

Senate BILL NO. 166

INTRODUCED BY LABOR & EMPLOYMENT RELATIONS COMMITTEE
BY REQUEST OF THE DIVISION OF WORKERS' COMPENSATION ^{Chairman}

A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTIONS 92-202.1, 92-204.1, 92-435, AND 92-614, R.C.M. 1947; CREATING AN UNINSURED EMPLOYERS' FUND TO GRANT TO ALL EMPLOYEES IN THIS STATE WORKERS' COMPENSATION BENEFITS EVEN IF THEIR EMPLOYERS ARE NOT PROPERLY INSURED; PROVIDING FOR FUNDING OF THE FUND; DEFINING INSURER; AND REPEALING SECTIONS 92-201, 92-203, 92-205, 92-207.1, 92-209, 92-210, 92-211, AND 92-1102, R.C.M. 1947."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
Section 1. Section 92-202.1, R.C.M. 1947, is amended to read as follows:

"92-202.1. Employments ~~covered and~~ covered and ~~employments~~ exempted from coverage. This act shall not apply to any of the following employments unless the employer elects coverage under this act: (1) Except as provided in subsection (2) of this section, the Workers' Compensation Act applies to all employers as defined in 92-410.1 and to all employees as defined in 92-411. An employer who has any employee in service under any appointment or contract of hire, expressed or implied, oral or written, shall elect to

INTRODUCED BILL

~~be bound by the provisions of compensation plan No. 1, 2, or 3. Every 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 the act and an insurer allows such an election, the Workers' Compensation Act does not apply to any of the following employments:

- ~~(1)(a)~~ Household employment.
- ~~(2)(b)~~ Casual employment as defined in 92-436.
- ~~(3)(c)~~ Employment of members of an employer's family dwelling in ~~his~~ the employer's household.
- ~~(4)(d)~~ Employment of sole proprietors or working members of a partnership.
- ~~(5)(e)~~ Employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States.
- ~~(6)(f)~~ Any person performing services in return for aid or sustenance only."

Section 2. Section 92-204.1, R.C.M. 1947, is amended to read as follows:

"92-204.1. Election of employer and employee to come under act -- action against third party causing injury -- ~~right to subrogation. Where both the employer and employee have elected to come~~ For all employments covered under this

1 ~~the act Workers' Compensation Act or for which an election~~
 2 ~~has been made for coverage under the act,~~ the provisions of
 3 ~~this the act shall be~~ are exclusive, and ~~such election~~
 4 ~~shall be held to be a surrender by such employer and the~~
 5 ~~servants and employees of such employer and such employee~~
 6 ~~as among themselves of their right to any other method~~
 7 ~~form or kind of compensation or determination thereof or~~
 8 ~~to any other compensation or kind of determination thereof~~
 9 ~~or cause of action at law, suit in equity or statutory or~~
 10 ~~common law right or remedy or proceeding whatever for or~~
 11 ~~on account of any personal injury to or death of such~~
 12 ~~employee except as such rights may be hereinafter~~
 13 ~~specifically granted and such election shall bind~~ Except as
 14 ~~provided in 92-212 for uninsured employers and except as~~
 15 ~~otherwise provided in the Workers' Compensation Act, an~~
 16 ~~employer is not subject to any liability whatever for the~~
 17 ~~death or personal injury to any employees covered by the~~
 18 ~~Workers' Compensation Act. The Workers' Compensation Act~~
 19 ~~binds~~ the employee himself, and in case of death ~~shall bind~~
 20 ~~binds~~ his personal representative, and all persons having
 21 any right or claim to compensation for his injury or death,
 22 as well as the employer, and the servants and employees of
 23 such employer, and those conducting his business during
 24 liquidation, bankruptcy or insolvency. The right to
 25 compensation and medical benefits as provided by this act

1 ~~shall~~ is not be affected by the fact that the injury,
 2 occupational disease or death is caused by the negligence
 3 of a third party other than the employer, or the servants or
 4 employees of the employer. Whenever such event ~~shall occur~~
 5 ~~occurs~~ to an employee while performing the duties of his
 6 employment and such event ~~shall be~~ is caused by the act or
 7 omission of some persons or corporations other than his
 8 employer, or the servants or employees of his employer, then
 9 ~~such the~~ employee, or in case of his death his heirs or
 10 personal representative shall, in addition to the right to
 11 receive compensation under this act, have a right to
 12 prosecute any cause of action he may have for damages
 13 against such persons or corporations. ~~Further provided~~
 14 ~~that whenever such~~ However, if an employee ~~shall receive~~
 15 ~~receives~~ an injury while performing the duties of his
 16 employment and ~~such the~~ injury or injuries, so received by
 17 ~~such the~~ employee, are caused by the intentional and
 18 malicious act or omission of a servant or employee of his
 19 employer, then ~~such the~~ employee, or in case of his death,
 20 his heirs or personal representatives, shall, in addition to
 21 the right to receive compensation under the ~~workmen's~~
 22 ~~Workers'~~ Compensation Act, have a right to prosecute any
 23 cause of action he may have for damages against ~~such the~~
 24 ~~servants or employees of his employer, causing such the~~
 25 ~~injury. Provided that the employer or insurer shall be~~

1 entitled to full subrogation for all compensation and
 2 benefits paid or to be paid under this act except as
 3 otherwise provided in this section. The employer's or
 4 insurer's right of subrogation shall be a first lien on such
 5 claim, judgment or recovery. The employee shall institute
 6 such third party action after giving the employer or insurer
 7 reasonable notice of his intention to institute such third
 8 party action. The employee may request that such insurer pay
 9 a proportionate share of the reasonable costs, including
 10 attorneys' fees, of such third party action. The insurer may
 11 elect not to participate in the cost of the third party
 12 action, but as such election is made the insurer shall be
 13 deemed to have waived fifty percent (50%) of its subrogation
 14 rights granted by the section. Provided, however, that if an
 15 employee refuses or fails to institute such action within
 16 one (1) year from the date of injury, the employer or
 17 insurer may institute such third party action in his name
 18 and for his benefit or that of his personal representative
 19 if the employee or his personal representative institutes
 20 such third party action, he shall be entitled to at least
 21 one third (1/3) of the amount recovered by judgment or
 22 compromise settlement less his proportionate share of the
 23 reasonable costs, including attorneys' fees, in the event
 24 the amount of recovery is insufficient to provide him with
 25 that amount after payment of subrogation. In the event the

1 employer or insurer institutes such third party action, he
 2 shall pay to the employee any amount recovered by judgment
 3 or settlement which is in excess of the amounts paid or to
 4 be paid under this act an employer's or insurer's reasonable
 5 costs and attorneys' fees. Nothing contained in this section
 6 shall prevent the employer or insurer, including the
 7 division of workmen's compensation, from entering into
 8 compromise agreements in settlement of subrogation rights.
 9 If death results from the injury or occupational disease,
 10 the employer shall have a right of action against the third
 11 party for recovery of any amount paid under this act and
 12 such right of action shall be in addition to any cause of
 13 action by the heirs or personal representative of the
 14 deceased. In the event that the amount of compensation and
 15 benefits payable under this act shall not have been fully
 16 determined at the time such employee or his heirs or
 17 personal representative or the employer or insurer shall
 18 receive settlement of his action, prosecuted as aforesaid,
 19 then the division shall determine what proportion of such
 20 settlement shall be allocated under subrogation and such
 21 determination may be appealed as any other determination of
 22 the division."

23 Section 3. There is a new R.C.M. section numbered
 24 92-204.2 that reads as follows:

25 92-204.2. Subrogation. (1) If an action is prosecuted

1 as provided for in 92-204.1 and except as otherwise provided
 2 in this section, the insurer is entitled to subrogation for
 3 all compensation and benefits paid or to be paid under the
 4 Workers' Compensation Act. The insurer's right of
 5 subrogation is a first lien on the claim, judgment, or
 6 recovery.

7 (2)(a) If the injured employee intends to institute
 8 the third party action, he shall give the insurer reasonable
 9 notice of his intention to institute the action.

10 (b) The injured employee may request that the insurer
 11 pay a proportionate share of the reasonable cost of the
 12 action, including attorneys' fees.

13 (c) The insurer may elect not to participate in the
 14 cost of the action. If this election is made, the insurer
 15 waives 50% of its subrogation rights granted by this
 16 section.

17 (d) If the injured employee or the employee's personal
 18 representative institutes the action, the employee is
 19 entitled to at least one-third of the amount recovered by
 20 judgment or settlement less a proportionate share of
 21 reasonable costs, including attorneys' fees, if the amount
 22 of recovery is insufficient to provide the employee with
 23 that amount after payment of subrogation.

24 (3) If an injured employee refuses or fails to
 25 institute the third party action within 1 year from the date

1 of injury, the insurer may institute the action in the name
 2 of the employee and for the employee's benefit or that of
 3 the employee's personal representative. If the insurer
 4 institutes the action, it shall pay to the employee any
 5 amount received by judgment or settlement which is in excess
 6 of the amounts paid or to be paid under the Workers'
 7 Compensation Act after the insurer's reasonable costs,
 8 including attorneys' fees for prosecuting the action, have
 9 been deducted from the recovery.

10 (4) An insurer may enter into compromise agreements in
 11 settlement of subrogation rights.

