

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW) NOTICE OF PUBLIC HEARING ON
RULES I through IX and the repeal of) PROPOSED ADOPTION AND
ARM 24.22.301, 24.22.304,) REPEAL
24.22.307, 24.22.311, 24.22.316, and)
24.22.321 pertaining to the incumbent)
worker training program)

TO: All Concerned Persons

1. On November 3, 2017, at 10:00 a.m., a public hearing will be held in the Lewis Room (basement conference room) at the Walt Sullivan Building, 1315 E. Lockey Avenue, Helena, Montana, to consider the proposed adoption and repeal of the above-stated rules.

2. The Department of Labor and Industry (department) will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on October 27, 2017, to advise us of the nature of the accommodation that you need. Please contact Chris Wilhelm, Workforce Services Division, 1315 E. Lockey Avenue, P.O. Box 1728, Helena MT 59604-1728; telephone (406) 444-3351; Montana Relay 711; facsimile (406) 444-3037; or ChrisWilhelm@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to adopt new rules to implement the provisions of Chap. 25, Laws of 2017 (House Bill 88) while repealing the existing rules on the same topic. Because the amended statutes completely removed the inclusion of the local BEAR (the business expansion and retention) programs as the gatekeeper for access to incumbent worker training (IWT) funds and make other significant changes, the department concludes that it is reasonably necessary to propose new rules and repeal existing rules in order to provide clarity and reduce confusion for businesses that want to apply for IWT grant funding. New rules will help ensure that businesses are following the correct version of the rules and statutes, as the new application process will only reference the new rules. This general statement of reasonable necessity applies to all of the rules proposed for adoption and repeal.

There is reasonable necessity to include NEW RULES II, III, VII, and VIII in light of the department's experience in processing IWT grants. The department believes that providing greater detail and explanation of the IWT grant application process will assist employers in applying for, and obtaining, IWT grants.

4. The proposed new rules are as follows:

NEW RULE I DEFINITIONS For the purposes of this subchapter, the following definitions apply:

(1) "Conference" means a meeting, seminar, discussion, or other similar event where the principal presentation, in the format of a lecture or similar presentation, is the primary purpose, and participation by attendees is a secondary purpose.

(2) "Credential" means a nationally recognized degree or certification or state-recognized credential. Credentials include, but are not limited to post-secondary degrees/certificates, recognized skill standards, licensure or industry-recognized certificates (i.e., ASE car repair, Hazmat, CAN, CDL, Boiler Operator, Flag Person, Heavy Equipment Operator, etc.), and all state education agency recognized credentials.

(3) "Department" means the Department of Labor and Industry.

(4) "Employer":

(a) means a for profit or non-profit business entity that:

(i) employs no more than 50 employees statewide; and

(ii) is properly registered with the secretary of state to conduct business as a sole proprietor, if required, or as a corporation, a partnership, a limited liability company, or an association; but

(b) does not include governmental entities.

(5) "Predominately year-round job" means a position that provides work in at least 11 months of a 12-month period.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE II GENERAL REQUIREMENTS REGARDING TRAINING

(1) In order to qualify for reimbursement, training must:

(a) be provided by an eligible training provider; and

(b) consist of:

(i) skills-based training that meets the criteria contained in (4);

(ii) certified education that meets the criteria contained in (5); or

(iii) online training that meets the criteria contained in (6).

(2) A training provider is eligible to provide training if the trainer is:

(a) a qualified educational institution recognized under 53-2-1216, MCA;

(b) a registered apprenticeship program that is in compliance with Title 39, chapter 6, MCA; or

(c) an other entity or individual approved by the department to provide workforce training.

(3) An "other entity or individual" may be approved by the department to provide workforce training, based one or more of the following criteria:

(a) the trainer can demonstrate substantial experience and background in the industry or occupational field relevant to the proposed course of training;

(b) the trainer possesses industry-recognized competency in the subject matter of the proposed training, as demonstrated by a certificate or similar credential issued by a bona fide industry source or organization; or

(c) the trainer demonstrates other suitable qualifications as may be reasonably accepted by the department.

(4) Skills-based training:

- (a) is training that:
 - (i) increases the quality of tasks an incumbent worker is able to perform;
 - (ii) increases the number of types of tasks an incumbent worker is able to perform; or
 - (iii) provides the ability to demonstrate that the incumbent worker is able to execute new tasks, or old tasks in new ways, as a direct result of the training; but
- (b) does not refer to training that generally increases an incumbent worker's knowledge of a topic area or areas.
- (5) Certified education must result in a nationally recognized or industry-recognized credential being awarded in recognition of attainment of a measurable technique or occupational skill, based on standards developed or endorsed by employers.
- (6) Training may be provided in any of the following methods:
 - (a) classroom training where the student travels to the trainer;
 - (b) on-site training where the trainer travels to the grantee's business and customizes training to the business's needs; or
 - (c) online training that is interactive, where:
 - (i) the student has access to the trainer;
 - (ii) the student demonstrates or practices what the student is learning; and
 - (iii) the online training has the capability to provide suitable proof of completion.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE III GENERAL PROVISIONS RELATING TO GRANT FUNDS

