day of violation.

20 (5) The department may institute and maintain in the name of the state, through the attorney
21 general or the county attorney of the county in which the violation occurs, an action for an injunction order or
22 other civil remedy in district court to enforce its order to cease operations.

23 (6) The remedies provided in 39-71-506 and subsections (3) through (5) of this section are not
24 mutually exclusive and may be pursued concurrently."

25

26 **Section 4.** Section 39-71-522, MCA, is amended to read:

27 **"39-71-522. Inspection of construction sites -- public policy -- penalty.** (1) In recognition of the
28 benefit of fair competition among business competitors and the public policy of this state providing for

1 enforcement of workers' compensation insurance coverage requirements, the legislature finds that it is
 2 reasonable to allow access by authorized employees of the department onto construction sites for the purpose
 3 of determining whether workers are appropriately covered by workers' compensation insurance or a valid
 4 exemption from insurance coverage.

5 (2) In order to determine if proper workers' compensation insurance coverage is in place or if a
 6 valid exemption is held by a worker present on a construction site, authorized employees of the department
 7 may enter onto any construction site for which a construction permit is required or has been issued.

8 (3) Upon presentation of proper credentials, department employees must be admitted to a
 9 construction site to:

10 (a) gather information relating to compliance with the coverage requirements of this chapter; and

11 (b) when appropriate, issue a notice of violation to a person who is in violation of 39-71-419.

12 (4) A worker providing labor or services for remuneration shall be considered an employee rather
 13 than an independent contractor unless the hiring entity demonstrates that all of the following conditions are
 14 satisfied:

15 (a) the worker is free from the control and direction of the hiring entity in connection with the
 16 performance of work, both under the contract for the performance of the work and in fact;

17 (b) the person performs work that is outside the usual course of the hiring entity's business; and

18 (c) the worker is customarily engaged in an independently established trade, occupation, or
 19 business of the same nature of the work performed.

20 ~~(4)(5)~~ This section does not authorize the department's employees to engage in a breach of the
 21 peace. The department may request the assistance of appropriate local law enforcement agencies to
 22 peaceably enter a construction site.

23 ~~(5)(6)~~ A person who purposely or knowingly restricts the access to a construction site by a
 24 credentialed department employee or who obstructs the employee in the performance of the employee's duties
 25 under this section commits the offense of obstruction of a public servant as provided in 45-7-302.

26 ~~(6)(7)~~ As used in this section, the following definitions apply:

27 (a) "Construction permit" means any permit that can be issued pursuant to Title 50, chapter 60,
 28 and includes:

