

## 1 SENATE BILL NO. 41

2 INTRODUCED BY BENEDICT

3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING JURISDICTION OVER DISPUTES RELATING TO

6 WAGES PAID FOR IN PROPERTY OTHER THAN MONEY, DISPUTES RELATING TO SUBROGATION, AND

7 DISPUTES RELATING TO PAYMENT OF COMPENSATION TO BENEFICIARIES TO THE WORKERS'

8 COMPENSATION COURT; REQUIRING MEDIATION OF CERTAIN TYPES OF DISPUTES; INCLUDING

9 LIMITED LIABILITY PARTNERSHIPS WITHIN THE PROVISIONS OF THE WORKERS' COMPENSATION ACT;

10 ELIMINATING THE UNDERINSURED EMPLOYERS' PROVISIONS OF THE WORKERS' COMPENSATION ACT;

11 PROVIDING FOR TRANSFER OF SURPLUS FUNDS IN THE UNDERINSURED EMPLOYERS' FUND TO THE

12 UNINSURED EMPLOYERS' FUND; AMENDING SECTIONS 39-71-117, 39-71-118, 39-71-303, 39-71-401,

13 39-71-414, 39-71-432, 39-71-723, AND 39-71-724, MCA; REPEALING SECTIONS 39-71-531, 39-71-532,

14 39-71-533, AND 39-71-534, MCA; AND PROVIDING EFFECTIVE DATES."

15

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

17

18 Section 1. Section 39-71-117, MCA, is amended to read:

19 "39-71-117. **Employer defined.** (1) "Employer" means:

20 (a) the state and each county, city and county, city school district, and irrigation district; all other

21 districts established by law; all public corporations and quasi-public corporations and public agencies; each

22 person; each prime contractor; each firm, voluntary association, limited liability company, limited liability

23 partnership, and private corporation, including any public service corporation and including an independent

24 contractor who has ~~any~~ a person in service under ~~any~~ an appointment or contract of hire, expressed or

25 implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee

26 of the deceased employer;

27 (b) any association, corporation, limited liability company, limited liability partnership, or

28 organization that seeks permission and meets the requirements set by the department by rule for a group

29 of individual employers to operate as self-insured under plan No. 1 of this chapter; and

30 (c) any nonprofit association, limited liability company, limited liability partnership, or corporation

1 or other entity funded in whole or in part by federal, state, or local government funds that places  
2 community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or  
3 associations or federal, state, or local government entities.

4 (2) A temporary service contractor is the employer of a temporary worker for premium and loss  
5 experience purposes.

6 (3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses  
7 the services of a worker furnished by another person, association, contractor, firm, limited liability  
8 company, limited liability partnership, or corporation, other than a temporary service contractor, is  
9 presumed to be the employer for workers' compensation premium and loss experience purposes for work  
10 performed by the worker. The presumption may be rebutted by substantial credible evidence of the  
11 following:

12 (a) the person, association, contractor, firm, limited liability company, limited liability partnership,  
13 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
14 retains control over all aspects of the work performed by the worker, both at the inception of employment  
15 and during all phases of the work; and

16 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
17 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
18 has obtained workers' compensation insurance for the worker in Montana both at the inception of  
19 employment and during all phases of the work performed.

20 (4) An interstate or intrastate common or contract motor carrier doing business in this state who  
21 uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is  
22 subject to loss experience rating in this state unless:

23 (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3);  
24 or

25 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
26 or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation  
27 insurance on the drivers in Montana both at the inception of employment and during all phases of the work  
28 performed."

29

30 **Section 2.** Section 39-71-118, MCA, is amended to read:

1           **"39-71-118. Employee, worker, volunteer, and volunteer firefighter defined.** (1) The term  
2 "employee" or "worker" means:

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

12           (b) any juvenile who is performing work under authorization of a district court judge in a  
13 delinquency prevention or rehabilitation program;

14           (c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training  
15 under a state or federal vocational training program, whether or not under an appointment or contract of  
16 hire with an employer, as defined in this chapter, and whether or not receiving payment from a third party.  
17 However, this subsection does not apply to students enrolled in vocational training programs, as outlined  
18 in this subsection, while they are on the premises of a public school or community college.

19           (d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

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

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

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

1 (f) an inmate working in a federally certified prison industries program authorized under 53-1-301;  
2 and

3 (g) a person who is an enrolled member of a volunteer fire department as described in 7-33-4109  
4 or a person who provides ambulance services under Title 7, chapter 34, part 1.

5 (2) The terms defined in subsection (1) do not include a person who is:

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

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

11 (c) performing services as a volunteer, except for a person who is otherwise entitled to coverage  
12 under the laws of this state. As used in this subsection (2)(c), "volunteer" means a person who performs  
13 services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined  
14 in 39-71-123.

15 (3) With the approval of the insurer, an employer may elect to include as an employee under the  
16 provisions of this chapter any volunteer as defined in subsection (2)(c).

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

19 (b) The term "volunteer hours" means all the time spent by a volunteer firefighter in the service  
20 of an employer, including but not limited to training time, response time, and time spent at the employer's  
21 premises.

22 (5) (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a  
23 member-managed limited liability company, the employer may elect to include as an employee within the  
24 provisions of this chapter any member of the partnership, or limited liability partnership, the owner of the  
25 sole proprietorship, or any member of the limited liability company devoting full time to the partnership,  
26 limited liability partnership, proprietorship, or limited liability company business.

27 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
28 naming the partners, sole proprietor, or members to be covered and stating the level of compensation  
29 coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection  
30 (5)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice

1 has been given.

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

4 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
5 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
6 determination of weekly wage for weekly compensation benefits, the electing employer may elect not less  
7 than \$900 a month and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

8 (6) (a) If the employer is a quasi-public or a private corporation or a manager-managed limited  
9 liability company, the employer may elect to include as an employee within the provisions of this chapter  
10 any corporate officer or manager exempted under 39-71-401(2).

11 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
12 naming the corporate officer or manager to be covered and stating the level of compensation coverage  
13 desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A  
14 corporate officer or manager is not considered an employee within this chapter until notice has been given.

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

17 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
18 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
19 determination of the weekly wage for weekly compensation benefits, the electing employer may elect not  
20 less than \$200 a week and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

21 (7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection,  
22 or the county commissioners or trustees for a fire service area may elect to include as an employee within  
23 the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers'  
24 compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

25 (b) In the event of an election, the employer shall report payroll for all volunteer firefighters for  
26 premium and weekly benefit purposes based on the number of volunteer hours of each firefighter times the  
27 average weekly wage divided by 40 hours, subject to a maximum of 1 1/2 times the average weekly wage.

28 (8) Except as provided in chapter 8 of this title, an employee or worker in this state whose services  
29 are furnished by a person, association, contractor, firm, limited liability company; limited liability  
30 partnership, or corporation, other than a temporary service contractor, to an employer, as defined in

1 39-71-117, is presumed to be under the control and employment of the employer. This presumption may  
2 be rebutted as provided in 39-71-117(3).

3 (9) For purposes of this section, an "employee or worker in this state" means:

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

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

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

10 (d) a nonresident of Montana who does not meet the requirements of subsection (9)(b) and whose  
11 employer elects coverage with an insurer that allows an election for an employer whose:

12 (i) nonresident employees are hired in Montana;

13 (ii) nonresident employees' wages are paid in Montana;

14 (iii) nonresident employees are supervised in Montana; and

15 (iv) business records are maintained in Montana.

16 (10) An insurer may require coverage for all nonresident employees of a Montana employer who  
17 do not meet the requirements of subsection (9)(b) or (9)(d) as a condition of approving the election under  
18 subsection (9)(d)."

19

20 **Section 3.** Section 39-71-303, MCA, is amended to read:

21 **"39-71-303. Work paid for in property other than money — ~~wages to be determined by~~**  
22 **~~department. Where any~~ When an employer procures ~~any~~ work to be done, payment for which is to be made**  
23 **in property other than money or its equivalent and the value of ~~which~~ that property is speculative or**  
24 **intangible, the wages of the employees receiving ~~such~~ the compensation ~~shall~~ must be determined ~~by the~~**  
25 **~~department~~ in accordance with the going wage for the same or similar work in the district or locality where**  
26 **the ~~same~~ work is to be performed."**

27

28 **Section 4.** Section 39-71-401, MCA, is amended to read:

29 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in  
30 subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to

1 all employees, as defined in 39-71-118. An employer who has any employee in service under any  
2 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the  
3 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'  
4 Compensation Act is subject to and bound by the compensation plan that has been elected by the  
5 employer.

