

HOUSE BILL NO. 691

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A BILL FOR AN ACT ENTITLED: "AN ACT GENERALLY REVISING LABOR LAWS; REVISING LAWS RELATED TO THE DUTIES OF THE DEPARTMENT; REVISING EXCLUSIONS FROM EMPLOYMENT TO EXCLUDE MINORS PERFORMING SEASONAL AND MINOR DUTIES; AND AMENDING SECTIONS 39-1-102 AND 39-51-204, MCA."

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

Section 1. Section 39-1-102, MCA, is amended to read:

"39-1-102. Duties of department. (1) The department shall enforce all the laws of Montana relating to hours of labor, conditions of labor, prosecution of employers who default in payment of wages, protection of employees, and all laws relating to child labor that regulate the employment of children in any manner and shall administer the laws of the state relating to free employment offices and all other state labor laws. The department shall investigate and enforce the laws prohibiting discrimination contained in Title 49, chapters 2 and 3, and provide a means for conciliation between parties.

(2) In carrying out its duties, the department may not use any form of coercion or undue influence against any person."

Section 2. 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 employee's main duties, carries or delivers papers.

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

(e) service performed by a cosmetologist or barber who is licensed under Title 37, chapter 31, 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 salon or shop, as defined in 37-31-101, and the 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

1 termination. The existence of a single license for the salon or shop may not be construed as a lack of freedom
2 from control or direction under this subsection.

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

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

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

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

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

11 (iv) may accept or reject any job;

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

13 (vi) works under a written contract that:

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

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

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

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

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

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

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

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

27 (j) agricultural labor, except as provided in 39-51-202(2), (4), or (6). If an employer is otherwise
28 subject to this chapter and has agricultural employment, all employees engaged in agricultural labor must be

1 excluded from coverage under this chapter if the employer:

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

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

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

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

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

25 (n) service performed by an individual who is enrolled at a nonprofit or public educational
26 institution that normally maintains a regular faculty and curriculum and normally has a regularly organized body
27 of students in attendance at the place where its educational activities are carried on, as a student in a full-time
28 program taken for credit at an institution that combines academic instruction with work experience if the service

1 is an integral part of the program and the institution has certified that fact to the employer, except that this
2 subsection (1)(n) does not apply to service performed in a program established for or on behalf of an employer
3 or group of employers;

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

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

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

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

13 (s) service performed by an individual as an official, including a timer, referee, umpire, or judge, at
14 an amateur athletic event; ~~or~~

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

18 (u) service performed by a person younger than 18 years of age who performs seasonal, part-time
19 duties, including but not limited to lawn care, landscape cleanup, snow removal, and other unsupervised and
20 unscheduled minimal duties.

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

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

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

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

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

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

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

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

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

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

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

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