# MONTANA ADMINISTRATIVE REGISTER



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MONTANA ADMINISTRATIVE REGISTER

ISSUE NO. 5

The Montana Administrative Register (MAR), a twice-monthly publication, has three sections. The notice section contains state agencies' proposed new, amended or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The rule section indicates that the proposed rule action is adopted and lists any changes made since the proposed stage. The interpretation section contains the attorney general's opinions and state declaratory rulings. Special notices and tables are inserted at the back of each register.

Page Number

TABLE OF CONTENTS

NOTICE SECTION

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.903, 2.21.909 and 2.21.912 relating to Leave of Absence Due to Disability and Maternity | ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.903, 2.21.909 AND 2.21.912 RELATING TO LEAVE OF ABSENCE DUE TO DISABILITY AND MATERNITY |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.903, 2.21.909 and 2.21.912 relating to leave of absence due to disability and maternity.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rules proposed to be amended provide as follows:

2.21.903 DEFINITIONS As used in this sub-chapter, the following definitions apply:

(1) "Disability" means any illness, injury, or other condition which prevents the employee from performing some or all of the duties of the position. A disability may be the result of a short-term illness or injury, pregnancy or childbirth, or industrial accident~~, or a handicap~~. "Disability" also includes, as provided in 49-2-101 and 49-3-101, MCA:

(a) a physical or mental impairment which substantially limits one or more of a person's major life activities;

(b) a record of such an impairment; or

(c) a condition regarded as such an impairment.

~~(2) "Handicap" means a physical or mental handicap as these terms are defined in 49-2-101, MCA, and with the following clarification found at ARM 24.9.801(3):~~

~~(a) "a 'handicapped person' is a person who:~~

~~(i) has a physical or mental handicap which substantially limits one or more of such person's major life activities;~~

~~(ii) has a record of having such an impairment; or~~

~~(iii) is regarded as having such an impairment.~~

~~(b) a factor in determining whether an impairment substan-~~

~~tially limits a major life activity is the duration of the impairment. A short term illness or injury such as a cold or sprained ankle, is not by itself a 'handicap' within the meaning of section 49-2-101, MCA."~~

~~(3)~~ (2) "Industrial accident" means an injury or ~~disease~~ accident, as defined in 39-71-119, MCA. ~~to an employee which arises out of and occurs in the course of employment.~~ "Occupational disease" has the meaning found in 39-72-102, MCA.

~~(4)~~ (3) Renumbered as (3) and remains the same.

~~(5)~~ (4) "Reasonable accommodation" means, in accordance with section 504 of the Rehabilitation Act of 1973~~, an adjustment made to a job, work environment, or both that enables an otherwise qualified handicapped person to perform the duties of the position, unless the accommodation would impose an undue hardship on the operation of the agency programs.~~ and Title I of the Americans with Disabilities Act of 1990:

(a) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires;

(b) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(c) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, unless the accommodation would impose an undue hardship on the department. (Types of reasonable accommodations and the ~~(c~~criteria for evaluating undue hardship can be found in the reasonable accommodation guide prepared by the state personnel division, department of administration.)

~~(6)~~ (5) Renumbered as (5) and remains the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.909 REASONABLE ACCOMMODATION OF AN EMPLOYEE'S ~~HANDICAP~~ WITH A DISABILITY (1) If a ~~disabling condition becomes a handicap~~ qualified individual with a disability makes known his or her disability, an ~~agency~~ department may be required to provide a reasonable accommodation unless to do so would impose an undue hardship in accordance with sections 503 and 504 of the Rehabilitation Act of 1973 ~~and federal regulations, 28 CFR part 41 and 29 CFR part 32, interpreting the act~~ and Title I of the Americans with Disabilities Act of 1990.

(2) If an employee's ~~condition~~ disability becomes a known ~~handicap~~ to the ~~agency~~ department and an accommodation is requested or needed to perform the essential functions of the job, the ~~agency~~ department may consult the "~~guide to~~ reasonable accommodation guide" for assistance. This guide is issued by and available from the state personnel division, department of administration.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.912 DISCHARGING AN ~~DISABLED OR HANDICAPPED~~ EMPLOYEE WITH A DISABILITY (1) An ~~disabled or handicapped~~ employee with a disability who fails to perform his or her essential job duties in a satisfactory manner or whose behavior interferes with or disrupts ~~agency~~ department operations may be subject to disciplinary action, up to and including discharge, in compliance with the state discipline handling policy, ARM 2.21.6505 et seq.

(2) If a disciplinary action or discharge is due to a known ~~handicap~~ disability, the ~~agency~~ department must be prepared to document:

(a) that the employee with the disability cannot perform the essential functions or duties of the position; and

~~(a)~~ (b) Relettered and remains the same.

~~(b)~~ (c) that an accommodation would create an undue hardship on the ~~operation of agency~~ department.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. It is reasonably necessary to amend ARM 2.21.903, 2.21.909 and 2.21.912 to better comply with the reasonable accommodation requirements of the Americans with Disabilities Act of 1990. Several sub-chapters in the administrative rules related to personnel management have been proposed for amendment in order to clarify duties under the Act to provide reasonable accommodation. It also is necessary to amend these rules because the 53rd legislature amended the Montana Human Rights Act to change the terminology throughout the Act from "handicap" to "disability." Because the Disability and Maternity rules refer to the Montana Human Rights Act and its accompanying rules, the same changes in terminology are proposed here for consistency. The definition of "handicap" is now incorporated into the definition of "disability."

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 15, 1994.

5. Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.1604 and 2.21.1606 relating to Alternate Work Schedules | ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.1604 AND 2.21.1606 RELATING TO ALTERNATE WORK SCHEDULES |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in State Personnel Division Conference Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.1604 and 2.21.1606 relating to alternate work schedules.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rules proposed to be amended provide as follows:

2.21.1604 ELIGIBILITY (1) Implementation of alternate work schedules in ~~an agency~~ department work unit is at the ~~agency~~ department's discretion. Employees working in a work unit where alternate work schedules are implemented may request an alternate schedule based on the procedures established by the ~~agency~~ department to administer such schedules.

(2) Provisions of this policy apply only to alternate work schedules requested by the employee and not to work schedules established by management. Nothing in this policy limits the authority of the ~~agency~~ department to establish or change work schedules as necessary for the successful operation of agency programs.

(3) Approval of an alternate schedule request for an employee is at the ~~agency~~ department's discretion, based on the considerations listed in ARM 2.21.1605 and 2.21.1606 and any other factors which the ~~agency~~ department deems appropriate.

(4) An alternative work schedule should be considered when an agency is required to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability unless to do so would impose an undue hardship on the agency. Approval for an alternative work schedule under ~~these~~ conditions is not subject to the limitations in ARM 2.21.1605.

~~(4)~~ (5) ~~An agency~~ department may withdraw approval for an alternate work schedule on 24-hours' notice.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.1606 CRITERIA FOR ALTERNATE SCHEDULES (1) Remains the same.

(2) State offices must be open from 8:00 a.m. to 5:00 p.m. daily, as required by Section ~~2-18-117~~ 2-16-117, MCA. Approval of alternate work schedules must be contingent on maintaining adequate staff coverage during those hours.

(3) When establishing alternate work schedules, the ~~agency~~ department must assure coverage of essential functions during regular work hours, such as a receptionist's duties, which are contingent on an 8:00 a.m. to 5:00 p.m. schedule or for other employees who provide assistance to persons outside the ~~agency~~ department who would expect to contact them during regular business hours.

(4) Remains the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. It is reasonably necessary to amend Rule 2.21.1604 to better comply with the reasonable accommodation requirements of Title II of the Americans with Disabilities Act of 1990. Several sub-chapters in the administrative rules related to personnel management have been proposed for amendment in order to clarify duties under the Act to provide reasonable accommodation. The amendment to 2.21.1606 corrects the MCA citation.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, no later than April 15, 1994.

5. Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dan Emilie, Chief Legal Counsel
Rule Reviewer

Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.8109 relating to Equal Employment Opportunity/Affirmative Action | ) ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.8109 RELATING TO EQUAL EMPLOYMENT OPPORTUNITY/AFFIRMATIVE ACTION |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.8109 relating to equal employment opportunity/affirmative action.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rule proposed to be amended provides as follows:

2.21.8109 AGENCY PROGRAM (1) - (3) Remain the same.

(4) Each agency shall develop a written equal employment opportunity policy statement for internal and external dissemination. The equal employment opportunity policy shall include, at a minimum, the following elements:

(a) a statement that it is the policy of the agency to provide equal employment opportunity (EEO) to all persons regardless of race, color, religion, creed, sex, national origin, age, ~~handicap~~ disability, marital status or political belief with the exception of special programs established by law;

(4)(b) - (4)(b)(i) Remain the same.

(ii) make a commitment to provide reasonable accommodation to any known disability that may interfere with a disabled applicant's ability to compete in the selection process or a disabled employee's ability to perform the essential duties of a job;

(4)(c) - (8) Remain the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. It is reasonably necessary to amend ARM 2.21.8109 to adopt terminology which is consistent with the Americans with

Disabilities Act of 1990 and the Montana Human Rights Act.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 15, 1994.

5. Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.137 and 2.21.144 relating to Sick Leave | ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.137 AND 2.21.144 RELATING TO SICK LEAVE |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in the State Personnel Division Conference Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.137 and 2.21.144 relating to sick leave.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rules proposed to be amended provide as follows:

2.21.137 SICK LEAVE REQUESTS (1) Remains the same.

(2) The employee's immediate supervisor or appropriate authority may require medical certification of sick leave charged against any sick leave credits. The medical certification ~~shall~~ must be provided by a licensed physician or, at the agency's discretion, by a licensed practitioner competent to treat and diagnose the particular illness or condition.

(3) Provisions of the federal Family and Medical Leave Act and the Americans with Disabilities Act of 1990 each place limitations on the kinds of information which may be sought when medical certification is required. The information required for medical certification should be job-related and consistent with business necessity. It may indicate a need for the leave, length of the leave and the timing of the leave. Seeking more information than necessary to verify the leave request may violate the ADA. An agency may not inquire into the possible future effects of an employee's "serious health condition," as that term is defined in the FMLA, during the certification process. For example, if a medical certification indicates an employee has cancer, the agency may not ask whether the illness is terminal.

~~(3)~~ (4) A statement by a licensed physician or, at the agency's discretion, by a licensed practitioner, may also be

required to certify that the illness ~~or~~ of a family member requires the immediate supervision of the employee.

(4) - (5) Renumbered and remain the same.

~~(6)~~ (7) The agency may require an employee to be examined by a licensed physician or a licensed practitioner of the agency's choice. A medical examination must be job-related and consistent with business necessity. The need for the examination may result from some evidence of problems related to job performance or safety, or an examination may be necessary to determine whether individuals in physically demanding jobs continue to be fit for duty. The agency shall pay the costs of such an examination.

(Auth. 2-18-604, MCA; Imp. 2-18-618, MCA)

2.21.144 INDUSTRIAL ACCIDENT (1) An employee who ~~is injured in~~ suffers an ~~industrial~~ on-the-job accident may be eligible for workers' compensation benefits. ~~Use of sick leave must be coordinated with receipt of workers' compensation benefits on a case-by-case basis by contacting the workers' compensation division, department of labor and industry.~~ Pursuant to 39-71-736, MCA, an injured worker is not considered to be entitled to workers' compensation benefits if the worker is receiving sick leave benefits, except:

(a) Sick leave may be used and counted toward the required 6-day waiting period. Departments should notify the state fund of approved sick leave benefits paid in this situation.

(b) Augmentation of workers' compensation temporary total disability benefits with sick leave by an employer pursuant to a collective bargaining agreement may not disqualify a worker from receiving temporary total disability benefits. It is not necessary to notify the state fund of sick leave benefits paid in this situation.

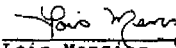
(Auth. 2-18-604, MCA; Imp. 2-18-618, MCA)

3. It is reasonably necessary to amend ARM 2.21.137 to better comply with the reasonable accommodation requirements of Title II of the Americans with Disabilities Act of 1990 and the medical certification limitations placed by the ADA and the Family and Medical Leave Act. Several administrative rules related to personnel management have been proposed for amendment in order to clarify duties under the Act to provide reasonable accommodation. It is reasonably necessary to amend ARM 2.21.144 in order to comply with 39-71-736, MCA, relating to the concurrent use of paid leave and receipt of workers' compensation benefits.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana, 59620 no later than April 15, 1994.

5. Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer



Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.704 relating to Leave of Absence Without Pay | ) ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.704 RELATING TO LEAVE OF ABSENCE WITHOUT PAY |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.704 relating to leave of absence without pay.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rule proposed to be amended provides as follows:

2.21.704 APPROVAL OF LEAVE (1) At the ~~agency's~~ department's discretion, an employee may be placed on leave of absence without pay.

(2) ~~An agency~~ department may require an employee to use all appropriate accrued leave or compensatory time before approving a leave of absence without pay request, unless the employee is requesting leave to serve in a public office or for extended military service.

(3) ~~An agency~~ department shall establish procedures for considering requests by an ~~employees~~ for a long-term leave of absence without pay. The procedures ~~shall~~ must be based on a cost/benefit analysis outlined in section (4) of this rule. Requests for short-term leave may be analyzed using the same procedure.

(4) ~~An agency~~ department shall assess a request for a long-term leave of absence without pay based on a cost/benefit analysis which weighs both direct and indirect costs against benefits to the ~~agency~~ department.

(5) Costs to the ~~agency~~ department management shall consider when assessing requests for leave of absence without pay include, but are not limited to, loss of productivity by the employee; overtime or compensatory time for other current employees; hiring and training a temporary replacement; and the impact on the agency budget.

(6) Benefits to the ~~agency~~ department management shall consider when assessing requests for leave of absence without pay include, but are not limited to, long-term retention of an employee and improved job performance as a result of the leave.

(7) Leave of absence without pay should be considered as an appropriate alternative when a department is required to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability unless to do so would impose an undue hardship on the department.

~~(7)~~ (8) The ~~agency~~ department shall determine the supervisory level at which ~~level~~ a leave of absence without pay may be approved.

(Auth. 2-18-604, MCA; Imp. 2-18-604, MCA)

3. It is reasonably necessary to amend Rule 2.21.704 to better comply with the reasonable accommodation requirements of Title II of the Americans with Disabilities Act of 1990. Several sub-chapters in the administrative rules related to personnel management have been proposed for amendment in order to clarify duties under the act to provide reasonable accommodation.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, no later than April 15, 1994.

5. Constance Enzweiler, Personnel Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994.

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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| In the matter of the proposed amendment of ARM 2.21.8011 relating to Grievances | ) ) ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.8011 RELATING TO GRIEVANCES |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.8011 relating to grievances.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rule proposed to be amended provides as follows:

2.21.8011 POLICY AND OBJECTIVES (1) - (2) Remain the same.

(3) The department of administration delegates the authority to each executive branch ~~agency~~ department to adopt an internal grievance procedure in accordance with ARM 2.21.1203, and with the general authority of a department head to adopt internal management policy found at 2-15-112 and 2-4-102 (10), MCA. An internal grievance procedure ~~shall~~ must be consistent with the provisions of this policy and at a minimum include all steps contained in ARM 2.21.8017. Additional steps may be added, forms may be included, and timeframes may be modified at the ~~agency's~~ department's discretion.

(4) An employee shall file a grievance under a procedure adopted by the ~~agency~~ department, if available. If the ~~agency~~ department has not adopted a procedure, the employee shall proceed under this policy.

(5) Incidents of sexual harassment ~~shall~~ must be reported using the procedure in the sexual harassment prevention policy, found at ARM 2.21.1305 (also found at policy 3-0620, Montana operations manual, volume III).

(6) Incidents that are alleged to be in violation of the Americans with Disabilities Act (ADA) of 1990 must be reported using an ADA complaint resolution procedure if such a procedure has been adopted by a department. Otherwise, the employee shall proceed under this policy.

~~(6)~~ (7) Renumbered as (7) and remains the same.

~~(7)~~ (8) A job classification appeal ~~shall~~ must be resolved through the procedure adopted by the board of personnel appeals at ARM 24.26.501 et seq., and ~~shall~~ may not be filed under any other grievance procedure.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. It is reasonably necessary to amend ARM 2.21.8011 to better comply with the reasonable accommodation requirements of Title II of the Americans with Disabilities Act of 1990. Several sub-chapters in the administrative rules relating to personnel management have been proposed for amendment in order to clarify duties under the act to provide reasonable accommodation.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Constance Enzweiler, Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 15, 1994.

5. Constance Enzweiler, Personnel Policy Specialist, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

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|---|---|---|
| In the matter of the proposed amendment of ARM 2.21.3702, 2.21.3703, 2.21.3708, 2.21.3709, 2.21.3712, 2.21.3713, 2.21.3715, 2.21.3719, 2.21.3721, 2.21.3724, 2.21.3726, 2.21.3727, 2.21.3728 and adoption of a new rule relating to recruitment and selection | ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.3702, 2.21.3703, 2.21.3708, 2.21.3709, 2.21.3712, 2.21.3713, 2.21.3715, 2.21.3719, 2.21.3721, 2.21.3724, 2.21.3726, 2.21.3727, 2.21.3728, AND ADOPTION OF A NEW RULE RELATING TO RECRUITMENT AND SELECTION |

TO: All Interested Persons.

1. On April 7, 1994, at 9 a.m. in Room 136 Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.2.3702, 2.21.3703, 2.21.3708, 2.21.3709, 2.21.3712, 2.21.3713, 2.21.3715, 2.21.3719, 2.21.3721, 2.21.3724, 2.21.3726, 2.21.3727, 2.21.3728, and adoption of a new rule relating to recruitment and selection.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rules proposed to be amended provide as follows:

2.21.3702 POLICY AND OBJECTIVES (1) It is the policy of the state of Montana to:

(a) recruit and select employees on the basis of merit and job-related qualifications and without regard to race, color, religion, creed, political ideas, sex, age, marital status, physical or mental ~~handicap~~ disability, or national origin as provided in 49-3-201, MCA, except where marital status, age, or physical or mental ~~handicap~~ disability is a bona fide occupational qualification reasonably necessary to the ~~agency's~~ department's operations;

(b) Remains the same.

(2) Nothing in these rules is intended to:

(a) limit a department's discretion to select a recruitment method for a vacancy, including, but not limited to, internal recruitment, promotion, reassignment or training assignment, external to the job registry recruitment, or external to the general public provided the department follows applicable rules for whichever method is selected; or

(b) preclude the use of recruitment and selection procedures ~~which~~ that assist in the achievement of affirmative action objectives. Compliance with these rules does not relieve an ~~agency~~ department of its equal employment opportunity and affirmative action obligations or its obligations under other state or federal rules and regulations ~~which~~ that govern recruitment and selection.

(3) Remains the same.

(Auth. 2-18-102, MCA;Imp. 2-18-102, 2-18-1201 et seq., MCA)

2.21.3703 DEFINITIONS ~~As used in this sub-chapter~~ For purposes of this sub-chapter, the following definitions apply:

~~(1) "Application supplement" means any questionnaire or other material requested in addition to the state application, form PD-25, for the purpose of evaluating an applicant's job-related qualifications.~~

~~(2)~~ (1) "Bona fide occupational qualification" means an exception to the prohibitions against discrimination ~~which~~ that is allowed where the reasonable demands of a position require an age, physical or mental ~~handicap~~ disability, marital status, or sex distinction. "Reasonable demands" is to be strictly construed, and the burden rests with the ~~agency~~ department to demonstrate that the exemption should be granted, as provided in 49-2-402, MCA.

~~(3) "Continuous recruitment" means a procedure in which applications are solicited for a position or a class of positions on an on-going basis regardless of whether a current vacancy exists.~~

(2) "Essential duties," or the essential functions of the job as referred to in the Americans with Disabilities Act of 1990, means the fundamental job duties of the position that are required to be performed by the employee either with or without an accommodation.

~~(4)~~ (3) "External recruitment" means the soliciting of applications from any interested persons in the general public including current employees of a department.

~~(5)~~ (4) "Internal recruitment" means the soliciting of applications ~~which~~ that, at the discretion of the ~~agency~~ department, is limited to current employees of the department, the division, or other appropriate internal unit or to employees in a reduction-in-force pool who have been laid off from the ~~agency~~ department.

~~(6)~~ (5) "Job analysis" means a study of a position to determine the major duties/responsibilities and ~~or~~ activities/tasks, their relative importance to the job and the knowledge, skills, and abilities required to perform them. Job analysis is also used to determine the qualifications for the position.

(6) "Job expert" means a person who is knowledgeable about the position being filled and/or a person who has expertise in the recruitment and selection process. Examples may include the incumbent, the incumbent's supervisors, persons in the same or a similar position, and the personnel or EEO officer.

(7) "Job-related" means criteria shown by a job analysis to be directly related to a specific activity/task or activities/tasks in a job or to be directly related to a qualification necessary to perform a specific activity/task or activities/tasks in a job.

~~(8) "Performance test" means a test which evaluates an applicant's knowledge, skill, or ability on a task very similar or identical to that required on the job, such as a typing test or driving test.~~

(9) Renumbered as (8) and remains the same.

(9) "Rating scale" means a system used to score suggested responses in a selection procedure. Examples are: a scale that uses a 0-5 rating or a scale that uses a (+), (✓), (-) system of scoring.

~~(10) "Reference check" means an inquiry which:~~

~~(a) relates to an applicant's possession of job-related qualifications; and~~

~~(b) is made of persons able to evaluate the applicant's job-related qualifications, such as a former or current supervisor.~~

~~(11) "Structured interview" means a personal contact, either face-to-face or by phone, between interviewer or panel of interviewers and the applicant for the purpose of evaluating the applicant's job-related qualifications. The questions are developed in advance along with model answers and rating criteria and are administered in a standardized manner.~~

~~(12) "Temporary employee" means a person hired for a temporary position, as that term is defined in 2-18-101, MCA, or a person not eligible to attain permanent status who is hired for a permanent position for a period of time not to exceed 9 months. The term does not include a current employee regularly assigned to a permanent position who is temporarily reassigned or promoted.~~

~~(13) "Work sample" means a product which results from an applicant's efforts and is representative of the applicant's level of competence in a specific area. A work sample may be requested at the time of application or may be produced during a performance exam. Examples include a brochure or computer program written by the applicant outside the selection process or a budget prepared as part of a written exercise.~~

~~(14) "Written test" means a paper and pencil exam which evaluates job-related qualifications and may include, but is not limited to, true or false, multiple choice, fill in the blank or essay items.~~

(10) "Reasonable accommodation" means, in accordance with section 504 of the Rehabilitation Act of 1973 and Title I of the Americans with Disabilities Act of 1990:

(a) modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires;

(b) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(c) modifications or adjustments that enable an employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities, unless the accommodation would impose an undue hardship on the department. (Types of reasonable accommodations and the criteria for evaluating undue hardship can be found in the reasonable accommodation guide prepared by the state personnel division, department of administration.)

(11) "Selection procedures" means procedures to evaluate applicants' qualifications as they relate to the knowledge, skills and abilities and education and experience for a job. These may include, but are not limited to:

(a) Performance tests: evaluate an applicant's knowledge, skill, or ability on a task very similar or identical to that required on the job, such as a typing test or driving test.

(b) Physical tests: generally include endurance and strength measurements.

(c) Reference checks: inquiries that relate to an applicant's possession of job-related qualifications and are made by persons able to evaluate the applicant's job-related qualifications, such as a former or current supervisor.

(d) Structured interviews: consist of job-related questions or situations asked to assess an applicant's knowledge, skills, and/or abilities to perform the job. Questions or situations may be administered in oral or written form.

(e) Supplement questions: describe a specific area of the job in detail and ask applicants to describe their knowledge, skills and abilities, training and/or experience as it relates to the specific area.

(f) Training and experience evaluations: examine an applicant's education, training and/or experience as they relate to the job.

(g) Written tests: paper-and-pencil exams that evaluate job-related qualifications and may include, but are not limited to, true or false, multiple choice, fill-in-the-blank or essay items.

(h) Work samples: products that result from an applicant's efforts and are representative of the applicant's level of competence in a specific area(s). A work sample may be requested at the time of application or may be requested later in the process. Examples include a budget or a work plan that was prepared by the applicant, a legal brief or computer program written by the applicant or a thesis or educational paper written by the applicant. A written work sample may be used to

evaluate an applicant's written communication skills, when appropriate.

(12) "Suggested response" means the written criteria used to evaluate an applicant's response to a job-related question or situation asked in a selection procedure.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3708 EXTERNAL RECRUITMENT (1) External recruitment must be used if a selection is not made through internal recruitment, a training assignment or pursuant to new Rule I. The vacancy announcement ~~will~~ must be sent to the job service for each permanent and seasonal position ~~which~~ that is opened to external recruitment.

(2) Vacancy announcements for temporary positions, as defined in 2-18-101, MCA, may be sent to the job service at the ~~agency's~~ department's discretion.

(3) When ~~an agency~~ department fills a permanent position on a temporary basis, vacancy announcements may be sent to the job service at the ~~agency's~~ department's discretion.

(4) Remains the same.

(5) Vacancy announcements may be distributed to other recruitment sources, such as newspapers, Indian community colleges, placement organizations for women and/or persons with disabilities, in addition to the job service in a manner consistent with ~~agency~~ department policy.

(6) ~~An agency~~ department may ~~restrict~~ limit external recruitment advertising, including posting at the job service, to a geographic area; however, all properly completed applications received by the closing date must be considered, regardless of whether the applicant resides within that geographic area.

(7) A department shall post all ~~E~~external vacancy announcements ~~will be posted~~ with job service for ~~a period of time consistent with agency policy and for a period of no less than~~ at least 5 working days. ~~When determining the closing date of a job vacancy announcement, the agency shall:~~

~~(a) add 2 calendar days for transmittal of the job vacancy announcement when recruiting through the local job service and;~~

~~(b) add 4 calendar days for transmittal of the job vacancy announcement when recruiting beyond the local area.~~

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3709 EXTERNAL VACANCY ANNOUNCEMENTS (1) It is recommended that ~~A~~all external vacancy announcements ~~will be printed on the form~~ contain information prescribed by the state's guidelines for preparing a vacancy announcement (available from the state personnel division, department of administration) ~~and will contain at least the following minimum information~~. Additional information may be included at the ~~agency's~~ department's discretion.

~~(a) Job title. The working title should be used in addition to the classification title when it is more descriptive.~~

~~(b) Location of the job. Specify the geographic location as well as the department work unit.~~

~~(c) Position number(s).~~

~~(d) A description of the essential duties obtained from a current job analysis.~~

~~(e) A description of the qualifications required to perform the essential duties of the job obtained from a current job analysis.~~

~~(f) Requirements such as licenses, shift work, travel, unusual working conditions, etc.~~

~~(g) Entrance salary and grade level as provided in the pay plan rules, policy 3-0505 (copies available from the department of administration, state personnel division).~~

~~(h) Closing date. The closing date shall be that date by which application materials must be received at any job service office participating in recruitment or at the agency for those agencies which accept materials directly from applicants, as well as from job service.~~

~~(i) The place(s) designated for receipt of applications.~~

~~(j) A list of all required application materials and forms.~~

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3712 INTERNAL RECRUITMENT (1) ~~An agency~~ department may use internal recruitment. During internal recruitment, job registry and external applications ~~will~~ may not be accepted.

