

SENATE BILL NO. 313

INTRODUCED BY BLAYLOCK

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

IN THE SENATE

FEBRUARY 10, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON LABOR & EMPLOYMENT RELATIONS.
FEBRUARY 18, 1987	COMMITTEE RECOMMEND BILL DO PASS. REPORT ADOPTED.
FEBRUARY 19, 1987	PRINTING REPORT.
FEBRUARY 20, 1987	SECOND READING, DO PASS.
FEBRUARY 21, 1987	ENGROSSING REPORT.
FEBRUARY 23, 1987	THIRD READING, PASSED. AYES, 48; NOES, 0.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 24, 1987	INTRODUCED AND REFERRED TO COMMITTEE ON BUSINESS & LABOR.
MARCH 13, 1987	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 17, 1987	SECOND READING, CONCURRED IN.
MARCH 18, 1987	THIRD READING, CONCURRED IN. AYES, 94; NOES, 0.
	RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

MARCH 21, 1987

RECEIVED FROM HOUSE.

ON MOTION, CONSIDERATION PASSED
FOR THE DAY.

MARCH 23, 1987

SECOND READING, AMENDMENTS
CONCURRED IN.

MARCH 24, 1987

THIRD READING, AMENDMENTS
CONCURRED IN.

SENT TO ENROLLING.

1 ~~Senate~~ BILL NO. 313
 2 INTRODUCED BY Blaylock
 3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY
 4

5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A COMMON
 6 DEFINITION FOR THE TERM "INDEPENDENT CONTRACTOR" FOR
 7 PURPOSES OF THE UNEMPLOYMENT INSURANCE LAW AND THE WORKERS'
 8 COMPENSATION ACT; REVISING AND UNIFYING THE PROCEDURE FOR
 9 DETERMINING AN INDIVIDUAL'S EMPLOYMENT STATUS AS AN
 10 INDEPENDENT CONTRACTOR; AMENDING SECTIONS 39-51-201,
 11 39-51-203, 39-51-310, 39-51-1109, 39-71-120, AND 39-71-401,
 12 MCA; AND PROVIDING AN EFFECTIVE DATE."
 13

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

15 Section 1. Section 39-51-201, MCA, is amended to read:
 16 "39-51-201. General definitions. As used in this
 17 chapter, unless the context clearly requires otherwise, the
 18 following definitions apply:

19 (1) "Annual payroll" means the total amount of wages
 20 paid by an employer, regardless of the time of payment, for
 21 employment during a calendar year.

22 (2) "Base period" means the first four of the last
 23 five completed calendar quarters immediately preceding the
 24 first day of an individual's benefit year. However, in the
 25 case of a combined-wage claim pursuant to the arrangement

1 approved by the secretary of labor of the United States, the
 2 base period shall be that applicable under the unemployment
 3 law of the paying state. For an individual who fails to
 4 meet the qualifications of 39-51-2105 due to a temporary
 5 total disability as defined in 39-71-116 or a similar
 6 statute of another state or the United States, the base
 7 period means the first four quarters of the last five
 8 quarters preceding the disability if a claim for
 9 unemployment benefits is filed within 24 months of the date
 10 on which the individual's disability was incurred.

11 (3) "Benefits" means the money payments payable to an
 12 individual, as provided in this chapter, with respect to his
 13 unemployment.

14 (4) "Benefit year", with respect to any individual,
 15 means the 52 consecutive-week period beginning with the
 16 first day of the calendar week in which such individual
 17 files a valid claim for benefits, except that the benefit
 18 year shall be 53 weeks if filing a new valid claim would
 19 result in overlapping any quarter of the base year of a
 20 previously filed new claim. A subsequent benefit year may
 21 not be established until the expiration of the current
 22 benefit year. However, in the case of a combined-wage claim
 23 pursuant to the arrangement approved by the secretary of
 24 labor of the United States, the base period is the period
 25 applicable under the unemployment law of the paying state.



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1 (5) "Board" means the board of labor appeals provided
2 for in Title 2, chapter 15, part 17.

3 (6) "Calendar quarter" means the period of 3
4 consecutive calendar months ending on March 31, June 30,
5 September 30, or December 31.

6 (7) "Contributions" means the money payments to the
7 state unemployment insurance fund required by this chapter
8 but does not include assessments under 39-51-404(4).

9 (8) "Department" means the department of labor and
10 industry provided for in Title 2, chapter 15, part 17.

11 (9) "Employing unit" means any individual or
12 organization, including the state government, any of its
13 political subdivisions or instrumentalities, any
14 partnership, association, trust, estate, joint-stock
15 company, insurance company, or corporation, whether domestic
16 or foreign, or the receiver, trustee in bankruptcy, trustee
17 or successor thereof, or the legal representative of a
18 deceased person which has or subsequent to January 1, 1936,
19 had in its employ one or more individuals performing
20 services for it within this state, except as provided under
21 subsections (8) and (9) of 39-51-203. All individuals
22 performing services within this state for any employing unit
23 which maintains two or more separate establishments within
24 this state are considered to be employed by a single
25 employing unit for all the purposes of this chapter. Each

1 individual employed to perform or assist in performing the
2 work of any agent or employee of an employing unit is deemed
3 to be employed by such employing unit for the purposes of
4 this chapter, whether such individual was hired or paid
5 directly by such employing unit or by such agent or
6 employee, provided the employing unit has actual or
7 constructive knowledge of the work.

8 (10) "Employment office" means a free public employment
9 office or branch thereof operated by this state or
10 maintained as a part of a state-controlled system of public
11 employment offices or such other free public employment
12 offices operated and maintained by the United States
13 government or its instrumentalities as the department may
14 approve.

15 (11) "Fund" means the unemployment insurance fund
16 established by this chapter to which all contributions and
17 payments in lieu of contributions are required and from
18 which all benefits provided under this chapter shall be
19 paid.

20 (12) "Gross misconduct" means a criminal act, other
21 than a violation of a motor vehicle traffic law, for which
22 an individual has been convicted in a criminal court or has
23 admitted or conduct which demonstrates a flagrant and wanton
24 disregard of and for the rights or title or interest of a
25 fellow employee or his employer.

1 (13) "Hospital" means an institution which has been
2 licensed, certified, or approved by the state as a hospital.

3 (14) "Independent contractor" means an individual who
4 renders service in the course of an occupation and:

5 (a) has been and will continue to be free from control
6 or direction over the performance of the services, both
7 under his contract and in fact; and

8 (b) is engaged in an independently established trade
9 occupation, profession, or business.

10 ~~(14)~~(15) (a) "Institution of higher education", for the
11 purposes of this part, means an educational institution
12 which:

13 (i) admits as regular students only individuals having
14 a certificate of graduation from a high school or the
15 recognized equivalent of such a certificate;

16 (ii) is legally authorized in this state to provide a
17 program of education beyond high school;

18 (iii) provides an educational program for which it
19 awards a bachelor's or higher degree or provides a program
20 which is acceptable for full credit toward such a degree, a
21 program of postgraduate or postdoctoral studies, or a
22 program of training to prepare students for gainful
23 employment in a recognized occupation; and

24 (iv) is a public or other nonprofit institution.

25 (b) Notwithstanding any of the foregoing provisions of

1 this subsection, all colleges and universities in this state
2 are institutions of higher education for purposes of this
3 part.

4 ~~(15)~~(16) "State" includes, in addition to the states of
5 the United States of America, the District of Columbia,
6 Puerto Rico, the Virgin Islands, and the Dominion of Canada.

7 ~~(16)~~(17) "Unemployment insurance administration fund"
8 means the unemployment insurance administration fund
9 established by this chapter from which administrative
10 expenses under this chapter shall be paid.

11 ~~(17)~~(18) (a) "Wages" means all remuneration payable for
12 personal services, including commissions and bonuses, the
13 cash value of all remuneration payable in any medium other
14 than cash, and backpay received pursuant to a dispute
15 related to employment. The reasonable cash value of
16 remuneration payable in any medium other than cash shall be
17 estimated and determined in accordance with rules prescribed
18 by the department.

19 (b) The term "wages" does not include:

20 (i) the amount of any payment made to or on behalf of
21 an employee by an employer on account of:

22 (A) retirement;

23 (B) sickness or accident disability;

24 (C) medical and hospitalization expenses in connection
25 with sickness or accident disability; or

1 (D) death;

2 (ii) remuneration paid by any county welfare office
3 from public assistance funds for services performed at the
4 direction and request of such county welfare office.

5 ~~{18}~~{19} "Week" means a period of 7 consecutive
6 calendar days ending at midnight on Saturday.

7 ~~{19}~~{20} An individual's "weekly benefit amount" means
8 the amount of benefits he would be entitled to receive for 1
9 week of total unemployment."

10 Section 2. Section 39-51-203, MCA, is amended to read:

11 "39-51-203. Employment defined. (1) "Employment",
12 subject to other provisions of this section, means service
13 by an individual or by an officer of a corporation,
14 including service in interstate commerce, performed for
15 wages or under any contract of hire, written or oral,
16 express or implied.

