MINUTES

MONTANA HOUSE OF REPRESENTATIVES
53rd LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By Chairman Tom Nelson, on February 4, 1993, at 3:10 p.m.

ROLL CALL

Members Present:

Rep. Tom Nelson, Chair (R)
Rep. Gary Feland, Vice Chair (R)
Rep. Vicki Cocchiarella (D)
Rep. Jerry Driscoll (D)
Rep. Alvin Ellis (R)
Rep. Pat Galvin (D)
Rep. Sonny Hanson (R)
Rep. Norm Mills (R)
Rep. Bob Pavlovich (D)
Rep. Bruce Simon (R)
Rep. Carolyn Squires (D)
Rep. Bill Tash (R)
Rep. Rolph Tunby (R)
Rep. Carley Tuss (D)
Rep. Tim Whalen (D)

Members Excused: Rep. Benedict

Members Absent: none

Staff Present: Susan Fox, Legislative Council
Cherri Schmaus, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: HB 287, HB 259 & SB 116
Executive Action: SB 116, HB 261, HB 296

HEARING ON HB 259

Opening Statement by Sponsor:

REP. DORE SCHWINDEN, HD 20, Roosevelt, sponsor, opened on HB 259 by handing out amendments **(EXHIBITS #1 & #2)**. He stated that this bill just states that if an employee is injured while recreating, he/she is not covered. He stated that it is not fair to pay someone Workers' Compensation if they are not on duty when injured.

Proponents' Testimony:

Lobbyist Pat Melby, Ski Area Association, stated that he was asked to introduce this bill to the committee. He stated that employees of a ski resort are usually given a seasonal pass as part of their payment. This bill is a common sense bill. A number of states have already adopted similar legislation.

He referred to the amendments **(EXHIBITS #1 & #2)** subparagraph (a). and stated that while visiting with the members of the state fund, they determined that this bill would have been limited to ski area employees, but may have constitutional problems, so it was expanded to other recreational activities.

George Willen, Showdown Ski Area, stated that his ski resort has been the victim of an off-duty employee who was injured. The total claim cost the ski resort $40,000. The employee is currently using the money to attend school. This costly claim will make us raise our rates.

Kevin Taylor, Great Divide Skiing Company, stated that they offer seasonal passes to their employees also. He stated one of the cases they had on the mountain by an off-duty employee who had only earned $7.40 when he broke his leg and the ski resort had to pay $4,200.

Usually these employees are young, single and very daring. These employees should not be able to claim benefits if they are skiing dangerously on their off-time.

Ken Hoovestol, Montana Snowmobile Association and Montana Boating Association, stated that he supports HB 259 for the reasons already stated.

James Tutwiler, Montana Chamber of Commerce, stated that this bill is fair and needed. This bill doesn't alter the employers ability to pay if an accident happens on-the-job, but it allows them to protect themselves. Now is the time to tighten accessibility to the system. I urge the committee to support HB 259.

Tim Prather, Red Lodge Mountain, stated that in the last ten years, he has had three Workers' Compensation claims that dealt with off-duty employees. These claims include one ski lift operator ($43,000), and two ski instructors ($14,000 and $43,000).

They would have a difficult time recruiting people for these jobs if they did not offer a seasonal ski pass as a benefit of employment. He urged the committee to support HB 259.

Jim Murphy, State Fund, stated that he has reviewed the amendments and recommends that the bill be passed with the added amendments.

Jacqueline Lenmark, American Insurance Association, stated that for Workers' Compensation to function like it was intended, these employees must only be covered if injured on duty. She stated that she supports HB 259.

Michael Collins, President of Montana Ski Area Association, (EXHIBIT #3).

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. COCCHIARELLA asked Mr. Murphy if this bill passed as amended, would the employee left on the ski lift at Marshal Ski Area, who had to jump from the ski lift, been covered by Workers' Compensation.

Mr. Murphy stated that yes, this employee would be covered.

REP. FELAND asked Mr. Prather if this pass is considered part of the employees pay?

Prather stated that it is just one of the benefits.

REP. FELAND asked if an employee is hurt while using a pass that is part of his pay, would he be considered an employee?

Mr. Prather stated that yes, he is an employee; however, he was not hurt in the line of duty.

REP. FELAND asked if these employees sign in or punch in on a time clock to confirm when they are on duty.

Mr. Prather stated that yes, they do punch in and out.

REP. FELAND asked Mr. Murphy the same question.

Mr. Murphy stated that Mr. Prather was correct in stating that if an employee is punched in when the accident occurs they will be covered.

REP. PAVLOVICH gave Mr. Murphy a scenario of a golf course grounds keeper who is hit in the head with a golf ball when mowing the lawn. He asked if this employee would be covered.

Mr. Murphy stated that he is covered if on duty, but not if he was golfing himself, even though the seasonal golf pass is a benefit of his employment.

REP. GALVIN asked Mr. Murphy if this bill only refers to ski resorts.

Mr. Murphy stated that the amendment refers to all recreational activities.

REP. GALVIN asked Mr. Murphy if any of these awards include hospital claims.

Mr. Murphy stated that it includes Workers' Compensation, but not to another hospital.

REP. TASH asked Mr. Taylor if the ski patrols are paid.

Mr. Taylor stated that some of these patrols are paid and some are not.

REP. WHALEN asked Mr. Murphy if under the current system this doesn't already exist.

Mr. Murphy stated that various court cases have ruled that when injured, regardless if one is on or off duty, that employee is covered. Several other states already have changed their state laws.

REP. WHALEN asked Mr. Murphy what the reason for the courts' decisions has been.

Mr. Murphy stated that the courts ruled that these seasonal passes were part of the pay of the employee and that the employee needed these passes to maintain physical fitness or to improve their skiing skills.

REP. DRISCOLL asked Mr. Melby what a volunteer employee is.

Pat Melby stated that there is not such a thing. Furthermore, the definition of employee is being amended. Volunteers aren't covered currently under Workers' Compensation. He referred to the laws of the other states and then referred to subsection (b) of the bill.

Jan Van Riper stated that her concern with redefining employee is that now volunteers are not automatically covered unless the employer elects to cover them.

REP. DRISCOLL asked Mr. Melby if this statement by Van Riper is correct. He stated that if it is true, volunteer ski patrols are not paid and employed ski patrols are paid. Both do the exact same job but one is paid and one is not.

Mr. Melby stated that is how it happens today. Volunteers usually don't want to be covered by Workers' Compensation.

REP. ELLIS gave Mr. Melby a scenario of a sportsman who gets hurt crossing a fence while working for Fish, Wildlife and Parks. If it results in lengthy litigation, how do the amendments to this bill affect this situation?

Mr. Melby asked if it was a workers compensation settlement? He further stated that if this person volunteered, he wouldn't be

covered unless the employer elected to cover him.

REP. WHALEN asked Ms. Van Riper the way the bill is currently drafted, if the volunteers are available to work. If not, he asked if she could suggest wording that would include this.

Ms. Van Riper referred to the language in the amendment, and stated that there is nothing in the law allowing the employer to elect covering these volunteers for Workers' Compensation. Furthermore, she suggested changing the language.

REP. ELLIS asked Ms. Van Riper if this bill only applies to recreational facilities. He asked if an employee working on a fence line is hurt on that fence line while hunting, will they be covered?

Ms Van Riper stated that initially this bill was directed at ski areas; however, they decided to expand it. She stated that if the employee was not doing official business, the injured employee would not be covered.

REP. TASH asked **REP. SCHWINDEN** if the intent of this bill was originally directed at ski area.

REP. SCHWINDEN stated that yes; however, it became apparent that this is a much larger issue that needs to be covered. Not just ski areas, but anyone on their own time recreating needs to be addressed in this bill.

REP. TASH asked **REP. SCHWINDEN** if in regard to volunteer ski patrols, this bill will see to it that they will not be covered by workers compensation.

REP. SCHWINDEN stated that this is not the intent of the bill.

REP. GALVIN asked **REP. SCHWINDEN** what the effective date of this bill will be if it is passed.

REP. SCHWINDEN stated that the effective date will be October 1, 1993.

Closing by Sponsor:

REP. SCHWINDEN closed on HB 259 by stating that he is pleased with the number of proponents that testified today. He stated that he has been a long-time supporter of employee rights; however, this should be a personal responsibility.

HEARING ON HB 287

Opening Statement by Sponsor:

REP. WISEMAN, HD 33, Malmstrom AFB, sponsor, stated that this bill's purpose is a small provision to Workers' Compensation. He

stated that the brief overview of the bill deals with an employee who is injured at a business that should have insurance but does not.

Proponents' Testimony:

Chuck Hunter, Department of Labor, handed the committee members a synopsis. **(EXHIBIT #4)** He stated that this is a small bill designed to take care of three major areas. He stated that the Department in the past has had to borrow from insurance codes. He suggested that the approval date for Plan 1 insurers be staggered. This would also stagger the workload so the workers can do a good analysis.

This bill would allow the injured worker and employer to set the amount.

Allen Chronister, Montana School Groups, stated that a large number of the school districts have become Plan 1 insurers. He referred to page 9 of the bill and offered some amendments. He stated that the biggest contributions are primarily from teachers.

He proposed to change the language of page 9, section 201. Furthermore, he wants the minimum assessment to be $15,000. He asked that a cap of $250 million be provided for the amount of payroll an employee can be accessed.

He stated that about $160,000 is contributed yearly. In FY92, 25 percent of the contribution consists of Plan 1 and in FY93, it raised to 30 percent. He stated that there needs to be a reallocation among Plan 1 insurers stating who pays what amount.

George Bennett, Montana Bankers Association, referred to page 9, section 8. He stated that this section is his biggest concern. He stated that the intent of this section is to give the Department of Labor what the Department of Revenue has for taxes. The intent is to protect all lien holders; however, the language may be confused. **(EXHIBIT #5)**

Roger Tippy, Independent Bankers, stated that due process can't be looked up. He also stated that it may be hard to delegate to specific agencies. **(EXHIBIT #6)**

Russell Hill, Montana Trial Lawyers Association, stated that he is here in support of HB 287. He referred to page 13, subsection m.

He referred to Section 9 and stated that the limit has been $25,000 since 1965 and section 18 has had a limit of $10,000 since 1977.

Third, he referred to page 32, line 24. He stated that this chapter should be replaced with chapter 7.

George Wood, Montana Self Insurers Association, stated that he supports the bill, but not the amendments by the school group. He stated that 54 insurers pay more and one pays less with the amendments.

Jan Van Riper, Attorney in Helena, referred to page 35 and 36. She stated that currently a rule in Montana requires all insurance companies doing business to have an in-state adjuster. However, this rule is very difficult to enforce.

She proposed that the State Fund separately track the payments they receive. She gave an example of a medical evaluation that the doctor had erroneously performed. She also proposed to pass additional remedies. She handed in written testimony. **(EXHIBIT #7 & 8)**

Ken Williams, Montana Power Company, referred to the testimony by George Wood. He stated that he supports the bill as well, but also resists the amendment by the school group.

Dan Walker, Self Insurers Association, also supports the bill, but not the amendments. He stated that to change the rules at this stage doesn't make sense.

Gary Spaeth, Liability Coalition, referred to page 19, paragraph 5. He stated that his concerns with this section are that this allows a piercing of the corporation male. This could create problems in other areas also. He stated that he doesn't feel this section is a mandatory part of the bill.

Jacqueline Lenmark, American Insurance Association, stated that she supports HB 287, but would like a withdrawal of section 2. She suggested putting this section somewhere where it will get special attention. She stated that she supports the bill, but not the proposed amendments by Van Riper.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. ELLIS told Ms. Van Riper that she clearly presented some dramatic changes. Furthermore, he asked why it had not been presented to anyone else before today.

Ms. Van Riper stated that nobody had advance notice except the select committee on Workers' Compensation.

REPRESENTATIVE DRISCOLL asked Mr. Hunter to speak again on the special fund.

Mr. Hunter stated that this funding is associated with Plan numbers 1, 2 and 3 insurers. The fiscal note is $5,000.

REP. DRISCOLL asked if the reason the fiscal note is $5,000 is

because they use computers to save the Plan 2 which costs the state money.

Mr. Hunter stated that the National Rating Association has a list of who is covered and who is not. This list is required by all 55 insurers. This may possibly have an overall savings on Plan 2 insurers; however, it will produce an overall net savings.

REP. WHALEN asked Mr. Hunter to refer to section 7 of the bill. He asked Mr. Hunter if the State Fund is the one that administers treatment of the union employee fund.

Mr. Hunter stated that the Department of Labor is the safety net and they administer it within the Department.

REP. WHALEN asked Mr. Hunter if he has any other rationale for them being treated differently other than the synopsis he presented.

Mr. Hunter stated that the funding is through penalties themselves. When it is depleted, it is gone.

REP. WHALEN asked Mr. Hunter if it would be correct to say that there is a reasonable refusal or delay.

Mr. Hunter stated that yes, that is correct.

REP. WHALEN asked Mr. Hunter what his reaction is to changing the system.

Mr. Hunter stated that the department doesn't have a bone to pick with either of the systems because both of them work well.

REP. SIMON asked Allen Chronister to refer to the amendments. He asked about the definition of compensation and stated that the meaning could be misconstrued.

Allen Chronister stated that any language can be misconstrued by anyone. He stated that he took this language from two other reports. These two other reports have been working well so far. He stated that he has no objection if Rep. Simon has a better change. He referred to 39-71-1004 MCA.

REP. SIMON asked Mr. Hunter what his definition of compensation is.