12 (5) If the amount of compensation and other benefits
 13 payable under the Workers' Compensation Act have not been
 14 fully determined at the time the employee, the employee's
 15 heirs or personal representatives, or the insurer have
 16 settled in any manner the action as provided for in this
 17 section, the division shall determine what proportion of the
 18 settlement shall be allocated under subrogation. The
 19 division's determination may be appealed to the workers'
 20 compensation judge.

21 Section 4. There is a new R.C.M. section numbered
 22 92-212 that reads as follows:

23 92-212. Uninsured employers fund. (1) There is created
 24 an uninsured employers fund. The purpose of the fund is to
 25 pay to an injured employee of an uninsured employer the same

1 benefits the employee would have received if the employer
 2 had been properly enrolled under compensation plan No. 1, 2,
 3 or 3. For the purposes of this section, the words "uninsured
 4 employer" mean an employer who has not properly complied
 5 with the provisions of 92.202.1. The division shall
 6 administer the fund and shall pay all proper benefits to
 7 injured employees of uninsured employers.

8 (2) The fund shall be funded in the following manner:

9 (a) The division shall require that the uninsured
 10 employer pay to the fund a penalty of either double the
 11 premium amount the employer would have paid on the payroll
 12 of the employer's workers in this state if the employer had
 13 been enrolled with compensation plan No. 3 or \$500,
 14 whichever is greater. In determining the premium amount for
 15 the calculation of the penalty under this subsection, the
 16 division shall make an assessment on how much premium would
 17 have been paid on the employer's past 3-year payroll for
 18 periods within the 3 years when the employer was uninsured.
 19 An assessment prior to July 1, 1977, may not be made.

20 (b) The fund shall receive from an uninsured employer
 21 an amount equal to all benefits paid or to be paid to an
 22 injured employee of the uninsured employer.

23 (c) In no event may an uninsured employer's combined
 24 liability under subsections (2)(a) and (2)(b) of this
 25 section exceed \$30,000.

1 (d) The division may, at the beginning of each fiscal
 2 year, determine that the \$1,000 assessments that are charged
 3 against an insurer in each case of an industrial death under
 4 92-709.1(13)(a) shall be paid to the uninsured employers'
 5 fund rather than the subsequent injury fund.

6 (e) The fund shall also be funded from the state
 7 general fund for payment of benefits as provided for in this
 8 section. However, any amounts collected under subsections
 9 (2)(a), (2)(b), or (2)(d) of this section shall be expended
 10 before any general fund appropriations are expended.

11 (3) If, upon demand of the division, an uninsured
 12 employer refuses to make the payments to the fund that are
 13 provided for in subsections (2)(a) and (2)(b) above, the
 14 sums may be collected by the division through suit. The
 15 division may settle through compromise with an uninsured
 16 employer the amount due the fund under this section.

17 (4) Proper surpluses and reserves shall be kept for
 18 the fund. The board of investments shall invest the moneys
 19 of the fund. The cost of administration of the fund shall be
 20 paid out of the money in the fund.

21 (5) All appropriate provisions in the Workers'
 22 Compensation Act apply to the fund in the same manner as
 23 they apply to compensation plans No. 1, 2, and 3.

24 (6) When the division discovers an uninsured employer
 25 it shall order him to cease operations until he has elected

1 to be bound by a compensation plan. An employer who does
2 not comply with the division's order to cease operations is
3 guilty of a misdemeanor.

4 Section 5. There is a new R.C.M. section that reads as
5 follows:

6 Effective date of uninsured employers' fund. Except as
7 provided in this section, 92-212 is effective on July 1,
8 1977. Payouts for benefits may not be made from the
9 uninsured employers' fund until the fund attains a level of
10 \$150,000 or January 1, 1979, whichever occurs first.
11 However, until payouts for benefits from the uninsured
12 employers' fund begin, an uninsured employer, as defined in
13 92-212(1), is subject to suit by an employee who suffers an
14 injury arising out of and in the course of employment. In
15 any such action to recover damages for personal injuries
16 sustained or for death resulting from personal injuries so
17 sustained, it is not a defense that the:

18 (1) employee was negligent unless such negligence was
19 wilful;

20 (2) injury was caused by the negligence of a fellow
21 employee; or

22 (3) employee had assumed the risks inherent in,
23 incident to, or arising out of his employment or arising
24 from the failure of the employer to provide and maintain a
25 reasonably safe place to work or reasonable safe tools or

1 appliances.

2 Section 6. Section 92-435, R.C.M. 1947, is amended to
3 read as follows:

4 "92-435. Insurer defined. "Insurer" means any
5 insurance company authorized to transact business in this
6 state insuring any employer under this act and includes
7 industrial insurance account created by this act known as
8 the "state fund" an employer bound by compensation plan No.
9 1, an insurance company transacting business under
10 compensation plan No. 2, the industrial insurance account
11 under compensation plan No. 3, or the uninsured employers'
12 fund provided for in 92-212."

13 Section 7. Section 92-614, R.C.M. 1947, is amended to
14 read as follows:

15 "92-614. Who liable for injuries under the different
16 plans of act and in what amounts, -- extraterritorial
17 application and reciprocity. (1) Every employer who shall
18 become bound by and subject to the provisions of
19 compensation plan number one (1), and every employer and
20 insurer who shall become bound by and subject to the
21 provisions of compensation plan number two (2), and the
22 industrial accident fund where the employer of the injured
23 employee has become bound by and subject to the provisions
24 of compensation plan No. 3, shall be insurer is liable for
25 the payment of compensation in the manner and to the extent

1 hereinafter provided to an employee of an employer if
 2 insures who ~~has elected to come under this act and who~~
 3 ~~shall receive~~ receives an injury arising out of and in the
 4 course of his employment, or, in the case of his death from
 5 such injury, to his beneficiaries, if any.

6 (2) If a worker employed in this state who is subject
 7 to the provisions of this act temporarily leaves the state
 8 incidental to that employment and receives an injury arising
 9 out of and in the course of such employment, the provisions
 10 of this act shall apply to such worker as though he were
 11 injured within this state.

12 (3) If a worker from another state and his employer
 13 from another state are temporarily engaged in work within
 14 this state, this act shall not apply to them:

15 (a) if the employer and employee are bound by the
 16 provisions of the Workers' Compensation Law or similar law
 17 of such other state which applies to them while they are in
 18 the state of Montana, and

19 (b) if the Workers' Compensation Act of this state is
 20 recognized and given effect as the exclusive remedy for
 21 workers employed in this state who are injured while
 22 temporarily employed in such other state.

23 (4) A certificate from an authorized officer of the
 24 workers' compensation department or similar agency of
 25 another state certifying that an employer of such other

1 state is bound by the Workers' Compensation Act of the state
 2 and that its act will be applied to employees of the
 3 employer while in the state of Montana shall be prima facie
 4 evidence of the application of the Workers' Compensation Law
 5 of the certifying state.

6 (5) The division may, with the approval of the
 7 governor, enter into agreements with workers' compensation
 8 agencies of other states for the purpose of promulgating
 9 regulations not inconsistent with the provisions of this act
 10 to carry out the extraterritorial application of the
 11 workers' compensation laws of the agreeing states."

12 Section 8. Repealer. Sections 92-201, 92-203, 92-205,
 13 92-207.1, 92-209, 92-210, 92-211, and 92-1102, R.C.M. 1947,
 14 are repealed.

-End-

STATE OF MONTANA

REQUEST NO. 135-77

FISCAL NOTE

Form BD-15

In compliance with a written request received January 21, 1977, there is hereby submitted a Fiscal Note for Senate Bill 166 pursuant to Chapter 53, Laws of Montana, 1965 - Thirty-Ninth Legislative Assembly.

Background information used in developing this Fiscal Note is available from the Office of Budget and Program Planning, to members of the Legislature upon request.

DESCRIPTION OF PROPOSED LEGISLATION:

An act creating an uninsured employers' fund to grant to all employees in this state Workers' Compensation benefits even if their employers are not properly insured; providing for funding of the fund; and defining insurer.

ASSUMPTIONS:

1. Benefit payments will become effective July 1, 1977.
2. The state's General Fund will provide the initial \$150,000.

FISCAL IMPACT:

	<u>FY 78</u>	<u>FY 79</u>	<u>TOTAL</u>
General Fund appropriation required	<u>\$150,000</u>	<u>\$ 0</u>	<u>\$150,000</u>

Richard J. Drayton
 BUDGET DIRECTOR
 Office of Budget and Program Planning
 Date: 1-24-77

Approved by Committee
on Finance & Claims

1 SENATE BILL NO. 166

2 INTRODUCED BY LABOR AND EMPLOYMENT RELATIONS COMMITTEE

3 LEE, CHAIRMAN

4 BY REQUEST OF THE DIVISION OF WORKERS' COMPENSATION

5
6 A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTIONS
7 92-202.1, 92-204.1, 92-435, AND 92-614, R.C.M. 1947;
8 CREATING AN UNINSURED EMPLOYERS' FUND TO GRANT TO ALL
9 EMPLOYEES IN THIS STATE WORKERS' COMPENSATION BENEFITS EVEN
10 IF THEIR EMPLOYERS ARE NOT PROPERLY INSURED; PROVIDING FOR
11 FUNDING OF THE FUND; DEFINING INSURER; AND REPEALING
12 SECTIONS 92-201, 92-203, 92-205, 92-207.1, 92-209, 92-210,
13 92-211, AND 92-1102, R.C.M. 1947."

