

1 House BILL NO. 98
2 INTRODUCED BY Carlovich Bank

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE LABOR LAWS TO EXCLUDE FROM MINIMUM
5 WAGE, OVERTIME, UNEMPLOYMENT INSURANCE, AND WORKERS' COMPENSATION REQUIREMENTS
6 A DIRECT SELLER AS DEFINED BY FEDERAL LAW; AMENDING SECTIONS 39-3-406, 39-51-204, AND
7 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

8
9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

10
11 **Section 1.** Section 39-3-406, MCA, is amended to read:

12 **"39-3-406. Exclusions.** (1) The provisions of 39-3-404 and 39-3-405 do not apply with respect
13 to:

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

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

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

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

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

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

26 (g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed
27 30 days of their employment;

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

1 in this part;

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

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

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

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

9 (m) an outside salesperson or marketing representative paid on a commission, contract, or salary
10 basis who is primarily employed in selling or marketing products or services in the food distribution industry
11 for a food broker, wholesaler, or association;

12 (n) a direct seller as defined in 26 U.S.C. 3508.

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

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

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

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

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

22 (e) a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily
23 engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements
24 if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily
25 engaged in the business of selling the vehicles or implements to ultimate purchasers;

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

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

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

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

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

10 (k) an employee employed in agriculture by a farmer, notwithstanding other employment of the
11 employee in connection with livestock auction operations in which the farmer is engaged as an adjunct to
12 the raising of livestock, either alone or in conjunction with other farmers, if the employee is:

13 (i) primarily employed during a workweek in agriculture by a farmer; and

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

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

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

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

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

30 (p) an employee of a sheriff's department who is working under an established work period in lieu

1 of a workweek pursuant to 7-4-2509(1);

2 (q) an employee of a municipal or county government who is working under a work period not
3 exceeding 40 hours in a 7-day period established through a collective bargaining agreement when a
4 collective bargaining unit represents the employee or by mutual agreement of the employer and employee
5 when a bargaining unit is not recognized. Employment in excess of 40 hours in a 7-day, 40-hour work
6 period must be compensated at a rate of not less than 1 ½ times the hourly wage rate for the employee.

7 (r) an employee of a hospital or other establishment primarily engaged in the care of the sick,
8 disabled, aged, or mentally ill or defective who is working under a work period not exceeding 80 hours in
9 a 14-day period established through either a collective bargaining agreement when a collective bargaining
10 unit represents the employee or by mutual agreement of the employer and employee when a bargaining unit
11 is not recognized. Employment in excess of 8 hours ~~per~~ a day or 80 hours in a 14-day period must be
12 compensated for at a rate of not less than 1 ½ times the hourly wage rate for the employee.

13 (s) a firefighter who is working under a work period established in a collective bargaining agreement
14 entered into between a public employer and a firefighters' organization or its exclusive representative;

15 (t) an officer or other employee of a police department in a city of the first or second class who
16 is working under a work period established by the chief of police under 7-32-4118;

17 (u) an employee of a department of public safety working under a work period established pursuant
18 to 7-32-115;

19 (v) an employee of a retail establishment if the employee's regular rate of pay exceeds 1 ½ times
20 the minimum hourly rate applicable under section 206 of the Fair Labor Standards Act of 1938 and if more
21 than half of the employee's compensation for a period of not less than 1 month is derived from
22 commissions on goods and services."

23

24 **Section 2.** Section 39-51-204, MCA, is amended to read:

25 **"39-51-204. Exclusions from definition of employment.** (1) The term "employment" does not
26 include:

27 (a) agricultural labor, except as provided in 39-51-202(2). If an employer is otherwise subject to
28 this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded
29 from coverage under this chapter if the employer:

30 (i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the

1 monetary amount or number of employees and days worked, for the subject wages attributable to
2 agricultural labor; and

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

4 (b) household and domestic service in a private home, local college club, or local chapter of a
5 college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to
6 this chapter and has domestic service employment, all employees engaged in domestic service must be
7 excluded from coverage under this chapter if the employer:

8 (i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the
9 subject wages attributable to domestic service; and

10 (ii) keeps separate books and records to account for the employment of persons in domestic service.

11 (c) service performed as an officer or member of the crew of a vessel on the navigable waters of
12 the United States;

13 (d) service performed by an individual in the employ of that individual's son, daughter, or spouse
14 and service performed by a child under the age of 21 in the employ of the child's father or mother;

15 (e) service performed in the employ of any other state or its political subdivisions or of the United
16 States government or of an instrumentality of any other state or states or their political subdivisions or of
17 the United States, except that national banks organized under the national banking law may not be entitled
18 to exemption under this subsection and are subject to this chapter the same as state banks, provided that
19 the service is excluded from employment as defined in the Federal Unemployment Tax Act by section
20 3306(c)(7) of that act;

21 (f) service with respect to which unemployment insurance is payable under an unemployment
22 insurance system established by an act of congress, provided that the department shall enter into
23 agreements with the proper agencies under an act of congress, which agreements become effective in the
24 manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide
25 reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter,
26 acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential
27 rights to unemployment insurance under the act of congress, acquired rights to benefits under this chapter;

28 (g) services performed as a newspaper carrier or free-lance correspondent if the person performing
29 the services or a parent or guardian of the person performing the services in the case of a minor has
30 acknowledged in writing that the person performing the services and the services are not covered. As used

1 in this subsection:

2 (i) "free-lance correspondent" is a person who submits articles or photographs for publication and
3 is paid by the article or by the photograph; and

4 (ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering
5 newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally
6 to the employee's main duties, carries or delivers papers.

