

SENATE BILL NO. 155

INTRODUCED BY

A BILL FOR AN ACT ENTITLED: "AN ACT EXEMPTING A MOTOR CARRIER VEHICLE LESSOR WHO IS AN INDEPENDENT CONTRACTOR FROM THE REQUIREMENTS OF UNEMPLOYMENT INSURANCE AND WORKERS' COMPENSATION LAWS; AMENDING SECTIONS 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 39-51-204, MCA, is amended to read:

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

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

(i) in any quarter or calendar year, as applicable, does not meet either of the tests relating to the monetary amount or number of employees and days worked, for the subject wages attributable to agricultural labor; and

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

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

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

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

(c) service performed as an officer or member of the crew of a vessel on the navigable waters of

1 the United States;

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

4 (e) service performed in the employ of any other state or its political subdivisions or of the United  
5 States government or of an instrumentality of any other state or states or their political subdivisions or of  
6 the United States, except that national banks organized under the national banking law may not be entitled  
7 to exemption under this subsection and are subject to this chapter the same as state banks, provided that  
8 the service is excluded from employment as defined in the Federal Unemployment Tax Act by section  
9 3306(c)(7) of that act;

10 (f) service ~~with respect to~~ in which unemployment insurance is payable under an unemployment  
11 insurance system established by an act of congress, ~~provided that if the department shall enter~~ enters  
12 agreements with the proper agencies under an act of congress, ~~which~~ and those agreements become  
13 effective in the manner prescribed in the Montana Administrative Procedure Act for the adoption of rules,  
14 to provide reciprocal treatment to individuals who have, after acquiring potential rights to benefits under  
15 this chapter, acquired rights to unemployment insurance under an act of congress or who have, after  
16 acquiring potential rights to unemployment insurance under the act of congress, acquired rights to benefits  
17 under this chapter;

18 (g) services performed as a newspaper carrier or free-lance correspondent if the person performing  
19 the services or a parent or guardian of the person performing the services in the case of a minor has  
20 acknowledged in writing that the person performing the services and the services are not covered. As used  
21 in this subsection:

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

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

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

29 (i) service performed in the employ of a school, college, or university if the service is performed  
30 by a student who is enrolled and is regularly attending classes at a school, college, or university or by the

1 spouse of a student if the spouse is advised, at the time that the spouse commences to perform the  
2 service, that the employment of the spouse to perform the service is provided under a program to provide  
3 financial assistance to the student by the school, college, or university and that the employment will not  
4 be covered by any program of unemployment insurance;

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

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

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

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

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

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

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

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

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

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

- 1 (n) employment of sole proprietors or working members of a partnership;
- 2 (o) services performed for the installation of floor coverings if the installer:
- 3 (i) bids or negotiates a contract price based upon work performed by the yard or by the job;
- 4 (ii) is paid upon completion of an agreed-upon portion of the job or after the job is completed;
- 5 (iii) may perform services for anyone without limitation;
- 6 (iv) may accept or reject any job;
- 7 (v) furnishes substantially all tools and equipment necessary to provide the services; and
- 8 (vi) works under a written contract that:
- 9 (A) gives rise to a breach of contract action if the installer or any other party fails to perform the
- 10 contract obligations;
- 11 (B) states that the installer is not covered by unemployment insurance; and
- 12 (C) requires the installer to provide a current workers' compensation policy or to obtain an
- 13 exemption from workers' compensation requirements-;
- 14 (p) services performed by a person who is a sole proprietor or working member of a partnership
- 15 who:
- 16 (i) represents to the public to be an independent contractor;
- 17 (ii) owns a motor vehicle or holds a motor vehicle under lease;
- 18 (iii) provides a motor vehicle and the services of a driver to a motor carrier, including driving
- 19 services provided by the person under written contract or bona fide lease; and
- 20 (iv) is not an employee of the motor carrier for purposes of this chapter. A person who meets the
- 21 requirements of this subsection (1)(p) may mutually agree with the motor carrier to whom the vehicle is
- 22 leased to be covered under the motor carrier's unemployment insurance if the person agrees to pay the
- 23 contract amounts requested by the motor carrier. Under the agreement, the independent contractor and
- 24 a person engaged by the person must be considered an employee of the motor carrier for purposes of this
- 25 chapter only.
- 26 (2) "Employment" does not include elected public officials.
- 27 (3) For the purposes of 39-51-203(6), the term "employment" does not apply to service performed:
- 28 (a) in the employ of a church or convention or association of churches or an organization that is
- 29 operated primarily for religious purposes and that is operated, supervised, controlled, or principally
- 30 supported by a church or convention or association of churches;