(2) Internal vacancy announcements ~~shall~~ must be posted according to ~~agency~~ department policy. It is recommended that internal vacancy announcements contain information similar to that required in ARM 2.21.3709 for external recruitment.

(Auth. 2-18-102, MCA; Imp. 2-18-102, 2-18-1201 et seq., MCA)

2.21.3713 REDUCTION IN FORCE REGISTRY OPTION (1) Operation of the reduction in force registry described in this rule is suspended from April 22, 1993 through June 30, 1995, and is replaced by the job registry program provided in the State Employee Protection Act, 2-18-1201 et seq., MCA, during that period.

(2) The department of administration ~~will~~ shall establish a voluntary registry of names and state applications of employees slated for layoff, as provided in ARM 2.21.5009, which also is suspended from April 22, 1993 through June 30, 1995. Records of laid off employees who elected to participate in the reduction in force registry program created in ARM 2.21.5009 have been transferred to the department of labor and industry, Helena job service. Departments may search this registry for applicants before any other solicitation for applications takes place.

(2) - (4) Renumbered (3) through (5) and remain the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, 2-18-1201 et seq., MCA)

2.21.3715 ~~NON-DISCRIMINATION~~ EQUAL EMPLOYMENT OPPORTUNITIES (1) As provided in 49-3-201, MCA, each ~~agency~~ department shall promulgate written directives to provide equal employment opportunity in recruitment and selection.

(2) As provided in 49-2-201, MCA, ~~E~~each ~~agency~~ department shall maintain records ~~or other information which will disclose the impact its recruitment, tests, or other selection procedures have upon employment opportunities of persons by race/ethnic group, sex and age.~~ on age, sex, and race that are required to administer the civil rights laws and regulations. These are confidential and available only to federal and state personnel legally charged with administering civil rights laws and regulations. However, statistical information compiled from records on age, sex, and race must be made available to the general public. Records ~~shall~~ must be maintained for a period of time consistent with the employee record keeping policy, ARM 2.21.6605 et seq. (also found at policy 3-0110, Montana operations manual, volume III).

(3) In accordance with the Americans with Disabilities Act of 1990, a department is required to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified individual unless to do so would impose an undue hardship. A reasonable accommodation may be required at any step of the recruitment and selection process such as when submitting an application, interviewing, testing, etc.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3719 ~~DESIGN OF SELECTION PROCEDURES~~ DEVELOPMENT OF SELECTION PROCEDURES (1) ~~An agency~~ department may use any selection procedure or combination of procedures ~~which~~ that ~~meets its needs so long as any procedure used~~ is based on information obtained from the job analysis. It is recommended that departments use the state's "guidelines for developing a selection plan" and "guidelines for developing specific selection procedures" (available from state personnel, department of administration).

(2) Selection procedures ~~shall~~ must be developed by persons familiar with the position (job experts).

(3) Remains the same.

(4) Selection procedures ~~shall~~ must have written criteria against which applicant performance can be evaluated (suggested responses and a rating scale).

(5) Remains the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3721 EVALUATION OF QUALIFICATIONS (1) Persons involved in ~~rating~~ evaluating applicants' qualifications ~~shall~~ must be ~~individuals who are knowledgeable about the position being filled or other individuals who have been provided with specific selection criteria based on a job analysis prepared by individuals who are knowledgeable about the position being filled~~ job experts. ~~Examples may include, the incumbent, the incumbent's supervisors, persons in the same class who have similar or identical duties, and the personnel officer.~~

(2) ~~Whenever an agency requests the job service to screen applicants, the agency must provide the job service information to make the judgments required.~~ Job experts shall use job-related questions, suggested responses and rating scales to evaluate applicants' qualifications.

(3) Remains the same.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3724 NOTIFICATION OF APPLICANTS (1) As provided in ARM 2.21.1428 and 2.21.3617, an applicant claiming an employment preference ~~shall~~ must be given a written notice of the hiring decision. The ~~agency~~ department shall maintain a record of which applicants were notified and the date the notification was sent in accordance with ARM 2.21.1428 and 2.21.3617.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3726 DOCUMENTATION (1) The following materials ~~shall~~ must be included ~~among~~ in the documentation for each selection:

(a) Remains the same.

(b) a copy of the vacancy ~~or posting~~ announcement;

(c) Remains the same.

(d) all applications, ~~application~~ supplement ~~questionnaires~~ question responses, and any other application materials received;

(e) a copy of all selection procedures and any criteria used to evaluate performance (suggested responses and rating scale);

(f) - (i) Remain the same.

(2) It is recommended that ~~T~~the items mentioned in (1)(a)-(i) above be maintained for 3 years in the department offices in case of litigation. The materials must be retained for at least 2 years after last use.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3727 ACCESS TO SELECTION MATERIAL (1) The amount of detail ~~which an agency~~ a department chooses to release regarding rating questions and criteria ~~will~~ depends on ~~agency~~ department policy, anticipated need to reuse the materials, and resources available to develop new materials.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.3728 CONFIDENTIALITY (1) Remains the same.

(2) ~~An agency~~ department ~~shall~~ may not release personal information relating to any applicant to any person not involved in administering the hiring process. Materials relating to selection decisions may be released by the ~~agency~~ department or other parties upon the receipt of a properly executed administrative or judicial order.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

3. The proposed new rule provides as follows:

RULE I JOB REGISTRY PROGRAM (1) This rule implements the recruitment and selection components of the State Employee Protection Act, 2-18-1201 et seq., MCA.

(2) For purposes of administering this rule, the following definitions apply:

(a) "Employee" means, as provided in 2-18-1202, MCA, "a person employed by the state who has achieved permanent status, as defined in 2-18-101, or employed by the senate or house of representatives during the 53rd legislature for a period of at least 8 continuous weeks."

(b) "Permanent status" means, as provided in 2-18-101, MCA, "the state an employee attains after satisfactorily completing an appropriate probationary period in a permanent position."

(c) "Effective date of lay-off" means the date determined by the agency to be the end of employment for an employee, allowing for notification prior to lay-off.

(3) The department of labor and industry, Helena job service office, shall administer the job registry program provided for under the State Employee Protection Act. Agencies shall provide the department of labor and industry, Helena job service office with notice of external recruitment for all positions, permanent and temporary, except positions exempt under 2-18-103 or 2-18-104, MCA. Prior to seeking applications from the general public, all agencies shall attempt to hire employees from the job registry program. The job registry program coordinator shall maintain placement files on all registry participants. These files must be made available to personnel officers seeking to fill vacant positions.

(4) When posting positions, departments must follow this procedure:

(a) Internal to department posting - A department may post a vacant position internally to the department in compliance with department policy or a provision of a collective bargaining agreement. The department shall notify employees laid off from the department of internal vacant positions for 1 calendar year from the effective date of lay-off. If a selection is not made internally, the department shall post the vacancy externally to the job registry program.

(b) External to job registry posting - A department shall post all permanent and temporary vacant positions, except positions exempt under 2-18-103 and 2-18-104, MCA, externally to the job registry program before posting to the general public. Current employees of the department may not be considered with job registry applicants at this step. Seasonal positions are excluded if the department is re-employing an employee who was terminated at the expiration of seasonal employment.

(c) External to general public - A department may post a vacant position externally to the general public if there are no qualified participants on the job registry or the department does not hire a referred job registry participant for documented, job-related reasons.

(5) Within 3 working days of receiving notice of a vacant position, the job registry coordinator shall contact the department personnel officer with one of the following options:

(a) No qualified participants are listed on the job registry and the department is authorized to post externally to the general public.

(b) Participants who may be qualified are available on the job registry and their placement materials are being sent.

(c) Additional time, up to 7 working days, is required to review placement files for possible qualified participants.

(6) A department shall determine if the referred participants are qualified. A department may hire with or without a competitive selection process for participants who are referred from the job registry. A department may use its usual selection procedures, such as a structured interview, performance test, or reference checks for participants who are referred from the job registry. Because recruitment from the job registry program is not a solicitation for applications from the general public, veterans', handicapped persons' and Indian employment preferences do not apply.

(7) If, from a review of the placement files, a department determines that there are possible qualified participants on the job registry for a vacant position, the department shall hire one of the participants unless the selection procedures define the participant as not qualified or there is a bona fide occupational qualification that the participant does not meet.

(8) If two or more participants listed on the job registry are equally qualified for a vacant position, the department shall select the participant with the longest continuous state government service.

(9) A department is encouraged to establish a training assignment, according to state policy, whenever possible to assist in hiring employees who have been laid off.

(10) A department should notify all referred participants if a job registry participant is selected or if a department is going to recruit externally to the general public.

(11) A department is encouraged to adopt a selection review procedure to resolve complaints from job registry participants who are not selected for positions.

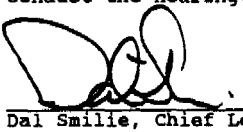
(Auth. 2-18-102, MCA; Imp. 2-18-102, 2-18-1201 et seq., MCA)

4. It is reasonably necessary to amend these rules and adopt a new rule to comply with the State Employee Protection Act, 2-18-1201 et seq., MCA, and to make rules consistent with current recruitment and selection practices in state government.

5. Interested persons may submit their data, views or arguments concerning the proposed amendments to Linda S. Davis, EEO Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 15, 1994.

6. Linda S. Davis, EEO Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building,

Helena, Montana 59620, has been designated to preside over and conduct the hearing.



Dal Smilie, Chief Legal Counsel
Rule Reviewer

Lois A. Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994

BEFORE THE DEPARTMENT OF ADMINISTRATION
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the proposed amendment of ARM 2.21.5006, 2.21.5007, 2.21.5009, 2.21.5011 and adoption of New Rules I and II relating to Reduction in Work Force | ) | NOTICE OF PUBLIC HEARING ON THE PROPOSED AMENDMENT OF ARM 2.21.5006, 2.21.5007, 2.21.5009, 2.21.5011 AND ADOPTION OF NEW RULES I AND II RELATING TO REDUCTION IN WORK FORCE |

TO: All Interested Persons.

1. On April 7, 1994, at 9:00 a.m. in Room 136, Mitchell Building, Helena, Montana, a public hearing will be held to consider the proposed amendment of ARM 2.21.5006, 2.21.5007, 2.21.5009, 2.21.5011 and adoption of NEW RULES I and II relating to reduction in work force.

The department of administration will make reasonable accommodations for persons with disabilities who wish to participate in the rule making process. To request an accommodation to participate in the public hearing, contact the State Personnel Division, Department of Administration, Attn: Ms. Constance Enzweiler, Room 130, Mitchell Building, Helena, MT. 59620; telephone (406) 444-3871; TT (406)444-1421; FAX (406)444-2812, no later than 5:00 p.m. on April 1, 1994, to advise us of the nature of the accommodation that you need. Persons with disabilities who need an alternative accessible format of this rule notice, or who require some other reasonable accommodation in order to participate in the rule making process also should contact Ms. Enzweiler.

2. The rules proposed to be amended and adopted provide as follows:

2.21.5006 DEFINITIONS (1) "Reduction in work force" means a management action taken for non-disciplinary reasons in which an employee is laid off from his~~/her~~ or her present position. The RIF may take place for reasons including, but not limited to: elimination of programs; reduction in FTE's by the legislature; lack of work; lack of funds; expiration of grants; ~~or~~ reorganization of a state agency; or privatization of a service normally or traditionally provided by an employee of a department.

~~(2) "Preference period" means a period of time beginning from the date of the notice of anticipated lay-off and continuing for a period of one calendar year from the effective date of lay-off.~~

~~(3)~~ (2) "Effective date of lay-off" means the date determined by the agency to be the end of employment for an employee, allowing adequate time for ~~10 working days advance~~ appropriate notice of lay-off.

~~(4)~~ (3) Renumbered and remains the same.

~~(5)~~ (4) "Notice of anticipated lay-off" means a written notice informing an employee that the agency anticipates he or she will be laid off. The notice must provide a tentative effective date of lay-off~~, and notification to other agencies that the employee is eligible for employment preference~~.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

2.21.5007 POLICY (1) - (3) Remain the same.

(4) ~~"An employee must be given written notice a minimum of 10 working days preceding the effective date of the lay-off."~~ An employee should be counseled as much in advance of the anticipated action as possible regarding available options and reasons for lay-off. An employee must be given a written notice of anticipated lay-off at the time of counseling. If the lay-off is anticipated to last longer than 15 working days, the employee must be terminated. ~~An employee becomes eligible for preference in state employment on the date he receives a written notice of anticipated lay-off or a formal notice of lay-off.~~

~~(5) A central registry of laid off employees will be established by the department of administration, as provided in ARM 2.21.5009.~~

~~(16)~~ (5) Lay-off ~~shall~~ may not be used as an alternative to discharging an employee for cause or disciplinary purposes. Unsatisfactory employees should be terminated subsequent to complete and appropriate evaluation, review and documentation. If an unsatisfactory employee is laid off without appropriate evaluation, review and documentation, the employee must be treated the same as any other laid-off employee.

(6) Agencies shall maintain a roster of employees who have been laid off from the agency and offer reinstatement on a "last-out/first-in" basis by skill match ~~and~~ within a job classification. An employee ~~shall~~ must be reinstated to the same position or a position in the same class when such a position becomes vacant in the agency from which the employee was laid off if such vacancy occurs during the employee's preference period. Specific reinstatement offers ~~shall~~ must be made to the employee in writing. The employee ~~must~~ shall accept or reject the reinstatement offer in writing within 5 working days following receipt of the offer. If a reinstatement offer is rejected by the employee, the employee loses all rights to the employment offered. An agency is no longer required to reinstate ~~or grant preference to~~ a laid-off employee who has rejected a previous reinstatement offer. ~~Such rejection ends the preference period.~~

(7) ~~Each agency must make other agencies aware of both the names of persons laid off and their job classifications within 15 working days from the effective date of lay-off. Agencies with vacancies shall give hiring preference over others of equal qualifications for a period starting the date the employee receives a notice of anticipated lay-off or the formal notice of lay-off and for one calendar year from the effective date of lay-off. The preference is provided to employees laid off from any state agency. It is the employee's responsibility to apply for vacant positions, to participate in the voluntary reduction~~

~~in force registry created in ARM 2.21.5009 and to make his eligibility for reduction-in-force preference known to the hiring agency.~~ Acceptance of a permanent, seasonal or temporary position with a state agency does not end the reinstatement rights as provided in (6) above.

~~(8) Acceptance of a permanent position with a state agency ends preference provided in (7) above; however, an employee retains reinstatement rights as provided in (6). If an employee is subsequently terminated for reasons other than lay-off as defined in this rule, the employee loses preference and reinstatement rights.~~

~~(9) All privileges and benefits extended by this rule end at the end of the preference period.~~

~~(10) If the lay-off is anticipated to last longer than 15 working days, the employee shall be terminated. Upon termination due to reduction in work force, the employee shall cash out accumulated annual leave and sick leave and may cash out retirement contributions or the agency may allow the employee to maintain accumulated annual leave and sick leave for a period of one calendar year from the effective date of lay-off, even though terminated. An employee must receive cash out for accrued leave credits at the end of the preference period or if hired by another agency, unless the hiring agency agrees to assume the liability for the accrued leave credits. (Accumulated vacation credits may be used to delay the termination date in lieu of a lump sum payment. This delay is for employee convenience only and does not alter the effective date of lay-off or extend the preference period.)~~

~~(11) Upon recall from a lay-off or upon placement of an employee during the preference period necessitated by a lay-off, the employee's salary shall be determined as if the employee had never been laid off. If recall or placement is with another agency, pay plan rule employee initiated transfer between agencies shall apply. The employee need not serve the qualifying period for use of annual leave and sick leave.~~

~~(12) An employee who is reinstated to a grade lower than the one held at lay-off should be treated as a voluntary demotion under the pay plan rules. The employee receives the same market ratio as the position from which he was laid-off at the grade assigned to the new position.~~

~~(13) Pay for an employee who is demoted as the result of a RIF, but who is not laid-off, will be administered using pay plan rule 1012, demotions.~~

~~(14) In some cases, a demotion as a result of a RIF may be considered "exceptional circumstances" for purposes of a pay plan exception.~~

~~(15) If an individual re-enters state employment after the preference period has expired, that individual's salary shall be the entry rate of the assigned grade. Further, the employee must begin anew earning time toward the qualifying period for annual leave and sick leave. A termination caused by lay-off shall not constitute a break in service for longevity purposes unless the employee has refused to accept a reinstatement offer. Only actual years of service count toward longevity.~~

~~(16) Lay-off shall not be used as an alternative to discharging an employee for cause or disciplinary purposes. Unsatisfactory employees should be terminated subsequent to complete and appropriate evaluation, review and documentation. If an unsatisfactory employee is laid off without appropriate evaluation, review and documentation, the employee must be treated the same as any other laid-off employee.~~

(17) Renumbered as (8) and remains the same.

~~(18) The lay-off policy described above will apply to permanent, full or part-time employees, and would not apply to seasonal employees whose employment is regularly interrupted by the seasonal nature of their work or to temporary employees with a specific employment period.~~

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

RULE I BENEFITS FOR EMPLOYEES LAID OFF BEFORE APRIL 22, 1993 (1) This rule applies only to employees laid off before April 22, 1993. Employees laid off on or after April 22, 1993 are subject to the provisions of RULE II.

(2) As used in this rule, the following definitions apply:

(a) "Employee" means a permanent, full or part-time classified employee, as defined in 2-18-101, MCA, and does not refer to seasonal employees whose employment is regularly interrupted by the seasonal nature of their work or to temporary employees with a specific employment period or to employees who are excepted from the classification system.

(b) "Preference period" means a period of time beginning from the date of the written notice of anticipated lay-off and continuing for a period of one calendar year from the effective date of lay-off or until rejection of a reinstatement offer, whichever first occurs.

(3) The employee must be given written notice a minimum of 10 working days preceding the effective date of the lay-off. An employee becomes eligible for preference in state employment on the date he or she receives a written notice of anticipated lay-off or a formal notice of lay-off.

(4) Upon termination due to reduction in work force, the employee shall cash out accumulated annual leave and sick leave and may cash out retirement contributions or the agency may allow the employee to maintain accumulated annual leave and sick leave for a period of one calendar year from the effective date of lay-off, even though terminated. An employee must receive cash out for accrued leave credits at the end of the preference period or, if hired by another agency, unless the hiring agency agrees to assume the liability for the accrued leave credits. (Accumulated vacation credits may be used to delay the termination date in lieu of a lump sum payment. This delay is for employee convenience only and does not alter the effective date of lay-off or extend the preference period.)

(5) Each agency shall make other agencies aware of both the names of persons laid off and their job classifications within 15 working days from the effective date of lay-off. Agencies with vacancies shall give hiring preference over others of equal qualifications for a period starting the date the

employee receives a notice of anticipated lay-off or the formal notice of lay-off and for one calendar year from the effective date of lay-off. The preference is provided to employees laid off from any state agency. It is the employee's responsibility to apply for vacant positions, to participate in the voluntary reduction in force registry created in ARM 2.21.5009 and to make his or her eligibility for reduction-in-force preference known to the hiring agency.

(6) Acceptance of a permanent position with a state agency ends preference provided in (5) above; however, an employee retains reinstatement rights as provided in ARM 2.21.5007. If an employee is subsequently terminated for reasons other than reduction-in-force, the employee loses preference and reinstatement rights.

(7) Upon reinstatement or rehire of an employee during the preference period, the employee's salary must be determined as if the employee had never been laid off. If hiring is with another agency, pay plan rule 1807, employee initiated transfer, applies. The employee need not serve the qualifying period for use of annual leave and sick leave.

(8) An individual who is hired in a position at a grade lower than the one held at lay-off should be treated as a voluntary demotion under pay plan rule 1812, demotions.

(9) Pay for an employee who is demoted as the result of a RIF, but who is not laid off, must also be administered using pay plan rule 1812, demotions.

(10) In some cases, a demotion as a result of a RIF may be considered "exceptional circumstances" for purposes of a pay plan exception, as provided in pay plan rule 1828, individual pay plan exceptions - department of administration authorized.

(11) If an individual re-enters state employment after the preference period has expired, that individual must be treated as a new hire for the purposes of establishing pay. Further, the employee shall begin anew earning time toward the qualifying period for annual leave and sick leave. A termination caused by lay-off does not constitute a break in service for longevity purposes unless the employee has refused to accept a reinstatement offer. Only actual years of service count toward longevity. All years of continuous employment up to the effective date of lay-off must be restored to the employee for purposes of calculating years of service which qualify the employee for longevity pay. The period following termination due to lay-off is excluded and the employee resumes earning time toward longevity when reemployed at any time in the future.

(12) Operation of the reduction in force registry program described in (12) through (18) is suspended from April 22, 1993 through June 30, 1995 and is replaced by the job registry program provided for in the State Employee Protection Act, 2-18-1201 et seq., MCA. The department of administration shall establish a central RIF registry to collect the names and state applications of employees who have received notice of lay-off. As provided in ARM 2.21.5009, RIF registry maintenance and functions have been transferred to the department of labor and industry for the period of April 22, 1993 to June 30, 1995.

Placement on the RIF registry does not represent any promise of employment.

(13) Submission of an application by an employee is voluntary.

(14) The department of labor and industry shall hold applications, sorted by job classification, for review by departments. The department shall search, sort, screen, and refer applicants for vacancies. If no applicant from the job registry is selected, an agency may consider referrals from the RIF registry before soliciting applications from the general public.

(15) Qualified applicants may be hired without a competitive process or a competitive selection process may be used.

(16) Veteran's employment preference and handicapped person's employment preference must be applied when appropriate.

(17) Placement in a permanent position ends participation on the RIF registry. The Helena job service, department of labor and industry, should be notified if an applicant is placed.

(18) The end of the preference period also ends participation on the registry.

(19) Any privilege or benefit extended by this rule ends one year from the effective date of lay-off.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

RULE II BENEFITS FOR EMPLOYEES LAID OFF BETWEEN APRIL 22, 1993 AND JUNE 30, 1995 (1) This rule applies only to employees laid off between April 22, 1993 and June 30, 1995, inclusive.

(2) As used in the following subsections:

(a) "Agency" means, as provided in 2-18-1202, MCA, a department, board, commission, office, bureau, institution, or unit of state government recognized in the state budget, but does not include the Montana university system.

(b) "Employee" means, as provided in 2-18-1202, MCA, "a person employed by the state who has achieved permanent status, as defined in 2-18-101, MCA, or employed by the senate or house of representatives during the 53rd legislature for a period of at least 8 continuous weeks." The term does not include an employee in a temporary position, an employee temporarily filling a permanent position who has not attained permanent status or an employee who has not successfully completed a probationary period and attained permanent status.

(3) As provided in 2-18-1206, MCA, written notice must be provided to an employee and the employee's collective bargaining agent, if any, at least 60 days prior to a reduction in force when 25 or more employees are affected by the RIF and 14 days notice when fewer than 25 employees are affected. The notice must provide a tentative effective date of lay-off.

(4) An employee may choose the following option in lieu of the benefits outlined in (5) - (15) below:

(a) If a laid-off employee terminates on or after May 17, 1993 and elects to receive termination benefits, as provided in

2-18-622, MCA, which is a lump sum payment of one week of severance pay for each year of employment with the state, not to exceed a total of 2 weeks of severance pay, that laid off employee is entitled to take part in any job retraining and career development programs provided by the state through the Job Training Partnership Act service delivery areas dislocated worker programs. Participation must begin within one year after termination. This benefit may also be extended to seasonal employees.

(5) As provided in 2-18-1201 et seq., MCA, an employee who is terminated due to reduction in force within an agency and who has not chosen the option described in (4) above is entitled to:

(a) notice of announcements for jobs for which the employee may qualify that arise within the terminating agency or within state government. Notices must be provided by the state for a period of one year from the date of separation. Each state agency shall provide a copy of all external vacancy announcements to the department of labor and industry, Helena job service office, which shall compile and distribute the notice to laid off employees on a weekly basis;

(b) access to any job retraining and career development programs provided by the state through the Job Training Partnership Act service delivery areas dislocated worker programs, provided that the employee begins participating in a program within one year after the elimination of the employee's position;

(c) inclusion in a special job register from which all agencies, except an agency attempting to hire for a position exempt under 2-18-103 or 2-18-104, shall attempt to hire employees prior to seeking applications from the general public. The employee must be listed in the job register according to the occupational categories in which the employee is qualified for employment. Participation in the job registry program is voluntary. The department of labor and industry shall administer the job registry program provided for in 2-18-1203, MCA, until June 30, 1995;

(d) retain all accrued sick leave credits;

(e) retain, cash out or use accrued vacation leave credits to extend the employee's effective date of lay-off. RIFed employees may choose to "bank" their credits with the agency that laid them off until they accept a permanent position in a state agency. The credits may not be transferred if an employee accepts a temporary position in a state agency;

(f) excluding employees of the senate or house of representatives, remain covered by the state's group health insurance plan and to the continuation of the employer's contribution to the employee's group health insurance for 6 months from the effective date of layoff or until the employee becomes employed in a position which is comparable in salary and which offers comparable benefits, whichever occurs first;

(g) relocation expenses as provided in state policy. An agency should consult with the Job Training Partnership Act service delivery areas dislocated worker programs prior to approving relocation expenses.

(6) As provided in 2-18-1204, MCA, an employee "who is subsequently transferred to a different position in a state agency is entitled to the same hourly salary as previously received if the new position is at the same grade level as the one previously held." The employee need not serve the qualifying period for use of annual leave and sick leave.

(7) The pay for an employee laid off from the legislative branch who accepts a classified position must be determined using pay plan rule 1818, change from exempt to classified position.

(8) An employee who is hired in a position at a grade lower than the one held at lay-off should be treated as a voluntary demotion under pay plan rule 1812, demotions. Pay for an employee who is demoted as the result of a RIF, but who is not laid off, must also be administered using pay plan rule 1812, demotions.

(9) In some cases, a demotion as a result of a RIF may be considered "exceptional circumstances" for purposes of a pay plan exception, as provided in pay plan rule 1828, individual pay plan exceptions - department of administration authorized.

(10) As provided in 2-18-1203, MCA, the department of labor and industry shall establish a central job register from which all agencies, except an agency attempting to hire for a position exempt under 2-18-103 or 2-18-104, shall attempt to hire employees prior to seeking applications from the general public. The employee must be listed in the job register according to the occupational categories in which the employee is qualifed for employment. Under the job registry program:

(a) an agency attempting to hire from the job register shall consider the employee's qualifications and length of state service. If 2 or more employees listed in the job register are equally qualified for a vacant position, the agency shall select the employee with the longest continuous state service.

(b) If there is not an employee listed on the job register who meets the job qualification for the vacant position, the agency may hire a qualified external applicant or establish a training assignment, according to state policy.

(c) An employee may remain on the job register through June 30, 1995 or until employment at a grade equal to the position from which the employee was laid off is secured, whichever occurs first. Acceptance of a permanent position at a lower grade or acceptance of a seasonal or a temporary position does not end an employee's right to continue participation in the job registry program.

(11) An employee who elects not to participate in the job registry program and who subsequently applies as an external applicant for a vacant position is not entitled to any additional consideration or preference.

(12) If an individual who was laid off on or after April 22, 1993 and re-enters state employment on or after July 1, 1995 that individual must be treated as a new hire for the purposes of establishing pay. Further, the employee shall begin anew earning time toward the qualifying period for annual leave and sick leave. A termination caused by lay-off does not constitute

a break in service for longevity purposes unless the employee has refused to accept a reinstatement offer. Only actual years of service count toward longevity.

