

MINUTES OF THE MEETING
LABOR AND EMPLOYMENT RELATIONS COMMITTEE
MONTANA STATE SENATE

March 19, 1987

The twentieth meeting of the Labor and Employment Relations Committee was called to order by Chairman Lynch on March 19, 1987, at 1:00 p.m. in Room 413/415 of the Capitol.

ROLL CALL: All members were present.

FURTHER CONSIDERATION OF HOUSE BILL NO. 166 AND HOUSE BILL NO. 170: Senator Gage stated the amendments added do about the same thing to both bills. One problem with these bills is title insurance companies are going to have problems in regard to liens that have been filed but were still valid. Also, this would have a reflection on the financial institutions who may be selling contracts outside the state. The language states if a third party receives an affidavit from the seller of the property that the taxes have been paid, then the department cannot go back against the third party for payment of the lien.

Ms. Peg Hartman, Department of Labor and Industry, stated the department has reviewed the amendments and they have no problems with them.

Mr. Bob Phillips stated the title insurance companies and financial institutions have no problem with the amendments.

DISPOSITION OF HOUSE BILL NO. 166: Senator Keating made a motion the amendments be adopted. The motion carried unanimously. Senator Keating made a motion that House Bill 166 AND AS AMENDED, BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

DISPOSITION OF HOUSE BILL NO. 170: Senator Keating made a motion the amendments be adopted. The motion carried unanimously. Senator Keating made a motion that House Bill 170 AND AS AMENDED, BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

CONSIDERATION OF HOUSE BILL NO. 810: Rep. Dan Harrington, House District 68, sponsor of the bill, stated this bill takes labor jurisdiction from the Nation Labor Relations Board (NLRB) and places it with the Board of Personnel Appeals. Three cities with Head Start Centers who have negotiating

LABOR AND EMPLOYMENT RELATIONS

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rights will be effected. They are Great Falls, Butte and Missoula. The reason for this bill is because most NLRB work is done on interstate commerce, and if a Head Start Center has a problem that requires negotiation, it takes more time to get someone from out of state than if they were under the State Board of Personnel Appeals.

Rep. Harrington reserved the right to close.

PROPOSERS: Ms. Terry Minow, representing the Montana Federation of Teachers, said they support this bill. They represent Head Start employees in Butte, Great Falls, and Missoula, and they currently have the right to collective bargaining. This bill will put these employees under the jurisdiction of the Board of Personnel Appeals. If these employees have a problem, they must get in touch with someone from the NLRB to come to Montana to deal with the problem. This bill would help move things along more quickly.

OPPOSERS: None were present.

QUESTIONS (OR DISCUSSION) OF THE COMMITTEE: There were no questions.

Rep. Harrington closed by stating this bill would move things along more quickly and he feels it is important this bill passes.

DISPOSITION OF HOUSE BILL NO. 810: Senator Manning made a motion that House Bill 810 BE CONCURRED IN. The motion CARRIED UNANIMOUSLY.

CONSIDERATION OF HOUSE BILL NO. 381: Rep. Edward Grady, House District 47, sponsor of the bill, stated that House Bill 381 concerns cosmetologists who rent or lease space or equipment, but are not considered self-employed under state law. This bill will exempt them from coverage under unemployment insurance law and Workers' Compensation Act. Also, it amends Section 39-51-204, MCA and Section 39-71-401, MCA. This bill is intended to allow licensed cosmetologists who rent the space from a licensed salon, where they have the freedom to be self-employed and to build personal clientele within the hours and days suitable for them and their clients.

PROPOSERS: Mr. Gary Burton, representing himself, gave testimony in support of this bill. A copy of his testimony is attached as Exhibit 1.

LABOR AND EMPLOYMENT RELATIONS

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Ms. Gayle Graber, representing herself, stated this bill would allow the cosmetologist the freedom to set their own hours and days, to learn the facets of the business, to promote themselves, and to increase their personal income by 20%. It would motivate cosmetologists to assume the responsibilities in management, self-image, education, private knowledge, and application.

Mr. Rick Tucker, representing Gary Burton, gave testimony in support of this bill. His testimony is attached as Exhibit 2.

OPPONENTS: Ms. Bev Ball, representing Ball Hair Designs, gave testimony in opposition to this bill. Her testimony is attached as Exhibit 3.

Senator Darryl Meyer, Senate District 17, stated he is opposed to this bill. He stated the establishments that are currently in business are licensed to operate, they have their license and they do not rent out space. When a cosmetologist rents space, she should have to pay unemployment and insurance.

Mr. Scott Stelchy, representing Scott's Hair Affair, from Great Falls, gave testimony in opposition to this bill. A copy of his testimony is attached as Exhibit 4.

Ms. Julie DeVries, representing Dahl's College of Beauty, gave testimony in opposition to this bill. A copy of her testimony is attached as Exhibit 5.

Ms. Peg Hartman, representing the Department of Labor and Industry, gave testimony as neither a proponent or an opponent. A copy of her testimony is attached as Exhibit 6.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 381: Senator Manning asked Mr. Hiram Shaw, Workers' Compensation Division, if these individuals lease space in a shop, are they exempt from Workers' Compensation taxes. Mr. Shaw stated they can apply to the Division for an exemption, and this is based on approval from their contract. Senator Manning asked Mr. Shaw who decides if they are exempt. Mr. Shaw stated the Division makes the decision. Senator Keating asked Mr. Shaw if many exemptions have been granted. Mr. Shaw replied 2/3 of the applications for exemption are granted an exemption. He could not remember receiving many requests from cosmetologists. Senator Keating asked if cosmetologists ever receive an exemption. Mr. Shaw stated no, not to his knowledge.

LABOR AND EMPLOYMENT RELATIONS

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Senator Gage asked what period of time the cosmetologist's license covers. Ms. Ball replied one year, starting December 31. Senator Gage asked Ms. Ball if a salon could have both a booth rental system and employees if this bill passed. Ms. Ball replied yes, it is possible. Senator Gage asked Ms. Ball if each person in the booth rental situation would be required to be licensed. Ms. Ball stated under current law, they operate under that single salon license.

Mr. Rick Tucker stated to obtain a cosmetology shop license, that person is not required to be a cosmetologist; however, licensed cosmetologists must work in a licensed shop.

Senator Lynch asked Mr. Tucker if there are booth rentals currently in use. Mr. Tucker replied yes. Senator Lynch asked Mr. Tucker to explain how they work. Mr. Tucker stated they are working with the liability of paying Workers' Compensation taxes and unemployment taxes. Senator Lynch asked Mr. Tucker if this bill passes and a booth renter hurts themselves on the job and is incapacitated, would the state have them under Workers' Compensation because they are not paying into the fund. Mr. Tucker stated they would not be covered because they elect not to pay it.

Senator Keating asked Mr. Tucker the cost of a shop license. Mr. Tucker replied the shop license is \$35 per year, and an individual cosmetologist license costs \$25.

Senator Lynch asked Ms. Hartman if this bill passes, would there be a drastic effect on the funds. Ms. Hartman replied no. Senator Keating asked Mr. Tucker if a person wanted to open a shop and be an independent shop owner, would she buy a shop license and a cosmetologist license. Mr. Tucker replied yes.

Senator Keating asked Mr. Burton if this law passed, if his employees would all want to lease their chairs. Mr. Burton replied no, not all of them could afford to lease their chairs, and some people do not like the responsibility of being self-employed.

Senator Gage asked Ms. Hartman if the Department of Labor would change their criteria for determining if people are self-proprietors or employees if this bill passes. Ms. Hartman stated they will abide by how the law reads; however, should this be tested in court, it could be changed.

Senator Thayer asked Ms. Hartman how they would determine if someone is an independent contractor. Ms. Hartman stated

LABOR AND EMPLOYMENT RELATIONS

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it is somewhat difficult because the law indicates if there is even a slight degree of control, an employee/employer relationship is indicated.

Senator Thayer said this bill also includes barbers, but there are none present at this hearing. Mr. Tucker stated the barbers were placed in this bill by the House Subcommittee.

Senator Keating asked Mr. Stelchy to explain a salon owner on a commission basis. Mr. Stelchy stated he pays through a progressive scale; the more work the cosmetologist turns out, the better they will be paid. They receive somewhere between 60-65% of the profit for the individual customer and he pays their social security, unemployment and Workers' Compensation. His employees have input as to how the salon is run.

Senator Blaylock asked Mr. Burton if, in a leased shop, an individual was doing a poor job, would you break the lease contract and fire that person. Mr. Burton replied he would have no choice but to keep them on if they signed a lease, however, it has been his experience the person who does a poor job generally leaves on their own accord. He has never had to cancel anyone's contract for that reason.

Senator Thayer asked Ms. Ball what her reaction was regarding Ms. DeVries' testimony that new cosmetologists would have no place to obtain a job. Ms. Ball replied most industries are having economic troubles, including the cosmetologist industry. Many salons have gone to the booth leasing because it guarantees an income for the salon.

Senator Keating stated he did not think this bill would affect Ms. Ball's shop. Ms. Ball stated it does affect her shop because they are all licensed under the same department regulations as she is. This bill exempts only booth renters or salon owners. Ms. Ball stated she would be exempt, but her 7 employees would not be.

Mr. Otto Witt, stated he is an owner of a salon and beauty school, and he is not a cosmetologist. Mr. Witt stated there have been some unstable comments made today, and there are some unsure legalities involved with this bill as it is written.

Rep. Grady closed by stating this bill was put into a subcommittee in the House and the amendments were agreed on there. This bill allows cosmetologists to build up a clientele and allow them to get started in a business of their own. Rep. Grady urged support of the committee.

CONSIDERATION OF HOUSE BILL NO. 727: Rep. Cal Winslow, House District 89, sponsor of the bill, stated this bill would exempt resident managers of lodging establishments from minimum wage and overtime laws. This would effect small motel managers generally managed by married couples who live on the premises. It is economically unfeasible for small motels to survive under current law. Rep. Winslow feels there is potential lawsuits for the small motels because last year a motel had to pay \$19,000 to a former manager who took her case to the Labor Standards Division.

PROPOSERS: Mr. Phil Strobe, representing the Montana Innkeepers Association, urged support of the bill.

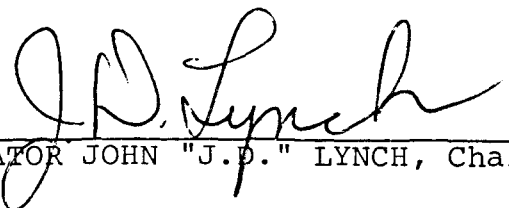
OPPOSERS: There were no opponents present.

QUESTIONS (OR DISCUSSION) ON HOUSE BILL NO. 727: Senator Manning asked Ms. Hartman if there have been many cases of live-in managers applying for overtime compensation. Ms. Hartman stated this has not been a large problem.

Rep. Winslow closed by stating this has not been a large problem, but there is potentially a large liability present if someone chooses to take it to court.

DISPOSITION OF HOUSE BILL NO. 727: Senator Galt made a motion that House Bill 727 BE CONCURRED IN. House Bill 727 was HELD IN COMMITTEE DUE TO A 4-4 TIE VOTE. (See attached roll call vote sheet.)

ADJOURNMENT: There being no further business to come before this committee, the hearing adjourned at 2:20 p.m.


SENATOR JOHN "J.D." LYNCH, Chairman

ROLL CALLLABOR AND EMPLOYMENT RELATIONS COMMITTEE

50th LEGISLATIVE SESSION -- 1987

Date March 19, 1987

NAME	PRESENT	ABSENT	EXCUSED
John "J.D." Lynch Chairman	X		
Gene Thayer Vice Chairman	X		
Richard Manning	X		
Thomas Keating	X		
Chet Blaylock	X		
Delwyn Gage	X		
Jack Haffey	X		
Jack Galt	X		

Each day attach to minutes.