Mr. Hunter stated that he is not sure, but he agrees with Allen Chronister and what he said.

REP. MILLS told Ms. Van Riper that he enjoyed her scenario because he can relate to it. He asked if she thought this bill could cure the problems for everyone in Montana.

Ms. Van Riper stated that she is not sure if it could cure

everyone's problems; however, with the appropriate language, it could help.

Closing by Sponsor:

The sponsor closed on HB 287.

HEARING ON SB 116

Opening Statement by Sponsor:

SEN. HARP opened on SB 116 by referring to what the bill will do. He referred to page 3, lines 6-10.

SEN. HARP asked permission to be excused by Chairman Nelson. Chairman Nelson granted his request.

Proponents' Testimony:

Tim Dowling, Montana Food Distributors Association, stated that SB 116 is not an earth-shaking bill. He stated that previously outside employees agree with the Montana Minimum Wage Law. He stated that this bill is not intended for route sales such as beer and pop, it just applies to outside sales. **(EXHIBIT #9)**

Roger Tippy turned in written testimony. **(EXHIBIT #10)**

Mike Stump, Montana Food Distribution Association, stated that he would like to be on the record in support of SB 116.

Opponents' Testimony: None

Questions From Committee Members and Responses:

REP. DRISCOLL asked if this bill would exempt these employees from minimum wage and overtime.

Roger Tippy stated that yes, it would exempt them from both.

REP. DRISCOLL asked Roger Tippy if they have both outside salesman and delivery trucks and they don't want to pay these employees even minimum wage.

Mr. Tippy stated that the drivers can deliver more efficiently if they don't have to stop and take orders.

REP. PAVLOVICH asked Mr. Tippy why the effective date is what it is.

Mr. Tippy stated that he can't tell him why.

Closing by Sponsor:

SB 116 was then closed.

EXECUTIVE ACTION ON SB 116

Motion: **REP. WHALEN MOVED SB 116 MOVED SB 116 DO BE CONCURRED IN.**

Discussion:

REP. SIMON stated that he was concerned about the effective date, but he still is in support of SB 116. He moved the amendments.

Motion/Vote: All of the committee members called for the question. The motion to DO BE CONCURRED IN AS AMENDED **CARRIED** unanimously. **REP. BENEDICT** agreed to carry the bill on the House floor.

HEARING ON HB 332

Informational Testimony:

George Wood spoke to the committee at the request of **REP. SQUIRES**. He stated that the information, as discussed by the pros and cons, about continuing with workers compensation only deals with the Vo-Techs. He stated that Vo-Tech students are entirely different than other university students. Vo-Tech students usually have a part-time job. Besides, $60,000 for Workers' Compensation, couldn't buy much insurance.

REP. SQUIRES asked how this bill deals with Plan 2 insurers.

George Wood stated that he feels this is backwards. He said that all employers want to stay out of TORT liability.

REP. DRISCOLL stated that the amount paid in is $5.94 on $80 per month and $4.50 per month premium from each student.

REP. MILLS told George Wood that he is concerned with the part-time employees.

George Wood stated that this is not a worry of part-time employees.

EXECUTIVE ACTION ON HB 296

Motion: REP. DRISCOLL MOVED HB 296 DO PASS WITHOUT THE AMENDMENTS..

Discussion: **REP. DRISCOLL** handed out amendments and referred to

page 3, subsection (6)(c).

REP. MILLS asked what the amendments do?

REP. DRISCOLL stated that it is the specialty contractors that are getting killed. If the construction lasts longer than six months the construction firm must already get Montana benefits. This bill will just make those less than six months get Montana benefits also.

REP. ELLIS MOVED THE AMENDMENTS. The question was called on the amendments. The motion carried unanimously. The amendments were adopted.

REP. FELAND stated that a driller must pay Montana rates, even if that particular company's rates go up to $6 per day.

REP. DRISCOLL stated that this bill excludes oil and timber. He referred back to 1987 and some register that he remembered seeing.

REP. PAVLOVICH stated that he supports the bill because Montana construction firms can't compete.

REP. MILLS stated that he supports the bill.

REP. SIMON asked if this bill applies only to contracts that are signed after the passage of the bill. He was assured that this is the intent of the effective date.

Motion/Vote:

REP. DRISCOLL MOVED HB 296 DO PASS AS AMENDED. The motion **CARRIED** with a vote of 14 to 2.

EXECUTIVE ACTION ON HB 261

Motion: **REP. WHALEN MOVED HB 261 DO PASS.**

Discussion:

REP. MILLS stated that the public fund is all paid by the employer and that it is only public as we spend it. He stated that he does not like to spend for someone who leaves the job.

Motion/Vote: **REP. HANSON MOVED TO TABLE HB 261.** The motion to TABLE **CARRIED** 9 to 7.

ADJOURNMENT

Adjournment: **CHAIRMAN NELSON** adjourned the meeting at 5:45 p.m.

TOM NELSON, Chair

CHERRI SCHMAUS, Secretary

TN/CS

HOUSE OF REPRESENTATIVES

LABOR COMMITTEE

ROLL CALL DATE 2/4/93

NAME	PRESENT	ABSENT	EXCUSED
REP. TOM NELSON, CHAIRMAN	✓		
REP. GARY FELAND, VICE CHAIRMAN	✓		
REP. STEVE BENEDICT	✓		✓
REP. VICKI COCCHIARELLA	✓		
REP. JERRY DRISCOLL	✓		
REP. ALVIN ELLIS	✓		
REP. PAT GALVIN	✓		
REP. SONNY HANSON	✓		
REP. NORM MILLS	✓		
REP. BOB PAVLOVICH	✓		
REP. BRUCE SIMON	✓		
REP. CAROLYN SQUIRES	✓		
REP. BILL TASH	✓		
REP. ROLPH TUNBY	✓		
REP. CARLEY TUSS	✓		
REP. TIM WHALEN	✓		

HOUSE STANDING COMMITTEE REPORT

February 5, 1993

Mr. Speaker: We, the committee on Labor report that Senate Bill 116 (third reading copy -- blue) be concurred in .

Signed: _____

Tom Nelson, Chair

Carried by: Rep. Benedict

Committee Vote:
Yes 4, No 0.

290938SC.Hss

HOUSE STANDING COMMITTEE REPORT

February 5, 1993

Mr. Speaker: We, the committee on Labor report that House Bill 296 (first reading copy -- white) do pass as amended .

Signed: _____
Tom Nelson, Chair

And, that such amendments read:

1. Title, line 8.
Strike: "SECTION"
Insert: "SECTIONS 39-71-118 AND"

2. Page 3, line 3.
Following: line 2
Insert: "Section 2. Section 39-71-118, MCA, is amended to read:

"39-71-118. Employee, worker, ~~workman,~~ and volunteer firefighter defined. (1) The terms "employee"~~, "workman",~~ or "worker" mean:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations while rendering actual service for ~~such~~ the corporations for pay. Casual employees as defined by 39-71-116 are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic service is excluded.

(b) a recipient of general relief who is performing work for a county of this state under the provisions of 53-3-303 through 53-3-305 and any juvenile performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program;

(c) a person receiving on-the-job vocational rehabilitation training or other on-the-job training under a state or federal vocational training program, whether or not under an appointment or contract of hire with an employer as defined in this chapter and whether or not receiving payment from a third party. However,

Committee Vote:
Yes 17, No 2.

290921SC.HSS

TABLED BILL

LABOR
Name of Committee

2/4
Date, 19 93

The following bill HB 261 (WHALEN)
was TABLED, by motion, on 2/4, 19 93.

Cherri Schreiber
For the Committee

RL
For the Chief Clerk

9:15
Time

2/5/93
Date

CS-04
1991

this subsection does not apply to students enrolled in vocational training programs as outlined above while they are on the premises of a public school or community college.

(d) students enrolled and in attendance in programs of vocational-technical education at designated vocational-technical centers;

(e) an airman or other person employed as a volunteer under 67-2-105; OR

(f) a person, other than a juvenile as defined in subsection (1)(b), performing community service for a nonprofit organization or association or for a federal, state, or local government entity under a court order, or an order from a hearings officer as a result of a probation or parole violation, whether or not under appointment or contract of hire with an employer as defined in this chapter and whether or not receiving payment from a third party. For a person covered by the definition in this subsection (f):

(i) compensation benefits must be limited to medical expenses pursuant to 39-71-704 and an impairment award pursuant to 39-71-703 that is based upon the minimum wage established under Title 39, chapter 3, part 4, for a full-time employee at the time of the injury; and

(ii) premiums must be paid by the employer, as defined in 39-71-117(3), and must be based upon the minimum wage established under Title 39, chapter 3, part 4, for the number of hours of community service required under the order from the court or hearings officer.

(2) The term "volunteer firefighter" means a firefighter who is an enrolled and active member of a fire company organized and funded by a county, a rural fire district, or a fire service area.

(3) (a) If the employer is a partnership or sole proprietorship, ~~such~~ the employer may elect to include as an employee within the provisions of this chapter any member of ~~such~~ the partnership or the owner of the sole proprietorship devoting full time to the partnership or proprietorship business.

(b) In the event of ~~such~~ an election, the employer must serve upon the employer's insurer written notice naming the partners or sole proprietor to be covered and stating the level of compensation coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection (3)(d). A partner or sole proprietor is not considered an employee within this chapter until such notice has been given.

(c) A change in elected wages must be in writing and is effective at the start of the next quarter following notification.

(d) All weekly compensation benefits must be based on the amount of elected wages, subject to the minimum and maximum limitations of this subsection. For premium ratemaking and for

the determination of weekly wage for weekly compensation benefits, the electing employer may elect not less than $900 a month and not more than 1 times the average weekly wage as defined in this chapter.

(4) The trustees of a rural fire district, a county governing body providing rural fire protection, or the county commissioners or trustees for a fire service area may elect to include as an employee within the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers' compensation coverage under this section may not receive disability benefits under Title 19, chapter 12.

(5) An employee~~, workman,~~ or worker in this state whose services are furnished by a person, association, contractor, firm, or corporation, other than a temporary service contractor, to an employer as defined in 39-71-117 is presumed to be under the control and employment of the employer. This presumption may be rebutted as provided in 39-71-117(3).

(6) For purposes of this section, an "employee~~, workman,~~ or worker in this state" means:

(a) a resident of Montana who is employed by an employer and whose employment duties are primarily carried out or controlled within this state; ~~or~~

(b) a nonresident of Montana whose principal employment duties are conducted within this state on a regular basis for an employer; or

(c) a nonresident employee of an employer from another state engaged in the construction industry, as defined in 39-71-116, within this state."

NEW SECTION. Section 3. Saving clause. [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act]."

Renumber: subsequent section

HOUSE OF REPRESENTATIVES

LABOR COMMITTEE

ROLL CALL VOTE

DATE 2/4/93 BILL NO. SB 116 NUMBER

MOTION: Do Pass

NAME	AYE	NO
REP. TOM NELSON, CHAIRMAN	✓	
REP. GARY FELAND, VICE CHAIRMAN	✓	
REP. STEVE BENEDICT	✓	
REP. VICKI COCCHIARELLA	✓	
REP. JERRY DRISCOLL	✓	
REP. ALVIN ELLIS	✓	
REP. PAT GALVIN	✓	
REP. SONNY HANSON	✓	
REP. NORM MILLS	✓	
REP. BOB PAVLOVICH	✓	
REP. BRUCE SIMON	✓	
REP. CAROLYN SQUIRES	✓	
REP. BILL TASH	✓	
REP. ROLPH TUNBY	✓	
REP. CARLEY TUSS	✓	
REP. TIM WHALEN	✓	
	✓	
	✓	
	✓	
	✓	

HOUSE OF REPRESENTATIVES

LABOR COMMITTEE

ROLL CALL VOTE

DATE 2/4/93 BILL NO. HB 296 NUMBER

MOTION: Do Pass as Amended

NAME	AYE	NO
REP. TOM NELSON, CHAIRMAN	✓	
REP. GARY FELAND, VICE CHAIRMAN	✓	
REP. STEVE BENEDICT	✓	
REP. VICKI COCCHIARELLA	✓	
REP. JERRY DRISCOLL	✓	
REP. ALVIN ELLIS	✓	
REP. PAT GALVIN	✓	
REP. SONNY HANSON		✓
REP. NORM MILLS		✓
REP. BOB PAVLOVICH	✓	
REP. BRUCE SIMON	✓	
REP. CAROLYN SQUIRES	✓	
REP. BILL TASH	✓	
REP. ROLPH TUNBY	✓	
REP. CARLEY TUSS	✓	
REP. TIM WHALEN	✓	

14 2

HOUSE OF REPRESENTATIVES

LABOR COMMITTEE

ROLL CALL VOTE

DATE 2/4/93 BILL NO. HB261 NUMBER

MOTION: TABLE

NAME	AYE	NO
REP. TOM NELSON, CHAIRMAN		
REP. GARY FELAND, VICE CHAIRMAN		
REP. STEVE BENEDICT		
REP. VICKI COCCHIARELLA		
REP. JERRY DRISCOLL		
REP. ALVIN ELLIS		
REP. PAT GALVIN		
REP. SONNY HANSON		
REP. NORM MILLS		
REP. BOB PAVLOVICH		
REP. BRUCE SIMON		
REP. CAROLYN SQUIRES		
REP. BILL TASH		
REP. ROLPH TUNBY		
REP. CARLEY TUSS		
REP. TIM WHALEN		

EXHIBIT #1
DATE 2/4/93
SB HB 259

Amendments to House Bill No. 259
First Reading Copy

Requested by Representative Schwinden
For the Committee on Labor and Employment Relations

Prepared by Paul Verdon
January 28, 1993

1. Title, line 5.
Strike: "OF A SKI AREA OPERATOR"
Insert: "INJURED WHILE PARTICIPATING IN A RECREATIONAL ACTIVITY"

2. Title, lines 6 through 8.
Following: "COMPENSATION" on line 6
Strike: the remainder of line 6 through "EMPLOYMENT" on line 8

3. Page 3, line 20 through page 4, line 1.
Following: "is" on page 1, line 20
Strike: the remainder of line 20 through "hours" on page 4, line 1
Insert: ":

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment; or

(b) performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities"

EXHIBIT #2
DATE 2/4/93
SB HB 259

HOUSE BILL NO. 259
With Representative Schwinden's Proposed Amendments
Incorporated at Page 3, line 19, through
Page 4, line 1

(2) The terms defined in subsection (1) do not include a person who is ~~employed by a ski area operator, as that term is defined in 23-2-732, to work at the ski area and who:~~

~~(a) is working but not acting in the scope and course of employment; or~~

~~(b) is on the premises at a time other than the person's work hours.~~ :

(a) participating in recreational activity and who at the time is relieved of and is not performing prescribed duties, regardless of whether the person is using, by discount or otherwise, a pass, ticket, permit, device, or other emolument of employment; or

(b) performing voluntary service at a recreational facility and who receives no compensation for those services other than meals, lodging, or the use of the recreational facilities.