- (1) The employer that is seeking grant funding must pay for all training and associated expenses "up front," and then seek reimbursement from the department for eligible expenses after the training is completed.
- (2) Grant funding may be used to purchase:
 - (a) skills-based training or certified education as outlined in [NEW RULE II];
 - (b) required materials and supplies, as identified by the course syllabus or the trainer; and
 - (c) testing fees, but only if the test occurs within 90 days of the training completion date.
- (3) Grant funding can reimburse the employer at a rate not to exceed:
 - (a) 80 percent for the cost of training paid to the training provider, and for associated required training expenses, such as books;
 - (b) 80 percent for in-state transportation and lodging costs reasonably incurred, if required to attend training; and
 - (c) 50 percent for out-of-state transportation and lodging costs reasonably incurred, if required to attend training.
- (4) The unreimbursed portion of allowed training, travel, and lodging expenses that the employer pays for is referred to as "matching funds" or "the matching share." The matching share paid by the employer may include:
 - (a) the cost of tuition, fees for certified education, or the cost of skills-based training;

- (b) the cost of educational materials, training supplies, or lab fees required for training;
 - (c) the cost of testing fees, but only if the tests are completed within 90 days of the date of training completion;
 - (d) in-state transportation and lodging costs required for training, calculated at the current state of Montana rate; and
 - (e) any costs incurred for training that are above the allowable grant cap.
- (5) Wages, at the regular hourly rate, paid by the employer to an employee who is undergoing required training, for the time spent in training and in transit to and from the training site may be claimed as a credit for the matching share.
- (a) Wages paid may not be credited as the matching share for any portion of out-of-state transportation and lodging costs paid by the employer.
- (b) Sole proprietors may not use their own wages to meet the matching share requirements.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE IV GRANT APPLICATION PROCESS (1) The department shall make available incumbent worker training grant application forms, which a business entity must complete for the purpose of applying for a grant award.

(2) The fiscal year for this program is from July 1 through June 30. A business entity may submit an application during the fiscal year for eligible training that will begin by June 20th of that same fiscal year.

(3) The department shall verify that the applicant is an employer that meets the definition in [NEW RULE I] and that the information contained in the application is accurate and complete.

(4) The department shall evaluate the application based upon the incumbent worker training program grant award criteria provided in 53-2-1218, MCA, and make a determination as to:

- (a) whether a grant should be awarded; and
 - (b) the amount of the grant award.
- (5) Applications submitted to the department for grant funding must be submitted as follows:
- (a) applications may be submitted by:
 - (i) the employer;
 - (ii) a direct employee of the employer; or
 - (iii) a grant writer designated by the employer.
 - (b) applications submitted by anyone other than those listed in (a) will not be accepted.
- (6) Applications must address, at a minimum, the following:
- (a) the goals of the proposed training of incumbent workers;
 - (b) the anticipated economic benefits to the employer from the training;
 - (c) the anticipated benefits to the incumbent workers to be trained; and
 - (d) the costs of the training.
- (7) The application must also include:
- (a) a course description of the training to be provided; and

(b) either a training schedule or course curriculum, sufficient for the department to determine if the proposed training meets the required criteria.

(8) Applicants requesting incumbent worker training grant funding for training provided by a department-approved training provider as allowed by 53-2-1216, MCA, must provide sufficient information for the department to determine the industry-recognized competency in the subject matter to be taught. Information about the proposed trainer should include, but is not limited to:

(a) the trainer's professional biography; and

(b) the trainer's professional resume, including any industry-recognized credentials earned by the trainer.

(9) Applications must be received by the department with sufficient time for processing. Generally, 20 calendar days prior to the date training begins is sufficient for the department to:

(a) verify completeness of the application; and

(b) evaluate eligibility in accordance with the incumbent worker training program grant award criteria that are provided by 53-2-1218, MCA.

(10) The department shall review the expenditures of the incumbent worker training program throughout the fiscal year. When funds are depleted before the end of the fiscal year, the department may suspend the grant program until the beginning of the next fiscal year.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE V EVALUATION OF GRANT APPLICATIONS AND LIMITATIONS (1) Except as provided in (a) and (b), the department provides grant funding on a first-come, first-served basis, in accordance with the receipt by the department of a complete application for funding.

(a) Although incumbent worker training grants are generally available on a first-come, first-served basis, the department reserves the right to defer the review of multiple grant applications submitted by any single employer, in order to provide funding to employers on an equitable basis. The department encourages employers not to submit multiple applications "shotgun style," but instead make applications that are well tailored to the specific needs of the employer and the employer's workforce.

(b) Applications for which review has been deferred will be reconsidered and evaluated on a quarterly basis during the state fiscal year in which the application was submitted. An employer's successful use of grant funding for completed training during the current year or previous years is a factor which will generally weigh in favor of additional applications being granted during the year.

(2) The department shall award incumbent worker training grant funds to employers in accordance with the grant award criteria set forth by 53-2-1218, MCA.

(3) The department shall award incumbent worker training grant funds only to employers who have demonstrated that incumbent worker training is an integral part of a plan for worker retention, skill improvement, or wage enhancement. The plan is demonstrated by the information provided on the grant application.

