



AN ACT GENERALLY REVISING LAWS RELATING TO THE INDEPENDENT CONTRACTOR CERTIFICATE; PROVIDING THAT THE DEPARTMENT OF LABOR AND INDUSTRY MAY NOT PRESUME AN EMPLOYMENT RELATIONSHIP BECAUSE A PARTY DOES NOT HOLD AN INDEPENDENT CONTRACTOR CERTIFICATE; APPLYING TO UNEMPLOYMENT INSURANCE AND WORKERS' COMPENSATION; AMENDING SECTIONS 39-51-203 AND 39-71-419, MCA; AND PROVIDING AN APPLICABILITY DATE.

WHEREAS, the Department of Labor and Industry's rule ARM 24.35.203 provides that when a worker does not have an independent contractor certificate, the worker is conclusively determined by the Department to be an employee for the purposes of wages and hours, unemployment insurance, workers' compensation, and income tax; and

WHEREAS, this interpretation is overly broad, does not correctly consider Montana Supreme Court caselaw, leads to confusion, conflicts with established law, and results in unfair determinations.

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

**Section 1.** Section 39-51-203, MCA, is amended to read:

**"39-51-203. Employment defined.** (1) "Employment", subject to other provisions of this section, means service by an individual, by a manager or member of a limited liability company treated as a corporation pursuant to 39-51-207, or by an officer of a corporation, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied.

(2) (a) The term "employment" includes an individual's entire service performed within or both within and outside this state if:

- (i) the service is localized in this state; or
- (ii) the service is not localized in any state but some of the service is performed in this state and:

- (A) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state; or
- (B) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.
- (b) Service is considered to be localized within a state if:
- (i) the service is performed entirely within the state; or
- (ii) the service is performed both within and outside the state, but the service performed outside the state is incidental to the individual's service within the state; for example, the out-of-state service is temporary or transitory in nature or consists of isolated transactions.
- (3) Service not covered under subsection (2) and performed entirely outside the state and on which contributions are neither required nor paid under an unemployment insurance law of any other state or of the federal government is considered to be employment subject to this chapter if the individual performing the services is a resident of this state and the department approves the election of the employing unit for whom the services are performed in order that the entire service of the individual is considered to be employment subject to this chapter.
- (4) Service performed by an individual for wages is considered to be employment subject to this chapter until it is shown to the satisfaction of the department that the individual is an independent contractor. An individual may not be determined to be an employee based solely on not having an independent contractor exemption certificate.
- (5) The term "employment" includes service performed by an individual in the employ of this state or any of its instrumentalities (or in the employ of this state and one or more other states or their instrumentalities) for a hospital or institution of higher education located in this state. The term "employment" includes service performed by all individuals, including those individuals who work for the state of Montana, its universities, public schools, components or units of universities or public schools, or any local government unit and one or more other states or their instrumentalities or political subdivisions whose services are compensated by salary or wages.
- (6) The term "employment" includes service performed by an individual in the employ of a religious, charitable, scientific, literary, or educational organization.

(7) (a) The term "employment" includes the service of an individual who is a citizen of the United States performed outside the United States, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of subsection (2) or the parallel provisions of another state's law, if:

- (i) the employer's principal place of business in the United States is located in this state;
- (ii) the employer has no place of business in the United States, but:
  - (A) the employer is an individual who is a resident of this state;
  - (B) the employer is a corporation that is organized under the laws of this state; or
  - (C) the employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any other state; or
- (iii) none of the criteria of subsections (7)(a)(i) and (7)(a)(ii) are met, but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits based on the service under the law of this state.

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

- (i) an individual who is a resident of the United States;
- (ii) a partnership if two-thirds or more of the partners are residents of the United States;
- (iii) a trust if all of the trustees are residents of the United States; or
- (iv) a corporation organized under the laws of the United States or of any state."

**Section 2.** Section 39-71-419, MCA, is amended to read:

**"39-71-419. Independent contractor violations -- penalty.** (1) A person may not:

- (a) perform work as an independent contractor without first:
  - (i) obtaining from the department an independent contractor exemption certificate unless the individual is not required to obtain an independent contractor exemption certificate pursuant to 39-71-417(1)(a); or
  - (ii) electing to be bound personally and individually by the provisions of compensation plan No. 1, 2, or 3;
- (b) perform work as an independent contractor when the department has revoked or denied the

independent contractor's exemption certificate;

(c) transfer to another person or allow another person to use an independent contractor exemption certificate that was not issued to that person;

(d) alter or falsify an independent contractor exemption certificate; or

(e) misrepresent the person's status as an independent contractor. A person who falsely claimed, either in writing or through credible evidence, to have an independent contractor certification may not be considered to be an employee solely based on not actually having an independent contractor exemption certificate. The burden of proof that an independent contractor is certified rests with the independent contractor and not the hiring entity.

(2) An employer may not:

(a) require an employee through coercion, misrepresentation, or fraudulent means to adopt independent contractor status to avoid the employer's obligations to provide workers' compensation coverage; or

(b) exert control to a degree that causes the independent contractor to violate the provisions of 39-71-417(4).

(3) In addition to any other penalty or sanction provided in this chapter, a person or employer who violates a provision of this section is subject to a fine to be assessed by the department of up to \$1,000 for each violation. The department shall deposit the fines in the uninsured employers' fund. The lien provisions of 39-71-506 apply to any assessed fines.

(4) A person or employer who disputes a fine assessed by the department pursuant to this section may file an appeal with the department within 30 days of the date on which the fine was assessed. If, after mediation, the issue is not resolved, the issue must be transferred to the workers' compensation court for resolution."

**Section 3. Applicability.** [This act] applies to employment determinations for the purposes of unemployment insurance and workers' compensation on or after [the effective date of this act].

- END -

I hereby certify that the within bill,  
SB 367, originated in the Senate.

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Secretary of the Senate

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President of the Senate

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

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Speaker of the House

Signed this \_\_\_\_\_ day  
of \_\_\_\_\_, 2021.

SENATE BILL NO. 367

INTRODUCED BY S. MORIGEAU

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