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16 Section 1. Section 92-202.1, R.C.M. 1947, is amended
17 to read as follows:

18 *92-202.1. Employments covered and employments
19 exempted from coverage. This act shall not apply to any of
20 the following employments unless the employer elects
21 coverage under this act: (1) Except as provided in
22 subsection (2) of this section, the Workers' Compensation
23 Act applies to all employers as defined in 92-410.1 and to
24 all employees as defined in 92-411. An employer who has any
25 employee in service under any appointment or contract of

1 hire, expressed or implied, oral or written, shall elect to
2 be bound by the provisions of compensation plan No. 1, 2, or
3 3. Every employee whose employer is bound by the Workers'
4 Compensation Act is subject to and bound by the compensation
5 plan that has been elected by the employer.

6 (2) Unless the employer elects coverage for these
7 employments under the act and an insurer allows such an
8 election, the Workers' Compensation Act does not apply to
9 any of the following employments:

10 (1)(a) Household AND DOMESTIC employment.

11 (2)(b) Casual employment as defined in 92-436.

12 (3)(c) Employment of members of an employer's family
13 dwelling in his the employer's household.

14 (4)(d) Employment of sole proprietors or working
15 members of a partnership.

16 (5)(e) Employment for which a rule of liability for
17 injury, occupational disease, or death is provided under the
18 laws of the United States.

19 (6)(f) Any person performing services in return for
20 aid or sustenance only."

21 Section 2. Section 92-204.1, R.C.M. 1947, is amended
22 to read as follows:

23 *92-204.1. Election of employer and employee to come
24 under act -- action against third party causing injury --
25 right-to-subrogation. ~~where both the employer and employee~~

SECOND READING

1 ~~have elected to come~~ For all employments covered under this
 2 ~~the act~~ Workers' Compensation Act, or for which an election
 3 ~~has been made for coverage under the act,~~ the provisions of
 4 ~~this the act shall be~~ are exclusive, and ~~such election~~
 5 ~~shall be held to be a surrender by such employer and the~~
 6 ~~servants, and employees of such employer and such employees,~~
 7 ~~as among themselves, of their right to any other method~~
 8 ~~form or kind of compensation, or determination thereof, or~~
 9 ~~to any other compensation, or kind of determination thereof,~~
 10 ~~or cause of action at law, suit in equity, or statutory or~~
 11 ~~common law right or remedy, or proceeding whatever, for or~~
 12 ~~on account of any personal injury to or death of such~~
 13 ~~employee, except as such rights may be hereinafter~~
 14 ~~specifically granted, and such election shall bind~~ Except as
 15 provided in 92-212, 92-213, AND 92-214 for uninsured
 16 employers and except as otherwise provided in the Workers'
 17 Compensation Act, an employer is not subject to any
 18 liability whatever for the death or personal injury to any
 19 employees covered by the Workers' Compensation Act. The
 20 Workers' Compensation Act binds the employee himself, and in
 21 case of death ~~shall bind~~ binds his personal representative,
 22 and all persons having any right or claim to compensation
 23 for his injury or death, as well as the employer, and the
 24 servants and employees of such employer, and those
 25 conducting his business during liquidation, bankruptcy or

1 insolvency. The right to compensation and medical benefits
 2 as provided by this act ~~shall is~~ not be affected by the fact
 3 that the injury, occupational disease, or death is caused by
 4 the negligence of a third party other than the employer, or
 5 the servants or employees of the employer. Whenever such
 6 event ~~shall occur~~ occurs to an employee while performing the
 7 duties of his employment and such event ~~shall be~~ is caused
 8 by the act or omission of some persons or corporations other
 9 than his employer, or the servants or employees of his
 10 employer, ~~then such the~~ employee, or in case of his death
 11 his heirs or personal representative shall, in addition to
 12 the right to receive compensation under this act, have a
 13 right to prosecute any cause of action he may have for
 14 damages against such persons or corporations. Further
 15 ~~provided, that whenever such~~ However, if an employee ~~shall~~
 16 receive ~~receives~~ an injury while performing the duties of
 17 his employment and ~~such the~~ injury or injuries, so received
 18 by ~~such the~~ employee, are caused by the intentional and
 19 malicious act or omission of a servant or employee of his
 20 employer, then ~~such the~~ employee, or in case of his death,
 21 his heirs or personal representatives, shall, in addition to
 22 the right to receive compensation under the ~~workmen's~~
 23 Workers' Compensation Act, have a right to prosecute any
 24 cause of action he may have for damages against ~~such the~~
 25 servants or employees of his employer, causing ~~such the~~

~~1 injury. Provided, that the employer or insurer shall be~~
~~2 entitled to full subrogation for all compensation and~~
~~3 benefits paid or to be paid under this act, except as~~
~~4 otherwise provided in this section. The employer's or~~
~~5 insurer's right of subrogation shall be a first lien on such~~
~~6 claim's judgment or recovery. The employee shall institute~~
~~7 such third party action after giving the employer or insurer~~
~~8 reasonable notice of his intention to institute such third~~
~~9 party action. The employee may request that such insurer pay~~
~~10 a proportionate share of the reasonable costs, including~~
~~11 attorneys' fees, of such third party action. The insurer may~~
~~12 elect not to participate in the cost of the third party~~
~~13 action, but as such election is made the insurer shall be~~
~~14 deemed to have waived fifty percent (50%) of its subrogation~~
~~15 rights granted by the section. Provided, however, that if an~~
~~16 employee refuses or fails to institute such action within~~
~~17 one (1) year from the date of injury, the employer or~~
~~18 insurer may institute such third party action in his name~~
~~19 and for his benefit or that of his personal representative.~~
~~20 If the employee or his personal representative institutes~~
~~21 such third party action, he shall be entitled to at least~~
~~22 one-third (1/3) of the amount recovered by judgment or~~
~~23 compromise settlement, less his proportionate share of the~~
~~24 reasonable costs, including attorneys' fees, in the event~~
~~25 the amount of recovery is insufficient to provide him with~~

~~1 that amount after payment of subrogation. In the event the~~
~~2 employer or insurer institutes such third party action, he~~
~~3 shall pay to the employee any amount recovered by judgment~~
~~4 or settlement which is in excess of the amounts paid or to~~
~~5 be paid under this act on employer's or insurer's reasonable~~
~~6 costs and attorneys' fees. Nothing contained in this section~~
~~7 shall prevent the employer or insurer, including the~~
~~8 division of workmen's compensation, from entering into~~
~~9 compromise agreements in settlement of subrogation rights.~~
~~10 If death results from the injury or occupational disease,~~
~~11 the employer shall have a right of action against the third~~
~~12 party for recovery of any amount paid under this act, and~~
~~13 such right of action shall be in addition to any cause of~~
~~14 action by the heirs or personal representative of the~~
~~15 deceased. In the event that the amount of compensation and~~
~~16 benefits payable under this act shall not have been fully~~
~~17 determined at the time such employee or his heirs or~~
~~18 personal representative or the employer or insurer shall~~
~~19 receive settlement of his action, prosecuted as aforesaid,~~
~~20 then the division shall determine what proportion of such~~
~~21 settlement shall be allocated under subrogation and such~~
~~22 determination may be appealed as any other determination of~~
~~23 the division."~~

24 Section 3. There is a new R.C.M. section numbered
 25 92-204.2 that reads as follows:

1 92-204.2. Subrogation. (1) If an action is prosecuted
 2 as provided for in 92-204.1 and except as otherwise provided
 3 in this section, the insurer is entitled to subrogation for
 4 all compensation and benefits paid or to be paid under the
 5 Workers' Compensation Act. The insurer's right of
 6 subrogation is a first lien on the claim, judgment, or
 7 recovery.

8 (2)(a) If the injured employee intends to institute
 9 the third party action, he shall give the insurer reasonable
 10 notice of his intention to institute the action.

11 (b) The injured employee may request that the insurer
 12 pay a proportionate share of the reasonable cost of the
 13 action, including attorneys' fees.

14 (c) The insurer may elect not to participate in the
 15 cost of the action. If this election is made, the insurer
 16 waives 50% of its subrogation rights granted by this
 17 section.

18 (d) If the injured employee or the employee's personal
 19 representative institutes the action, the employee is
 20 entitled to at least one-third of the amount recovered by
 21 judgment or settlement less a proportionate share of
 22 reasonable costs, including attorneys' fees, if the amount
 23 of recovery is insufficient to provide the employee with
 24 that amount after payment of subrogation.

25 (3) If an injured employee refuses or fails to

1 institute the third party action within 1 year from the date
 2 of injury, the insurer may institute the action in the name
 3 of the employee and for the employee's benefit or that of
 4 the employee's personal representative. If the insurer
 5 institutes the action, it shall pay to the employee any
 6 amount received by judgment or settlement which is in excess
 7 of the amounts paid or to be paid under the Workers'
 8 Compensation Act after the insurer's reasonable costs,
 9 including attorneys' fees for prosecuting the action, have
 10 been deducted from the recovery.

11 (4) An insurer may enter into compromise agreements in
 12 settlement of subrogation rights.

13 (5) If the amount of compensation and other benefits
 14 payable under the Workers' Compensation Act have not been
 15 fully determined at the time the employee, the employee's
 16 heirs or personal representatives, or the insurer have
 17 settled in any manner the action as provided for in this
 18 section, the division shall determine what proportion of the
 19 settlement shall be allocated under subrogation. The
 20 division's determination may be appealed to the workers'
 21 compensation judge.