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

8 (a) household and domestic employment;

9 (b) casual employment as defined in 39-71-116;

10 (c) employment of a dependent member of an employer's family for whom an exemption may be  
11 claimed by the employer under the federal Internal Revenue Code;

12 (d) employment of sole proprietors, working members of a partnership, working members of a  
13 limited liability partnership, or working members of a member-managed limited liability company, except  
14 as provided in subsection (3);

15 (e) employment of a broker or salesman performing under a license issued by the board of realty  
16 regulation;

17 (f) employment of a direct seller as defined in 26 U.S.C. 3508;

18 (g) employment for which a rule of liability for injury, occupational disease, or death is provided  
19 under the laws of the United States;

20 (h) employment of a person performing services in return for aid or sustenance only, except  
21 employment of a volunteer under 67-2-105;

22 (i) employment with a railroad engaged in interstate commerce, except that railroad construction  
23 work is included in and subject to the provisions of this chapter;

24 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic  
25 event, unless the person is otherwise employed by a school district;

26 (k) employment of a person performing services as a newspaper carrier or free-lance correspondent  
27 if the person performing the services or a parent or guardian of the person performing the services in the  
28 case of a minor has acknowledged in writing that the person performing the services and the services are  
29 not covered. As used in this subsection, "free-lance correspondent" is a person who submits articles or  
30 photographs for publication and is paid by the article or by the photograph. As used in this subsection,

1 "newspaper carrier":

2 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in  
3 bundles; but

4 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,  
5 carries or delivers papers.

6 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);

7 (m) a person who is employed by an enrolled tribal member or an association, business,  
8 corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose  
9 business is conducted solely within the exterior boundaries of an Indian reservation;

10 (n) employment of a jockey who is performing under a license issued by the board of horseracing  
11 from the time the jockey reports to the scale room prior to a race through the time the jockey is weighed  
12 out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of  
13 horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services  
14 as a jockey;

15 (o) employment of an employer's spouse for whom an exemption based on marital status may be  
16 claimed by the employer under 26 U.S.C. 7703;

17 (p) a person who performs services as a petroleum land professional. As used in this subsection,  
18 a "petroleum land professional" is a person who:

19 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in  
20 negotiating a business agreement for the exploration or development of minerals;

21 (ii) is paid for services that are directly related to the completion of a contracted specific task rather  
22 than on an hourly wage basis; and

23 (iii) performs all services as an independent contractor pursuant to a written contract.

24 (q) an officer of a quasi-public or a private corporation or manager of a manager-managed limited  
25 liability company who qualifies under one or more of the following provisions:

26 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or  
27 the limited liability company and does not receive any pay from the corporation or the limited liability  
28 company for performance of the duties;

29 (ii) the officer or manager is engaged primarily in household employment for the corporation or the  
30 limited liability company;



1 (iii) the officer or manager owns 20% or more of the number of shares of stock in the corporation  
2 or owns 20% or more of the limited liability company; or

3 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,  
4 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who owns 20% or more of the  
5 number of shares of stock in the corporation or who owns 20% or more of the limited liability company.

6 (3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability  
7 partnership, or a working member of a member-managed limited liability company who represents to the  
8 public that the person is an independent contractor shall elect to be bound personally and individually by  
9 the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from  
10 the Workers' Compensation Act.

11 (b) The application must be made in accordance with the rules adopted by the department. There  
12 is no fee for the initial application. Any subsequent application must be accompanied by a \$25 application  
13 fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset  
14 the costs of administering the program.

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

17 (d) The exemption, if approved, remains in effect for 1 year following the date of the department's  
18 approval. To maintain the independent contractor status, an independent contractor shall annually submit  
19 a renewal application. A renewal application must be submitted for all independent contractor exemptions  
20 approved ~~as of~~ on or after July 1, 1995, ~~or thereafter~~. The renewal application and the \$25 renewal  
21 application fee must be received by the department at least 30 days ~~prior to~~ before the anniversary date  
22 of the previously approved exemption.

23 (e) A person who makes a false statement or misrepresentation concerning that person's status  
24 as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose  
25 the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured  
26 employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

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

1 (4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its  
2 employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private  
3 corporation, or a manager-managed limited liability company may elect coverage for its corporate officers  
4 or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following  
5 manner:

6 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by  
7 delivering the notice to the board of directors of the corporation or to the management organization of the  
8 manager-managed limited liability company; 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 corporation or to the management organization of the  
11 manager-managed limited liability company and to the insurer.

12 (b) If the employer changes plans or insurers, the employer's previous election is not effective and  
13 the employer shall again serve notice to its insurer and to its board of directors or the management  
14 organization of the manager-managed limited liability company if the employer elects to be bound.

15 (5) The appointment or election of an employee as an officer of a corporation, a partner in a  
16 partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability  
17 company for the purpose of exempting the employee from coverage under this chapter does not entitle the  
18 officer, partner, member, or manager to exemption from coverage.

19 (6) Each employer shall post a sign in the workplace at the locations where notices to employees  
20 are normally posted, informing employees about the employer's current provision of workers' compensation  
21 insurance. A workplace is any location where an employee performs any work-related act in the course of  
22 employment, regardless of whether the location is temporary or permanent, and includes the place of  
23 business or property of a third person while the employer has access to or control over the place of  
24 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.  
25 The sign must be provided by the department, distributed through insurers or directly by the department,  
26 and posted by employers in accordance with rules adopted by the department. An employer who purposely  
27 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."  
28

29 **Section 5.** Section 39-71-414, MCA, is amended to read:

30 **"39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or

1 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all  
2 compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right  
3 of subrogation is a first lien on the claim, judgment, or recovery.

4 (2) (a) If the injured employee intends to institute the third-party action, the employee shall give  
5 the insurer reasonable notice of the intention to institute the action.

6 (b) The injured employee may request that the insurer pay a proportionate share of the reasonable  
7 cost of the action, including attorney fees.

8 (c) The insurer may elect not to participate in the cost of the action. If this election is made, the  
9 insurer waives 50% of its subrogation rights granted by this section.

10 (d) If the injured employee or the employee's personal representative institutes the action, the  
11 employee is entitled to at least one-third of the amount recovered by judgment or settlement less a  
12 proportionate share of reasonable costs, including attorney fees, if the amount of recovery is insufficient  
13 to provide the employee with that amount after payment of subrogation.

14 (3) If an injured employee refuses or fails to institute the third-party action within 1 year from the  
15 date of injury, the insurer may institute the action in the name of the employee and for the employee's  
16 benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to  
17 the employee any amount received by judgment or settlement that is in excess of the amounts paid or to  
18 be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorney fees  
19 for prosecuting the action, have been deducted from the recovery.

20 (4) An insurer may enter into compromise agreements in settlement of subrogation rights.

21 (5) Regardless of whether the amount of compensation and other benefits payable under the  
22 Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal  
23 representative may stipulate the proportion of the third-party settlement to be allocated under subrogation.  
24 ~~Upon review and approval by the department, the agreement constitutes a compromise settlement of the~~  
25 ~~issue of subrogation and may not be reopened by the department.~~ A dispute between the insurer and  
26 claimant concerning subrogation is a dispute subject to the mediation requirements of 39-71-2401.

27 (6) (a) The insurer is entitled to full subrogation rights under this section, unless the claimant is able  
28 to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery  
29 combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the  
30 entire settlement or award of a third-party claim brought by the claimant or the claimant's personal

1 representative without regard to the nature of the damages.

2 (b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim  
3 without apportionment of damages by a court or jury, the insurer may subrogate against the entire  
4 settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a  
5 party to the settlement agreement.

6 (7) Regardless of whether the amount of compensation and other benefits payable have been fully  
7 determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be  
8 allocated under subrogation. Upon review and approval by the department, the agreement constitutes a  
9 compromise settlement of the issue of subrogation and may not be reopened by the department."  
10

11 **Section 6.** Section 39-71-432, MCA, is amended to read:

12 **"39-71-432. Definitions.** As used in 39-71-433, the following definitions apply:

13 (1) "Business entity" means a business enterprise owned by a single person, corporation,  
14 organization, business trust, trust, partnership, limited liability company, limited liability partnership, joint  
15 venture, association, or other business entity.