7 (h) services performed by real estate, securities, and insurance salespeople paid solely by
8 commissions and without guarantee of minimum earnings;

9 (i) service performed in the employ of a school, college, or university if the service is performed
10 by a student who is enrolled and is regularly attending classes at a school, college, or university or by the
11 spouse of a student if the spouse is advised, at the time that the spouse commences to perform the
12 service, that the employment of the spouse to perform the service is provided under a program to provide
13 financial assistance to the student by the school, college, or university and that the employment will not
14 be covered by any program of unemployment insurance;

15 (j) service performed by an individual who is enrolled at a nonprofit or public educational institution,
16 which normally maintains a regular faculty and curriculum and normally has a regularly organized body of
17 students in attendance at the place where its educational activities are carried on, as a student in a full-time
18 program taken for credit at an institution that combines academic instruction with work experience if the
19 service is an integral part of the program and the institution has certified that fact to the employer, except
20 that this subsection does not apply to service performed in a program established for or on behalf of an
21 employer or group of employers;

22 (k) service performed in the employ of a hospital if the service is performed by a patient of the
23 hospital;

24 (l) services performed by a cosmetologist who is licensed under Title 37, chapter 31, or a barber
25 who is licensed under Title 37, chapter 30, and:

26 (i) who has acknowledged in writing that the cosmetologist or barber is not covered by
27 unemployment insurance and workers' compensation;

28 (ii) who contracts with a cosmetology salon, as defined in 37-31-101, or a barbershop, as defined
29 in 37-30-101, which contract must show that the cosmetologist or barber:

30 (A) is free from all control and direction of the owner in the contract;

1 (B) receives payment for services from individual clientele; and

2 (C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or
3 knowledge; and

4 (iii) whose contract gives rise to an action for breach of contract in the event of contract termination
5 (the existence of a single license for the cosmetology salon or barbershop may not be construed as a lack
6 of freedom from control or direction under this subsection);

7 (m) casual labor not in the course of an employer's trade or business performed in any calendar
8 quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by
9 an individual who is regularly employed by the employer to perform the service. "Regularly employed"
10 means the services are performed during at least 24 days in the same quarter.

11 (n) employment of sole proprietors or working members of a partnership;

12 (o) services performed for the installation of floor coverings if the installer:

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

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

15 (iii) may perform services for anyone without limitation;

16 (iv) may accept or reject any job;

17 (v) furnishes substantially all tools and equipment necessary to provide the services; and

18 (vi) works under a written contract that:

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

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

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

24 (p) employment of a direct seller as defined in 26 U.S.C. 3508.

25 (2) "Employment" does not include elected public officials.

26 (3) For the purposes of 39-51-203(6), the term "employment" does not apply to service performed:

27 (a) in the employ of a church or convention or association of churches or an organization that is
28 operated primarily for religious purposes and that is operated, supervised, controlled, or principally
29 supported by a church or convention or association of churches;

30 (b) by ~~a duly~~ an ordained, commissioned, or licensed minister of a church in the exercise of the

1 church's ministry or by a member of a religious order in the exercise of duties required by the order;

2 (c) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals
3 whose earning capacity is impaired by age or physical or mental deficiency or injury or providing
4 remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily
5 absorbed in the competitive labor market by an individual receiving rehabilitation or remunerative work;

6 (d) as part of an unemployment work-relief or work-training program assisted or financed in whole
7 or in part by a federal agency or any agency of a state or political subdivision of the state by an individual
8 receiving work relief or work training; or

9 (e) for a state prison or other state correctional or custodial institution by an inmate of that
10 institution.

11 (4) An individual found to be an independent contractor by the department under the terms of
12 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent
13 contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to
14 39-51-2402.

15 (5) This section does not apply to a state or local governmental entity or a nonprofit organization
16 defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from
17 employment as defined in the Federal Unemployment Tax Act."

18
19 **Section 3.** Section 39-71-401, MCA, is amended to read:

20 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in
21 subsection (2), the Workers' Compensation Act applies to all employers₂ as defined in 39-71-117₂ and to
22 all employees₂ as defined in 39-71-118. An employer who has any employee in service under any
23 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the
24 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'
25 Compensation Act is subject to and bound by the compensation plan that has been elected by the
26 employer.

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

30 (a) household and domestic employment;

- 1 (b) casual employment as defined in 39-71-116;
- 2 (c) employment of a dependent member of an employer's family for whom an exemption may be
3 claimed by the employer under the federal Internal Revenue Code;
- 4 (d) employment of sole proprietors or working members of a partnership, except as provided in
5 subsection (3);
- 6 (e) employment of a broker or salesman performing under a license issued by the board of realty
7 regulation;
- 8 (f) employment of a direct seller ~~engaged in the sale of consumer products, primarily in the~~
9 ~~customer's home~~ as defined in 26 U.S.C. 3508;
- 10 (g) employment for which a rule of liability for injury, occupational disease, or death is provided
11 under the laws of the United States;
- 12 (h) employment of any person performing services in return for aid or sustenance only, except
13 employment of a volunteer under 67-2-105;
- 14 (i) employment with any railroad engaged in interstate commerce, except that railroad construction
15 work is included in and subject to the provisions of this chapter;
- 16 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic
17 event, unless the person is otherwise employed by a school district;
- 18 (k) any person performing services as a newspaper carrier or free-lance correspondent if the person
19 performing the services or a parent or guardian of the person performing the services in the case of a minor
20 has acknowledged in writing that the person performing the services and the services are not covered. As
21 used in this subsection, "free-lance correspondent" is a person who submits articles or photographs for
22 publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":
- 23 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in
24 bundles; but
- 25 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,
26 carries or delivers papers.
- 27 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);
- 28 (m) a person who is employed by an enrolled tribal member who operates solely within the exterior
29 boundaries of an Indian reservation.
- 30 (3) (a) A sole proprietor or a working member of a partnership who represents to the public that

1 the person is an independent contractor shall elect to be bound personally and individually by the provisions
2 of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers'
3 Compensation Act.