17 (2) (a) The term "employment" includes an individual's
18 entire service performed within or both within and without
19 this state if:

20 (i) the service is localized in this state; or

21 (ii) the service is not localized in any state but some
22 of the service is performed in this state and:

23 (A) the base of operations or, if there is no base of
24 operations, then the place from which such service is
25 directed or controlled, is in this state; or

1 (B) the base of operations or place from which such
2 service is directed or controlled is not in any state in
3 which some part of the service is performed, but the
4 individual's residence is in this state.

5 (b) Service is considered to be localized within a
6 state if:

7 (i) the service is performed entirely within such
8 state; or

9 (ii) the service is performed both within and without
10 such state, but the service performed without such state is
11 incidental to the individual's service within the state, for
12 example, is temporary or transitory in nature or consists of
13 isolated transactions.

14 (3) Service not covered under subsection (2) of this
15 section and performed entirely without this state with
16 respect to no part of which contributions are required and
17 paid under an unemployment insurance law of any other state
18 or of the federal government is considered to be employment
19 subject to this chapter if the individual performing such
20 services is a resident of this state and the department
21 approves the election of the employing unit for whom such
22 services are performed that the entire service of such
23 individual is considered to be employment subject to this
24 chapter.

25 (4) Service performed by an individual for wages is

1 considered to be employment subject to this chapter unless
2 and until it is shown to the satisfaction of the department
3 that:

4 ~~{a}--such-individual-has-been-and-will-continue-to-be~~
5 ~~free--from-control-or-direction-over-the-performance-of-such~~
6 ~~services,-both-under-his-contract-and-in-fact,-~~

7 ~~{b}--such-service-is-either-outside-the-usual-course-of~~
8 ~~the-business-for-which-such-service--is--performed--or--that~~
9 ~~such--service--is--performed--outside--of--all-the-places-of~~
10 ~~business--of--the-enterprise--for--which--such--service--is~~
11 ~~performed,-and~~

12 ~~{c}--such-individual-is--customarily--engaged--in--an~~
13 ~~independently-established-trade,-occupation,-profession,-or~~
14 ~~business the individual is an independent contractor.~~

15 (5) The term "employment" includes service performed
16 after December 31, 1971, by an individual in the employ of
17 this state or any of its instrumentalities (or in the employ
18 of this state and one or more other states or their
19 instrumentalities) for a hospital or institution of higher
20 education located in this state. The term "employment"
21 includes service performed after July 1, 1975, by all
22 individuals, including without limitations those individuals
23 who work for the state of Montana, its university, any of
24 its colleges, public schools, components or units thereof,
25 or any local government unit and one or more other states or

1 their instrumentalities or political subdivisions whose
2 services are compensated by salary or wages.

3 (6) The term "employment" includes service performed
4 after December 31, 1971, by an individual in the employ of a
5 religious, charitable, scientific, literary, or educational
6 organization.

7 (7) (a) The term "employment" includes the service of
8 an individual who is a citizen of the United States
9 performed outside the United States, except in Canada, after
10 December 31, 1971, in the employ of an American employer,
11 other than service which is considered employment under the
12 provisions of subsection (2) of this section or the parallel
13 provisions of another state's law, if:

14 (i) the employer's principal place of business in the
15 United States is located in this state;

16 (ii) the employer has no place of business in the
17 United States, but:

18 (A) the employer is an individual who is a resident of
19 this state;

20 (B) the employer is a corporation which is organized
21 under the laws of this state; or

22 (C) the employer is a partnership or a trust and the
23 number of the partners or trustees who are residents of this
24 state is greater than the number who are residents of any
25 other state; or

1 (iii) none of the criteria of sections (7)(a)(i) and
 2 (7)(a)(ii) of this subsection are met but the employer has
 3 elected coverage in this state or, the employer having
 4 failed to elect coverage in any state, the individual has
 5 filed a claim for benefits based on such service under the
 6 law of this state.

7 (b) An "American employer", for purposes of this
 8 subsection, means a person who is:

9 (i) an individual who is a resident of the United
 10 States;

11 (ii) a partnership if two-thirds or more of the
 12 partners are residents of the United States;

13 (iii) a trust if all of the trustees are residents of
 14 the United States; or

15 (iv) a corporation organized under the laws of the
 16 United States or of any state.

17 (8) Agricultural labor exempted under 39-51-204 is
 18 considered employment subject to this chapter effective
 19 January 1, 1978, whenever the employing unit pays \$20,000 or
 20 more in cash to workers for agricultural labor in any
 21 quarter in the current or preceding calendar year or employs
 22 10 or more workers in agricultural labor on 20 days in 20
 23 different weeks during the current or preceding calendar
 24 year. If an employer is otherwise subject to the chapter
 25 and has agricultural employment, all employees are covered

1 under the chapter regardless of the amount of money
 2 expended for agricultural purposes.

3 (9) Domestic service exempted under 39-51-204(1)(b) is
 4 considered employment subject to this chapter effective
 5 January 1, 1978, whenever the employing unit pays \$1,000 or
 6 more in cash for domestic service in any quarter during the
 7 current or preceding calendar year. If an employer is
 8 otherwise subject to the chapter and has domestic
 9 employment, all employees are covered under the chapter
 10 regardless of the amount of money expended for domestic
 11 purposes."

12 Section 3. Section 39-51-310, MCA, is amended to read:

13 "39-51-310. Function of board. The board shall act in
 14 a quasi-judicial capacity for the hearing of disputes
 15 concerning the administration of Montana's unemployment
 16 insurance laws and disputes arising under Title 39, chapter
 17 71, not concerning benefits, regarding whether an individual
 18 is an employee or an independent contractor as defined in
 19 that chapter."

20 Section 4. Section 39-51-1109, MCA, is amended to
 21 read:

22 "39-51-1109. Tax appeals. Any person aggrieved by any
 23 decision, determination, or redetermination of the
 24 department involving contribution liability, contribution
 25 rate, application for refund, employment status, or the

1 charging of benefit payments to employers making payment in
 2 lieu of contributions ~~is entitled to a review in accordance~~
 3 ~~with Title 2, chapter 4, parts 6 and 7:~~ may appeal to an
 4 appeals referee within 10 days after notice of the decision
 5 is mailed to that person's last-known address, except the
 6 period for timely appeal may be extended by the referee upon
 7 a showing of good cause. The decision of the appeals referee
 8 and any appeal therefrom must be made in the same manner as
 9 prescribed in 39-51-2403 and 39-51-2404."

10 Section 5. Section 39-71-120, MCA, is amended to read:

11 "39-71-120. Independent contractor defined. (1) An
 12 "independent contractor" is one who renders service in the
 13 course of an occupation and:

14 {1}(a) has been and will continue to be free from
 15 control or direction over the performance of the services,
 16 both under his contract and in fact; and

17 {2}(b) is engaged in an independently established
 18 trade, occupation, profession, or business.

19 (2) An individual performing services for remuneration
 20 is considered to be an employee under this chapter unless
 21 and until it is shown to the satisfaction of the department
 22 of labor and industry or the division that the requirements
 23 of subsection (1) are met."

24 Section 6. Section 39-71-401, MCA, is amended to read:

25 "39-71-401. Employments covered and employments

1 exempted. (1) Except as provided in subsection (2) of this
 2 section, the Workers' Compensation Act applies to all
 3 employers as defined in 39-71-117 and to all employees as
 4 defined in 39-71-118. An employer who has any employee in
 5 service under any appointment or contract of hire, expressed
 6 or implied, oral or written, shall elect to be bound by the
 7 provisions of compensation plan No. 1, 2, or 3. Every
 8 employee whose employer is bound by the Workers'
 9 Compensation Act is subject to and bound by the compensation
 10 plan that has been elected by the employer.

11 (2) Unless the employer elects coverage for these
 12 employments under this chapter and an insurer allows such an
 13 election, the Workers' Compensation Act does not apply to
 14 any of the following employments:

15 (a) household and domestic employment;

16 (b) casual employment as defined in 39-71-116(3)
 17 except employment of a volunteer under 67-2-105;

18 (c) employment of members of an employer's family
 19 dwelling in the employer's household;

20 (d) employment of sole proprietors or working members
 21 of a partnership other than those who consider themselves or
 22 hold themselves out as independent contractors and who are
 23 not contracting for agricultural services to be performed on
 24 a farm or ranch, or for broker or salesman services
 25 performed under a license issued by the board of realty

1 regulation, or for services as a direct seller engaged in
2 the sale of consumer products to customers primarily in the
3 home;

4 (e) employment for which a rule of liability for
5 injury, occupational disease, or death is provided under the
6 laws of the United States;

7 (f) any person performing services in return for aid
8 or sustenance only, except employment of a volunteer under
9 67-2-105;

10 (g) employment with any railroad engaged in interstate
11 commerce, except that railroad construction work shall be
12 included in and subject to the provisions of this chapter;

13 (h) employment as an official, including a timer,
14 referee, or judge, at a school amateur athletic event,
15 unless the person is otherwise employed by a school
16 district.