EXHIBIT #3

Rm 4
#3
EXHIBIT
DATE 2/14/93
HB 259

THE BIG MOUNTAIN
Ski & Summer Resort
P.O. Box 1400
Whitefish, MT 59937

THE BIG MOUNTAIN
FAX TRANSMITTAL SHEET

SENDING TO: Labor & Employ't Rel. Comm.

ATTENTION: Tom Nelson, Chair

FAX NUMBER: 444-4105

FROM: Michael Collins (FAX# 406/862-1467)

TIME 1:05 DATE: 2/2/93

NUMBER OF PAGES (including cover sheet): 2

If there is a problem with this tranmission, please call (406) 862-3511.

****

MESSAGE:

Please deliver ASAP.

Please insure that all committee members get copies.

Thanks,
M. Collins

Ski Montana

February 2, 1993

Tom Nelson, Chair
The Committee Members
Labor and Employment Relations Committee
Capitol Station
Helena, MT 59620
Fax: 444-4105

Dear Chairman Nelson and Committee Members:

RE: House Bill 259

On behalf of the members of the Montana Ski Areas Association, I would like to express strong support for House Bill 259.

The ski industry is a major contributor to Montana's economy. One limitation that currently has the power to drive Montana ski areas out of business is the loose interpretation of what constitutes a "working injury" or "employee injury" while skiing at a resort. It is critical that we differentiate between employees injured while recreating and those injured in their line of work. Workers' Compensation rates are being driven steadily higher by claims being awarded to employees injured while skiing off-duty, or to volunteers helping out by their own choice.

We are willing to pay for legitimate coverage of working injuries, but we cannot afford to support benefits for those individuals who are injured while skiing when that is not part of their job description or who are injured outside work hours. We cannot control an employee's behavior in a public area (the ski resort) while he or she is not under supervision. It follows that we should not be held responsible for their injuries under these circumstances.

I would like to emphasize how strongly we as an industry feel about this issue.

Sincerely,

Michael Collins
President
Montana Ski Areas Association

"Let's ski them all"

Bear Paw Ski Bowl
(406) 265-8404

Big Sky Montana
(406) 995-4211

Bridger Bowl
(406) 587-2111

Discovery Basin
(406) 563-2184

Great Divide
(406) 449-3746

Lookout Pass
(208) 744-1301

Lost Trail
(406) 821-3211

Marshall Ski Area
(406) 258-6619

Maverick Mountain
(406) 834-3454

Montana Snowbowl
(406) 549-9777

Red Lodge Mountain
(406) 446-2610

Rocky Mountain Hi
(406) 466-2422

Showdown
(406) 236-5522

Sleeping Giant
(307) 587-4044

The Big Mountain
(406) 862-3511

Montana Ski Areas Association
P.O. Box 1128 * Red Lodge, Montana 59068-1128
Tele: (406) 446-2800 * Fax: 446-2513

EXHIBIT #4
DATE 2/4/93
SB HB 287

House Bill 287
Synopsis of Section Content

Section 1: Definitions

Section 2: Separates funds for Subsequent Injury and Uninsured Employers Fund from Workers'Compensation administrative fund, and provides for assessment to all plan 1s and 2s.

Section 3: Allows Uninsured Employers fund to issue subpoenas.

Section 4: Exempts person working for indian employer on indian lands from coverage.

Section 5: Provides for statutory appropriation for Uninsured Employers Fund.

Section 6: Provides that wages paid to spouses of uninsured sole proprietors or partners will not be used in calculation of penalty, and provides that corporate officers can be held liable for amounts owing to the fund if they have not made proper filings to the secretary of state.

Section 7: Limits the uninsured employers fund's liability for attorney fees and awards, since they are not an insurer.

Section 8: Provides for the filing of liens for debts owed to the uninsured employers fund.

Section 9: Clarifies how disfigurement awards are made.

Section 10: Provides that the administrative costs of the subsequent injury fund must be paid out of that fund.

Section 11: Provides for statutory appropriation of subsequent injury funds.

Section 12: Provides that the department may set staggered renewal dates for Plan 1 applications.

Section 13: Requires security deposits placed with the department to be in book entry form.

Section 14: Allows the department to use the National Council of Compensation Insurers to be the department's agent for notice of coverage.

Section 15: Same as above, except for notice of cancellation of coverage.

Section 16: Provides that the department may cash a maturing security and retain the funds until the security is replaced by the insurer. Also provides that the department can transfer the security to the Montana Insurance Guarantee Association in the event of an insolvency.

Section 17: Provides that a self-insurer's assessment is based upon compensation paid during the preceding policy year rather than the preceding 12 months.

Section 18: Clarifies how a lump sum payment for a non-disabling occupational disease may be made, and specifies that mediation procedures shall be used in the event of a dispute.

Section 19: Clarifies that the party requesting an autopsy shall be the party that pays for the autopsy under the occupational disease act.

Section 20: Places the subsequent injury fund and the uninsured employers fund in the list of statutory appropriations.

Section 21: Provides a time limit for benefit appeals regarding the uninsured employers fund.

Section 22: Provides for involvement, along with the state auditor's office, in a new process to set quality standards for workers' compensation claims adjusters.

Section 23: Repealer.

Section 24: Codification instructions.

EXHIBIT #5
DATE 2/4/93
SB HB 287

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME GEORGE BENNETT **BILL NO.** H.B. 287

ADDRESS POBox 1705 HELENA 59624 **DATE** 2/4/93

WHOM DO YOU REPRESENT? MONTANA BANKERS ASSOCIATION

SUPPORT _____ **OPPOSE** _____ **AMEND** X

COMMENTS: Section 8, Pages 15 and following allows the Department to obtain a judgment. Dept. of Revenue and Department of Social and Rehab. Service (SRS) have a procedure for filing a "Warrant of Distraint" to obtain a judgment and lien.

Bill should be amended to adopt same procedure as used by Revenue and SRS.

HR:1991
CS15

Exhibit 5
2-4-93
HB-287

Compiler's Comments

1991 Amendment: In (1), near beginning after "department of revenue", inserted "or of the department of transportation"; and made minor changes in style. Amendment effective July 1, 1991.

15-1-702. Issuance of warrant. (1) If a tax administered and collected by the department is not paid within 30 days of the due date, the department may issue a notice to the taxpayer notifying him that unless payment is received within 30 days of the date of the notice a warrant for distraint may be issued. Thirty days after the date of the notice, the department may issue a warrant if payment is not received.

(2) Use of the procedure to issue a warrant under this section does not preclude use of the procedure under 15-1-703 if the department determines that it is appropriate to utilize 15-1-703.

History: En. Sec. 2, Ch. 439, L. 1981; amd. Sec. 1, Ch. 131, L. 1989.

15-1-703. Emergency issuance of warrant. (1) The department may issue a warrant for distraint without waiting for the expiration of either 30-day period provided for in 15-1-702 if:

(a) the department determines that the collection of the tax is or may be jeopardized because of the delay imposed by the waiting period; or

(b) the tax involved is a tax considered to be held in trust by the taxpayer under state law.

(2) Whenever the provisions of this section are utilized, the department must notify the taxpayer that warrants have been issued.

History: En. Sec. 3, Ch. 439, L. 1981.

15-1-704. Filing with district court. (1) After issuing a warrant, the department may file the warrant with the clerk of a district court. The clerk shall file the warrant in the judgment docket, with the name of the taxpayer listed as the judgment debtor.

(2) A copy of the filed warrant may be sent by the department to the sheriff or agent authorized to collect the tax.

History: En. Sec. 4, Ch. 439, L. 1981.

15-1-705. Review. (1) Except as provided in 15-1-707, a taxpayer has the right to a review of the tax liability pursuant to 15-1-211 prior to execution on a filed warrant for distraint.

(2) The department must provide notice of the right to review to the taxpayer. This notice may be given prior to the notice referred to in 15-1-702. If the taxpayer notified the department that he disagrees with an assessment as provided in 15-1-211, the warrant may not be executed upon until after the review process and any appeals are completed.

History: En. Sec. 5, Ch. 439, L. 1981; amd. Sec. 4, Ch. 811, L. 1991.

Compiler's Comments

1991 Amendment: In (1) substituted "right to a review of the tax liability pursuant to 15-1-211" for "right to request a hearing on the matter of tax liability"; in (2), in first sentence, substituted "review" for "hearing", deleted former second sentence that read: "A request for a hearing must be made in writing within 30 days of the date of the notice", and substituted last sentence relating to requirement that review process and appeals be completed before warrant may be executed for former last sentence that read: "If a written request for a hearing is received, the warrant may not be executed upon until after the date the hearing is held or, if the taxpayer fails to attend a scheduled hearing, the date the hearing is scheduled"; and deleted (3) that read: "(

e hearing is subject to the contested case ovisions of the Montana Administrative Pro- Act. Before a decision may be appealed th district court, an appeal must first be to the state tax appeal board. A request a hearing must be in writing in order to stpone execution on a warrant".

Applicability: Section 31, Ch. 811, L. 1991, provided: "[This act] applies to requests for refunds received by and the notices of additional tax issued by the department of revenue pursuant to [section 1] [15-1-211] after December 31, 1991."

5-1-706. Execution upon warrant. (1) Upon receipt of a copy of the led warrant and notice from the department that the applicable hearing rovisions have been complied with, the sheriff or agent authorized to collect ıe tax shall proceed to execute upon the warrant in the same manner as r cribed for execution upon a judgment.

(2) A notice of levy may be made by means of a certified letter by an agent ıthorized to collect the tax. An agent is not entitled to any fee or compensa- o in excess of actual expenses incurred in enforcing the warrant.

(3) A sheriff or agent shall return a warrant, along with any funds ollected, within 90 days of the date of the warrant.

(4) If the warrant is returned not satisfied in full, the department has the a e remedies to collect the deficiency as are available for any civil judgment.

History: En. Sec. 6, Ch. 439, L. 1981.

ıs-References
Execution of judgment, Title 25, ch. 13.

15-1-707. Emergency execution upon warrant. (1) The department n y execute upon a filed warrant for distraint without providing an opportuni for a hearing prior to execution if the department determines that the ollection of the tax is jeopardized because of the delay imposed by the hearing equirement.

(2) When the provisions of this section are utilized, the department must n ify the taxpayer and inform the taxpayer that he has a right to request a hearing to be held subsequent to execution. A hearing, if desired, must be requested in writing within 30 days of the date of the notice and, if requested, m st be held as soon as possible. The commencement of a proceeding under 15-1-705 does not preclude the use of the provisions of this section if the department determines that such action is appropriate.

History: En. Sec. 7, Ch. 439, L. 1981.

15-1-708. Release of lien. (1) Upon payment in full of the unpaid tax plus penalty, if any, and accumulated interest, the department shall release t e lien acquired by filing the warrant for distraint.

(2) Upon partial payment or whenever the department determines that a release or partial release of the lien will facilitate the collection of the unpaid t x, penalty, and interest, the department may release or may partially release the lien acquired by filing the warrant for distraint. The department may release the lien if it determines that the lien is unenforceable.

History: En. Sec. 8, Ch. 439, L. 1981.

15-1-709. Remedy not exclusive. The use of the warrant for distraint provided for in 15-1-701 through 15-1-708 is not exclusive, and the depart- ent may use any other remedy provided by law for the collection of tax debts.

EXHIBIT # 5
DATE 2/4/93
SB HB 287

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME ROGER TIPPY **BILL NO.** HB 287

ADDRESS 1215 11th Ave, Helena **DATE** 2/4/93

WHOM DO YOU REPRESENT? Mont Independent Bankers

SUPPORT _____ **OPPOSE** _____ **AMEND** X

COMMENTS: & clarify due process

HR:1991
CS15

EXHIBIT ~~EXHIBIT #1~~ #7
DATE ~~2/4/93~~ 2/4/93
HB 287

Speed Messag

To Sherri Schmaus, Secretary
House Labor Committee
By Facsimile: 444-4105

The Meloy Law Firm
P.O. BOX 1241
80 S. WARREN
HELENA, MONTANA 59624
(406) 442-8670

Subject Testimony before House Labor Committee; 2/4/93; HB287

Date Feb 5 1993

Enclosed are some written submissions as requested by Rep. Nelson in the Labor Committee hearing yesterday. They are in connection with my testimony on HB 287.