4 (b) The application must be made in accordance with the rules adopted by the department. The
5 department may deny the application only if it determines that the applicant is not an independent
6 contractor.

7 (c) When an application is approved by the department, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from obtaining benefits under this chapter.

9 (d) When an election of an exemption is approved by the department, the election remains effective
10 and the independent contractor retains the status as an independent contractor until the independent
11 contractor notifies the department of any change in status and provides a description of present work
12 status.

13 (e) If the department denies the application for exemption, the applicant may contest the denial by
14 petitioning for review of the decision by an appeals referee in the manner provided for in 39-51-1109. An
15 applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with
16 the procedure established in 39-51-2403 and 39-51-2404.

17 (4) (a) A private corporation shall provide coverage for its officers and other employees under the
18 provisions of compensation plan No. 1, 2, or 3. However, pursuant to rules that the department
19 promulgates and subject in all cases to approval by the department, an officer of a private corporation may
20 elect not to be bound as an employee under this chapter by giving a written notice, on a form provided by
21 the department, served in the following manner:

22 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by
23 delivering the notice to the board of directors of the employer and to the department; or

24 (ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by
25 delivering the notice to the board of directors of the employer, to the department, and to the insurer.

26 (b) If the employer changes plans or insurers, the officer's previous election is not effective and
27 the officer shall again serve notice as provided if the officer elects not to be bound.

28 (c) The appointment or election of an employee as an officer of a corporation for the purpose of
29 excluding the employee from coverage under this chapter does not entitle the officer to elect not to be
30 bound as an employee under this chapter. In any case, the officer shall sign the notice required by

1 subsection (4)(a) under oath or affirmation and is subject to the penalties for false swearing under 45-7-202
2 if the officer falsifies the notice.

3 (5) Each employer shall post a sign in the workplace at the locations where notices to employees
4 are normally posted, informing employees about the employer's current provision of compensation
5 insurance. A workplace is any location where an employee performs any work-related act in the course
6 of employment, regardless of whether the location is temporary or permanent, and includes the place of
7 business or property of a third person while the employer has access to or control over the place of
8 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.
9 The sign must be provided by the department, distributed through insurers or directly by the department,
10 and posted by employers in accordance with rules adopted by the department. An employer who purposely
11 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."
12

13 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

14 -END-

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0098, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act revising state labor laws to exclude from minimum wage, overtime, unemployment insurance, and workers' compensation requirements a direct seller as defined by federal law.

ASSUMPTIONS:

Department of Labor and Industry

1. The Department of Labor and Industry does not keep data on this specific employment category, but it is assumed that the number of direct sellers in this category is minimal.

State Fund

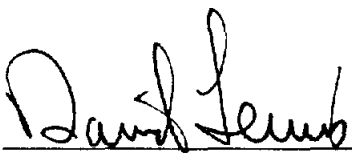
2. Direct sellers are currently exempt from workers' compensation laws.
3. Direct sellers will continue to be exempt from workers' compensation laws.
4. Sellers working from a shop or showroom to arrange in-home demonstrations are covered under workers' compensation laws.

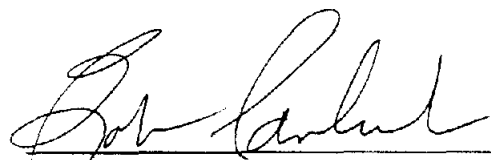
FISCAL IMPACT:

No fiscal impact.

TECHNICAL NOTE:

The bill would exclude "direct sellers", as defined by federal law (26 U.S.C. 3508) from the definition of "employment" (39-51-204, MCA) relative to coverage under unemployment insurance laws and, in effect, exempt this employment category from unemployment insurance requirements. With this exclusion, employers that use "direct sellers" would not report wages or pay the related UI tax for this group of employees (a reduction in income to the UI Trust Fund). Wages received by "direct sellers" would not be included in the employee's wage history which might at a future time be used to calculate a UI benefit payment (a potential reduction in future benefits paid from the UI Trust Fund). Those individuals (direct sellers) for whom wages are reported under current law, would receive a reduced benefit or no benefit under the proposed law since their wages would not be reported.

 1-10-95
DAVID LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning


BOB PAVLOVICH, PRIMARY SPONSOR DATE

Fiscal Note for HB0098, as introduced

HB 98

APPROVED BY COMMITTEE
ON BUSINESS AND LABOR

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INTRODUCED BY Parlow Bank ^{House} BILL NO. 98

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE LABOR LAWS TO EXCLUDE FROM MINIMUM WAGE, OVERTIME, UNEMPLOYMENT INSURANCE, AND WORKERS' COMPENSATION REQUIREMENTS A DIRECT SELLER AS DEFINED BY FEDERAL LAW; AMENDING SECTIONS 39-3-406, 39-51-204, AND 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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

Section 1. Section 39-3-406, MCA, is amended to read:

"**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, and 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 of a nonprofit organization who voluntarily offer their services to a nonprofit organization on a fully or partially reimbursed basis;

(f) handicapped workers engaged in work that 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 the exclusion may not exceed 180 days from their initial date of employment and further provided that during this exclusion period, wages paid the learners may not be less than 50% of the minimum wage rate established

1 in this part;

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

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

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

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

9 (m) an outside salesperson or marketing representative paid on a commission, contract, or salary
10 basis who is primarily employed in selling or marketing products or services in the food distribution industry
11 for a food broker, wholesaler, or association;

12 (n) a direct seller as defined in 26 U.S.C. 3508.