DATE March 19, 1987

COMMITTEE ON Labels

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppose
Rob "Rob" Tucker	Gary Burton	HB-381	X	
Ben Bell		HB381		X
Teri Yates		HB381	X	
Alto Witt		HB381		X
Larry Burton		HB381	X	
Scott Steckly				X
Julie DeBenedis				X
Hiram Shaw	WORKERS' COMP.	HB381		X
Sandy Kuffman		HB-381	X	
Connie Henderson			X	
Gayle Graber			X	
Brenda B. Belforte		HB-381		
Margie Schweyer		HB381		
Linda Haney		HB381		

(Please leave prepared statement with Secretary)

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date march 19, 1987 Bill No. HB 170 Time 1:06 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman	X	
Gene Thayer, Vice Chairman	X	
Richard Manning	X	
Thomas Keating	X	
Chet Blaylock	X	
Delwyn Gage	X	
Jack Haffey	X	
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Be Concurred In, And As Amended

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date March 19, 1987 Bill No. H.B. 166 Time 1:06 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman	X	
Gene Thayer, Vice Chairman	X	
Richard Manning	X	
Thomas Keating	X	
Chet Blaylock	X	
Delwyn Gage	X	
Jack Haffey	X	
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Be Concurred In, And As Amended

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date March 19, 1987 Bill No. #B 727 Time 2:20 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman		X
Gene Thayer, Vice Chairman	X	
Richard Manning		X
Thomas Keating	X	
Chet Blaylock		X
Delwyn Gage	X	
Jack Haffey		X
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Be Concurred In 4/4 tie

ROLL CALL VOTE

SENATE COMMITTEE LABOR AND EMPLOYMENT RELATIONS

Date March 19, 1987 Bill No. #B810 Time 1:10 p.m.

NAME	YES	NO
John "J.D." Lynch, Chairman	X	
Gene Thayer, Vice Chairman	X	
Richard Manning	X	
Thomas Keating	X	
Chet Blaylock	X	
Delwyn Gage	X	
Jack Haffey	X	
Jack Galt	X	

Julie Rademacher
Secretary

John "J.D." Lynch
Chairman

Motion: Be Concurred In
(Walker)

STANDING COMMITTEE REPORT

March 19, 1987

37

19.....

MR. PRESIDENT

LABOR AND EMPLOYMENT RELATIONS

We, your committee on.....

HOUSE BILL

810

having had under consideration..... No.....

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color

PROVIDE HEAD START EMPLOYEES RIGHT TO BARGAIN COLLECTIVELY

HARRINGTON (WALKER)

HOUSE BILL

810

Respectfully report as follows: That..... No.....

BE CONCURRED IN

~~DO PASS~~

~~DO NOT PASS~~

Sen. John "J.D." Lynch

Chairman.

STANDING COMMITTEE REPORT

March 19

19 87

MR. PRESIDENT

We, your committee on..... **LABOR AND EMPLOYMENT RELATIONS**

having had under consideration..... **HOUSE BILL** No. **166**

Third reading copy (blue)
color

**JUDGMENT FOR UNPAID UNEMPLOYMENT INSURANCE NOT ARISE WHEN
CONTRIBUTIONS DUE**

JONES (GAGE)

Respectfully report as follows: That..... **HOUSE BILL** No. **166**

be amended as follows:

1. Title, lines 4 through 7.

Strike: "DELETE" on line 4 through "DUE" on line 7

Insert: "PROVIDE THAT THE LIEN ON REAL OR PERSONAL PROPERTY
CREATED BY THE ENTRANCE OF THE CERTIFICATE IS NOT VALID
AGAINST ANY THIRD PARTY WHO RECEIVED AN AFFIDAVIT FROM THE
MOST RECENT GRANTOR CONFIRMING THAT ALL CONTRIBUTIONS,
ASSESSMENTS, PENALTIES, AND INTEREST DUE HAVE BEEN PAID"

2. Page 1, line 15.

Following: "execution."

Insert: "(1)"

3. Page 1, line 17.

Following: "due"

Insert: ", arising at the time the contributions are due"

4. Page 2, following line 1.

Insert: "(2) The lien provided for in subsection (1) is not
valid against any third party owning an interest in real or
personal property against which the judgment is enforced if:

(a) the third party's interest is recorded prior to the
entrance of the certificate as a judgment; and

(b) the third party receives from the most recent grantor
of the interest a signed affidavit stating that all
contributions, assessments, penalties, and interest due from
the grantor have been paid.

~~XXXXXXX~~

~~XXXXXXXXXX~~

CONTINUED

Chairman.

March 19..... 19.87

(3) A grantor who signs and delivers an affidavit is subject to the penalties imposed by 39-51-3204 if any part of it is untrue. Notwithstanding the provisions of 39-51-3204, the department may proceed against the employer under this section or 39-51-1303, or both, to collect the delinquent contributions, assessments, penalties, and interest."

AND AS AMENDED,
BE CONCURRED IN

JOHN "J.D." LYNCH, Chairman

STANDING COMMITTEE REPORT

March 19, 1987

MR. PRESIDENT

We, your committee on **LABOR AND EMPLOYMENT RELATIONS**

having had under consideration **HOUSE BILL** No. **170**

third reading copy (**blue** color)

DELETE PROVISION SETTING LIEN PRIORITY OF WITHOLDING TAXES

JONES (GAGE)

Respectfully report as follows: That **HOUSE BILL** No. **170**
be amended as follows:

1. Title, lines 4 through 6.

Following: "AN ACT TO" on line 4

Strike: remainder of line 4 through "TAXES" on line 6

Insert: "PROVIDE THAT THE LIEN ON REAL OR PERSONAL PROPERTY
CREATED BY A WARRANT FOR DISTRRAINT IS NOT VALID AGAINST A
THIRD PARTY WHO RECEIVED AN AFFIDAVIT FROM THE MOST RECENT
GRANTOR CONFIRMING THAT ALL TAXES, ASSESSMENTS, PENALTIES,
AND INTEREST DUE HAVE BEEN PAID"

2. Page 1, line 22.

Following: "distrainr"

Insert: "The priority date of the tax lien created by filing
the warrant of distrainr is the date the tax was due as indicated
on the warrant for distrainr.

(3) The tax lien provided for in subsection (2) is not valid
against any third party owning an interest in the real or
personal property whose interest is recorded prior to the
filing of the warrant for distrainr if the third party receives
from the most recent grantor of the interest an affidavit
stating that all taxes, assessments, penalties, and interest due
from the grantor have been paid.

(4) A grantor who signs and delivers to the third party an
affidavit as provided in subsection (3) is subject to the
penalties imposed by 15-30-321 (3) if any part of the affidavit
is untrue. Notwithstanding the provisions of 15-30-321 (3), the
department may bring an action as provided for in that subsection
in the name of the state to recover the civil penalty and any
delinquent taxes."

DO PASS

(CONTINUED)

DO NOT PASS

Chairman.

.....March 19,..... 19~~86~~⁸⁷.....

3. Page 2, line 4.
Following: "due"
Strike: "after December 31, 1986"
Insert: "on and after the effective date of this act"

AND AS AMENDED,
BE CONCURRED IN

.....Sen. John "J.D." Lynch Chairman.....

H.B. 381

MISTER CHAIRMEN & MEMBERS OF THE COMMITTEE:

FOR THE RECORD, MY NAME IS GARY BURTON. I AM A COSMETOLOGY SALON OWNER AND LICENSED COSMETOLOGIST.

POINTS FOR THIS BILL:

- 1.) IT ALLOWS A NEW LICENSEE THE OPPORTUNITY TO CONTINUE MANAGEMENT TRAINING THEY RECEIVED IN SCHOOL.
- 2.) IT ALLOWS THE LICENSED COSMETOLOGIST TO BE SELF-EMPLOYED WITHOUT THE CAPITAL FOR A SALON.
- 3.) IT ALLOWS COSMETOLOGISTS TO BUILD A PERSONAL CLIFENTELE.
- 4.) IT ALLOWS A SALON OWNER TO RENT SPACE AND EQUIPMENT TO A LICENSED COSMETOLOGIST WITHOUT BEING PENALIZED BY WORKERS' COMPENSATION AND UNEMPLOYMENT INSURANCE.
- 5.) THE COSMETOLOGIST WILL BE ABLE TO CHOOSE THE PRODUCTS AND TECHNIQS THEY FEEL ARE BEST FOR THEIR PERSONAL CLIFENTELE.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 1
DATE 3/19/87
BILL NO. HB 381

HB-381

FIRST OF ALL, I WOULD LIKE TO POINT OUT THAT THE PERSONS (LICENSEES) WHO WOULD FALL WITHIN THIS LEGISLATION ARE NOT CONTRACTING FOR SERVICES. THEY ARE LEASING SPACE UNDER A LEASE AGREEMENT - SPACE IN WHICH TO PERFORM THEIR OWN SERVICES. THEY ARE NOT LEASING OR CONTRACTING TO PERFORM ANY SERVICES ON BEHALF OF THE PERSON OR PERSONS WHO OWN OR LEASE THE PREMISES AND WHO'S NAME APPEARS ON THE LICENSE FOR THE COSMETOLOGIST SHOP.

IN ADDITION, THEY MAY, OR MAY NOT, BE RENTING OR LEASING FURNITURE, FIXTURES AND ^{other} EQUIPMENT, BUT IF SO, THIS COULD ^{also} BE ACCOMPLISHED, ~~ALSO~~, THROUGH A THIRD PARTY ~~PERSON~~, I.E., BANK, RENTAL AGENCY OR ANY ONE WHO MAY OWN SUCH EQUIPMENT OR FURNITURE AND OFFER IT FOR SALE OR LEASE.

THIS BILL, AS AMENDED, DOES NOT REALLY EXEMPT COSMETOLOGISTS OR SHOP OWNERS FROM WORKMANS COMPENSATION OR UNEMPLOYMENT LIABILITY AS IT WOULD IF THE COSMETOLOGICAL PROFESSION WAS TREATED LIKE DOCTORS, LAWYERS, REAL ESTATE, INSURANCE AND SECURITIES SALESMEN. (SEE SECTION 39-51-204(1)(h)).

HOWEVER, GETTING AWAY FROM THE STIGMA OF INDEPENDENT CONTRACTOR STATUS THAT ARISES THROUGH WORKING UNDER ONE SHOP LICENSE, IS WHAT THIS BILL SHOULD DO FOR NOW. THE STATE COSMETOLOGISTst ASSOCIATION, THE STATE BOARD OF COSMETOLOGY, THROUGH THE DEPARTMENT OF COMMERCE NEED TO DEVELOPE A SEPARATE BOOTH LICENSE. IT IS MY UNDERSTANDING THIS WILL BE DONE IF THIS BILL PASSES IN ITS PRESENT FORM.

SENATE LABOR & EMPLOYMENT
EXH. 2
DATE 3/9/87
BILL NO. HB 381

PAGE 2-

I CANNOT STRESS TOO MUCH THAT THIS BILL IS INTENDED TO ALLOW INDIVIDUAL COSMETOLOGISTS TO BECOME SELF-EMPLOYED, DEVELOPE THEIR OWN BUSINESS HABITS, FURTHER THEIR OWN CREATIVITY, DEVELOPE AND RETAIN THEIR OWN CLIENTELE WITHOUT THE INITIAL EXPENSE OF BUYING OR LEASING A SEPARATE SHOP AND WITHOUT THE EXPENSE OR CAPITAL OUT-LAY NEEDED FOR FURNITURE, FIXTURES AND OTHER EQUIPMENT.

THIS BILL WILL ALLOW GRADUATING COSMETOLOGISTS OR THOSE PRESENTLY EMPLOYED TO AVAIL THEMSELVES TO AN OPPORTUNITY OF STARTING THEIR OWN BUSINESS WITHOUT PENALIZING A SHOP OWNER WHO WOULD LEASE SPACE TO THESE INDIVIDUALS BY BURDENING THEM WITH PAYMENT OF WORKMAN'S COMPENSATION OR UNEMPLOYMENT TAXES.

IN CLOSING, I WOULD FURTHER ADD THAT DOROTHY TURNER, SECRETARY FOR THE STATE COSMETOLOGISTS ASSOCIATION, COMMUNICATED TO ME THAT SHE HAS POLLED THE STATE ASSOCIATION MEMBERSHIP AND OF THOSE REPLYING, ONLY 31 WERE OPPOSED TO THIS LAGISLATION, WHILE 215 REPLIES WERE IN SUPPORT OF THIS BILL, A 7 TO 1 RATION IN SUPPORT.

SENATE LABOR & EMPLOYMENT
EXHIBIT 2
DATE 3/19/97
BILL NO. HB 381

(This sheet to be used by those testifying on a bill.)

NAME: GAYLE S. GRABER DATE: 3-19-87

ADDRESS: Box 904 MCK

PHONE: 443-6484

REPRESENTING WHOM? ~~SEEA~~ HB-381

APPEARING ON WHICH PROPOSAL: _____

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? _____

COMMENT: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

(This sheet to be used by those testifying on a bill.)