(Auth. 2-18-102, MCA; Imp. 2-18-1201-1206, MCA)

2.21.5009 REDUCTION-IN-FORCE REGISTRY (1) Operation of the reduction-in-force registry described in this rule is suspended from April 22, 1993 through June 30, 1995, and is replaced by the job registry program provided in the State Employee Protection Act, 2-18-1201 et seq., MCA, during that period. The department of administration ~~will~~ shall establish a central registry to collect the names and state applications of employees who have received notice of lay-off. The maintenance and functions of the registry must be transferred to the department of labor and industry between April 22, 1993 and June 30, 1995. Placement on the registry does not represent any promise of employment.

(2) ~~Submission of an application by an employee is voluntary.~~ Participation in the job registry is voluntary on the part of the employee.

(3) The job registry coordinator shall maintain placement files on all registry participants. These files must be made available to hiring officials seeking to fill vacant positions. It is the responsibility of the employee who has been laid off to insure that his or her placement file is accurate and information is up-to-date.

~~(3) Agency personnel officers or other state hiring officials may search the registry for applicants for a vacant position before any other solicitation for applications takes place.~~

~~(4) Qualified applicants may be hired without a competitive process or a competitive selection process may be used.~~

~~(5)~~ (4) Veteran's employment preference, ~~and~~ handicapped person's employment preference, and Indian employment preference must be applied, when appropriate.

~~(6) The department of administration will hold applications, sorted by job classification, for review by departments. The department will not search, sort, screen, or refer applicants to other departments.~~

~~(7) Placement in a position ends participation on the registry. The department of administration should be notified if an applicant is placed.~~

~~(8) The end of the preference period also ends participation on the registry.~~

(Auth. 2-18-102, MCA; Imp. 2-18-1203, MCA)

2.21.5011 CLOSING (1) This policy ~~should~~ must be followed unless it conflicts with negotiated labor contracts which ~~shall~~ take precedence to the extent applicable.

(Auth. 2-18-102, MCA; Imp. 2-18-102, MCA)

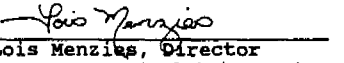
3. It is reasonably necessary to amend these rules because the 1993 Legislature in H.B. 522 passed the State

Employees' Protection Act, 2-18-1201 et seq., MCA, which provides for additional benefits and entitlements for employees laid off after April 22, 1993, while employees laid off before April 22, 1993 are entitled to a different set of benefits.

4. Interested persons may submit their data, views or arguments concerning the proposed amendments to Linda S. Davis, EEO Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620 no later than April 15, 1994.

5. Linda S. Davis, EEO Coordinator, State Personnel Division, Department of Administration, Room 130 Mitchell Building, Helena, Montana 59620, has been designated to preside over and conduct the hearing.

Dal Smilie, Chief Legal Counsel
Rule Reviewer



Lois Menzies, Director
Department of Administration

Certified to the Secretary of State March 7, 1994

BEFORE THE PUBLIC EMPLOYEES' RETIREMENT BOARD
OF THE STATE OF MONTANA

In the matter of the adoption of proposed rules relating to mailing membership information about non-profit organizations ) NOTICE OF PUBLIC HEARING

TO: All Interested Persons.

1. On April 18, 1994 at 9:00 a.m. in the Board Meeting Room of the Public Employees' Retirement Division, 1712 Ninth Avenue, Helena, Montana, a public hearing will be held to consider the adoption of the following proposed rules pertaining to mailing membership information about non-profit organizations.

2. The rules as proposed provide as follows:

RULE I MAILING INFORMATION ABOUT NON-PROFIT ORGANIZATIONS

(1) Except as provided in [Rule III]no more than once in any 12-month period the division will mail information to retirees of one or more retirement systems or members who have requested estimates of their retirement benefits about an eligible non-profit organization which meets all the requirements contained in [Rule I] and [Rule II].

(2) A non-profit organization must have a current tax exempt status granted under section 501(c)(3) of the Internal Revenue Code and possess a non-profit organization mailing permit from the U.S. Postal Service.

(3) A non-profit organization must submit a completed application to the division at least one month prior to a proposed bulk mailing or prior to initiation of a program of inserting membership recruitment information for mailing along with the division's retirement estimates. All applications must consist of:

(a) a current application form provided by the division which has been completed and signed by an officer of the requesting organization;

(b) a copy of the IRS exemption letter provided to non-profit organizations receiving exemption under section 501(c)(3) of the tax code;

(c) a certified copy of the articles of incorporation and current bylaws of the organization;

(d) a copy of the secretary of state's certification of the organization's current incorporation as a non-profit entity;

(e) a copy of the organization's current U.S. postal mailing permit for non-profit organizations; and

(f) an exact copy of the proposed mailing.

(4) Upon division approval of the application, the organization will receive a billing for the estimated costs of completing the mailing and, for bulk mailings, a proposed completion date. Payment of the estimated charges must be made in full at least 10 working days prior to initiation of the mailing.

(5) Upon completion of the mailing, or at least monthly for

insertion mailings, the organization will be billed for any additional costs incurred by the division to accomplish this service. All such charges must be paid in full within 30 days of billing. Thereafter, interest will be assessed at the maximum rate allowed by law from the date of billing.

(6) This rule will be effective between May 13, 1994 and July 1, 1995.

AUTH: Sec. 19-2-403, MCA; IMP: Sec. 2-6-109, MCA

RULE II DOCUMENTS ACCEPTABLE FOR MAILING -- NON-PROFIT ORGANIZATIONS (1) The division will approve materials for mailing which conform to the following criteria.

(a) Each piece must be exactly the same as every other piece to be mailed.

(b) Each piece must include an application for membership in the non-profit organization and may include general information about the organization's non-profit activities. No piece may urge or recommend specific actions not within the non-profit nature and scope of the organization (e.g., a non-profit organization may not urge an activity such as voting for a particular individual or joining another organization or affiliated organization).

(c) The following disclaimer must be printed on each piece to be mailed, in print no smaller than the largest print otherwise contained in the text of the piece: "The State of Montana and the Public Employees' Retirement Board make no express or implied endorsement of [name of organization] and make no representation as to the content of the information herein."

(2) Each piece approved for insertion with mailings of retirement estimates also must be no more than one single page, 8 1/2 inches by 17 inches (or smaller), folded to fit within a regular business envelope (and not stapled or sealed in any manner).

(3) Each piece approved for bulk mailings also must be no more than a single page, folded (but not stapled or sealed in any manner) in an acceptable manner for bulk mailings by the U.S. postal service. Each piece must be preprinted with the non-profit organization's non-profit mailing permit.

(4) This rule will be effective between May 13, 1994 and July 1, 1995.

AUTH: Sec. 19-2-403, MCA; IMP: Sec. 2-6-109, MCA

RULE III BENEFIT RECIPIENTS' RIGHTS TO BE EXCLUDED FROM MAILINGS OF INFORMATIONAL MATERIALS ABOUT NON-PROFIT ORGANIZATIONS (1) Members and other persons receiving benefits from the retirement systems may be excluded from receiving any mailings about non-profit organizations on written request to the retirement division.

(2) Requests for exclusion will become effective no later than 30 days after the division's receipt of the signed request.

AUTH: Sec. 19-2-403, MCA; IMP: Sec. 2-6-109, MCA

3. The rules are proposed in order to provide guidance to organizations which desire to have membership materials mailed to retired or soon to retire members of the retirement systems administered by this board and a means for members to be excluded from such mailings.

In the past, the board has received requests for mailing lists of retirees from retiree organizations. For reasons of personal privacy such lists can not be compiled and provided. Since some retirees have indicated they would like to receive such materials, the rules are proposed to allow the division to mail organizational materials under the provisions of 2-6-109, MCA. The rules are further proposed in order to inform organizations of the parameters of such mailings. The proposed rules provide for payment of all costs associated with such mailings to be borne by individual organizations with no subsidy on the part of the retirement systems or the state.

Additionally, the rules are proposed to sunset at the end of the current biennium so that the board may assess the continued practicality of such rules.

4. The authority for the proposed rules is found in 19-2-403, MCA and the proposed rules will implement 2-6-109, MCA.

5. Interested persons may present their data, views, or arguments, either orally or in writing, at the hearing. Written data, views or arguments may also be submitted no later than April 19, 1994 to:

Linda King, Administrator
Public Employees' Retirement Division
1712 Ninth Avenue
Helena, Montana 59620

6. Keith McCallum, Administrative Specialist, Public Employees' Retirement Division, Department of Administration, has been designated to preside over and conduct the hearing.

By: Linda King
Linda King, Administrator
Public Employees' Retirement Division

Dal Smilie, Chief Legal Counsel
Rule Reviewer

Certified to the Secretary of State on February 28, 1994.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of new rules regarding small employer health benefit plans | ) ) ) | NOTICE OF PUBLIC HEARING |

TO: All Interested Persons.

1. On April 22, 1994, at 8:30 o'clock a.m., MST, a public hearing will be held in the Conference Room 102A of the Commissioner of Higher Education Building, 2500 Broadway Street, Helena, Montana. The hearing will be to consider the proposed adoption of new rules regarding basic and standard health benefit plans under the Small Employer Health Insurance Availability Act.

2. The proposed new rules provide as follows:

RULE I DEFINITIONS For the purposes of this sub-chapter, the following terms have the following definitions:

(1) "Act" means the Montana Small Employer Health Insurance Availability Act.

(2) "Adjusted gross income" means gross income minus deductions recognized by the Internal Revenue Code.

(3) "Associate member of an employee organization" means any individual who participates in an employee benefit plan, as defined in 29 U.S.C. 1002(1), that is a multiemployer plan, as defined in 29 U.S.C. 1002(37A), other than the following:

(a) An individual (or the beneficiary of such individual) who is employed by a participating employer within a bargaining unit covered by at least one of the collective bargaining agreements under or pursuant to which the employee benefit plan is established or maintained; or

(b) An individual who is a present or former employee (or a beneficiary of such employee) of the sponsoring employee organization, of an employer who is or was a party to at least one of the collective bargaining agreements under or pursuant to which the employee benefit plan is established or maintained, or of the employee benefit plan, or of a related plan.

(4) "Case management" means the process of planning and coordinating care and services to meet the individual needs of a client. Case management includes assessment, care coordination and referral, case planning, and monitoring.

(5) "Coinsurance" means the percentage of eligible charges which the insurer must pay, after the deductible is met and up to the maximum annual out-of-pocket.

(6) "Copayment" means the dollar amount of eligible charges which the insured must pay.

(7) "Deductible" means the amount of eligible charges which the insured must pay in an annual benefit period before any benefits are payable.

(8) "Eligible Dependent" means any dependent defined in 33-22-1803, MCA, and the eligible employee's lawful spouse, including declared common law spouse, and unmarried children who are under the age of 19 or full time students under the age of 23. Dependent children include natural or legally adopted children of the eligible employee or the employee's spouse or any other child who qualifies as a dependent under the Internal Revenue Code, and each newborn infant of any insured, as contemplated by 33-22-301 and 33-22-504, MCA.

(9) "High risk pregnancy" means a pregnancy, the outcome of which is considered to be at high risk as determined by the case manager, based upon the following factors:

(a) Age 19 or younger and 35 or older;

(b) Medical factors which indicate the potential for a poor pregnancy outcome;

(c) Physical disability or mental impairment;

(d) Abuse of alcohol or drugs by the patient and/or someone in the person's immediate environment; and

(e) Psychosocial factors, including emotional and social needs.

(10) "Lifetime maximum benefit" means maximum benefits paid by insurer excluding amounts for deductible, coinsurance, and copayment.

(11) "Maximum annual out-of-pocket" means total amount of eligible charges paid by the insured through the deductible, the insured's share of the coinsurance, or copayment.

(12) "New entrant" means an eligible employee, or the dependent of an eligible employee, who becomes part of an employer group after the initial period for enrollment in a health benefit plan.

(13) "Risk characteristic" means the health status, claims experience, duration of coverage, or any similar characteristic related to the health status or experience of a small employer group or of any member of a small employer group.

(14) "Risk load" means the percentage above the applicable base premium rate that is charged by a small employer carrier to a small employer to reflect the risk characteristics of the small employer group.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1803, and 33-22-1812, MCA

RULE II APPLICABILITY, SCOPE, AND TRANSITION (1) Except as provided in (2) and NEW RULE XV, these rules apply to any health benefit plan, whether provided on a group or individual basis, which:

(a) Meets one or more of the conditions set forth in 33-22-1804, MCA; and

(b) Provides coverage to one or more employees of a small employer located in this state, without regard to whether the policy or certificate was issued in this state.

(2) Except as set forth in (3), the provisions of these rules do not apply to an individual health insurance policy delivered or issued for delivery prior to the effective date of these rules.

(3) A carrier that provides individual health insurance policies to one or more of the employees of a small employer must be considered a small employer carrier and must be subject to the provisions of these rules with respect to such policies if the small employer contributes directly or indirectly to the premiums for the policies and the carrier is aware or should have been aware of such contribution. For the purpose of this rule, payroll deductions, list billed premium payments, and employer contributions to premiums paid through cafeteria plans, as defined in section 125 of the Internal Revenue Code, must be regarded as employer contributions.

(a) Any carrier that has a list billed premium payment arrangement with a small employer after January 1, 1994, shall either renew coverage or withdraw from the market, in accordance with the procedures in 33-22-1810, MCA. If a carrier chooses to renew coverage, then that carrier must be treated as a small employer carrier and shall thereafter comply with all provisions of the act and these rules.

(4) In the case of a carrier that provides individual health insurance policies to one or more employees of a small employer, the small employer must be considered to be an eligible small employer, and the small employer carrier must be subject to 33-22-1811, MCA, relating to availability of coverage, if:

(a) The small employer has from 3 to 25 employees who work 30 hours or more a week;

(b) The small employer contributes directly or indirectly to the premiums charged by the carrier; and

(c) The carrier is aware or should have been aware of the contribution by the employer.

(5) These rules apply to all health benefit plans provided to small employers or to the employees of small employers, without regard to whether the health benefit plans are offered under, or provided through, a group policy or trust arrangement of any size sponsored by an association or employer contributions to premiums paid through cafeteria plans, as defined in section 125 of the Internal Revenue Code, unless excepted by 33-22-1803(25), MCA.

(6) An individual health insurance policy is not subject to the provisions of these rules solely because the policyholder elects a deduction under section 162(l) of the Internal Revenue Code, entitled "special rules for health insurance costs of self-employed individuals."

(7) If the small employer is issued a health benefit plan under the terms of the act, these rules must continue to apply to the health benefit plan in the case that the small employer subsequently employs more than 25 eligible employees.

(8) A carrier providing coverage to such an employer shall, within 60 days of becoming aware that the employer has more than 25 eligible employees, but no later than the anniversary date of the employer's health benefit plan, notify the employer that the protections provided under the act and these rules must cease to apply to the employer if such employer fails to renew its current health benefit plan or elects to enroll in a different health benefit plan.

(9) If a health benefit plan is issued to an employer that is not a small employer as defined in the act, but subsequently the employer becomes a small employer, these rules must not apply to the existing health benefit plan. The carrier providing a health benefit plan to such an employer must not become a small employer carrier under these rules solely because the carrier continues to provide coverage under the existing health benefit plan to the employer.

(10) A carrier providing coverage to an employer described in (8) shall, within 60 days of becoming aware that the employer has 3 to 25 eligible employees, notify the employer of the options and protections available to the employer under the act, including the employer's option to purchase a small employer health benefit plan from any small employer carrier.

(11) If a small employer has employees in more than one state, these rules must apply to any health benefit plan issued to the small employer if:

(a) The majority of eligible employees of such small employer are employed in this state; or

(b) If no state contains a majority of the eligible employees of the small employer, the primary business location of the small employer is in this state.

(c) In determining whether the laws of this state or another state apply to a health benefit plan issued to a small employer described in (10), the provisions of (10) apply as of the date the health benefit plan was issued to the small employer for the period that the health benefit plan remains in effect.

(d) If a health benefit plan is subject to these rules, these rules must apply to all individuals covered under the health benefit plan, whether they reside in this state or in another state.

(12) A carrier that is not operating as a small employer carrier in this state is not subject to the provisions of these rules solely because a small employer that was issued a health benefit plan in another state by that carrier moves to this state, until coverage is renewed, extended or modified. However, such a carrier shall, within 60 days of becoming aware that the employer has moved to this state, notify the employer of the options and protections available to the employer under the act, including the employer's option to

purchase a small employer health benefit plan from any small employer carrier authorized to do business in this state.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1808, and 33-22-1812, MCA

RULE III COVERED SERVICES OF POLICIES UNDER STANDARD PLAN (1) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide the following coverage for medically necessary services, subject to the deductible, coinsurance, copayment, maximum out-of-pocket, and lifetime maximum benefit levels, unless specifically exempted herein:

(a) Coverage of inpatient hospital services, including but not limited to, semi-private room and board, intensive care services, and all other related hospital services.

(b) Coverage of outpatient hospital services.

(c) Coverage for hospital emergency room, services, subject to a $75 copayment, if the insured is not admitted to the hospital. This copayment must not be applied toward the deductible or coinsurance limit.

(d) Coverage for obstetrical care, including services of physicians, certified nurse midwives and other nurse specialists, costs of delivery room, and other medically necessary services directly associated with the delivery.

(e) Coverage for services of physicians and other health care professionals, subject to the freedom of choice protections of 33-22-111, MCA.

(i) Services of nutritionists, speech pathologists, audiologists, occupational therapists, and physical therapists, within limitations of other provisions of this plan, must be covered, if referred by a licensed medical doctor (MD), doctor of osteopathy (DO), or other provider if within the scope of practice as determined by the provider's licensing board and practice act.

(f) Coverage for medical nutrition services deemed medically necessary, including nutrition assessment and counseling. The following disease conditions must be reimbursed for nutrition consultations at a total cost of no more than $240 per benefit period:

(i) diabetes mellitus;
(ii) renal disease;
(iii) high risk pregnancies;
(iv) malnutrition;
(v) high risk pediatrics;
(vi) cardiovascular disease;
(vii) cancer;
(viii) gastrointestinal disease; and
(ix) eating disorders.

(g) Coverage for home health care under a plan written by an MD, DO, or other provider if within the scope of practice as determined by the provider's licensing board and

practice act, when there is a cost savings compared to alternative services, as evidenced by an agreement between the referring practitioner, patient, and insurer, that home health care is desirable and cost-effective.

(h) Coverage for chiropractic services not exceeding 24 treatments a year, unless an additional 11 visits are approved by the insurer, provided that the maximum covered charge must not exceed $25 per treatment.

(i) Coverage for the following mental health services:

(i) Coverage for outpatient mental health services may be limited to no less than $1,000 a year, including expenses for outpatient substance abuse treatment.

(ii) Coverage for inpatient services may be limited to no less than 30 days for treatment of mental illness.

(j) Coverage for the following substance abuse treatment:

(i) The maximum benefit for inpatient substance abuse services may be limited to no less than $4,000 in any 24-month period and $8,000 in lifetime benefits.

(ii) The maximum benefit for outpatient services may be limited to $1,000 a year, including expenses for outpatient mental health care.

(iii) Only services within the American Society of Addictive Medicine criteria may be covered.

(k) Coverage of prescription drugs.

(l) Coverage for diagnostic X-ray and laboratory services.

(m) Coverage for ambulance transportation to nearest facility where necessary care is available.

(n) Coverage for rental of durable medical equipment, and coverage for purchase of such equipment in cases where purchase of the equipment would be more cost-effective.

(o) Coverage for radiation therapy and chemotherapy.

(p) Coverage for state licensed hospice services, when the insured's life expectancy is determined by an MD or DO, to be six months or less.

(q) Coverage for all usual, customary, and reasonable charges related to medical services rendered, as defined in the contract.

(r) Coverage for all statutory mandated benefits, including, but not limited to those mandated by 33-22-114, MCA, (services of physician's assistants - certified); 33-22-125, MCA (independent chiropractic examination and review); 33-22-130, MCA (treatment of adopted children); 33-22-131, MCA (phenylketonuria treatment); 33-22-303, 33-22-512, and 33-30-1014, MCA (well child treatment); 33-22-703, MCA (treatment of mental illness, alcoholism and drug abuse); 33-22-1001 and 33-22-1002, MCA (home health care); 33-22-301, 33-22-504, and 33-30-1001, MCA (newborns); 33-22-304, 33-22-506, and 33-30-1004, MCA (continuation of coverage for the handicapped); 33-22-305 through 311, MCA (the Individual Family Disability Insurance Continuation of Coverage Act); 33-22-503, MCA (regarding

continuation of benefits to dependents); 33-22-507, MCA (regarding continuing group coverage after reduction of work schedule); 33-22-508, MCA (regarding conversion on termination of eligibility); 33-22-509, MCA (regarding imposition of pre-existing conditions to a converted policy covered by a group contract); and 33-22-510, MCA (insured family-conversion entitlement).

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE IV COVERED PREVENTIVE CARE AND HEALTH MAINTENANCE SERVICES OF POLICIES UNDER STANDARD PLAN (1) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide full coverage of all costs of the following preventive care services, provided that no charges for such services may be subject to deductible or coinsurance allowances:

(a) The following low risk preventive care for low risk, asymptomatic adults:

(i) Coverage for one health examination and related counseling every 1-5 years, as determined by a licensed MD, DO, or other provider if within the scope of practice as determined by the provider's licensing board and practice act, including current health history and counseling for tobacco and substance abuse, nutrition, exercise, sexual behavior, injury prevention, and dental care.

(ii) Coverage of age-appropriate physical examinations, including, for ages 19-39, 1 exam every 5 years; for ages 40-49, 1 exam every 3 years; and for ages 50 and above, 1 exam every 1 to 2 years, as determined by an MD, DO, or other provider if within the scope of practice as determined by the provider's licensing board and practice act.

(iii) Coverage for mammography examinations contemplated by 33-22-132, MCA.

(iv) Coverage for 3 consecutive normal pap smear tests following the onset of sexual activity, and subsequent tests every 3 years until age 65.

(v) Coverage of 1 cholesterol test every 5 years beginning at age 35.

(vi) Coverage of 1 stool test for occult blood (colon cancer) every 1 to 2 years beginning at age 50, as determined by an MD, DO, or nurse specialist.

(vii) Coverage for 1 flexible sigmoidoscopy every 5 years beginning at age 50.

(viii) Coverage for annual flu shots after age 65.

(ix) Coverage for 1 pneumococcal vaccine after age 65.

(x) Coverage for 1 diphtheria/tetanus booster shot every 10 years following the initial series of shots.

(b) The following preventive care for children from birth to age 20:

(i) Coverage for interval health history and physical examinations conducted or performed by an MD, DO, or other provider if within the scope of practice as determined by the provider's licensing board and practice act, at intervals recommended by the American Academy of Pediatrics (AAP).

(ii) Coverage for immunizations of eligible dependents following schedules recommended by the AAP.

(c) The following reproductive health care:

(i) Family planning services, including contraception planning;

(ii) Pregnancy related services; and

(iii) "Risk appropriate" prenatal care following medicaid guidelines. Risk appropriate prenatal care includes payment for case management for high risk pregnant individuals.

(d) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide full coverage for 4 visits per year to health care providers of the patient's choice. This coverage must not be subject to deductible and coinsurance, but must be subject to a copayment of $25 per consultation and be applied toward meeting the out-of-pocket limit. This benefit must cover professional service fees only, and not the cost of tests, medications, or other items.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE V SERVICES THAT MAY BE EXCLUDED FROM COVERAGE UNDER THE STANDARD PLAN (1) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, may exclude the following health care services from coverage:

(a) Cosmetic surgery unless performed to correct functional impairment or defects caused by disease, trauma, or previous therapeutic processes;

(b) Diagnosis or treatment of infertility, when infertility is the only diagnosis;

(c) Treatment of temporomandibular joint syndrome, except medically necessary surgery on the temporomandibular joint;

(d) Eyeglasses, contact lenses, hearing aids, or any examination or fitting related to these devices;

(e) Eye refractive surgery, including radial keratotomy, unless the corrected vision in the operated eye is worse than 20/70 prior to surgery and can be corrected to 20/70 or better only by surgery;

(f) Routine foot care;

(g) Sex change surgery;

(h) Skilled nursing facility, except as recommended by case management;

(i) Experimental and investigational treatment;

(j) Medical expenses for work-related injuries or occupational disease covered by a worker's compensation insurer, unless the worker's compensation insurer has denied benefits and the claimant is pursuing redress through mediation, a contested case hearing, or a court and no decision has been made on the case;

(k) Expenses that are or, without litigation could be, recovered through any federal, state, county, or municipal law, other than medicaid;

(l) Services for which there would be no charge in the absence of insurance;

(m) Services provided by immediate family members;

(n) Losses which are due to war or any act of war, whether declared or undeclared;

(o) Dental services, except for tumors or injury to the natural teeth and gums;

(p) Services and supplies not administered or ordered by an MD, DO, nurse specialist, or other covered professional.

(2) The commissioner may authorize any other exclusion which he deems to be consistent with the intent of the standard plan provisions contained in these rules.

AUTH: 33-1-313 and 33-12 1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE VI DEDUCTIBLE CHARGES, COINSURANCE, MAXIMUM ALLOWABLE OUT-OF-POCKET CHARGES, AND LIFETIME MAXIMUM BENEFIT LEVEL UNDER THE STANDARD PLAN (1) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide an annual deductible of $250 per person and $500 per family. Such deductible must be applicable to all benefits, except as specifically exempted by these rules.

(2) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must have a coinsurance in which the insurer must pay 80% of eligible expenses after the deductible is met, except as specifically exempted by these rules.

(3) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide maximum annual out-of-pocket charges of $1,250 per person and $2,500 per family. Such policies must also provide that, after the out-of-pocket limit is met, the insurer will pay 100% of all charges up to the lifetime maximum benefit level.

(4) Policies of insurance offered under the standard health benefit plan contemplated by 33-22-1812, MCA, must provide a lifetime maximum benefit of $1,000,000.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE VII HMO COST SHARING SCHEDULE AND EXCEPTION TO STANDARD PLAN PROVISIONS (1) Standard plans offered by HMOs must comply with NEW RULES III, IV, V, and VI. HMO plans may require that all services provided in RULES III and IV must be rendered or referred by a primary care provider.