22 Section 4. There is a new R.C.M. section numbered
 23 92-212 that reads as follows:

24 92-212. Uninsured employers fund. (1) There is created
 25 an uninsured employers fund. The purpose of the fund is to

1 pay to an injured employee of an uninsured employer the same
 2 benefits the employee would have received if the employer
 3 had been properly enrolled under compensation plan No. 1, 2,
 4 or 3. For the purposes of this section, the words "uninsured
 5 employer" mean an employer who has not properly complied
 6 with the provisions of 92-202.1. The division shall
 7 administer the fund and shall pay all proper benefits to
 8 injured employees of uninsured employers.

9 (2) The fund shall be funded in the following manner:

10 (a) The division shall require that the uninsured
 11 employer pay to the fund a penalty of either double the
 12 premium amount the employer would have paid on the payroll
 13 of the employer's workers in this state if the employer had
 14 been enrolled with compensation plan No. 3 or \$500,
 15 whichever is greater. In determining the premium amount for
 16 the calculation of the penalty under this subsection, the
 17 division shall make an assessment on how much premium would
 18 have been paid on the employer's past 3-year payroll for
 19 periods within the 3 years when the employer was uninsured.
 20 An assessment prior to July 1, 1977, may not be made.

21 (b) The fund shall receive from an uninsured employer
 22 an amount equal to all benefits paid or to be paid FROM THE
 23 FUND to an injured employee of the uninsured employer.

24 (c) In no event may an uninsured employer's combined
 25 liability under subsections (2)(a) and (2)(b) of this

1 section exceed \$30,000.

2 (d) The division may, at the beginning of each fiscal
 3 year, determine that the \$1,000 assessments that are charged
 4 against an insurer in each case of an industrial death under
 5 92-709.1(13)(a) shall be paid to the uninsured employers'
 6 fund rather than the subsequent injury fund.

7 ~~(e) The fund shall also be funded from the state~~
 8 ~~general fund for payment of benefits as provided for in this~~
 9 ~~section. However, any amounts collected under subsections~~
 10 ~~(2)(a), (2)(b), or (2)(d) of this section shall be expended~~
 11 ~~before any general fund appropriations are expended.~~

12 (3) If, upon demand of the division, an uninsured
 13 employer refuses to make the payments to the fund that are
 14 provided for in subsections (2)(a) and (2)(b) above, the
 15 sums may be collected by the division through suit. The
 16 division may settle through compromise with an uninsured
 17 employer the amount due the fund under this section.

18 (4) Proper surpluses and reserves shall be kept for
 19 the fund. The board of investments shall invest the moneys
 20 of the fund. The cost of administration of the fund shall be
 21 paid out of the money in the fund.

22 (5) All appropriate provisions in the Workers'
 23 Compensation Act apply to the fund in the same manner as
 24 they apply to compensation plans No. 1, 2, and 3.

25 (6) When the division discovers an uninsured employer

1 it shall order him to cease operations until he has elected
2 to be bound by a compensation plan. An employer who does
3 not comply with the division's order to cease operations is
4 guilty of a misdemeanor.

5 SECTION 5. THERE IS A NEW R.C.M. SECTION NUMBERED
6 92-213 THAT READS AS FOLLOWS:

7 92-213. Election of uninsured employee to take under
8 the fund or bring action against employer -- limitation on
9 benefit entitlement under the fund. (1) An employee who
10 suffers an injury arising out of and in the course of
11 employment while working for an uninsured employer as
12 defined in 92-212(1), or an employee's beneficiaries in
13 injuries resulting in death, may elect to either receive
14 benefits from the uninsured employers fund or pursue a
15 damage action against the employer. However, once an
16 election has been made to either take from the fund or
17 pursue a damage action, the election is final and binding on
18 the employee or the employee's beneficiaries, heirs, and
19 personal representatives. An injured employee or the
20 employee's beneficiaries may not receive both benefits from
21 the fund and pursue a damage action. If an injured employee
22 or the employee's beneficiaries elect to bring an action to
23 recover damages for personal injuries sustained or for death
24 resulting from personal injuries so sustained, it is not a
25 defense for the employer that the:

1 (a) employee was negligent unless such negligence was
2 willful;

3 (b) injury was caused by the negligence of a fellow
4 employee; or

5 (c) employee had assumed the risks inherent in,
6 incident to, or arising out of his employment or arising
7 from the failure of the employer to provide and maintain a
8 reasonably safe place to work or reasonably safe tools or
9 appliances.

10 (2) Notwithstanding the provisions of 92-212 and
11 92-61, injured employees or an employee's beneficiaries who
12 elect to receive benefits from the uninsured employers fund
13 are not granted an entitlement by this state for full
14 workers' compensation benefits from the fund. Benefits from
15 the fund shall be paid in accordance with the sums in the
16 fund. If the division determines at any time that the sums
17 in the fund are not adequate to fully pay all claims, the
18 division may make appropriate proportionate reductions in
19 benefits to all claimants. The reductions do not entitle
20 claimants to retroactive reimbursements in the future.

21 Section 6. There is a new R.C.M. section NUMBERED
22 92-214 that reads as follows:

23 Effective date of uninsured employers' fund. Except as
24 provided in this section, 92-212 is effective on July 1,
25 1977. Payouts for benefits may not be made from the

1 uninsured employers' fund until the fund attains a level of
 2 \$150,000 or January 1, 1979, whichever occurs first.
 3 However, until payouts for benefits from the uninsured
 4 employers' fund begin, an uninsured employer, as defined in
 5 92-212(1), is subject to suit by an employee who suffers an
 6 injury arising out of and in the course of employment. In
 7 any such action to recover damages for personal injuries
 8 sustained or for death resulting from personal injuries so
 9 sustained, it is not a defense that the:

10 (1) employee was negligent unless such negligence was
 11 ~~wifful~~ WILLEFUL;

12 (2) injury was caused by the negligence of a fellow
 13 employee; or

14 (3) employee had assumed the risks inherent in,
 15 incident to, or arising out of his employment or arising
 16 from the failure of the employer to provide and maintain a
 17 reasonably safe place to work or reasonable safe tools or
 18 appliances.

19 Section 7. Section 92-435, R.C.M. 1947, is amended to
 20 read as follows:

21 "92-435. Insurer defined. "Insurer" means any
 22 ~~insurance company authorized to transact business in this~~
 23 ~~state insuring any employer under this act and includes~~
 24 ~~industrial insurance account created by this act, known as~~
 25 ~~the "state fund" an employer bound by compensation plan No.~~

1 ~~1. an insurance company transacting business under~~
 2 ~~compensation plan No. 2, the industrial insurance account~~
 3 ~~under compensation plan No. 3, or the uninsured employers'~~
 4 ~~fund provided for in 92-212."~~

5 Section 8. Section 92-614, R.C.M. 1947, is amended to
 6 read as follows:

7 "92-614. Who liable for injuries under the different
 8 ~~plans of act and in what amounts, =~~ extraterritorial
 9 application and reciprocity. (1) ~~Every employer who shall~~
 10 ~~become bound by and subject to the provisions of~~
 11 ~~compensation plan number one (1), and every employer and~~
 12 ~~insurer who shall become bound by and subject to the~~
 13 ~~provisions of compensation plan number two (2), and the~~
 14 ~~industrial accident fund where the employer of the injured~~
 15 ~~employee has become bound by and subject to the provisions~~
 16 ~~of compensation plan No. 3, shall be insurer is~~ liable for
 17 the payment of compensation in the manner and to the extent
 18 hereinafter provided to an employee of an employer it
 19 ~~insures who has elected to come under this act, and who~~
 20 ~~shall receive~~ receives an injury arising out of and in the
 21 course of his employment, or, in the case of his death from
 22 such injury, to his beneficiaries, if any.

23 (2) If a worker employed in this state who is subject
 24 to the provisions of this act temporarily leaves the state
 25 incidental to that employment and receives an injury arising

1 out of and in the course of such employment, the provisions
 2 of this act shall apply to such worker as though he were
 3 injured within this state.

4 (3) If a worker from another state and his employer
 5 from another state are temporarily engaged in work within
 6 this state, this act shall not apply to them:

7 (a) if the employer and employee are bound by the
 8 provisions of the Workers' Compensation Law or similar law
 9 of such other state which applies to them while they are in
 10 the state of Montana, and

11 (b) if the Workers' Compensation Act of this state is
 12 recognized and given effect as the exclusive remedy for
 13 workers employed in this state who are injured while
 14 temporarily employed in such other state.

15 (4) A certificate from an authorized officer of the
 16 workers' compensation department or similar agency of
 17 another state certifying that an employer of such other
 18 state is bound by the Workers' Compensation Act of the state
 19 and that its act will be applied to employees of the
 20 employer while in the state of Montana shall be prima facie
 21 evidence of the application of the Workers' Compensation Law
 22 of the certifying state.

23 (5) The division may, with the approval of the
 24 governor, enter into agreements with workers' compensation
 25 agencies of other states for the purpose of promulgating

1 regulations not inconsistent with the provisions of this act
 2 to carry out the extraterritorial application of the
 3 workers' compensation laws of the agreeing states."