16 (2) "Group" means two or more business entities that join together, with the approval of the  
17 department, to purchase individual workers' compensation insurance policies covering each business entity  
18 that is part of a group."  
19

20 **Section 7.** Section 39-71-723, MCA, is amended to read:

21 **"39-71-723. How compensation to be divided among beneficiaries.** Compensation that is due to  
22 beneficiaries must be paid to the surviving spouse, if any, or if none, ~~then~~ divided equally among or for the  
23 benefit of the children. In cases in which beneficiaries are a surviving spouse and stepchildren of the  
24 spouse, the compensation must be divided equally among all beneficiaries. Compensation that is due to  
25 beneficiaries, as defined in 39-71-116(5)(e) and (5)(f), if there is more than one, must be divided equitably  
26 among them, ~~and the question of dependency and amount is a question of fact for determination by the~~  
27 ~~department.~~"  
28

29 **Section 8.** Section 39-71-724, MCA, is amended to read:

30 **"39-71-724. Payment of compensation to beneficiary not a resident of United States.** (1) Before

1 payment of compensation to a beneficiary who is not residing within the United States, satisfactory proof  
 2 of ~~such the~~ relationship as to constitute a beneficiary under this chapter ~~shall~~ must be furnished by ~~such~~  
 3 the beneficiary, ~~duly~~ authenticated under seal of an officer of a court of law in the country where ~~such the~~  
 4 beneficiary resides, ~~at such times and in such manner as may be required by the department.~~ Such The  
 5 proof ~~shall be~~ is conclusive as to the identity of ~~such the~~ beneficiary, and any other claim of any other  
 6 person to any ~~such~~ compensation ~~shall be~~ is barred from and after the filing of ~~such the~~ proof.

7 (2) Payment of compensation to a beneficiary not residing within the United States may be made  
 8 to any plenipotentiary, ~~or~~ consul, or consular agent within the United States representing the country in  
 9 which ~~such the~~ nonresident beneficiary resides, and the written receipt of ~~such the~~ plenipotentiary, ~~or~~  
 10 consul, or consular agent ~~shall acquit~~ acquits the employer, or the insurer, ~~or the department, as the case~~  
 11 may be."

12  
 13 **NEW SECTION. Section 9. Repealer.** Sections 39-71-531, 39-71-532, 39-71-533, and 39-71-534,  
 14 MCA, are repealed.

15  
 16 **NEW SECTION. Section 10. Transition.** Any surplus funds remaining in the underinsured  
 17 employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund  
 18 provided in 39-71-502.

19  
 20 **NEW SECTION. Section 11. Saving clause.** [Section 9] does not affect rights and duties that  
 21 matured, penalties that were incurred, or proceedings that were begun before [the effective date of section  
 22 9].

23  
 24 **NEW SECTION. Section 12. Effective dates -- applicability.** (1) [Sections 1 through 8] are  
 25 effective July 1, 1997.

26 (2) [Sections 9 through 11 and this section] are effective on passage and approval.

27 -END-

STATE OF MONTANA - FISCAL NOTE


Fiscal Note for SB0041, as introduced


DESCRIPTION OF PROPOSED LEGISLATION:

An act transferring jurisdiction over disputes relating to wages paid for in property other than money, disputes relating to subrogation, and disputes relating to payment of compensation to beneficiaries to the Workers' Compensation Court; requiring mediation of certain types of disputes; including limited liability partnerships within the provisions of the provisions of the Workers' Compensation Act; providing for transfer of surplus funds in the underinsured employers' fund to the uninsured employers' fund.

FISCAL IMPACT:

There is no fiscal impact to the state.

 1-10-97  
DAVE LEWIS, BUDGET DIRECTOR      DATE  
Office of Budget and Program Planning

 1/10/97  
STEVE BENEDICT, PRIMARY SPONSOR      DATE

Fiscal Note for SB0041, as introduced

SB41

APPROVED BY COM ON LABOR & EMPLOYMENT RELATIONS

SENATE BILL NO. 41

INTRODUCED BY BENEDICT

BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING JURISDICTION OVER DISPUTES RELATING TO WAGES PAID FOR IN PROPERTY OTHER THAN MONEY, DISPUTES RELATING TO SUBROGATION, AND DISPUTES RELATING TO PAYMENT OF COMPENSATION TO BENEFICIARIES TO THE WORKERS' COMPENSATION COURT; REQUIRING MEDIATION OF CERTAIN TYPES OF DISPUTES; INCLUDING LIMITED LIABILITY PARTNERSHIPS WITHIN THE PROVISIONS OF THE WORKERS' COMPENSATION ACT; ELIMINATING THE UNDERINSURED EMPLOYERS' PROVISIONS OF THE WORKERS' COMPENSATION ACT; PROVIDING FOR TRANSFER OF SURPLUS FUNDS IN THE UNDERINSURED EMPLOYERS' FUND TO THE UNINSURED EMPLOYERS' FUND; AMENDING SECTIONS 39-71-117, 39-71-118, 39-71-303, 39-71-401, 39-71-414, 39-71-432, 39-71-723, AND 39-71-724, MCA; REPEALING SECTIONS 39-71-531, 39-71-532, 39-71-533, AND 39-71-534, MCA; AND PROVIDING EFFECTIVE DATES."

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

Section 1. Section 39-71-117, MCA, is amended to read:

"39-71-117. Employer defined. (1) "Employer" means:

- (a) the state and each county, city and county, city school district, and irrigation district; all other districts established by law; all public corporations and quasi-public corporations and public agencies; each person; each prime contractor; each firm, voluntary association, limited liability company, limited liability partnership, and private corporation, including any public service corporation and including an independent contractor who has ~~any~~ a person in service under ~~any~~ an appointment or contract of hire, expressed or implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee of the deceased employer;
- (b) any association, corporation, limited liability company, limited liability partnership, or organization that seeks permission and meets the requirements set by the department by rule for a group of individual employers to operate as self-insured under plan No. 1 of this chapter; and
- (c) any nonprofit association, limited liability company, limited liability partnership, or corporation

1 or other entity funded in whole or in part by federal, state, or local government funds that places  
2 community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or  
3 associations or federal, state, or local government entities.

4 (2) A temporary service contractor is the employer of a temporary worker for premium and loss  
5 experience purposes.

6 (3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses  
7 the services of a worker furnished by another person, association, contractor, firm, limited liability  
8 company, limited liability partnership, or corporation, other than a temporary service contractor, is  
9 presumed to be the employer for workers' compensation premium and loss experience purposes for work  
10 performed by the worker. The presumption may be rebutted by substantial credible evidence of the  
11 following:

12 (a) the person, association, contractor, firm, limited liability company, limited liability partnership,  
13 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
14 retains control over all aspects of the work performed by the worker, both at the inception of employment  
15 and during all phases of the work; and

16 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
17 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
18 has obtained workers' compensation insurance for the worker in Montana both at the inception of  
19 employment and during all phases of the work performed.

20 (4) An interstate or intrastate common or contract motor carrier doing business in this state who  
21 uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is  
22 subject to loss experience rating in this state unless:

23 (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3);  
24 or

25 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
26 or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation  
27 insurance on the drivers in Montana both at the inception of employment and during all phases of the work  
28 performed."

29  
30 **Section 2.** Section 39-71-118, MCA, is amended to read:



1           **"39-71-118. Employee, worker, volunteer, and volunteer firefighter defined.** (1) The term  
2 "employee" or "worker" means:

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

12           (b) any juvenile who is performing work under authorization of a district court judge in a  
13 delinquency prevention or rehabilitation program;

14           (c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training  
15 under a state or federal vocational training program, whether or not under an appointment or contract of  
16 hire with an employer, as defined in this chapter, and whether or not receiving payment from a third party.  
17 However, this subsection does not apply to students enrolled in vocational training programs, as outlined  
18 in this subsection, while they are on the premises of a public school or community college.

19           (d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

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

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

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

1 (f) an inmate working in a federally certified prison industries program authorized under 53-1-301;  
2 and

3 (g) a person who is an enrolled member of a volunteer fire department as described in 7-33-4109  
4 or a person who provides ambulance services under Title 7, chapter 34, part 1.

5 (2) The terms defined in subsection (1) do not include a person who is:

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

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

11 (c) performing services as a volunteer, except for a person who is otherwise entitled to coverage  
12 under the laws of this state. As used in this subsection (2)(c), "volunteer" means a person who performs  
13 services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined  
14 in 39-71-123.

15 (3) With the approval of the insurer, an employer may elect to include as an employee under the  
16 provisions of this chapter any volunteer as defined in subsection (2)(c).