NAME: GARY BURTON DATE: MAR 19 1981

ADDRESS: 38 So Main Helena

PHONE: 449-7900

REPRESENTING WHOM? _____

APPEARING ON WHICH PROPOSAL: HB 381

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENT: We need this Bill to
allow Hair Stylist's to work on
their customers as they as they feel
is Best.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: R.G. "Red" Tucker DATE: 3/19/87

ADDRESS: 1111 North Rodney #1 Salem, MA 01960

PHONE: 442-1177 - 442-6302

REPRESENTING WHOM? Gary Burdon

APPEARING ON WHICH PROPOSAL: AB-381

DO YOU: SUPPORT? X AMEND? _____ OPPOSE? _____

COMMENTS: attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: BEVERLY BALL DATE: 3/19/87
ADDRESS: 819 47th St So, G FALLS MT
PHONE: WORK 454-3453 / HOME 761-3525
REPRESENTING WHOM? BALL HAIR DESIGNS / COSMETOLOGIST
APPEARING ON WHICH PROPOSAL: HB 381 (OPP)
DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: _____

all attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE LABOR & EMPLOYMENT

EMPH NO 3

DATE 3/19/87

BILL NO. HB 381

March 6, 1987

Senator John Lynch
Capitol Station
Capitol Bldg.
Helena, Montana 59602

Bev's Copy

Dear Senator Lynch,

As Chairman (A Member) of the Labor and Employment Relations Committee, you will be hearing arguments on HB 381, March 19, 1987 at 1:00 P.M. Your time is greatly appreciated in reviewing my opposition to this Bill.

As the owner of a professional full-service Salon, currently in its 15th year of operation, I have several concerns and reasons for said opposition. This Bill, if passed, would allow a Booth renter the exemption from Workmens Compensation and Unemployment Insurance, but as for myself, as an owner that assumes full responsibility, under current law, my business operation would be discriminated against. This is especially a concern as both establishments would be performing identical services. If HB 381 is enacted into law, I also have the following concerns for professional assumptions:

1. Consumer/Public protection
2. Unconditional satisfaction
3. Quality product control
4. Hours of operation
5. Sanitation requirements
6. Facility maintenance
7. Insurance of premises

As you can clearly see, "Independent Contracting" or the "Self Employed" status does not exist with ownership responsibility being delegated by the Dept. of Commerce or the State Board of Cosmetologists currently. I have attached for your attention, Law and Rule books, an Inspection Report, and a Salon Application, all of which indicate this Bill is in direct conflict with current Licensure Laws.

Along with Ownership should come the responsibility of protecting the Public, employee benefits, premises, reputation, and of course, personal investment. These are all qualities to be commended when taking on a position of ownership in any given field. I do not feel I should have to reassess my professional values to accommodate my immediate competition who is performing the identical services. I feel this would not only compromise, but discriminate against the competent owner.

Respectfully,

Bev Ball

Bev Ball
Ball Hair Designs
Great Falls, Montana

ATCHMT: 3

1. Inspection Report
2. Salon registration form
3. Law and Rule books

BILL NO.

3
3/10/87
HB 381

PLEASE POST
STATE OF MONTANA
DEPARTMENT OF COMMERCE
PROFESSIONAL AND OCCUPATIONAL LICENSING BUREAU

BOARD OF COSMETOLOGISTS
1987 COSMETOLOGY SALON LICENSE

OWNER BEVERLY BALL
CERTIFICATE NUMBER 374

DATED: DEC 18, 1986

THIS LICENSE MUST BE DISPLAYED IN A CONSPICUOUS
PLACE AND MUST BE RENEWED BY DECEMBER 31 OF EACH
YEAR. IT IS NOT TRANSFERABLE.

BALL HAIR DESIGN
716 CENTRAL AVENUE
GREAT FALLS, MT
59401

Beverly Ball
SIGNATURE

YOU MUST NOTIFY THIS AGENCY OF ANY CHANGES WITHIN 10 DAYS

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 3

DATE 3/26/87

BILL NO. 13 381

BOARD OF COSMETOLOGISTS

APPLICATION FOR BEAUTY SALON CERTIFICATION OF REGISTRATION

Initial Inspection Fee ~~\$50.00~~
Original License for NEW shop ~~\$35.00~~ 50
Application Fee ~~\$25.00~~

TOTAL \$110.00 -
(Accompanied by this application)

1. Residential Salon: _____ Business Area Salon: _____
2. Name of Shop: _____ Telephone: _____
3. Street Address: _____ Town: _____ Zip: _____
4. Shop Owner's Name: _____ Address: _____ License No. _____
Telephone: _____
5. Shop Manager's Name: _____ Address: _____ License No. _____
6. Number of operators to be employed: _____ Opening Date: _____

SALON REQUIREMENTS

7. Give dimensions of floor space of each room: _____ Total square: _____
(120 sq. ft. per operator is considered a minimum for adequate service to public)
8. Does one have to go through any part of your living quarters to gain entrance to the shop? _____
9. Is your establishment separated from any other place of business or living quarters and odor proof partition extending from floor to the ceiling? _____
10. Does your shop have hot and cold running water and sewage connections? _____
If no—explain on reverse side of application.
11. Are there separate toilet facilities for this shop? _____
12. Are there hand washing facilities in the toilet? _____
13. Are all electric outlets grounded? _____
14. Does your shop have mechanical ventilation? _____
15. Fill in parenthesis (below) the number of the following equipment in this shop:
- | | | |
|---------------------|-------------------------------|---|
| () Shampoo bowls | () Work stations | () Clothes racks |
| () Hair dryers | () Covered waste containers | () Towels |
| () Wet sterilizers | () Covered towel containers | () Combs (18) |
| () Dry sterilizers | () Hair brushes (6 at least) | () Cabinets or drawers for clean towel storage |
16. Draw detailed floor plan of your salon on reverse side of this application.
17. Have you read the Sanitary Rules and Regulations? _____

I hereby declare that I will operate my establishment in compliance with the rules governing the practice of cosmetology in Montana and I will see that my employees comply with all the requirements. XXXX

The undersigned hereby certifies UNDER PENALTY OF PERJURY that the statements and drawing of floorplan contained herein are true and correct, with full knowledge that all statements made in this application are subject to investigation and the salon is subject to an initial inspection. ANY FALSE, DISHONEST OR INCOMPLETE ANSWER TO ANY QUESTION ON THIS FORM MAY BE GROUNDS FOR DENIAL OR SUBSEQUENT REVOCATION OF LICENSE.

(Signature of Applicant)

DATE

(Date)

BILL NO.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3
DATE 3/9/27
BILL NO. 43381

BOARD OF COSMETOLOGISTS

1424 - 9th AVENUE
HELENA, MONTANA 59620-0407

REQUEST FOR INSPECTION

SECTION 66-813.1 INSPECTION FEES — TEMPORARY PERMIT. Upon application for a license, any cosmetological establishment, must pay an initial inspection fee of \$35. The board may authorize the department to grant to a cosmetological establishment, upon payment of the initial inspection fee, a temporary permit authorizing the cosmetological establishment to operate for a period of not to exceed 90 days or until the inspector is able to make the inspection, whichever event occurs first. This temporary permit is not renewable.

I the undersigned, do hereby make application for an Initial Inspection of my cosmetological establishment and will pay the required fee of \$50 plus \$35 shop license fee, according to Section 66-813.1. Fee must accompany application. (Application fee — \$25.)

(PAYABLE BY CERTIFIED CHECK OR MONEY ORDER ONLY.)

Requested Inspection Date _____

Residential Area _____ Business Area _____

Shop Owner _____ Shop Manager _____

Location _____ Address _____ City/Town _____ County _____

(If Rural, Give Directions) _____

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 3
(Attach Map if Necessary)

DATE 3/14/87

Signed _____ Date _____ BILL NO. 48 281

FOR OFFICE USE ONLY

Inspection Fee _____

Shop License Fee _____

License No. Issued _____

Date _____

BOARD OF COSMETOLOGISTS

AFFIDAVIT

COSMETOLOGY SALON — TEMPORARY PERMIT

_____ being first duly sworn upon oath,
(Name of Applicant)

deposes and says that he/she has complied with the requirements of Title 37, Chapter 31 of the Montana Annotated Codes, and of Title 40, Chapter 30 of the Montana Administrative Code to the best of his/her knowledge and ability, in the following particulars:

1. That the salon, for which the license is applied, complies with the requirements set out in MAC 40-3.30 (8)—S30135.
2. That the salon and equipment and facilities therein complies with the sanitary rules for beauty salons as set out in MAC 40-3.30 (10)—S30165 through MAC 40—3.30 (10)—S30315.
3. And that the applicant has submitted to the Board a complete application for salon licensure, along with a request for inspection, a floor plan, and the applicable fees.

The above named affiant further states he/she understands by acceptance of, and operation under this permit, that he/she is entitled to continue operation under the permit only until the State Board provides inspection; that if inspection is not passed, then the temporary permit shall expire when the applicant is notified by the Board or its designee of the failure; that if such inspection is passed then the permit expires upon issuance of the license.

The applicant further understands that if upon inspection, the compliance sworn to in the affidavit is in any respect not found, then this shall constitute cause for refusal to issue the license.

I have carefully read the questions on the enclosed application and have answered them completely, without reservations of any kind and I declare under PENALTY OF PERJURY that my answers and all statements made by me herein are true and correct. Should I furnish any false information on the application, I hereby agree that such act shall constitute cause for the denial, suspension or revocation of my license to operate a cosmetology salon in the State of Montana.

(Signature of Applicant)

(Date)

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 3

DATE 3/19/87

BILL NO. HB 321

SALON INSPECTION REPORT

444-4289
444-4288

BILL NO. 775



NATIONAL COSMETOLOGY ASSOCIATION

The U.S.A. Affiliate of *Confederation Internationale de la Coiffure* · The U.S.A. Section of *CIDESO International*
3510 Olive Street · St. Louis, Missouri 63103 · (314) 534-7980
Formerly *The National Hairdressers and Cosmetologists Association*

March 6, 1987

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Senator John D. "JD" Lynch
State of Montana
Capitol Station
Capitol Building
Helena, Montana 59602

Dear Senator Lynch:

Over the past few weeks, I have had time to review House Bill 381 that is before your Labor and Employment Relations Committee. In that review, it has become evident that the proponents of this bill are looking at rewarding the independent contractor or booth renter, while penalizing the wage paying salon owner. The wage paying salon owner is the lifeblood of the cosmetology industry. They are the ones that pay for salon licenses, unemployment taxes on their employees, proper and correct State and Federal income taxes, support the communities they live in with contributions, etc. While the booth renter or independent contractor has none of these requirements, except to pay State and Federal income taxes.

The employee or wage paying salon is the one that is able to give that new cosmetologist a proper start in the industry, when they have no following and could not afford to pay money up front to lease a booth, acquire supplies, advertise for clients, etc.

Now it seems that HB 381 is going to let the booth renter and/or independent contractor off the hook from paying unemployment taxes and workman's comp. If they don't pay it, who will? The booth renter or independent contractor is in business one day, and out the next, because unless they have a big following they don't make a sufficient income.

I have enclosed copies of articles that have been in our SALONAMERICA and SCHOOLSAMERICA publications on the issue of booth rental and independent contractors. I would hope that you would take the time to read them as they will surely provide some insight into this matter.

In the Article on "Booth Renting: A Dilemma for School Owners," you will note that one of the first commentators on the subject (in a negative manner) is Mrs. Darlene Battaiola of Butte, as school owner/booth renter salon owner.

I hope this information will give you an insight into the problems with booth rental.

Sincerely,


Thomas E. Berger

Executive Director

Enclosures

SENATE LABOR & EMPLOYMENT

FILE # 413 381

DATE 3

cc: Senator Gene Thayer
Legislative Committee
Richard M. Swinney

3/19/87

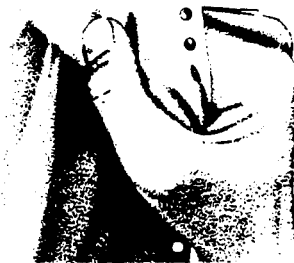
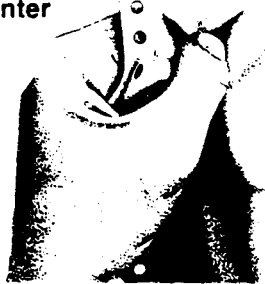
Beware of

Booth Rentals and Contract Labor

Don't create problems for yourself by renting booth space and/or paying employees as "contract" laborers. These types of arrangements often lead to questions of legitimate business operation of the salon and could take the salon owner into an audit with the Internal Revenue Service (IRS) which could prove disastrous.

When salons rent booth space and/or pay for what they define as "contract labor," the IRS can scrutinize the relationship and determine that the booth renters are actually employees of the salon. When this happens, the salon owner suddenly becomes responsible for withholding the taxes for the booth renter, now employee. This means that if the salon owner, up to this point in time, has considered the booth renter an "independent" contractor (responsible for own withholding taxes), there is trouble. The trouble begins when the IRS calls for an audit of the salon owner and so-called booth renter or so-called contract labor-hair-stylist and finds the relationship one of employer and employee.