(2) Standard plans offered by HMOs are exempt from the deductible charges, and coinsurance provisions of NEW RULE VI, but must comply with the maximum annual out-of-pocket and lifetime maximum requirements of NEW RULE VI. HMO plans must include the following cost sharing schedule:

| | |
|---|---|
| INPATIENT HOSPITAL SERVICES | |
| Semi-Private Room and Board Charges: Copayment Per Admission | $500 |
| Other Medically Necessary Hospital Charges | No copayment |
| OUTPATIENT HOSPITAL SERVICES | |
| Outpatient Therapy | $15 copayment |
| Other Non-emergency services | No copayment |
| HOSPITAL EMERGENCY ROOM | |
| If admitted to the hospital | No copayment for emergency room; inpatient copayment applies |
| If not admitted to the hospital | $50 copayment |
| OBSTETRICAL CARE | |
| Professional services only | $150 copayment per delivery |
| PHYSICIANS AND OTHER MEDICAL PROFESSIONALS | |
| Hospital inpatient visits | No copayment |
| Physician office or home visits | $10 copayment |
| After hours visits (in- or outpatient) | $10 copayment |
| Referred Services | $15 copayment |
| MEDICAL NUTRITION SERVICES | $15 copayment |
| HOME HEALTH CARE | No copayment |

| | |
|---|---|
| **CHIROPRACTIC SERVICES** | |
| Copayment | $10 per visit |
| Maximum covered charge | $25 per visit |
| Covered treatments per year | 24 visits, plus an additional 11 visits with the HMO's approval |
| **MENTAL HEALTH SERVICES** | |
| Inpatient | |
| Copayment | $200 per day |
| Days of covered treatment | 30 days per year |
| Outpatient | |
| Copayment | $25 per visit |
| Maximum covered charge | $1,000 combined with substance abuse treatment |
| **SUBSTANCE ABUSE TREATMENT** | |
| Inpatient | |
| Copayment | $150 per day |
| Maximum covered charge | $4,000 per 24-month period |
| Lifetime maximum | $8,000 |
| Outpatient | |
| Copayment | $25 per visit |
| Maximum covered charge | $1,000 combined with mental health service |
| **PRESCRIPTION DRUGS** | |
| Generic | $5 copayment |
| Brand name at patient's request | Copayment = brand name price minus the generic price |
| **DIAGNOSTIC X-RAY AND LABORATORY** | No copayment |
| **AMBULANCE** | |
| Ground ambulance | $50 copayment |
| Air ambulance | $250 copayment |
| **DURABLE MEDICAL EQUIPMENT** | 20% coinsurance |
| **RADIATION THERAPY AND CHEMOTHERAPY** | 20% coinsurance |

| | |
|---|---|
| HOSPICE SERVICE | $150 copayment per week |

OFFICE VISITS

| | |
|---|---|
| Adult preventative care visits | $10 copayment |
| Children preventative care visits | $10 copayment |
| Reproductive health care visits | $10 copayment |

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE VIII CRITERIA OF POLICIES OFFERED UNDER BASIC PLAN (1) Any health benefit plan offered to a small employer group that has a benefit value, as calculated in NEW RULE IX, of less than the benefit value of the insurer's standard plan will qualify as a basic health benefit plan contemplated by 33-22-1812, MCA.

(2) All basic health benefit plan contemplated 33-22-1812, MCA, must include all benefits mandated by statute, including, but not limited to, maternity benefits contemplated by court interpretations of statutes.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE IX CALCULATION OF BENEFIT VALUES (1) For the purposes of determining whether a health benefit plan is a basic health benefit plan under NEW RULE VIII, the following computations must be used, together with the values listed.

(a) The formula for calculating the benefit value is as follows:

BENEFIT VALUE = DEDUCTIBLE VALUE + COINSURANCE VALUE + LIFETIME-MAXIMUM VALUE

where

DEDUCTIBLE VALUE = DEDUCTIBLE CLAIMS COST x Y x UTILIZATION(Y) / 0.8

and

COINSURANCE VALUE = COINSURANCE-STOPLOSS-PLUS-DEDUCTIBLE CLAIMS COST x {[Z x UTILIZATION(Z)] - [Y x UTILIZATION(Y)]} / 0.8.

(b) The variables for the formula must be developed in accordance with the following:

(i) COINSURANCE STOPLOSS refers to the maximum amount of annual claims to which the coinsurance is applied. For the standard plan, the COINSURANCE STOPLOSS is $5,000.

(ii) DEDUCTIBLE CLAIMS COST is the expected claims cost for a plan with a particular deductible.

(iii) COINSURANCE-STOPLOSS-PLUS-DEDUCTIBLE CLAIMS COST is the expected claim cost for a plan with a "deductible" equal to the amount of the COINSURANCE STOPLOSS plus the DEDUCTIBLE.

(iv) LIFETIME-MAXIMUM VALUE is the dollar adjustment to the expected claims cost for a particular lifetime maximum amount.

(v) UTILIZATION(Y) and UTILIZATION(Z) each refer to a factor to apply to the expected claims cost to adjust for expected utilization of a plan with a coinsurance level Y or Z.

(vi) Y is the coinsurance percent applied to claims, up to the amount of the coinsurance stoploss annually.

(vii) Z is the coinsurance percent applied to claims above the coinsurance stoploss (usually 100%).

(c) The calculation of the benefit value must be made as follows:

(i) Determine the deductible claims cost. (Table I) _____

(ii) Determine the value of Y, as a decimal. (coinsurance percentage) _____

(iii) Determine the value of utilization(Y). (Table II) _____

(iv) Determine Y x utilization(Y). (line [ii] x line [iii]) _____

(v) Determine the deductible value. (line [i] x line [iv] / 0.8) _____

(vi) Determine the coinsurance-stoploss-plus-deductible. (Coinsurance stoploss amount + deductible amount.) _____

(vii) Determine the coinsurance-stoploss-plus-deductible claims cost. (Interpolate the claims costs in Table I corresponding to the deductibles immediately bounding the coinsurance-stoploss-plus-deductible.) _____

(viii) Determine the value of Z, as a decimal. (usually, but not always, 1.0) _____

(ix) Determine the value of utilization(Z). (Table II) _____

(x) Determine Z x utilization(Z). (line [viii] x line [ix]) _____

(xi) Determine the coinsurance value. (line [vii] x (line [x] - line [iv]) / 0.8) _____

(xii) Determine the lifetime-maximum value. (Table III) _____

(xiii) Determine the benefit value. (line [v] + line [xi] + line [xii]) _____

(d) The following tables must be used in calculating benefit values under this rule:

Table I - Claim Costs by Deductible Amount *

| Deductible Amount | Claims Cost | Deductible Amount | Claims Cost | Deductible Amount | Claims Cost |
|---|---|---|---|---|---|
| $ 0 | $124.83 | $ 750 | $ 89.29 | $ 10,000 | $ 24.92 |
| 100 | 119.43 | 1,000 | 79.77 | 15,000 | 20.56 |
| 150 | 116.82 | 1,500 | 68.70 | 20,000 | 17.38 |
| 200 | 114.23 | 2,000 | 60.42 | 25,000 | 15.11 |
| 250 | 111.65 | 2,500 | 53.69 | 50,000 | 9.36 |
| 300 | 109.08 | 5,000 | 35.21 | 100,000 | 5.38 |
| 500 | 98.81 | 7,500 | 30.07 | 150,000 | 2.87 |

Table II - Utilization Rate by Coinsurance *

| Coinsurance | Utilization Rate | Coinsurance | Utilization Rate |
|---|---|---|---|
| 100% | 1.14 | 70% | 0.93 |
| 95% | 1.10 | 65% | 0.91 |
| 90% | 1.07 | 60% | 0.89 |
| 85% | 1.03 | 55% | 0.87 |
| 80% | 1.00 | 50% or less | 0.86 |
| 75% | 0.97 | | |

Table III - Lifetime-Maximum Values by Lifetime Maximum Amount *

| Lifetime Maximum Amount | Lifetime-Maximum Value |
|---|---|
| $5,000,000 or more | $ 0.23 |
| 2,000,000 | 0.17 |
| 1,000,000 | 0.00 |
| 750,000 | -0.28 |
| 500,000 | -0.55 |
| 250,000 | -1.78 |
| 100,000 | -7.67 |
| 50,000 | -13.34 |
| 25,000 | -21.54 |

* Values were constructed by the Montana Insurance Department, using the 1994 Tillinghast Group Medical Insurance Rate Manual as a reference.

(c) Calculations must be made for the standard health benefit plan offered by the carrier and for each proposed basic health benefit plan offered by the carrier, and the results must be compared to determine whether the proposed plan qualifies as a basic health benefit plan.

(2) In instances wherein some benefits under the proposed basic health care plan are of significantly higher

value than those offered under the small group carrier's standard health benefit plan, and increase the overall value of the basic plan above the overall value of the carrier's standard plan, the carrier must file complete documentation justifying the plan's proposed classification with the commissioner.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1809, and 33-22-1812, MCA

RULE X COST CONTAINMENT FEATURES OF BASIC AND STANDARD PLANS (1) All basic health benefit plans and standard health benefit plans offered to small employers in this state must include at least two of the following cost containment features acceptable to the commissioner:

(a) A patient education and assistance program that provides guidance for seeking appropriate medical care, including written materials and phone call-in services;

(b) A program for management of acute, long-term care to determine appropriate cost-effective treatment, which must include an agreement to the treatment plan by the patient, family or authorized representative, the treating health care provider, and the insurer;

(c) A program for primary care physicians and referrals, such as a health maintenance organization style of delivery of care, in which each patient has a primary care provider who makes all referrals to other providers;

(d) A program for review of health care services for patients to determine the medical necessity or appropriateness of service, consistent with 33-32-102(4), MCA, or

(e) A preferred provider agreement between health care providers and the insurer, which may limit the amount a provider may charge an insured for service, as well as the amount a provider may be reimbursed.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802 and 33-22-1812, MCA

RULE XI FILING AND APPROVAL OF BASIC AND STANDARD PLANS (1) All small employer carriers shall file all of the standard health benefit plans that they intend to market in this state with the commissioner for prior approval.

(2) All small employer carriers shall file all of the basic health benefit plans that they intend to market in this state with the commissioner for prior approval.

(3) No small employer carrier may market any health benefit plans in this state, unless and until one of its basic health benefit plans and one of its standard health benefit plans has been approved by the commissioner.

AUTH: 33-1-313, 33-1-501 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1811, and 33-22-1812, MCA

RULE XII STATUS OF CARRIERS AS SMALL EMPLOYER CARRIERS (1) Within 30 days after the effective date of these rules, each carrier providing health benefit plans in this state shall file a statement with the commissioner indicating whether the carrier intends to operate as a small employer carrier in this state. Status as a small employer carrier will be granted by the commissioner when the carrier has both a standard and a basic health benefit plan approved by the commissioner.

(2) Each new carrier applying for a certificate of authority to sell disability insurance in this state shall include with its application a statement whether it intends to operate as a small employer carrier in this state.

(3) Except as provided below in (4), no carrier may offer health benefit plans to small employers, or continue to provide coverage under health benefit plans previously issued to small employers in this state, unless the filing pursuant to this rule indicates that the carrier intends to operate as a small employer carrier in this state.

(4) If the filing made pursuant to this rule indicates that a carrier does not intend to operate as a small employer carrier in this state, the carrier may continue to provide coverage under health benefit plans previously issued to small employers in this state for no more than 3 years following the date that the carrier declares that it does not intend to operate as a small employer carrier in this state. Such continued small group policies must comply with the act and these rules.

(5) If a filing made pursuant to this rule indicates that a carrier does not intend to operate as a small employer carrier in this state, the carrier shall be precluded from operating as a small employer carrier in this state for a period of 5 years from the date of the filing. Upon a written request from such a carrier, the commissioner may reduce the period provided for herein, if the commissioner finds that permitting the carrier to operate as a small employer carrier would be in the best interests of the small employers in this state.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1812, and 33-22-1814, MCA

RULE XIII APPLICATION TO REENTER STATE (1) A carrier that has been prohibited from writing coverage for small employers in this state pursuant to 33-22-1810(1)(g), MCA, may not resume offering health benefit plans to small employers in this state until the carrier has applied to the commissioner to be reinstated as a small employer carrier and the application has been granted by the commissioner.

(2) In the case of a small employer carrier doing business in only one established geographic service area of the state, if the small employer carrier elects not to renew a

health benefit plan under 33-22-1810(1)(f), MCA, the small employer carrier may be prohibited from offering health benefit plans to small employers in any part of the service area for a period of 5 years. In addition, the small employer carrier must not offer health benefit plans to small employers in any other geographic area of the state without the prior approval of the commissioner.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1810, and 33-22-1812, MCA

RULE XIV REQUIREMENT TO INSURE ENTIRE GROUPS (1) Small employer carriers that offer coverage to small employers shall offer to provide coverage to each eligible employee and to each dependent. Except as provided in (2), such small employer carriers shall provide the same health benefit plan to each such eligible employee and dependent.

(2) Small employer carriers may offer the employees of a small employer the option of choosing among one or more health benefit plans, provided that each employee may choose any of the offered plans. Except as provided in 33-22-1811(3), MCA, with respect to exclusions for pre-existing conditions, the choice among benefit plans may not be limited, restricted, or conditioned based upon the risk characteristics of the employees or their dependents.

(3) Except as provided in (4), small employer carriers may not issue health benefit plans to small employers unless the health benefit plans cover all eligible employees and all eligible dependents as defined in 33-22-1803, MCA, and NEW RULE I.

(4) Small employer carriers may issue health benefit plans to small employers that exclude eligible employees or eligible dependents, as defined in 33-22-1803, MCA, and NEW RULE I, only if one of the following applies:

(a) The excluded individuals have coverage under health benefit plans or other health benefit arrangement that provide benefits equal to or greater than the benefits provided under the health benefit plan offered by the employer;

(b) The excluded individuals do not have risk characteristics or other attributes that would cause the carriers to make decisions with respect to premiums or eligibility for a health benefit plan that are adverse to the small employer;

(c) The premium contribution to be paid by the eligible employee would have exceeded 7.5% of the adjusted gross income of the eligible employee and the employee decides not to be covered. The decision not to be covered for this reason is exclusively that of the employee;

(d) An excluded individual states in a signed waiver that the individual has had coverage under a health benefit plan or other health benefit arrangement within the previous 6 months and expects to have coverage within the succeeding 6

months under a health benefit plan or other health benefit arrangement that provides benefits similar to or exceeding benefits provided under the basic health benefit plan offered by the employer; or

(e) An employee shows that, in changing policies, the 12-month waiting period in pre-existing conditions would be unduly burdensome to the employee. Whether the waiting period imposes such a burden is a decision that only the employee may make. Employers shall refrain from influencing their employees' decisions.

(5) Small employer carriers shall require each small employer that applies for coverage, as part of the application process, to provide a complete list of eligible employees and eligible dependents. The list must include a statement showing how much the employer is contributing to each employee's premiums. The small employer carrier shall require the small employer to provide appropriate supporting documentation, such as a W-2 Summary Wage and Tax Form, to verify the information required under this paragraph.

(6) Small employer carriers shall secure waivers with respect to each eligible employee and each eligible dependent who declines an offer of coverage under a health benefit plan provided to a small employer for the reasons given in (4). Such waivers must be signed by the eligible employees on behalf of such employee or the dependent of such employee and must certify that the individual who declined coverage was informed of the availability of coverage under the health benefit plan. The waiver form must require that the reason for declining coverage be stated on the form and must include a written warning of the penalties imposed on late enrollees. Waivers must be maintained by the small employer carrier for a period of 6 years.

(a) Small employer carriers shall obtain, with respect to each individual who submits a waiver under (4), information sufficient to establish that the waiver is permitted.

(7) Small employer carriers may not issue coverage to any small employer if the carrier is unable to obtain the list required under (5), a waiver required under (6) or the information required under (6)(a).

(a) Small employer carriers may not offer coverage to any small employer if the carrier, or a producer for such carrier, has reason to believe that the small employer or producer has induced or pressured an eligible employee, or dependent of an eligible employee, to decline coverage due to the individual's risk characteristics.

(b) Prior to submitting an application for coverage with the carrier on behalf of a small employer, each involved producer shall notify his or her small employer carrier of any circumstances that would indicate that the small employer has induced or pressured an eligible employee or eligible dependent, to decline coverage due to the individual's risk characteristics.

(8) New entrants to a small employer group must be offered an opportunity to enroll in the health benefit plan currently held by such group. Any new entrant that does not exercise the opportunity to enroll in the health benefit plan within the period provided by the small employer carrier may be treated as a late enrollee by the carrier, provided that the time within which to enroll in the health benefit plan extends at least 30 days after the date the new entrant is notified of his or her opportunity to enroll. If a small employer carrier has offered more than one health benefit plan to a small employer group pursuant to (2), the new entrant must be offered the same choice of health benefit plans as the other members of the group.

(a) New entrants to a group must be accepted for coverage by the small employer carrier without any restrictions or limitations on coverage related to the risk characteristics of the employees or their dependents, except that a carrier may exclude coverage for pre-existing medical conditions, consistent with the provisions of 33-22-1811(3), MCA.

(b) Small employer carriers may assess a risk load to the premium rate associated with new entrants, consistent with the requirements of 33-22-1809, MCA. The risk loads must be the same risk load charged to the small employer group immediately prior to acceptance of the new entrant into the group.

(9) In the case of an eligible employee, or eligible dependent, who, prior to the effective date of 33-22-1811, MCA, was excluded from coverage or denied coverage by a small employer carrier in the process of providing a health benefit plan to an eligible small employer, the small employer carrier shall provide an opportunity for the eligible employee or eligible dependent, to enroll in the health benefit plan currently held by the small employer.

(a) Small employer carriers may require any individual who requests enrollment under this subsection to sign a statement indicating that such individual sought coverage under the group contract, other than as a late enrollee, and that the coverage was not offered to the individual.

(b) The opportunity to enroll must meet the following requirements:

(i) The opportunity to enroll must begin on the effective date of 33-22-1811, MCA, and continue for a period of at least 6 months.

(ii) Eligible employees and eligible dependents who are provided an opportunity to enroll pursuant to this subsection must be treated as new entrants. Premium rates related to such individuals must be set in accordance with (8).

(iii) The terms of coverage offered to an individual described in (9) may exclude coverage for pre-existing medical conditions for a period not to exceed 12 months, if the health benefit plan currently held by the small employer contains

such an exclusion, provided that the exclusion period must be reduced by the number of days between the date the individual was excluded or denied coverage and the date coverage is provided to the individual pursuant to this provision.

(iv) Small employer carriers shall provide written notice at least 45 days prior to the opportunity to enroll provided in (9) to each small employer insured under a health benefit plan offered by such carrier. The notice must clearly describe the rights granted under this subsection to employees and dependents who were previously excluded from or denied coverage and the process for enrollment of such individuals in the employer's health benefit plan.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1811, and 33-22-1812, MCA

RULE XV RESTORATION OF COVERAGE (1) Except as provided in (2), a small employer carrier shall, as a condition of continuing to transact business in this state with small employers, offer to provide a health benefit plan as described in (3) to any small employer whose coverage was terminated or not renewed by such small employer carrier after July 1, 1993.

(2) The offer required under (1) must not be required with respect to a health benefit plan that was not renewed if:

(a) The health benefit plan was not renewed for reasons set forth in 33-22-1810, MCA; or

(b) The nonrenewal was a result of the small employer voluntarily electing coverage under a different health benefit plan.

(3) The offer made under (1) must be made no later than 30 days after a carrier indicates its intention to operate as a small employer carrier in this state pursuant to NEW RULE XII. Small employers must be given at least 60 days to accept an offer made pursuant to (1). If the employer accepts the offer of coverage, the carrier must provide the plan offered. A health benefit plan provided to a terminated small employer pursuant to (1) must meet the following conditions:

(a) The health benefit plan must contain benefits that are identical to the benefits in the health benefit plan that was terminated or nonrenewed.

(b) The health benefit plan must not be subject to any waiting periods, including exclusion periods for pre-existing conditions, or other limitations on coverage that exceed those contained in the health benefit plan that was terminated or nonrenewed. In applying such exclusions or limitations, the health benefit plan must be treated as if it were continuously in force from the date it was originally issued to the date that it is restored pursuant to this rule and 33-22-1814, MCA.

(c) The health benefit plan must not be subject to any provision that restricts or excludes coverage or benefits for specific diseases, medical conditions, or services otherwise covered by the plan.

(d) The health benefit plan must provide coverage to all employees who are eligible employees as of the date the plan is restored. The carrier shall offer coverage to each dependent of such eligible employees.

(e) The premium rate for the health benefit plan must be no more than the premium rate charged to the small employer on the date the health benefit plan was terminated or nonrenewed; provided that, if the number or case characteristics of the eligible employees, or their dependents, of the small employer has changed between the date the health benefit plan was terminated or nonrenewed and the date that it is restored, the carrier may adjust the premium rates to reflect any changes in case characteristics of the small employer. If the carrier has increased premium rates for other similar groups with similar coverage to reflect general increases in health care costs and utilization, the premium rate may further be adjusted to reflect the lowest such increase given to a similar group. The premium rate for the health benefit plan may not be increased to reflect any changes in risk characteristics of the small employer group until one year after the date of health benefit plan is restored. Any such increase must be subject to the provisions of 33-22-1809, MCA.

(4) The health benefit plan under (3) must not be eligible for reinsurance under the provisions of 33-22-1818 and 33-22-1819, MCA, except that the carrier may reinsure new entrants to the health benefit plan who enroll after the restoration of coverage.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1809, 33-22-1812, 33-22-1814, and 33-22-1814, MCA

RULE XVI QUALIFYING PREVIOUS AND QUALIFYING EXISTING COVERAGES (1) For the purposes of 33-22-1811(3)(b), MCA, an individual must be considered to have qualifying previous coverage with respect to a particular service if the previous policy, certificate, or other benefit arrangement covering such individual met the definition of qualifying previous coverage contained in 33-22-1803(21), MCA, and provided benefits with respect to the service.

(2) If a waiting period for pre-existing conditions is to be applied, the small employer carrier shall ascertain the source of previous or existing coverage of each eligible employee and each dependent of an eligible employee at the time such employee or dependent initially enrolls in the health benefit plan provided by the small employer carrier. The small employer carrier may contact the source of previous or existing coverage to resolve any questions about the benefits or limitations related to such previous or existing coverage.

(3) In cases referred to in 33-22-1810(2), MCA, the replacement coverage for small employers must not have pre-

existing conditions applied to benefits comparable to those in the employer's previous coverage. The previous coverage in such cases must be considered qualifying previous coverage.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1810, 33-22-1811, and 33-22-1812, MCA

RULE XVII CONSIDERATION OF TRADE, OCCUPATION, OR INDUSTRY IN DECIDING WHETHER TO OFFER COVERAGE (1) Except as provided in this rule, small employer carriers may not consider the trade or occupation of the employees of a small employer, or the industry or type of business in which the small employer is engaged, in determining whether to issue or continue to provide coverage to the small employer.

(a) Small employer carriers may use industry as a case characteristic in establishing premium rates, subject to 33-22-1809(1)(f), MCA.

(b) Small employer carriers may consider trade, occupation or industry as part of the eligibility criteria for a class of business, subject to 33-22-1811(1)(b)(ii), MCA.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1809, 33-22-1811, and 33-22-1812, MCA

RULE XVIII RESTRICTIVE RIDERS (1) A restrictive rider, endorsement, or other provision that would violate 33-22-1811(3)(e)(ii), MCA, and that was in force on the effective date of these rules may not remain in force beyond the first anniversary date following the effective date of these rules. Small employer carriers shall provide written notice to those small employers whose coverage will be changed pursuant to these rules at least 30 days prior to the required change to the health benefit plan.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1811, and 33-22-1812, MCA

RULE XIX FAIR MARKETING STANDARDS (1) Small employer carriers shall actively market each of their basic and standard health benefit plans to small employers in this state. Small employer carriers may not suspend the marketing or issuance of the basic and standard health benefit plans except for good cause and with the prior approval of the commissioner.

(2) In marketing basic and standard health benefit plans to small employers, small employer carriers shall use at least the same sources and methods of distribution that they use to market other health benefit plans to small employers. Producers authorized by small employer carriers to market health benefit plans to small employers in the state shall also be authorized to market the basic and standard health benefit plans.

(3) Every small employer carrier shall offer at least its basic and standard health benefit plans to any small employer that applies for or makes an inquiry regarding health insurance coverage from the small employer carrier. Such offers may be provided directly to the small employers or delivered through a producer. The offers must be in writing and must include at least the following information:

(a) A general description of the benefits contained in the basic and standard health benefit plans and any other health benefit plan being offered to the small employer; and

(b) A description how the small employer may enroll in the plans.

(4) Small employer carriers shall provide price quotes to small employers, either directly or through authorized producers, within 10 working days of receiving a request for a quote. Price quotes must include such information as is necessary to understand the quotes. If a small employer carrier needs additional information to provide price quotes, it must request such information from the employer within 5 working days of receiving the request for the price quotes.

(5) Small employer carriers may not apply more stringent or detailed requirements related to the application process for the basic and standard health benefit plans than are applied for other health benefit plans offered by the carrier.

(6) If a small employer carrier denies coverage under a plan that is not a basic or standard health benefit plan, the denial must be in writing and must state with specificity the reasons for the denial, subject to any restrictions related to confidentiality of medical information.

(a) The written denial must be accompanied by a written explanation of the availability of the basic and standard health benefit plans from the small employer carrier. The explanation must include at least the following:

(i) A general description of the benefits contained in each such plan;

(ii) A price quote for each such plan; and

(iii) Written advice as to how the small employer may enroll in such plans.

(b) The written information must be provided within the time periods provided in (4) directly to the small employer and can be delivered through an authorized producer.

(c) Price quotes required under this subsection must be for the lowest-priced basic and standard health benefit plan for which the small employer is eligible. Availability of other basic and standard plans must be described in the price quotes.

(7) Small employer carriers may not require, as a condition to the offer or sale of a health benefit plan to small employers, that the small employer purchase or qualify for any other insurance product or service.

(8) Carriers offering individual and group health benefit plans in this state must be responsible for

determining whether the plans are subject to the requirements of the act and these rules.

(9) No later than March 1 of each year, all small employer carriers shall file with the commissioner, the following information related to health benefit plans issued by them to small employers in this state:

(a) The number of small employers that were issued health benefit plans in the previous calendar year, indicating the number of newly issued plans and the number of renewals;

(b) The number of small employers that were issued basic health benefit plans and the number of small employers that were issued standard health benefit plans in the previous calendar year, arranged separately, showing the number of newly issued plans and the number of renewals as to each class of business;

(c) The number of small employer health benefit plans in force in each county of the state as of December 31 of the previous calendar year;

(d) The number of small employer health benefit plans that were voluntarily not renewed by small employers in the previous calendar year;

(e) The number of small employer health benefit plans that were terminated or nonrenewed, for reasons other than nonpayment of premium, by the carrier in the previous calendar year; and

(f) The number of small employer health benefit plans that were issued to small employers that were uninsured for at least the 3 months prior to issue.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1812, and 33-22-1813, MCA

RULE XX ESTABLISHMENT OF CLASSES OF BUSINESS

(1) Every small employer carrier that establishes more than one class of business pursuant to 33-22-1808, MCA, shall maintain on file for inspection by the commissioner the following information with respect to each class of business so established:

(a) A description of each criterion employed by the carrier, or any of its agents, for determining membership in the class of business;

(b) A statement describing the justification for establishing the class as a separate class of business and documentation that the establishment of the class of business is intended to reflect substantial differences in expected claims experience or administrative costs related to the reasons set forth in 33-22-1808, MCA; and

(c) A statement disclosing which, if any, health benefit plans are currently available for purchase in the class and any significant limitations related to the purchase of such plans.

(2) A carrier may not directly or indirectly use group size as a criterion for establishing eligibility for a health benefit plan or for a class of business.

AUTH: 33-1-313 and 33-22-1822
IMP: 33-22-1802, 33-22-1808, and 33-22-1812, MCA

RULE XXI TRANSITION FOR ASSUMPTIONS OF BUSINESS FROM ANOTHER CARRIER (1) No small employer carrier may transfer or assume the entire insurance obligation and/or risk of a health benefit plan covering a small employer in this state unless:

(a) The transfer has been approved by the commissioner of the state of domicile of the assuming carrier;

(b) The transfer has been approved by the commissioner of the state of domicile of the ceding carrier;

(c) The transfer has been approved by the commissioner of this state; and

(d) The transfer otherwise meets the requirements of this rule.