17 (3) A sole proprietor or working member of a
18 partnership who holds himself out or considers himself an
19 independent contractor and who is not contracting for
20 agricultural services to be performed on a farm or ranch, or
21 for broker or salesman services performed under a license
22 issued by the board of realty regulation, or for services as
23 a direct seller engaged in the sale of consumer products to
24 customers primarily in the home must elect to be bound
25 personally and individually by the provisions of

1 compensation plan No. 1, 2, or 3, but he may apply to the
2 division for an exemption from the Workers' Compensation Act
3 for himself. The application must be made in accordance with
4 the rules adopted by the division. The division may deny the
5 application only if it determines that the applicant is not
6 an independent contractor. When an application is approved
7 by the division, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from
9 obtaining benefits under this chapter. If the division
10 denies the application for exemption, the applicant may
11 contest the denial by petitioning for review of the decision
12 by an appeals referee in the manner provided for in
13 39-51-1109. An applicant dissatisfied with the decision of
14 the appeals referee may appeal the decision in accordance
15 with the procedure established in 39-51-2403 and 39-51-2404.

16 (4) Each employer shall post a sign in the workplace
17 at the locations where notices to employees are normally
18 posted, informing employees about the employer's current
19 provision of compensation insurance. A workplace is any
20 location where an employee performs any work-related act in
21 the course of employment, regardless of whether the location
22 is temporary or permanent, and includes the place of
23 business or property of a third person while the employer
24 has access to or control over such place of business or
25 property for the purpose of carrying on his usual trade,

1 business, or occupation. The sign will be provided by the
 2 division, distributed through insurers or directly by the
 3 division, and posted by employers in accordance with rules
 4 adopted by the division. An employer who purposely or
 5 knowingly fails to post a sign as provided in this
 6 subsection is subject to a \$50 fine for each citation."

7 NEW SECTION. Section 7. Procedure for resolving
 8 disputes regarding independent contractor status. (1) If an
 9 individual, employer, or insurer has a dispute as to whether
 10 an individual is an independent contractor or an employee as
 11 defined in this chapter, any party may petition a department
 12 of labor and industry appeals referee for resolution of the
 13 dispute in accordance with 39-51-1109, and may appeal from a
 14 decision of the appeals referee in the same manner as
 15 prescribed in 39-51-2403 and 39-51-2404.

16 (2) If a claimant and insurer have a dispute over
 17 benefits and the dispute involves an issue of whether the
 18 claimant is an independent contractor or employee as defined
 19 in this chapter, either party may petition the workers'
 20 compensation judge for resolution of the dispute in
 21 accordance with 39-71-2905.

22 (3) Notwithstanding the provisions of subsection (1),
 23 an individual may apply to the division for an exemption
 24 from the Workers' Compensation Act in accordance with
 25 39-71-401.

1 NEW SECTION. Section 8. Extension of authority. Any
 2 existing authority of the department of labor and industry
 3 to make rules on the subject of the provisions of this act
 4 is extended to the provisions of this act.

5 NEW SECTION. Section 9. Codification instruction.
 6 Section 7 is intended to be codified as an integral part of
 7 Title 39, chapter 71, part 4, and the provisions of Title
 8 39, chapter 71, part 4, apply to section 7.

9 NEW SECTION. Section 10. Effective date. This act is
 10 effective July 1, 1987.

-End-

APPROVED BY COMMITTEE
ON LABOR & EMPLOYMENT
RELATIONS

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3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY
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6 DEFINITION FOR THE TERM "INDEPENDENT CONTRACTOR" FOR
7 PURPOSES OF THE UNEMPLOYMENT INSURANCE LAW AND THE WORKERS'
8 COMPENSATION ACT; REVISING AND UNIFYING THE PROCEDURE FOR
9 DETERMINING AN INDIVIDUAL'S EMPLOYMENT STATUS AS AN
10 INDEPENDENT CONTRACTOR; AMENDING SECTIONS 39-51-201,
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21 employment during a calendar year.

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23 five completed calendar quarters immediately preceding the
24 first day of an individual's benefit year. However, in the
25 case of a combined-wage claim pursuant to the arrangement

1 approved by the secretary of labor of the United States, the
2 base period shall be that applicable under the unemployment
3 law of the paying state. For an individual who fails to
4 meet the qualifications of 39-51-2105 due to a temporary
5 total disability as defined in 39-71-116 or a similar
6 statute of another state or the United States, the base
7 period means the first four quarters of the last five
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9 unemployment benefits is filed within 24 months of the date
10 on which the individual's disability was incurred.

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12 individual, as provided in this chapter, with respect to his
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16 first day of the calendar week in which such individual
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18 year shall be 53 weeks if filing a new valid claim would
19 result in overlapping any quarter of the base year of a
20 previously filed new claim. A subsequent benefit year may
21 not be established until the expiration of the current
22 benefit year. However, in the case of a combined-wage claim
23 pursuant to the arrangement approved by the secretary of
24 labor of the United States, the base period is the period
25 applicable under the unemployment law of the paying state.

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2 for in Title 2, chapter 15, part 17.

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14 partnership, association, trust, estate, joint-stock
15 company, insurance company, or corporation, whether domestic
16 or foreign, or the receiver, trustee in bankruptcy, trustee
17 or successor thereof, or the legal representative of a
18 deceased person which has or subsequent to January 1, 1936,
19 had in its employ one or more individuals performing
20 services for it within this state, except as provided under
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22 performing services within this state for any employing unit
23 which maintains two or more separate establishments within
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25 employing unit for all the purposes of this chapter. Each

1 individual employed to perform or assist in performing the
2 work of any agent or employee of an employing unit is deemed
3 to be employed by such employing unit for the purposes of
4 this chapter, whether such individual was hired or paid
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6 employee, provided the employing unit has actual or
7 constructive knowledge of the work.

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9 office or branch thereof operated by this state or
10 maintained as a part of a state-controlled system of public
11 employment offices or such other free public employment
12 offices operated and maintained by the United States
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22 an individual has been convicted in a criminal court or has
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24 disregard of and for the rights or title or interest of a
25 fellow employee or his employer.

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2 licensed, certified, or approved by the state as a hospital.

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7 under his contract and in fact; and

8 (b) is engaged in an independently established trade
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11 purposes of this part, means an educational institution
12 which:

13 (i) admits as regular students only individuals having
14 a certificate of graduation from a high school or the
15 recognized equivalent of such a certificate;

16 (ii) is legally authorized in this state to provide a
17 program of education beyond high school;

18 (iii) provides an educational program for which it
19 awards a bachelor's or higher degree or provides a program
20 which is acceptable for full credit toward such a degree, a
21 program of postgraduate or postdoctoral studies, or a
22 program of training to prepare students for gainful
23 employment in a recognized occupation; and

24 (iv) is a public or other nonprofit institution.

25 (b) Notwithstanding any of the foregoing provisions of

1 this subsection, all colleges and universities in this state
2 are institutions of higher education for purposes of this
3 part.

4 (16) "State" includes, in addition to the states of
5 the United States of America, the District of Columbia,
6 Puerto Rico, the Virgin Islands, and the Dominion of Canada.

7 (17) "Unemployment insurance administration fund"
8 means the unemployment insurance administration fund
9 established by this chapter from which administrative
10 expenses under this chapter shall be paid.

11 (18) (a) "Wages" means all remuneration payable for
12 personal services, including commissions and bonuses, the
13 cash value of all remuneration payable in any medium other
14 than cash, and backpay received pursuant to a dispute
15 related to employment. The reasonable cash value of
16 remuneration payable in any medium other than cash shall be
17 estimated and determined in accordance with rules prescribed
18 by the department.

19 (b) The term "wages" does not include:

20 (i) the amount of any payment made to or on behalf of
21 an employee by an employer on account of:

22 (A) retirement;

23 (B) sickness or accident disability;

24 (C) medical and hospitalization expenses in connection
25 with sickness or accident disability; or

1 (D) death;

2 (ii) remuneration paid by any county welfare office

3 from public assistance funds for services performed at the

4 direction and request of such county welfare office.

5 ~~(18)~~(19) "Week" means a period of 7 consecutive

6 calendar days ending at midnight on Saturday.

7 ~~(19)~~(20) An individual's "weekly benefit amount" means

8 the amount of benefits he would be entitled to receive for 1

9 week of total unemployment."

10 Section 2. Section 39-51-203, MCA, is amended to read:

11 "39-51-203. Employment defined. (1) "Employment",

12 subject to other provisions of this section, means service

13 by an individual or by an officer of a corporation,

14 including service in interstate commerce, performed for

15 wages or under any contract of hire, written or oral,

16 express or implied.