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

19 (b) The term "volunteer hours" means all the time spent by a volunteer firefighter in the service  
20 of an employer, including but not limited to training time, response time, and time spent at the employer's  
21 premises.

22 (5) (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a  
23 member-managed limited liability company, the employer may elect to include as an employee within the  
24 provisions of this chapter any member of the partnership, or limited liability partnership, the owner of the  
25 sole proprietorship, or any member of the limited liability company devoting full time to the partnership,  
26 limited liability partnership, proprietorship, or limited liability company business.

27 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
28 naming the partners, sole proprietor, or members to be covered and stating the level of compensation  
29 coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection  
30 (5)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice

1 has been given.

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

4 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
5 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
6 determination of weekly wage for weekly compensation benefits, the electing employer may elect not less  
7 than \$900 a month and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

8 (6) (a) If the employer is a quasi-public or a private corporation or a manager-managed limited  
9 liability company, the employer may elect to include as an employee within the provisions of this chapter  
10 any corporate officer or manager exempted under 39-71-401(2).

11 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
12 naming the corporate officer or manager to be covered and stating the level of compensation coverage  
13 desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A  
14 corporate officer or manager is not considered an employee within this chapter until notice has been given.

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

17 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
18 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
19 determination of the weekly wage for weekly compensation benefits, the electing employer may elect not  
20 less than \$200 a week and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

21 (7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection,  
22 or the county commissioners or trustees for a fire service area may elect to include as an employee within  
23 the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers'  
24 compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

25 (b) In the event of an election, the employer shall report payroll for all volunteer firefighters for  
26 premium and weekly benefit purposes based on the number of volunteer hours of each firefighter times the  
27 average weekly wage divided by 40 hours, subject to a maximum of 1 1/2 times the average weekly wage.

28 (8) Except as provided in chapter 8 of this title, an employee or worker in this state whose services  
29 are furnished by a person, association, contractor, firm, limited liability company, limited liability  
30 partnership, or corporation, other than a temporary service contractor, to an employer, as defined in

1 39-71-117, is presumed to be under the control and employment of the employer. This presumption may  
2 be rebutted as provided in 39-71-117(3).

3 (9) For purposes of this section, an "employee or worker in this state" means:

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

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

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

10 (d) a nonresident of Montana who does not meet the requirements of subsection (9)(b) and whose  
11 employer elects coverage with an insurer that allows an election for an employer whose:

12 (i) nonresident employees are hired in Montana;

13 (ii) nonresident employees' wages are paid in Montana;

14 (iii) nonresident employees are supervised in Montana; and

15 (iv) business records are maintained in Montana.

16 (10) An insurer may require coverage for all nonresident employees of a Montana employer who  
17 do not meet the requirements of subsection (9)(b) or (9)(d) as a condition of approving the election under  
18 subsection (9)(d)."

19  
20 **Section 3.** Section 39-71-303, MCA, is amended to read:

21 "**39-71-303. Work paid for in property other than money** ~~— wages to be determined by~~  
22 ~~department. Where any~~ When an employer procures ~~any~~ work to be done, payment for which is to be made  
23 in property other than money or its equivalent and the value of ~~which~~ that property is speculative or  
24 intangible, the wages of the employees receiving ~~such~~ the compensation ~~shall~~ must be determined ~~by the~~  
25 ~~department~~ in accordance with the going wage for the same or similar work in the district or locality where  
26 the ~~same~~ work is to be performed."

27  
28 **Section 4.** Section 39-71-401, MCA, is amended to read:

29 "**39-71-401. Employments covered and employments exempted.** (1) Except as provided in  
30 subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to

1 all employees, as defined in 39-71-118. An employer who has any employee in service under any  
2 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the  
3 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'  
4 Compensation Act is subject to and bound by the compensation plan that has been elected by the  
5 employer.

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

8 (a) household and domestic employment;

9 (b) casual employment as defined in 39-71-116;

10 (c) employment of a dependent member of an employer's family for whom an exemption may be  
11 claimed by the employer under the federal Internal Revenue Code;

12 (d) employment of sole proprietors, working members of a partnership, working members of a  
13 limited liability partnership, or working members of a member-managed limited liability company, except  
14 as provided in subsection (3);

15 (e) employment of a broker or salesman performing under a license issued by the board of realty  
16 regulation;

17 (f) employment of a direct seller as defined in 26 U.S.C. 3508;

18 (g) employment for which a rule of liability for injury, occupational disease, or death is provided  
19 under the laws of the United States;

20 (h) employment of a person performing services in return for aid or sustenance only, except  
21 employment of a volunteer under 67-2-105;

22 (i) employment with a railroad engaged in interstate commerce, except that railroad construction  
23 work is included in and subject to the provisions of this chapter;

24 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic  
25 event, unless the person is otherwise employed by a school district;

26 (k) employment of a person performing services as a newspaper carrier or free-lance correspondent  
27 if the person performing the services or a parent or guardian of the person performing the services in the  
28 case of a minor has acknowledged in writing that the person performing the services and the services are  
29 not covered. As used in this subsection, "free-lance correspondent" is a person who submits articles or  
30 photographs for publication and is paid by the article or by the photograph. As used in this subsection,

1 "newspaper carrier":

2 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in  
3 bundles; but

4 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,  
5 carries or delivers papers.

6 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);

7 (m) a person who is employed by an enrolled tribal member or an association, business,  
8 corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose  
9 business is conducted solely within the exterior boundaries of an Indian reservation;

10 (n) employment of a jockey who is performing under a license issued by the board of horseracing  
11 from the time the jockey reports to the scale room prior to a race through the time the jockey is weighed  
12 out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of  
13 horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services  
14 as a jockey;

15 (o) employment of an employer's spouse for whom an exemption based on marital status may be  
16 claimed by the employer under 26 U.S.C. 7703;

17 (p) a person who performs services as a petroleum land professional. As used in this subsection,  
18 a "petroleum land professional" is a person who:

19 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in  
20 negotiating a business agreement for the exploration or development of minerals;

21 (ii) is paid for services that are directly related to the completion of a contracted specific task rather  
22 than on an hourly wage basis; and

23 (iii) performs all services as an independent contractor pursuant to a written contract.

24 (q) an officer of a quasi-public or a private corporation or manager of a manager-managed limited  
25 liability company who qualifies under one or more of the following provisions:

26 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or  
27 the limited liability company and does not receive any pay from the corporation or the limited liability  
28 company for performance of the duties;

29 (ii) the officer or manager is engaged primarily in household employment for the corporation or the  
30 limited liability company;

1 (iii) the officer or manager owns 20% or more of the number of shares of stock in the corporation  
2 or owns 20% or more of the limited liability company; or

3 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,  
4 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who owns 20% or more of the  
5 number of shares of stock in the corporation or who owns 20% or more of the limited liability company.

6 (3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability  
7 partnership, or a working member of a member-managed limited liability company who represents to the  
8 public that the person is an independent contractor shall elect to be bound personally and individually by  
9 the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from  
10 the Workers' Compensation Act.

11 (b) The application must be made in accordance with the rules adopted by the department. There  
12 is no fee for the initial application. Any subsequent application must be accompanied by a \$25 application  
13 fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset  
14 the costs of administering the program.

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

17 (d) The exemption, if approved, remains in effect for 1 year following the date of the department's  
18 approval. To maintain the independent contractor status, an independent contractor shall annually submit  
19 a renewal application. A renewal application must be submitted for all independent contractor exemptions  
20 approved ~~as of~~ on or after July 1, 1995, ~~or thereafter~~. The renewal application and the \$25 renewal  
21 application fee must be received by the department at least 30 days ~~prior to~~ before the anniversary date  
22 of the previously approved exemption.

23 (e) A person who makes a false statement or misrepresentation concerning that person's status  
24 as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose  
25 the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured  
26 employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

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

1 (4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its  
2 employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private  
3 corporation, or a manager-managed limited liability company may elect coverage for its corporate officers  
4 or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following  
5 manner:

6 (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by  
7 delivering the notice to the board of directors of the corporation or to the management organization of the  
8 manager-managed limited liability company; 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 corporation or to the management organization of the  
11 manager-managed limited liability company and to the insurer.

12 (b) If the employer changes plans or insurers, the employer's previous election is not effective and  
13 the employer shall again serve notice to its insurer and to its board of directors or the management  
14 organization of the manager-managed limited liability company if the employer elects to be bound.

15 (5) The appointment or election of an employee as an officer of a corporation, a partner in a  
16 partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability  
17 company for the purpose of exempting the employee from coverage under this chapter does not entitle the  
18 officer, partner, member, or manager to exemption from coverage.