(2) Any carrier domiciled in this state that proposes to assume or cede the entire insurance obligation and/or risk of one or more small employer health benefit plans from another carrier shall file a request for approval of the transfer with the commissioner at least 60 days prior to the date of the proposed assumption. The commissioner may approve the transfer if the commissioner finds that the transaction is in the best interests of the individuals insured under the health benefit plans to be transferred and is consistent with the purposes of the act and these rules. The commissioner shall not approve the transfer until at least 30 days after the date of the filing, unless the commissioner finds that the ceding carrier is in hazardous financial condition, in which case the commissioner may approve the transfer as soon as the commissioner deems reasonable after the filing.

(3) The filing required under (2) must:

(a) Describe the class of business (including any eligibility requirements) of the ceding carrier from which the health benefit plans will be ceded;

(b) State whether the assuming carrier will maintain the assumed health benefit plans as a separate class of business pursuant to (8) or will incorporate them into an existing class of business pursuant to (9). If the assumed health benefit plans will be incorporated into an existing class of business, the filing must describe the class of business of the assuming carrier into which the health benefit plans will be incorporated;

(c) State whether the health benefit plans being assumed are currently available for purchase by small employers;

(d) Describe the potential effect, if any, of the assumption on the benefits provided by the health benefit plans to be assumed;

(e) Describe the potential effect, if any, of the assumption on the premiums for the health benefit plans to be assumed; and

(f) Describe any other potential material effects of the assumption on the coverage provided to the small employers covered by the health benefit plans to be assumed.

(4) A small employer carrier required to file a request under (2) shall include an informational filing, or other such filing as may be required, with the commissioner of each state in which there are small employer health benefit plans that would be included in the transfer. The informational filing to each state may be made concurrently with the filing made under (2) and include at least the information specified in (3) for the small employer health benefit plans in that state.

(5) No small employer carrier may transfer or assume the entire insurance obligation and/or risk of a health benefit plan covering a small employer in this state unless it complies with the following provisions:

(a) The carrier shall provide notice to the commissioner at least 60 days prior to the date of the proposed assumption. The notice must contain the information specified in (3) for the health benefit plans covering small employers in this state.

(b) If the assumption of a class of business would result in the assuming small employer carrier being out of compliance with the limitations related to premium rates contained in 33-22-1809, MCA, the assuming carrier shall apply to the commissioner pursuant to 33-22-1809(3), MCA, for a suspension of the application of 33-22-1809(1), MCA.

(c) No assuming carrier seeking suspension of the application of 33-22-1809(1), MCA, may complete the assumption of health benefit plans covering small employers in this state unless the commissioner grants the suspension requested pursuant to (5)(b).

(d) Unless a different period is approved by the commissioner, a suspension of the application of 33-22-1809(1), MCA, must, with respect to an assumed class of business, be for no more than 15 months and, with respect to each individual small employer, must last only until the anniversary date of such employer's coverage, provided that the period with respect to an individual small employer may be extended beyond its first anniversary date for a period of up to 12 months if the anniversary date occurs within 3 months of the date of assumption of the class of business.

(6) Except as provided in (2), no small employer carrier may cede or assume the entire insurance obligation and/or risk for a small employer health benefit plan unless the transfer includes the ceding to the assuming carrier of the entire class of business which includes such health benefit plan.

(7) A small employer carrier may cede less than an entire class of business to an assuming carrier if:

(a) One or more small employers in the class has exercised their right under contract or state law to reject, either directly or by implication, the ceding of their health benefit plans to another carrier. In that instance, the transfer must include each health benefit plan in the class of business except those health benefit plans for which a small employer has rejected the proposed cession; or

(b) After a written request from the transferring carrier, the commissioner determines that the transfer of less than the entire class of business is in the best interests of the small employers insured in that class of business.

(8) Except as provided in (9), a small employer carrier that assumes one or more health benefit plans from another carrier shall maintain such health benefit plans as a separate class of business.

(9) Subject to the prior approval of the commissioner, a small employer carrier that assumes one or more health benefit plans from another carrier may exceed the limitation contained in 33-22-1808(2), MCA, due solely to such assumption for a period of no more than 15 months after the date of the assumption, provided that the carrier complies with the following provisions:

(a) Upon assumption of the health benefit plans, such health benefit plans must be maintained as separate classes of business. During the 15-month period following the assumption, each of the assumed small employer health benefit plans must be transferred by the assuming small employer carrier into a single class of business operated by the assuming small employer carrier. The assuming small employer carrier shall select the class of business into which the assumed health benefit plans will be transferred in a manner such that the transfer results in the least possible change to the benefits and rating method of the assumed health benefit plans;

(b) The transfers authorized in (9)(a) must occur, with respect to each small employer on the anniversary date of the small employer's coverage, provided that the period with respect to an individual small employer may be extended beyond its first anniversary date for a period of up to 12 months if the anniversary date occurs within 3 months of the date of the assumption of the class of business;

(c) A small employer carrier making a transfer pursuant to (9)(a) may alter the benefits of the assumed health benefit plans to conform to the benefits currently offered by the carrier in the class of business into which the health benefit plans have been transferred;

(d) The premium rate for an assumed small employer health benefit plan must not be modified by the assuming small employer carrier until the health benefit plan is transferred pursuant to (9)(a). Upon transfer, the assuming small employer carrier shall calculate a new premium rate for the health benefit plan from the rate manual established for the

class of business into which the health benefit plan is transferred. In making such calculation, the risk load applied to the health benefit plan must be no higher than the risk load applicable to such health benefit plan prior to the assumption.

(10) During the 15-month period provided in (9)(a), the transfer of small employer health benefit plans from the assumed class of business in accordance herewith may not be treated as a violation of 33-22-1809(2), MCA.

(11) Assuming carriers may not apply eligibility requirements, including minimum participation and contribution requirements, with respect to an assumed health benefit plan, or with respect to any health benefit plan subsequently offered to a small employer covered by such an assumed health benefit plan, that are more stringent than the requirements applicable to such health benefit plan prior to the assumption.

(12) The commissioner may approve a longer period of transition upon application by a small employer carrier. The application must be made within 60 days after the date of assumption of the class of business and must clearly state the justification for a longer transition period.

(13) Nothing in this rule is intended to:

(a) Reduce or diminish any legal or contractual obligation or requirement, including any obligation provided in Title 33, chapter 2, part 12, MCA, of the ceding or assuming carrier related to the transaction;

(b) Authorize a carrier that is not admitted to transact the business of insurance in this state to offer or insure health benefit plans in this state; or

(c) Reduce or diminish the protections related to an assumption reinsurance transaction provided in Title 33, chapter 2, part 12, MCA, or otherwise provided by law.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1808, 33-22-1809, and 33-22-1812, MCA

RULE XXII RATE MANUAL AND RATE RESTRICTION GUIDELINES

(1) Each small employer carrier shall develop a separate rate manual for each class of business, which must be the basis for all premium rates and new business premium rates charged to small employers by the small employer carrier. To the extent that a portion of the premium rates charged by a small employer carrier is based on the carrier's discretion, the manual must specify the criteria and factors considered by the carrier in exercising such discretion.

(2) Small employer carriers may not modify the rating method or any characteristics used in the rate manual for a class of business, until the change has been approved by the commissioner.

(a) The commissioner may approve a change to a rating method if the commissioner finds that the change is

reasonable, actuarially supported, and consistent with the purposes of the act.

(b) A carrier requesting to change the rating method for a class of business shall file a request with the commissioner for authority to modify the rating method at least 30 days prior to the proposed date of the change. The filing must contain at least the following information:

(i) The reasons the change in rating method is being requested;

(ii) A complete description of each of the proposed modifications to the rating method;

(iii) A description how the proposed change in rating method would affect the premium rates currently charged to small employers in the class of business, including an estimate from a qualified actuary of the number of groups or individuals whose premium rates may change by more than 10% due to the proposed change in rating method. This estimate must include a narrative description of the types of groups and individuals whose premium rates may change by more than 10%;

(iv) A certification from a qualified actuary that the proposed rating method is based on objective and credible data and would be actuarially sound and appropriate; and

(v) A certification from a qualified actuary that the proposed change in rating method would not produce premium rates for small employers that would be in violation of 33-22-1809, MCA.

(3) For the purpose of this rule, a change in rating method includes the following:

(a) A change in the number of case characteristics used by a small employer carrier to determine premium rates for health benefit plans in a class of business;

(b) A change in the manner or procedures by which insureds are assigned into categories for the purpose of applying a case characteristic to determine premium rates for health benefit plans in a class of business;

(c) A change in the method of allocating expenses among health benefit plans in a class of business; or

(d) A change in a rating factor with respect to any case characteristic if the change would produce a change in premium for any small employer that exceeds 10%.

(i) For the purpose of this subsection, a change in a rating factor involves the cumulative change with respect to such factor over a 12-month period.

(ii) If a small employer carrier changes rating factors with respect to more than one case characteristic in a 12-month period, the carrier shall consider the cumulative effect of all such changes in applying the 10% test under this subsection.

(4) The rate manual developed pursuant to (1) must specify the case characteristics and rate factors to be

applied by the small employer carrier in establishing premium rates for each class of business.

(5) The small employer carrier shall use the same case characteristics in establishing premium rates for each health benefit plan in a class of business and shall apply them in the same manner in establishing premium rates for each such health benefit plan. Case characteristics must be applied without regard to the risk characteristics of a small employer.

(6) The rate manual developed pursuant to (1) must clearly illustrate the relationships among the base premium rates charged for each health benefit plan in the class of business. If the new business premium rate is different than the base premium rate for a health benefit plan, the rate manual must illustrate and justify the difference.

(7) Differences among base premium rates for health benefit plans must be based solely on the reasonable and objective differences in the design and benefits of the health benefit plans and may not be based in any way on the actual or expected health status or claims experience of the small employer groups that choose, or are expected to choose, a particular health benefit plan. The small employer carrier shall apply case characteristics and rate factors within each class of business in a manner that assures that premium differences among health benefit plans for identical small employer groups vary only due to reasonable and objective differences in the design and benefits of the health benefit plans, and not due to the actual or expected health status or claims experience of the small employer groups that choose, or are expected to choose, a particular health benefit plan.

(8) The rate manual developed pursuant to (1) must provide for premium rates to be developed in a two-step process. In the first step, a base premium rate must be developed for the small employer group, without regard to any risk characteristics of the group. In the second step, the resulting base premium rate may be adjusted by a risk load, subject to the provisions of 33-22-1809, MCA, to reflect the risk characteristics of the group.

(9) Premiums charged to small employers for health benefit plans must not include separate application fees, underwriting fees, or any other separate fees or charges.

(10) Small employer carriers shall allocate administrative expenses to basic and standard health benefit plans on no less favorable a basis than expenses are allocated to other health benefit plans in the class of business. The rate manual developed pursuant to (1) must describe the method of allocating administrative expenses to the health benefit plans in the class of business for which the manual was developed.

(11) Each rate manual developed pursuant to (1) must be maintained by the carrier for a period of 6 years. Updates and changes to the manual must be maintained with the manual.

(12) If group size is used as a case characteristic by a small employer carrier, the highest rate factor associated with a group size classification must not exceed the lowest rate factor associated with such a classification by more than 20%.

(13) The restrictions related to changes in premium rates in 33-22-1809(1), MCA, apply as follows:

(a) Small employer carriers shall revise their rate manuals each rating period to reflect changes in base premium rates and changes in new business premium rates.

(b) If, for any health benefit plan with respect to any rating period, the percentage change in the new business premium rate is less than, or the same as, the percentage change in the base premium rate, the change in the new business premium rate must be deemed to be a change in the base premium rate under 33-22-1809(1), MCA.

(c) If, for any health benefit plan with respect to any rating period, the percentage change in the new business premium rate exceeds the percentage change in the base premium rate, the health benefit plan must be considered a health benefit plan into which the small employer carrier is no longer enrolling new small employers for the purposes of 33-22-1809(1), MCA.

(d) If, for any rating period, the change in the new business premium rate for a health benefit plan differs from the change in the new business premium rate for any other health benefit plan in the same class of business by more than 20%, the carrier shall file a statement with the commissioner which contains a complete explanation of how the respective changes in new business premium rates were established and the reason for the difference. The filing must be made within 30 days of the beginning of the rating period.

(e) Small employer carriers shall keep on file for a period of at least 6 years, all calculations used to determine all changes in base premium rates and new business premium rates for each health benefit plan for each rating period.

(14) A representative of a Taft-Harley trust, including a carrier upon the written request of such a trust, may file a written request with commissioner for a waiver of the application of the provisions of 33-22-1809(1), MCA, with respect to such trust.

(a) Such a request must identify the provisions for which the trust is seeking the waiver and must describe, with respect to each provision, the extent to which application of such provision would:

(i) Adversely affect the participants and beneficiaries of the trust; and

(ii) Require modifications to one or more of the collective bargaining agreements under, or pursuant to, which the trust was or is established or maintained.

(b) A waiver granted hereunder may not apply to an individual who participates in the trust because the individual is an associate member of an employee organization or the beneficiary of such an individual.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1809, and 33-22-1812, MCA

RULE XXIII CALCULATIONS RELATING TO PREMIUM RATE RESTRICTIONS (1) The restriction in 33-22-1809(1)(a), MCA, that the index rate for a rating period for any class of business may not exceed the index rate for any other class of business by more than 20% must be tested as follows:

(a) The small employer carrier shall conduct a representative census of its business, based on all applicable case characteristics, and formulate a representative and actuarially equivalent plan of benefits for all classes of business combined.

(b) The small employer carrier shall calculate an index rate for each class of business identified in (a).

(c) The small employer carrier shall identify the class of business with the lowest index rate.

(d) The ratio of the index rate calculated for each class of business in (b) to the lowest index rate identified in (c) of this must be between 1.00 and 1.20, inclusive.

(e) Any change in the representative census or representative actuarially equivalent plan of benefits used in (a) through (d) must be specifically documented and the test must be performed on both the previous and the new census, or actuarially equivalent plan of benefits, at the time of change.

(f) Other methods may be used if the results meet the requirements of (1)(a) through (e), when the method established therein is used.

(2) The restrictions in 33-22-1809(1)(b), MCA, that, within a class, the premium rates charged during a rating period to small employers with similar case characteristics for the same or similar coverage, or the premium rates that could be charged for that class of business, may not vary from the index rate by more than 25%, or by more than 20% from the index rate if the conditions set forth in 33-22-1809(1)(b)(ii), MCA, are met, must be tested as follows:

(a) Using the carrier's rate manual for each class of business, the small group carrier shall calculate an index rate for each plan of benefits and for each small employer census within each class. Index rates must be based on all applicable characteristics of each small employer group within each class. Index rates must be based on all applicable characteristics of each small employer group within each class of business.

(b) For each small employer within a given class of business, the small group carrier shall calculate the ratio of the premium rate charged the small employer during the rating period to the index rate for the census, the plan of business, and the class of business of that small employer for which an index rate was calculated in under (a).

(c) The ratio calculated in (b) must be between .75 and 1.25, inclusive, to comply with the requirement of 33-22-1809(1)(b)(i), MCA, or between .80 and 1.20, inclusive, to comply with the requirements of 33-22-1809(1)(b)(ii), MCA.

(d) Other methods of calculation may be used if the results meet the requirements of (2)(a) through (c), when the method established therein is used.

(3) The acceptability of a proposed rate increase for health benefits plans of small employers must be determined as follows:

(a) Using the small group carrier's rate manual, the small group carrier shall calculate the new base premium rate for the new rating period, the actual census, and the plan of benefits for the small employer at the beginning of the new rating period.

(b) Using the rate manual, the small group carrier shall calculate the base premium rate for the prior rating period, the actual census, and the plan of benefits for the small employer at the beginning of the prior rating period.

(c) The premium rate calculated in (a) must be divided by the premium rate calculated in (b), and the quotient must be multiplied by the gross premium in effect at the beginning of the prior rating period. The product will be the maximum renewal premium for the new rating period under 33-22-1809(1)(c)(i), MCA.

(d) The premium rate calculated in (c) may be adjusted by a percentage of the gross premium in force prior to renewal. Such percentage may consist of:

(i) A percentage to reflect the risk load, not to exceed 15% per year, prorated for the months elapsed between the previous and the new rating dates, to be determined from the small employer carrier's rate manual for the class of business; plus

(ii) Any adjustment because of a change in coverage or a change in case characteristics for the small employer, from the beginning of the prior rating period, as determined from the small employer carrier's rate manual for the class of business.

(e) The premium rate calculated in (c) must be multiplied by 1 plus the percentage in (d).

(f) The maximum renewal gross premium is the premium rate calculated in (e), if (2) is satisfied.

(g) If the resulting maximum renewal gross premium calculated in (e) does not satisfy (2), then the maximum renewal gross premium must be adjusted downward until (2) is satisfied.

(h) Other methods of calculation may be used if the results meet the requirements of (3)(a) through (g), when the method established therein is used.

(4) The requirement in 33-22-1809(1)(e), MCA, that, if a small employer uses industry as a case characteristic in establishing premium rates, the rate factor associated with any industry classification may not vary from the average of the rate factors associated with all industry classifications by more than 15% of that coverage, must be tested as follows:

(a) A small group carrier which charges different premium rates for different industries shall include in each class's rate manual a schedule of factors which reflect the rate differential by industry.

(b) Within each class, the small group carrier shall calculate the average of all factors which are used, or which could be used, to vary rates by industry within that class.

(c) Within each class, the lowest industry factor and the highest industry factor each may not vary from the average calculated in (b) by more than 15%.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1809, and 33-22-1812, MCA

RULE XXIV ANNUAL FILING OF ACTUARIAL CERTIFICATION

(1) On or before March 15 of each year after the effective date of these rules, each small group carrier shall file with the commissioner annually an actuarial certification which complies with 33-22-1809(5)(b), MCA. The certification must include the following effect:

(a) A statement that the carrier is in compliance with Title 33, chapter 22, part 18, MCA;

(b) A statement that the rating methods of the small employer carrier are actuarially sound; and

(c) A list and description of each class of business in the state. The description shall include:

(i) The reason the distinct grouping qualifies as a class of business under 33-22-1808(1), MCA;

(ii) Whether the distinct grouping is open to new business; and

(iii) A request for approval of the additional classes in instances wherein the number of distinct groupings exceeds nine.

(d) A written description of the derivation of the representative census developed pursuant to NEW RULE XI and a statement that the representative census has either changed or not changed during the period between annual filings.

(e) A written description of the derivation of the representative actuarially equivalent plan of benefits developed pursuant to NEW RULE XI and a statement that the representative census has either changed or not changed during the period between annual filings.

(f) A statement that the tests developed in NEW RULE XI have been performed on the representative census and the actuarially equivalent plan of benefits. If such definitions have changed, the definitions of the representative census and the actuarially equivalent plan of benefits have changed. The statement must state that the tests have been performed on both the previous and the new definitions.

(g) A written description of the results of each of the tests referred to in (e) and an explanation addressing the reason for changing either the definition of the representative census or the representative actuarially equivalent plan of benefits.

(2) On or before March 15 of each year after the effective date of these rules, every small group carrier shall file with the commissioner all rates intended for use for its small employer health benefit plans within this state. Each filing must include a schedule of rates for each plan of benefits within each class of business; and each schedule of rates must contain a reference to the plan of benefits and the class of business for which the rates are charged.

AUTH: 33-1-313 and 33-22-1822, MCA
IMP: 33-22-1802, 33-22-1808, 33-22-1809, and 33-22-1812, MCA

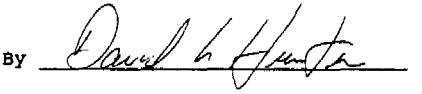
3. REASON: These rules are being proposed because they are mandated by 33-22-1822, MCA.

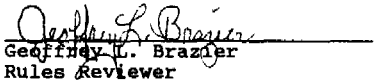
4. Interested persons may present their data, views, or arguments, either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Frank G. Coté, Deputy Commissioner of Insurance, P.O. Box 4009, Helena, Montana 59604, and must be received no later than April 15, 1994.

5. The State Auditor will make reasonable accommodations for persons with disabilities who wish to participate at this public hearing. If you request an accommodation, please do so by contacting the State Auditor's Office no later than 5:00 p.m., April 18, 1994, and advising the office of the nature of the accommodation needed. Please contact Frank G. Coté, Deputy Commissioner of Insurance, P.O. Box 4009, Helena, Montana, 59604; telephone (406) 444-2997; toll free dial 1 and then 800-332-6148; fax (406) 444-3497.

6. Geoffrey L. Brazier, 516 Harrison Avenue, Helena, Montana, 59601, has been designated to preside over and conduct the hearing.

MARK O'KEEFE, State Auditor
and Commissioner of Insurance

By 



Geoffrey L. Brazier
Rules Reviewer

Certified to the Secretary of State this 7th day of March, 1994.

BEFORE THE BOARD OF HORSE RACING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | |
|---|---|
| In the matter of the proposed amendment of rules pertaining to definitions, licenses, fees, clerk of scales, general provisions, grooms, jockeys, owners, declarations and scratches, claiming, paddock to post and permissible medication | NOTICE OF PROPOSED AMENDMENT OF RULES PERTAINING TO THE HORSE RACING INDUSTRY |

NO PUBLIC HEARING CONTEMPLATED

TO: All Interested Persons:

1. On April 16, 1994, the Board of Horse Racing proposes to amend rules pertaining to the horse racing industry.

2. The proposed amendments will read as follows: (new matter underlined, deleted matter interlined)

"8.22.501 DEFINITIONS (1) will remain the same.

(2) Singular - use of a term shall include the plural, and the masculine gender shall include the feminine, except where a particular context clearly requires a different meaning.

(3) through (7) will remain the same.

(8) Bred - means a horse that is considered bred at its place of birth, see ARM 8.22.502.

(9) through (11) will remain the same.

(12) Declared - means scratched, as defined below.

(13) through (15) will remain the same.

(16) Field means:

(a) through (18) will remain the same.

(19) Jockey - is a race rider whether a licensed jockey, or apprentice~~, or amateur~~.

(20) through (33) will remain the same.

(34) Race - is a contest between horses or mules for a purse and/or entry fees on a track under the jurisdiction of the board to be conducted under the parimutuel system of wagering with approved officials present and officiating.

(35) Race meet ~~shall be~~ means that time construed to begin at the time the racing office is first open to accept entries and to end at midnight the last day races are held.

(36) Races - means the following classifications:

(a) through (46) will remain the same.

~~(47) Untried horse - is one whose produce are maidens.~~

~~(48)~~ (47) Winner - means, for purposes of eligibility at race meetings whose race records are recorded in an official chart book or the Daily Racing Form, ~~is~~ a horse which, at the time of starting, has won a race on the flat in any country at a track whose racing records are recorded in an official chart or the Daily Racing Form.

~~(49)~~ (48) A winner - means, for purposes of eligibility at race meetings whose racing records are not recorded in an official chart book or the Daily Racing Form, ~~is~~ a horse which at the time of starting, has won a race on the flat in any country.

(a) will remain the same.

(50) will remain the same but will be renumbered (49).

~~(51)~~ (50) Simulcast network licensee - means ~~An~~ an association licensed by the board to receive and/or originate intrastate simulcast race signals and relay them to licensed simulcast facilities; in certain instances, to receive interstate race signals and relay them to licensed simulcast facilities; and to manage statewide wagering pools on simulcast races.

~~(52)~~ (51) Simulcast facility licensee - means ~~A~~ a local fair board or an association approved by a local fair board which operates a simulcast facility licensed by the board. The simulcast facility may be located either at a race track or at an outside location, and is deemed to be an extension of the host track during intrastate wagering and an extension of the simulcast network licensee during interstate wagering.

~~(53)~~ (52) Track licensee - means ~~A~~ a corporation, association, firm, political subdivision (fair board, or individual(s)) licensed by the board to conduct live parimutuel horse racing at a race track."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-101, 23-4-104, 23-4-202, MCA

REASON: Subsections (2), (8), (12), (16), (35), (36), (48), (49), (51), (52) and (53) are being amended to delete the hyphen which appears after the words being defined to make the definition rule consistent with other chapters under Title 8 of the Administrative Rules of Montana. The hyphen currently existing in subsections (3) through (7), (9) through (11), (13) through (15), (17), (18), (21) through (33), (36) through (46) and (50) will be deleted when replacement pages are updated. The proposed amendment to (19) will delete the reference to "amateur," as only licensed jockeys or apprentice jockeys are allowed to ride in official race meets in Montana, but not "amateur" riders. The proposed amendment to (34) will add "mules" to the definition, as both horses and mules are being raced at the live race meets in Montana, and the jurisdiction of the board statutorily extends to both. The proposed amendment to (47) will delete this definition, as it is not used elsewhere throughout the rules.

"8.22.502 LICENSES ISSUED FOR CONDUCTING PARIMUTUEL WAGERING ON HORSE RACING MEETINGS (1) will remain the same.

(2) Each applicant for license to hold a live race meeting shall pay a fee determined by the board for workers' compensation coverage for each race season.

(2) through (36) will remain the same but will be renumbered (3) through (37).

(a) through (j) will remain the same.

~~(37)~~ (38) Each color assigned to a post position must be indicated directly below the number of the post position in the official program. ~~A horse may start in owner or stable silks in any race, providing the colors have been registered with the racing secretary at the race office prior to the start of the race meet and are printed in the official program. Any stable colors so registered shall then be used consistently throughout the race meet, without reverting to the standard state colors listed above. Helmet covers shall remain the standard colors listed above at all race meets.~~ No person shall start a horse in racing colors other than those ~~registered with the racing secretary, or~~ set as standard colors above, except in case of emergency a temporary change from a standard color of a post position may be approved by the stewards; such a change must be posted by the clerk of the scales on the bulletin board together with the number of the horses as exhibited after weighing out. The use of colors which are not neat, clean and proper in all respects shall not be permitted.

(38) through (47) will remain the same but will be renumbered (39) through (48).

~~(48) All licensees shall keep on file or turn over to the board all photo patrol film, and the film shall be retained by the board for the duration of the racing season.~~

(49) and (50) will remain the same."

Auth: Sec. 23-4-104, 23-4-201, 23-4-202, 37-1-131, MCA; IMP, Sec. 23-4-104, 23-4-201, 23-4-202, MCA

REASON: The proposed new language of (2) will require each race track licensee to pay a workers' compensation fee, as agreed under the 1994 State Fund policy, and as agreed with each track. The proposed amendment to (37) will delete the language allowing the use of stable silks in a race, as the use of non-standard colors is confusing for both race officials and bettors in trying to follow the progress of a race. The proposed amendment to (48) will delete the language regarding retention of photo patrol films, as all films (videotapes) are now controlled by the photo company hired by the track for that purpose.

"8.22.503 ANNUAL LICENSE FEES The following fees shall be charged annually:

(1) through (11)(b) will remain the same.

~~(c) Calculator operator~~ ~~20.00~~

(d) and (e) will remain the same but will be renumbered (c) and (d).

(12) through (13)(a) will remain the same.

(b) ~~Track~~ State veterinarian 30.00

(14) through (16)(k) will remain the same.