4 Section 9. Repealer. Sections 92-201, 92-203, 92-205,
 5 92-207.1, 92-209, 92-210, 92-211, and 92-1102, R.C.M. 1947,
 6 are repealed.

-End-

1 SENATE BILL NO. 166
 2 INTRODUCED BY LABOR AND EMPLOYMENT RELATIONS COMMITTEE
 3 LEE, CHAIRMAN
 4 BY REQUEST OF THE DIVISION OF WORKERS' COMPENSATION
 5
 6 A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTIONS
 7 92-202.1, 92-204.1, 92-435, AND 92-614, R.C.M. 1947;
 8 CREATING AN UNINSURED EMPLOYERS' FUND TO GRANT TO ALL
 9 EMPLOYEES IN THIS STATE WORKERS' COMPENSATION BENEFITS EVEN
 10 IF THEIR EMPLOYERS ARE NOT PROPERLY INSURED; PROVIDING FOR
 11 FUNDING OF THE FUND; DEFINING INSURER; AND REPEALING
 12 SECTIONS 92-201, 92-203, 92-205, 92-207.1, 92-209, 92-210,
 13 92-211, AND 92-1102, R.C.M. 1947."
 14
 15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 16 Section 1. Section 92-202.1, R.C.M. 1947, is amended
 17 to read as follows:
 18 "92-202.1. Employments covered and employments
 19 exempted from coverage. This act shall not apply to any of
 20 the following employments unless the employer elects
 21 coverage under this act: (1) Except as provided in
 22 subsection (2) of this section, the Workers' Compensation
 23 Act applies to all employers as defined in 92-410.1 and to
 24 all employees as defined in 92-411. An employer who has any
 25 employee in service under any appointment or contract of

1 hire, expressed or implied, oral or written, shall elect to
 2 be bound by the provisions of compensation plan No. 1, 2, or
 3 3. Every employee whose employer is bound by the Workers'
 4 Compensation Act is subject to and bound by the compensation
 5 plan that has been elected by the employer.
 6 (2) Unless the employer elects coverage for these
 7 employments under the act and an insurer allows such an
 8 election, the Workers' Compensation Act does not apply to
 9 any of the following employments:
 10 (1)(a) Household AND DOMESTIC employment.
 11 (2)(b) Casual employment as defined in 92-436.
 12 (3)(c) Employment of members of an employer's family
 13 dwelling in his the employer's household.
 14 (4)(d) Employment of sole proprietors or working
 15 members of a partnership.
 16 (5)(e) Employment for which a rule of liability for
 17 injury, occupational disease, or death is provided under the
 18 laws of the United States.
 19 (6)(f) Any person performing services in return for
 20 aid or sustenance only."
 21 Section 2. Section 92-204.1, R.C.M. 1947, is amended
 22 to read as follows:
 23 "92-204.1. Election of employer and employee to come
 24 under act -- action against third party causing injury --
 25 right to subrogation. Where both the employer and employee

~~have elected to come~~ For all employments covered under this
~~the act Workers' Compensation Act, or for which an election~~
~~has been made for coverage under the act,~~ the provisions of
~~this the act shall be~~ are ~~exclusive,~~ and ~~such election~~
~~shall be held to be a surrender by such employer and the~~
~~servants and employees of such employer and such employees~~
~~as among themselves, of their right to any other method~~
~~form or kind of compensation, or determination thereof, or~~
~~to any other compensation, or kind of determination thereof,~~
~~or cause of action at law, suit in equity, or statutory or~~
~~common law right or remedy, or proceeding whatever, for or~~
~~on account of any personal injury to or death of such~~
~~employee, except as such rights may be hereinafter~~
~~specifically granted; and such election shall bind~~ Except as
~~provided in 92-212, 92-213, AND 92-214 for uninsured~~
~~employers and except as otherwise provided in the Workers'~~
~~Compensation Act, an employer is not subject to any~~
~~liability whatever for the death or personal injury to any~~
~~employees covered by the Workers' Compensation Act. The~~
~~Workers' Compensation Act binds~~ the employee himself, and in
~~case of death shall bind~~ binds his personal representative,
and all persons having any right or claim to compensation
for his injury or death, as well as the employer, and the
servants and employees of such employer, and those
conducting his business during liquidation, bankruptcy or

insolvency. The right to compensation and medical benefits
as provided by this act ~~shall is~~ not be affected by the fact
that the injury, occupational disease, or death is caused by
the negligence of a third party other than the employer, or
the servants or employees of the employer. Whenever such
event ~~shall occur~~ occurs to an employee while performing the
duties of his employment and such event ~~shall be~~ is caused
by the act or omission of some persons or corporations other
than his employer, or the servants or employees of his
employer, ~~then such the~~ employee, or in case of his death
his heirs or personal representative shall, in addition to
the right to receive compensation under this act, have a
right to prosecute any cause of action he may have for
damages against such persons or corporations. Further
~~provided, that whenever such~~ However, if an employee ~~shall~~
~~receive~~ receives an injury while performing the duties of
his employment and ~~such the~~ injury or injuries, so received
by ~~such the~~ employee, are caused by the intentional and
malicious act or omission of a servant or employee of his
employer, then ~~such the~~ employee, or in case of his death,
his heirs or personal representatives, shall, in addition to
the right to receive compensation under the ~~workmen's~~
~~Workers' Compensation Act,~~ have a right to prosecute any
cause of action he may have for damages against ~~such the~~
servants or employees of his employer, causing ~~such the~~

~~1 injury. Provided, that the employer or insurer shall be~~
~~2 entitled to full subrogation for all compensation and~~
~~3 benefits paid or to be paid under this act except as~~
~~4 otherwise provided in this section. The employer's or~~
~~5 insurer's right of subrogation shall be a first lien on such~~
~~6 claim, judgment or recovery. The employee shall institute~~
~~7 such third party action after giving the employer or insurer~~
~~8 reasonable notice of his intention to institute such third~~
~~9 party action. The employee may request that such insurer pay~~
~~10 a proportionate share of the reasonable cost, including~~
~~11 attorneys' fees, of such third party action. The insurer may~~
~~12 elect not to participate in the cost of the third party~~
~~13 action, but as such election is made the insurer shall be~~
~~14 deemed to have waived fifty percent (50%) of its subrogation~~
~~15 rights granted by the section. Provided, however, that if an~~
~~16 employee refuses or fails to institute such action within~~
~~17 one (1) year from the date of injury, the employer or~~
~~18 insurer may institute such third party action in his name~~
~~19 and for his benefit or that of his personal representative.~~
~~20 If the employee or his personal representative institutes~~
~~21 such third party action, he shall be entitled to at least~~
~~22 one-third (1/3) of the amount recovered by judgment or~~
~~23 compromise settlement less his proportionate share of the~~
~~24 reasonable costs, including attorneys' fees, in the event~~
~~25 the amount of recovery is insufficient to provide him with~~

~~1 that amount after payment of subrogation. In the event the~~
~~2 employer or insurer institutes such third party action, he~~
~~3 shall pay to the employee any amount recovered by judgment~~
~~4 or settlement which is in excess of the amounts paid or to~~
~~5 be paid under this act on employer's or insurer's reasonable~~
~~6 costs and attorneys' fees. Nothing contained in this section~~
~~7 shall prevent the employer or insurer, including the~~
~~8 division of workmen's compensation, from entering into~~
~~9 compromise agreements in settlement of subrogation rights.~~
~~10 If death results from the injury or occupational disease,~~
~~11 the employer shall have a right of action against the third~~
~~12 party for recovery of any amount paid under this act, and~~
~~13 such right of action shall be in addition to any cause of~~
~~14 action by the heirs or personal representative of the~~
~~15 deceased. In the event that the amount of compensation and~~
~~16 benefits payable under this act shall not have been fully~~
~~17 determined at the time such employee or his heirs or~~
~~18 personal representative or the employer or insurer shall~~
~~19 receive settlement of his action, prosecuted as aforesaid,~~
~~20 then the division shall determine what proportion of such~~
~~21 settlement shall be allocated under subrogation and such~~
~~22 determination may be appealed as any other determination of~~
~~23 the division."~~

Section 3. There is a new R.C.M. section numbered
 92-204.2 that reads as follows:

1 92-204.2. Subrogation. (1) If an action is prosecuted
 2 as provided for in 92-204.1 and except as otherwise provided
 3 in this section, the insurer is entitled to subrogation for
 4 all compensation and benefits paid or to be paid under the
 5 Workers' Compensation Act. The insurer's right of
 6 subrogation is a first lien on the claim, judgment, or
 7 recovery.

8 (2)(a) If the injured employee intends to institute
 9 the third party action, he shall give the insurer reasonable
 10 notice of his intention to institute the action.

11 (b) The injured employee may request that the insurer
 12 pay a proportionate share of the reasonable cost o the
 13 action, including attorneys' fees.

14 (c) The insurer may elect not to participate in the
 15 cost of the action. If this election is made, the insurer
 16 waives 50% of its subrogation rights granted by this
 17 section.

18 (d) If the injured employee or the employee's personal
 19 representative institutes the action, the employee is
 20 entitled to at least one-third of the amount recovered by
 21 judgment or settlement less a proportionate share of
 22 reasonable costs, including attorneys' fees, if the amount
 23 of recovery is insufficient to provide the employee with
 24 that amount after payment of subrogation.