Signed Janice S. VanRiper

Presented to the House Select Committee on Workers' Compensation by Janice S. VanRiper, January 28, 1993.

TWO MAJOR ISSUES FOR THIS LEGISLATIVE SESSION

I. MISPLACED FOCUS ON COMPENSATION AND MEDICAL BENEFITS TO CLAIMANTS AS THE MAJOR FACTORS DRIVING UP COSTS

In 1987 the legislature did a major revision of workers' compensations laws, including a major reduction in most kinds of compensation benefits. In addition to reducing the amount and duration of benefits going to claimants, the definition of "accident" was drastically narrowed, resulting in the exclusion of many injuries from coverage at all. Again in 1991, the legislature reduced the compensation benefits in a major way. As a result of these changes, it is inconceivable that benefits *actually going directly to injured workers* can be driving up costs. And yet, apparently, that is what some of the figures the legislature has been provided show. (Of course, the actual cost of medical benefits have increased from inflationary pressures -- that doesn't mean that claimants are getting more medical services.)

What appears to be happening is that insurers are chalking up to "benefit costs" many administrative costs incurred by the insurers themselves. I am not in a position to obtain a lot of hard evidence about this, and I understand that some attempts to obtain figures have not been successful. I simply suggest that the task force be aware of these potential pressures on costs, try to obtain more information about them, and hesitate to reduce claimant benefits further until these are well understood. There may be more than this, but these are the kinds of things I've tumbled across in my practice:

> (A) Payments to doctors for "independent medical evaluations" requested rather routinely by insurers. (I became concerned about this due to the fact that in the last year three of my clients were erroneously billed for

Exhibit 7
2-4-93
HB-287

these services. In these three cases the clients told me they were seen by the insurer's doctor for less than 15 minutes. The bills ran: $350.00, $350.00, and $375.00. I understand that the fee schedule for a similar visit to a claimant's doctor is very substantially less (certainly less than $100.00). IME appointments are very common, and occasionally there is more than one request for these on a case.

(B) Medical Panels. Insurance companies are authorized by statute to require claimants to attend medical panel evaluations. There are three in the state (that I know of), so the claimant is required, in most cases to do substantial travel. For a typical back injury case, the panel usually consists of an orthopaedic specialist, a neurologist, a physiatrist, and psychologist or psychiatrist and possibly an internist. They require the claimant to stay in the hospital for a few days, and submit to all tests the doctors might wish to take. I've never seen the entire bill for one of these panels, but one can safely assume that they run several thousands of dollars. These panels are very common, and frequently are used in the same cases in which the insurers already have an IME or two. (Certainly, this is not to say that there are not certain special cases in which a panel evaluation might be appropriate. My contention is that these are grossly over-utilized by insurers, and that they contribute substantially to the medical costs of claims.)

(C) Insurers, at least the State Fund, retain doctors, chiropractors, dentists, nurses, etc., to examine files. Additionally, some of the rehabilitation consultant firms now employ "nurse-consultants" to "medically manage" claims (and these services are purchased by the insurers). It would be interesting to see the costs associated with these, especially in conjunction with those costs previously mentioned.

(D) "Rehabilitation Payments". There is not enough space here to fully discuss the rehabilitation benefit problem. Suffice it to say that there are two kinds of rehabilitation costs:

> (1) Payments made by insurers to private rehab. agencies for services of benefit primarily to insurers; and,
>
> (2) direct rehabilitation benefits paid to claimants in the form of retraining programs and on-the-job training.

It is my suspicion that the former payments outweigh the latter grossly. It seems that this is simply information that should be obtained to see how much of the "rehab" dollar is paid to private rehab firms for what is essentially insurer-related administrative work, versus what actually has gone into real rehabilitation. (This would be especially interesting in light of the 1991 amendments which drastically reduced a claimant's right to partial disability benefits in favor of the right to obtain actual rehabilitation services.)

(E) Fraud investigation. The carriers make what appears to be liberal use of private investigators to investigate claimants, and their tactics include surveillance and videotaping. It would seem to be of interest to find out the price tag associated with this, and the results associated with the price tag. Also, these costs may be being chalked up to "claimant benefits", although I don't know that for sure. Also, rehabilitation agents and in-house field personnel additionally are used for fraud investigation at times. (I mention this primarily because in all the information that I've seen which has been provided by insurers on the subject of "inadequate resources for fraud investigation", these resources have not been mentioned.

Exhibit #7
2-4-93
HB-287

Some proposed legislation requiring insurers to track these costs separately is attached.

II. LACK OF ADEQUATE REMEDIES.

Along with drastically reducing the benefit package to injured workers, the 1987 session all but reduced to naught any meaningful remedies against insurers for delaying or failing to pay benefits adequately and in a timely manner. What I see primarily in my practice now are not claimants who come in needing assistance with settlements, but rather those whose benefits have never been initiated, whose unpaid medical bills (clearly payable by the insurer) have been turned over for collection against them, who are being denied reasonable medical treatment, whose compensation rates have been calculated wrongly, etc. Insurers simply no longer have legal incentives to follow the law. Below is an example of what a claimant might encounter (and I ensure you it is not a rare situation). I've not yet drafted any proposed language to change this, but will shortly.

Example: Claimant comes to see lawyer 8 months after injury. Claimant was injured June 6, 1991, and filed a claim for benefits 6 weeks later. Claimant worked for three weeks after the accident, then could not continue due to the accident. In addition to losing the hourly pay associated with his job, claimant looses annual bonuses, commissions, and health insurance. Claimant reveals that the insurer did not commence payments until 3 months after claim filed, so claimant has had to sell some assets to survive financially. Additionally, two accident-related doctor bills have been turned over for collection because insurer has not paid. Claimant's doctor has recommended additional physical therapy, which insurer won't authorize, so his medical condition is deteriorating. Claimant wonders why his compensation rate is so low, and it is discovered that the insurer did not include in the wage basis the bonuses and commissions he received, although it is required by law. WHAT TO DO?

First, the lawyer calls the insurer and gets no response. The lawyer then makes a written demand to the insurer, and waits the required 15 working days for a response (as required by law). The lawyer then files a request for mediation, and waits for the mediator to send a notice to the insurer, and then waits another 10 days while the insurer responds to the notice (or doesn't respond, which is usually the case). Then a mediation conference is set for sometime in the future. The claimant must personally appear at this mediation conference, but the insurer doesn't have to. Claimant then waits another 10 days for the mediator to issue a RECOMMENDATION. (The mediator has no authority to order anything. Then the claimant must wait another 45 working days while the insurer has an opportunity to decide whether it will go along with the mediator's recommendation. Only then, after this incredible process, may the claimant file a petition in court, and at that time has the first opportunity to present his case before someone who has any authority. A trial will generally be held in about two months, but then there is the wait for the court decision.

Rarely do these issues make it all the way through to the court. Generally, *sometime* prior to that stage the insurer will raise the comp. rate, pay the bills, authorize the medical treatment, etc.. So after all the waiting and pleading and worry and delayed treatment, the benefits are finally forthcoming. But the insurer now has to pay no attorney fees and costs for the claimant. So the insurer gets away with delaying all of these benefits (and in most unrepresented cases, probably gets away without paying them at all) at no cost to the insurer!

This is essentially a description of how the current legal "remedies" created by this legislature operate in practice.

(With this scenario in mind, is it any wonder why many injured workers cannot find legal representation?)

Exhibit #7
2-4-93
HB-287

ATTACHMENT A

1/28/93 by Jan VanRiper
Proposed Legislation re: tracking certain State Fund costs

NEW SECTION: The state fund shall account for different kinds of claims and administrative expenses in separate class codes. Payments made to claimants and their designated health care providers must be accounted for separately from payments to providers hired by the state fund.

The state fund shall specifically account for the following costs separately:

(a) payments to health care providers for independent medical evaluations or other services provided at the request of the state fund;

(b) payments to medical panels;

(c) payments to rehabilitation providers for services performed at the request of the state fund;

(d) payments made for retraining or on-the-job training programs;

(e) payments made to in-house or contracted legal counsel; and

(f) payments made in connection with fraud investigation.

Amendments to House Bill No. 287
First Reading Copy

Requested by Rep. Cocchiarella
For the Committee on Labor and Employment Relations

Prepared by Susan B. Fox
February 1, 1993

1. Title, page 1, lines 19 through 21.
Following: ";" on page 19
Strike: remainder of line 19 through ";" on line 21

2. Title, page 2, lines 13 and 14.
Strike: "AND" on line 13 through "CERTIFICATION" on line 14

3. Title, page 2, line 14.
Following: ";"
Insert: "PROVIDING FOR SPECIFIC CLAIMS EXPENDITURES CODES;"

4. Title, line 16.
Strike: "39-71-505,"

5. Page 19, lines 12 through 23.
Strike: section 7 in its entirety
Renumber: subsequent sections

6. Page 35, line 17 through page 36, line 5.
Strike: "(1)" on page 35, line 17 through the remainder of section 22
Insert: "Each insurer is required to designate at least one adjuster who shall maintain an office in Montana, shall pay compensation when due, and has authority to adjust and settle claims."

7. Page 36, line 6.
Following: line 5
Insert: " NEW SECTION. Section 22. Specific claims expenditures codes. The state fund shall account for different kinds of claims and administrative expenses in separate class codes. Payments made to claimants and their designated health care providers must be accounted for separately from payments to providers hired by the state fund. The state fund shall specifically account for the following costs separately:

(1) payments to health care providers for independent medical evaluations or other services provided at the request of the state fund;

(2) payments to medical panels;

(3) payments to rehabilitation providers for services performed at the request of the state fund;

(4) payments made for retraining or on-the-job training programs;

(5) payments made in-house or for contracted legal counsel; and

(6) payments made in connection with fraud investigation."

Exhibit #7
2-4-93
HB-287

Renumber: subsequent sections

8. Page 36, line 9.
Page 36, line 11.
Following: "Sections"
Strike: "21 and"
Insert: "20 through"

EXHIBIT # 8

HB 28

EXHIBIT
DATE 2/4/93
HB 287

THE MELOY LAW FIRM

Peter Michael Meloy
Janice S. VanRiper

P.O. Box 1241
80 South Warren
Helena, Montana 59624

Telephone:
(406) 442-8670
Facsimile:
(406) 442-4953

TO: House Labor and Employment Relations Committee

FROM: Jan VanRiper

RE: Proposed amendments to HB287, providing additional remedies against insurers that do not provide workers' compensation benefits in a timely fashion

DATE: 2/8/93

At the hearing on Feb. 4, 1993 I testified in support of Rep. Cocciarella's proposal to amend HB287 to include better remedies against insurers for failing to adequately and timely provide injured workers with benefits as provided by law. An example of the kinds of inadequate remedies we have now was given. Under separate cover, I supplied the Committee Secretary with a written version of that example. Several Committee members requested that I provide more specific suggested amendments with respect to providing better remedies.

What follows are those suggestions, albeit in outline form. Since several sections of the existing Workers' Compensation Act would be affected, I thought it best to leave the actual drafting of language up to the professional Legislative Council drafters. A copy of this is being provided to the Department of Labor and Industry for their consideration. Copies will also be provided to members of the House Select Committee on Workers' Compensation.

The amendments suggested are primarily in these areas:

(1) Expediting the mediations procedures somewhat, and allowing for further expediting in cases of emergency;

(2) Imposing on insurers the obligation to speedily obtain the information they need to pay medical claims, to authorize medical treatment and changes in claimant's physicians, and to make the payments and determinations in an expeditious manner; imposing penalties on insurers for failing to comply;

(3) Giving authority to the Department of Labor and Industry, the mediators and the Court to assess penalties and attorney fees against insurers where insurers have failed to provided benefits, but a claimant or his/her attorney has persuaded them to provide benefits short of actually going to court. This would get at the problem now in which insurers can "hold out" until the last minute, forcing claimants through all kinds of lengthy hoops, only to "cave in" before a court proceeding, incurring no penalty whatsoever; and,

(4) Requiring the Department to provide for ways of informing claimants of their basic rights and responsibilities under the Workers' Compensation and Occupational Disease Acts.

In addition, the Committee may wish to consider creating a "workers' compensation ombudsman". This person would be a highly knowledgeable person, located in the Department of Labor and Industry, whose function would be to answer calls from workers with questions about their claims, and with authority to pass complaints on to the appropriate insurer and to attempt to assist with solutions. The much-touted Oregon workers' compensation system has this feature. It would seem to provide a much needed service for claimants, and perhaps a feature which might alleviate the necessity for legal involvement in many claims. A copy of Oregon's law in this regard is provided.

It is also suggested that any fees, fines or penalties provided under these amendments be accounted for separately by insurers for the legislature's future information.

EXHIBIT 8
2-4-93
HB-287

HB287
PROPOSED AMENDMENTS RELATING TO REMEDIES

I. EXPEDITING MEDIATION PROCEDURES.

A. Amend waiting requirements as follows:

- reduce time in which an insurer must respond to a written demand for benefits from 15 to 7 working days;

- reduce time an insurer has to respond to a written mediator's recommendation from 45 days to 7 working days.