1 (b) by ~~a duly~~ an ordained, commissioned, or licensed minister of a church in the exercise of the  
2 church's ministry or by a member of a religious order in the exercise of duties required by the order;

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

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

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

12 (4) An individual found to be an independent contractor by the department under the terms of  
13 39-71-401(3) is considered an independent contractor for the purposes of this chapter. An independent  
14 contractor is not precluded from filing a claim for benefits and receiving a determination pursuant to  
15 39-51-2402.

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

19  
20 **Section 2.** Section 39-71-401, MCA, is amended to read:

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

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

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

1           (n) a person who is a sole proprietor or working member of a partnership who:  
2           (i) represents to the public to be an independent contractor;  
3           (ii) owns a motor vehicle or holds a motor vehicle under lease;  
4           (iii) provides a motor vehicle and the services of a driver to a motor carrier, including driving  
5 services provided by the person under written contract or bona fide lease; and

6           (iv) is not an employee of the motor carrier for purposes of this chapter. A person who meets the  
7 requirements of this subsection (2)(n) may:

8           (A) elect to be bound personally and individually by the provisions of compensation plan No. 1, 2,  
9 or 3; or

10           (B) mutually agree with the motor carrier to whom the vehicle is leased to be covered under the  
11 motor carrier's workers' compensation or self-insured policy if the person agrees to pay the contract  
12 amounts requested by the motor carrier. Under the agreement, the independent contractor and a person  
13 engaged by the person must be considered an employee of the motor carrier for purposes of this chapter  
14 only.

15           (3) (a) A sole proprietor or a working member of a partnership who represents to the public that  
16 the person is an independent contractor shall elect to be bound personally and individually by the provisions  
17 of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from the Workers'  
18 Compensation Act.

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

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

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

28           (e) If the department denies the application for exemption, the applicant may contest the denial by  
29 petitioning for review of the decision by an appeals referee in the manner provided for in 39-51-1109. An  
30 applicant dissatisfied with the decision of the appeals referee may appeal the decision in accordance with

1 the procedure established in 39-51-2403 and 39-51-2404.

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

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

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

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

13 (c) The appointment or election of an employee as an officer of a corporation for the purpose of  
14 excluding the employee from coverage under this chapter does not entitle the officer to elect not to be  
15 bound as an employee under this chapter. In any case, the officer shall sign the notice required by  
16 subsection (4)(a) under oath or affirmation and is subject to the penalties for false swearing under 45-7-202  
17 if the officer falsifies the notice.

18 (5) Each employer shall post a sign in the workplace at the locations where notices to employees  
19 are normally posted, informing employees about the employer's current provision of compensation  
20 insurance. A workplace is any location where an employee performs any work-related act in the course of  
21 employment, regardless of whether the location is temporary or permanent, and includes the place of  
22 business or property of a third person while the employer has access to or control over the place of  
23 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.  
24 The sign must be provided by the department, distributed through insurers or directly by the department,  
25 and posted by employers in accordance with rules adopted by the department. An employer who purposely  
26 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."  
27

28 **NEW SECTION. Section 3. Effective date.** [This act] is effective on passage and approval.