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

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

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

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

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

22 (e) a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily
23 engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements
24 if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily
25 engaged in the business of selling the vehicles or implements to ultimate purchasers;

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

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

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

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

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

10 (k) an employee employed in agriculture by a farmer, notwithstanding other employment of the
11 employee in connection with livestock auction operations in which the farmer is engaged as an adjunct to
12 the raising of livestock, either alone or in conjunction with other farmers, if the employee is:

13 (i) primarily employed during a workweek in agriculture by a farmer; and

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

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

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

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

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

30 (p) an employee of a sheriff's department who is working under an established work period in lieu

1 of a workweek pursuant to 7-4-2509(1);

2 (q) an employee of a municipal or county government who is working under a work period not
3 exceeding 40 hours in a 7-day period established through a collective bargaining agreement when a
4 collective bargaining unit represents the employee or by mutual agreement of the employer and employee
5 when a bargaining unit is not recognized. Employment in excess of 40 hours in a 7-day, 40-hour work
6 period must be compensated at a rate of not less than 1½ times the hourly wage rate for the employee.

7 (r) an employee of a hospital or other establishment primarily engaged in the care of the sick,
8 disabled, aged, or mentally ill or defective who is working under a work period not exceeding 80 hours in
9 a 14-day period established through either a collective bargaining agreement when a collective bargaining
10 unit represents the employee or by mutual agreement of the employer and employee when a bargaining unit
11 is not recognized. Employment in excess of 8 hours ~~per~~ a day or 80 hours in a 14-day period must be
12 compensated for at a rate of not less than 1½ times the hourly wage rate for the employee.

13 (s) a firefighter who is working under a work period established in a collective bargaining agreement
14 entered into between a public employer and a firefighters' organization or its exclusive representative;

15 (t) an officer or other employee of a police department in a city of the first or second class who
16 is working under a work period established by the chief of police under 7-32-4118;

17 (u) an employee of a department of public safety working under a work period established pursuant
18 to 7-32-115;

19 (v) an employee of a retail establishment if the employee's regular rate of pay exceeds 1½ times
20 the minimum hourly rate applicable under section 206 of the Fair Labor Standards Act of 1938 and if more
21 than half of the employee's compensation for a period of not less than 1 month is derived from
22 commissions on goods and services."

23

24 **Section 2.** Section 39-51-204, MCA, is amended to read:

25 **"39-51-204. Exclusions from definition of employment.** (1) The term "employment" does not
26 include:

27 (a) agricultural labor, except as provided in 39-51-202(2). If an employer is otherwise subject to
28 this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded
29 from coverage under this chapter if the employer:

30 (i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the

1 monetary amount or number of employees and days worked, for the subject wages attributable to
2 agricultural labor; and

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

4 (b) household and domestic service in a private home, local college club, or local chapter of a
5 college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to
6 this chapter and has domestic service employment, all employees engaged in domestic service must be
7 excluded from coverage under this chapter if the employer:

8 (i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the
9 subject wages attributable to domestic service; and

10 (ii) keeps separate books and records to account for the employment of persons in domestic service.

11 (c) service performed as an officer or member of the crew of a vessel on the navigable waters of
12 the United States;

13 (d) service performed by an individual in the employ of that individual's son, daughter, or spouse
14 and service performed by a child under the age of 21 in the employ of the child's father or mother;

15 (e) service performed in the employ of any other state or its political subdivisions or of the United
16 States government or of an instrumentality of any other state or states or their political subdivisions or of
17 the United States, except that national banks organized under the national banking law may not be entitled
18 to exemption under this subsection and are subject to this chapter the same as state banks, provided that
19 the service is excluded from employment as defined in the Federal Unemployment Tax Act by section
20 3306(c)(7) of that act;

21 (f) service with respect to which unemployment insurance is payable under an unemployment
22 insurance system established by an act of congress, provided that the department shall enter into
23 agreements with the proper agencies under an act of congress, which agreements become effective in the
24 manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide
25 reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter,
26 acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential
27 rights to unemployment insurance under the act of congress, acquired rights to benefits under this chapter;

28 (g) services performed as a newspaper carrier or free-lance correspondent if the person performing
29 the services or a parent or guardian of the person performing the services in the case of a minor has
30 acknowledged in writing that the person performing the services and the services are not covered. As used

1 in this subsection:

2 (i) "free-lance correspondent" is a person who submits articles or photographs for publication and
3 is paid by the article or by the photograph; and

4 (ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering
5 newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally
6 to the employee's main duties, carries or delivers papers.

7 (h) services performed by real estate, securities, and insurance salespeople paid solely by
8 commissions and without guarantee of minimum earnings;

9 (i) service performed in the employ of a school, college, or university if the service is performed
10 by a student who is enrolled and is regularly attending classes at a school, college, or university or by the
11 spouse of a student if the spouse is advised, at the time that the spouse commences to perform the
12 service, that the employment of the spouse to perform the service is provided under a program to provide
13 financial assistance to the student by the school, college, or university and that the employment will not
14 be covered by any program of unemployment insurance;

15 (j) service performed by an individual who is enrolled at a nonprofit or public educational institution,
16 which normally maintains a regular faculty and curriculum and normally has a regularly organized body of
17 students in attendance at the place where its educational activities are carried on, as a student in a full-time
18 program taken for credit at an institution that combines academic instruction with work experience if the
19 service is an integral part of the program and the institution has certified that fact to the employer, except
20 that this subsection does not apply to service performed in a program established for or on behalf of an
21 employer or group of employers;

22 (k) service performed in the employ of a hospital if the service is performed by a patient of the
23 hospital;

24 (l) services performed by a cosmetologist who is licensed under Title 37, chapter 31, or a barber
25 who is licensed under Title 37, chapter 30, and:

26 (i) who has acknowledged in writing that the cosmetologist or barber is not covered by
27 unemployment insurance and workers' compensation;

28 (ii) who contracts with a cosmetology salon₂ as defined in 37-31-101₂ or a barbershop₂ as defined
29 in 37-30-101, which contract must show that the cosmetologist or barber:

30 (A) is free from all control and direction of the owner in the contract;

1 (B) receives payment for services from individual clientele; and

2 (C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or
3 knowledge; and

4 (iii) whose contract gives rise to an action for breach of contract in the event of contract termination
5 (the existence of a single license for the cosmetology salon or barbershop may not be construed as a lack
6 of freedom from control or direction under this subsection);

7 (m) casual labor not in the course of an employer's trade or business performed in any calendar
8 quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by
9 an individual who is regularly employed by the employer to perform the service. "Regularly employed"
10 means the services are performed during at least 24 days in the same quarter.