B. Require the Department to reduce the time frames even further in emergencies.

II. IMPOSING UPON INSURERS AND PROVIDERS DUTIES WITH RESPECT TO PAYMENT OF MEDICAL BILLS AND AUTHORIZING TREATMENT; PROVIDING PENALTIES FOR NONCOMPLIANCE.

A. Require medical service providers to bill an insurance carrier first, in workers' compensation cases; to provide proper billing information and supporting information to allow an insurer to determine their liability for the medical claim (Department should further delineate what supporting documentation is required through rule); disallowing providers from billing a claimant until such information is supplied to an insurer and the insurer accepts or denies the claim;

B. Requiring an insurer, upon receipt of a medical bill, to immediately request, in writing and within 7 working days, any additional information needed to determine compensability of the claim; preventing an insurer from

billing a claimant pending the provision of the requested information;

C. Requiring an insurer to pay within 30 days after receipt of necessary information:

D. Providing that a medical service provider may not bill a claimant directly unless it is in receipt of a written denial from an insurer.

E. Requiring the insurer to send to a claimant copies of any requests for further information or denials under this section;

F. Preventing collection agencies in Montana from pursuing collection procedures against claimants without a written denial of compensability from an insurer;

G. Providing fines against insurers whose actions have caused unwarranted collection agency efforts against claimants;

H. Providing penalties against insurers for failure to pay according to these provisions, (Suggested fines: 1% per week of total bill to providers; 15% or more of bill to claimant where insurer's actions have caused them inability to obtain further medical services or to have been turned in to collection agencies);

I. Requiring insurers to inform claimants in writing within 7 working days of receipt of billing information (in cases of denial or delay), stating their reasons for any denial or delay.

J. Giving the Department authority to enforce these provisions by providing for speedy procedures for providers and claimants to contest nonpayment and non-authorizations, and for provisions of penalties; allowing

for even more expedited procedures in cases of emergencies.

III. GIVING AUTHORITY TO THE DEPARTMENT OF LABOR AND INDUSTRY, MEDIATORS, AND THE COURT, TO ASSESS PENALTIES AND ATTORNEY FEES AGAINST INSURERS WHERE INSURERS HAVE FAILED TO PROVIDE BENEFITS, BUT A CLAIMANT OR THE CLAIMANT'S ATTORNEY HAS PERSUADED THE INSURER TO PROVIDE BENEFITS SHORT OF AN ADMINISTRATIVE OR COURT DETERMINATION.

A. In cases where an insurer fails to pay compensation or other benefits (including the authorization of medical treatment and changes in physicians) when due, or denies the compensability of a claim, and the insurer pays or accepts liability or authorizes treatment or a change in physician due to the efforts of a claimant or the claimant's attorney, the insurer shall pay a reasonable attorney fee and costs, or, in the case of an unrepresented claimant, a reasonable reimbursement for the claimant's effort and for any costs incurred by the claimant.

B. Providing for penalties in the amount of 20% of any benefits, acceptances of liability or authorization of treatment in cases where the insurer's denial, delay or failure to authorize has been unreasonable.

C. Providing that the insurer's failure to comply with 39-71-2401(4)(b), or these new sections regarding payment of medical bills is prima facia evidence that an insurer's actions have been unreasonable.

D. Granting the Department authority to award fees, costs and penalties pursuant to this section. (Appropriate provisions of the statutes regarding the workers' compensation court would also have to be amended to be consistent with these provisions.)

IV. REQUIRE THE DEPARTMENT TO PROVIDE FOR METHODS OF INFORMING CLAIMANTS OF THEIR RIGHTS AND RESPONSIBILITIES UNDER THE WORKERS' COMPENSATION AND OCCUPATIONAL DISEASE ACTS.

A. Granting the Department the authority and responsibility to insure that claimants and potential claimants have access to and receive information about their rights and responsibilities under the W.C. and O.D. Acts by:

- Developing and revising forms for use by insurers, providers and claimants;

- Requiring insurers and employers to provide certain information to injured workers and claimants;

B. Failure by an insurer to comply with Departmental rules adopted pursuant to this section shall be punishable, at the Department's discretion, by a fine not less than $100 nor more than $1000 per occurrence.

C. The Department shall adopt rules pursuant to subsection (A), and to provide for procedures for imposing fines pursuant to subsection (B).

OREGON WORKERS' COMPENSATION STATUTES

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c.839 §16; 1981 c.874 §11; 1985 c.770 §8; 1987 c.373 §38a; 1990 c.2 §37]

656.708 Hearings Division; duties. The Hearings Division is continued within the board. The division has the responsibility for providing an impartial forum for deciding all cases, disputes and controversies arising under ORS 654.001 to 654.295 and 654.750 to 654.780, all cases, disputes and controversies regarding matters concerning a claim under this chapter, and for conducting such other hearings and proceedings as may be prescribed by law. [1977 c.804 §25; 1979 c.839 §17; 1987 c.373 §39]

656.709 Ombudsman for injured workers; ombudsman for small business; duties. (1) The office of ombudsman for injured workers is created in the department. The ombudsman shall report directly to the director. The ombudsman shall act as an advocate for injured workers by accepting complaints concerning matters related to workers' compensation, investigating them and attempting to resolve them. The ombudsman shall also provide information to injured workers to enable them to protect their rights in the workers' compensation system.

(2) The office of ombudsman for small business is created in the department. The ombudsman shall report directly to the director. The ombudsman shall provide information and assistance to small businesses with regard to workers' compensation insurance and claims processing matters. [1987 c.884 §60b; 1990 c.2 §38]

656.710. [1977 c.699 §2; 1979 c.839 §18; repealed by 1981 c.535 §26]

656.712 Workers' Compensation Board; members; qualifications; confirmation; term; vacancies. (1) The Workers' Compensation Board, composed of three members appointed by the Governor, is created within the department. Not more than two members shall belong to one political party and inasmuch as the duties to be performed by the members vitally concern the employers, the employees, as well as the whole people, of the state, persons shall be appointed as members who fairly represent the interests of all concerned.

(2) A member of the board shall be appointed for a term of four years on the first Monday in December of each year next preceding the expiration of the term of a member. Each member shall hold office until a

Article III of the Oregon Constitution. [Formerly 656.402; 1973 c.792 §28; 1977 c.109 §3; 1977 c.804 §26; 1981 c.535 §43; 1987 c.373 §40]

Note: Sections 2 to 4, chapter 954, Oregon Laws 1991, provide:

Sec. 2. Notwithstanding ORS 656.712:

(1) The Governor shall appoint, not later than August 1, 1991, two individuals who are well qualified by training and experience to serve, for the biennium beginning July 1, 1991, as members of the Workers' Compensation Board.

(2) Appointments pursuant to this section shall be made so that of the members so appointed, together with members appointed pursuant to ORS 656.712, two members shall represent the interests of employees, two members shall represent the interests of employers and one member shall not represent the interests of either employees or employers.

(3) Individuals appointed pursuant to this section are subject to ORS 656.716.

(4) The term of office of each individual appointed pursuant to this section, unless sooner terminated pursuant to ORS 656.714, shall cease June 30, 1993.

(5) Individuals appointed pursuant to this section are subject to confirmation by the Senate pursuant to ORS 171.562 and 171.565.

(6) Notwithstanding ORS 236.145, if an individual appointed pursuant to this section is a referee, that individual shall be entitled to return to employment as a referee with accumulated seniority when the term of service as a board member ends.

(7) Individuals appointed as board members pursuant to this section have all the duties, functions and powers of board members appointed pursuant to ORS 656.712.

(8) Any vacancy in an appointment made pursuant to this section shall be filled by appointment by the Governor. [1991 c.954 §2]

Sec. 3. Notwithstanding ORS 656.718, in exercise of authority to decide individual cases, members of the Workers' Compensation Board appointed pursuant to ORS 656.712 and sections 2 and 4 of this 1991 Act may sit together or in panels. A decision of a panel shall be by a majority of the panel. When sitting en banc, the concurrence of a majority of the members participating is necessary to render a decision. No board member appointed pursuant to section 2 or 4 of this 1991 Act shall review any case in which the member acted as a referee in the case. [1991 c.954 §3]

Sec. 4. (1) Notwithstanding ORS 656.712, the Workers' Compensation Board, by unanimous consent, may appoint up to two individuals who are well qualified by training and experience to serve temporarily as members of the board to assist in the performance of board duties, functions and powers.

(2) Individuals appointed pursuant to this section are subject to ORS 656.716, but are not subject to ORS 656.712.

(3) Unless appointed for a shorter term, the term of office of each individual appointed pursuant to this section shall not exceed 180 days from the date of appointment.

(4) Notwithstanding ORS 236.145, if an individual appointed pursuant to this section is a referee, that in-

(a) The adoption of the admi board; and

(b) The administration of Hearings Division, including but nel matters. [1991 c.954 §4]

656.714 Removal of b The Governor may at any member of the board for i of duty or malfeasance in removal the Governor shal a copy of the charges ag and shall fix the time whe be heard in defense, whic than 10 days thereafter. be open to the public.

(2) If the member is r nor shall file in the offic of State a complete staten made against such membe thereon, with a record of

(3) The power of remo there is no right of re whatsoever. [Formerly 656.40

656.716 Board memb in political or business bond required. (1) No m shall hold any other of profit or pursue any othe tion or serve on or unde any political party, but s tire time to the duties member.

(2) Before entering o fice, each member shall to an oath or affirmation

(a) That the membe Constitutions of the U this state and faithfully charge the duties of the

(b) That the member or position of profit.

(c) That the membe pursue while such mem or vocation.

(d) That the memb such member will hold any political party.

(3) The oath or affir in the office of the Secr

(4) Each of the me shall also, before enteri office, execute a bond of Oregon, in the penal sureties to be approve

MONTANA FOOD DISTRIBUTORS ASSOCIATION

2700 Airport Way • P.O. Box 5775 • Helena, Montana 59604 • (406) 449-6394 • 1-800-735-1082

EXHIBIT #9
DATE 2/4/93
SB 116

Senate Bill #116
Introduced by Senator Harp
Sponsored by Montana Food Distributors Association

BACKGROUND INFORMATION:

Montana businesses are subject to either the Montana Wage and Hour law (Title 39-3-100 dt. seq. MCA) or to the requirements of the federal Fair Labor Standards Act or both. Although the two laws have many similar provisions, they differ with regard to who is exempt from the minimum wage and overtime provisions of each law.

One such area of disagreement exists with regard to outside sales employees. The federal FLSA exempts <u>all</u> outside sales employees (see attached). State law on the other hand does not provide for such a blanket exemption. The determination of which law a particular employer must follow requires understanding of the complex differences between federal and state coverage and must be made on a job by job basis. This results in confusion and inadvertant violations.

This bill would add a new exculsion from the minimum wage and overtime requirements of state law for outside sales employees who are employed by firms in the food distribution industry. Several types of employers such as radio and television stations and office machine dealers have been exempted from the state law.

The intent of this bill is to apply the exemption only to those sales persons who work for food brokers, food wholesalers or food associations selling products and services to retail stores. It would not affect in-store sales persons or employees at the retail level. Employees of organizations like COSTCO and other "wholesale" organizations would not be exempted because they are not "outside sales". Nor is it the intent of this bill to exempt route drivers such as those delivering beer and pop to retail establishments. As a matter of fact those employees covered under this bill rarely carry product with them other than samples of new products being introduced into the food distribution system.

For enforcement purposes, the terms used in this bill should be interpreted the same as the federal FLSA. Using the federal definitions is consistent with the method used in interpreting the other federal exemptions that are also recognizes in Montana law. See subsection (j) of 39-3-406 (1).

FISCAL IMPACT:
Passage of this bill should result in a reduction of cost to the Department of Labor and Industry due to diminished compliance responsibilities.

Section 39-3-406(1), MCA, is amended by the addition of a new subsection (m) which provides:

> (v) An outside salesman or marketing representative paid on a commission, contract, or salary basis who is primarily employed selling or marketing products or services within the food distribution industry for a food broker, wholesaler, or association.

Statement of Intent:

This bill would amend the Montana minimum wage and overtime compensation law to provide an exemption from the minimum wage and overtime requirements for an outside salesman or marketing representative in the food distribution industry. The federal law (Fair Labor Standards Act) provides for such an exemption.

Definitions:
"Outside salesman" is an employee:

> 1. who customarily and regularly works away from his employers place of business while making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> 2. whose hours spent engaged in work of any other nature do not exceed 20 percent of the hours worked in the workweek by the employer's nonexempt employees.

well-being of workers against the unfair competition of wage and hour standards which do not provide such adequate standards of living; and

(3) sustain purchasing power and increase employment opportunities.

History: En. Sec. 1, Ch. 417, L. 1971; R.C.M. 1947, 41-2301.

39-3-402. Definitions. As used in this part, the following definitions apply:

(1) "Commissioner" means the commissioner of labor and industry.

(2) "Employ" means to suffer or permit to work.

(3) "Employee" means an individual employed by an employer.

(4) "Farm or ranch" means any endeavor primarily engaged in cultivating the soil or in connection with raising or harvesting any agricultural or horticultural commodity, including the raising, shearing, feeding, caring for, training, and management of livestock, bees, and poultry and fur-bearing animals and wildlife.

(5) "Farm worker" means a person employed to do any service performed on a farm or ranch.

(6) "Occupation" means any occupation, service, trade, business, industry, or branch or group of industries or employment or class of employment in which employees are gainfully employed.