To bring home the potential for danger in a booth renting situation, look at a Supreme Court ruling which has not been reversed in nine years. A North Dakota salon owner was assessed \$33,819.26 by the U.S. government for employment taxes, assessed interest and penalties accrued for a three-year period in which she did not view booth renters as employees. The following is taken from code section 3401, court case No. A3-76-11, 3/28/77, as reported in U.S. Tax Cases, © 1977, Commerce Clearing House, Inc.: "Prior to the tax years in question, Plaintiff (salon owner) owned and operated a beauty shop in Devils Lake, North Dakota and employed three or four persons. In 1969, she moved her business to a new location within Devils Lake. That business had facilities for operating eight booths and included a reception room and desks. Each booth contained a dressing table, sink, drawers, hamper, styling chair and a mirror. A beautician-operator was secured for each booth.



"In her beauty shop operation, Plaintiff initially interviewed each operator and orally agreed with the operator on a percentage split of the charges for services generated by each operator. The percentage varied according to the experience of the operator. A booth assigned to a beautician was for her exclusive use and she

**Supreme Court ruled
salon owner pay an
amount totalling
\$33,819.26.**

was responsible for the care of it. She would handle her own customers and furnish her own tools and equipment, which consisted essentially of razors, scissors, capes, rubber gloves, dispensary for wave set, clamps and permanent wave rods. Plaintiff had some tools available that the beauticians could purchase from her. If a beautician did purchase tools from Plaintiff, the purchase price was deducted from her percentage of the receipts.

"As part of the arrangement, Plain-

tiff also furnished certain of the chemicals used by various operators. A permanent wave solution, hair coloring and a "general clean shampoo" were all supplied by Plaintiff. Other chemicals used by operators, but which were not furnished under the terms of the agreement, included peroxide, hair conditioners and hair spray. If a particular operator wanted a special shampoo, she had to furnish it herself. The supplies were purchased either from Plaintiff's stock or from other beauty shop suppliers.

"Appointments for each hairdresser were made through the receptionist, although each operator set her own hours and had her own key to the facility. When a customer had received services, the beautician would hand to the customer a slip or ticket with that beautician's name on it, on which the beautician had noted the customer's name, the work done and the amount to be charged the customer. The customer was then told to take the ticket to the receptionist, who would receive payment, make change if required,

and record in a book a credit for the amount received under the name of the particular beautician.

"Receipts would be credited to each operator's account, and charges would be made against such accounts for any supply or tool purchases made by the operator from Plaintiff's stock. Once a week or 'periodically,' each operator was paid her percentage of the amount of money she brought in from her customers during the pay period, less charges for supplies, tools and booth rental.

"Each operator was required to possess a minimum of 1800 hours of training, pass a state examination and be licensed. In addition, the operator had to possess sufficient skills to perform customary beauty treatments. Once the beautician-operator began work, Plaintiff did not supervise her. The operators would decide what prices to charge their customers, subject however to a minimum fee required by state law.

"Plaintiff required certain minimum notice be given her before an operator

DATE 3/1/77
BILL NO. 4A 381

could take a Saturday off or go on vacation.

"Plaintiff had no training sessions. She did not maintain malpractice insurance on the operators. Plaintiff had no right to impose customers on the operators. If a customer called and wanted service, Plaintiff would ask the operator if they wanted the customer.

"On these facts and under the applicable law and regulations, the Court concludes the beauty operators were Plaintiff's employees and Defendant (U.S. government) is entitled to recover on its (claim)."

How was the determination made that the booth renters were indeed employees of the salon? The rationale used to make the court's conclusion is found in the definition of an employee and the legal relationship of employer and employee. As documented in this same court case: "Generally, such relationship exists (employer-employee) when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but, how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other facts characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services."

Following a precedence set with prior court rulings, the burden is on the taxpayer (salon owner) to establish that the relationship of employer-employee did not exist for the time in question for payment of the withholding taxes. In applying the legal definition of an "employee" to a particular individual in a booth renting situation, a key factor under the applicable regulations is whether or not the salon owner had the right to control the actions of that person. Apparently, it is not important that a salon owner does not exercise that right. (*United States v. Silk*, 331 U.S. 704 1947).

Also considered significant in assessing whether or not an employer-

employee relationship exists is the individual's investment in the equipment of his/her trade, level of skill, opportunity to profit from own management skill and the permanence of the relationship to "employer." *Id.* at 716.

Citing further from *U.S. Tax Cases*: "Contract recitations that a worker is either an employee or independent contractor have no effect on tax liability." Based on *Silk, supra* and *Bartels v. Birmingham*, 332 U.S. 126 (1947), the Court of Appeals for the Second Circuit identified relevant factors in the determination of the issue in dispute.

(1) If the person receiving the benefit of a service has the right to control the manner in which the service is performed, the person rendering the service may be an employee.

(2) If a person rendering a service has a substantial investment in his own tools or equipment, he may be an independent contractor.

(3) If a person performing a service undertakes a substantial cost, say by employing and paying his own laborers, he may be an independent contractor.

(4) If a person performing a service has an opportunity to profit depending on his management skill, he may be an independent contractor.

(5) If a service rendered requires a special skill, the person rendering it may be an independent contractor.

(6) If the relationship between a person rendering a service and the person receiving it is permanent, it may be an employment relationship.

(7) If a person rendering a service works in the court of the recipient's business, rather than in some ancillary capacity, he may be an employee.

"The evidence, considered in the light of these criteria and the Plaintiff's burden in this case, established the beauty operators were Plaintiff's employees. The Plaintiff had the right to control which booth an operator could use, the duration of employment and the extent to which an operator could choose to not work. Plaintiff required advance notice to take time off as well as to take vacation time. Plaintiff, with certain limitations, had exclusive control over the receipts from customers

for the services rendered and paid the operators only after all deductions were made. The beauty operators' tools and supplies consisting of razors, scissors, capes, rubber gloves, dispensary for wave set, clamps and permanent wave rods, did not require substantial investment. Therefore, the beauticians did not undertake a substantial cost in performing their services. The operators had no substantial opportunity to increase their profit depending on their management skills. It is not significant that each operator could charge any price above the minimum she could get. The speed of her work was the only effective way she could increase her profit. The relationship between the operators and Plaintiff, though described as transient, was in reality more fixed. The operator did not rent a booth from Plaintiff to perform a single job, in the manner often performed by independent contractors. And clearly, the beauticians were working in the course of the Plaintiff's business, rather than in some ancillary capacity.

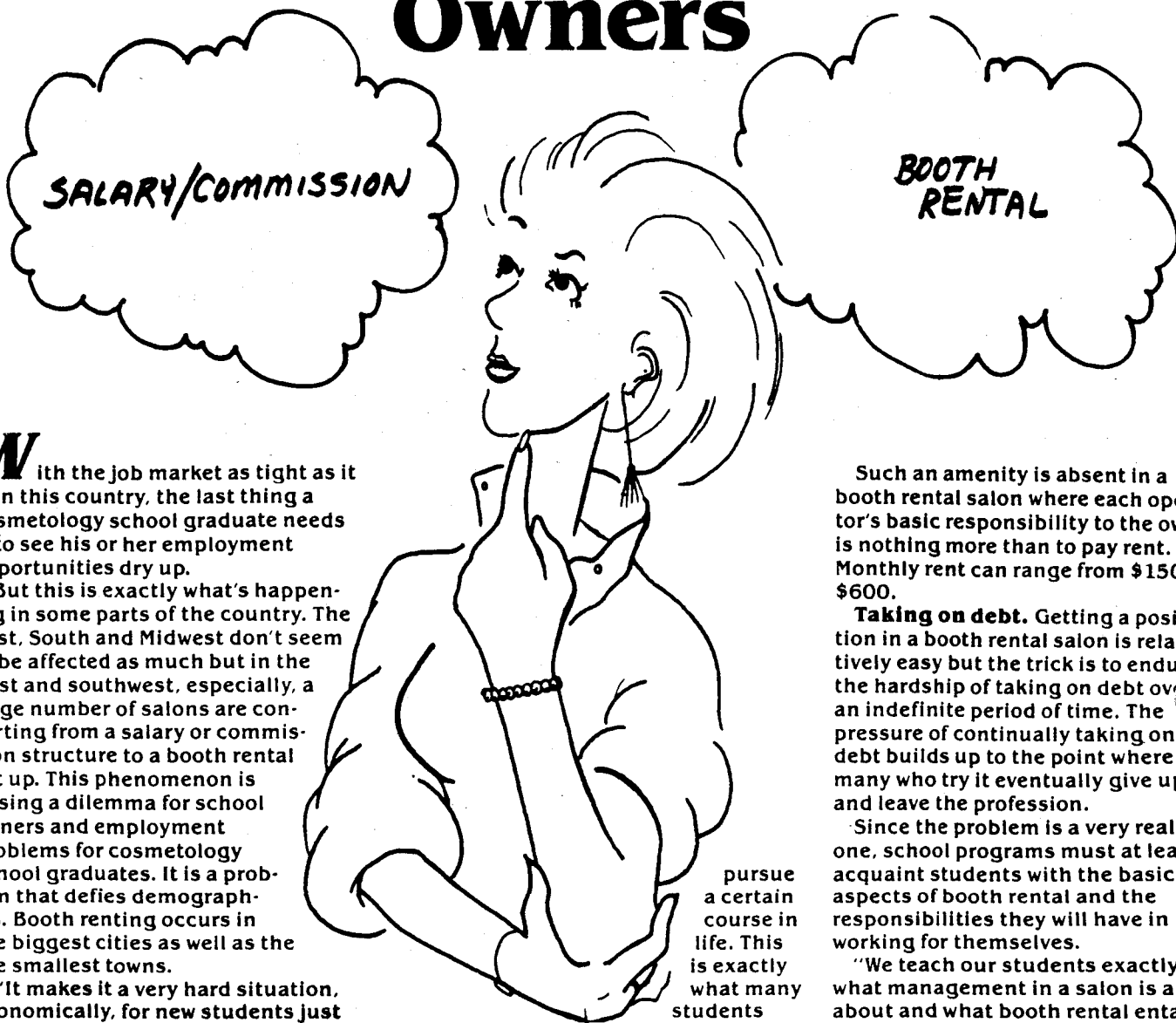
"The single criterion that may qualify the beautician-operators as independent contractors is number five; that is, that the service rendered does require a degree of skill. Each operator was required to possess minimum qualifications and a degree attesting that the recipient completed prescribed education prerequisites. However, standing alone, this quality does not convert one who is otherwise an employee into an independent contractor. No single consideration governs.

The Supreme Court ruled that the North Dakota salon owner pay the full amount for employment taxes and associated interest assessed her, as well as penalties... an amount totalling \$33,819.26. While the decision was appealed and many similar suits have gone to trial, the Court's decision stands as it was first set forth in this case of salon owner versus the United States.

Obviously, such a ruling should have all but put to rest the idea or desire of renting portions of your salon to contractors. But it has not. Why? Why is it that today, more and more salons are renting booth space than ever before? We'll examine that question further and report on some industry responses to booth renting in the next issue of *SalonAmerica*. Meanwhile, if you have any thoughts on the concept, forward them to: Editor, *SalonAmerica*

3510 Olive
St Louis, MO 63103.

Booth Renting: A Dilemma for School Owners



With the job market as tight as it is in this country, the last thing a cosmetology school graduate needs is to see his or her employment opportunities dry up.

But this is exactly what's happening in some parts of the country. The East, South and Midwest don't seem to be affected as much but in the west and southwest, especially, a large number of salons are converting from a salary or commission structure to a booth rental set up. This phenomenon is posing a dilemma for school owners and employment problems for cosmetology school graduates. It is a problem that defies demographics. Booth renting occurs in the biggest cities as well as the smallest towns.

"It makes it a very hard situation, economically, for new students just entering the work force to get out and work because they can be potentially putting out money and basically have nothing coming back to themselves after they pay for their booth rent and supplies and what other added expenses they might have. So it's very hard for them to get started in the field.

"It's kind of a 'downer' for a lot of them to have money going out and seeing nothing come in. It takes time to build up a clientele," said Darlene Battaiola, owner of Butte Academy of Hair Design in Butte, Montana.

The prospect of immediately taking on debt upon entering a profession is not a strong selling point when encouraging an individual to

pursue a certain course in life. This is exactly what many students are having to do.

School owners encourage students to try to get into a salary or commission salon setup. Considering it takes anywhere from eight months to two years for a cosmetologist to build a respectable, loyal clientele, the optimum situation for a student is a commission or salary-type salon where the owner is active in the daily affairs of the salon.