17 (2) (a) The term "employment" includes an individual's

18 entire service performed within or both within and without

19 this state if:

20 (i) the service is localized in this state; or

21 (ii) the service is not localized in any state but some

22 of the service is performed in this state and:

23 (A) the base of operations or, if there is no base of

24 operations, then the place from which such service is

25 directed or controlled, is in this state; or

1 (B) the base of operations or place from which such

2 service is directed or controlled is not in any state in

3 which some part of the service is performed, but the

4 individual's residence is in this state.

5 (b) Service is considered to be localized within a

6 state if:

7 (i) the service is performed entirely within such

8 state; or

9 (ii) the service is performed both within and without

10 such state, but the service performed without such state is

11 incidental to the individual's service within the state, for

12 example, is temporary or transitory in nature or consists of

13 isolated transactions.

14 (3) Service not covered under subsection (2) of this

15 section and performed entirely without this state with

16 respect to no part of which contributions are required and

17 paid under an unemployment insurance law of any other state

18 or of the federal government is considered to be employment

19 subject to this chapter if the individual performing such

20 services is a resident of this state and the department

21 approves the election of the employing unit for whom such

22 services are performed that the entire service of such

23 individual is considered to be employment subject to this

24 chapter.

25 (4) Service performed by an individual for wages is

1 considered to be employment subject to this chapter unless
2 and until it is shown to the satisfaction of the department
3 that:

4 ~~(a) such individual has been and will continue to be~~
5 ~~free from control or direction over the performance of such~~
6 ~~services, both under his contract and in fact;~~

7 ~~(b) such service is either outside the usual course of~~
8 ~~the business for which such service is performed or that~~
9 ~~such service is performed outside of all the places of~~
10 ~~business of the enterprise for which such service is~~
11 ~~performed; and~~

12 ~~(c) such individual is customarily engaged in an~~
13 ~~independently established trade, occupation, profession, or~~
14 ~~business~~ the individual is an independent contractor.

15 (5) The term "employment" includes service performed
16 after December 31, 1971, by an individual in the employ of
17 this state or any of its instrumentalities (or in the employ
18 of this state and one or more other states or their
19 instrumentalities) for a hospital or institution of higher
20 education located in this state. The term "employment"
21 includes service performed after July 1, 1975, by all
22 individuals, including without limitations those individuals
23 who work for the state of Montana, its university, any of
24 its colleges, public schools, components or units thereof,
25 or any local government unit and one or more other states or

1 their instrumentalities or political subdivisions whose
2 services are compensated by salary or wages.

3 (6) The term "employment" includes service performed
4 after December 31, 1971, by an individual in the employ of a
5 religious, charitable, scientific, literary, or educational
6 organization.

7 (7) (a) The term "employment" includes the service of
8 an individual who is a citizen of the United States
9 performed outside the United States, except in Canada, after
10 December 31, 1971, in the employ of an American employer,
11 other than service which is considered employment under the
12 provisions of subsection (2) of this section or the parallel
13 provisions of another state's law, if:

14 (i) the employer's principal place of business in the
15 United States is located in this state;

16 (ii) the employer has no place of business in the
17 United States, but:

18 (A) the employer is an individual who is a resident of
19 this state;

20 (B) the employer is a corporation which is organized
21 under the laws of this state; or

22 (C) the employer is a partnership or a trust and the
23 number of the partners or trustees who are residents of this
24 state is greater than the number who are residents of any
25 other state; or

1 (iii) none of the criteria of sections (7)(a)(i) and
 2 (7)(a)(ii) of this subsection are met but the employer has
 3 elected coverage in this state or, the employer having
 4 failed to elect coverage in any state, the individual has
 5 filed a claim for benefits based on such service under the
 6 law of this state.

7 (b) An "American employer", for purposes of this
 8 subsection, means a person who is:

9 (i) an individual who is a resident of the United
 10 States;

11 (ii) a partnership if two-thirds or more of the
 12 partners are residents of the United States;

13 (iii) a trust if all of the trustees are residents of
 14 the United States; or

15 (iv) a corporation organized under the laws of the
 16 United States or of any state.

17 (8) Agricultural labor exempted under 39-51-204 is
 18 considered employment subject to this chapter effective
 19 January 1, 1978, whenever the employing unit pays \$20,000 or
 20 more in cash to workers for agricultural labor in any
 21 quarter in the current or preceding calendar year or employs
 22 10 or more workers in agricultural labor on 20 days in 20
 23 different weeks during the current or preceding calendar
 24 year. If an employer is otherwise subject to the chapter
 25 and has agricultural employment, all employees are covered

1 under the chapter regardless of the amount of money
 2 expended for agricultural purposes.

3 (9) Domestic service exempted under 39-51-204(1)(b) is
 4 considered employment subject to this chapter effective
 5 January 1, 1978, whenever the employing unit pays \$1,000 or
 6 more in cash for domestic service in any quarter during the
 7 current or preceding calendar year. If an employer is
 8 otherwise subject to the chapter and has domestic
 9 employment, all employees are covered under the chapter
 10 regardless of the amount of money expended for domestic
 11 purposes."

12 Section 3. Section 39-51-310, MCA, is amended to read:

13 "39-51-310. Function of board. The board shall act in
 14 a quasi-judicial capacity for the hearing of disputes
 15 concerning the administration of Montana's unemployment
 16 insurance laws and disputes arising under Title 39, chapter
 17 71, not concerning benefits, regarding whether an individual
 18 is an employee or an independent contractor as defined in
 19 that chapter."

20 Section 4. Section 39-51-1109, MCA, is amended to
 21 read:

22 "39-51-1109. Tax appeals. Any person aggrieved by any
 23 decision, determination, or redetermination of the
 24 department involving contribution liability, contribution
 25 rate, application for refund, employment status, or the

1 charging of benefit payments to employers making payment in
 2 lieu of contributions ~~is entitled to a review in accordance~~
 3 ~~with Title 2, chapter 4, parts 6 and 7.~~ may appeal to an
 4 appeals referee within 10 days after notice of the decision
 5 is mailed to that person's last-known address, except the
 6 period for timely appeal may be extended by the referee upon
 7 a showing of good cause. The decision of the appeals referee
 8 and any appeal therefrom must be made in the same manner as
 9 prescribed in 39-51-2403 and 39-51-2404."

10 Section 5. Section 39-71-120, MCA, is amended to read:

11 "39-71-120. Independent contractor defined. (1) An
 12 "independent contractor" is one who renders service in the
 13 course of an occupation and:

14 (1)(a) has been and will continue to be free from
 15 control or direction over the performance of the services,
 16 both under his contract and in fact; and

17 (1)(b) is engaged in an independently established
 18 trade, occupation, profession, or business.

19 (2) An individual performing services for remuneration
 20 is considered to be an employee under this chapter unless
 21 and until it is shown to the satisfaction of the department
 22 of labor and industry or the division that the requirements
 23 of subsection (1) are met."

24 Section 6. Section 39-71-401, MCA, is amended to read:

25 "39-71-401. Employments covered and employments

1 exempted. (1) Except as provided in subsection (2) of this
 2 section, the Workers' Compensation Act applies to all
 3 employers as defined in 39-71-117 and to all employees as
 4 defined in 39-71-118. An employer who has any employee in
 5 service under any appointment or contract of hire, expressed
 6 or implied, oral or written, shall elect to be bound by the
 7 provisions of compensation plan No. 1, 2, or 3. Every
 8 employee whose employer is bound by the Workers'
 9 Compensation Act is subject to and bound by the compensation
 10 plan that has been elected by the employer.

11 (2) Unless the employer elects coverage for these
 12 employments under this chapter and an insurer allows such an
 13 election, the Workers' Compensation Act does not apply to
 14 any of the following employments:

15 (a) household and domestic employment;

16 (b) casual employment as defined in 39-71-116(3)
 17 except employment of a volunteer under 67-2-105;

18 (c) employment of members of an employer's family
 19 dwelling in the employer's household;

20 (d) employment of sole proprietors or working members
 21 of a partnership other than those who consider themselves or
 22 hold themselves out as independent contractors and who are
 23 not contracting for agricultural services to be performed on
 24 a farm or ranch, or for broker or salesman services
 25 performed under a license issued by the board of realty

1 regulation, or for services as a direct seller engaged in
2 the sale of consumer products to customers primarily in the
3 home;

4 (e) employment for which a rule of liability for
5 injury, occupational disease, or death is provided under the
6 laws of the United States;

7 (f) any person performing services in return for aid
8 or sustenance only, except employment of a volunteer under
9 67-2-105;

10 (g) employment with any railroad engaged in interstate
11 commerce, except that railroad construction work shall be
12 included in and subject to the provisions of this chapter;

13 (h) employment as an official, including a timer,
14 referee, or judge, at a school amateur athletic event,
15 unless the person is otherwise employed by a school
16 district.