(7) "Wage" means compensation due to an employee by reason of his employment, payable in legal tender of the United States or check on banks convertible into cash on demand at full face value, subject to an allowance as may be permitted by regulations of the commissioner under 39-3-403. The term "wage" includes the reasonable cost to the employer of furnishing the employee with lodging or other facility if the lodging or other facility is customarily furnished by the employer to his employees; however, the inclusion may not exceed an amount equal to 40% of the total wage paid by the employer to the employee. The term "wage" does not include the cost to the employer of providing meals or a meal allowance to the employee or the value of any tips received by an employee as a gratuity for service.

History: En. Sec. 2, Ch. 417, L. 1971; R.C.M. 1947, 41-2302; amd. Sec. 1, Ch. 446, L. 1987; amd. Sec. 1, Ch. 216, L. 1991.

Compiler's Comments

1991 Amendment: In (7), in last sentence after "include", inserted "the cost to the employer of providing meals or a meal allowance to the employee or"; and made minor changes in style. Amendment effective March 29, 1991.

39-3-403. Regulations. The commissioner shall make and revise administrative regulations to carry out the purposes of this part. Such regulations shall take effect upon publication by the commissioner. Any person who is aggrieved by an administrative regulation may obtain a hearing before the commissioner upon filing written protest with the commissioner, who shall thereupon set such matter for hearing in the county of residence of such protestant within 30 days after receipt of such protest. After such hearing, the commissioner shall promulgate such further administrative regulations as the evidence produced at said hearing shall justify.

History: En. Sec. 4, Ch. 417, L. 1971; R.C.M. 1947, 41-2305.

Cross-References

Adoption and publication of rules, Title 2, ch. 4, part 3.

"Commissioner" defined, 39-3-402.

39-3-404. Minimum wage. (1) Except as otherwise provided in this part and except for farm workers as provided in subsection (2), every employer shall pay to each of his employees a wage of not less than the applicable minimum wage as determined by the commissioner in accordance with 39-3-409.

(2) In the case of a farm worker employed for a part of a calendar year which includes periods requiring working hours in excess of 8 hours per day and other seasonal periods requiring working hours substantially less than 8 hours per day, the employer may pay the worker at a fixed rate of compensation during the term of employment. The employer may elect to:

(a) keep a record of the total number of hours worked by the worker during the part of the year during which the worker was employed by him (the total wages paid by such employer to such employee for that part of the year during which said employee was employed by him shall not be less than the applicable minimum wage rate multiplied by the total number of hours so worked); or

(b) in lieu of the minimum wage set forth herein, pay the farm worker a wage as herein defined on a monthly basis. This monthly compensation shall constitute a minimum wage and shall not be less than $635 a month beginning January 1, 1990.

History: En. Sec. 3, Ch. 417, L. 1971; amd. Sec. 1, Ch. 383, L. 1973; amd. Sec. 1, Ch. 421, L. 1975; R.C.M. 1947, 41-2303(a), (c); amd. Sec. 1, Ch. 410, L. 1981; amd. Sec. 1, Ch. 360, L. 1985; amd. Sec. 1, Ch. 674, L. 1989.

Cross-References

Eight-hour maximum workday, Art. XII, sec. 2, Mont. Const.

Standard prevailing wages in public works, Title 18, ch. 2, part 4.

"Employee" defined, 39-3-402.

"Farm worker" defined, 39-3-402.

"Wage" defined, 39-3-402.

39-3-405. Overtime compensation. (1) No employer shall employ any of his employees for a workweek longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which he is employed.

(2) No overtime provision shall apply for farm workers.

(3) Employers of students at an amusement or recreational area that operates on a seasonal basis who furnish said students with board, lodging, or other facilities shall not employ said students for a workweek longer than 48 hours, unless such students receive compensation for their employment in excess of 48 hours in a workweek at a rate of not less than 1 1/2 times the hourly wage rate at which they are employed.

History: En. Sec. 3, Ch. 417, L. 1971; amd. Sec. 1, Ch. 383, L. 1973; amd. Sec. 1, Ch. 421, L. 1975; R.C.M. 1947, 41-2303(b).

Cross-References Public

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39-3-406. Exclusions. (1) The provisions of 39-3-404 and 39-3-405 do not apply with respect to:

(a) students participating in a distributive education program established under the auspices of an accredited educational agency;

(b) persons employed in private homes whose duties consist of menial chores such as babysitting, mowing lawns, cleaning sidewalks;

(c) persons employed directly by the head of a household to care for children dependent upon the head of the household;

(d) immediate members of the family of an employer or persons dependent upon an employer for half or more of their support in the customary sense of being a dependent;

(e) any persons not regular employees thereof who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;

(f) handicapped workers engaged in work which is incidental to training or evaluation programs or whose earning capacity is so severely impaired that they are unable to engage in competitive employment;

(g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed 30 days of their employment;

(h) learners under the age of 18 who are employed as farm workers, provided that such exclusion shall not exceed a period of 180 days from their initial date of employment and further provided that during this exclusion period wages paid such learners may not be less than 50% of the minimum wage rate established in this part;

(i) retired or semiretired persons performing part-time incidental work as a condition of their residence on a farm or ranch;

(j) any individual employed in a bona fide executive, administrative, or professional capacity as these terms are defined and delimited by regulations of the commissioner;

(k) any individual employed by the United States of America;

(l) resident managers employed in lodging establishments or personal care facilities who, under the terms of their employment, live in the establishment or facility.

(2) The provisions of 39-3-405 do not apply to:

(a) an employee with respect to whom the United States Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of 49 U.S.C. 304;

(b) an employee of an employer subject to the provisions of part I of the Interstate Commerce Act;

(c) an individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state;

(d) an outside salesman paid on a commission or contract basis who is primarily employed in selling advertising for a newspaper;

(e) a salesman, partsman, or mechanic paid on a commission or contract basis and primarily engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers;

(f) a salesman primarily engaged in selling trailers, boats, or aircraft if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers;

(g) an outside salesman paid on a commission or contract basis who is primarily employed in selling office supplies, computers, or other office equipment for an office equipment dealer;

(h) a salesman paid on a commission or contract basis who is primarily engaged in selling advertising for a radio or television station employer;

(i) an employee employed as a driver or driver's helper making local deliveries who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the commissioner finds that such plan has the general purpose and effect of reducing hours worked by such employees to or below the maximum workweek applicable to them under 39-3-405;

(j) an employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways not owned or operated for profit and not operated on a sharecrop basis and which are used exclusively for supply and storing of water for agricultural purposes;

(k) an employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own account or in conjunction with other farmers, if such employee is:

(i) primarily employed during his workweek in agriculture by such farmer; and

(ii) paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by 39-3-404;

(l) an employee of an establishment commonly recognized as a country elevator, including an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed by the establishment;

(m) a driver employed by an employer engaged in the business of operating taxicabs;

(n) an employee who is employed with his spouse by a nonprofit educational institution to serve as the parents of children who are orphans or one of whose natural parents is deceased or who are enrolled in such institution and reside in residential facilities of the institution so long as the children are in residence at the institution and so long as such employee and his spouse reside in such facilities and receive, without cost, board and lodging from the institution and are together compensated, on a cash basis, at an annual rate of not less than $10,000;

(o) an employee employed in planting or tending trees; cruising, surveying, or felling timber; or transporting logs or other forestry products to a mill, processing plant, railroad, or other transportation terminal if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight;

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which are not an essential part of and necessarily incident to exempt professional work.[48]

observation: There are no percentage limits on nonexempt work for employees that meet the short test other than those implied in the primary duty rule (¶ C-11,107).

illustration: This test of whether routine work is exempt work is different for professionals than it is for executives and administrators. Routine work for the latter employee groups is exempt if it is directly and closely related to the performance of exempt executive or administrative duties (¶s C-11,124, 11,137), while routine work for professionals is not exempt unless it is an essential part of and necessarily incident to exempt professional work.[49]

Who Is an Outside Salesman

¶ C-11,147. List of criteria.

An "outside salesman" is an employee:

(1) who customarily and regularly works away from his employer's place of business while making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer;[50] and

(2) whose hours spent engaged in work of any other nature do not exceed 20 percent of the hours worked in the workweek by the employer's nonexempt employees.[51]

Among the indicia of an employee's bona fide status as an outside salesman are:

(1) significant compensation on a commission basis;[52]

(2) special sales training;[53]

(3) little or no direct or constant supervision in carrying out daily tasks;[54] and

(4) a contractual designation of job title that reflects sales involvement.[55]

observation: Although a term indicating male gender (salesman) is used in this exemption, the exemption can apply to either male or female workers.

¶ C-11,148. Work away from employer's place of business.

For an "outside salesman" to meet the requirement that he work away from his employer's place or places of businesses (¶ C-11,147), he cannot engage in inside sales or other inside work unless it is in direct conjunction with and incidental to his outside sales and solicitations activities.[56] Any fixed site used as headquarters or for solicitation of sales by telephone is considered the employer's place of business, even though the employer in no formal sense owns the property; the employee's home or office used in this manner is also considered the employer's place of business. On the other hand, hotel rooms used by the employee as he travels to display samples and sell merchandise are not considered employer places of business.[57]

¶ C-11,149. Making sales or obtaining orders or contracts.

With respect to the requirement that an

48. 29 CFR §§ 541.3(d), 541.307, 541.309.

49. 29 CFR § 541.307(b).

50. 29 CFR §§ 541.5(a), 541.500.
Brennan v Modern Chevrolet Co. (1973, ND Tex) 363 F Supp 327, affd without op (CA5) 491 F2d 1271; Reynolds v Salt River Valley Water Users Asso. (1944, CA9) 143 F2d 863, 8 CCH LC ¶ 62262, cert den 323 US 764, 89 L Ed 611, 65 S Ct 117.

51. 29 CFR §§ 541.5(b), 541.500.
Fifth Circuit—Wirtz v Dr Pepper Co. (1966, ND Tex) 53 CCH LC ¶ 31797;
Sixth Circuit—Wirtz v Atlantic Life Ins. Co. (1963, CA6) 311 F2d 646, 46 CCH LC ¶ 31369;
Eighth Circuit—Young v Caldarera (1954, ED Ark) 26 CCH LC ¶ 68607;
Ninth Circuit—Reynolds v Salt River Valley Water Users Asso. (1944, CA9) 143 F2d 863, 8 CCH LC ¶ 62262, cert den 323 US 764, 89 L Ed 611, 65 S Ct 117.
Who is employed in "capacity of outside salesman" within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.

52. Hodgson v Krispy Kreme Doughnut Co. (1972, MD NC) 346 F Supp 1102.

53. Bradford v Gaylord Products, Inc. (1948, DC Ill) 77 F Supp 1002.

54. Hodgson v Krispy Kreme Doughnut Co. (1972, MD NC) 346 F Supp 1102.

55. Jewel Tea Co. v Williams (1941, CA10) 118 F2d 202, 3 CCH LC ¶ 60322.

56. 29 CFR § 541.502(a).
Who is employed in "capacity of outside salesman" within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.

57. 29 CFR § 541.502(b).

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employee be engaged in making sales or obtaining orders or contracts for services or for the use of facilities (¶ C-11,147), the word "sale" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition[58] of title to tangible property, or of tangible and valuable evidences of intangible property.[59]

"Obtaining orders or contracts for the use of facilities" includes the sale of radio time, the solicitation of advertising for periodicals, and the solicitation of freight for transportation agencies.[60]

Obtaining orders or contracts for services" applies only to services not performed by the employee himself.[61] Therefore, persons who make repairs or provide other services are not outside salesmen even though they may sell the services which they themselves perform.[62]

¶ C-11,150. Percentage limits on nonexempt work.

There is a limit on the amount of time that an "outside salesman" may devote to nonexempt activities (¶ C-11,147), which includes all nonoutside sales work and all other work not performed in conjunction with or incidental to outside sales (¶ C-11,151).[63] Since the limit is 20% and the base to be taken is 40 hours a week, the amount of nonexempt work allowed is eight hours a week, unless there are nonexempt employees of the same employer who perform the kind of nonexempt work performed by the outside salesman; in the latter case, the 20% limitation is computed on the basis of the hours worked in a week by those nonexempt employees.[64]

Whether an employee is required by his employer to do nonexempt work is not material in determining whether the work is nonexempt.[65]

¶ C-11,151. Work incident to outside sales work.

Work that is incidental to and performed in conjunction with outside sales includes deliveries and collections[66] and all other work that furthers the employee's own sales, such as writing sales reports, revising merchandise catalogs, planning itineraries and attending sales conferences.[67]

Nonexempt work is work which is not sales work and is neither incidental to nor performed in conjunction with outside sales activities. Activities which are nonexempt include: inside sales and all work incidental thereto, outside nonsales work like meter-reading and clerical warehouse work, and the training of other salesmen, except when trainees accompany salesmen while they are making outside sales.[68]

Illustration: A propane gas routeman could still be an outside salesman, even though a detailed examination revealed that more than 20% of his work time was nonsales related, since under all the facts and circumstances his primary duty was that of making outside sales. The labeling of his duties as exempt or nonexempt was inappropriate because, even when performing maintenance work on his customers' appliances or when delivering orders to customers solicited by other salesmen, the employee would still essentially be engaged either in selling his employer's product or in performing work incidental to his selling activities.[69]

¶ C-11,152. Promotional work.