When the new student enters such a salon, while they are an employee, they have someone to go to if they have a problem. In a sense, the student/teacher relationship is still intact. Moreover, it is an environment where a recent graduate can develop a sense of confidence.

Such an amenity is absent in a booth rental salon where each operator's basic responsibility to the owner is nothing more than to pay rent. Monthly rent can range from \$150 to \$600.

Taking on debt. Getting a position in a booth rental salon is relatively easy but the trick is to endure the hardship of taking on debt over an indefinite period of time. The pressure of continually taking on debt builds up to the point where many who try it eventually give up and leave the profession.

Since the problem is a very real one, school programs must at least acquaint students with the basic aspects of booth rental and the responsibilities they will have in working for themselves.

"We teach our students exactly what management in a salon is all about and what booth rental entails and the (responsibilities) of the salon owner who is renting the booth to them. We feel they need to know this and (the students) need to make an educated decision," said Ruth Waters, co-owner of Springfield College of Beauty in Oregon.

"The (students) that are going into booth rental, we show them how to buy their supplies, how to advertise, how to work with their clientele. They really need a salon where they have a manager," said Darlene Brockett, owner of Jessie Lee's School of Hair Design in Lubbock, Texas. She added that her school encourages students to get even the most basic job in a managed salon just to get additional training with some guidance.

"We do talk (to students) a great deal about booth rental. We go over it step by step as to how much they can look at putting out per month in a booth rental situation. We go over what approximately their supplies' bill will be. We look at exactly how much work they would have to do in order to be able to handle all of (their expenses). We usually try to make up a budget for them," Watters said.

As to what's behind the flow of salons changing over from salary or commission setup to a booth rental setup, it seems a number of causes are working in harmony. Rising insurance premiums, time-consuming accounting procedures and tax liability are some of the major reasons why salon owners are converting to the booth rental setup.

Watters contends that for many years, the cosmetology student received very little business management in their training. Most were more interested in developing their artistic abilities rather than their administrative skills. "Many owners just weren't taking the time nor did they have the energy or expertise to properly manage their salons—and this is why booth rental was a viable option for those people to go to," Watters said.

However, while booth renting doesn't require as much time, the opportunity for making a good profit are limited.

A little more effort is all it takes. "A salary setup salon will have higher operating costs and considerably more management responsibility than a booth renting setup. However,

"A salary setup salon will have higher operating costs and considerably more management responsibility than a booth renting setup. However, a salary setup salon has a much higher potential for larger profits than a booth rental setup."

a salary setup salon has a much higher potential for larger profits than a booth rental setup. More risk and more work should result in a higher income for the owner," said Sam Federico, owner of Federico Beauty College Inc. Federico adds that a booth rental salon requires less work but the profitability is reduced as well.

Perhaps the most serious charge leveled against booth renting salons is that the quality of service they offer to the public tends to deteriorate over a period of time.

"You really don't have any form of professionalism in booth rental—none whatsoever. You might as well open it up to people in their homes," Brockett said.

"The philosophy behind that type of salon, I never really could quite understand. In my opinion, in that type of situation, I would consider myself a landlord rather than a proprietor of a salon. You want your

"You really don't have any form of professionalism in booth rental—none whatsoever. You might as well open it up to people (working) in their homes."

salon to project an image that would draw a clientele for the salon and not necessarily for the individual operator," said Frank Pappacoda, owner of Long Island Beauty Schools. He adds that booth rental has not been a big problem in New York state.

Whether school owners have any control over the spread of booth rental, is difficult to say. But some see a light at the end of the tunnel.

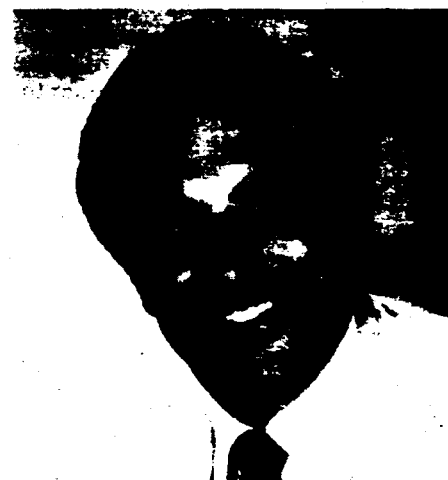
A glimmer of hope. "If anything, I see a return back to a situation where it will probably be a salary on a floating basis which is based on the amount of the employee. Even if you have a booth rental situation, it still has a direct reflection on you as a business person and in a (booth rental) situation, you basically have no control over what they're doing, what they're wearing or what their behavior is. It's very hard to administer any of those and I think a lot of people are unhappy with that situation," Watters said.

Watters also said that a number of salon owners, who are booth renters

are the going through tough times because of faulty contracts which breach the rules that establish the separation between a renter and an owner. If this separation is eliminated or modified, such a violation can lead to the owner having to pay income and social security taxes on the earnings of the employee(s) involved.



Darlene Battaiola



Frank Pappacoda

"One of the reasons booth renting salons are growing in number is due to the fact that many salon owners need help in developing the expertise required in professional salon management. Many struggling salon owners resort to booth renting because they lack the education and experience required to operate a successful business. Many salon owners have developed an attitude that it is better to make a little money renting booths than to lose the salon because of unsuccessful management practices," Federico said.

(Is booth rental a student's nightmare? If it is, then I would like to hear from you on the issue. Write Jeff Reisner, Prophet\$ Editor, NCA, 3510 Olive St., St. Louis, MO 63103 or call 314-534-7980. I will publish your comments in the next issue provided I get some.)

DATE 3/19/87

BILL NO. AB 381

Perspective on

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 3

DATE 3/9/87

BILL NO. HB 381

Booth renting... the U.S. government scrutinizes the relationship between booth renters and salon owners—assessing whether or not a salon owner really functions as an employer, thereby responsible for withholding employee taxes and matching of social security payments.

Booth renting... the professional organizations of the salon industry are starting to take a stand against the practice, i.e., the Beauty & Barber Supply Institute deems the practice a detriment to the image of the professional salon industry and resolves that the "professional salon industry brings this issue of booth rental to the attention of state legislatures, health and tax agencies."

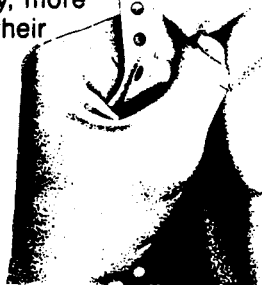
Booth renting... Why do it? In the face of such potential negative repercussions, why is it that today, more and more salon owners rent their salon space? Why? After intense examination, the answer comes as a complicated reflection of where the industry has been and what it is to become. The answer is not a simple one of right versus wrong, but yet, there may be some real direction to be found in contemplating and assessing today's trend to booth rental.

So, why do salons go into lease arrangements with their operators? Simply put, because it's an easy out from the scenario of struggling to stay in business while paying high percentages or wages in order to keep your good stylists. Blatant as it may sound, this is the crux of the trend to booth renting.

Booth renting takes the immediate burden and headache of trying to make your business profitable and alleviates a lot of the frustration by spreading the business management to your independent booth operators. At first glance, this looks wonderful. But, at what cost? Obviously, there is a cost involved, or perceived cost, or else the controversy over this issue would be almost nonexistent.

But, there IS controversy. And, because of it, SalonAmerica sponsored a panel discussion by industry experts to identify the pros and cons to booth renting and provide some answers to

Booth Rentals and Contract Labor



the "why" and "how" of this trend. Supporters, opponents and those neutral on this issue gathered to lend their insight. This special panel was comprised of: Clayton Chambers of Madison, WI, Jack Duckworth of Houston, TX, Peg Gaudian of Cedar Rapids, IA, Helen Pollard of Raleigh, NC, Leo Siroonian of Worcester, MA, John Solo of Pasadena, CA and Bobbie Yeates of Riverton, WY.

The panel's bottom-line answer to why salons go into booth renting? You've already been introduced to it... booth renting seems to be an avenue by which to make more money, with fewer management headaches. Delving further, however, the panel sees this as being only a Band-Aid approach, unless salon owners adhere to some stringent planning guidelines and management techniques. Herein lies the real problem with the booth renting concept—too often, salon owners use booth renting for the "easy out," not putting any forethought into how they are setting it up.

This creates the stereotyped scenario of today where the Internal Revenue Service (IRS) can wreck havoc for the booth renting salon owner or where the professionalism of the industry is sacrificed to operators whose only concern is keeping as much as is humanly possible from Uncle Sam.

It does no good for the industry to have a salon go under from an IRS audit which finds the salon delinquent in taxes. Likewise, it is truly a disservice to the industry for your booth renting operators to perpetuate poor management techniques which have plagued the professionalism of our industry, such as failure to report total earnings or use of sub-standard materials for premium prices. Over and over again, the experts in the industry have attested to the growing necessity for sound business management techniques. They are the key to future success. Any fraudulent practices may hardly be viewed as stepping stones to individual success or enhanced professionalism for the industry.

You say you **DON'T** fall into the "easy out" category? You want to rent booths as a business investment and intend to manage your business on-site, encouraging ethical business practices? Such intentions are in the minority, as evidenced by the overt concern that booth renting damages the industry as a whole and puts the individual salon owner in severe jeopardy from the U.S. government.

If you are serious about booth renting, however, approach it from a business perspective. Then, when you think you are ready to talk to a lawyer, call in a **CONTRACT** lawyer. One lawyer is NOT the same as another and only a contract lawyer can most appropriately safeguard your needs. Every one of the SalonAmerica panelists was adamant about this. There are too many ways in which contract loopholes can ruin your salon's reputation when a booth renter takes advantage of them. In addition, affirms the panel, make sure all rules and regulations are stated clearly in your contract. But, comes the caution, state them so that

There are too many ways in which contract loopholes can ruin your salon.

they are salon regulations and NOT regulations for the individual booth renter.

The reason for this is to keep from IRS harm...you cannot be perceived as an employer. This means you cannot control the manner in which the services of the salon booth renters are performed. Some examples:

- Don't tell your booth renter what he/she should wear, rather, establish a salon dress code that must be adhered to or the contract is nullified;
- Don't require that the independent operators attend any special school, classes or even salon meetings, rather, suggest to them that it might be beneficial if they would attend; or,
- Don't tell your booth renting operators that they must work, for instance, from "9 to 5," rather, inform them in the contract that salon hours are "9 to 5."

Such "quirks" in the contract can make the difference between a smooth running business or disaster (if the IRS views you as an employer). Some other ideas for that contract:

- Request that each booth renting operator provide you with proof that they have filed their taxes and that adequate withholdings are being made. State in the contract that each operator must provide you a copy of their filings for your records. Refusal to do so voids the contract.
- Refer to the booth renters as "leasees" in the contract, NOT "independent contractors." According to the panel, there is less scrutiny of a booth renting salon by the IRS when this terminology is used.
- Require that each booth renter carry liability insurance. Failure to provide you with proof of such coverage could also void the contract.
- Specify no retailing from the booth space by the operator. Put-

ting this in the contract prevents the individual operator from setting up a wig display, along with scarves, purses or shoes. Prevent a mess in your shop. Specify in the contract that there be no retailing within the leased space.

- Specify in the contract that there will be no subleasing. Prevent one operator from selling off interests to other individuals (for the duration of the contract with original booth renter). Prevent chaos and loss of control in your salon.
- State in the contract that the leasee's space returns to you as your legal property should death or severe illness prevent the booth renter from performing expected services. If this is NOT done, the renter's family can legally hold the agreement as a business lease and utilize it as they wish, until expiration of the contract.

One of our panelists had a 152-page contract for renting of salon space to a single operator.

Sound complicated? It is! One of our panelists had a 152-page contract for renting of salon space to a single operator. The operation of a booth renting salon is NOT an easy out for salons in trouble. Just the opposite is true, IF the operation is set up properly to protect the business and salon owner from IRS judgements and a leasee's independence. Some salon owners take the time to properly research the pros and cons of booth renting. Of those, many decide it isn't worth the headaches. Others proceed with caution and take the time and money to work up a contract which does not have damaging loopholes. Yet, too many charge ahead, changing almost overnight to a booth rental salon. It is from these salons that booth renting gets the bad name among professionals interested in furthering our industry. And, it is from these salons that the IRS fuels the search for delinquent taxes, interest and penalties.

Don't perpetuate the stereotyped problems of booth renting salons.