29

-END-



STATE OF MONTANA - FISCAL NOTE

Fiscal Note for SB0155, as introduced

DESCRIPTION OF PROPOSED LEGISLATION:

An act exempting motor carrier vehicle lessors who are independent contractors from requirements of unemployment insurance and workers' compensation laws.

ASSUMPTIONS:

State Compensation Insurance Fund:

1. This bill does not require motor carrier vehicle lessors to be bona fide "independent contractors".
2. Motor carrier vehicle lessors who are "independent contractors", in accordance with statute, will not be covered under the workers' compensation act unless they specifically elect to be covered.
3. Motor carrier vehicle lessors who are independent contractors may elect to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3.
4. Motor carrier vehicle lessors who are independent contractors may mutually agree with the motor carrier to whom the vehicle is leased to be covered under the motor carrier's workers compensation or self insured policy.
5. The State Fund is unable to determine the number of motor carrier vehicle lessors who are independent contractors and will elect coverage with the State Fund.
6. The State Fund, which has traditionally been the insurer of small policies in Montana, will have an increase in small policies.
7. It will be possible for motor carriers with adverse loss experience to distort loss experience in their favor and to pass this adverse loss experience on to the overall average State Fund rate.
8. If the bill is passed, the State Fund would need to notify affected policyholders of exemption. Since the number of motor carrier vehicle lessors who are independent contractors can not be determined, notification cost can not be determined.

Department of Labor & Industry:

9. The Department can not determine the impact of this legislation.
10. The Department does not keep data on this specific employment category and is unable to determine the number of employers and claimants that would be affected by this legislation.

FISCAL IMPACT:

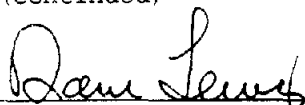
Fiscal impact can not be determined by the Department of Labor & Industry or the State Compensation Insurance Fund. The Department of Revenue will have no fiscal impact.

TECHNICAL NOTES:

State Compensation Insurance Fund:

1. The State Fund has potential liability under 39-71-405, MCA, as a result of this bill. Claims of drivers who are employees of independent contractors (exempt from the Workers' Compensation Act) who are contracting with a party insured by the State Fund, would be paid by the State Fund.

(Continued)

 1-19-95  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

CHARLES SWYSGOOD, PRIMARY SPONSOR      DATE

Fiscal Note for SB0155, as introduced

**SB 155**

2. Section 39-71-401(2)(B) of SB-155, will provide for employees to pay for workers' compensation premiums which is prohibited under Section 39-71-406, MCA.
3. Section 39-71-401(2)(n)(iv) of this bill states that the exempt person "is not an employee" for purposes of this chapter. This conflicts with Section 39-71-401(2)(B) of this bill which states "the person must be considered an employee of the motor carrier for purposes of this chapter only."
4. The "motor vehicle" terminology used in this bill is broad in scope. This terminology will include any drivers who own their own cars.
5. The "independent contractor" terminology used in this bill is broad in scope. This terminology will apply to all purported independent contractors, not just motor carriers.

Department of Labor & Industry:

6. The language in Section 1(p)(iv) appears to allow an individual to elect UI coverage provided the individual pays contract amounts requested by the motor carrier. If that is the intent of the wording, such action is a violation of 39-51-3103, MCA, which prohibits an employer from making, requiring or accepting a deduction from an employee's wages to fund the employer's UI contribution. Criminal penalties can be imposed against any employer found in violation of this section. Any agreement, including voluntary agreements, by an individual to waive their rights to UI benefits is void under provisions of 39-51-3102, MCA.
7. Sections 39-51-3102, MCA, and 39-51-3103, MCA, are based upon the Social Security Act wording and passage of this bill as written would create a conformity issue.
8. The services of motor vehicle drivers appear to be exempted from UI coverage by this bill. Effect of this legislation would eliminate these wages from use in determining UI benefit entitlement for any of these individuals.