19 (6) Each employer shall post a sign in the workplace at the locations where notices to employees  
20 are normally posted, informing employees about the employer's current provision of workers' compensation  
21 insurance. A workplace is any location where an employee performs any work-related act in the course of  
22 employment, regardless of whether the location is temporary or permanent, and includes the place of  
23 business or property of a third person while the employer has access to or control over the place of  
24 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.  
25 The sign must be provided by the department, distributed through insurers or directly by the department,  
26 and posted by employers in accordance with rules adopted by the department. An employer who purposely  
27 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."  
28

29 **Section 5.** Section 39-71-414, MCA, is amended to read:

30 **"39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or



1 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all  
2 compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right  
3 of subrogation is a first lien on the claim, judgment, or recovery.

4 (2) (a) If the injured employee intends to institute the third-party action, the employee shall give  
5 the insurer reasonable notice of the intention to institute the action.

6 (b) The injured employee may request that the insurer pay a proportionate share of the reasonable  
7 cost of the action, including attorney fees.

8 (c) The insurer may elect not to participate in the cost of the action. If this election is made, the  
9 insurer waives 50% of its subrogation rights granted by this section.

10 (d) If the injured employee or the employee's personal representative institutes the action, the  
11 employee is entitled to at least one-third of the amount recovered by judgment or settlement less a  
12 proportionate share of reasonable costs, including attorney fees, if the amount of recovery is insufficient  
13 to provide the employee with that amount after payment of subrogation.

14 (3) If an injured employee refuses or fails to institute the third-party action within 1 year from the  
15 date of injury, the insurer may institute the action in the name of the employee and for the employee's  
16 benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to  
17 the employee any amount received by judgment or settlement that is in excess of the amounts paid or to  
18 be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorney fees  
19 for prosecuting the action, have been deducted from the recovery.

20 (4) An insurer may enter into compromise agreements in settlement of subrogation rights.

21 (5) Regardless of whether the amount of compensation and other benefits payable under the  
22 Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal  
23 representative may stipulate the proportion of the third-party settlement to be allocated under subrogation.

24 UPON REVIEW AND APPROVAL BY THE DEPARTMENT, THE AGREEMENT CONSTITUTES A COMPROMISE  
25 SETTLEMENT OF THE ISSUE OF SUBROGATION. ~~Upon review and approval by the department, the~~  
26 ~~agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by~~  
27 ~~the department~~ A dispute between the insurer and claimant concerning subrogation is a dispute subject to  
28 the mediation requirements of 39-71-2401.

29 (6) (a) The insurer is entitled to full subrogation rights under this section, unless the claimant is able  
30 to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery

1 combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the  
 2 entire settlement or award of a third-party claim brought by the claimant or the claimant's personal  
 3 representative without regard to the nature of the damages.

4 (b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim  
 5 without apportionment of damages by a court or jury, the insurer may subrogate against the entire  
 6 settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a  
 7 party to the settlement agreement.

8 (7) Regardless of whether the amount of compensation and other benefits payable have been fully  
 9 determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be  
 10 allocated under subrogation. Upon review and approval by the department, the agreement constitutes a  
 11 compromise settlement of the issue of subrogation ~~and may not be reopened by the department.~~ A  
 12 DISPUTE BETWEEN THE INSURER AND CLAIMANT CONCERNING SUBROGATION IS A DISPUTE SUBJECT  
 13 TO THE MEDIATION REQUIREMENTS OF 39-71-2401."

14  
 15 **Section 6.** Section 39-71-432, MCA, is amended to read:

16 **"39-71-432. Definitions.** As used in 39-71-433, the following definitions apply:

17 (1) "Business entity" means a business enterprise owned by a single person, corporation,  
 18 organization, business trust, trust, partnership, limited liability company, limited liability partnership, joint  
 19 venture, association, or other business entity.

20 (2) "Group" means two or more business entities that join together, with the approval of the  
 21 department, to purchase individual workers' compensation insurance policies covering each business entity  
 22 that is part of a group."

23  
 24 **Section 7.** Section 39-71-723, MCA, is amended to read:

25 **"39-71-723. How compensation to be divided among beneficiaries.** Compensation that is due to  
 26 beneficiaries must be paid to the surviving spouse, if any, or if none, ~~then~~ divided equally among or for the  
 27 benefit of the children. In cases in which beneficiaries are a surviving spouse and stepchildren of the  
 28 spouse, the compensation must be divided equally among all beneficiaries. Compensation that is due to  
 29 beneficiaries, as defined in 39-71-116(5)(e) and (5)(f), if there is more than one, must be divided equitably  
 30 among them, ~~and the question of dependency and amount is a question of fact for determination by the~~

1 department."

2

3 **Section 8.** Section 39-71-724, MCA, is amended to read:

4 **"39-71-724. Payment of compensation to beneficiary not a resident of United States.** (1) Before  
5 payment of compensation to a beneficiary who is not residing within the United States, satisfactory proof  
6 of ~~such~~ the relationship as to constitute a beneficiary under this chapter ~~shall~~ must be furnished by ~~such~~  
7 the beneficiary, ~~only~~ authenticated under seal of an officer of a court of law in the country where ~~such~~ the  
8 beneficiary resides, ~~at such times and in such manner as may be required by the department.~~ The  
9 proof ~~shall be~~ is conclusive as to the identity of ~~such~~ the beneficiary, and any other claim of any other  
10 person to any ~~such~~ compensation ~~shall be~~ is barred from and after the filing of ~~such~~ the proof.

11 (2) Payment of compensation to a beneficiary not residing within the United States may be made  
12 to any plenipotentiary, ~~or~~ consul, or consular agent within the United States representing the country in  
13 which ~~such~~ the nonresident beneficiary resides, and the written receipt of ~~such~~ the plenipotentiary, ~~or~~  
14 consul, or consular agent ~~shall acquit~~ acquits the employer, or the insurer, ~~or the department, as the case~~  
15 may be."

16

17 **NEW SECTION. Section 9. Repealer.** Sections 39-71-531, 39-71-532, 39-71-533, and 39-71-534,  
18 MCA, are repealed.

19

20 **NEW SECTION. Section 10. Transition.** Any surplus funds remaining in the underinsured  
21 employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund  
22 provided in 39-71-502.

23

24 **NEW SECTION. Section 11. Saving clause.** [Section 9] does not affect rights and duties that  
25 matured, penalties that were incurred, or proceedings that were begun before [the effective date of section  
26 9].

27

28 **NEW SECTION. Section 12. Effective dates -- applicability.** (1) [Sections 1 through 8] are  
29 effective July 1, 1997.

30 (2) [Sections 9 through 11 and this section] are effective on passage and approval.

-END-

## 1 SENATE BILL NO. 41

2 INTRODUCED BY BENEDICT

3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

4  
5 A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING JURISDICTION OVER DISPUTES RELATING TO  
6 WAGES PAID FOR IN PROPERTY OTHER THAN MONEY, DISPUTES RELATING TO SUBROGATION, AND  
7 DISPUTES RELATING TO PAYMENT OF COMPENSATION TO BENEFICIARIES TO THE WORKERS'  
8 COMPENSATION COURT; REQUIRING MEDIATION OF CERTAIN TYPES OF DISPUTES; INCLUDING  
9 LIMITED LIABILITY PARTNERSHIPS WITHIN THE PROVISIONS OF THE WORKERS' COMPENSATION ACT;  
10 ELIMINATING THE UNDERINSURED EMPLOYERS' PROVISIONS OF THE WORKERS' COMPENSATION ACT;  
11 PROVIDING FOR TRANSFER OF SURPLUS FUNDS IN THE UNDERINSURED EMPLOYERS' FUND TO THE  
12 UNINSURED EMPLOYERS' FUND; AMENDING SECTIONS 39-71-117, 39-71-118, 39-71-303, 39-71-401,  
13 39-71-414, 39-71-432, 39-71-723, AND 39-71-724, MCA; REPEALING SECTIONS 39-71-531, 39-71-532,  
14 39-71-533, AND 39-71-534, MCA; AND PROVIDING EFFECTIVE DATES."