Any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work which is incidental to sales

58. 29 USCS § 203(k).
59. 29 CFR § 541.501(b).
Who is employed in "capacity of outside salesman" within meaning of § 13(a)(1) of Fair Labor Standards Act (29 USCS § 213(a)(1)), as amended, exempting such employees from minimum wage and overtime requirements of Act. 26 ALR Fed 941.
60. 29 CFR § 541.501(c).
61. 29 CFR § 541.501(d).
62. 29 CFR § 541.501(e).
63. 29 CFR § 541.506.
64. 29 CFR § 541.507.
65. Weeks v Postal Telegraph-Cable Co. (1941, Okla CP) 3 CCH LC 60857.
66. Jewel Tea Co. v Williams (1941, CA10) 118 F2d 202, 3 CCH LC ¶ 60322.
67. 29 CFR § 541.503.
68. 29 CFR § 541.506.
69. Hodgson v Greene's Propane Gas Service, Inc. (1971, MD Ga) 64 CCH LC ¶ 32455, aff'd (CA5) 71 CCH LC ¶ 32907.

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pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $250 per week exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal government) who are compensated on a salary or fee basis of not less than $200 per week.

[40 FR 7093, Feb. 19, 1975]

Postponed Regulations: Section 541.315 was revised at 40 FR 3018, Jan. 13, 1981, in accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed indefinitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.315 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.315 Special proviso for high salaried professional employees.

(a) Except as otherwise noted in paragraph (b) of this section, the definition of "professional" contains a special proviso for employees who are compensated on a salary or fee basis at a rate of at least $320 per week beginning February 15, 1981 and $340 per week beginning February 15, 1983, exclusive of board, lodging, or other facilities. Under this proviso, the requirements for exemption in § 541.3 (a) through (e) will be deemed to be met by an employee who receives the higher salary or fees and whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning, or work as a teacher in the activity of imparting knowledge, which includes work requiring the consistent exercise of discretion and judgment, or consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor. Thus, the exemption will apply to highly paid employees employed either in one of the "learned" professions or in an "artistic" profession and doing primarily professional work. If an employee qualifies for exemption under this proviso, it is not necessary to test the employee's qualifications in detail under § 541.3 (a) through (e).

(b) In Puerto Rico, the Virgin Islands, and American Samoa the second proviso of § 541.3(e) applies to those "professional" employees (other than employees of the Federal Government) who are compensated on a salary or fee basis of not less than $260 per week beginning February 13, 1981 and $285 per week beginning February 13, 1983.

Employee Employed in the Capacity of Outside Salesman

§ 541.500 Definition of "outside salesman."

Section 541.5 defines the term "outside salesman" as follows: The term "employee employed * * * in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee:

(a) Who is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in:

(1) Making sales within the meaning of section 3(k) of the act; or

(2) Obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(b) Whose hours of work of a nature other than that described in paragraph (a) (1) or (2) of this section do not exceed 20 percent of the hours worked in the workweek by nonexempt employees of the employer: *Provided*, That work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall not be regarded as nonexempt work.

§ 541.501 Making sales or obtaining orders.

(a) Section 541.5 requires that the employee be engaged in: (1) Making sales within the meaning of section 3(k) of the act, or (2) obtaining orders or contracts for services or for the use of facilities.

(b) Generally speaking, the divisions have interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidence of intangible property. Thus sales of automobiles, coffee, shoes, cl stocks, bonds, and insurance are strued as sales within the meanin section 3(k). (Sec. 3(k) of the act s that "sale" or "sell" includes any exchange, contract to sell, con ment for sale, shipment for sale other disposition.)

(c) It will be noted that the exe work includes not only the sale commodities, but also "obtai orders or contracts for services o the use of facilities for which a co eration will be paid by the clien customer." "Obtaining orders or for the use of facilities" includes selling of time on the radio, the s tation of advertising for newspa and other periodicals and the soli tion of freight for railroads and o transportation agencies.

(d) The word "services" extends exemption as outside salesmen to ployees who sell or take orders f service, which is performed for customer by someone other than person taking the order. For exam it includes the salesman of a types er repair service who does not him do the repairing. It also includes erwise exempt outside salesmen obtain orders for the laundering of customer's own linens as well as th who obtain orders for the rental of laundry's linens.

(e) The inclusion of the word "s lees" is not intended to exempt sons who, in a very loose sense, sometimes described as selling "s lees". For example, it does not incl persons such as servicemen e though they may sell the ser which they themselves perform. S ling the service in such cases would incidental to the servicing rather th the reverse. Nor does it include outs buyers, who in a very loose sense sometimes described as selling th employer's "service" to the pers from whom they obtain their goods. is obvious that the relationship her the reverse of that of salesman-c tomer.

§ 541.502 Away from his employer's pl of business.

(a) Section 541.5 requires that outside salesman be customarily a regularly engaged "away from his e ployer's place or places of busines This requirement is based on the ob ous connotation of the word "outsid in the term "outside salesman", would obviously lie beyond the scop of the Administrator's authority th "outside salesman" should be co strued to include inside salesme Inside sales and other inside wor (except such as is directly in conjun tion with and incidental to outsid

sales and solicitations, as explained in paragraph (b) of this section) is nonexempt.

(b) Characteristically the outside salesman is one who makes his sales at his customer's place of business. This is the reverse of sales made by mail or telephone (except where the telephone is used merely as an adjunct to personal calls). Thus any fixed site, whether home or office, used by a salesman as a headquarters or for telephonic solicitation of sales must be construed as one of his employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. It should not be inferred from the foregoing that an outside salesman loses his exemption by displaying his samples in hotel sample rooms as he travels from city to city; these sample rooms should not be considered as his employer's places of business.

§ 541.503 Incidental to and in conjunction with sales work.

Work performed "incidental to and in conjunction with the employee's own outside sales or solicitation" includes not only incidental deliveries and collections which are specifically mentioned in § 541.5(b), but also any other work performed by the employee in furthering his own sales efforts. Work performed incidental to and in conjunction with the employee's own outside sales or solicitations would include, among other things, the writing of his sales reports, the revision of his own catalog, the planning of his itinerary and attendance at sales conferences.

§ 541.504 Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt work, depending upon the circumstances under which it is performed. Promotion men are not exempt as "outside salesmen." (This discussion relates solely to the exemption under § 541.5, dealing with outside salesmen. Promotion men who receive the required salary and otherwise qualify may be exempt as administrative employees.) However, any promotional work which is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is clearly exempt work. On the other hand, promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work. Many persons are engaged in certain combinations of sales and promotional work or in certain types of promotional work having some of the characteristics of sales work while lacking others. The types of work involved include activities in borderline areas in which it is difficult to determine whether the work is sales or promotional. Where the work is promotional in nature it is sometimes difficult to determine whether it is incidental to the employee's own sales work.

(b) (1) Typically, the problems presented involve distribution through jobbers (who employ their own salesmen) or through central warehouses of chainstore organizations or cooperative retail buying associations. A manufacturer's representative in such cases visits the retailer, either alone or accompanied by the jobber's salesman. In some instances the manufacturer's representative may sell directly to the retailer; in others, he may urge the retailer to buy from the jobber.

(2) This manufacturer's representative may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such persons can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or contracts. To the extent that they are engaged in promotional activities designed to stimulate sales which will be made by someone else the work must be considered nonexempt. With such variations in the methods of selling and promoting sales each case must be decided upon its facts. In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt. Incidental promotional activities may be tested by whether they are "performed incidental to and in conjunction with the employee's own outside sales or solicitations" or whether they are incidental to sales which will be made by someone else.

(c) (1) A few illustrations of typical situations will be of assistance in determining whether a particular type of work is exempt or nonexempt under § 541.5. One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any orders he obtains to the local jobber to be filled. In such a case the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commi from the customer.

(2) Another typical situatio volves facts similar to those des in the preceding illustration wit difference that the jobber's sale accompanies the representative company whose product is bein The order in this instance is tak the jobber's salesman after the facturer's representative has do preliminary work which may i arranging the stock, putting up play or poster, and talking to t tailer for the purpose of gettin to place the order for the produc the jobber's salesman. In this in the sale is consummated by th ber's salesman. The work perf by the manufacturer's represen is not incidental to sales made b self and is not exempt work. Mor even if in a particular instance th is consummated by the manufact representative it is necessary to ine the nature of the work perf by the representative to dete whether his promotional activiti directed toward paving the way f own present and future sale whether they are intended to s late the present and future sa the jobber's salesman. If his w related to his own sales it wou considered exempt work, while i directed toward stimulating sale the jobber's representative it mu considered nonexempt work.

(3) Another type of situatio volves representatives employe utility companies engaged in fur ing gas or electricity to consume a sense these representatives are ployed for the purpose of "selling consumer an increased volume o product of the utility. This "sellin accomplished indirectly by persua the consumer to purchase applia which will result in a greater u gas or electricity. Different met are used by various companies some instances the utility repres tive after persuading the consum install a particular appliance ma tually take the order for the appli which is delivered from stock b employer, or he may forward order to an appliance dealer who delivers it. In such cases the sale tivity would be exempt, since it i rected at the consummation of a cific sale by the utility representa the employer actually making the livery in the one case, while in other the sale is consummated in sense that the representative obt an order or commitment from the tomer. In another type of situa the utility representative persu the consumer to buy the applia and he may even accompany the sumer to an appliance store where retailer shows the appliance and t

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the order. In such instances the utility representative is not an outside salesman since he does not consummate the sale or direct his efforts toward making the sale himself. Similarly, the utility representative is not exempt as an outside salesman if he merely persuades the consumer to purchase an appliance and the consumer then goes to an appliance dealer and places his order.

(4) Still another type of situation involves the company representative who visits chainstores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, consults with the manager as to the requirements of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chainstore company which later ships the quantity requested. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale (the store manager often has no authority to buy) this work must be counted as nonexempt.

§ 541.505 Driver salesmen.

(a) Where drivers who deliver to an employer's customers the products distributed by the employer also perform functions concerned with the selling of such products, and questions arise as to whether such an employee is employed in the capacity of outside salesman, all the facts bearing on the content of the job as a whole must be scrutinized to determine whether such an employee is really employed for the purpose of making sales rather than for the service and delivery duties which he performs and, if so, whether he is customarily and regularly engaged in making sales and his performance of nonexempt work is sufficiently limited to come within the tolerance permitted by § 541.5. The employee may qualify as an employee employed in the capacity of outside salesman if, and only if, the facts clearly indicate that he is employed for the purpose of making sales and that he is customarily and regularly engaged in such activity within the meaning of the act and this part. As in the case of outside salesmen whose jobs do not involve delivery of products to customers, the employee's chief duty or primary function must be the making of sales or the taking of orders if he is to qualify under the definition in § 541.5. He must be a

ly incidental to and in conjunction with his own sales effort is exempt work. All other work of such an employee is nonexempt work. A determination of an employee's chief duty or primary function must be made in terms of the basic character of the job as a whole. All of the duties performed by an employee must be considered. The time devoted to the various duties is an important, but not necessarily controlling, element.

(b) Employees who may perform a combination of selling or sales promotion activities with product deliveries are employed in a number of industries. Distributors of carbonated beverages, beer, bottled water, food and dairy products of various kinds, cigars and other nonfood products commonly utilize such employees, variously known as routemen, route drivers, route salesmen, dealer salesmen, distributor salesmen, or driver salesmen. Some such employees deliver at retail to customers' homes; others deliver on wholesale routes to such customers as retail stores, restaurants, hospitals, hotels, taverns, and other business establishments. Whether such an employee qualifies as an outside salesman under the regulations depends, as stated in paragraph (a) of this section, on the content of the job as a whole and not on its title or designation or the kind of business in which the employer is engaged. Hearings in 1964 concerning the application of § 541.5 to such employees demonstrated that there is great variation in the nature and extent of sales activity and its significance as an element of the job, as among drivers whose duties are performed with respect to different products or different industries and also among drivers engaged in the same industry in delivering products to different types of customers. In some cases the facts may make it plain that such an employee is employed for the purpose of making sales; in other cases the facts are equally clear that he is employed for another purpose. Thus, there is little question that a routeman who provides the only sales contact between the employer and the customers, who calls on customers and takes orders for products which he delivers from stock in his vehicle or procures and delivers to the customer on a later trip, and who receives compensation commensurate with the volume of products sold, is employed for the purpose of making sales. It is equally clear, on the other hand, that a routeman whose chief duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations, is

which, although important to the motion of sales to customers using machines, plainly cannot characte the employee as a salesman by occ tion. In other cases there may be r difficulty in determining whether employee is employed for the pur of making sales within the meanin this part. The facts in such cases r be weighed in the light of the pr ples stated in paragraph (a) of section, giving due consideration the factors discussed in subseq paragraphs of this section.

(c) One source of difficulty in de mining the extent to which a r driver may actually be engaged making sales arises from the fact such a driver often calls on establis customers day after day or week a week, delivering a quantity of his ployer's products at each call. Pla such a driver is not making sales w he delivers orders to customers whom he did not make the initial in amounts which are exactly or proximately prearranged by custo or contractual arrangement or amounts specified by the custo and not significantly affected by so tations of the customer by the deli ing driver. Making such deliveries well as recurring deliveries amounts of which are determined the volume of sales by the custo since the previous delivery rather t by any sales effort of the driver, not qualify the driver as an outs salesman nor are such deliveries the work incident thereto directly the making or soliciting of sales by driver so as to be considered exer work. On the other hand, route driv are making sales when they actu obtain or solicit, at the stops on th routes, orders for their employ products from persons who have thority to commit the customer purchases. A driver who calls on r prospects for customers along route and attempts to convince th of the desirability of accepting regu delivery of goods is likewise engaged sales activity and is making sales those from whom he obtains a co mitment. Also, a driver salesman c ing on established customers on route, carrying an assortment of t articles which his employer sells, m be making sales by persuading regu customers to accept delivery of creased amounts of goods or of n products, even though the initial sa or agreement for delivery of the e ployer's products may have been ma by someone else. Work which is pe formed incidental to and in conjun tion with such sales activities will al be considered exempt work, provide such solicitation of the customer

man, driving the truck, delivering the products sold, removing empty containers for return to the employer, and collecting payment for the goods delivered.