11 (n) employment of sole proprietors or working members of a partnership;

12 (o) services performed for the installation of floor coverings if the installer:

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

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

15 (iii) may perform services for anyone without limitation;

16 (iv) may accept or reject any job;

17 (v) furnishes substantially all tools and equipment necessary to provide the services; and

18 (vi) works under a written contract that:

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

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

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

24 (p) employment of a direct seller as defined in 26 U.S.C. 3508.

25 (2) "Employment" does not include elected public officials.

26 (3) For the purposes of 39-51-203(6), the term "employment" does not apply to service performed:

27 (a) in the employ of a church or convention or association of churches or an organization that is
28 operated primarily for religious purposes and that is operated, supervised, controlled, or principally
29 supported by a church or convention or association of churches;

30 (b) by ~~a duly~~ an ordained, commissioned, or licensed minister of a church in the exercise of the

1 church's ministry or by a member of a religious order in the exercise of duties required by the order;

2 (c) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals
3 whose earning capacity is impaired by age or physical or mental deficiency or injury or providing
4 remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily
5 absorbed in the competitive labor market by an individual receiving rehabilitation or remunerative work;

6 (d) as part of an unemployment work-relief or work-training program assisted or financed in whole
7 or in part by a federal agency or any agency of a state or political subdivision of the state by an individual
8 receiving work relief or work training; or

9 (e) for a state prison or other state correctional or custodial institution by an inmate of that
10 institution.

11 (4) An individual found to be an independent contractor by the department under the terms of
12 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent
13 contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to
14 39-51-2402.

15 (5) This section does not apply to a state or local governmental entity or a nonprofit organization
16 defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from
17 employment as defined in the Federal Unemployment Tax Act."

18

19 **Section 3.** Section 39-71-401, MCA, is amended to read:

20 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in
21 subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to
22 all employees, as defined in 39-71-118. An employer who has any employee in service under any
23 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the
24 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'
25 Compensation Act is subject to and bound by the compensation plan that has been elected by the
26 employer.

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

30 (a) household and domestic employment;

- 1 (b) casual employment as defined in 39-71-116;
- 2 (c) employment of a dependent member of an employer's family for whom an exemption may be
3 claimed by the employer under the federal Internal Revenue Code;
- 4 (d) employment of sole proprietors or working members of a partnership, except as provided in
5 subsection (3);
- 6 (e) employment of a broker or salesman performing under a license issued by the board of realty
7 regulation;
- 8 (f) employment of a direct seller ~~engaged in the sale of consumer products, primarily in the~~
9 ~~customer's home~~ as defined in 26 U.S.C. 3508;
- 10 (g) employment for which a rule of liability for injury, occupational disease, or death is provided
11 under the laws of the United States;
- 12 (h) employment of any person performing services in return for aid or sustenance only, except
13 employment of a volunteer under 67-2-105;
- 14 (i) employment with any railroad engaged in interstate commerce, except that railroad construction
15 work is included in and subject to the provisions of this chapter;
- 16 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic
17 event, unless the person is otherwise employed by a school district;
- 18 (k) any person performing services as a newspaper carrier or free-lance correspondent if the person
19 performing the services or a parent or guardian of the person performing the services in the case of a minor
20 has acknowledged in writing that the person performing the services and the services are not covered. As
21 used in this subsection, "free-lance correspondent" is a person who submits articles or photographs for
22 publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":
- 23 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in
24 bundles; but
- 25 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,
26 carries or delivers papers.
- 27 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);
- 28 (m) a person who is employed by an enrolled tribal member who operates solely within the exterior
29 boundaries of an Indian reservation.
- 30 (3) (a) A sole proprietor or a working member of a partnership who represents to the public that

1 the person is an independent contractor shall elect to be bound personally and individually by the provisions
2 of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers'
3 Compensation Act.

4 (b) The application must be made in accordance with the rules adopted by the department. The
5 department may deny the application only if it determines that the applicant is not an independent
6 contractor.

7 (c) When an application is approved by the department, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from obtaining benefits under this chapter.

9 (d) When an election of an exemption is approved by the department, the election remains effective
10 and the independent contractor retains the status as an independent contractor until the independent
11 contractor notifies the department of any change in status and provides a description of present work
12 status.

13 (e) If the department denies the application for exemption, the applicant may contest the denial by
14 petitioning for review of the decision by an appeals referee in the manner provided for in 39-51-1109. An
15 applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with
16 the procedure established in 39-51-2403 and 39-51-2404.

17 (4) (a) A private corporation shall provide coverage for its officers and other employees under the
18 provisions of compensation plan No. 1, 2, or 3. However, pursuant to rules that the department
19 promulgates and subject in all cases to approval by the department, an officer of a private corporation may
20 elect not to be bound as an employee under this chapter by giving a written notice, on a form provided by
21 the department, served in the following manner:

22 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by
23 delivering the notice to the board of directors of the employer and to the department; or

24 (ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by
25 delivering the notice to the board of directors of the employer, to the department, and to the insurer.