17 (3) A sole proprietor or working member of a
18 partnership who holds himself out or considers himself an
19 independent contractor and who is not contracting for
20 agricultural services to be performed on a farm or ranch, or
21 for broker or salesman services performed under a license
22 issued by the board of realty regulation, or for services as
23 a direct seller engaged in the sale of consumer products to
24 customers primarily in the home must elect to be bound
25 personally and individually by the provisions of

1 compensation plan No. 1, 2, or 3, but he may apply to the
2 division for an exemption from the Workers' Compensation Act
3 for himself. The application must be made in accordance with
4 the rules adopted by the division. The division may deny the
5 application only if it determines that the applicant is not
6 an independent contractor. When an application is approved
7 by the division, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from
9 obtaining benefits under this chapter. If the division
10 denies the application for exemption, the applicant may
11 contest the denial by petitioning for review of the decision
12 by an appeals referee in the manner provided for in
13 39-51-1109. An applicant dissatisfied with the decision of
14 the appeals referee may appeal the decision in accordance
15 with the procedure established in 39-51-2403 and 39-51-2404.

16 (4) Each employer shall post a sign in the workplace
17 at the locations where notices to employees are normally
18 posted, informing employees about the employer's current
19 provision of compensation insurance. A workplace is any
20 location where an employee performs any work-related act in
21 the course of employment, regardless of whether the location
22 is temporary or permanent, and includes the place of
23 business or property of a third person while the employer
24 has access to or control over such place of business or
25 property for the purpose of carrying on his usual trade,

1 business, or occupation. The sign will be provided by the
 2 division, distributed through insurers or directly by the
 3 division, and posted by employers in accordance with rules
 4 adopted by the division. An employer who purposely or
 5 knowingly fails to post a sign as provided in this
 6 subsection is subject to a \$50 fine for each citation."

7 NEW SECTION. Section 7. Procedure for resolving
 8 disputes regarding independent contractor status. (1) If an
 9 individual, employer, or insurer has a dispute as to whether
 10 an individual is an independent contractor or an employee as
 11 defined in this chapter, any party may petition a department
 12 of labor and industry appeals referee for resolution of the
 13 dispute in accordance with 39-51-1109, and may appeal from a
 14 decision of the appeals referee in the same manner as
 15 prescribed in 39-51-2403 and 39-51-2404.

16 (2) If a claimant and insurer have a dispute over
 17 benefits and the dispute involves an issue of whether the
 18 claimant is an independent contractor or employee as defined
 19 in this chapter, either party may petition the workers'
 20 compensation judge for resolution of the dispute in
 21 accordance with 39-71-2905.

22 (3) Notwithstanding the provisions of subsection (1),
 23 an individual may apply to the division for an exemption
 24 from the Workers' Compensation Act in accordance with
 25 39-71-401.

1 NEW SECTION. Section 8. Extension of authority. Any
 2 existing authority of the department of labor and industry
 3 to make rules on the subject of the provisions of this act
 4 is extended to the provisions of this act.

5 NEW SECTION. Section 9. Codification instruction.
 6 Section 7 is intended to be codified as an integral part of
 7 Title 39, chapter 71, part 4, and the provisions of Title
 8 39, chapter 71, part 4, apply to section 7.

9 NEW SECTION. Section 10. Effective date. This act is
 10 effective July 1, 1987.

-End-

1 (5) "Board" means the board of labor appeals provided
2 for in Title 2, chapter 15, part 17.

3 (6) "Calendar quarter" means the period of 3
4 consecutive calendar months ending on March 31, June 30,
5 September 30, or December 31.

6 (7) "Contributions" means the money payments to the
7 state unemployment insurance fund required by this chapter
8 but does not include assessments under 39-51-404(4).

9 (8) "Department" means the department of labor and
10 industry provided for in Title 2, chapter 15, part 17.

11 (9) "Employing unit" means any individual or
12 organization, including the state government, any of its
13 political subdivisions or instrumentalities, any
14 partnership, association, trust, estate, joint-stock
15 company, insurance company, or corporation, whether domestic
16 or foreign, or the receiver, trustee in bankruptcy, trustee
17 or successor thereof, or the legal representative of a
18 deceased person which has or subsequent to January 1, 1936,
19 had in its employ one or more individuals performing
20 services for it within this state, except as provided under
21 subsections (8) and (9) of 39-51-203. All individuals
22 performing services within this state for any employing unit
23 which maintains two or more separate establishments within
24 this state are considered to be employed by a single
25 employing unit for all the purposes of this chapter. Each

1 individual employed to perform or assist in performing the
2 work of any agent or employee of an employing unit is deemed
3 to be employed by such employing unit for the purposes of
4 this chapter, whether such individual was hired or paid
5 directly by such employing unit or by such agent or
6 employee, provided the employing unit has actual or
7 constructive knowledge of the work.

8 (10) "Employment office" means a free public employment
9 office or branch thereof operated by this state or
10 maintained as a part of a state-controlled system of public
11 employment offices or such other free public employment
12 offices operated and maintained by the United States
13 government or its instrumentalities as the department may
14 approve.

15 (11) "Fund" means the unemployment insurance fund
16 established by this chapter to which all contributions and
17 payments in lieu of contributions are required and from
18 which all benefits provided under this chapter shall be
19 paid.

20 (12) "Gross misconduct" means a criminal act, other
21 than a violation of a motor vehicle traffic law, for which
22 an individual has been convicted in a criminal court or has
23 admitted or conduct which demonstrates a flagrant and wanton
24 disregard of and for the rights or title or interest of a
25 fellow employee or his employer.

1 (13) "Hospital" means an institution which has been
2 licensed, certified, or approved by the state as a hospital.

3 (14) "Independent contractor" means an individual who
4 renders service in the course of an occupation and:

5 (a) has been and will continue to be free from control
6 or direction over the performance of the services, both
7 under his contract and in fact; and

8 (b) is engaged in an independently established trade
9 occupation, profession, or business.

10 ~~(14)~~(15) (a) "Institution of higher education", for the
11 purposes of this part, means an educational institution
12 which:

13 (i) admits as regular students only individuals having
14 a certificate of graduation from a high school or the
15 recognized equivalent of such a certificate;

16 (ii) is legally authorized in this state to provide a
17 program of education beyond high school;

18 (iii) provides an educational program for which it
19 awards a bachelor's or higher degree or provides a program
20 which is acceptable for full credit toward such a degree, a
21 program of postgraduate or postdoctoral studies, or a
22 program of training to prepare students for gainful
23 employment in a recognized occupation; and

24 (iv) is a public or other nonprofit institution.

25 (b) Notwithstanding any of the foregoing provisions of

1 this subsection, all colleges and universities in this state
2 are institutions of higher education for purposes of this
3 part.

4 ~~(15)~~(16) "State" includes, in addition to the states of
5 the United States of America, the District of Columbia,
6 Puerto Rico, the Virgin Islands, and the Dominion of Canada.

7 ~~(16)~~(17) "Unemployment insurance administration fund"
8 means the unemployment insurance administration fund
9 established by this chapter from which administrative
10 expenses under this chapter shall be paid.

11 ~~(17)~~(18) (a) "Wages" means all remuneration payable for
12 personal services, including commissions and bonuses, the
13 cash value of all remuneration payable in any medium other
14 than cash, and backpay received pursuant to a dispute
15 related to employment. The reasonable cash value of
16 remuneration payable in any medium other than cash shall be
17 estimated and determined in accordance with rules prescribed
18 by the department.

19 (b) The term "wages" does not include:

20 (i) the amount of any payment made to or on behalf of
21 an employee by an employer on account of:

22 (A) retirement;

23 (B) sickness or accident disability;

24 (C) medical and hospitalization expenses in connection
25 with sickness or accident disability; or

1 (D) death;

2 (ii) remuneration paid by any county welfare office
3 from public assistance funds for services performed at the
4 direction and request of such county welfare office.

5 ~~(18)~~(19) "Week" means a period of 7 consecutive
6 calendar days ending at midnight on Saturday.

7 ~~(19)~~(20) An individual's "weekly benefit amount" means
8 the amount of benefits he would be entitled to receive for 1
9 week of total unemployment."

10 Section 2. Section 39-51-203, MCA, is amended to read:

11 "39-51-203. Employment defined. (1) "Employment",
12 subject to other provisions of this section, means service
13 by an individual or by an officer of a corporation,
14 including service in interstate commerce, performed for
15 wages or under any contract of hire, written or oral,
16 express or implied.

17 (2) (a) The term "employment" includes an individual's
18 entire service performed within or both within and without
19 this state if:

20 (i) the service is localized in this state; or

21 (ii) the service is not localized in any state but some
22 of the service is performed in this state and:

23 (A) the base of operations or, if there is no base of
24 operations, then the place from which such service is
25 directed or controlled, is in this state; or

1 (B) the base of operations or place from which such
2 service is directed or controlled is not in any state in
3 which some part of the service is performed, but the
4 individual's residence is in this state.

5 (b) Service is considered to be localized within a
6 state if:

7 (i) the service is performed entirely within such
8 state; or

9 (ii) the service is performed both within and without
10 such state, but the service performed without such state is
11 incidental to the individual's service within the state, for
12 example, is temporary or transitory in nature or consists of
13 isolated transactions.