15

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

**THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE  
REPRINTED. PLEASE REFER TO SECOND READING COPY  
(YELLOW) FOR COMPLETE TEXT.**

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SENATE BILL NO. 41  
INTRODUCED BY BENEDICT  
BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY

A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING JURISDICTION OVER DISPUTES RELATING TO WAGES PAID FOR IN PROPERTY OTHER THAN MONEY, DISPUTES RELATING TO SUBROGATION, AND DISPUTES RELATING TO PAYMENT OF COMPENSATION TO BENEFICIARIES TO THE WORKERS' COMPENSATION COURT; REQUIRING MEDIATION OF CERTAIN TYPES OF DISPUTES; INCLUDING LIMITED LIABILITY PARTNERSHIPS WITHIN THE PROVISIONS OF THE WORKERS' COMPENSATION ACT; ELIMINATING THE UNDERINSURED EMPLOYERS' PROVISIONS OF THE WORKERS' COMPENSATION ACT; PROVIDING FOR TRANSFER OF SURPLUS FUNDS IN THE UNDERINSURED EMPLOYERS' FUND TO THE UNINSURED EMPLOYERS' FUND; AMENDING SECTIONS 39-71-117, 39-71-118, 39-71-303, 39-71-401, 39-71-414, 39-71-432, 39-71-723, AND 39-71-724, MCA; REPEALING SECTIONS 39-71-531, 39-71-532, 39-71-533, AND 39-71-534, MCA; AND PROVIDING EFFECTIVE DATES."

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

**THERE ARE NO CHANGES IN THIS BILL AND IT WILL NOT BE REPRINTED. PLEASE REFER TO SECOND READING COPY (YELLOW) FOR COMPLETE TEXT.**

## 1 SENATE BILL NO. 41

2 INTRODUCED BY BENEDICT

3 BY REQUEST OF THE DEPARTMENT OF LABOR AND INDUSTRY  
4

5 A BILL FOR AN ACT ENTITLED: "AN ACT TRANSFERRING JURISDICTION OVER DISPUTES RELATING TO  
6 WAGES PAID FOR IN PROPERTY OTHER THAN MONEY, DISPUTES RELATING TO SUBROGATION, AND  
7 DISPUTES RELATING TO PAYMENT OF COMPENSATION TO BENEFICIARIES TO THE WORKERS'  
8 COMPENSATION COURT; REQUIRING MEDIATION OF CERTAIN TYPES OF DISPUTES; INCLUDING  
9 LIMITED LIABILITY PARTNERSHIPS WITHIN THE PROVISIONS OF THE WORKERS' COMPENSATION ACT;  
10 ELIMINATING THE UNDERINSURED EMPLOYERS' PROVISIONS OF THE WORKERS' COMPENSATION ACT;  
11 PROVIDING FOR TRANSFER OF SURPLUS FUNDS IN THE UNDERINSURED EMPLOYERS' FUND TO THE  
12 UNINSURED EMPLOYERS' FUND; AMENDING SECTIONS 39-71-117, 39-71-118, 39-71-303, 39-71-401,  
13 39-71-414, 39-71-432, 39-71-723, AND 39-71-724, MCA; REPEALING SECTIONS 39-71-531, 39-71-532,  
14 39-71-533, AND 39-71-534, MCA; AND PROVIDING EFFECTIVE DATES."

15  
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:  
1718 **Section 1.** Section 39-71-117, MCA, is amended to read:19 **"39-71-117. Employer defined.** (1) "Employer" means:

20 (a) the state and each county, city and county, city school district, and irrigation district; all other  
21 districts established by law; all public corporations and quasi-public corporations and public agencies; each  
22 person; each prime contractor; each firm, voluntary association, limited liability company, limited liability  
23 partnership, and private corporation, including any public service corporation and including an independent  
24 contractor who has ~~any a~~ person in service under ~~any an~~ appointment or contract of hire, expressed or  
25 implied, oral or written; and the legal representative of any deceased employer or the receiver or trustee  
26 of the deceased employer;

27 (b) any association, corporation, limited liability company, limited liability partnership, or  
28 organization that seeks permission and meets the requirements set by the department by rule for a group  
29 of individual employers to operate as self-insured under plan No. 1 of this chapter; and

30 (c) any nonprofit association, limited liability company, limited liability partnership, or corporation

1 or other entity funded in whole or in part by federal, state, or local government funds that places  
2 community service participants, as described in 39-71-118(1)(e), with nonprofit organizations or  
3 associations or federal, state, or local government entities.

4 (2) A temporary service contractor is the employer of a temporary worker for premium and loss  
5 experience purposes.

6 (3) Except as provided in chapter 8 of this title, an employer defined in subsection (1) who uses  
7 the services of a worker furnished by another person, association, contractor, firm, limited liability  
8 company, limited liability partnership, or corporation, other than a temporary service contractor, is  
9 presumed to be the employer for workers' compensation premium and loss experience purposes for work  
10 performed by the worker. The presumption may be rebutted by substantial credible evidence of the  
11 following:

12 (a) the person, association, contractor, firm, limited liability company, limited liability partnership,  
13 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
14 retains control over all aspects of the work performed by the worker, both at the inception of employment  
15 and during all phases of the work; and

16 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
17 or corporation, other than a temporary service contractor, furnishing the services of a worker to another  
18 has obtained workers' compensation insurance for the worker in Montana both at the inception of  
19 employment and during all phases of the work performed.

20 (4) An interstate or intrastate common or contract motor carrier doing business in this state who  
21 uses drivers in this state is considered the employer, is liable for workers' compensation premiums, and is  
22 subject to loss experience rating in this state unless:

23 (a) the driver in this state is certified as an independent contractor as provided in 39-71-401(3);  
24 or

25 (b) the person, association, contractor, firm, limited liability company, limited liability partnership,  
26 or corporation furnishing drivers in this state to a motor carrier has obtained workers' compensation  
27 insurance on the drivers in Montana both at the inception of employment and during all phases of the work  
28 performed."

29

30 **Section 2.** Section 39-71-118, MCA, is amended to read:

1           **"39-71-118. Employee, worker, volunteer, and volunteer firefighter defined.** (1) The term  
2 "employee" or "worker" means:

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

12           (b) any juvenile who is performing work under authorization of a district court judge in a  
13 delinquency prevention or rehabilitation program;

14           (c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training  
15 under a state or federal vocational training program, whether or not under an appointment or contract of  
16 hire with an employer, as defined in this chapter, and whether or not receiving payment from a third party.  
17 However, this subsection does not apply to students enrolled in vocational training programs, as outlined  
18 in this subsection, while they are on the premises of a public school or community college.

19           (d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

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

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

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



1 (f) an inmate working in a federally certified prison industries program authorized under 53-1-301;  
2 and

3 (g) a person who is an enrolled member of a volunteer fire department as described in 7-33-4109  
4 or a person who provides ambulance services under Title 7, chapter 34, part 1.

5 (2) The terms defined in subsection (1) do not include a person who is:

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

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

11 (c) performing services as a volunteer, except for a person who is otherwise entitled to coverage  
12 under the laws of this state. As used in this subsection (2)(c), "volunteer" means a person who performs  
13 services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined  
14 in 39-71-123.

15 (3) With the approval of the insurer, an employer may elect to include as an employee under the  
16 provisions of this chapter any volunteer as defined in subsection (2)(c).

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

19 (b) The term "volunteer hours" means all the time spent by a volunteer firefighter in the service  
20 of an employer, including but not limited to training time, response time, and time spent at the employer's  
21 premises.

22 (5) (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a  
23 member-managed limited liability company, the employer may elect to include as an employee within the  
24 provisions of this chapter any member of the partnership, or limited liability partnership, the owner of the  
25 sole proprietorship, or any member of the limited liability company devoting full time to the partnership,  
26 limited liability partnership, proprietorship, or limited liability company business.

27 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
28 naming the partners, sole proprietor, or members to be covered and stating the level of compensation  
29 coverage desired by electing the amount of wages to be reported, subject to the limitations in subsection  
30 (5)(d). A partner, sole proprietor, or member is not considered an employee within this chapter until notice

1 has been given.

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

4 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
5 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
6 determination of weekly wage for weekly compensation benefits, the electing employer may elect not less  
7 than \$900 a month and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

8 (6) (a) If the employer is a quasi-public or a private corporation or a manager-managed limited  
9 liability company, the employer may elect to include as an employee within the provisions of this chapter  
10 any corporate officer or manager exempted under 39-71-401(2).

11 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
12 naming the corporate officer or manager to be covered and stating the level of compensation coverage  
13 desired by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A  
14 corporate officer or manager is not considered an employee within this chapter until notice has been given.