~~(l) Hot walker~~ ~~20.00~~

(m) through (p) will remain the same but will be renumbered (l) through (o).

~~(q) Stable foreman~~ ~~20.00~~

~~(r) Stable super~~ ~~20.00~~

(s) will remain the same but will be renumbered (p).

~~(t) Watchman~~ ~~20.00~~

~~(u)~~ (g) Others not listed~~)~~ 20.00
(r) Track maintenance 20.00
(s) Spouse/family 20.00

(v) through (ae) will remain the same but will be renumbered (t) through (ac).

(17) Not requiring licenses but requiring identification. [~~Wives, c~~Children over 6 years of age and under 16 years of age, duplicate (lost i.d. cards)]." 10.00

Auth: Sec. 23-4-104, 23-4-201, 37-1-134, MCA; IMP, Sec. 23-4-104, 23-4-201, 37-1-134, MCA

REASON: The proposed amendment to (11)(c) will delete the calculator operator license category, as this position no longer exists with the use of new parimutuel equipment. The proposed amendment to (13)(b) will standardize the use of the term "state" veterinarian, rather than "track" veterinarian, for consistency with a previous rule amendment making this term official for this position. The proposed amendment to (16)(l) will delete the hot walker license category, as this position no longer exists with the use of mechanical walkers. The proposed amendment to (16)(q), (r) and (t) will delete the stable foreman, stable super and watchman license categories, as these positions are no longer used at the track. The proposed new language of (16)(r) and (s) will establish a separate track maintenance license category, and a separate spouse/family license category, as these two categories require the issuance of many licenses at each race meet, and should not be combined under a general "other" category. The proposed amendment to (17) will delete the outdated word "wives" from the rule, as all spouses of either sex will now be covered under the "spouse" license category.

"8.22.602 CLERK OF SCALES (1) through (8)(e) will remain the same.

(f) blinkers or protective helmet~~.~~;

(g) safety vest.

(9) will remain the same.

(10) No safety vest shall exceed two pounds in weight.

(10) through (12) will remain the same but will be renumbered (11) through (13)."

Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-201, MCA

REASON: The proposed amendment at (8)(g) will add the newly required jockey safety vest to the list of equipment that will not be included in a jockey's weight, as this is safety equipment with a function similar to the protective helmet. The proposed new language in (10) will clarify the allowable weight for the newly required safety vests to ensure uniformity among jockeys using the equipment.

"8.22.701 GENERAL PROVISIONS (1) will remain the same.

(2) Each applicant for owner's, trainer's and owner-trainer's license must provide evidence of workers' compensation insurance or its equivalent as determined by the state compensation insurance fund (state fund) for the protection of the applicant's employees, prior to being issued

a license. All applicants shall pay the appropriate workers' compensation fees as determined by the board for each race season's on-track workers' compensation coverage.

(2) through (11) will remain the same but will be renumbered (3) through (12).

~~(12)~~ (13) In the event of the loss of a license card, the board may in its discretion issue a duplicate ~~the fee for which shall be $10 and all minor and spouses identification cards shall be issued for $10.00~~ upon payment of the appropriate fee.

(13) and (14) will remain the same but will be renumbered (14) and (15)."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, 23-4-201, MCA

REASON: The proposed new language in (2) will once again require proof of workers' compensation insurance coverage for employees of the occupational license categories listed, as required by Montana law, and also require the payment of appropriate workers' compensation fees to fund the industry's liability, as per the agreement between the board and the state fund for the 1994 race season. The proposed amendment to (12) will make duplicate licenses, minor and spouse license language consistent with the previous rule change to ARM 8.22.503.

"8.22.704 GROOMS ~~AND HOTWALKERS~~ (1) Each groom ~~and hotwalker~~ shall obtain a license from the board before acting in any capacity as groom ~~or hotwalker~~ on the grounds of a race meeting."

Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed deletion of "hotwalkers" from the title and rule language will be consistent with the elimination of this category as a licensing category. The position no longer exists at the track since the use of mechanical walkers has become common.

"8.22.705 JOCKEYS (1) through (14) will remain the same.

(15) A jockey must wear a safety vest when riding in any official race. The safety vest shall weigh no more than two pounds and shall be designed to provide shock absorbing protection to the upper body of at least a rating of five as defined by the British equestrian trade association (BETA).

(16) The weight of the safety vest shall not be included in the jockey's weight.

(15) through (42) will remain the same but will be renumbered (17) through (44)."

Auth: Sec. 23-4-104, 23-4-202, MCA; Sec. 23-4-104, 23-4-201, MCA

REASON: The proposed new language at (15) and (16) will require the use of a safety vest by all jockeys in all races in an effort to make racing safer for the riders, and lower liability costs. The language will clarify standards for the

safety vests, and reiterate that the weight of the vest will not be included in the jockey's weight.

"8.22.707 OWNERS (1) through (8) will remain the same.
(9) No owner shall ~~employ~~ compensate a jockey for the purpose of preventing him from riding in any race.
(10) through (13) will remain the same."
Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed amendment to (9) will clarify that jockeys are not usually considered employees of an owner, but will retain the meaning of the subsection which does not allow compensation to a jockey for preventing him from riding.

"8.22.803 DECLARATIONS AND SCRATCHES (1) No horse shall be considered scratched or declared out of an engagement until the trainer or his authorized agent ~~or some person deputized by him~~ shall have given due notice in writing to the racing secretary before the time stipulated by the regulations of the licensee.
(2) through (8) will remain the same."
Auth: Sec. 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed amendment to (1) will delete the reference to a person deputized to give notice of a scratch, as only the trainer or authorized agent should have this authority. The phrase "or some person deputized" is so vague as to be capable of all possible interpretations.

"8.22.804 CLAIMING (1) In claiming races any horse is subject to claim for its entered price by an owner ~~registered in good faith~~ whose horse's papers have been entered in the race office for racing at that meeting or by a licensed authorized agent for the account of such owner, provided however, that no person shall claim his own horse, or cause his horse to be claimed directly or indirectly for his own account.
~~(2) No person shall claim more than one horse in any race.~~
(3) through (13) will remain the same but will be renumbered (2) through (12).
~~(14) Any information concerning a claim shall not be divulged by any licensed person to anyone other than the stewards or their designated representatives until after the race has been run.~~
(15) through (27) will remain the same but will be renumbered (13) through (25)."
Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed amendment to (1) will delete the broadly-interpreted phrase "in good faith" and substitute language making it clear that the horse's papers must be in the race office so the present confusion over whether an owner's horse must have already run, or just be entered for a later race, will be alleviated. The proposed amendment to (2)

will delete the unnecessary prohibition on a person claiming more than one horse in any race, as there is no basis in safety or other regulation for this prohibition. The proposed amendment to (14) will delete the subsection entirely, as previous subsection (13) and subsequent subsection (19) already adequately protect against abuses of the claiming system by advance word being given out, or side agreements or other tactics being used to keep horses out. The present (14) is also unenforceable, as it prohibits even casual conversations among licensees, which are held with no ulterior purposes.

"8.22.806 PADDOCK TO POST (1) through (10) will remain the same.

(11) No person other than the rider~~, starter, or assistant starter~~ shall be permitted to strike a horse, or attempt by shouting or otherwise to assist it in getting a start.

(12) will remain the same."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed amendment to (11) will establish the prohibition on starters or assistant starters attempting to assist a horse in getting a start, and thus encouraging attempts to influence the use of that particular assistant starter with a particular horse in a race.

"8.22.1402 PERMISSIBLE MEDICATION (1) through (3) will remain the same.

(4) The ~~track~~ state veterinarian shall approve phenylbutazone drug requests only if, in the exercise of ~~his or her~~ the veterinarian's professional judgment, a need for the use of the drug for the treatment of the particular horse's injury or disease has been satisfactorily demonstrated. In arriving at the decision, the ~~track~~ state veterinarian may take into account, and rely upon, a written professional diagnosis made by a qualified veterinarian duly licensed by the board.

(5) Approved medication may be discontinued with written permission of the ~~track~~ state veterinarian on a medication request form after a minimum of thirty (30) days from the time that permission to medicate was initially granted. Otherwise, approval will expire on December 31 of the year in which it is approved.

(6) and (7) will remain the same.

(8) A horse which, during a race or following a race, or which, during exercise or following exercise, is found to be hemorrhaging from one or both nostrils or is found to have bled into its trachea is eligible to be placed on a bleeder list and treated on race day to prevent bleeding during its race. In order to obtain authorization for race day treatment of the bleeder, the horse's trainer must obtain a certificate of examination from the ~~track~~ state veterinarian and have the horse placed on the official bleeder list. The ~~track~~ state veterinarian must, by examination, and/or in consultation with

the stewards, establish that the horse did in fact hemorrhage from one or both nostrils or that an endoscopic examination in the test barn or receiving barn showed observable amounts of free blood in the horse's respiratory tract. When confirmed by the ~~track~~ state veterinarian, the horse shall be placed on the bleeder list which is maintained by the ~~track~~ state veterinarian. Once on the list, a horse may be removed from the bleeder list only upon the direction of the ~~track~~ state veterinarian, who must certify in writing to the board his recommendation for removal of the horse from the list. Bleeder lists will apply to horses listed at all tracks on a statewide basis.

(9) A horse on a bleeder list cannot be treated within four hours prior to post time with furosemide (lasix). No other medication may be administered for bleeder treatment. Bleeder medication must be administered in the manner approved by the ~~track~~ state veterinarian. Oral administration of furosemide (lasix) is not permitted for such purpose. Permitted bleeder medication shall be administered by the horse's regular veterinarian, and shall be witnessed by the ~~track~~ state veterinarian, or his designee, at a place designated by the ~~track~~ state veterinarian.

(10) A bleeder shipped into Montana from another racing jurisdiction must conform to Montana rules. However, a horse on a bleeder list in another racing jurisdiction may be placed on the Montana bleeder list, provided that a current certificate from the jurisdiction in which it was first placed on a bleeder list is presented to the ~~track~~ state veterinarian and, provided further that it is approved by the ~~track~~ state veterinarian.

(11) No horses may be entered into races under the influence of phenylbutazone or furosemide unless the trainer and veterinarian of the horse submits to the ~~track~~ state veterinarian a drug request form and obtain written approval from the ~~track~~ state veterinarian. The board shall publish and supply the appropriate drug request form and a copy of the established procedures shall be posted in the office of the racing secretary. The drug request form shall include provision for the following:

(a) through (d) will remain the same.

(e) a place for the signature of trainer and veterinarian attending the horse and the board approved ~~track~~ state veterinarian.

(12) through (20) will remain the same.

(21) A fee approved by the board will be assessed against each horse on the medication list before the horse is allowed to run. Phenylbutazone fees will be held by the board to be used for costs associated with annual organization and presentation of racing industry seminars put on by the board. All other medication fees ~~This fee~~ will be divided between the track and the board for administration and regulation of this rule. The fee will be used to offset additional testing costs, veterinarian costs and board regulation costs."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, MCA

REASON: The proposed amendment to (4), (5), (8), (9), (10), and (11) will standardize the use of the title as "state" rather than "track" veterinarian, for consistency with a previous rule change to the title for that official position. The proposed amendment to (21) will distinguish between the use of the phenylbutazone fees, and the use of other medication fees, so that the phenylbutazone money may be set aside for the board's presentation of an annual seminar for the racing industry.

"8.22.1501 GENERAL PROVISIONS (1) through (12) will remain the same.

(13) No owner or trainer shall ~~employ~~ compensate a jockey for the purpose of preventing him from riding in any race.

(14) through (32) will remain the same."

Auth: Sec. 23-4-104, 23-4-202, MCA; IMP, Sec. 23-4-104, 23-4-106, 23-4-202, MCA

REASON: The proposed amendment to (13) will clarify that jockeys are not usually considered employees of an owner, to be consistent with the rule change to ARM 8.22.707 above.

3. Interested persons may submit their data, views or arguments concerning the proposed amendments in writing to the Board of Horse Racing, 1520 East Sixth Avenue, Room 50, P.O. Box 200512, Helena, Montana 59620-0512, to be received no later than 5:00 p.m., April 14, 1994.

4. If a person who is directly affected by the proposed amendments wishes to present his data, views or arguments orally or in writing at a public hearing, he must make written request for a hearing and submit the request along with any comments he has to the Board of Horse Racing, 1520 East Sixth Avenue, Room 50, P.O. Box 200512, Helena, Montana 59620-0512, to be received no later than 5:00 p.m., April 14, 1994.

5. If the Board receives requests for a public hearing on the proposed amendments from either 10 percent or 25, whichever is less, of those persons who are directly affected by the proposed amendments, from the Administrative Code Committee of the legislature, from a governmental agency or subdivision or from an association having no less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those persons directly affected has been determined to be 70 based on the 700 licensees in Montana.

BOARD OF HORSE RACING
MALCOLM ADAMS, CHAIRMAN

BY: _____

ANNIE M. BARTOS
RULE REVIEWER

ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

Certified to the Secretary of State, March 7, 1994.

BEFORE THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
OF THE STATE OF MONTANA

| | |
|---|---|
| In the matter of the amendment of rules 16.44.303, 304, 330, 351, 402, 430 and 505, concerning hazardous waste management, and the adoption of new rule I dealing with the use of used oil as a dust suppressant | NOTICE OF PUBLIC HEARING FOR PROPOSED AMENDMENT OF RULES AND ADOPTION OF NEW RULE I<br><br>(Solid & Hazardous Waste) |

To: All Interested Persons

1. On Monday, April 11, 1994, at 9:00 AM, the department will hold a public hearing in Room C209 of the Cogswell Building, 1400 Broadway, Helena, Montana, to consider the amendment and adoption of the above-captioned rules.

2. The rules, as proposed, appear as follows (new material in the rules to be amended is underlined; material to be deleted is interlined):

NEW RULE I USED OIL AS DUST SUPPRESSANT PROHIBITED

(1) For purposes of this rule, the following definitions apply:

(a) "Used oil" means any oil that has been refined from crude oil, or any synthetic oil, that has been used and as a result of such use is contaminated by physical or chemical impurities. The term includes materials derived from used oil and mixtures of used oil and waste materials or products.

(b) "Household 'do-it-yourselfer' used oil" means oil that is derived from households, such as used oil generated by individuals who generate used oil through the maintenance of their personal vehicles.

(c) "Household 'do-it-yourselfer' used oil generator" means an individual who generates household 'do-it-yourselfer' used oil.

(2) Except as otherwise provided in (3), no person may apply used oil as a dust suppressant.

(3) This rule does not apply to household "do-it-yourselfer" used oil generators and farmers who generate in a calendar year an average of 25 gallons per month or less of used oil from vehicles or machinery used on the farm.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.44.303 DEFINITION OF HAZARDOUS WASTE (1) A waste, as defined in ARM 16.44.302, is a hazardous waste if:

(a) it is not excluded from regulation as a hazardous waste under ARM 16.44.304(1)(a) ~~and (c), and 16.44.304(2)(a)-(g)~~, (1)(e), or (2); and

(b) Remains the same.

(2)-(4) Remain the same.
AUTH: 75-10-405, MCA; IMP: 75-10-403, 75-10-405, MCA

16.44.304 EXCLUSIONS (1) Remains the same.
(2) The following are not subject to regulation under this chapter but may be subject to regulation under the provisions of ARM Title 16, chapter 14:
(a)-(e) Remain the same.
(f) waste which consists of discarded arsenical-treated wood or wood products which fails the test for the toxicity characteristic for hazardous waste codes ~~D007~~ D004-D017 and which is not a hazardous waste for any other reason, if the waste is generated by persons who utilize the arsenical-treated wood and wood products for these materials' intended end use;
(g)-(j) Remain the same.
(3) Remains the same.
(4) The following provisions apply to samples collected for the purpose of treatability studies as defined in ARM 16.44.202:
(a) Remains the same.
(b)(i)-(iv) Remain the same.
(v) The generator or sample collector maintains the following records for a period ending 3 years after completion of the treatability study:
(A) Copies of the shipping documents;
(B) A copy of the contract with the facility conducting the ~~feasibility~~ treatability study;
(C) Remains the same.
(vi) Remains the same.
(c)-(d) Remain the same.
(5) Remains the same.
AUTH: 75-10-405, MCA; IMP: 75-10-403, 75-10-405, MCA

16.44.330 LISTS OF HAZARDOUS WASTES -- GENERAL
(1) Remains the same.
(2) The basis for listing the classes or types of wastes listed in ARM 16.44.331-16.44.333 will be indicated by employing one or more of the following hazard codes:
(a) Remains the same.
(b) ARM 16.44.352 identifies the constituent which caused the waste to be listed as a toxicity characteristic waste (E) or toxic waste (T) in ARM 16.44.331 and 16.44.332.
(3)-(4) Remain the same.
AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.351 REPRESENTATIVE SAMPLING METHODS; TOXICITY CHARACTERISTIC LEACHING PROCEDURE; CHEMICAL ANALYSIS TEST METHODS; AND TESTING METHODS (1) For the purposes of this chapter, the department hereby adopts and incorporates herein by reference the following (the correct CFR edition is listed in ARM 16.44.102):
(a)-(c) Remain the same.

(d) Appendix X of 40 CFR Part 261 which sets forth analytical procedures for chlorinated dibenzo-p-dioxins and dibenzofurans; ~~and~~

(e) "ASTM Standard Test Method for Analysis of Reformed Gas by Gas Chromatography," ASTM Standard D 1946-82;

(f) "ASTM Standard Test Method for Heat of Combustion of Hydrocarbon Fuels by Bomb Calorimeter (High-Precision Method)," ASTM Standard D 2382-83;

(g) "ASTM Standard Practices for General Techniques of Ultraviolet-Visible Quantitative Analysis," ASTM Standard E 169-87;

(h) "ASTM Standard Practices for General Techniques of Infrared Quantitative Analysis," ASTM Standard E 168-88;

(i) "ASTM Standard Practice for Packed Column Gas Chromatography," ASTM Standard E 260-85;

(j) "ASTM Standard Test Method for Aromatics in Light Naphthas and Aviation Gasolines by Gas Chromatography," ASTM Standard D 2267-88;

(k) "ASTM Standard Test Method for Vapor Pressure-Temperature Relationship and Initial Decomposition Temperature of Liquids by Isoteriscope," ASTM Standard D 2879-86;

(l) "APTI Course 415: Control of Gaseous Emissions," EPA Publication EPA-450/2-81-005, December 1981, which contains fundamental concepts of operation of equipment and techniques to control gaseous emissions from stationary sources;

~~(e)(i)~~(m) "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", second edition as amended by Update I (April 1984) and Update II (April 1985), an EPA publication setting forth standard sampling, extraction, and analytical test methods for the national hazardous waste program (NTIS document number PB87-120-291)~~,~~; and

~~(ii)~~(n) "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", EPA Publication SW-846, third edition (November 1986) as amended by Revision I (December 1987), an EPA publication setting forth standard sampling, extraction, and analytical test methods for the national hazardous waste program (document number 955-001-00000-1). The third edition of SW-846 contains 47 analytical testing methods (listed in 40 CFR 260.11) which are not contained in the second edition of this document.

(2) ~~A copy of Appendix I, Appendix II, Appendix III, and Appendix X of 40 CFR Part 261 and "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", second and third edition,~~ Copies of the appendices and publications listed in (1) may be obtained (at established copying charges) from the Solid and Hazardous Waste Bureau, Department of Health and Environmental Sciences, Cogswell Building, Helena, Montana 59620.
AUTH: 75-10-405, MCA; IMP: 75-10-405, MCA

16.44.402 HAZARDOUS WASTE DETERMINATION; APPLICABILITY OF RULES TO GENERATOR CATEGORIES; SPECIAL REQUIREMENTS FOR CONDITIONALLY EXEMPT SMALL QUANTITY GENERATORS (1)-(4) Remain the same.

(5) The following special requirements apply to a conditionally exempt small quantity generator:

(a)-(c) Remain the same.

(d) If a conditionally exempt generator's hazardous wastes are mixed with used oil and if the mixture is destined to be burned for energy ~~recovery or further blended for eventual energy~~ recovery, the mixture is subject to subpart E of 40 CFR Part 266 (incorporated by reference in ARM 16.44.306(5)). Any material produced from such a mixture by processing, blending, or other treatment is also so regulated if it is destined to be burned for energy recovery.

(e) The hazardous waste of a conditionally exempt generator may not be used for dust suppression or road treatment. If these hazardous wastes ~~(except for wastes identified as hazardous solely on the basis of ignitability)~~ are mixed with used oil or with other materials, the resultant mixture is likewise prohibited from use in dust suppression or road treatment.

AUTH: 75-10-204, 75-10-405, MCA; IMP: 75-10-204, 75-10-405, MCA

16.44.430 FARMERS (1) A farmer disposing of waste pesticides from his own use which are hazardous wastes is not required to comply with the standards in this subchapter or in 40 CFR Part 268 (incorporated by reference in ARM 16.44.129) for those wastes provided he triple rinses each emptied pesticide container in accordance with ARM 16.44.307(5) and disposes of the pesticide residues on his own farm in a manner consistent with the disposal instructions on the pesticide label.

AUTH: 75-10-204, MCA; IMP: 75-10-204, MCA

16.44.505 MANIFEST SYSTEM (1)-(4) Remain the same.

(5) The requirements of sections (3), (4), and (6) of this rule do not apply to ~~rail or~~ water (bulk shipment) transporters if:

(a)-(c) Remain the same.

(d) the person delivering the hazardous waste to the initial water (bulk shipment) transporter obtains the date of delivery and signature of the ~~rail or~~ water (bulk shipment) transporter on the manifest and forwards it to the designated facility; and

(e) Remains the same.

(6) For shipments involving rail transportation, the requirements of paragraphs (3), (4), and (5) do not apply and the following requirements do apply:

(a) When accepting hazardous waste from a non-rail transporter, the initial rail transporter must:

(i) Remains the same.

(ii) Remains the same.

(iii) forward at least three copies of the manifest to:

(A) the next non-rail transporter, if any; or,

(B) the designated facility, if the shipment is delivered to that facility by rail; or

(C) the last rail transporter ~~designed~~ designated to handle the waste in the United States;

(iv) Remains the same.
(b)-(e) Remain the same.
(7)-(8) Remain the same.
AUTH: 75-10-404, 75-10-405, MCA; IMP: 75-10-405, MCA

3. The department is proposing the new rule in order to prohibit the use of used oil as a dust suppressant. The department believes the new rule is necessary in order to protect public health and safety. The department is proposing the amendments to the existing rules in order to make technical corrections and to maintain consistency with Federal EPA standards. Maintaining consistency with the Federal standards enables the State of Montana to retain "primacy" under the Federal Resource Conservation and Recovery Act to operate the State hazardous waste program in lieu of the Federal hazardous waste program.

4. Interested persons may submit their data, views, or arguments concerning the proposed amendments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted to Mark Stahly, Department of Health and Environmental Sciences, Cogswell Building, Capitol Station, Helena, Montana 59620, no later than Friday, April 15, 1994.

5. Mark Stahly has been designated to preside over and conduct the hearing.

ROBERT J. ROBINSON, Director

Certified to the Secretary of State March 7, 1994.

Reviewed by:

Eleanor Parker, DHES Attorney

BEFORE THE TEACHERS' RETIREMENT BOARD
OF THE STATE OF MONTANA

| | |
|---|---|
| In the matter of the adoption of new rule relating to adjusting disability allowances, amending Rules 2.44.405 and 2.44.407 relating to the Teachers' Retirement System | NOTICE OF ADOPTION OF PROPOSED NEW RULE AND AMENDMENT OF RULES RELATING TO THE TEACHERS' RETIREMENT SYSTEM |

TO: All Interested Persons.

1. On December 9, 1993, the Teachers' Retirement Board published notice of a public hearing on the proposed adoption of the above new rules concerning the Teachers' Retirement System in Administrative Register, Issue number 23, starting at page 2858 and inclusive of page 2860.

2. On January 5, 1994 at 10:00 a.m. at the Teachers' Retirement System, 1500 Sixth Avenue, Helena, Montana, a public hearing was held pursuant to the December 9, 1993 notice. No one attended the hearing.

3. The following comments were received by the Board:

COMMENTS: A staff member of the Legislative Council commented that the rationale for each rule noticed needed to state why the rule is necessary.

RESPONSE: Rule I, The Board recently review a case where the earnings of a disability annuitant exceeded the maximum allowed under 19-20-904, MCA. The statute did not provide clear guidance on how to calculate and recover benefits that had been overpaid. This rule is necessary to provide guidance and notice to members on how much they may earn and continue to receive benefits.

RESPONSE: Rule 2.44.450, Under the provisions of 19-20-501, MCA., the board is required to annually establish the rate of regular interest. This rate is credited to member accounts and is the same rate members pay to purchase additional service. Interest is credited to member accounts monthly, compounded annually, while interest is charged on unpaid balance due to purchase additional service only once a year. The board has a fiduciary duty to set a rate that is fair to both the members and the system. The change in this rule is necessary to charge interest on the purchase of additional service in the same manner as interest is credited to member accounts.

RESPONSE: Rule 2.44.407, A member of the TRS recently asked to purchase private teaching service for employment in a special

purpose school. It is necessary to amend this rule to make clear that members may purchase service for private teaching service in a special purpose school.

4. The Teachers' Retirement Board has adopted the proposed rules as noticed.

5. The new rule which has been adopted will be numbered as follows: Rule I ARM 2.44.524

By:

Dal Smilie, Chief Legal Counsel
Rule Reviewer

David L. Senn, Administrator
Teachers' Retirement System

Certified to the Secretary of State February 28, 1994

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

| | |
|---|---|
| In the matter of the amendment of ARM 4.5.202 and 4.5.203 relating to noxious weeds. | ) NOTICE OF AMEND-<br>) MENT of ARM 4.5.202<br>) and 4.5.203 relating to<br>) Category 1 Noxious Weeds |

TO: All Interested Persons

1. On January 27, 1994, the Department of Agriculture published a notice of proposed amendment of the above stated rule at page 93 of the 1994 Montana Administrative Register, issue no. 2.

2. The department has adopted the rules as proposed.

3. No comments were received.

LEO A. GIACOMETTO, DIRECTOR
DEPARTMENT OF AGRICULTURE

TIMOTHY J. MELOY, ATTORNEY
RULE REVIEWER

Certified to the Secretary of State this 28th day of February, 1994

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the adoption of emergency rules allowing credit to domestic ceding insurers and reduction of liability for reinsurance ceded by domestic insurers to assuming insurers. | ) ) ) ) ) | NOTICE OF EMERGENCY ADOPTION |

To: All Interested Persons.

1. Montana insurers are required by law to establish liabilities for their unpaid losses and claims on their balance sheets. Because the size of some of the claims incurred by these insurers is larger than the insurers could safely handle with their own resources, insurers obtain reinsurance which relieves them of all, or a sizable portion of, the loss liability.

Insurers need to be able to take credit on their balance sheets for reinsurance coverage obtained which they are unable to do for reinsurance contracts entered into after April 1, 1993.

The inability of a Montana insurer to take reinsurance credit could cause its surplus (net worth) to fall below the minimum statutory requirement for continuation of its license. When that happens, the commissioner of insurance is statutorily required to take steps pursuant to Title 33, Chapter 2, Part 13, MCA, to obtain an order to put an offending insurer under rehabilitation. This action by the commissioner could have a serious adverse impact on insurers and their policyholders in Montana. The rules allow reinsurance credit prospectively so that insurers can maintain their sound financial condition on their balance sheets.