25 (3) If an injured employee refuses or fails to

1 institute the third party action within 1 year from the date
 2 of injury, the insurer may institute the action in the name
 3 of the employee and for the employee's benefit or that of
 4 the employee's personal representative. If the insurer
 5 institutes the action, it shall pay to the employee any
 6 amount received by judgment or settlement which is in excess
 7 of the amounts paid or to be paid under the Workers'
 8 Compensation Act after the insurer's reasonable costs,
 9 including attorneys' fees for prosecuting the action, have
 10 been deducted from the recovery.

11 (4) An insurer may enter into compromise agreements in
 12 settlement of subrogation rights.

13 (5) If the amount of compensation and other benefits
 14 payable under the Workers' Compensation Act have not been
 15 fully determined at the time the employee, the employee's
 16 heirs or personal representatives, or the insurer have
 17 settled in any manner the action as provided for in this
 18 section, the division shall determine what proportion of the
 19 settlement shall be allocated under subrogation. The
 20 division's determination may be appealed to the workers'
 21 compensation judge.

22 Section 4. There is a new R.C.M. section numbered
 23 92-212 that reads as follows:

24 92-212. Uninsured employers fund. (1) There is created
 25 an uninsured employers fund. The purpose of the fund is to

1 pay to an injured employee of an uninsured employer the same
 2 benefits the employee would have received if the employer
 3 had been properly enrolled under compensation plan No. 1, 2,
 4 or 3. For the purposes of this section, the words "uninsured
 5 employer" mean an employer who has not properly complied
 6 with the provisions of 92.202.1. The division shall
 7 administer the fund and shall pay all proper benefits to
 8 injured employees of uninsured employers.

9 (2) The fund shall be funded in the following manner:

10 (a) The division shall require that the uninsured
 11 employer pay to the fund a penalty of either double the
 12 premium amount the employer would have paid on the payroll
 13 of the employer's workers in this state if the employer had
 14 been enrolled with compensation plan No. 3 or \$500,
 15 whichever is greater. In determining the premium amount for
 16 the calculation of the penalty under this subsection, the
 17 division shall make an assessment on how much premium would
 18 have been paid on the employer's past 3-year payroll for
 19 periods within the 3 years when the employer was uninsured.
 20 An assessment prior to July 1, 1977, may not be made.

21 (b) The fund shall receive from an uninsured employer
 22 an amount equal to all benefits paid or to be paid FROM THE
 23 FUND to an injured employee of the uninsured employer.

24 (c) In no event may an uninsured employer's combined
 25 liability under subsections (2)(a) and (2)(b) of this

1 section exceed \$30,000.

2 (d) The division may, at the beginning of each fiscal
 3 year, determine that the \$1,000 assessments that are charged
 4 against an insurer in each case of an industrial death under
 5 92-709.1(13)(a) shall be paid to the uninsured employers'
 6 fund rather than the subsequent injury fund.

7 ~~(e) The fund shall also be funded from the state~~
 8 ~~general fund for payment of benefits as provided for in this~~
 9 ~~section. However, any amounts collected under subsections~~
 10 ~~(2)(a), (2)(b), or (2)(d) of this section shall be expended~~
 11 ~~before any general fund appropriations are expended.~~

12 (3) If, upon demand of the division, an uninsured
 13 employer refuses to make the payments to the fund that are
 14 provided for in subsections (2)(a) and (2)(b) above, the
 15 sums may be collected by the division through suit. The
 16 division may settle through compromise with an uninsured
 17 employer the amount due the fund under this section.

18 (4) Proper surpluses and reserves shall be kept for
 19 the fund. The board of investments shall invest the moneys
 20 of the fund. The cost of administration of the fund shall be
 21 paid out of the money in the fund.

22 (5) All appropriate provisions in the Workers'
 23 Compensation Act apply to the fund in the same manner as
 24 they apply to compensation plans No. 1, 2, and 3.

25 (6) When the division discovers an uninsured employer

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2 to be bound by a compensation plan. An employer who does
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11 employment while working for an uninsured employer as
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14 benefits from the uniasured employers fund or pursue a
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18 the employee or the employee's beneficiaries, heirs, and
19 personal representatives. An injured employee or the
20 employee's beneficiaries may not receive both benefits from
21 the fund and pursue a damage action. If an injured employee
22 or the employee's beneficiaries elect to bring an action to
23 recover damages for personal injuries sustained or for death
24 resulting from personal injuries so sustained, it is not a
25 defense for the employer that the:

1 (a) employee was negligent unless such negligence was
2 willful;

3 (b) injury was caused by the negligence of a fellow
4 employee; or

5 (c) employee had assumed the risks inherent in,
6 incident to, or arising out of his employment or arising
7 from the failure of the employer to provide and maintain a
8 reasonably safe place to work or reasonably safe tools or
9 appliances.

10 (2) Notwithstanding the provisions of 92-212 and
11 92-614, injured employees or an employee's beneficiaries who
12 elect to receive benefits from the uninsured employers fund
13 are not granted an entitlement by this state for full
14 workers' compensation benefits from the fund. Benefits from
15 the fund shall be paid in accordance with the sums in the
16 fund. If the division determines at any time that the sums
17 in the fund are not adequate to fully pay all claims, the
18 division may make appropriate proportionate reductions in
19 benefits to all claimants. The reductions to not entitle
20 claimants to retroactive reimbursements in the future.

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23 Effective date of uninsured employers' fund. Except as
24 provided in this section, 92-212 is effective on July 1,
25 1977. Payouts for benefits may not be made from the

1 uninsured employers' fund until the fund attains a level of
 2 \$150,000 or January 1, 1979, whichever occurs first.
 3 However, until payouts for benefits from the uninsured
 4 employers' fund begin, an uninsured employer, as defined in
 5 92-212(1), is subject to suit by an employee who suffers an
 6 injury arising out of and in the course of employment. In
 7 any such action to recover damages for personal injuries
 8 sustained or for death resulting from personal injuries so
 9 sustained, it is not a defense that the:

- 10 (1) employee was negligent unless such negligence was
 11 willful ~~MILLEUL~~;
 12 (2) injury was caused by the negligence of a fellow
 13 employee; or
 14 (3) employee had assumed the risks inherent in,
 15 incident to, or arising out of his employment or arising
 16 from the failure of the employer to provide and maintain a
 17 reasonably safe place to work or reasonable safe tools or
 18 appliances.

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21 "92-435. Insurer defined. "Insurer" means any
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 12 ~~insurer who shall become bound by and subject to the~~
 13 ~~provisions of compensation plan number two (2), and the~~
 14 ~~industrial accident fund where the employer of the injured~~
 15 ~~employee has become bound by and subject to the provisions~~
 16 ~~of compensation plan No. 3, shall be insurer is~~ liable for
 17 the payment of compensation in the manner and to the extent
 18 hereinafter provided to an employee of an employer it
 19 insures who ~~has elected to come under this act and who~~
 20 ~~shall receive~~ receives an injury arising out of and in the
 21 course of his employment, or, in the case of his death from
 22 such injury, to his beneficiaries, if any.

23 (2) If a worker employed in this state who is subject
 24 to the provisions of this act temporarily leaves the state
 25 incidental to that employment and receives an injury arising

1 out of and in the course of such employment, the provisions
 2 of this act shall apply to such worker as though he were
 3 injured within this state.

4 (3) If a worker from another state and his employer
 5 from another state are temporarily engaged in work within
 6 this state, this act shall not apply to them:

7 (a) if the employer and employee are bound by the
 8 provisions of the Workers' Compensation Law or similar law
 9 of such other state which applies to them while they are in
 10 the state of Montana, and

11 (b) if the Workers' Compensation Act of this state is
 12 recognized and given effect as the exclusive remedy for
 13 workers employed in this state who are injured while
 14 temporarily employed in such other state.

15 (4) A certificate from an authorized officer of the
 16 workers' compensation department or similar agency of
 17 another state certifying that an employer of such other
 18 state is bound by the Workers' Compensation Act of the state
 19 and that its act will be applied to employees of the
 20 employer while in the state of Montana shall be prima facie
 21 evidence of the application of the Workers' Compensation Law
 22 of the certifying state.

23 (5) The division may, with the approval of the
 24 governor, enter into agreements with workers' compensation
 25 agencies of other states for the purpose of promulgating

1 regulations not inconsistent with the provisions of this act
 2 to carry out the extraterritorial application of the
 3 workers' compensation laws of the agreeing states."

4 Section 9. Repealer. Sections 92-201, 92-203, 92-205,
 5 92-207.1, 92-209, 92-210, 92-211, and 92-1102, R.C.M. 1947,
 6 are repealed.