(d) Neither delivery of goods sold by others nor sales promotion work as such constitutes making sales within the meaning of § 541.5; delivery men and promotion men are not employed in the capacity of outside salesmen for purposes of section 13(a)(1) of the act although both delivery work and promotion work are exempt salesman as an incident to his own sales or efforts to sell. The distinction between the making of sales and the promotion of sales is explained in more detail in the discussion and illustrations contained in § 541.504. Under the principles there stated a route driver, just as any other employee, must have as his chief duty and primary function the making of sales in the sense of obtaining and soliciting commitments to buy from the persons upon whom he calls if he is to qualify under the regulations as an employee employed in the capacity of outside salesman. For this reason, a route driver primarily engaged in making deliveries to his employer's customers and performing activities intended to promote sales by customers, including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves or in coolers or cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases, is not employed in the capacity of an outside salesman by reason of such work. Such work is nonexempt work for purposes of this part unless it is performed as an incident to or in conjunction with sales actually made by the driver to such customers. If the driver who performs such functions actually takes orders or obtains commitments from such customers for the products which he delivers, and the performance of the promotion work is in furtherance of his own sales efforts, his activities for that purpose in the customer's establishment would be exempt work.

(e) As indicated in paragraph (a) of this section, whether a route driver can qualify as an outside salesman depends on the facts which establish the content of his job as a whole. Accordingly, in borderline cases a determination of whether the driver is actually employed for the purpose of, is customarily and regularly engaged in, and has as his chief duty and primary function the making of sales, may involve consideration of such factors as a comparison of his duties with those of other employees engaged as (1) truckdrivers and (2) salesmen; possession of a salesman's or solicitor's license when such license is required by

of customary or contractual prearrangements concerning amounts of products to be delivered; description of the employee's occupation in union contracts; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; and other factors that may have a bearing on the relationship to sales of the employee's work. However, where it is clear that an employee performs nonexempt work in excess of the amount permitted by § 541.5, he would be nonexempt in any event and consideration of such factors as the foregoing would not be pertinent.

(f) The following examples will further illustrate the factual situations in which, under the principles discussed previously in this section, routemen engaged in recurrent deliveries of goods may qualify or may fail to qualify for exemption as outside salesmen.

(1) A retail routeman who regularly calls on established retail customers to deliver goods of generally prearranged amounts and kinds may also exert considerable effort not only to keep such customers satisfied to continue their orders for such goods but also to make such customers aware of other products which he would like to sell to them and to offer to take orders for such products or for increased amounts of the products which he is already delivering to the customer. In addition, he may call at prospective retail customers' homes for the purpose of persuading such persons to order the goods which he sells. A routeman who customarily and regularly calls on customers for these purposes and takes orders from them for products which he delivers to them, in addition to those products for which delivery has been prearranged, who is in practical effect his employer's exclusive sales contact with such customers, and whose earnings are in large part directly attributable to sales made to such customers, will be considered to be employed in the capacity of outside salesman and within the exemption provided by section 13(a)(1) of the Act if he does not perform nonexempt work in excess of the tolerance permitted by § 541.5.

(2) A routeman who calls on retail stores which are among his employer's established customers may also qualify as an outside salesman notwithstanding the goods he delivers to them are of kinds and in amounts which are generally prearranged. Other facts may show that making sales is his chief duty and primary function and that he is customarily and regularly engaged in performing this function. Thus, such a

tablished customers involve not delivery of prearranged items but active efforts to persuade such tomers to continue or increase orders for such goods and to s their orders for other kinds of p ucts which he offers for sale, who calls on retail stores which are r pective customers, talks to per who are authorized to order goods such stores, and solicits orders f them for the goods which he sells, whose compensation is based prim on the volume of sales attributabl his efforts, will be considered exe as an outside salesman if he does perform nonexempt work in exces the tolerance permitted by § 541.5.

(3) If a routeman delivers good branch business establishments wi personnel have no authority to p orders or make commitments with spect to the kinds and amounts such goods, and if the kinds amounts of goods delivered are not termined pursuant to orders placed the authorized personnel of the tomer's enterprise as a result of a solicitation by the routeman, it is c that the routeman's calls on s branch establishments are not a p of the making of sales by him or i dental to sales made by him. If s work is his chief duty or primary fu tion or if he spends a greater prop tion of the workweek in such w than is allowed for nonexempt w under § 541.5, such a routeman can qualify for exemption as an "outs salesman".

(4) A routeman who delivers to permarkets after the enterprise h been persuaded, by a salesman of t routeman's employer, to accept del ery of goods, and whose functio other than such deliveries are prim ily to arrange merchandise, rota stocks, place point-of-sale and oth advertising materials, and engage other activities which are intended promote sales by the supermarkets the goods he has delivered, is not e ployed primarily for the purpose selling and is not customarily and re ularly engaged in making sal Rather, he is employed primarily deliver goods and to perform activiti in the supermarkets of a nature usua ly performed by store employees n employed as salesmen. Such a rout man is not employed in the capacity outside salesman within the exemp [illegible]

(5) Some employees are engaged in combination of activities involving d livery, the selling of services, and th performance of the services. For ex ample, some drivers call on customer for the purpose of selling pesticide and, if a sale is consummated, appl ing the pesticides on the customer

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referred to in § 541.501(e), are not exempt as outside salesmen. They are primarily engaged in delivery or service functions, not in outside selling.

§ 541.506 Nonexempt work generally

Nonexempt work is that work which is not sales work and is not performed incidental to and in conjunction with the outside sales activities of the employee. It includes outside activities like meter-reading, which are not part of the sales process. Inside sales and all work incidental thereto are also nonexempt work. So is clerical warehouse work which is not related to the employee's own sales. Similarly, the training of other salesmen is not exempt as outside sales work, with one exception. In some concerns it is the custom for the salesman to be accompanied by the trainee while actually making sales. Under such circumstances it appears that normally the trainer-salesman and the trainee make the various sales jointly, and both normally receive a commission thereon. In such instances, since both are engaged in making sales, the work of both is considered exempt work. However, the work of a helper who merely assists the salesman in transporting goods or samples and who is not directly concerned with effectuating the sale is nonexempt work.

§ 541.507 20-percent limitation on nonexempt work.

Nonexempt work in the definition of "outside salesman" is limited to "20 percent of the hours worked in the workweek by nonexempt employees of the employer." The 20 percent is computed on the basis of the hours worked by nonexempt employees of the employer who perform the kind of nonexempt work performed by the outside salesman. If there are no employees of the employer performing such nonexempt work, the base to be taken is 40 hours a week, and the amount of nonexempt work allowed will be 8 hours a week.

§ 541.508 Trainees, outside salesmen.

The exemption is applicable to an employee employed in the capacity of outside salesman and does not include employees training to become outside salesmen who are not actually performing the duties of an outside salesman (see also § 541.506).

Special Problems

§ 541.600 Combination exemptions

(a) The divisions' position under the regulations in Subpart A of this part permits the "tacking" of exempt work under one section of the regulations in Subpart A to exempt work under another section of those regulations, so that a person who, for example, performs a combination of executive and professional work may qualify for exemption. In combination exemptions, however, the employee must meet the stricter of the requirements on salary and nonexempt work. For instance, if the employee performs a combination of an executive's and an outside salesman's function (regardless of which occupies most of his time) he must meet the salary requirement for executives. Also, the total hours of nonexempt work under the definition of "executive"-together with the hours of work which would not be exempt if he were clearly an outside salesman, must not exceed either 20 percent of his own time or 20 percent of the hours worked in the workweek by the nonexempt employees of the employer, whichever is the smaller amount.

(b) Under the principles in paragraph (a) of this section combinations of exemptions under the other sections of the regulations in Subpart A of this part are also permissible. In short, under the regulations in Subpart A, work which is "exempt" under one section of the regulations in Subpart A will not defeat the exemption under any other section.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $250 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least $250 a week is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least $250 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least $250 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on April 1, 1978.

[40 FR 7094, Feb. 19, 1975]

Postponed Regulations: Section 541.601 was revised at 46 FR 3010, Jan. 13, 1981. In accordance with the President's Memorandum of January 29, 1981 (46 FR 11227, Feb. 6, 1981), the effective date was postponed definitely at 46 FR 11972, Feb. 12, 1981.

The text of § 541.601 set forth above remains in effect pending further action by the issuing agency. The text of the postponed regulation appears below.

§ 541.601 Special provision for motion picture producing industry.

Under § 541.5a, the requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $320 per week beginning February 13, 1981 and $340 per week beginning February 13, 1983 (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under §§ 541.1, 541.2, or 541.3 and who is employed at a base rate of at least $320 per week beginning February 13, 1981 and $340 per week beginning February 13, 1983 is exempt if he is paid at least prorata (based on a week of not more than 6 days) for any week when he does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if he is employed at a daily rate under the following circumstances: (a) The employee is in a job category for which a weekly base rate is not provided and his daily base rate would yield at least $320 per week beginning February 13, 1981 and $340 per week beginning February 13, 1983 if 6 days were worked; or (b) the employee is in a job category having a weekly base rate of at least $320 per week beginning February 13, 1983 and his daily base rate is at least one-sixth of such weekly base rate.

The higher minimum salary tests will be effective on February 13, 1981, and February 13, 1983, respectively.

§ 541.602 Special provision concerning executive and administrative employees in multi-store retailing operations.

(a) The tolerance of up to 40 percent of the employee's time which is allowed for nonexempt work performed by an executive or administrative employee of a retail or service establishment does not apply to employees of a multiunit retailing operation, such as a chainstore system or a retail establishment having one or more branch stores, who perform central functions for the organization in physically separated establishments such as warehouses, central office buildings or other central service units or by traveling from store to store. Nor does the special tolerance apply to employees who perform central office, warehousing, or service functions in a multi-unit retailing operation by reason of the fact that the space provided for such work is located in a portion or portions of the building in which the main retail or service establishment or another retail outlet of the organization is also situated. Such employees are subject to the 20-percent limitation on nonexempt work.

(b) With respect to executive or ad-

EXHIBIT #10
DATE 2/4/93
SB 116

HOUSE OF REPRESENTATIVES

WITNESS STATEMENT

PLEASE PRINT

NAME Roger Tippy **BILL NO.** SB116

ADDRESS 1215 11th Ave, Helena **DATE** 2/4/93

WHOM DO YOU REPRESENT? Montana Beer & Wine Wholesalers

SUPPORT X **OPPOSE** _____ **AMEND** _____

COMMENTS: As a group of wholesalers to the food service industry, the beer and wine wholesalers support this bill to more closely track with the F.L.S.A.

HR:1991
CS15

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Labor COMMITTEE BILL NO. HB 259

DATE Feb. 4, 1993 SPONSOR(S) Schwinden

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
Pat Melby	Mont. Ski Area Assn	✓	
GEORGE WILLETT	Showdown N Ski Area	✓	
Kevin Taylor	Great Divide Skiing Co.	✓	
Tim Pratt	Red Lodge Mountain	✓	
Terry Abelin	Bridger Bowl	✓	
Ken Hoovestol	MT Snowmobile Assn. MT. Boating Assn.	✓	
Jim Murphy	State Fund	✓	
Jim Tutwiler	MT CHAMBER	✓	
Jacqueline J. Lenmark	Am. Insurance Assoc.	✓	

PLEASE LEAVE PREPARED TESTIMONY WITH SECRETARY. WITNESS STATEMENT FORMS ARE AVAILABLE IF YOU CARE TO SUBMIT WRITTEN TESTIMONY.

HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Labor COMMITTEE BILL NO. HB 287

DATE Feb. 4, 1993 SPONSOR(S) Wiseman

PLEASE PRINT **PLEASE PRINT** **PLEASE PRINT**

NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
CHUCK HUNTER	DOLI	✓	
Terry Klark	MTPA		
Sam Van Riper	self	✓	
George Wood	MT Self Insurers Assoc	✓ as amended	
Mike McGee	MHCA	✓	
Russell B Hill	MTLA	✓	
Jim Tutwiler	MT Chamber	✓ AS AMEND.	
Gary Spratt	Liability Coalition	X	
Ken Williams	MPC/ENTech	✓ with Amendment	
DAN WALKER	US WEST	✓	
Jacqueline J. Lenmark	American Insurance Assoc	✓ w/ some amdt	

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HOUSE OF REPRESENTATIVES
VISITOR'S REGISTER

Labor COMMITTEE BILL NO. SB 116

DATE Feb. 4, 1993 SPONSOR(S) Harp

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NAME AND ADDRESS	REPRESENTING	SUPPORT	OPPOSE
MIKE STUMP - HELENA	MONTANA FOOD DIS. ASSN	✓	
TOM DOWLING "	"	✓	
Bill Stejskal ✓	✓ ✓ — —	✓	

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The Big Sky Country

MONTANA HOUSE OF REPRESENTATIVES

2/4/93

Proxy -

Please record my votes IN Labor, as follows:

HB 208 - - - Yes

HB 261 - - - NO

HB 296 - - - Yes -
Yes on Driscoll amendment.

HB 332 - - - No position
Discretion of the ch