26 (b) If the employer changes plans or insurers, the officer's previous election is not effective and
27 the officer shall again serve notice as provided if the officer elects not to be bound.

28 (c) The appointment or election of an employee as an officer of a corporation for the purpose of
29 excluding the employee from coverage under this chapter does not entitle the officer to elect not to be
30 bound as an employee under this chapter. In any case, the officer shall sign the notice required by

1 subsection (4)(a) under oath or affirmation and is subject to the penalties for false swearing under 45-7-202
2 if the officer falsifies the notice.

3 (5) Each employer shall post a sign in the workplace at the locations where notices to employees
4 are normally posted, informing employees about the employer's current provision of compensation
5 insurance. A workplace is any location where an employee performs any work-related act in the course
6 of employment, regardless of whether the location is temporary or permanent, and includes the place of
7 business or property of a third person while the employer has access to or control over the place of
8 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.
9 The sign must be provided by the department, distributed through insurers or directly by the department,
10 and posted by employers in accordance with rules adopted by the department. An employer who purposely
11 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."
12

13 **NEW SECTION. Section 4. Effective date.** [This act] is effective on passage and approval.

14 -END-

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INTRODUCED BY Carlovich Bank ~~HOUSE~~ BILL NO. 98

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE LABOR LAWS TO EXCLUDE FROM MINIMUM WAGE, OVERTIME, UNEMPLOYMENT INSURANCE, AND WORKERS' COMPENSATION REQUIREMENTS A DIRECT SELLER AS DEFINED BY FEDERAL LAW; AMENDING SECTIONS 39-3-406, 39-51-204, AND 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

THERE ARE NO CHANGES IN THIS BILL AND WILL NOT BE REPRINTED. PLEASE REFER TO YELLOW COPY FOR COMPLETE TEXT.

1 HOUSE BILL NO. 98

2 INTRODUCED BY PAVLOVICH, BECK

3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING STATE LABOR LAWS TO EXCLUDE FROM MINIMUM
5 WAGE, OVERTIME, UNEMPLOYMENT INSURANCE, AND WORKERS' COMPENSATION REQUIREMENTS
6 A DIRECT SELLER AS DEFINED BY FEDERAL LAW; AMENDING SECTIONS 39-3-406, 39-51-204, AND
7 39-71-401, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."
8

9 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:
10

11 **Section 1.** Section 39-3-406, MCA, is amended to read:

12 "**39-3-406. Exclusions.** (1) The provisions of 39-3-404 and 39-3-405 do not apply with respect
13 to:

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

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

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

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

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

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

26 (g) apprentices or learners, who may be exempted by the commissioner for a period not to exceed
27 30 days of their employment;

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

1 in this part:

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

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

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

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

9 (m) an outside salesperson or marketing representative paid on a commission, contract, or salary
10 basis who is primarily employed in selling or marketing products or services in the food distribution industry
11 for a food broker, wholesaler, or association;

12 (n) a direct seller as defined in 26 U.S.C. 3508.

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

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

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

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

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

22 (e) a salesperson, parts person, or mechanic paid on a commission or contract basis and primarily
23 engaged in selling or servicing automobiles, trucks, mobile homes, recreational vehicles, or farm implements
24 if the salesperson, parts person, or mechanic is employed by a nonmanufacturing establishment primarily
25 engaged in the business of selling the vehicles or implements to ultimate purchasers;

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

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

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

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

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

10 (k) an employee employed in agriculture by a farmer, notwithstanding other employment of the
11 employee in connection with livestock auction operations in which the farmer is engaged as an adjunct to
12 the raising of livestock, either alone or in conjunction with other farmers, if the employee is:

13 (i) primarily employed during a workweek in agriculture by a farmer; and

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

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

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

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

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

30 (p) an employee of a sheriff's department who is working under an established work period in lieu

1 of a workweek pursuant to 7-4-2509(1);

2 (q) an employee of a municipal or county government who is working under a work period not
3 exceeding 40 hours in a 7-day period established through a collective bargaining agreement when a
4 collective bargaining unit represents the employee or by mutual agreement of the employer and employee
5 when a bargaining unit is not recognized. Employment in excess of 40 hours in a 7-day, 40-hour work
6 period must be compensated at a rate of not less than 1½ times the hourly wage rate for the employee.

7 (r) an employee of a hospital or other establishment primarily engaged in the care of the sick,
8 disabled, aged, or mentally ill or defective who is working under a work period not exceeding 80 hours in
9 a 14-day period established through either a collective bargaining agreement when a collective bargaining
10 unit represents the employee or by mutual agreement of the employer and employee when a bargaining unit
11 is not recognized. Employment in excess of 8 hours per a day or 80 hours in a 14-day period must be
12 compensated for at a rate of not less than 1½ times the hourly wage rate for the employee.

13 (s) a firefighter who is working under a work period established in a collective bargaining agreement
14 entered into between a public employer and a firefighters' organization or its exclusive representative;

15 (t) an officer or other employee of a police department in a city of the first or second class who
16 is working under a work period established by the chief of police under 7-32-4118;

17 (u) an employee of a department of public safety working under a work period established pursuant
18 to 7-32-115;

19 (v) an employee of a retail establishment if the employee's regular rate of pay exceeds 1½ times
20 the minimum hourly rate applicable under section 206 of the Fair Labor Standards Act of 1938 and if more
21 than half of the employee's compensation for a period of not less than 1 month is derived from
22 commissions on goods and services."