14 (3) Service not covered under subsection (2) of this
15 section and performed entirely without this state with
16 respect to no part of which contributions are required and
17 paid under an unemployment insurance law of any other state
18 or of the federal government is considered to be employment
19 subject to this chapter if the individual performing such
20 services is a resident of this state and the department
21 approves the election of the employing unit for whom such
22 services are performed that the entire service of such
23 individual is considered to be employment subject to this
24 chapter.

25 (4) Service performed by an individual for wages is

1 considered to be employment subject to this chapter unless
2 and until it is shown to the satisfaction of the department
3 that:

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13 ~~independently established trade, occupation, profession, or~~
14 ~~business the individual is an independent contractor.~~

15 (5) The term "employment" includes service performed
16 after December 31, 1971, by an individual in the employ of
17 this state or any of its instrumentalities (or in the employ
18 of this state and one or more other states or their
19 instrumentalities) for a hospital or institution of higher
20 education located in this state. The term "employment"
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22 individuals, including without limitations those individuals
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7 (7) (a) The term "employment" includes the service of
8 an individual who is a citizen of the United States
9 performed outside the United States, except in Canada, after
10 December 31, 1971, in the employ of an American employer,
11 other than service which is considered employment under the
12 provisions of subsection (2) of this section or the parallel
13 provisions of another state's law, if:

14 (i) the employer's principal place of business in the
15 United States is located in this state;

16 (ii) the employer has no place of business in the
17 United States, but:

18 (A) the employer is an individual who is a resident of
19 this state;

20 (B) the employer is a corporation which is organized
21 under the laws of this state; or

22 (C) the employer is a partnership or a trust and the
23 number of the partners or trustees who are residents of this
24 state is greater than the number who are residents of any
25 other state; or

1 (iii) none of the criteria of sections (7)(a)(i) and
 2 (7)(a)(ii) of this subsection are met but the employer has
 3 elected coverage in this state or, the employer having
 4 failed to elect coverage in any state, the individual has
 5 filed a claim for benefits based on such service under the
 6 law of this state.

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 8 subsection, means a person who is:

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 15 control or direction over the performance of the services,
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 17 except employment of a volunteer under 67-2-105;

18 (c) employment of members of an employer's family
 19 dwelling in the employer's household;

20 (d) employment of sole proprietors or working members
 21 of a partnership other than those who consider themselves or
 22 hold themselves out as independent contractors and who are
 23 not contracting for agricultural services to be performed on
 24 a farm or ranch, or for broker or salesman services
 25 performed under a license issued by the board of realty

1 regulation, or for services as a direct seller engaged in
2 the sale of consumer products to customers primarily in the
3 home;

4 (e) employment for which a rule of liability for
5 injury, occupational disease, or death is provided under the
6 laws of the United States;

7 (f) any person performing services in return for aid
8 or sustenance only, except employment of a volunteer under
9 67-2-105;

10 (g) employment with any railroad engaged in interstate
11 commerce, except that railroad construction work shall be
12 included in and subject to the provisions of this chapter;

13 (h) employment as an official, including a timer,
14 referee, or judge, at a school amateur athletic event,
15 unless the person is otherwise employed by a school
16 district.

17 (3) A sole proprietor or working member of a
18 partnership who holds himself out or considers himself an
19 independent contractor and who is not contracting for
20 agricultural services to be performed on a farm or ranch, or
21 for broker or salesman services performed under a license
22 issued by the board of realty regulation, or for services as
23 a direct seller engaged in the sale of consumer products to
24 customers primarily in the home must elect to be bound
25 personally and individually by the provisions of

1 compensation plan No. 1, 2, or 3, but he may apply to the
2 division for an exemption from the Workers' Compensation Act
3 for himself. The application must be made in accordance with
4 the rules adopted by the division. The division may deny the
5 application only if it determines that the applicant is not
6 an independent contractor. When an application is approved
7 by the division, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from
9 obtaining benefits under this chapter. If the division
10 denies the application for exemption, the applicant may
11 contest the denial by petitioning for review of the decision
12 by an appeals referee in the manner provided for in
13 39-51-1109. An applicant dissatisfied with the decision of
14 the appeals referee may appeal the decision in accordance
15 with the procedure established in 39-51-2403 and 39-51-2404.

16 (4) Each employer shall post a sign in the workplace
17 at the locations where notices to employees are normally
18 posted, informing employees about the employer's current
19 provision of compensation insurance. A workplace is any
20 location where an employee performs any work-related act in
21 the course of employment, regardless of whether the location
22 is temporary or permanent, and includes the place of
23 business or property of a third person while the employer
24 has access to or control over such place of business or
25 property for the purpose of carrying on his usual trade,

1 business, or occupation. The sign will be provided by the
 2 division, distributed through insurers or directly by the
 3 division, and posted by employers in accordance with rules
 4 adopted by the division. An employer who purposely or
 5 knowingly fails to post a sign as provided in this
 6 subsection is subject to a \$50 fine for each citation."

7 NEW SECTION. Section 7. Procedure for resolving
 8 disputes regarding independent contractor status. (1) If an
 9 individual, employer, or insurer has a dispute as to whether
 10 an individual is an independent contractor or an employee as
 11 defined in this chapter, any party may petition a department
 12 of labor and industry appeals referee for resolution of the
 13 dispute in accordance with 39-51-1109, and may appeal from a
 14 decision of the appeals referee in the same manner as
 15 prescribed in 39-51-2403 and 39-51-2404.

16 (2) If a claimant and insurer have a dispute over
 17 benefits and the dispute involves an issue of whether the
 18 claimant is an independent contractor or employee as defined
 19 in this chapter, either party may petition the workers'
 20 compensation judge for resolution of the dispute in
 21 accordance with 39-71-2905.

22 (3) Notwithstanding the provisions of subsection (1),
 23 an individual may apply to the division for an exemption
 24 from the Workers' Compensation Act in accordance with
 25 39-71-401.

1 NEW SECTION. Section 8. Extension of authority. Any
 2 existing authority of the department of labor and industry
 3 to make rules on the subject of the provisions of this act
 4 is extended to the provisions of this act.

5 NEW SECTION. Section 9. Codification instruction.
 6 Section 7 is intended to be codified as an integral part of
 7 Title 39, chapter 71, part 4, and the provisions of Title
 8 39, chapter 71, part 4, apply to section 7.

9 NEW SECTION. Section 10. Effective date. This act is
 10 effective July 1, 1987.

-End-

1 SENATE BILL NO. 313

2 INTRODUCED BY BLAYLOCK

3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

4
5 A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING A COMMON
6 DEFINITION FOR THE TERM "INDEPENDENT CONTRACTOR" FOR
7 PURPOSES OF THE UNEMPLOYMENT INSURANCE LAW AND THE WORKERS'
8 COMPENSATION ACT; REVISING AND UNIFYING THE PROCEDURE FOR
9 DETERMINING AN INDIVIDUAL'S EMPLOYMENT STATUS AS AN
10 INDEPENDENT CONTRACTOR; AMENDING SECTIONS 39-51-201,
11 39-51-203, 39-51-310, 39-51-1109, 39-71-120, AND 39-71-401,
12 MCA; AND PROVIDING AN EFFECTIVE DATE."
13

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

15 Section 1. Section 39-51-201, MCA, is amended to read:

16 "39-51-201. General definitions. As used in this
17 chapter, unless the context clearly requires otherwise, the
18 following definitions apply:

19 (1) "Annual payroll" means the total amount of wages
20 paid by an employer, regardless of the time of payment, for
21 employment during a calendar year.

22 (2) "Base period" means the first four of the last
23 five completed calendar quarters immediately preceding the
24 first day of an individual's benefit year. However, in the
25 case of a combined-wage claim pursuant to the arrangement

1 approved by the secretary of labor of the United States, the
2 base period shall be that applicable under the unemployment
3 law of the paying state. For an individual who fails to
4 meet the qualifications of 39-51-2105 due to a temporary
5 total disability as defined in 39-71-116 or a similar
6 statute of another state or the United States, the base
7 period means the first four quarters of the last five
8 quarters preceding the disability if a claim for
9 unemployment benefits is filed within 24 months of the date
10 on which the individual's disability was incurred.

11 (3) "Benefits" means the money payments payable to an
12 individual, as provided in this chapter, with respect to his
13 unemployment.

14 (4) "Benefit year", with respect to any individual,
15 means the 52 consecutive-week period beginning with the
16 first day of the calendar week in which such individual
17 files a valid claim for benefits, except that the benefit
18 year shall be 53 weeks if filing a new valid claim would
19 result in overlapping any quarter of the base year of a
20 previously filed new claim. A subsequent benefit year may
21 not be established until the expiration of the current
22 benefit year. However, in the case of a combined-wage claim
23 pursuant to the arrangement approved by the secretary of
24 labor of the United States, the base period is the period
25 applicable under the unemployment law of the paying state.

1 (5) "Board" means the board of labor appeals provided
2 for in Title 2, chapter 15, part 17.