-End-

1 SENATE BILL NO. 166
 2 INTRODUCED BY LABOR AND EMPLOYMENT RELATIONS COMMITTEE
 3 LEE, CHAIRMAN
 4 BY REQUEST OF THE DIVISION OF WORKERS' COMPENSATION
 5
 6 A BILL FOR AN ACT ENTITLED: "AN ACT AMENDING SECTIONS
 7 92-202.1, 92-204.1, 92-435, AND 92-614, R.C.M. 1947;
 8 CREATING AN UNINSURED EMPLOYERS' FUND TO GRANT TO ALL
 9 EMPLOYEES IN THIS STATE WORKERS' COMPENSATION BENEFITS EVEN
 10 IF THEIR EMPLOYERS ARE NOT PROPERLY INSURED; PROVIDING FOR
 11 FUNDING OF THE FUND; DEFINING INSURER; AND REPEALING
 12 SECTIONS 92-201, 92-203, 92-205, 92-207.1, 92-209, 92-210,
 13 92-211, AND 92-1102, R.C.M. 1947."
 14
 15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
 16 Section 1. Section 92-202.1, R.C.M. 1947, is amended
 17 to read as follows:
 18 "92-202.1. Employments covered and employments
 19 exempted from coverage. This act shall not apply to any of
 20 the following employments unless the employer elects
 21 coverage under this act: (1) Except as provided in
 22 subsection (2) of this section, the Workers' Compensation
 23 Act applies to all employers as defined in 92-410.1 and to
 24 all employees as defined in 92-411. An employer who has any
 25 employee in service under any appointment or contract of

1 hire, expressed or implied, oral or written, shall elect to
 2 be bound by the provisions of compensation plan No. 1, 2, or
 3 3. Every employee whose employer is bound by the Workers'
 4 Compensation Act is subject to and bound by the compensation
 5 plan that has been elected by the employer.
 6 (2) Unless the employer elects coverage for these
 7 employments under the act and an insurer allows such an
 8 election, the Workers' Compensation Act does not apply to
 9 any of the following employments:
 10 (1)(a) Household AND DOMESTIC employment.
 11 (2)(b) Casual employment as defined in 92-436.
 12 (3)(c) Employment of members of an employer's family
 13 dwelling in his the employer's household.
 14 (4)(d) Employment of sole proprietors or working
 15 members of a partnership.
 16 (5)(e) Employment for which a rule of liability for
 17 injury, occupational disease, or death is provided under the
 18 laws of the United States.
 19 (6)(f) Any person performing services in return for
 20 aid or sustenance only."
 21 section 2. Section 92-204.1, R.C.M. 1947, is amended
 22 to read as follows:
 23 "92-204.1. Election of employer and employee to come
 24 under act -- action against third party causing injury --
 25 ~~right-to-subrogation. Where both the employer and employee~~

1 ~~have elected to come~~ for all employments covered under this
 2 ~~the act~~ Workers' Compensation Act, or for which an election
 3 ~~has been made for coverage under the act,~~ the provisions of
 4 this ~~the act shall be~~ are exclusive, and ~~such election~~
 5 ~~shall be held to be a surrender by such employer and the~~
 6 ~~servants and employees of such employer and such employee~~
 7 ~~as among themselves, of their right to any other method~~
 8 ~~form or kind of compensation, or determination thereof, or~~
 9 ~~to any other compensation, or kind of determination thereof,~~
 10 ~~or cause of action at law, suit in equity, or statutory or~~
 11 ~~common law right or remedy, or proceeding whatever, for or~~
 12 ~~on account of any personal injury to or death of such~~
 13 ~~employee, except as such rights may be hereinafter~~
 14 ~~specifically granted, and such election shall bind~~ Except as
 15 provided in 92-212, 92-213, AND 92-214 for uninsured
 16 employers and except as otherwise provided in the Workers'
 17 Compensation Act, an employer is not subject to any
 18 liability whatever for the death or personal injury to any
 19 employees covered by the Workers' Compensation Act. The
 20 Workers' Compensation Act binds the employee himself, and in
 21 case of death ~~shall bind~~ binds his personal representative,
 22 and all persons having any right or claim to compensation
 23 for his injury or death, as well as the employer, and the
 24 servants and employees of such employer, and those
 25 conducting his business during liquidation, bankruptcy or

1 insolvency. The right to compensation and medical benefits
 2 as provided by this act ~~shall~~ is not be affected by the fact
 3 that the injury, occupational disease, or death is caused by
 4 the negligence of a third party other than the employer, or
 5 the servants or employees of the employer. Whenever such
 6 event ~~shall occur~~ occurs to an employee while performing the
 7 duties of his employment and such event ~~shall be~~ is caused
 8 by the act or omission of some persons or corporations other
 9 than his employer, or the servants or employees of his
 10 employer, ~~then such the~~ employee, or in case of his death
 11 his heirs or personal representative shall, in addition to
 12 the right to receive compensation under this act, have a
 13 right to prosecute any cause of action he may have for
 14 damages against such persons or corporations. ~~Further~~
 15 ~~provided, that whenever such~~ However, if an employee ~~shall~~
 16 ~~receive~~ receives an injury while performing the duties of
 17 his employment and ~~such the~~ injury or injuries, so received
 18 by ~~such the~~ employee, are caused by the intentional and
 19 malicious act or omission of a servant or employee of his
 20 employer, then ~~such the~~ employee, or in case of his death,
 21 his heirs or personal representatives, shall, in addition to
 22 the right to receive compensation under the ~~workmen's~~
 23 Workers' Compensation Act, have a right to prosecute any
 24 cause of action he may have for damages against ~~such the~~
 25 servants or employees of his employer, causing ~~such the~~

1 injury. Provided~~v~~ that the employer or insurer shall be
 2 entitled to full subrogation for all compensation and
 3 benefits paid or to be paid under this act except as
 4 otherwise provided in this section. The employer's or
 5 insurer's right of subrogation shall be a first lien on such
 6 claim, judgment or recovery. The employee shall institute
 7 such third party action after giving the employer or insurer
 8 reasonable notice of his intention to institute such third
 9 party action. The employee may request that such insurer pay
 10 a proportionate share of the reasonable costs including
 11 attorneys' fees of such third party action. The insurer may
 12 elect not to participate in the cost of the third party
 13 action but as such election is made the insurer shall be
 14 deemed to have waived fifty percent (50%) of its subrogation
 15 rights granted by the section. Provided, however, that if an
 16 employee refuses or fails to institute such action within
 17 one (1) year from the date of injury, the employer or
 18 insurer may institute such third party action in his name
 19 and for his benefit or that of his personal representative.
 20 If the employee or his personal representative institutes
 21 such third party action, he shall be entitled to at least
 22 one-third (1/3) of the amount recovered by judgment or
 23 compromise settlement less his proportionate share of the
 24 reasonable costs, including attorneys' fees, in the event
 25 the amount of recovery is insufficient to provide him with

1 that amount after payment of subrogation. In the event the
 2 employer or insurer institutes such third party action, he
 3 shall pay to the employee any amount recovered by judgment
 4 or settlement which is in excess of the amounts paid or to
 5 be paid under this act an employer's or insurer's reasonable
 6 costs and attorneys' fees. Nothing contained in this section
 7 shall prevent the employer or insurer, including the
 8 division of workmen's compensation, from entering into
 9 compromise agreements in settlement of subrogation rights.
 10 If death results from the injury or occupational disease,
 11 the employer shall have a right of action against the third
 12 party for recovery of any amount paid under this act and
 13 such right of action shall be in addition to any cause of
 14 action by the heirs or personal representative of the
 15 deceased. In the event that the amount of compensation and
 16 benefits payable under this act shall not have been fully
 17 determined at the time such employee or his heirs or
 18 personal representative or the employer or insurer shall
 19 receive settlement of his action, prosecuted as aforesaid,
 20 then the division shall determine what proportion of such
 21 settlement shall be allocated under subrogation and such
 22 determination may be appealed as any other determination of
 23 the division."

24 Section 3. There is a new R.C.M. section numbered
 25 92-204.2 that reads as follows:

1 92-204.2. Subrogation. (1) If an action is prosecuted
 2 as provided for in 92-204.1 and except as otherwise provided
 3 in this section, the insurer is entitled to subrogation for
 4 all compensation and benefits paid or to be paid under the
 5 Workers' Compensation Act. The insurer's right of
 6 subrogation is a first lien on the claim, judgment, or
 7 recovery.

8 (2)(a) If the injured employee intends to institute
 9 the third party action, he shall give the insurer reasonable
 10 notice of his intention to institute the action.

11 (b) The injured employee may request that the insurer
 12 pay a proportionate share of the reasonable cost of the
 13 action, including attorneys' fees.

14 (c) The insurer may elect not to participate in the
 15 cost of the action. If this election is made, the insurer
 16 waives 50% of its subrogation rights granted by this
 17 section.

18 (d) If the injured employee or the employee's personal
 19 representative institutes the action, the employee is
 20 entitled to at least one-third of the amount recovered by
 21 judgment or settlement less a proportionate share of
 22 reasonable costs, including attorneys' fees, if the amount
 23 of recovery is insufficient to provide the employee with
 24 that amount after payment of subrogation.

25 (3) If an injured employee refuses or fails to

1 institute the third party action within 1 year from the date
 2 of injury, the insurer may institute the action in the name
 3 of the employee and for the employee's benefit or that of
 4 the employee's personal representative. If the insurer
 5 institutes the action, it shall pay to the employee any
 6 amount received by judgment or settlement which is in excess
 7 of the amounts paid or to be paid under the Workers'
 8 Compensation Act after the insurer's reasonable costs,
 9 including attorneys' fees for prosecuting the action, have
 10 been deducted from the recovery.

11 (4) An insurer may enter into compromise agreements in
 12 settlement of subrogation rights.

13 (5) If the amount of compensation and other benefits
 14 payable under the Workers' Compensation Act have not been
 15 fully determined at the time the employee, the employee's
 16 heirs or personal representatives, or the insurer have
 17 settled in any manner the action as provided for in this
 18 section, the division shall determine what proportion of the
 19 settlement shall be allocated under subrogation. The
 20 division's determination may be appealed to the workers'
 21 compensation judge.