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

17 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
18 the minimum and maximum limitations of this subsection. For premium ratemaking and for the  
19 determination of the weekly wage for weekly compensation benefits, the electing employer may elect not  
20 less than \$200 a week and not more than 1 1/2 times the average weekly wage, as defined in this chapter.

21 (7) (a) The trustees of a rural fire district, a county governing body providing rural fire protection,  
22 or the county commissioners or trustees for a fire service area may elect to include as an employee within  
23 the provisions of this chapter any volunteer firefighter. A volunteer firefighter who receives workers'  
24 compensation coverage under this section may not receive disability benefits under Title 19, chapter 17.

25 (b) In the event of an election, the employer shall report payroll for all volunteer firefighters for  
26 premium and weekly benefit purposes based on the number of volunteer hours of each firefighter times the  
27 average weekly wage divided by 40 hours, subject to a maximum of 1 1/2 times the average weekly wage.

28 (8) Except as provided in chapter 8 of this title, an employee or worker in this state whose services  
29 are furnished by a person, association, contractor, firm, limited liability company, limited liability  
30 partnership, or corporation, other than a temporary service contractor, to an employer, as defined in

1 39-71-117, is presumed to be under the control and employment of the employer. This presumption may  
2 be rebutted as provided in 39-71-117(3).

3 (9) For purposes of this section, an "employee or worker in this state" means:

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

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

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

10 (d) a nonresident of Montana who does not meet the requirements of subsection (9)(b) and whose  
11 employer elects coverage with an insurer that allows an election for an employer whose:

12 (i) nonresident employees are hired in Montana;

13 (ii) nonresident employees' wages are paid in Montana;

14 (iii) nonresident employees are supervised in Montana; and

15 (iv) business records are maintained in Montana.

16 (10) An insurer may require coverage for all nonresident employees of a Montana employer who  
17 do not meet the requirements of subsection (9)(b) or (9)(d) as a condition of approving the election under  
18 subsection (9)(d)."

19

20 **Section 3.** Section 39-71-303, MCA, is amended to read:

21 **"39-71-303. Work paid for in property other than money — ~~wages to be determined by~~**  
22 **~~department. Where any~~ When an employer procures ~~any~~ work to be done, payment for which is to be made**  
23 **in property other than money or its equivalent and the value of ~~which~~ that property is speculative or**  
24 **intangible, the wages of the employees receiving ~~such~~ the compensation ~~shall~~ must be determined ~~by the~~**  
25 **~~department~~ in accordance with the going wage for the same or similar work in the district or locality where**  
26 **the ~~same~~ work is to be performed."**

27

28 **Section 4.** Section 39-71-401, MCA, is amended to read:

29 **"39-71-401. Employments covered and employments exempted.** (1) Except as provided in  
30 subsection (2), the Workers' Compensation Act applies to all employers, as defined in 39-71-117, and to

1 all employees, as defined in 39-71-118. An employer who has any employee in service under any  
2 appointment or contract of hire, expressed or implied, oral or written, shall elect to be bound by the  
3 provisions of compensation plan No. 1, 2, or 3. Each employee whose employer is bound by the Workers'  
4 Compensation Act is subject to and bound by the compensation plan that has been elected by the  
5 employer.

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

8 (a) household and domestic employment;

9 (b) casual employment as defined in 39-71-116;

10 (c) employment of a dependent member of an employer's family for whom an exemption may be  
11 claimed by the employer under the federal Internal Revenue Code;

12 (d) employment of sole proprietors, working members of a partnership, working members of a  
13 limited liability partnership, or working members of a member-managed limited liability company, except  
14 as provided in subsection (3);

15 (e) employment of a broker or salesman performing under a license issued by the board of realty  
16 regulation;

17 (f) employment of a direct seller as defined in 26 U.S.C. 3508;

18 (g) employment for which a rule of liability for injury, occupational disease, or death is provided  
19 under the laws of the United States;

20 (h) employment of a person performing services in return for aid or sustenance only, except  
21 employment of a volunteer under 67-2-105;

22 (i) employment with a railroad engaged in interstate commerce, except that railroad construction  
23 work is included in and subject to the provisions of this chapter;

24 (j) employment as an official, including a timer, referee, or judge, at a school amateur athletic  
25 event, unless the person is otherwise employed by a school district;

26 (k) employment of a person performing services as a newspaper carrier or free-lance correspondent  
27 if the person performing the services or a parent or guardian of the person performing the services in the  
28 case of a minor has acknowledged in writing that the person performing the services and the services are  
29 not covered. As used in this subsection, "free-lance correspondent" is a person who submits articles or  
30 photographs for publication and is paid by the article or by the photograph. As used in this subsection,

1 "newspaper carrier":

2 (i) is a person who provides a newspaper with the service of delivering newspapers singly or in  
3 bundles; but

4 (ii) does not include an employee of the paper who, incidentally to the employee's main duties,  
5 carries or delivers papers.

6 (l) cosmetologist's services and barber's services as defined in 39-51-204(1)(l);

7 (m) a person who is employed by an enrolled tribal member or an association, business,  
8 corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose  
9 business is conducted solely within the exterior boundaries of an Indian reservation;

10 (n) employment of a jockey who is performing under a license issued by the board of horseracing  
11 from the time the jockey reports to the scale room prior to a race through the time the jockey is weighed  
12 out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of  
13 horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services  
14 as a jockey;

15 (o) employment of an employer's spouse for whom an exemption based on marital status may be  
16 claimed by the employer under 26 U.S.C. 7703;

17 (p) a person who performs services as a petroleum land professional. As used in this subsection,  
18 a "petroleum land professional" is a person who:

19 (i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in  
20 negotiating a business agreement for the exploration or development of minerals;

21 (ii) is paid for services that are directly related to the completion of a contracted specific task rather  
22 than on an hourly wage basis; and

23 (iii) performs all services as an independent contractor pursuant to a written contract.

24 (q) an officer of a quasi-public or a private corporation or manager of a manager-managed limited  
25 liability company who qualifies under one or more of the following provisions:

26 (i) the officer or manager is not engaged in the ordinary duties of a worker for the corporation or  
27 the limited liability company and does not receive any pay from the corporation or the limited liability  
28 company for performance of the duties;

29 (ii) the officer or manager is engaged primarily in household employment for the corporation or the  
30 limited liability company;

1 (iii) the officer or manager owns 20% or more of the number of shares of stock in the corporation  
 2 or owns 20% or more of the limited liability company; or

3 (iv) the officer or manager is the spouse, child, adopted child, stepchild, mother, father, son-in-law,  
 4 daughter-in-law, nephew, niece, brother, or sister of a corporate officer who owns 20% or more of the  
 5 number of shares of stock in the corporation or who owns 20% or more of the limited liability company.

6 (3) (a) A sole proprietor, a working member of a partnership, a working member of a limited liability  
 7 partnership, or a working member of a member-managed limited liability company who represents to the  
 8 public that the person is an independent contractor shall elect to be bound personally and individually by  
 9 the provisions of compensation plan No. 1, 2, or 3 but may apply to the department for an exemption from  
 10 the Workers' Compensation Act.

11 (b) The application must be made in accordance with the rules adopted by the department. There  
 12 is no fee for the initial application. Any subsequent application must be accompanied by a \$25 application  
 13 fee. The application fee must be deposited in the administration fund established in 39-71-201 to offset  
 14 the costs of administering the program.

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

17 (d) The exemption, if approved, remains in effect for 1 year following the date of the department's  
 18 approval. To maintain the independent contractor status, an independent contractor shall annually submit  
 19 a renewal application. A renewal application must be submitted for all independent contractor exemptions  
 20 approved ~~as of~~ on or after July 1, 1995, ~~or thereafter~~. The renewal application and the \$25 renewal  
 21 application fee must be received by the department at least 30 days ~~prior to~~ before the anniversary date  
 22 of the previously approved exemption.

23 (e) A person who makes a false statement or misrepresentation concerning that person's status  
 24 as an exempt independent contractor is subject to a civil penalty of \$1,000. The department may impose  
 25 the penalty for each false statement or misrepresentation. The penalty must be paid to the uninsured  
 26 employers' fund. The lien provisions of 39-71-506 apply to the penalty imposed by this section.

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

1           (4) (a) A corporation or a manager-managed limited liability company shall provide coverage for its  
2 employees under the provisions of compensation plan No. 1, 2, or 3. A quasi-public corporation, a private  
3 corporation, or a manager-managed limited liability company may elect coverage for its corporate officers  
4 or managers, who are otherwise exempt under subsection (2), by giving a written notice in the following  
5 manner:

6           (i) if the employer has elected to be bound by the provisions of compensation plan No. 1, by  
7 delivering the notice to the board of directors of the corporation or to the management organization of the  
8 manager-managed limited liability company; 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 corporation or to the management organization of the  
11 manager-managed limited liability company and to the insurer.