(4) The department shall award incumbent worker training grant funds on a prospective basis only and may not award grant funding to an employer for training that occurred prior to the date upon which the application was approved by the department.

(5) The department shall award incumbent worker training grant funds only for training that is completed in less than a year.

(6) The following are not eligible for incumbent worker training grant funding:

(a) continuing education that is necessary to maintain a license or certification;

(b) conferences, or training that occurs in conjunction with a conference;

(c) training customarily provided or required by the employer or the industry. This includes new employee training and training required to perform the duties the incumbent worker was hired to perform; and

(d) periodic updates regarding laws or product lines.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE VI AWARD OF GRANT (1) Upon approval of an application for grant funds, the department shall enter into a funding agreement for incumbent worker training with the employer.

(2) A funding agreement must contain the following:

(a) the terms of the grant;

(b) a schedule for reimbursement of approved costs to the employer; and

(c) the grant reporting requirements of the employer.

(3) Upon approval of an application for grant funds, the employer must:

(a) sign the financial agreement within 14 calendar days; and

(b) submit a completed state of Montana form SW9 (Substitute W-9) or IRS form W-9.

(4) Grants are funded on the basis of the state fiscal year. Funding may not exceed:

(a) \$1,000 per incumbent worker working an average of 20-34 hours a week, predominantly year round; and

(b) \$2,000 per incumbent worker working an average of 35 or more hours a week, predominantly year round.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE VII CHANGES TO THE APPLICATION OR APPROVED GRANT (1) An employer may request to amend an application by contacting the department. An amendment will change the submission date of the application.

(2) An employer may request a modification to an approved grant by submitting a modification request form.

(a) In order to determine whether the modification will be approved, the following changes must be received before training begins:

(i) changes to the person or entity designated as the trainer;

- (ii) changes to the training delivery, method, or location; and
 - (iii) a change in attendees of the training.
- (b) A request for a change of the training completion date must be received prior to the date upon which the previously approved training was to be completed.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE VIII PAYMENT OF GRANT FUNDS (1) Reimbursement of expenses will be made after the employer has purchased and completed the approved training as outlined on the application. The employer has 30 calendar days from the date of training completion to submit a reimbursement claim which includes:

- (a) a receipt for the training issued by the trainer;
- (b) receipts for other approved costs issued by the vendor; and
- (c) proof of completion of the training by the employee(s), issued by the trainer.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

NEW RULE IX APPEALS (1) An employer has the right to appeal when the department:

- (a) decides not to award grant funding for incumbent worker training; or
 - (b) awards less grant funding than requested.
- (2) If an employer disagrees with the department's decision to not approve an application, or to approve less funding than was requested, the employer may either:
- (a) request an administrative review within 30 calendar days of the date of the notice of the department's decision regarding the application. The employer may seek informal administrative review of a decision by submitting a written request for an administrative review to the department: Department of Labor and Industry, Incumbent Worker Training Program, P.O. Box 1728, Helena MT 59604-1728, or electronically to iwt@mt.gov; or
 - (b) request a contested case proceeding within 20 calendar days of the date of the notice of final decision of the department, which may be the result of an administrative review requested pursuant to (a). The employer shall submit a written request to the department for a contested case proceeding, pursuant to Title 2, chapter 4, MCA, at the address provided in this rule.
- (3) The employer bears the burden of demonstrating that the action by the department constitutes an abuse of discretion.

AUTH: 53-2-1220, MCA

IMP: 53-2-1217, 53-2-1218, MCA

5. The department proposes to repeal the following rules:

24.22.301 DEFINITIONS

AUTH: 53-2-1220, MCA
IMP: 53-2-1215, 53-2-1216, MCA

24.22.304 RECOGNITION OF A BEAR PROGRAM

AUTH: 53-2-1220, MCA
IMP: 53-2-1216, MCA

24.22.307 GENERAL REQUIREMENTS

AUTH: 53-2-1220, MCA
IMP: 53-2-1217, 53-2-1218, MCA

24.22.311 GRANT APPLICATION PROCEDURES

AUTH: 53-2-1220, MCA
IMP: 53-2-1217, 53-2-1218, MCA

24.22.316 EVALUATION CRITERIA AND LIMITATIONS

AUTH: 53-2-1220, MCA
IMP: 53-2-1217, 53-2-1218, MCA

24.22.321 APPEAL PROCEDURE

AUTH: 2-4-201, 53-2-1220, MCA
IMP: 2-4-201, 53-2-1218, MCA

6. Concerned 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 Chris Wilhelm, Workforce Services Division, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59604-1728, by facsimile to (406) 444-3037, or e-mail to ChrisWilhelm@mt.gov, and must be received no later than 5:00 p.m., November 13, 2017.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59604-1728, faxed to the department at (406) 444-1394, e-mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on September 22, 2017, by telephone.

9. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption and repeal of the above-referenced rules will have a significant and direct impact on small businesses that choose to participate in the incumbent worker training program.

10. The department's Office of Administrative Hearings has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Acting Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State October 2, 2017.