Is it worth all of it? Is booth renting really the answer of the future? Many in the profession say "no," yet there are those who are quite successful at managing their business as a booth rental shop. SalonAmerica's position is that salon owners NOT be subject to heavy fines levied by the IRS and that the salon of today be a respectable business establishment, furthering the professionalism of the cosmetology industry. The next question: Whether or not booth renting is right for YOUR salon? Think about it before deciding; do your homework; talk with qualified lawyers. KNOW THE BUSINESS INSIDE AND OUT BEFORE PROCEEDING! Don't perpetuate the stereotyped problems of booth renting salons. As SalonAmerica members, you should keep only the most efficient business techniques at hand. If you can do booth renting in this manner, then do it... but, do it professionally!! ■



BOARD OF COSMETOLOGISTS
DEPARTMENT OF COMMERCE



STATE OF MONTANA

1424 9TH AVENUE

(406) 444 4288/4289

HELENA, MONTANA 59620-0407

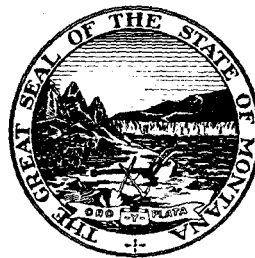
MONTANA LAW
Governing
THE PRACTICE OF
COSMETOLOGY
&
MANICURING

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 3

DATE 3/9/87
BILL NO. HB 381

AN EQUAL OPPORTUNITY EMPLOYMENT ACT

STATE OF MONTANA
RULES
Governing
THE PRACTICE OF
COSMETOLOGY
&
MANICURING



Printed June/1986

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 3

DATE 3/19/87

BILL NO. HO 381

NAME: Scott Stebbins DATE: 3-19-87

ADDRESS: R 4382 Great Falls

PHONE: 727 3522

REPRESENTING WHOM? Scott's Hair Affair - Great Falls

APPEARING ON WHICH PROPOSAL: HB 381

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? X

COMMENTS: _____

Attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE LABOR & EMPLOYMENT
EXHIBIT NO. 4
DATE 3/19/87
BILL NO. HB 381

Dear Senators -

My Name is Scott Stechly, I have been a cosmetologist for 15 yrs. ~~a~~ commission salon owner for 9 of those years - I'm an active National Cosmetologist Assoc. member and also a state examiner.

As a salon owner & cosmetologist I feel that this bill is discriminatory and will eventually split our industry as well. Why should the commission salons be penalized by having to pay, while other salons will get off their obligations.

Our obligations are to our customers or clientel, that we give quality work & working conditions, consumer protection, meet sanitation requirements, but also we have an obligation to our workers - to cover them with insurance (be it workmans comp. or private ins.) to train & educate in an ever changing industry, and to give controlled working conditions.

Yes, I hate it everytime I get my Workmans Comp & Unemployment Ins. Bill but I also took on obligations to my employees -

I said earlier that I feel this bill would spit us apart as an industry, if passed I believe within a few years most salons - 80% will be lease/booth salons - where then will the next generation of Cosmetologist come from? It takes almost a year to develop a decent clientel - if most salons are rental how can the young professionals get started when more money is going out than coming in?

Most lessee salons get started by cosmetologists who have been in the business for 5 years or better. I would like to see a booth rental salon ~~start out~~ open or stay open with all new cosmetologist out of school with no real clientele—

if most salons are to go the self employment route where then will the young professionals get started— they won't—

Then where will we be in 5-ten years from ^{now} ~~now~~

In closing, I want to remind you that the National Cosmetologist Assoc. is opposed to Booth Rental salons + is opposed to any state assoc. involvement with legislation for the Booth Rental system—

~~No~~ If you pass this bill please amend it so its fair for all or kill it

As an Active Assoc. member ~~along with~~ ~~and my employees~~ we were never notified of this hearing. ~~on this bill until~~

As an active Assoc member as are most of my employees we were never notified of this hearing—

Also we came from G.F. this morning and it is socked in so some people are not able to attend today

Thank you—

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 4

DATE 3/19/27

BILL NO. HB 321

NAME: Julie DeVries DATE: 3-19-87

ADDRESS: 2508 11th ave So. GT. Falls

PHONE: 727-0368

REPRESENTING WHOM? Dahl's College of Beauty - student

APPEARING ON WHICH PROPOSAL: ~~OPP~~ 4B381

DO YOU: SUPPORT? AMEND? OPPOSE? ✓

COMMENTS: Attached

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

SENATE LABOR & EMPLOYMENT

EXHIBIT NO. 5

DATE 3/19/87

BILL NO. 4B381

LABOR & EMPLOYMENT

BIT NO. 5

DATE 3/1/87

BILL NO. 381

My name is Julie DeVries and I am a student in a cosmetology school.

I am currently attending an accredited school on a federal Grant, which is for 2 years, I will very soon graduate and take April boards. Although I am still a student I have been offered a job in a reputable full-service salon which pays on a progressive commission base salary that also covers me for unemployment insurance & workers compensation.

* Should this bill pass, where does that leave me? I will lose many other future cosmetologists with no opportunity to build a clientele, with an eagerness to gain experience, yet my personal expenses let alone any \$ to pay an ave. of 400⁰⁰ a mo. for a booth to work in! not to mention the current cost of supplies, & my professional insurance which would be my personal responsibility. If "Both Kent" implements only 10% taking into the future 2-5 yrs. from now. Where does that leave the young cosmetologist. For these reasons I oppose House Bill 381.

Thank you

In room 2
I will have to
buy a job
for a
part of
this
it's
further

DEPARTMENT OF LABOR AND INDUSTRY
Peg Hartman
TAX COMPARISONS REGARDING COSMETOLOGISTS

COSMETOLOGIST'S COSTS			EMPLOYER'S COSTS		
	Current Situation	House Bill 381		Current Situation	House Bill 381
Earnings	\$15,000	\$15,000		\$15,000	\$15,000
UI Taxes					
State	\$ 0.00			\$ 322.40	\$ 0.00
Federal	0.00			56.00	434.00
FICA	1072.50			1072.50	1072.50
Self Emp		1845.00		0.00	0.00
W. Comp				46.50	
	\$1072.50	\$1845.00		\$1497.40	\$1506.90
	Increase	\$ 772.50		Increase	\$ 9.50

Assumptions - 2.6 State UI Rate, \$12,400 WB, WC Class 9586, \$.31 per hundred; \$15,000 annual earnings

SENATE LABOR & EMPLOYMENT
EXHIBIT NO 6
DATE 3/9/87
BILL NO. HB 381

DEPARTMENT OF LABOR & INDUSTRY

IMPACT OF HB 381: EXEMPTING FROM UNEMPLOYMENT INSURANCE AND WORKERS' COMPENSATION SELF-EMPLOYED COSMETOLOGISTS WHO RENT SPACE OR EQUIPMENT IN A SHOP

WHAT THE BILL DOES

1. AMENDS SECTION 39-51-204, UNEMPLOYMENT INSURANCE STATUTES, TO EXCLUDE FROM THE TERM "EMPLOYMENT",

services performed by a self-employed person at the order of clients by whom the person is compensated, who is licensed under Title 37, Chapter 31, who rents or leases space or equipment in a cosmetological establishment as defined in 37-31-101, and who has no guarantee of minimum earnings."

2. AMENDS SECTION 39-71-410, WORKERS' COMPENSATION ACT, TO EXEMPT, "cosmetologists' services as defined in 39-51-204 (1)."

TECHNICAL ISSUES

1. There is no definition of "self-employment" in either unemployment or workers' compensation statutes.
2. If the definition of "self-employment" in the unemployment statute means "independent contractor" in the workers' compensation statute, there are several well accepted tests of independent contractor status which are not entirely spelled out in the amendment:
 - a. Direct evidence of right or exercise of control
(independent contractors show freedom from control by:
 - evidence paid self employment tax, or
 - business taxes on income tax form, and
 - signed contract showing contractor holds self out as independent, or
 - letter from 3 hiring agents attesting to independence.)
 - b. Method of payment

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- c. Furnishing equipment. (amendment refers to "space or equipment.")
- d. Right to fire

All conditions must be present

In several hearings on the issue of cosmetologists, they were found to be employees because:

- lease agreements were typically able to be terminated at anytime
 - lessee had no significant investment in the chairs of other shop fixtures
 - lessee had little to say with respect to the operating rules of the shop
 - none of the cosmetologists worked or had contracts with other similar businesses
 - ✓ - the owner's shop license indicates inherent control
3. The proposed language is confusing. A cosmetologist would not be certain if the statute exempted them. The amendment could mean anyone who rents a chair and is not guaranteed minimum earnings is an independent contractor without consideration of the tests noted above.
4. There is a typographical error in the second amendment. Delete, page 8, line 2, the second "(1)" in the statute citation.

STATE OF MONTANA
BEFORE THE APPEALS DIVISION OF THE
DEPARTMENT OF LABOR AND INDUSTRY

IN THE MATTER OF UNEMPLOYMENT INSURANCE TAX
CONTRIBUTION CASE NO. 13-85:

EL CABELLO BEAUTY SALON,)	
JUNE M. SLOAN, OWNER,)	
ACCOUNT NO. 111581,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW
)	AND DECISION
Appellant.)	

* * * * *

BACKGROUND

The Unemployment Insurance Division issued a determination on June 20, 1985 which found that the work performed by cosmetologists in the El Cabello Beauty Salon owned by June M. Sloan was employment pursuant to section 39-51-203(4) MCA. A redetermination was issued on September 25, 1985 upholding the June 20th determination. Ms. Sloan filed a timely appeal and the matter was referred to this Division. A hearing was held in Missoula on January 29, 1986. The appellant was represented by Edward A. Cummings and Janet C. Brosius.

ISSUE

The issue raised by this appeal is whether the services performed by cosmetologists at the El Cabello Beauty Salon owned by June M. Sloan are employment pursuant to section 39-51-203(4) MCA.

FINDINGS OF FACT

Based on the evidence on the record in this matter, including the sworn testimony of the witnesses, I make the following findings.

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1 1. June Sloan leases a building which houses the El
2 Cabello Beauty Salon. She rents space, in the form of
3 individual rooms, to three cosmetologists at the rate of
4 \$75.00 per room per week. Ms. Sloan, who is a cosmetolo-
5 gist, also utilizes a room. Utilities are included in the
6 rent.

7 2. A reception area and a shampoo area are used in
8 common by all the cosmetologists.

9 3. Each cosmetologist buys her own supplies and
10 furnishes all her own combs, brushes, blow dryers, curling
11 irons, scissors and razors.

12 4. All major equipment used in the salon such as
13 hydraulic chairs, mirrors, counters, sinks and drop-back
14 shampoo chairs are furnished by Ms. Sloan.

15 5. Each cosmetologist keeps her own appointment book,
16 however, a central appointment book is kept so that when a
17 customer comes in while, for example, the cosmetologist whom
18 she wishes to see is away, the customer can be taken care
19 of.

20 6. When a customer is finished she pays the indivi-
21 dual cosmetologist who served her. The cosmetologists keep
22 their own individual books and bank accounts. They each
23 charge customers in accordance with their individual pricing
24 arrangement. Ms. Sloan receives no money from the cosmetol-
25 ogists other than the \$75.00 per week in rent.

26 7. Ms. Sloan has no control over the hours worked by
27 the cosmetologists. Each cosmetologist has her own key and
28 comes and goes as she wishes. Mrs. Sloan does not control
29 the methods of work of the cosmetologists.

30 8. Each cosmetologist has an individual license as a
31 manager-operator issued by the state.
32

END

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1 9. Each cosmetologist carries her own liability
2 insurance which is issued by a carrier from whom they all
3 purchase their liability insurance for purposes of getting a
4 discount.

5 10. The individual cosmetologist is responsible for
6 cleaning her own towels and her own work area.

7 11. When an individual cosmetologist advertises she
8 refers to El Cabello Beauty Salon in the advertisement.

9 12. Prior to July 1, 1984, Ms. Sloan operated her shop
10 in a different location where she had an employer-employee
11 relationship with the cosmetologists.

12 13. Since July 1, 1984 and subsequent to her move to
13 her new location Ms. Sloan has entered into a rental agree-
14 ment with each of the cosmetologists.

15 14. The rental agreement states that the individual
16 cosmetologist is an independent contractor free from control
17 of Ms. Sloan; that the cosmetologist may come and go as she
18 chooses, operates her business as she desires and otherwise
19 be independent.

20 15. The agreement requires the individual cosmetolo-
21 gist to maintain her booth in a neat, clean and sanitary
22 manner equal to the standards of the state health depart-
23 ment. The agreement reserves the right in Ms. Sloan to
24 maintain sanitation levels and standards throughout the
25 premises.

26 16. The agreement requires that each party conduct
27 herself in a manner in keeping with the beauty salon busi-
28 ness and that each person's appearance, demeanor and dress
29 be professional.