The NAIC imposes, as an accreditation requirement on the state of Montana, that credit be allowed domestic ceding insurers prospectively. The consequences of failure to take this action will result in all domestic ceding insurers being subject to expensive and detailed financial audits in every state in which they do business. This could imperil the public by depriving them of access to such insurance or could materially endanger the coverage provided to current policyholders.

2. The emergency rules will be effective immediately.

3. The text of the emergency rules are as follows:

NEW RULE I CREDIT ALLOWED DOMESTIC CEDING INSURERS

(1) Credit for reinsurance is allowed to a domestic ceding insurer as either an asset or a deduction from

liability on account of reinsurance ceded only when the reinsurer meets the requirements of (2), (3), (4), (5), or (6). If the requirements of (4) or (5) are met, the requirements of (7) must also be met.

(2) Credit must be allowed when the reinsurance is ceded to an assuming insurer that is licensed to transact insurance or reinsurance in this state.

(3) Credit must be allowed when the reinsurance is ceded to an assuming insurer that is accredited as a reinsurer in this state. Credit may not be allowed a domestic ceding insurer if the assuming insurer's accreditation has been revoked by the commissioner after notice and hearing. An accredited reinsurer is one that:

(a) files with the commissioner evidence of its submission to this state's jurisdiction;

(b) submits to this state's authority to examine its books and records;

(c) is licensed to transact insurance or reinsurance in at least one state or, in the case of a United States branch of an alien assuming insurer, is entered through and licensed to transact insurance or reinsurance in at least one state;

(d) files annually with the commissioner a copy of its annual statement filed with the insurance department of its state of domicile and a copy of its most recent audited financial statement and either:

(i) maintains a surplus with regard to policyholders in an amount that is not less than $20 million and whose accreditation has not been denied by the commissioner within 90 days of its submission; or

(ii) maintains a surplus with regard to policyholders in an amount less than $20 million and whose accreditation has been approved by the commissioner.

(4) Subject to (4)(c), credit must be allowed when:

(a) the reinsurance is ceded to an assuming insurer that is domiciled and licensed in or, in the case of a United States branch of an alien assuming insurer, is entered through a state that employs standards regarding credit for reinsurance substantially similar to those applicable under this statute; and

(b) the assuming insurer or the United States branch of an alien assuming insurer:

(i) maintains a surplus with regard to policyholders in an amount not less than $20 million; and

(ii) submits to the authority of this state to examine its books and records.

(c) The requirement of (4)(b)(i) does not apply to reinsurance ceded and assumed pursuant to pooling arrangements among insurers in the same holding company system.

(5) Credit must be allowed when the reinsurance is ceded to an assuming insurer that maintains a trust fund in a qualified United States financial institution for the payment of the valid claims of its United States policyholders and ceding insurers and their assigns and successors in interest. The assuming insurer shall report annually to the commissioner

information substantially the same as that required to be reported on the NAIC annual statement form by licensed insurers to enable the commissioner to determine the sufficiency of the trust fund.

(a) In the case of a single assuming insurer, the trust must consist of a trusteed account representing the assuming insurer's liabilities attributable to business written in the United States, and in addition, the assuming insurer shall maintain a surplus with the trustee of not less than $20 million.

(b) In the case of a group of individual unincorporated underwriters, the trust must consist of a trusteed account representing the group's liabilities attributable to business written in the United States, and in addition, the group shall maintain a surplus with the trustee of which $100 million must be held jointly for the benefit of United States ceding insurers of any member of the group. The group shall make available to the commissioner an annual certification of the solvency of each underwriter by the group's domiciliary regulator and its independent public accountants.

(c) In the case of a group of incorporated insurers under common administration:

(i) the provisions of (5)(c)(ii), (iii) and (iv) apply, to the group that:

(A) complies with the reporting requirements contained in (5);

(B) has continuously transacted an insurance business outside the United States for at least 3 years immediately prior to making application for accreditation;

(C) submits to this state's authority to examine its books and records and bears the expense of the examination; and

(D) has aggregate policyholders' surplus of $10 billion;

(ii) the trust must be in an amount equal to the group's several liabilities attributable to business ceded by United States ceding insurers to any member of the group pursuant to reinsurance contracts issued in the name of the group;

(iii) the group shall also maintain a joint surplus with a trustee of which $100 million is held jointly for the benefit of United States ceding insurers of any member of the group as additional security for any liabilities; and

(iv) each member of the group shall make available to the commissioner an annual certification of the member's solvency by the member's domiciliary regulator and its independent public accountant.

(d) The trust must be established in a form approved by the commissioner. The trust instrument must provide that contested claims are valid and enforceable upon the final order of any court of competent jurisdiction in the United States. The trust must vest legal title to its assets in the trustees of the trust for its United States policyholders and ceding insurers and their assigns and successors in interest. The trust and the assuming insurer are subject to examination as determined by the commissioner. The trust described in

this provision must remain in effect for as long as the assuming insurer has outstanding obligations due under the reinsurance agreements subject to the trust.

(e) No later than February 28 of each year, the trustees of the trust shall report to the commissioner in writing setting forth the balance of the trust and listing the trust's investments at the end of the preceding year. The trustees shall certify the date of termination of the trust, if planned, or certify that the trust may not expire prior to the following December 31.

(6) Credit must be allowed when the reinsurance is ceded to an assuming insurer that does not meet the requirements of (2), (3), (4), or (5) but only with respect to the insurance of risks located in a jurisdiction in which the reinsurance is required by applicable law or regulation of that jurisdiction.

(7) If the assuming insurer is not licensed or accredited to transact insurance or reinsurance in this state, the credit permitted by (4) and (5) may not be allowed unless the assuming insurer agrees in the reinsurance agreements:

(a) that in the event of the failure of the assuming insurer to perform its obligations under the terms of the reinsurance agreement, the assuming insurer, at the request of the ceding insurer, will:

(i) submit to the jurisdiction of any court of competent jurisdiction in any state of the United States;

(ii) comply with all requirements necessary to give the court jurisdiction;

(iii) abide by the final decision of the court or of any appellate court in the event of an appeal; and

(iv) designate the commissioner or a designated attorney as its attorney upon whom may be served any lawful process in any action, suit, or proceeding instituted by or on behalf of the ceding company.

(b) Subsection (7)(a) is not intended to conflict with or override the obligation of the parties to a reinsurance agreement to arbitrate their disputes if an obligation is created in the agreement.

AUTH: 33-1-313 and 33-2-1517, MCA
IMP: 33-2-1216, MCA

NEW RULE II REDUCTION OF LIABILITY FOR REINSURANCE CEDED BY DOMESTIC INSURER TO ASSUMING INSURERS (1) A reduction from liability for the reinsurance ceded by a domestic insurer to an assuming insurer not meeting the requirements of NEW RULE I must be allowed in an amount not exceeding the liabilities carried by the ceding insurer. The reduction must be in the amount of funds held by or on behalf of the ceding insurer, including funds held in trust for the ceding insurer:

(a) under a reinsurance contract with the assuming insurer as security for the payment of obligations under the contract if the security is held in the United States subject to withdrawal solely by and under the exclusive control of the ceding insurer; or

(b) in the case of a trust, in a qualified United States financial institution.

(c) Securities under this rule may be in the form of:

(i) cash;

(ii) securities listed by the securities valuation office of the NAIC and qualifying as admitted assets;

(iii) clean, irrevocable, unconditional letters of credit that are issued or confirmed by a qualified United States financial institution no later than December 31 of the year for which filing is being made and that are in the possession of the ceding company on or before the filing date of its annual statement. Letters of credit meeting applicable standards of issuer acceptability as of the dates of their issuance or confirmation must, notwithstanding the issuing or confirming institution's subsequent failure to meet applicable standards of issuer acceptability, continue to be acceptable as security until their expiration, extension, renewal, modification, or amendment, whichever occurs first.

(iv) any other form of security acceptable to the commissioner.

AUTH: 33-1-313 and 33-2-1517, MCA
IMP: 33-2-1217, MCA

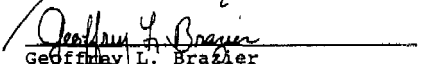
4. The rationale for the emergency rule is as set forth in paragraph 1.

5. A standard rulemaking procedure will be undertaken prior to the expiration of these emergency rules.

6. Interested persons are encouraged to submit their comments during the upcoming standard rulemaking process. If interested persons wish to be personally notified of that rulemaking process, they should submit their names and addresses to Gary Spaeth, Chief Counsel, State Auditor's Office, Mitchell Building, P.O. Box 4009, Helena, MT 59604.

Mark O'Keefe
State Auditor and
Commissioner of Insurance

By 



Geoffrey L. Brazier
Rules Reviewer

Certified to the Secretary of State this 23 day of February, 1994.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the Matter of the Proposed Adoption and Amendment of Rules to Exempt Certain Foreign Securities from Registration and to Require that Exempt Foreign Savings and Loan Associations be Members of the Federal Deposit Insurance Corporation and that their Certificates of Deposit be Fully Insured by the Federal Deposit Insurance Corporation. | ) | **NOTICE OF AMENDMENT AND ADOPTION** |

To: All Interested Persons:

1. On January 27, 1994, the State Auditor and Securities Commissioner of the state of Montana published notice of the proposed adoption and amendment of rules to exempt certain foreign securities from registration and to require that exempt foreign savings and loan association be members of the Federal Deposit Insurance Corporation and that their certificates of deposit be fully insured by the Federal Deposit Insurance Corporation at page 95 of the 1994 Montana Administrative Register, issue number 2.

2. The agency has amended ARM 6.10.125 and adopted NEW RULE II (ARM 6.10.132) as proposed.

3. The agency has amended ARM 6.10.102 with the following changes (new material underlined):

6.10.102 DEFINITIONS As used in this sub-chapter, unless the context indicates otherwise: (1) and (2) same as proposed

(3) "American depository receipt" is a negotiable certificate issued by a U.S. depository pursuant to an effective registration statement filed on form F-6 with the securities and exchange commission, representing the securities of a non-U.S. company, which securities are held in custody by a custodian in the United States or in the company's country of domicile or a similar type of receipt or instrument issued with respect to a security, which receipt or instrument has been approved for sale by order of the commissioner.

(4) through (9) same as proposed

4. The agency has adopted Rule I (ARM 6.10.131) with the following changes (new matter underlined; stricken material interlined):

NEW RULE I (6.10.131) FOREIGN SECURITY EXEMPTION

(1) through (1)(a)(ii)(A) same as proposed.

(B) The issuer of the security has a class of securities subject to the reporting requirements of Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. 78m or Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(d)

and is not delinquent in such reporting; ~~or~~

(C) The security is exempted from the provisions of Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. 781(g) by Section 12(g)(3) of that Act, 15 U.S.C. 781(g)(3), and the issuer is in compliance with all of the conditions of 17 CFR 240.12g3-2(b)(1) ~~.~~; or

(D) The security is approved for margin by the federal reserve board.

(iii) This exemption is not available unless all of the following requirements are met:

(A) The issuer, including any predecessors, has been in continuous operation for at least the preceding 2 years, is a going concern actually engaged in business and is not in an organizational or developmental stage, and is not in bankruptcy or receivership; and

(B) The issuer has net tangible assets of at least U.S. $25,000,000 as of the date of its most recent externally audited financial statement prepared in accordance with U.S. or foreign GAAP. Such statement shall be dated as of a date within 18 months of the date of the transaction; and

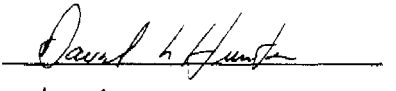
(C) The issuer had an average gross operating revenue of at least U.S. $5,000,000 or average net income after taxes of at least $1,000,000 over its most recent 2 consecutive years of operation according to audited profit and loss statements of the issuer prepared in accordance with U.S. or foreign GAAP for the issuer's two fiscal years immediately preceding the date of the financial statement referred to in (B); and

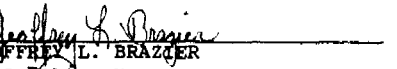
(1)(a)(iii)(D) through (b) same as proposed.

AUTH: 30-10-107, MCA IMP: 30-10-104 and 30-10-107, MCA

5. No public hearing was contemplated or held in this matter. However, the agency did receive written comments from Fried, Frank, Harris, Shriver & Jacobson, from Merrill Lynch, and from D. A. Davidson & Co., all supporting the proposals but suggesting the revisions adopted and incorporated herein, all of which were deemed appropriate and constructive.

MARK O'KEEFE
State Auditor and
Securities Commissioner

By: 



GEOFFREY L. BRAZZER
Rule Reviewer

Certified to the Secretary of State this 7th day of March, 1994.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the Matter of the Proposed Adoption and Amendment of Rules to Exempt Certain Foreign Securities from Registration and to Require that Exempt Foreign Savings and Loan Associations be Members of the Federal Deposit Insurance Corporation and that their Certificates of Deposit be Fully Insured by the Federal Deposit Insurance Corporation. | ) | **NOTICE OF AMENDMENT AND ADOPTION** |

To: All Interested Persons:

1. On January 27, 1994, the State Auditor and Securities Commissioner of the state of Montana published notice of the proposed adoption and amendment of rules to exempt certain foreign securities from registration and to require that exempt foreign savings and loan association be members of the Federal Deposit Insurance Corporation and that their certificates of deposit be fully insured by the Federal Deposit Insurance Corporation at page 95 of the 1994 Montana Administrative Register, issue number 2.

2. The agency has amended ARM 6.10.125 and adopted NEW RULE II (ARM 6.10.132) as proposed.

3. The agency has amended ARM 6.10.102 with the following changes (new material underlined):

6.10.102 DEFINITIONS As used in this sub-chapter, unless the context indicates otherwise: (1) and (2) same as proposed

(3) "American depository receipt" is a negotiable certificate issued by a U.S. depository pursuant to an effective registration statement filed on form F-6 with the securities and exchange commission, representing the securities of a non-U.S. company, which securities are held in custody by a custodian in the United States or in the company's country of domicile or a similar type of receipt or instrument issued with respect to a security, which receipt or instrument has been approved for sale by order of the commissioner.

(4) through (9) same as proposed

4. The agency has adopted Rule I (ARM 6.10.131) with the following changes (new matter underlined; stricken material interlined):

NEW RULE I (6.10.131) FOREIGN SECURITY EXEMPTION

(1) through (1)(a)(ii)(A) same as proposed.

(B) The issuer of the security has a class of securities subject to the reporting requirements of Section 13 of the Securities Exchange Act of 1934, 15 U.S.C. 78m or Section 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(d)

and is not delinquent in such reporting; ~~or~~

(C) The security is exempted from the provisions of Section 12(g) of the Securities Exchange Act of 1934, 15 U.S.C. 781(g) by Section 12(g)(3) of that Act, 15 U.S.C. 781(g)(3), and the issuer is in compliance with all of the conditions of 17 CFR 240.12g3-2(b)(1)~~.~~; or

(D) The security is approved for margin by the federal reserve board.

(iii) This exemption is not available unless all of the following requirements are met:

(A) The issuer, including any predecessors, has been in continuous operation for at least the preceding 2 years, is a going concern actually engaged in business and is not in an organizational or developmental stage, and is not in bankruptcy or receivership; and

(B) The issuer has net tangible assets of at least U.S. $25,000,000 as of the date of its most recent externally audited financial statement prepared in accordance with U.S. or foreign GAAP. Such statement shall be dated as of a date within 18 months of the date of the transaction; and

(C) The issuer had an average gross operating revenue of at least U.S. $5,000,000 or average net income after taxes of at least $1,000,000 over its most recent 2 consecutive years of operation according to audited profit and loss statements of the issuer prepared in accordance with U.S. or foreign GAAP for the issuer's two fiscal years immediately preceding the date of the financial statement referred to in (B); and

(1)(a)(iii)(D) through (b) same as proposed.

AUTH: 30-10-107, MCA IMP: 30-10-104 and 30-10-107, MCA

5. No public hearing was contemplated or held in this matter. However, the agency did receive written comments from Fried, Frank, Harris, Shriver & Jacobson, from Merrill Lynch, and from D. A. Davidson & Co., all supporting the proposals but suggesting the revisions adopted and incorporated herein, all of which were deemed appropriate and constructive.

MARK O'KEEFE
State Auditor and
Securities Commissioner

By: _____

_____
GEOFFREY L. BRAZIER
Rule Reviewer

Certified to the Secretary of State this 7th day of March, 1994.

BEFORE THE BOARD OF PHARMACY
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of a rule pertaining to fees and the adoption of new rules pertaining to out-of-state mail service pharmacies | ) ) ) ) | NOTICE OF AMENDMENT OF 8.40.404 FEE SCHEDULE AND THE ADOPTION OF NEW RULES PERTAINING TO OUT-OF-STATE MAIL SERVICE PHARMACIES |

TO: All Interested Persons:

1. On September 16, 1993, the Board of Pharmacy published a notice of proposed amendment and adoption of the above-stated rules, at page 2073, 1993 Montana Administrative Register, issue number 17.

2. A request for hearing on the rules was received, and a subsequent Notice of Public Hearing was published at page 2586, 1993 Montana Administrative Register, issue number 21. The hearing was held on December 15, 1993, at 9:00 a.m., in Helena, Montana, and oral testimony was received. Written testimony was accepted through the hearing date as well.

3. The Board has amended ARM 8.40.404 exactly as proposed. The Board has adopted new rules I (8.40.1601), III (8.40.1603), IV (8.40.1604), VII (8.40.1606) and VIII (8.40.1607) exactly as proposed. The Board has adopted new rules II (8.40.1602) and VI (8.40.1605) as proposed, but with the following changes. The Board will not adopt proposed new rule V.

"8.40.1602 AGENT OF RECORD (1) will remain the same as proposed.

(2) Any such out-of-state mail service pharmacy that does not so designate a ~~registered~~ RESIDENT agent and that ships, mails, or delivers prescription drugs and/or devices in the state of Montana shall be deemed an appointment by such out-of-state mail service pharmacy of the secretary of state to be its true and lawful attorney, upon whom may be served all legal process in any action or proceeding against such pharmacy growing out of or arising from such delivery.

(3) and (4) will remain the same as proposed."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, MCA

"8.40.1605 DISCIPLINARY ACTION (1) Except in emergencies that constitute an immediate threat to public health and require prompt action by the board, the Montana board of pharmacy shall file a complaint against any out-of-state mail service pharmacy that violates any statute or regulation of Montana with the board in which the out-of-state mail service pharmacy is located. If the board in the state in which the out-of-state mail service pharmacy is based fails to resolve the violation complained of within a reasonable time, (not less than ~~ninety~~ 180 WORKING days from the date that the complaint is filed), disciplinary proceedings may be instituted in Montana before the board."

Auth: Sec. 37-7-201, MCA; IMP, Sec. 37-7-703, 37-7-704, 37-7-711, MCA

4. The Board has thoroughly considered all comments and testimony received. Those comments, and the Board's responses thereto, are as follows:

New Rule III (8.40.1603)

COMMENT NO. 1: Three comments were received stating the requirement that all out-of-state mail service pharmacies register with the Secretary of State as a foreign corporation is beyond the scope of the statutes. That requirement is found at Title 2, Chapter 18, MCA, which pertains to Public Employee Health Plans covered by Chapter 2 only, and not all out-of-state pharmacies.

RESPONSE: The Board recognizes that this requirement is only found at a certain section of the statutes, but also recognizes that the authority to require this of all mail service pharmacy licensees already exists with the Board under their rule-making authority. It is within the scope of Board authority to require the foreign corporation registration for all mail service pharmacy licensees, in addition to other statutory sections which already require this of companies doing business within the state. Additionally, a problem would be created by implementing two different systems for the mail service program, whereby public employee health plan licensees would be required to register, and all others would not be required to register, thus creating tracking and other difficulties.

COMMENT NO. 2: One comment was received stating requiring registration as a foreign corporation is a reasonable requirement ensuring that out-of-state pharmacies will be available for court actions in Montana.

RESPONSE: The Board concurs with the comment, and will adopt the rule as proposed, with this requirement in place.

New Rule IV (8.40.1604)

COMMENT NO. 3: Ten comments were received stating it is unduly burdensome to require a pharmacy to comply with requirements of several states at once, as the requirements often contradict one another from state to state on matters such as formularies, generic drug dispensing, and multiple copy prescription control programs for Schedule II controlled substances.

RESPONSE: The Board noted that the out-of-state mail service pharmacies are already required to comply with several different states' laws because they are registered or licensed in several different states already. The Board does not wish to encourage the circumvention of laws in its own state, and so will require compliance with Montana laws and rules. However, the existing language of the rule already says: "unless compliance with [Montana laws] would violate the laws or regulations of the state in which the pharmacy is located,"

which language would recognize other state laws, and not require violation of them. If the out-of-state mail service pharmacies wish to do business in another state such as Montana, they should be willing to comply with that state's regulations, as do the in-state pharmacies. Finally, controlled substance regulation is already standardized in all states under Federal regulation.

COMMENT NO. 4: One comment was received stating compliance with all Montana laws and rules is necessary for out-of-state as well as in-state pharmacies for product selection, controlled substance schedules, and pharmacy regulation in general.

RESPONSE: The Board concurs with the comment and will adopt the rule as proposed, with this language in place.

PROPOSED NEW RULE V

COMMENT NO. 5: Six comments were received stating the requirement that out-of-state mail service pharmacies shall develop a policy and procedures manual is unnecessary; exceeds the statutory authority of the relevant statutes; and is constitutionally suspect. The rule would require competitors to share proprietary information, and cannot be supported by legitimate health and safety concerns.

RESPONSE: The Board concurs with the comment, as this is not a requirement of in-state pharmacies, and could create a problem with different treatment of out-of-state pharmacies. There is not currently a problem with mail service pharmacies that would necessitate this type of requirement. Also, the Board does not have the capacity to review the manuals submitted, and agrees with the comment that this would create a problem with release of confidential or proprietary information. The Board, therefore, will not adopt proposed rule V requiring policy and procedure manuals.

New Rule VI (8.40.1605)

COMMENT NO. 6: One comment was received stating the power granted in the rule to allow the Montana Board of Pharmacy to institute disciplinary action against an out-of-state mail service pharmacy is arbitrary, as it would permit the Board to institute the disciplinary action when it deems that another state hasn't taken effective action. This would be a denial of comity, since it allows the Board to substitute its judgement for that of another state without any particular factual or legal finding.

RESPONSE: The Board determined since the statutory authority to license was granted, the Board will also follow through with the ability to discipline that license in Montana. The proposed rule is in agreement with what Montana is trying to accomplish by licensing the out-of-state mail service pharmacies. Since the mail service pharmacies must meet

regulations in Montana, the rules need to be consistent and allow discipline of the license by the Montana Board for violation of those regulations.

COMMENT NO. 7: Three comments were received stating the ninety-day requirement for resolution by another state board of the violation is not sufficient for action by any other entity.

RESPONSE: The Board concurs with the comment and will amend the rule as shown above to state "180 working days," rather than "90 days."

New Rules I (8.40.1601) through VIII (8.40.1607)

COMMENT NO. 8: Seven comments were received stating the rules are constitutionally flawed in that they are in violation of the Interstate Commerce Clause of the U.S. Constitution. The rules do not state a specific local purpose which would allow consideration of an alternative to the clear burden on interstate commerce imposed by Article I, Section 8 of the U.S. Constitution.

RESPONSE: The Board's intent is to protect the public health, which is by definition its local purpose. The same arguments had been raised before the Legislature before the enactment and amendment of the statutes, and sufficient local purpose was found for requiring licensure of out-of-state mail service pharmacies.

COMMENT NO. 9: Eight comments were received stating the rules exceed the statutory authority in general because their effect is to set policy that is inconsistent with legislative intent. The rules instead promote the economic interests of the Montana Pharmaceutical Association, and do not further the public health and safety of Montana's consumers.

RESPONSE: The Board is implementing the Montana Legislature's intent in promulgating these rules, and is not trying to set policy for the state on its own. Since not all pharmacies belong to the Montana Pharmaceutical Association, the action is not merely protectionism. The Board is not requiring different actions or procedures by out-of-state mail service pharmacies than it requires of in-state pharmacies. The Board has amended the rules to delete different requirements for the two groups. It is necessary to have licensure and some control over the out-of-state mail service pharmacies for the protection of the public, as the Legislature has mandated.

COMMENT NO. 10: Three comments were received stating there is no authority for the Board to require a license or permit for nonresident pharmacies, but instead, should require licensure in the state where the pharmacy is located.

RESPONSE: The authority to license out-of-state mail service pharmacies exists in Section 37-7-703, MCA. Also, see response to Comment No. 9 above.

COMMENT NO. 11: One comment was received stating the Board should not limit the rules of out-of-state pharmacies which deliver by mail, but should include out-of-state community pharmacies near the Montana border who have Montana customers.

RESPONSE: All out-of-state pharmacies who mail into the state will be required to be licensed, if they can be identified. The rules do not differentiate between types of businesses performing this act, and all businesses who do will therefore be under the Board's rules. There is no statutory authority to license filling of prescriptions out-of-state, when the prescription is not mailed into the state.

COMMENT NO. 12: One comment was received stating the rules do not show an arbitrary and capricious disregard for documented legislative intent, which is the standard for determining whether legislative intent has been exceeded.

RESPONSE: The Board acknowledges receipt of this comment in support.

COMMENT NO. 13: One comment was received stating the full faith and credit and commerce clauses of the U.S. Constitution are not being violated by the rules, as Montana has a separate interest in regulating the health and safety of its residents.

RESPONSE: The Board acknowledges receipt of this comment in support.

COMMENT NO. 14: One comment was received stating the rules do not presume higher or lower negligence standards for out-of-state versus in-state pharmacies, but since the remedies are clear for in-state pharmacy negligence, the rules want to meet the same standards for out-of-state pharmacies.

RESPONSE: The Board acknowledges receipt of this comment in support.

COMMENT NO. 15: One comment was received stating institutions around the country are shipping to patients who happen to live in Montana, and are not presently required to be licensed.

RESPONSE: The Board will try to identify all entities which must be licensed. If an institution is identified as being under the rule, they must become licensed. Also, see response to No. 11 above.

BOARD OF PHARMACY
PATRICIA MITCHELL, PRESIDENT

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 7, 1994.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of a rule pertaining to income limits and loan amounts | ) ) ) | NOTICE OF AMENDMENT OF 8.111.405 INCOME LIMITS AND LOAN AMOUNTS |

TO: All Interested Persons:

1. On January 13, 1994, the Board of Housing published a notice of proposed amendment of the above-stated rule at page 5, 1994 Montana Administrative Register, issue number 1.

2. The Board has amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF HOUSING
BOB THOMAS, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 7, 1994.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the amendment of Rule 23.5.101 concerning the state adoption of federal hazardous materials regulations | ) ) ) ) ) | NOTICE OF AMENDMENT OF RULE 23.5.101 CONCERNING THE STATE ADOPTION OF FEDERAL HAZARDOUS MATERIALS REGULATIONS |

TO: All Interested Persons.

1. On January 27, 1994, the Department of Justice published notice of the proposed amendment of Rule 23.5.101 concerning the state adoption of federal hazardous materials regulations at page 141 of the 1994 Montana Administrative Register, issue number 2.

2. The agency has adopted the amendment as proposed.

3. No comments were received on the proposed amendment. In addition, no requests for a public hearing were received on the proposed amendment.