3 (6) "Calendar quarter" means the period of 3
4 consecutive calendar months ending on March 31, June 30,
5 September 30, or December 31.

6 (7) "Contributions" means the money payments to the
7 state unemployment insurance fund required by this chapter
8 but does not include assessments under 39-51-404(4).

9 (8) "Department" means the department of labor and
10 industry provided for in Title 2, chapter 15, part 17.

11 (9) "Employing unit" means any individual or
12 organization, including the state government, any of its
13 political subdivisions or instrumentalities, any
14 partnership, association, trust, estate, joint-stock
15 company, insurance company, or corporation, whether domestic
16 or foreign, or the receiver, trustee in bankruptcy, trustee
17 or successor thereof, or the legal representative of a
18 deceased person which has or subsequent to January 1, 1936,
19 had in its employ one or more individuals performing
20 services for it within this state, except as provided under
21 subsections (8) and (9) of 39-51-203. All individuals
22 performing services within this state for any employing unit
23 which maintains two or more separate establishments within
24 this state are considered to be employed by a single
25 employing unit for all the purposes of this chapter. Each

1 individual employed to perform or assist in performing the
2 work of any agent or employee of an employing unit is deemed
3 to be employed by such employing unit for the purposes of
4 this chapter, whether such individual was hired or paid
5 directly by such employing unit or by such agent or
6 employee, provided the employing unit has actual or
7 constructive knowledge of the work.

8 (10) "Employment office" means a free public employment
9 office or branch thereof operated by this state or
10 maintained as a part of a state-controlled system of public
11 employment offices or such other free public employment
12 offices operated and maintained by the United States
13 government or its instrumentalities as the department may
14 approve.

15 (11) "Fund" means the unemployment insurance fund
16 established by this chapter to which all contributions and
17 payments in lieu of contributions are required and from
18 which all benefits provided under this chapter shall be
19 paid.

20 (12) "Gross misconduct" means a criminal act, other
21 than a violation of a motor vehicle traffic law, for which
22 an individual has been convicted in a criminal court or has
23 admitted or conduct which demonstrates a flagrant and wanton
24 disregard of and for the rights or title or interest of a
25 fellow employee or his employer.

1 (13) "Hospital" means an institution which has been
2 licensed, certified, or approved by the state as a hospital.

3 (14) "Independent contractor" means an individual who
4 renders service in the course of an occupation and:

5 (a) has been and will continue to be free from control
6 or direction over the performance of the services, both
7 under his contract and in fact; and

8 (b) is engaged in an independently established trade
9 occupation, profession, or business.

10 ~~(14)~~(15) (a) "Institution of higher education", for the
11 purposes of this part, means an educational institution
12 which:

13 (i) admits as regular students only individuals having
14 a certificate of graduation from a high school or the
15 recognized equivalent of such a certificate;

16 (ii) is legally authorized in this state to provide a
17 program of education beyond high school;

18 (iii) provides an educational program for which it
19 awards a bachelor's or higher degree or provides a program
20 which is acceptable for full credit toward such a degree, a
21 program of postgraduate or postdoctoral studies, or a
22 program of training to prepare students for gainful
23 employment in a recognized occupation; and

24 (iv) is a public or other nonprofit institution.

25 (b) Notwithstanding any of the foregoing provisions of

1 this subsection, all colleges and universities in this state
2 are institutions of higher education for purposes of this
3 part.

4 ~~(15)~~(16) "State" includes, in addition to the states of
5 the United States of America, the District of Columbia,
6 Puerto Rico, the Virgin Islands, and the Dominion of Canada.

7 ~~(16)~~(17) "Unemployment insurance administration fund"
8 means the unemployment insurance administration fund
9 established by this chapter from which administrative
10 expenses under this chapter shall be paid.

11 ~~(17)~~(18) (a) "Wages" means all remuneration payable for
12 personal services, including commissions and bonuses, the
13 cash value of all remuneration payable in any medium other
14 than cash, and backpay received pursuant to a dispute
15 related to employment. The reasonable cash value of
16 remuneration payable in any medium other than cash shall be
17 estimated and determined in accordance with rules prescribed
18 by the department.

19 (b) The term "wages" does not include:

20 (i) the amount of any payment made to or on behalf of
21 an employee by an employer on account of:

22 (A) retirement;

23 (B) sickness or accident disability;

24 (C) medical and hospitalization expenses in connection
25 with sickness or accident disability; or

1 (D) death;

2 (ii) remuneration paid by any county welfare office

3 from public assistance funds for services performed at the

4 direction and request of such county welfare office.

5 ~~(18)~~(19) "Week" means a period of 7 consecutive

6 calendar days ending at midnight on Saturday.

7 ~~(19)~~(20) An individual's "weekly benefit amount" means

8 the amount of benefits he would be entitled to receive for 1

9 week of total unemployment."

10 Section 2. Section 39-51-203, MCA, is amended to read:

11 "39-51-203. Employment defined. (1) "Employment",

12 subject to other provisions of this section, means service

13 by an individual or by an officer of a corporation,

14 including service in interstate commerce, performed for

15 wages or under any contract of hire, written or oral,

16 express or implied.

17 (2) (a) The term "employment" includes an individual's

18 entire service performed within or both within and without

19 this state if:

20 (i) the service is localized in this state; or

21 (ii) the service is not localized in any state but some

22 of the service is performed in this state and:

23 (A) the base of operations or, if there is no base of

24 operations, then the place from which such service is

25 directed or controlled, is in this state; or

1 (B) the base of operations or place from which such

2 service is directed or controlled is not in any state in

3 which some part of the service is performed, but the

4 individual's residence is in this state.

5 (b) Service is considered to be localized within a

6 state if:

7 (i) the service is performed entirely within such

8 state; or

9 (ii) the service is performed both within and without

10 such state, but the service performed without such state is

11 incidental to the individual's service within the state, for

12 example, is temporary or transitory in nature or consists of

13 isolated transactions.

14 (3) Service not covered under subsection (2) of this

15 section and performed entirely without this state with

16 respect to no part of which contributions are required and

17 paid under an unemployment insurance law of any other state

18 or of the federal government is considered to be employment

19 subject to this chapter if the individual performing such

20 services is a resident of this state and the department

21 approves the election of the employing unit for whom such

22 services are performed that the entire service of such

23 individual is considered to be employment subject to this

24 chapter.

25 (4) Service performed by an individual for wages is

1 considered to be employment subject to this chapter unless
2 and until it is shown to the satisfaction of the department
3 that:

4 ~~(a) such individual has been and will continue to be~~
5 ~~free from control or direction over the performance of such~~
6 ~~services, both under his contract and in fact;~~

7 ~~(b) such service is either outside the usual course of~~
8 ~~the business for which such service is performed or that~~
9 ~~such service is performed outside of all the places of~~
10 ~~business of the enterprise for which such service is~~
11 ~~performed; and~~

12 ~~(c) such individual is customarily engaged in an~~
13 ~~independently established trade, occupation, profession, or~~
14 ~~business the individual is an independent contractor.~~

15 (5) The term "employment" includes service performed
16 after December 31, 1971, by an individual in the employ of
17 this state or any of its instrumentalities (or in the employ
18 of this state and one or more other states or their
19 instrumentalities) for a hospital or institution of higher
20 education located in this state. The term "employment"
21 includes service performed after July 1, 1975, by all
22 individuals, including without limitations those individuals
23 who work for the state of Montana, its university, any of
24 its colleges, public schools, components or units thereof,
25 or any local government unit and one or more other states or

1 their instrumentalities or political subdivisions whose
2 services are compensated by salary or wages.

3 (6) The term "employment" includes service performed
4 after December 31, 1971, by an individual in the employ of a
5 religious, charitable, scientific, literary, or educational
6 organization.

7 (7) (a) The term "employment" includes the service of
8 an individual who is a citizen of the United States
9 performed outside the United States, except in Canada, after
10 December 31, 1971, in the employ of an American employer,
11 other than service which is considered employment under the
12 provisions of subsection (2) of this section or the parallel
13 provisions of another state's law, if:

14 (i) the employer's principal place of business in the
15 United States is located in this state;

16 (ii) the employer has no place of business in the
17 United States, but:

18 (A) the employer is an individual who is a resident of
19 this state;

20 (B) the employer is a corporation which is organized
21 under the laws of this state; or

22 (C) the employer is a partnership or a trust and the
23 number of the partners or trustees who are residents of this
24 state is greater than the number who are residents of any
25 other state; or

1 (iii) none of the criteria of sections (7)(a)(i) and
 2 (7)(a)(ii) of this subsection are met but the employer has
 3 elected coverage in this state or, the employer having
 4 failed to elect coverage in any state, the individual has
 5 filed a claim for benefits based on such service under the
 6 law of this state.