30 17. Either party to the agreement may terminate it by
31 giving seven days' written notice. No liability is in-
32 volved.

1 18. Under the agreement each party pays a propor-
2 tionate share of the cost of cooperative advertising.
3 Other, non-cooperative, advertising is paid by the indivi-
4 dual.

5 19. The agreement requires each party to contribute
6 proportionately toward waiting room supplies and laundry
7 service.

8 20. The cosmetologists do not perform cosmetology work
9 at any other beauty salon. They perform their work under
10 the name of El Cabello Beauty Salon.

11
12 RESOLUTION AND RATIONALE

13 Section 39-51-203(4) MCA provides that service per-
14 formed by an individual for wages is considered to be
15 employment unless and until it is shown to the satisfaction
16 of the department that:

17 (a) such individual has been and will continue to
18 be free from control or direction over the perfor-
19 mance of such services, both under his contract
and in fact;

20 (b) such service is either outside the usual
21 course of the business for which such services is
22 performed or that such service is performed
outside of all the places of business of the
enterprise for which such service is performed;
and

23 (c) such individual is customarily engaged in an
24 independently established trade, occupation,
profession, or business.

25 The term "wages" is defined in section 39-51-201(17) (a)
26 as:

27 . . . all remuneration payable for personal
28 services, including commissions and bonuses, the
29 cash value of all remuneration payable in any
medium other than cash, . . .

30 The Montana Supreme Court has construed section 39-51-
31 203(4) MCA several times. Beginning with St. Regis Paper
32 Company vs. Unemployment Compensation Commission, 487 P.2d
524, 157 Mont. 546 (1971) the Court held that, quoting from

SENATE LABOR & EMPLOYMENT

SEN. NO. 6

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1 National Trailer Convoy, Inc. vs. Undercofler, 109 Ga. App.
2 703, 137 SE2d 328, it is first necessary to establish that
3 the individual in question performs services for wages or
4 the equivalent of wages before considering subparagraphs
5 (a)(b) and (c) of the statute. The Court has not ruled on
6 the specific question which is raised by the case at hand,
7 viz., whether the "services . . . for wages" requirement of
8 the statute should be interpreted with regard to the immedi-
9 ate source of the funds received by a worker or whether in
10 substance the funds received indirectly constitute remunera-
11 tion for the personal services of the worker. Wages are all
12 remuneration for personal service, service for wages is
13 employment unless certain enumerated conditions are met.

14 Although the Montana Supreme Court has not addressed a
15 fact situation similar to that brought by this case involv-
16 ing the services-for-wages concept, courts in other juris-
17 dictions have. In Department of Employment Security vs.
18 Charlie's Barber Shop, etc., 187 A2d 695, 23 Md. 470 (1963),
19 the Court of Appeals of Maryland held that where three
20 barbers leased their chairs from a master barber and were
21 paid directly by the customer rather than by the master
22 barber, they nonetheless performed personal services for
23 remuneration. The Court said the amount collected as rent
24 by the master barber may have been the amount of profit he
25 expected to make if he had paid the barbers directly out of
26 his total receipts. Under the Maryland law wages were
27 defined as ". . . all remuneration for personal services
28 including commissions and bonuses and the cash value of all
29 compensation in any medium other than cash".

30 In Unemployment Compensation Commission vs. Harvey, 18
31 SE2d 390, 179 Va. 202 (1942), the lessor owned and operated
three beauty salons. Each of the beauty operators paid rent

1 for a booth in the salon. The Virginia Supreme Court held
2 that the beauty operators were employees within the meaning
3 of Virginia's unemployment compensation statute and the
4 owner of the salons was liable for contributions to the
5 fund. Under Virginia's statute "wages" were defined as all
6 remuneration payable for personal services. As to the
7 method of payment by the customers the Court said:

8 Even at common law the existence of the relation
9 of master and servant does not depend upon the
10 payment of wages or a salary by a master direct to
11 the servant. The compensation of the employee may
12 consist of commissions or a share of the profits
13 of the employer's business. (Citations omitted)

Harvey, supra,
18 SE2d at 396

13 The Oklahoma Supreme Court in Everett Sanders d/b/a
14 Suburban, etc. Barber vs. Oklahoma Employment Security
15 Commission, 430 P.2d 789 (1967) cited Harvey, supra, with
16 approval.

17 The Supreme Court of Wyoming in deciding an owner/
18 lessor barber/lessee case, Tharp vs. Unemployment Compen-
19 sation Commission, 121 P.2d 172, 57 Wyo. 486 (1942), where
20 the barbers paid one-third of their receipt to the owner for
21 use of barber chairs and supplies, held that an
22 employer-employee relation existed and the owner was liable
23 for contributions under Wyoming law. The Court quoted
24 extensively from Kaus vs. Unemployment Compensation Commis-
25 sion, 299 NW 415, 230 Iowa 860, where the plaintiff operated
26 a taxicab business under an oral agreement with cab drivers.
27 The plaintiff furnished the cabs and switchboard service,
28 the drivers furnished gas and paid a weekly amount for the
29 use of the cabs. The Court held:

30 Nor is the fact that the drivers are not paid a
31 stated wage by appellee necessarily inconsistent
32 with the claim made by the commission. It should
be noticed that the statutory definition of the
term 'wages' contained in the law cited above
is 'all remuneration payable for personal

SENATE LABOR & EMPLOYMENT
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1 services, including commissions', etc. It is not
2 required that the remuneration be paid by the
3 employer. It has frequently been held that
4 payment by the employer is not necessary. Remun-
5 eration of an employee may consist of the differ-
6 ence between the price which he pays his employer
7 for goods and the price at which he sells them, a
8 percentage of the sale price of goods sold by the
9 employee to customers and collected by him from
10 them, and various other methods of collecting
11 compensation from customers rather than directly
12 from the employer. (Citations omitted) The
13 earnings of the drivers over and above the \$3 and
14 cost of the gasoline constitute the remuneration
15 or wages for their services and it is not neces-
16 sary that they be paid directly by appellee.

Tharp, supra,
121 P.2d at 177

11 In a case involving a beauty shop owner who previously
12 employed beauty operators but later converted to a leasing
13 arrangement whereby each operator paid to the owner a
14 certain percent of her gross weekly income, the Court of
15 Appeals of Ohio, in State vs. Iden, 47 NE2d 907, 71 Ohio
16 App. 65 (1942), commented regarding remuneration for ser-
17 vices:

18 Coming now to consider the facts in issue, Section
19 1345-1 (c-D), General Code, 118 Ohio Laws, 259,
20 722, must be examined. It provides, that:
21 "Services performed by an individual for remunera-
22 tion shall be deemed to be employment subject to
23 this act unless and until it is shown to the
24 satisfaction of the administrator that: (i) such
25 individual has been and will continue to be free
26 from control or direction over the performance of
27 such services, both under his contract of service
28 and in fact, and (ii) such service is outside the
29 usual course of the business for which such
30 service is performed, and (iii) such individual is
31 customarily engaged in an independently estab-
lished trade, occupation, profession, or busi-
ness."

Subsection "f" of 1345-1, General Code, 118 Ohio
Laws, 259, 724, is also pertinent. It prescribes,
that: "'Remuneration' means all compensation
payable for personal services, including commis-
sions and bonuses and the cash value of all
compensation payable in any medium other than
cash."

These two portions of the act, in conjunction with
the facts, have been under consideration in
the predictions which, with almost complete
unanimity, have held that the leasing of space in
beauty and barber shops was resorted to

EXHIBIT NO. 6
DATE 3/19/87
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1 for the evident purpose of avoiding payment of
2 excise taxes. The scheme repeatedly has been held
3 to be a subterfuge for that purpose.

4 Iden, supra,
5 47 NE2d at 911

6 Counsel for the appellant argues in her brief that
7 there are no services performed by the cosmetologists in El
8 Cabello Beauty Salon for Ms. Sloan, that no remuneration is
9 paid by Ms. Sloan to the cosmetologists and, therefore,
10 there can be no employment relationship between them. She
11 cites St. Regis, supra, for the proposition that it must
12 first be established that services were performed for wages
13 before consideration can properly be given to the exceptions
14 enumerated in section 39-51-203(4) (a) (b) (c) MCA. With that
15 one can readily agree, for without employment, which is
16 service for wages, no liability as an employer for unemploy-
17 ment insurance tax contributions can be assigned to Ms.
18 Sloan as owner of El Cabello. However, as the above-cited
19 cases have demonstrated, in those jurisdictions where the
20 courts have had occasion to address the specific issue, they
21 have held that the remuneration received by an employee does
22 not have to come directly from the employer. The remunera-
23 tion may consist of a share of the profits of the business,
24 or the remuneration may be the amount above the periodic
25 rent the lessee realizes from his association with the
26 business. It seems apparent in the instant case that the
27 remuneration or wages the cosmetologists receive for their
28 service to El Cabello is that amount paid directly to them
29 by customers. The amount paid them by customers less \$75.00
30 rent is their remuneration. The \$75.00 collected each week
31 by Ms. Sloan, plus her own earnings, is, no doubt, the
32 amount of profit she expects to make from her operation.

The amount paid directly to the cosmetologists by
customers is the equivalent of wages as that term was used

1 by the Court in St. Regis, supra, where it quoted National
2 Trailer Convoy with approval and said the reasoning of the
3 case was sound:

4 "In determining whether an individual comes within
5 the scope of the Employment Security Law . . . it
6 is first necessary to establish that the indivi-
7 dual in question performs service for wages, or
8 the equivalent of the same, and this major premise
9 must be established before the exceptions . . .
10 become material . . ."

11 St. Regis, supra,
12 487 P.2d at 526

13 Counsel cites Burson vs. Moore, 450 SW2d 309 (1970) and
14 urges that we reach the same conclusion as did the Supreme
15 Court of Tennessee where it held that a barber who leased
16 space in his building to other barbers who had no contract
17 of hire with him, did not perform services for him and
18 received no wages from him, was not an employer. That
19 holding is contrary to the majority rule which was expressed
20 in Iden, supra, which should be followed here.

21 Having determined that the cosmetologists at El Cabello
22 perform services for the equivalent of wages and that,
23 therefore, those services are employment pursuant to section
24 39-51-203(4) MCA, it is now necessary to examine subpara-
25 graphs (a)(b) and (c), the exceptions to employment, and to
26 apply principles and guidelines derived by the courts from
27 those exceptions to the facts of the case at hand.

28 The Montana Supreme Court noted in St. Regis, supra,
29 that the unemployment compensation law provides that all
30 three of the stated conditions in subparagraphs (a)(b) and
31 (c) must exist, or services performed will be deemed employ-
32 ment. The Court emphasized that the vital test in deter-
mining whether a person employed to do work is a contractor
or a servant is the control over the work which the employer
reserves.

SEARCHED & INDEXED
EXHIBIT 6
DATE 3/9/87
BILL NO. 18381

1 In a later case, Pat Griffin Company and Gasamat
2 Service Stations vs. Employment Security Commission, 163
3 Mont. 529, 519 P.2d 147 (1974), the Court concluded that
4 since an operator of a Gasamat station did not have freedom
5 of control over the means, methods and details of his
6 business because he was required to make three reports each
7 week, to make daily bank deposits to Gasamat accounts, to
8 order gas from a distributor named by Gasamat and to use a
9 gas supply controlled by Gasamat, the first provision of the
10 statute had not been met and, therefore, the station opera-
11 tor was not an independent contractor. The Court went on to
12 reiterate the test which it had previously expressed in
13 Shope vs. City of Billings, 85 Mont. 302, 306, 278 P. 826,
14 827 (1929):

15 An independent contractor is one who renders
16 service in the course of an occupation, and
17 represents the will of his employer only as the
18 result of his work, and not as to the means
whereby it is accomplished, and is usually paid by
the job (And see Neyman vs. Pincus, 82 Mont. 467,
267 P. 805.) . . .

19 The vital test in determining whether a person
20 employed to do a certain piece of work is a
21 contractor or a mere servant, is the control over
22 the work which is reserved by the employer.
23 Stated as a general proposition, if the contractor
is under the control of the employer he is a
servant; if not under such control, he is an
independent contractor.

24 Pat Griffin, supra,
25 519 P.2d at 150

26 The Court decided two cases in 1980 in which it con-
27 strued section 39-51-203(4) MCA. The first was Standard
28 Chemical Manufacturing Company vs. Employment Security
29 Division, 605 P.2d 610, 37 St. Rptr. 105 (1980) where the
30 Court held that livestock nutritional product distributors
31 were employees of Standard Chemical rather than independent
32 contractors. The Court reviewed its rulings in St. Regis
and Griffin, supra, and acknowledged that two tests had been

1 previously used in determining whether services performed by
2 an individual for wages were employment or were those of an
3 independent contractor. The first test was the so-called
4 "ABC" test and is set forth in section 39-51-203(4) MCA.
5 The second test recognized by the Court was the one which
6 was derived from common law principles and was used by the
7 Court as an additional guideline, it was the test quoted
8 from the Shope case in Pat Griffin, supra.