23

24 **Section 2.** Section 39-51-204, MCA, is amended to read:

25 **"39-51-204. Exclusions from definition of employment.** (1) The term "employment" does not
26 include:

27 (a) agricultural labor, except as provided in 39-51-202(2). If an employer is otherwise subject to
28 this chapter and has agricultural employment, all employees engaged in agricultural labor must be excluded
29 from coverage under this chapter if the employer:

30 (i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the

1 monetary amount or number of employees and days worked, for the subject wages attributable to
2 agricultural labor; and

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

4 (b) household and domestic service in a private home, local college club, or local chapter of a
5 college fraternity or sorority, except as provided in 39-51-202(3). If an employer is otherwise subject to
6 this chapter and has domestic service employment, all employees engaged in domestic service must be
7 excluded from coverage under this chapter if the employer:

8 (i) does not meet the monetary payment test in any quarter or calendar year, as applicable, for the
9 subject wages attributable to domestic service; and

10 (ii) keeps separate books and records to account for the employment of persons in domestic service.

11 (c) service performed as an officer or member of the crew of a vessel on the navigable waters of
12 the United States;

13 (d) service performed by an individual in the employ of that individual's son, daughter, or spouse
14 and service performed by a child under the age of 21 in the employ of the child's father or mother;

15 (e) service performed in the employ of any other state or its political subdivisions or of the United
16 States government or of an instrumentality of any other state or states or their political subdivisions or of
17 the United States, except that national banks organized under the national banking law may not be entitled
18 to exemption under this subsection and are subject to this chapter the same as state banks, provided that
19 the service is excluded from employment as defined in the Federal Unemployment Tax Act by section
20 3306(c)(7) of that act;

21 (f) service with respect to which unemployment insurance is payable under an unemployment
22 insurance system established by an act of congress, provided that the department shall enter into
23 agreements with the proper agencies under an act of congress, which agreements become effective in the
24 manner prescribed in the Montana Administrative Procedure Act for the adoption of rules, to provide
25 reciprocal treatment to individuals who have, after acquiring potential rights to benefits under this chapter,
26 acquired rights to unemployment insurance under an act of congress or who have, after acquiring potential
27 rights to unemployment insurance under the act of congress, acquired rights to benefits under this chapter;

28 (g) services performed as a newspaper carrier or free-lance correspondent if the person performing
29 the services or a parent or guardian of the person performing the services in the case of a minor has
30 acknowledged in writing that the person performing the services and the services are not covered. As used

1 in this subsection:

2 (i) "free-lance correspondent" is a person who submits articles or photographs for publication and
3 is paid by the article or by the photograph; and

4 (ii) "newspaper carrier" means a person who provides a newspaper with the service of delivering
5 newspapers singly or in bundles. The term does not include an employee of the paper who, incidentally
6 to the employee's main duties, carries or delivers papers.

7 (h) services performed by real estate, securities, and insurance salespeople paid solely by
8 commissions and without guarantee of minimum earnings;

9 (i) service performed in the employ of a school, college, or university if the service is performed
10 by a student who is enrolled and is regularly attending classes at a school, college, or university or by the
11 spouse of a student if the spouse is advised, at the time that the spouse commences to perform the
12 service, that the employment of the spouse to perform the service is provided under a program to provide
13 financial assistance to the student by the school, college, or university and that the employment will not
14 be covered by any program of unemployment insurance;

15 (j) service performed by an individual who is enrolled at a nonprofit or public educational institution,
16 which normally maintains a regular faculty and curriculum and normally has a regularly organized body of
17 students in attendance at the place where its educational activities are carried on, as a student in a full-time
18 program taken for credit at an institution that combines academic instruction with work experience if the
19 service is an integral part of the program and the institution has certified that fact to the employer, except
20 that this subsection does not apply to service performed in a program established for or on behalf of an
21 employer or group of employers;

22 (k) service performed in the employ of a hospital if the service is performed by a patient of the
23 hospital;

24 (l) services performed by a cosmetologist who is licensed under Title 37, chapter 31, or a barber
25 who is licensed under Title 37, chapter 30, and:

26 (i) who has acknowledged in writing that the cosmetologist or barber is not covered by
27 unemployment insurance and workers' compensation;

28 (ii) who contracts with a cosmetology salon, as defined in 37-31-101, or a barbershop, as defined
29 in 37-30-101, which contract must show that the cosmetologist or barber:

30 (A) is free from all control and direction of the owner in the contract;

1 (B) receives payment for services from individual clientele; and

2 (C) leases, rents, or furnishes all of the cosmetologist's or barber's own equipment, skills, or
3 knowledge; and

4 (iii) whose contract gives rise to an action for breach of contract in the event of contract termination
5 (the existence of a single license for the cosmetology salon or barbershop may not be construed as a lack
6 of freedom from control or direction under this subsection);

7 (m) casual labor not in the course of an employer's trade or business performed in any calendar
8 quarter, unless the cash remuneration paid for the service is \$50 or more and the service is performed by
9 an individual who is regularly employed by the employer to perform the service. "Regularly employed"
10 means the services are performed during at least 24 days in the same quarter.

11 (n) employment of sole proprietors or working members of a partnership;

12 (o) services performed for the installation of floor coverings if the installer:

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

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

15 (iii) may perform services for anyone without limitation;

16 (iv) may accept or reject any job;

17 (v) furnishes substantially all tools and equipment necessary to provide the services; and

18 (vi) works under a written contract that:

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

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

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

24 (p) employment of a direct seller as defined in 26 U.S.C. 3508.

25 (2) "Employment" does not include elected public officials.