7 (b) An "American employer", for purposes of this
 8 subsection, means a person who is:

9 (i) an individual who is a resident of the United
 10 States;

11 (ii) a partnership if two-thirds or more of the
 12 partners are residents of the United States;

13 (iii) a trust if all of the trustees are residents of
 14 the United States; or

15 (iv) a corporation organized under the laws of the
 16 United States or of any state.

17 (8) Agricultural labor exempted under 39-51-204 is
 18 considered employment subject to this chapter effective
 19 January 1, 1978, whenever the employing unit pays \$20,000 or
 20 more in cash to workers for agricultural labor in any
 21 quarter in the current or preceding calendar year or employs
 22 10 or more workers in agricultural labor on 20 days in 20
 23 different weeks during the current or preceding calendar
 24 year. If an employer is otherwise subject to the chapter
 25 and has agricultural employment, all employees are covered

1 under the chapter regardless of the amount of money
 2 expended for agricultural purposes.

3 (9) Domestic service exempted under 39-51-204(1)(b) is
 4 considered employment subject to this chapter effective
 5 January 1, 1978, whenever the employing unit pays \$1,000 or
 6 more in cash for domestic service in any quarter during the
 7 current or preceding calendar year. If an employer is
 8 otherwise subject to the chapter and has domestic
 9 employment, all employees are covered under the chapter
 10 regardless of the amount of money expended for domestic
 11 purposes."

12 Section 3. Section 39-51-310, MCA, is amended to read:

13 "39-51-310. Function of board. The board shall act in
 14 a quasi-judicial capacity for the hearing of disputes
 15 concerning the administration of Montana's unemployment
 16 insurance laws and disputes arising under Title 39, chapter
 17 71, not concerning benefits, regarding whether an individual
 18 is an employee or an independent contractor as defined in
 19 that chapter."

20 Section 4. Section 39-51-1109, MCA, is amended to
 21 read:

22 "39-51-1109. Tax appeals. Any person aggrieved by any
 23 decision, determination, or redetermination of the
 24 department involving contribution liability, contribution
 25 rate, application for refund, employment status, or the

1 charging of benefit payments to employers making payment in
 2 lieu of contributions ~~is entitled to a review in accordance~~
 3 ~~with Title 27, chapter 47, parts 6 and 7.~~ may appeal to an
 4 appeals referee within 10 days after notice of the decision
 5 is mailed to that person's last-known address, except the
 6 period for timely appeal may be extended by the referee upon
 7 a showing of good cause. The decision of the appeals referee
 8 and any appeal therefrom must be made in the same manner as
 9 prescribed in 39-51-2403 and 39-51-2404."

10 Section 5. Section 39-71-120, MCA, is amended to read:

11 "39-71-120. Independent contractor defined. (1) An
 12 "independent contractor" is one who renders service in the
 13 course of an occupation and:

14 (1)(a) has been and will continue to be free from
 15 control or direction over the performance of the services,
 16 both under his contract and in fact; and

17 (2)(b) is engaged in an independently established
 18 trade, occupation, profession, or business.

19 (2) An individual performing services for remuneration
 20 is considered to be an employee under this chapter unless
 21 and until it is shown to the satisfaction of the department
 22 of labor and industry or the division that the requirements
 23 of subsection (1) are met."

24 Section 6. Section 39-71-401, MCA, is amended to read:

25 "39-71-401. Employments covered and employments

1 exempted. (1) Except as provided in subsection (2) of this
 2 section, the Workers' Compensation Act applies to all
 3 employers as defined in 39-71-117 and to all employees as
 4 defined in 39-71-118. An employer who has any employee in
 5 service under any appointment or contract of hire, expressed
 6 or implied, oral or written, shall elect to be bound by the
 7 provisions of compensation plan No. 1, 2, or 3. Every
 8 employee whose employer is bound by the Workers'
 9 Compensation Act is subject to and bound by the compensation
 10 plan that has been elected by the employer.

11 (2) Unless the employer elects coverage for these
 12 employments under this chapter and an insurer allows such an
 13 election, the Workers' Compensation Act does not apply to
 14 any of the following employments:

15 (a) household and domestic employment;

16 (b) casual employment as defined in 39-71-116(3)
 17 except employment of a volunteer under 67-2-105;

18 (c) employment of members of an employer's family
 19 dwelling in the employer's household;

20 (d) employment of sole proprietors or working members
 21 of a partnership other than those who consider themselves or
 22 hold themselves out as independent contractors and who are
 23 not contracting for agricultural services to be performed on
 24 a farm or ranch, or for broker or salesman services
 25 performed under a license issued by the board of realty

1 regulation, or for services as a direct seller engaged in
2 the sale of consumer products to customers primarily in the
3 home;

4 (e) employment for which a rule of liability for
5 injury, occupational disease, or death is provided under the
6 laws of the United States;

7 (f) any person performing services in return for aid
8 or sustenance only, except employment of a volunteer under
9 67-2-105;

10 (g) employment with any railroad engaged in interstate
11 commerce, except that railroad construction work shall be
12 included in and subject to the provisions of this chapter;

13 (h) employment as an official, including a timer,
14 referee, or judge, at a school amateur athletic event,
15 unless the person is otherwise employed by a school
16 district.

17 (3) A sole proprietor or working member of a
18 partnership who holds himself out or considers himself an
19 independent contractor and who is not contracting for
20 agricultural services to be performed on a farm or ranch, or
21 for broker or salesman services performed under a license
22 issued by the board of realty regulation, or for services as
23 a direct seller engaged in the sale of consumer products to
24 customers primarily in the home must elect to be bound
25 personally and individually by the provisions of

1 compensation plan No. 1, 2, or 3, but he may apply to the
2 division for an exemption from the Workers' Compensation Act
3 for himself. The application must be made in accordance with
4 the rules adopted by the division. The division may deny the
5 application only if it determines that the applicant is not
6 an independent contractor. When an application is approved
7 by the division, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from
9 obtaining benefits under this chapter. If the division
10 denies the application for exemption, the applicant may
11 contest the denial by petitioning for review of the decision
12 by an appeals referee in the manner provided for in
13 39-51-1109. An applicant dissatisfied with the decision of
14 the appeals referee may appeal the decision in accordance
15 with the procedure established in 39-51-2403 and 39-51-2404.

16 (4) Each employer shall post a sign in the workplace
17 at the locations where notices to employees are normally
18 posted, informing employees about the employer's current
19 provision of compensation insurance. A workplace is any
20 location where an employee performs any work-related act in
21 the course of employment, regardless of whether the location
22 is temporary or permanent, and includes the place of
23 business or property of a third person while the employer
24 has access to or control over such place of business or
25 property for the purpose of carrying on his usual trade,

1 business, or occupation. The sign will be provided by the
 2 division, distributed through insurers or directly by the
 3 division, and posted by employers in accordance with rules
 4 adopted by the division. An employer who purposely or
 5 knowingly fails to post a sign as provided in this
 6 subsection is subject to a \$50 fine for each citation."

7 NEW SECTION. Section 7. Procedure for resolving
 8 disputes regarding independent contractor status. (1) If an
 9 individual, employer, or insurer has a dispute as to whether
 10 an individual is an independent contractor or an employee as
 11 defined in this chapter, any party may petition a department
 12 of labor and industry appeals referee for resolution of the
 13 dispute in accordance with 39-51-1109, and may appeal from a
 14 decision of the appeals referee in the same manner as
 15 prescribed in 39-51-2403 and 39-51-2404.

16 (2) If a claimant and insurer have a dispute over
 17 benefits and the dispute involves an issue of whether the
 18 claimant is an independent contractor or employee as defined
 19 in this chapter, either party may petition the workers'
 20 compensation judge for resolution of the dispute in
 21 accordance with 39-71-2905.

22 (3) Notwithstanding the provisions of subsection (1),
 23 an individual may apply to the division for an exemption
 24 from the Workers' Compensation Act in accordance with
 25 39-71-401.

1 NEW SECTION. Section 8. Extension of authority. Any
 2 existing authority of the department of labor and industry
 3 to make rules on the subject of the provisions of this act
 4 is extended to the provisions of this act.

5 NEW SECTION. Section 9. Codification instruction.
 6 Section 7 is intended to be codified as an integral part of
 7 Title 39, chapter 71, part 4, and the provisions of Title
 8 39, chapter 71, part 4, apply to section 7.

9 NEW SECTION. Section 10. Effective date. This act is
 10 effective July 1, 1987.

-End-

HOUSE

STANDING COMMITTEE REPORT

MARCH 13

19 87

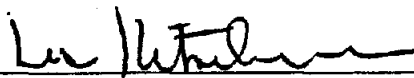
Mr. Speaker: We, the committee on BUSINESS AND LABOR

report SENATE BILL NO. 313

do pass
 do not pass

be concurred in
 be not concurred in

as amended
 statement of intent attached



REP. LES KITSELMAN

Chairman

AMENDMENTS AS FOLLOWS:

- 1) Page 13, lines 21 and 22
Strike: line 21 in its entirety and line 22
through "that"

Rep. Jerry Driscoll will sponsor

THIRD reading copy (BLUE color)

TP MS