12           (b) If the employer changes plans or insurers, the employer's previous election is not effective and  
13 the employer shall again serve notice to its insurer and to its board of directors or the management  
14 organization of the manager-managed limited liability company if the employer elects to be bound.

15           (5) The appointment or election of an employee as an officer of a corporation, a partner in a  
16 partnership, a partner in a limited liability partnership, or a member in or a manager of a limited liability  
17 company for the purpose of exempting the employee from coverage under this chapter does not entitle the  
18 officer, partner, member, or manager to exemption from coverage.

19           (6) Each employer shall post a sign in the workplace at the locations where notices to employees  
20 are normally posted, informing employees about the employer's current provision of workers' compensation  
21 insurance. A workplace is any location where an employee performs any work-related act in the course of  
22 employment, regardless of whether the location is temporary or permanent, and includes the place of  
23 business or property of a third person while the employer has access to or control over the place of  
24 business or property for the purpose of carrying on the employer's usual trade, business, or occupation.  
25 The sign must be provided by the department, distributed through insurers or directly by the department,  
26 and posted by employers in accordance with rules adopted by the department. An employer who purposely  
27 or knowingly fails to post a sign as provided in this subsection is subject to a \$50 fine for each citation."  
28

29           **Section 5.** Section 39-71-414, MCA, is amended to read:

30           "**39-71-414. Subrogation.** (1) If an action is prosecuted as provided for in 39-71-412 or

1 39-71-413 and except as otherwise provided in this section, the insurer is entitled to subrogation for all  
 2 compensation and benefits paid or to be paid under the Workers' Compensation Act. The insurer's right  
 3 of subrogation is a first lien on the claim, judgment, or recovery.

4 (2) (a) If the injured employee intends to institute the third-party action, the employee shall give  
 5 the insurer reasonable notice of the intention to institute the action.

6 (b) The injured employee may request that the insurer pay a proportionate share of the reasonable  
 7 cost of the action, including attorney fees.

8 (c) The insurer may elect not to participate in the cost of the action. If this election is made, the  
 9 insurer waives 50% of its subrogation rights granted by this section.

10 (d) If the injured employee or the employee's personal representative institutes the action, the  
 11 employee is entitled to at least one-third of the amount recovered by judgment or settlement less a  
 12 proportionate share of reasonable costs, including attorney fees, if the amount of recovery is insufficient  
 13 to provide the employee with that amount after payment of subrogation.

14 (3) If an injured employee refuses or fails to institute the third-party action within 1 year from the  
 15 date of injury, the insurer may institute the action in the name of the employee and for the employee's  
 16 benefit or that of the employee's personal representative. If the insurer institutes the action, it shall pay to  
 17 the employee any amount received by judgment or settlement that is in excess of the amounts paid or to  
 18 be paid under the Workers' Compensation Act after the insurer's reasonable costs, including attorney fees  
 19 for prosecuting the action, have been deducted from the recovery.

20 (4) An insurer may enter into compromise agreements in settlement of subrogation rights.

21 (5) Regardless of whether the amount of compensation and other benefits payable under the  
 22 Workers' Compensation Act have been fully determined, the insurer and the claimant's heirs or personal  
 23 representative may stipulate the proportion of the third-party settlement to be allocated under subrogation.

24 UPON REVIEW AND APPROVAL BY THE DEPARTMENT, THE AGREEMENT CONSTITUTES A COMPROMISE  
 25 SETTLEMENT OF THE ISSUE OF SUBROGATION. ~~Upon review and approval by the department, the~~  
 26 ~~agreement constitutes a compromise settlement of the issue of subrogation and may not be reopened by~~  
 27 ~~the department~~ A dispute between the insurer and claimant concerning subrogation is a dispute subject to  
 28 the mediation requirements of 39-71-2401.

29 (6) (a) The insurer is entitled to full subrogation rights under this section, unless the claimant is able  
 30 to demonstrate damages in excess of the workers' compensation benefits and the third-party recovery



1 combined. If the insurer is entitled to subrogation under this section, the insurer may subrogate against the  
2 entire settlement or award of a third-party claim brought by the claimant or the claimant's personal  
3 representative without regard to the nature of the damages.

4 (b) If a survival action does not exist and the parties reach a settlement of a wrongful death claim  
5 without apportionment of damages by a court or jury, the insurer may subrogate against the entire  
6 settlement amount, without regard to the parties' apportionment of the damages, unless the insurer is a  
7 party to the settlement agreement.

8 (7) Regardless of whether the amount of compensation and other benefits payable have been fully  
9 determined, the insurer and the claimant may stipulate the proportion of the third-party settlement to be  
10 allocated under subrogation. Upon review and approval by the department, the agreement constitutes a  
11 compromise settlement of the issue of subrogation ~~and may not be reopened by the department.~~ A  
12 DISPUTE BETWEEN THE INSURER AND CLAIMANT CONCERNING SUBROGATION IS A DISPUTE SUBJECT  
13 TO THE MEDIATION REQUIREMENTS OF 39-71-2401."

14

15 **Section 6.** Section 39-71-432, MCA, is amended to read:

16 **"39-71-432. Definitions.** As used in 39-71-433, the following definitions apply:

17 (1) "Business entity" means a business enterprise owned by a single person, corporation,  
18 organization, business trust, trust, partnership, limited liability company, limited liability partnership, joint  
19 venture, association, or other business entity.

20 (2) "Group" means two or more business entities that join together, with the approval of the  
21 department, to purchase individual workers' compensation insurance policies covering each business entity  
22 that is part of a group."

23

24 **Section 7.** Section 39-71-723, MCA, is amended to read:

25 **"39-71-723. How compensation to be divided among beneficiaries.** Compensation that is due to  
26 beneficiaries must be paid to the surviving spouse, if any, or if none, ~~then~~ divided equally among or for the  
27 benefit of the children. In cases in which beneficiaries are a surviving spouse and stepchildren of the  
28 spouse, the compensation must be divided equally among all beneficiaries. Compensation that is due to  
29 beneficiaries, as defined in 39-71-116(5)(e) and (5)(f), if there is more than one, must be divided equitably  
30 among them, ~~and the question of dependency and amount is a question of fact for determination by the~~

1 department."

2

3 Section 8. Section 39-71-724, MCA, is amended to read:

4 "39-71-724. Payment of compensation to beneficiary not a resident of United States. (1) Before  
5 payment of compensation to a beneficiary who is not residing within the United States, satisfactory proof  
6 of ~~such the~~ relationship as to constitute a beneficiary under this chapter ~~shall~~ must be furnished by ~~such~~  
7 ~~the~~ beneficiary, ~~duly~~ authenticated under seal of an officer of a court of law in the country where ~~such the~~  
8 beneficiary resides, ~~at such times and in such manner as may be required by the department. Such The~~  
9 proof ~~shall be~~ is conclusive as to the identity of ~~such the~~ beneficiary, and any other claim of any other  
10 person to any ~~such~~ compensation ~~shall be~~ is barred from and after the filing of ~~such the~~ proof.

11 (2) Payment of compensation to a beneficiary not residing within the United States may be made  
12 to any plenipotentiary, ~~or~~ consul, or consular agent within the United States representing the country in  
13 which ~~such the~~ nonresident beneficiary resides, and the written receipt of ~~such the~~ plenipotentiary, ~~or~~  
14 consul, or consular agent ~~shall acquit~~ acquits the employer, or the insurer, ~~or the department, as the case~~  
15 ~~may be."~~

16

17 NEW SECTION. Section 9. Repealer. Sections 39-71-531, 39-71-532, 39-71-533, and 39-71-534,  
18 MCA, are repealed.

19

20 NEW SECTION. Section 10. Transition. Any surplus funds remaining in the underinsured  
21 employers' fund on [the effective date of this section] must be deposited in the uninsured employers' fund  
22 provided in 39-71-502.

23

24 NEW SECTION. Section 11. Saving clause. [Section 9] does not affect rights and duties that  
25 matured, penalties that were incurred, or proceedings that were begun before [the effective date of section  
26 9].

27

28 NEW SECTION. Section 12. Effective dates -- applicability. (1) [Sections 1 through 8] are  
29 effective July 1, 1997.

30 (2) [Sections 9 through 11 and this section] are effective on passage and approval.

-END-