26 (3) For the purposes of 39-51-203(6), the term "employment" does not apply to service performed:

27 (a) in the employ of a church or convention or association of churches or an organization that is
28 operated primarily for religious purposes and that is operated, supervised, controlled, or principally
29 supported by a church or convention or association of churches;

30 (b) by ~~a duly~~ an ordained, commissioned, or licensed minister of a church in the exercise of the

1 church's ministry or by a member of a religious order in the exercise of duties required by the order;

2 (c) in a facility conducted for the purpose of carrying out a program of rehabilitation for individuals
3 whose earning capacity is impaired by age or physical or mental deficiency or injury or providing
4 remunerative work for individuals who, because of impaired physical or mental capacity, cannot be readily
5 absorbed in the competitive labor market by an individual receiving rehabilitation or remunerative work;

6 (d) as part of an unemployment work-relief or work-training program assisted or financed in whole
7 or in part by a federal agency or any agency of a state or political subdivision of the state by an individual
8 receiving work relief or work training; or

9 (e) for a state prison or other state correctional or custodial institution by an inmate of that
10 institution.

11 (4) An individual found to be an independent contractor by the department under the terms of
12 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent
13 contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to
14 39-51-2402.

15 (5) This section does not apply to a state or local governmental entity or a nonprofit organization
16 defined under section 501(c)(3) of the Internal Revenue Code unless the service is excluded from
17 employment as defined in the Federal Unemployment Tax Act."

18

19 **Section 3.** Section 39-71-401, MCA, is amended to read:

20 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in
21 subsection (2), the Workers' Compensation Act applies to all employers_z as defined in 39-71-117_z and to
22 all employees_z as defined in 39-71-118. An employer who has any employee in service under any
23 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the
24 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'
25 Compensation Act is subject to and bound by the compensation plan that has been elected by the
26 employer.

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

30 (a) household and domestic employment;

- 1 (b) casual employment as defined in 39-71-116;
- 2 (c) employment of a dependent member of an employer's family for whom an exemption may be
3 claimed by the employer under the federal Internal Revenue Code;
- 4 (d) employment of sole proprietors or working members of a partnership, except as provided in
5 subsection (3);
- 6 (e) employment of a broker or salesman performing under a license issued by the board of realty
7 regulation;
- 8 (f) employment of a direct seller ~~engaged in the sale of consumer products, primarily in the~~
9 ~~customer's home~~ as defined in 26 U.S.C. 3508;
- 10 (g) employment for which a rule of liability for injury, occupational disease, or death is provided
11 under the laws of the United States;
- 12 (h) employment of any person performing services in return for aid or sustenance only, except
13 employment of a volunteer under 67-2-105;
- 14 (i) employment with any railroad engaged in interstate commerce, except that railroad construction
15 work is included in and subject to the provisions of this chapter;
- 16 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic
17 event, unless the person is otherwise employed by a school district;
- 18 (k) any person performing services as a newspaper carrier or free-lance correspondent if the person
19 performing the services or a parent or guardian of the person performing the services in the case of a minor
20 has acknowledged in writing that the person performing the services and the services are not covered. As
21 used in this subsection, "free-lance correspondent" is a person who submits articles or photographs for
22 publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":
- 23 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in
24 bundles; but
- 25 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,
26 carries or delivers papers.
- 27 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);
- 28 (m) a person who is employed by an enrolled tribal member who operates solely within the exterior
29 boundaries of an Indian reservation.
- 30 (3) (a) A sole proprietor or a working member of a partnership who represents to the public that

1 the person is an independent contractor shall elect to be bound personally and individually by the provisions
2 of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers'
3 Compensation Act.

4 (b) The application must be made in accordance with the rules adopted by the department. The
5 department may deny the application only if it determines that the applicant is not an independent
6 contractor.

7 (c) When an application is approved by the department, it is conclusive as to the status of an
8 independent contractor and precludes the applicant from obtaining benefits under this chapter.

9 (d) When an election of an exemption is approved by the department, the election remains effective
10 and the independent contractor retains the status as an independent contractor until the independent
11 contractor notifies the department of any change in status and provides a description of present work
12 status.

13 (e) If the department denies the application for exemption, the applicant may contest the denial by
14 petitioning for review of the decision by an appeals referee in the manner provided for in 39-51-1109. An
15 applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with
16 the procedure established in 39-51-2403 and 39-51-2404.

17 (4) (a) A private corporation shall provide coverage for its officers and other employees under the
18 provisions of compensation plan No. 1, 2, or 3. However, pursuant to rules that the department
19 promulgates and subject in all cases to approval by the department, an officer of a private corporation may
20 elect not to be bound as an employee under this chapter by giving a written notice, on a form provided by
21 the department, served in the following manner:

22 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by
23 delivering the notice to the board of directors of the employer and to the department; or

24 (ii) if the employer has elected to be bound by the provisions of compensation plan No. 2 or 3, by
25 delivering the notice to the board of directors of the employer, to the department, and to the insurer.

26 (b) If the employer changes plans or insurers, the officer's previous election is not effective and
27 the officer shall again serve notice as provided if the officer elects not to be bound.

28 (c) The appointment or election of an employee as an officer of a corporation for the purpose of
29 excluding the employee from coverage under this chapter does not entitle the officer to elect not to be
30 bound as an employee under this chapter. In any case, the officer shall sign the notice required by

1 subsection (4)(a) under oath or affirmation and is subject to the penalties for false swearing under 45-7-202
2 if the officer falsifies the notice.

3 (5) Each employer shall post a sign in the workplace at the locations where notices to employees
4 are normally posted, informing employees about the employer's current provision of compensation
5 insurance. A workplace is any location where an employee performs any work-related act in the course
6 of employment, regardless of whether the location is temporary or permanent, and includes the place of
7 business or property of a third person while the employer has access to or control over the place of
8 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.
9 The sign must be provided by the department, distributed through insurers or directly by the department,
10 and posted by employers in accordance with rules adopted by the department. An employer who purposely
11 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."

12

13 NEW SECTION. **Section 4. Effective date.** [This act] is effective on passage and approval.

14

-END-