9 The second case decided by the Montana Supreme Court in
10 1980 was Kirby Co. of Bozeman, Inc. vs. Employment Security
11 Division, 614 P.2d 1040 (Mont. 1980). That case focused on
12 the relationship between salesmen, who signed one-year
13 agreements, which were automatically renewable and subject
14 to termination on thirty days notice, and the Bozeman Kirby
15 store. Salesmen had to be authorized by Kirby of Bozeman to
16 sell its products. The Court cited Standard Chemical,
17 supra, and set forth the two tests used to determine whether
18 an employment or independent contractor relationship ex-
19 isted. The first test reiterated by the Court was the
20 statutory test set out in section 39-51-203(4) MCA. The
21 second test restated by the Court, citing Standard Chemical,
22 supra, was the common law test.

23 The salesmen were trained by Kirby in marketing its
24 products; Kirby regulated the price charged for the product;
25 and Kirby usually received receipts and paid the salesmen
26 their commissions. Emphasizing the significant aspects of
27 the case, the Court stated:

28 . . . Finally, and possibly most important,
29 dealers had to be authorized through a wholesale
30 outlet like Kirby to sell Kirby products and Kirby
31 could terminate the contract granting the dealers
32 that authorization without cause on thirty days'
notice. Under Standard Chemical, this setup
represents the kind of control, although in some
aspects indirect, that is sufficient to establish
an employer-employee relationship. The

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1 meaning of our unemployment insurance stat-
2 utes . . .

3 Kirby, supra,
4 614 P.2d at 1044

5 A worker's compensation case decided by the Montana
6 Supreme Court in 1978 treated the subject of independent
7 contractor status and the determinative test of right of
8 control. In Peggy M. Sharp vs. Hoerner Waldorf Corp., 584
9 P.2d 1298, 178 Mont. 423 (1978), the Court held that since
10 the right existed in either party to terminate the relation-
11 ship at any time without liability, a factor which is strong
12 evidence of an employer-employee status because the right to
13 terminate the relationship without liability is not consis-
14 tent with the concept of independent contractor status, and
15 since other factors also showed an exercise of control by
16 Hoerner Waldorf, Sharp was under the control of Hoerner
17 Waldorf and was not, therefore, an independent contractor.

18 Courts in other jurisdictions have examined lease
19 arrangements created by employers and have concluded that
20 the absence of control which was required by their statutes
21 did not exist. In Charlie's Barber Shop, supra, the Court
22 said:

23 At the inception of the unemployment insurance
24 program it must have been apparent to the drafters
25 of the statute that employers would attempt to
26 avoid coverage under the Act by creating "lease"
27 arrangements, and for that reason a special
28 definition of employer-employee relationship was
29 included in this statute. The test is a much
30 stricter one than the common law test. Basically,
31 Section 20(g)(6) provides for coverage unless
there is: (A) freedom from control or direction;
(B) service outside the usual course of business;
and (C) customary engagement in an independently
established occupation. The burden is upon the
employer to show that the parties concerned fall
within the A-B-C test. (Citation omitted)

32 As to freedom of control or direction it appears
33 that appellee could not tell the other barbers how
to provide services for a customer, nor could he
control their working hours. It also appears that
the contract of lease could not be broken by
appellee if he no longer wished to have one of the

1 barbers work in the shop, except for the clause
2 that states they must work "in harmony" with the
3 others. It would be unrealistic to believe that
4 he could not "fire" one of the barbers if he found
5 it necessary to do so in order to protect the
6 business patrons of the shop, particularly in the
7 face of no applicable standards of what is to
8 constitute "harmony". This clearly appears to be
9 an exculpatory clause inserted in the lease so as
to give appellee a "way out" of the contract, if
he felt it necessary. We feel that there is not
the absence of control or direction so as to
satisfy (A). Although appellee may not have had
the full freedom to terminate the employment
relationship as is usually found in such cases, he
did have such power as to amount to constructive
control.

10 Under Section 20(g)(6)(B), there is no question
11 that the services were rendered within the usual
12 course of business. They were all barbers working
13 in a barber shop. As to sub-section (C), there is
14 no evidence to indicate that any one of the
15 barbers was engaged in an independently estab-
16 lished business, other than the posting of their
17 names by their individual chairs or their owner-
18 ship of individual business cards. This is not
19 indicative of an independent business. This is a
20 common facet of many employment relationships
21 which never have been disputed as being within the
22 coverage of the act, e.g., the insurance agent who
23 has his own office and his own business cards but
24 yet is a covered employee of the insurance compa-
25 ny.

26 Charlie's Barber Shop, supra,
27 187 A2d at 698

28 Similarly, the Oklahoma Supreme Court, in Everett
29 Sanders, supra, held that where barbers performed services
30 in a barber shop, under a chair leasing agreement, owned by
31 another barber who retained a percentage of the barbers'
32 earnings, the relationship was one of employer-employee.
The lease provided that the owner could terminate the
agreement on thirty days written notice. The Court said
that by virtue of his power of discharge within thirty days,
he reserved effective control; it went on to state:

33 . . . In the Brenner case where the lease con-
34 tained a thirty-day terminable clause, this court
35 quoted from Industrial Commission of Colorado et
36 al. v. Bonfils et al., Colo., 78 Colo. 306, 241 P.
37 735, as follows:

38 "The most important point in the case is that the
39 main question (contractor or employee, is the

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1 right of either to terminate the relation
2 without liability."

3 and,

4 "It is the power of control, not the fact of
5 control, that is the principal factor * * *"

6 And our court said:

7 "Whether such control was exercised is
8 immaterial. * * *"

9 In Mississippi Employment Security Commission vs.
10 Logan, 248 Miss. 595, 159 So.2d 802, the court
11 sustained an employer's unemployment assessment
12 where he operated a barbershop, notwithstanding a
13 chair leasing agreement which attempted to estab-
14 lish an independent relationship and provided that
15 either party could terminate the agreement within
16 ten days. The court in applying the common law of
17 master and servant stated:

18 "One may be actually under slight supervision
19 or control, but still be an employee where
20 the right of control existed and the service
21 performed was a part of the regular business
22 of the alleged employer."

23 In State vs. Goessman, 13 Wash.2d 598, 126 P.2d
24 201, the defendant operated three barber shops and
25 had an oral agreement with each barber for the
26 lease of a particular chair with the provision
27 that the leases were for a term of fifty-two
28 weeks, but were terminable, without cause, by
29 either party upon one week's notice. The court
30 held the unemployment assessment upon the employer
31 to be valid. In rejecting the employer's argument
32 that he had no right of control under the leases,
33 the court stated:

34 "The absence from the oral lease of a pro-
35 vision recognizing the right of control does
36 not mean that no such right existed. The
37 reservation of the right of control is
38 presumed in those cases in which it is found
39 that one individual performs services upon
40 the premises of another."

41 We do not see where the "lease" agreement made any
42 substantial change in the relationship between
43 the employer and the barbers. For all practical
44 purposes the operation of Sanders' business is
45 the same as before. This question of the rela-
46 tionship between a barber and an owner-operator
47 under a chair leasing agreement for purposes of

48 unemployment compensation
49 is a question of fact. In each instance these
50 cases. In each instance these
51 under statutes almost identical
52 to that of the so-called lessor was, in fact,
53 an employer under the Act. Tharp vs. Unemployment
54 Commission, 37 Wyo. 304, 121 P.2d 1001
55 (1942).

1 absence from the oral lease of a provision recognizing the
2 right of control did not mean that no such right existed,
3 the reservation of the right of control was presumed where
4 the party performed the services upon the premises of the
5 other party to the agreement.

6 The Court in Harvey, supra, referred to the fact that
7 the owner of a beauty parlor could terminate his lease with
8 his operators on 15 days notice as one of the reasons for
9 finding an employer-employee relationship.

10 The Wyoming Supreme Court, in Tharp, supra, discussed
11 its earlier holding on the question of whether an employer-
12 employee relationship existed:

13 . . . In Fox Park Timber Co. vs. Baker, 53 Wyo.
14 467, 84 P.2d 736, 743, 120 A.L.R. 1020, this court
15 has pointed out that in determining whether the
16 relation of employer and employee exists: "Another
17 test is whether either of the parties possesses
18 the right to terminate the services at will
19 without incurring liability to the other, this
20 embracing, of course, the right of the employer at
21 any time to discharge the party performing the
22 work, an affirmative answer establishing the
23 status of master and servant." (Citing cases.)
24 And in the same opinion it was also said: "As
25 phases of control or right of control may be
26 mentioned the factors: The place where the work
27 is to be performed, the scope of the work and the
28 control of the premises where the work is required
29 to be done. 71 C.J. 458." The work done by the
30 barbers aforesaid necessarily had to be performed
31 in the shop leased and controlled by Tharp as
32 lessee. As to the scope of the work, Tharp
undoubtedly held the right to control that also,
for if a barber had undertaken to do, for example,
cabinet carpentering in the shop, Tharp could have
put a stop to such a practice if he so desired.

Tharp, supra,
121 P.2d at 177

27 The facts of the instant case show that the cosmetol-
28 ogists who work in the El Cabello Beauty Salon are not free
29 from control over the performance of their services as the
30 term "free from control" has been interpreted by the Montana
31 Supreme Court and other courts. The rental agreement
32 between the cosmetologists and Ms. Sloan allows either

1 to terminate it by giving a seven day written notice without
2 liability. Such right to terminate the services at will
3 necessarily implies the existence of control over the
4 cosmetologists by Ms. Sloan. Whether the control has been
5 exercised is, of course, immaterial; it is the existence
6 that is determinative. Moreover, the rental agreement
7 reserves to Ms. Sloan the right to maintain sanitation
8 standards on the premises and it implies that Ms. Sloan may
9 maintain personal appearance standards.

10 The cosmetologists do the same kind of work as does Ms.
11 Sloan and they perform their work at the same location.
12 Their service is clearly not outside the usual course of the
13 business for which they perform their service nor is their
14 service performed outside the place of the business of El
15 Cabello.

16 Cosmetologists working at El Cabello are not engaged in
17 an independently established trade, occupation, profession,
18 or business. All the major items of equipment are owned by
19 Ms. Sloan, the cosmetologists furnish small items and
20 supplies. There was no evidence to show that any of the
21 cosmetologists could survive her relationship with El
22 Cabello. There is nothing on the record to show they have
23 other contracts with other beauty shops.

24
25 CONCLUSIONS OF LAW AND DECISION

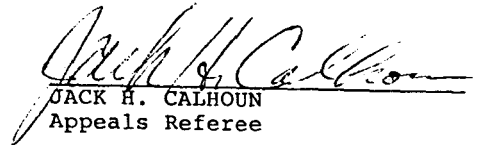
26 The service performed by cosmetologists for El Cabello
27 Beauty Salon was employment, pursuant to section 39-51-
28 203(4) MCA. Therefore, their earnings must be reported to
29 the Unemployment Insurance Division and El Cabello Beauty
30 Salon, June M. Sloan, owner, must pay appropriate amounts
31 into the unemployment insurance trust fund.
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NOTICE

Interested parties dissatisfied with this decision may request a review by the Board of Labor Appeals. This decision will become final unless further review is initiated pursuant to Section 39-51-2404 MCA within five days after delivery of this decision or within seven days after this decision was mailed. Review by the Board will be confined to the record before the appeals referee, no additional issue or supporting evidence not contained in the record may be introduced before the Board. ARM 24.11.311(8).

Dated this 24th day of April, 1986.

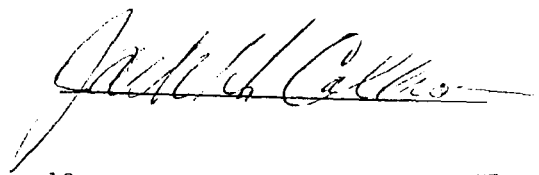

JACK H. CALHOUN
Appeals Referee

CERTIFICATE OF MAILING

I the undersigned do hereby certify that on the 24th day of April, 1986, a true and correct copy of these FINDINGS OF FACT, CONCLUSION OF LAW AND DECISION was mailed to the following:

Edward A. Cummings
CUMMINGS LAW FIRM
311 Woody
Missoula, MT 59801

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June M. Sloan, Owner
P.O. Box 3725
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