22 section 4. There is a new R.C.M. section numbered
 23 92-212 that reads as follows:

24 92-212. Uninsured employers fund. (1) There is created
 25 an uninsured employers fund. The purpose of the fund is to

1 pay to an injured employee of an uninsured employer the same
 2 benefits the employee would have received if the employer
 3 had been properly enrolled under compensation plan No. 1, 2,
 4 or 3. For the purposes of this section, the words "uninsured
 5 employer" mean an employer who has not properly complied
 6 with the provisions of 92.202.1. The division shall
 7 administer the fund and shall pay all proper benefits to
 8 injured employees of uninsured employers.

9 (2) The fund shall be funded in the following manner:

10 (a) The division shall require that the uninsured
 11 employer pay to the fund a penalty of either double the
 12 premium amount the employer would have paid on the payroll
 13 of the employer's workers in this state if the employer had
 14 been enrolled with compensation plan No. 3 or \$500,
 15 whichever is greater. In determining the premium amount for
 16 the calculation of the penalty under this subsection, the
 17 division shall make an assessment on how much premium would
 18 have been paid on the employer's past 3-year payroll for
 19 periods within the 3 years when the employer was uninsured.
 20 An assessment prior to July 1, 1977, may not be made.

21 (b) The fund shall receive from an uninsured employer
 22 an amount equal to all benefits paid or to be paid FROM THE
 23 FUND to an injured employee of the uninsured employer.

24 (c) In no event may an uninsured employer's combined
 25 liability under subsections (2)(a) and (2)(b) of this

1 section exceed \$30,000.

2 (d) The division may, at the beginning of each fiscal
 3 year, determine that the \$1,000 assessments that are charged
 4 against an insurer in each case of an industrial death under
 5 92-709.1(13)(a) shall be paid to the uninsured employers'
 6 fund rather than the subsequent injury fund.

7 ~~(e) The fund shall also be funded from the state~~
 8 ~~general fund for payment of benefits as provided for in this~~
 9 ~~section. However, any amounts collected under subsections~~
 10 ~~(2)(a), (2)(b), or (2)(d) of this section shall be expended~~
 11 ~~before any general fund appropriations are expended.~~

12 (3) If, upon demand of the division, an uninsured
 13 employer refuses to make the payments to the fund that are
 14 provided for in subsections (2)(a) and (2)(b) above, the
 15 sums may be collected by the division through suit. The
 16 division may settle through compromise with an uninsured
 17 employer the amount due the fund under this section.

18 (4) Proper surpluses and reserves shall be kept for
 19 the fund. The board of investments shall invest the moneys
 20 of the fund. The cost of administration of the fund shall be
 21 paid out of the money in the fund.

22 (5) All appropriate provisions in the Workers'
 23 Compensation Act apply to the fund in the same manner as
 24 they apply to compensation plans No. 1, 2, and 3.

25 (6) When the division discovers an uninsured employer

1 it shall order him to cease operations until he has elected
2 to be bound by a compensation plan. An employer who does
3 not comply with the division's order to cease operations is
4 guilty of a misdemeanor.

5 SECTION 5. THERE IS A NEW R.C.M. SECTION NUMBERED
6 92-213 THAT READS AS FOLLOWS:

7 92-213. Election of uninsured employee to take under
8 the fund or bring action against employer -- limitation on
9 benefit entitlement under the fund. (1) An employee who
10 suffers an injury arising out of and in the course of
11 employment while working for an uninsured employer as
12 defined in 92-212(1), or an employee's beneficiaries in
13 injuries resulting in death, may elect to either receive
14 benefits from the uninsured employers fund or pursue a
15 damage action against the employer. However, once an
16 election has been made to either take from the fund or
17 pursue a damage action, the election is final and binding on
18 the employee or the employee's beneficiaries, heirs, and
19 personal representatives. An injured employee or the
20 employee's beneficiaries may not receive both benefits from
21 the fund and pursue a damage action. If an injured employee
22 or the employee's beneficiaries elect to bring an action to
23 recover damages for personal injuries sustained or for death
24 resulting from personal injuries so sustained, it is not a
25 defense for the employer that the:

1 (a) employee was negligent unless such negligence was
2 willful;

3 (b) injury was caused by the negligence of a fellow
4 employee; or

5 (c) employee had assumed the risks inherent in,
6 incident to, or arising out of his employment or arising
7 from the failure of the employer to provide and maintain a
8 reasonably safe place to work or reasonably safe tools or
9 appliances.

10 (2) Notwithstanding the provisions of 92-212 and
11 92-614, injured employees or an employee's beneficiaries who
12 elect to receive benefits from the uninsured employers fund
13 are not granted an entitlement by this state for full
14 workers' compensation benefits from the fund. Benefits from
15 the fund shall be paid in accordance with the sums in the
16 fund. If the division determines at any time that the sums
17 in the fund are not adequate to fully pay all claims, the
18 division may make appropriate proportionate reductions in
19 benefits to all claimants. The reductions to not entitle
20 claimants to retroactive reimbursements in the future.

21 Section 6. There is a new R.C.M. section NUMBERED
22 92-214 that reads as follows:

23 Effective date of uninsured employers' fund. Except as
24 provided in this section, 92-212 is effective on July 1,
25 1977. Payouts for benefits may not be made from the

1 uninsured employers' fund until the fund attains a level of
 2 \$150,000 or January 1, 1979, whichever occurs first.
 3 However, until payouts for benefits from the uninsured
 4 employers' fund begin, an uninsured employer, as defined in
 5 92-212(1), is subject to suit by an employee who suffers an
 6 injury arising out of and in the course of employment. In
 7 any such action to recover damages for personal injuries
 8 sustained or for death resulting from personal injuries so
 9 sustained, it is not a defense that the:

10 (1) employee was negligent unless such negligence was
 11 ~~witful~~ WILLEFUL;

12 (2) injury was caused by the negligence of a fellow
 13 employee; or

14 (3) employee had assumed the risks inherent in,
 15 incident to, or arising out of his employment or arising
 16 from the failure of the employer to provide and maintain a
 17 reasonably safe place to work or reasonable safe tools or
 18 appliances.

19 Section 7. Section 92-435, R.C.M. 1947, is amended to
 20 read as follows:

21 "92-435. Insurer defined. "Insurer" means any
 22 ~~insurance--company--authorized--to--transact--business--in--this~~
 23 ~~state--insuring--any--employer--under--this--act--and--includes~~
 24 ~~industrial--insurance--account--created--by--this--act--known--as~~
 25 ~~the--"state--fund"--an employer bound by compensation plan No.~~

1 1. an insurance company transacting business under
 2 compensation plan No. 2, the industrial insurance account
 3 under compensation plan No. 3, or the uninsured employers'
 4 fund provided for in 92-212."

5 Section 8. Section 92-614, R.C.M. 1947, is amended to
 6 read as follows:

7 "92-614. Who liable for injuries under the different
 8 ~~plans of~~ act and in what amounts, ~~==~~ extraterritorial
 9 application and reciprocity. (1) ~~Every employer who shall~~
 10 ~~become bound by and subject to the provisions of~~
 11 ~~compensation plan number one (1) and every employer and~~
 12 ~~insurer who shall become bound by and subject to the~~
 13 ~~provisions of compensation plan number two (2), and the~~
 14 ~~industrial accident fund where the employer of the injured~~
 15 ~~employee has become bound by and subject to the provisions~~
 16 ~~of compensation plan No. 3, shall be insurer is~~ liable for
 17 the payment of compensation in the manner and to the extent
 18 hereinafter provided to an employee of an employer if
 19 insures who has ~~elects to come under this act, and who~~
 20 ~~shall receive~~ receives an injury arising out of and in the
 21 course of his employment, or, in the case of his death from
 22 such injury, to his beneficiaries, if any.

23 (2) If a worker employed in this state who is subject
 24 to the provisions of this act temporarily leaves the state
 25 incidental to that employment and receives an injury arising

1 out of and in the course of such employment, the provisions
2 of this act shall apply to such worker as though he were
3 injured within this state.

4 (3) If a worker from another state and his employer
5 from another state are temporarily engaged in work within
6 this state, this act shall not apply to them:

7 (a) if the employer and employee are bound by the
8 provisions of the Workers' Compensation Law or similar law
9 of such other state which applies to them while they are in
10 the state of Montana, and

11 (b) if the Workers' Compensation Act of this state is
12 recognized and given effect as the exclusive remedy for
13 workers employed in this state who are injured while
14 temporarily employed in such other state.

15 (4) A certificate from an authorized officer of the
16 workers' compensation department or similar agency of
17 another state certifying that an employer of such other
18 state is bound by the Workers' Compensation Act of the state
19 and that its act will be applied to employees of the
20 employer while in the state of Montana shall be prima facie
21 evidence of the application of the Workers' Compensation Law
22 of the certifying state.

23 (5) The division may, with the approval of the
24 governor, enter into agreements with workers' compensation
25 agencies of other states for the purpose of promulgating

1 regulations not inconsistent with the provisions of this act
2 to carry out the extraterritorial application of the
3 workers' compensation laws of the agreeing states."

4 Section 9. Repealer. Sections 92-201, 92-203, 92-205,
5 92-207.1, 92-209, 92-210, 92-211, and 92-1102, R.C.M. 1947,
6 are repealed.

-End-