DEPARTMENT OF JUSTICE

By: _____
JOSEPH P. MAZUREK
Attorney General

_____
ROBERT F.W. SMITH, Rule Reviewer

Certified to the Secretary of State this 7th day of March, 1994.

BEFORE THE BOARD OF HOUSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
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TO: All Interested Persons:

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2. The Board has amended the rule exactly as proposed.

3. No comments or testimony were received.

BOARD OF HOUSING
BOB THOMAS, CHAIRMAN

BY: _____
ANNIE M. BARTOS, CHIEF COUNSEL
DEPARTMENT OF COMMERCE

_____
ANNIE M. BARTOS, RULE REVIEWER

Certified to the Secretary of State, March 7, 1994.

BEFORE THE DEPARTMENT OF JUSTICE
OF THE STATE OF MONTANA

| | | |
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DEPARTMENT OF JUSTICE

By: _____
JOSEPH P. MAZUREK
Attorney General

_____
ROBERT F.W. SMITH, Rule Reviewer

Certified to the Secretary of State this 7th day of March, 1994.

BEFORE THE BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE
STATE OF MONTANA

| | | |
|---|---|---|
| In the Matter of the Adoption of rules regarding Regional Youth Detention Services | ) ) ) | NOTICE OF ADOPTION OF RULES I - 23.14.601 THROUGH VII - 23.14.607 REGARDING REGIONAL YOUTH DETENTION |

TO: All Interested Persons:

1. On December 9, 1993, the Board of Crime Control published notice to adopt the following rules concerning the provision of regional youth detention services, at page 2886 of the 1993 Montana Administrative Register, issue number 23.

2. The rules were adopted as proposed.

3. No comments were received regarding the rules, however, the Administrative Code Committee wished to clarify the statement of necessity to convey the following:

The Board of Crime Control proposes to adopt seven rules which are necessary to establish the regulation of regional youth detention facility planning boards, the process by which their regional plans are approved by the Board of Crime Control and by which grants are given to the regional boards, and setting procedures for amendments to the plans, reports to the Board of Crime Control by each county participating in a regional plan, and planning boards' task forces. The proposed rules are reasonably necessary to establish guidelines for counties applying for grants under 41-5-1003, MCA. In addition, the proposed rules clarify the planning process for youth detention services and set forth the procedures by which grants will be administered to the counties.

BOARD OF CRIME CONTROL
EDWIN L. HALL, Executive Director

By: Edwin L. Hall
EDWIN L. HALL, Executive Director
BOARD OF CRIME CONTROL
DEPARTMENT OF JUSTICE

Rule Reviewer

Certified to the Secretary of State, March 2, 1994

BEFORE THE BOARD OF NURSING
DEPARTMENT OF COMMERCE
STATE OF MONTANA

| | | |
|---|---|---|
| In the matter of the petition for declaratory ruling regarding the scope of practice for registered nurses performing conservative, sharp debridement of non-viable tissue in wounds | ) ) ) ) ) | DECLARATORY RULING |

**Introduction**

1. The Board of Nursing received a Petition for Declaratory Ruling from various nurses regarding the authority of registered professional nurses to perform conservative, sharp debridement of non-viable tissue in wounds, pursuant to physician order.

2. On October 14, 1993, the Board of Nursing published a Notice of Petition for Declaratory Ruling setting forth the facts and issues presented and establishing a hearing date of November 5, 1993. This notice was published in the 1993 Montana Administrative Register, Issue 19, page 2445.

3. Interested persons were given the opportunity to present their views and arguments orally and in writing. The deadline for submission of written comments was November 12, 1993. No written comments were received by the Board.

4. On November 5, 1993, at 8:00 a.m., in the conference room of the Professional and Occupational Licensing Bureau, Lower Level, Arcade Building, 111 North Jackson, Helena, Montana, the Board of Nursing considered the petition for declaratory ruling regarding the scope of practice for registered nurses performing conservative, sharp debridement of non-viable tissue in wounds, pursuant to physician order.

**The Question Presented**

5. Petitioners requested a ruling on whether it is within the scope of the RN practice act for registered professional nurses to perform conservative, sharp debridement of non-viable tissue in wounds, pursuant to physician order.

**Facts Presented**

6. The Petitioners represented registered nurses providing wound care. The Petitioners indicated this issue has been addressed in IAET (WOCN) educational programs, conferences and Standards of Care. Recent nursing literature discusses debridement as a component of wound management. The Petitioners also stated that the practice of sharp debridement on non-viable tissue in wounds is being performed in certain areas.

**Applicable Law**

7. Section 37-8-102(3)(a), defines the practice of professional nursing as follows:

(a) "Practice of professional nursing" means the performance for compensation of services requiring substantial specialized knowledge of the biological, physical, behavioral, psychological, and sociological sciences and of nursing theory as a basis for the nursing process. The nursing process is the assessment, nursing analysis, planning, nursing intervention, and evaluation in the promotion and maintenance of health; the prevention, casefinding, and management of illness, injury, or infirmity; and the restoration of optimum function. The term also includes administration, teaching, counseling, supervision, delegation, and evaluation of nursing practice and the administration of medications and treatments prescribed by physicians, dentists, osteopaths, or podiatrists authorized by state law to prescribe medications and treatments. Each registered nurse is directly accountable and responsible to the consumer for the quality of nursing care rendered. As used in this subsection (3)(a):

(i) "nursing analysis" is the identification of those client problems for which nursing care is indicated and may include referral to medical or community resources;

(ii) "nursing intervention" is the implementation of a plan of nursing care necessary to accomplish defined goals."

8. Under ARM 8.32.1403(4), the registered nurse shall:

(4) implement the strategy of care by:
- (a) initiating nursing interventions through;
  - (i) giving direct care,
  - (ii) assisting with care,
  - (iii) delegating care,
  - (iv) collaboration and/or referral when appropriate.
- (b) providing an environment conducive to safety and health,
- (c) documenting nursing interventions and responses to care to other members of the health team;
- (d) communicating nursing interventions and responses to care to other members of the health team.

9. Under ARM 8.32.1404(3), the registered nurse shall:

(3) obtain instruction and supervision as necessary when implementing nursing techniques or practices.

**Declaratory Ruling**

1. The term "professional nursing", as found at section 37-8-101(5)(b), is defined as including the administration . . . of . . . treatments prescribed by physicians, advanced practice registered nurses, dentists, osteopaths, or podiatrists authorized by state law to prescribe medications and treatments. The performance of conservative, sharp debridement of non-viable tissue in wounds, by a registered nurse, when performed pursuant to the requirements of section 37-8-101(5)(b), and in compliance with the applicable law as cited herein, is within the scope of a properly trained registered nurse's practice.

2. Under ARM 8.32.1404(3), a registered nurse is to obtain instruction and supervision as necessary when implementing nursing techniques or practices. The Board of Nursing interprets this section to require adequate training of a registered nurse prior to performance of conservative sharp wound debridement. A registered nurse, prior to performing conservative sharp wound debridement, must complete training, involving both didactic and preceptored components. The training must afford opportunities to assess complications and appropriate application of treatments.

3. A registered nurse, in order to continue with conservative sharp wound debridement, must maintain proficiency. This may be done through, among other methods, continued education, demonstration, & quality assurance monitoring.

4. Any interested parties may request judicial review of this declaratory ruling by filing a petition for judicial review in a District Court of the State of Montana within thirty (30) days of the publication of this ruling pursuant to Section 2-4-501 and 2-4-702, MCA.

DONE this 18th day of February, 1994.

Nancy Heyer, RN, CNA, President
Montana Board of Nursing

NOTICE OF FUNCTIONS OF ADMINISTRATIVE CODE COMMITTEE

The Administrative Code Committee reviews all proposals for adoption of new rules, amendment or repeal of existing rules filed with the Secretary of State, except rules proposed by the Department of Revenue. Proposals of the Department of Revenue are reviewed by the Revenue Oversight Committee.

The Administrative Code Committee has the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. In addition, the Committee may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt or amend a rule.

The Committee welcomes comments from the public and invites members of the public to appear before it or to send it written statements in order to bring to the Committee's attention any difficulties with the existing or proposed rules. The address is Room 138, Montana State Capitol, Helena, Montana 59620.

## HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions: Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the attorney general (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

| | |
|---|---|
| Known Subject Matter | 1. Consult ARM topical index. Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued. |
| Statute Number and Department | 2. Go to cross reference table at end of each title which lists MCA section numbers and corresponding ARM rule numbers. |

## ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies which have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 1993. This table includes those rules adopted during the period January 1, 1994 through March 31, 1994 and any proposed rule action that was pending during the past 6-month period. (A notice of adoption must be published within 6 months of the published notice of the proposed rule.) This table does not, however, include the contents of this issue of the Montana Administrative Register (MAR).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 1993, this table and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule and the page number at which the action is published in the 1994 Montana Administrative Register.

ADMINISTRATION, Department of, Title 2

2.5.202 and other rules - State Purchasing, p. 1, 383
2.21.224 and other rules - Annual Vacation Leave, p. 2861, 151
2.21.908 and other rules - Disability and Maternity Leave - Sick Leave - Parental Leave for State Employees, p. 827, 2372
2.21.1812 Exempt Compensatory Time, p. 2462, 22
2.21.3607 and other rules - Veterans' Employment Preference p. 2464, 23
(Public Employees' Retirement Board)
I-II Establishment and Implementation of Family Law Orders Splitting and Paying Montana Public Retirement Benefits, p. 1580, 2400
I-V Retirement Incentive Program Provided by HB 517, p. 742, 2008
2.43.302 and other rules - Definitions - Request for Release of Information by Members - Effect of Voluntary Elections - Lump Sum Payments of Vacation or Sick Leave - Purchase of Previous Military Service -- Modifications Affecting Actuarial Cost - Disability Retirement - Conversion of Optional Retirement Benefit Upon Death or Divorce from the Contingent Annuitant, p. 2864, 291
2.43.302 and other rules - Retirement Incentive Program Provided by HB 517, p. 2057, 2762

(Teachers' Retirement Board)

I-II Implementing the Provisions of SB 173 Pertaining to the Establishment and Implementation of Family Law Orders, p. 1584, 2404

2.44.405 and other rules - Adjusting Disability Allowances - Interest on Non-Payment for Additional Credits - Creditable Service for Teaching in Private Educational Institutions, p. 2858

(State Compensation Insurance Fund)

I Establishing Criteria for Assessing a Premium Surcharge, p. 2060, 2527

2.55.327 and other rules - Construction Industry Program - Scheduled Rating for Loss Control Non-compliance Modifier and Unique Risk Characteristics Modifier, p. 2870, 292

AGRICULTURE, Department of, Title 4

I-II and other rules - Civil Penalties - Enforcement and Matrix - Sale, Distribution and Inspection of Nursery Stock in Montana, p. 2580, 24

I-III and other rules - Civil Penalties Relating to Beekeeping in Montana - Designating Regulated Bee Diseases - Clarifying the Apiary Registration Forfeiture Procedure - Restrictions on Apiary Registration, p. 1588, 2120

4.5.202 and other rule - Category 1 Noxious Weeds, p. 93

4.10.206 Licensing for Pesticide Operators, p. 2063, 2669

STATE AUDITOR, Title 6

I-II and other rules - Establishing Accreditation Fees for Annual Continuation of Authority - Defining "Money Market Funds" as they Relate to Investments by Farm Mutual Insurers - Remove Limitations on the Issuance of Credit Life and Credit Disability Insurance to Joint Debtors - Prohibiting Discrimination in Determining Eligibility for Personal Automobile Insurance - Wage Assignments - Voluntary Payroll Deduction, p. 2163, 2764

I-XI Continuing Education Program for Insurance Producers and Consultants, p. 2466, 3004

I-LV Administration and Enforcement of Laws Regulating Standards for Companies Considered to be in Hazardous Financial Condition - Annual Audited Reports - Life and Health Reinsurance Agreements - Reports by Holding Company Systems - Establishing Accounting Practices and Procedures to be Used in Annual Statements - Credit for Reinsurance, Including Letters of Credit - Standards for Valuation of Insurer Securities and Other Invested Assets, p. 1726, 2408

6.10.102 and other rules - Exempting Certain Foreign Securities from Registration - Requiring that Exempt Foreign Savings and Loan Associations be Members of the Federal Deposit Insurance Corporation and that their Certificates of Deposit be Fully Insured by the Federal Deposit Insurance Corporation, p. 95

(Classification and Rating Committee)

I-X Matters Subject to Notice and Hearing Before the Classification and Rating Committee, p. 1781, 2225

COMMERCE, Department of, Title 8

(Board of Alternative Health Care)

8.4.404 and other rules - Certification for Specialty Practice - Conditions Which Require Physician Consultation - Continuing Education, p. 2713, 386

(Board of Barbers)

8.10.405 Fee Schedule, p. 2168, 295

(Board of Chiropractors)

8.12.601 and other rules - Applications, Educational Requirements - Renewals - Continuing Education Requirements - Unprofessional Conduct, p. 222

(Board of Clinical Laboratory Science Practitioners)

I-IX Clinical Laboratory Science Practitioners, p. 2065, 2766

(Board of Cosmetologists)

8.14.401 and other rules - Practice of Cosmetology, Manicuring and Electrolysis, p. 331

(State Electrical Board)

8.18.402 and other rules - Applications - General Responsibilities - Temporary Permit - Fees - Examinations - Continuing Education - Pioneer Electrician Certificates, p. 225

(Board of Dentistry)

8.22.502 and other rules - Licenses Issued for Conducting Parimutuel Wagering - Daily Double Feature - Requirements of Licensee - Pool Calculations, p. 1595, 2412

(Board of Landscape Architects)

8.24.409 Fee Schedule, p. 2986, 388

(Board of Funeral Service)

8.30.407 and other rules - Fees - Unprofessional Conduct - Crematory Facility Regulation - Casket/Containers - Shipping Cremated Human Remains - Identifying Metal Disc - Processing of Cremated Remains - Crematory Prohibitions, p. 1787, 2670

(Board of Nursing)

8.32.304 and other rules - Advanced Practice Registered Nurses - Executive Director - Examinations - Inactive Status - Schools - Prescriptive Authority - Clinical Nurse Specialists - Delegation of Nursing Tasks, p. 100

(Board of Occupational Therapy Practice)
8.35.402 and other rules - Definitions - Use of Modalities, p. 116
8.35.408 Unprofessional Conduct, p. 2483, 25
8.35.414 Therapeutic Devices, p. 1598, 2231
(Board of Optometry)
8.36.401 and other rules - Board Meetings - Applications for Examination - Examinations - Reciprocity - General Practice Requirements - Fees - Applicants for Licensure, p. 1447, 2121
8.36.601 and other rules - Continuing Education - Approved Courses and Examinations - New Licenses - Therapeutic Pharmaceutical Agents, p. 120
8.36.602 Continuing Education - Approved Programs or Courses, p. 2294, 152
8.36.801 and other rule - Therapeutic Pharmaceutical Agents - Approved Drugs, p. 2485, 153
(Board of Outfitters)
8.39.504 and other rules - Outfitter Operations Plans - Conduct of Outfitters and Guides - Unprofessional Conduct, p. 2070, 155
(Board of Pharmacy)
8.40.404 and other rules - Fees - Out-of-State Mail Service Pharmacies, p. 2073, 2586
(Board of Physical Therapy Examiners)
8.42.402 Examinations - Fees - Temporary Licenses - Licensure by Endorsement, p. 2587, 159
(Board of Private Security Patrol Officers & Investigators)
8.50.428 and other rules - Experience Requirements - Insurance Requirements - Fees, p. 1450, 2413
(Board of Psychologists)
8.52.604 and other rules - Application Procedures - Examination - Fee Schedule, p. 1792, 2232
8.52.606 and other rule - Required Supervised Experience - Licensees from Other States, p. 2590, 389
(Board of Public Accountants)
8.54.407 Qualifications for a License as a Licensed Public Accountant, p. 1453, 2122
(Board of Radiologic Technologists)
8.56.409 and other rules - Examinations - Renewals - Fees - Permits - Permit Fees, p. 1455, 2912
(Board of Real Estate Appraisers)
8.57.403 and other rules - Examinations - Experience Requirements - Education Requirements - Fees - Agricultural Certification, p. 2170, 2775
(Board of Realty Regulation)
8.58.406A and other rules - Applications - Trust Accounts - Continuing Education - Unprofessional Conduct - Property Management, p. 1063, 1909, 2123, 2233
8.58.419 Grounds for License Discipline - General Provisions - Unprofessional Conduct, p. 232
8.58.419 Grounds for License Discipline - General Provisions - Unprofessional Conduct, p. 2719, 297

Certificate of Authorization for a State Chartered Bank - Assuming Deposit Liability of Any Closed Bank - Merger of Affiliated Banks - Establishment of New Branch Banks - Discovery and Hearing Procedures - Application Requirement, p. 361

(Local Government Assistance Division)

I Administration of the 1994 Treasure State Endowment (TSEP) Program, p. 125

I Administration of the 1994 Federal Community Development Block Grant (CDBG) Program, p. 127

(Board of Investments)

8.97.1301 and other rules - Definitions - Seller/Services Approval Procedures - Loan Loss Reserve Account, p. 1247, 2235

(Business Development Division)

8.99.401 and other rules - Microbusiness Finance Program, p. 1800, 2236

(Board of Housing)

8.111.405 Income Limits and Loan Amounts, p. 5

(Montana State Lottery)

8.127.407 Retailer Commission, p. 2078, 391

EDUCATION, Title 10

(Superintendent of Public Instruction)

10.16.901 and other rules - Special Education, p. 757, 1913, 2415

(Board of Public Education)

I Teacher Certification - Area of Specialized Competency, p. 237

I Certification - Early Childhood, p. 2323

10.57.211 Test for Teacher Certification, p. 1463, 2781

10.57.501 Teacher Certification - School Psychologists, School Social Workers, Nurses and Speech and Hearing Therapists, p. 234

10.60.101 and other rules - Board of Public Education Policy Statement - Due Process in Services - Identification of Children with Disabilities - Opportunity and Educational Equity - Special Education - Student Records - Special Education Records, p. 2326, 166

10.66.101 and other rules - General Educational Development - Requirements Which Must be Met in Order to Receive High School Equivalency Certificates - Waiver of Age Requirements - Method of Applying - Fees - Waiting Period for Retesting - Issuance of Equivalency Certificates, p. 2593, 167

(State Library Commission)

10.101.101 Organization of the State Library Agency, p. 1461, 2783

FAMILY SERVICES, Department of, Title 11

I and other rules - Day Care Facilities - Legally Unregistered Providers Participating in Day Care Benefits' Programs, p. 129
I Qualifications of Respite Care Providers, p. 1251, 3019
11.5.602 and other rule - Case Records of Abuse or Neglect, p. 238
11.7.601 and other rules - Foster Care Support Services, p. 2080, 2528

FISH, WILDLIFE, AND PARKS, Department of, Title 12

I Nonresident Hunting License Preference System, p. 242
12.3.112 Setting of Nonresident Antelope Doe/Fawn Licenses, p. 2201, 2914
12.3.116 and other rule - Application and Drawing of Moose, Sheep, and Goat Licenses, p. 6, 392
12.3.123 Nonresident Combination License Alternate List, p. 2199, 2915
12.6.901 Water Safety Regulations - Allowing Electric Motors on Lake Elmo, p. 1963, 2916

HEALTH AND ENVIRONMENTAL SCIENCES, Department of, Title 16

I Administrative Penalties for Violations of Hazardous Waste Laws and Rules, p. 2992, 419
I Water Quality Permit and Degradation Authorization Fees, p. 2489, 393
I-III Health Care Authority - Process for Selection of Regional Health Care Planning Boards, p. 1972, 2416
I-III Health Care Facility Licensing - Licensure Standards for Residential Treatment Facilities, p. 1809, 304
I-IX and other rules - Implementation of the Water Quality Act's Nondegradation Policy, p. 2723
I-XXV Air Quality Bureau - Operating Permits for Certain Stationary Sources of Air Pollution, p. 1817, 2933
I-XXXIV and other rules - Air Quality - Air Quality Permitting - Prevention of Significant Deterioration - Permitting in Nonattainment Areas - Source Testing - Protocol and Procedure - Wood Waste Burners, p. 1264, 2530, 2919
16.6.901 and other rules - Records and Statistics - Filing Death Certificates - Burial Transit Permits - Dead Body Removal Authorization - Notification of Failure to File Certificate or Body Removal Authorization, p. 2599, 3023
16.8.1107 and other rules - Air Quality Preconstruction Permits, p. 1965, 2930
16.8.1903 and other rule - Air Quality - Air Quality Operation and Permit Fees, p. 1807, 2531

16.14.501 and other rules - Solid Waste - Municipal Solid Waste Management, p. 2083, 2672
16.14.502 and other rules - Solid Waste - Municipal Solid Waste Management, p. 2203, 2784
16.20.603 and other rules - Water Quality - Surface Water Quality Standards, p. 2737
16.20.1003 and other rules - Water Quality - Ground Water Quality Standards - Mixing Zones - Water Quality Nondegradation, p. 244
16.28.1005 Tuberculosis Control Requirements for Schools and Day Care Facilities, p. 2721
16.30.801 and other rules - Emergency Amendment - Reporting of Exposure to Infectious Diseases, p. 415
16.38.301 and other rules - Public Health Lab and Chemistry Lab Addressing Laboratory Fees for Food, Consumer Safety and Occupational Health Analysis, p. 1812, 2239
16.44.102 and other rules - Hazardous Wastes - Hazardous Waste Management, p. 2330, 2952
16.44.125 and other rules - Hazardous Waste - Facility Permit Fees - Hazardous Waste Management - Attorney's Fees in Court Action Concerning Release of Records, p. 1254, 2009
16.44.202 and other rule - Hazardous Waste - Underground Injection Wells, p. 1608, 2126

(Petroleum Tank Release Compensation Board)

16.47.311 and other rules - Consultant Labor Classifications, p. 2206, 2678

TRANSPORTATION, Department of, Title 18

18.7.302 and other rules - Motorist Information Signs, p. 137
18.8.101 and other rules - Motor Carrier Services (Formerly "Gross Vehicle Weight"), p. 2875

CORRECTIONS AND HUMAN SERVICES, Department of, Title 20

(Board of Pardons)

20.25.101 and other rules - Revision of Rules of the Board of Pardons - ARM Title 20, Subchapters 3 through 11, p. 2495, 168

JUSTICE, Department of, Title 23

I Issuance of Seasonal Commercial Driver's License, p. 1610, 169
I Affidavit Form for an Indigence Financial Statement, p. 1465, 2532
I-VI and other rules - Rules of the Fire Prevention and Investigation Bureau Describing the Revision of Licensure Requirements for Persons Selling, Installing or Servicing Fire Protection Equipment - Other Provisions Dealing with Fire Safety, p. 1855, 2953, 3025

I-VII Regional Youth Detention Services, p. 2886
23.5.101 State Adoption of Federal Hazardous Materials Regulations, p. 1469, 141
23.16.101 and other rules - Regulating Public Gambling, p. 1974, 2786, 3025

LABOR AND INDUSTRY, Department of, Title 24

I-IV Implementation of Education-based Safety Programs for Workers' Compensation Purposes, p. 257
I-IX Groups of Business Entities Joining Together for the Purchase of Workers' Compensation Insurance, p. 9
I-XIX and other rules - Claims for Unpaid and Underpaid Wages - Calculation of Penalties, p. 367
I-XX Certification of Managed Care Organizations for Workers' Compensation, p. 2890, 420
(Workers' Compensation Judge)
24.5.301 and other rules - Procedural Rules of the Court, p. 2747, 27
24.5.322 and other rules - Procedural Rules of the Court, p. 248
24.26.202 and other rules - Rules of Procedure before the Board of Personnel Appeals - Labor-Management Relations and Grievances, p. 2339, 3026
24.29.702G and other rule - Groups of Employers that Self-Insure for Workers' Compensation Purposes, p. 1613, 2240
24.29.1402 Liability for Workers for Medical Expenses for Workers' Compensation Purposes - Payment of Medical Claims, p. 1870, 2801
24.29.1409 Travel Expense Reimbursements for Workers' Compensation Purposes, p. 1872, 2804
24.29.1416 Applicability of Rules and Statutes in Workers' Compensation Matters - Applicability of Date of Injury, Date of Service, p. 143
24.29.1504 and other rules - Selection of Treating Physician for Workers' Compensation Purposes, p. 1878, 2809
24.29.1513 and other rules - Utilization and Medical Fee Schedules for Workers' Compensation Matters, p. 146

STATE LANDS, Department of, Title 26

I Rental Rates for Grazing Leases and Licenses - Rental Rates for Cabinsite Leases - Fees for General Recreational Use License, p. 2496, 34
I Assessment of Fire Protection Fees for Private Lands Under Direct State Fire Protection, p. 1881, 35
26.3.180 and other rules - Recreational Use of State Lands - Posting of State Lands to Prevent Trespass, p. 1471, 2536, 33

LIVESTOCK, Department of, Title 32

32.2.401 Fees for Slaughterhouse, Meat Packing House or Meat Depot License, p. 1180, 2417

NATURAL RESOURCES AND CONSERVATION, Department of, Title 36

36.12.202 and other rules - Water Right Contested Case Hearings, p. 2086, 307
36.16.102 and other rules - Water Reservations, p. 262
36.17.101 and other rules - Renewable Resource Grant and Loan Program, p. 2498, 3040

PUBLIC SERVICE REGULATION, Department of, Title 38

I Adoption by Reference of the 1993 Edition of the National Electrical Safety Code, p. 2606, 3042
I-V Exclusion from Motor Carrier Regulation for Transportation Incidental to a Principal Business, p. 18
38.3.201 and other rules - Registration of Intrastate, Interstate and Foreign Motor Carriers to Implement New Federal Requirements on Single State Registration, p. 275
38.3.702 Class E Motor Carriers - Motor Carriers Authorized to Transport Logs, p. 2370, 2966
38.3.2504 and other rules - Tariff Fee - Tariff Symbols, All Relating to Motor Carriers, p. 14
38.4.801 and other rules - Rear-End Telemetry Systems for Trains, p. 2602, 3041
38.5.2202 and other rule - Federal Pipeline Safety Regulations, p. 2604, 3043
38.5.3345 Unauthorized Changes of Telephone Customers' Primary Interexchange Carrier (PIC), p. 2368, 3044

REVENUE, Department of, Title 42

I Tax Information Provided to the Department of Revenue, p. 1192, 2811
I-II Exemptions Involving Ownership and Use Tests for Property, p. 2212, 2968
I-VIII Regulation of Cigarette Marketing, p. 375
42.11.301 Opening a New Liquor Store, p. 1475, 2418
42.12.103 and other rules - Liquor Licenses and Permits, p. 2003, 2423
42.17.105 and other rules - Old Fund Liability Tax, p. 2612, 3045
42.17.111 Withholding Taxes Which Apply to Indians, p. 1995, 2426
42.18.105 and other rules - Property Reappraisal for Taxable Property in Montana, p. 1182, 2127
42.19.401 Low Income Property Tax Reduction, p. 2398, 2967

SECRETARY OF STATE, Title 44



SOCIAL AND REHABILITATION SERVICES, Department of, Title 46

46.12.3002 Determination of Eligibility for Medicaid Disability Aid, p. 2758, 36
46.13.203 and other rules - Low Income Energy Assistance Program (LIEAP), p. 1618, 2437