

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY  
OF THE STATE OF MONTANA

In the matter of the adoption of New	)	NOTICE OF PUBLIC HEARING ON
Rules I through IV, the amendment of	)	PROPOSED ADOPTION,
ARM 24.33.121, 24.33.131,	)	AMENDMENT, AND REPEAL
24.33.142, 24.33.151, 24.35.101,	)	
24.35.111, 24.35.117, 24.35.121,	)	
24.35.131, 24.35.202, 24.35.205, and	)	
24.35.206, and the repeal of ARM	)	
24.33.101, 24.35.141, and 24.35.207	)	
pertaining to Construction Contractor	)	
Registration and the Independent	)	
Contractor Central Unit	)	

TO: All Concerned Persons

1. On March 1, 2018, at 1:30 p.m., the Department of Labor and Industry will hold a public hearing in 2nd floor Conference Room A & B, 1805 Prospect Ave, Helena, Montana, to consider the proposed adoption, amendment, and repeal of the above-stated rules.

2. The Department of Labor and Industry will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Labor and Industry no later than 5:00 p.m. on February 22, 2018, to advise us of the nature of the accommodation that you need. Please contact Tracy Gonzalez, Department of Labor and Industry, P.O. Box 8011, Helena, Montana, 59624; telephone (406) 444-9585; fax (406) 444-3465; or e-mail [tgonzalez@mt.gov](mailto:tgonzalez@mt.gov).

3. General Statement of Reasonable Necessity: The proposed adoption, amendment, and repeal of those rules stated herein are reasonably necessary as part of the general obligation of the department periodically to review administrative rules under its purview, pursuant to 2-4-314, MCA, as well as to shorten, simplify, and clarify existing rules. The department endeavors continually to improve its administrative processes, shorten investigative timeframes, and provide simplicity for members of the public who utilize these rules.

Of particular note is the proposed adoption of four new rules. First, New Rule I exists to restate and provide clarity regarding the departmental interpretation of the Independent Contractor Exemption Certificate (ICEC ) law, which has been affirmed by the Workers' Compensation Court. Specifically, the rule states that the holding of an ICEC conclusively determines a worker as an independent contractor; conversely, where a worker is required to hold an ICEC and does not, the worker is conclusively an employee.

Second, New Rules II and III recodify into separate rules specific provisions of ARM 24.35.111. That is, the new rules maintain the requirements of ARM 24.35.111, but place them in a new location. This modification is intended to simplify the rules which exist and state the requirements for ICEC applications, affidavits, and waivers in separate rules for the sake of clarity and readability. The text of the point system established in ARM 24.35.111, and which is recodified in New Rule II, remains fundamentally unchanged.

Finally, New Rule IV codifies existing practice of the department with regard to construction contractor registration, as provided by Title 39, chapter 9, MCA, and the ability of the department to suspend the registration where necessary.

4. The rules as proposed to be adopted provide as follows:

NEW RULE I DETERMINATIONS WHERE EXEMPTION CERTIFICATE MANDATORY

(1) When a worker is required by 39-71-417, MCA, to have an independent contractor exemption certificate and does not, the worker is conclusively determined to be an employee for purposes of wage and hour, unemployment insurance, workers' compensation, and income tax.

(2) When a worker holds an independent contractor exemption certificate and is working under that certificate as required by 39-71-417, MCA, the worker is conclusively determined to be an independent contractor for purposes of wage and hour, unemployment insurance, workers' compensation, and income tax.

(3) When worker status is conclusively determined pursuant to this rule, the ICCU may issue a decision based solely on information sufficient to determine that conclusive outcome.

(4) Notwithstanding the foregoing, the ICCU may, at its discretion, perform an investigation pursuant to ARM 24.35.202 or when a decision is needed for a program other than wage and hour, unemployment insurance, workers' compensation, or income tax. A decision may also be issued for the purposes of suspending revoking the certificate pursuant to ARM 24.35.131 or issuing penalties, or for other purposes as the ICCU deems necessary.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-71-203, 39-71-417, MCA

IMP: 39-3-201, 39-3-402, 39-51-201, 39-51-204, 39-71-417, 39-71-418, 39-71-419, MCA

REASON: Reasonable necessity exists to adopt this new rule to make explicit the holdings of the Workers' Compensation Court for the clarity of the public with regard to independent contractor exemption certificates. Specifically, the Court held in *McCone County v. ICCU*, 2012 MTWCC 19, ¶ 24, that the failure of the worker to hold an ICEC when required to do so conclusively determined her status to be that of an employee. The Court issued the same ruling for purposes of workers' compensation in *Reule v. UEF*, 2017 MTWCC 3, ¶ 44. As such, the ICCU hopes to further inform the public of their obligations and corresponding responsibilities through the enactment of this rule. In addition, proposed new rules for wage and hour claims adopt the conclusive status of the ICEC and define "independent

contractor" for wage and hour purposes to conform with workers' compensation and unemployment insurance laws. As such, this rule proposes to implement that modification. Finally, the department interprets 15-30-2523, MCA, and ARM 42.17.223 to require a mandatory determination of independent contractor status based on the holding or not holding of an ICEC. Sections (3) and (4) are designed to permit a streamlined investigation by the ICCU in instances where the legal conclusion as to independent contractor versus employee status is conclusively determined through limited facts. That is, where a worker holds an ICEC and is working under that ICEC, as defined by 39-71-417(7)(c), MCA, the only facts necessary for conclusion for the purposes of wage and hour, workers' compensation, and unemployment insurance laws are the fact of the ICEC and that the worker is working under that ICEC by performing work described in the categories of the ICEC. This proposed rule, then, permits the ICCU to issue a decision based solely on those facts, rather than engaging in a full investigation and analysis under the AB test where such investigation is unnecessary to the result.

NEW RULE II INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE APPLICATION AFFIDAVIT (1) On the form provided by the department, the applicant shall provide all information designated as required. The form must be notarized, and the applicant must state, under oath, the veracity of all information on and attached to the form.

(2) The applicant shall also submit supporting documentation to prove applicant's qualification for an ICEC. The department has the discretion to assess the reliability of the documentation and award points for each item of proof as outlined by this rule. Each item of documentation submitted may count toward points in more than one category. No more than two items of proof may be submitted under each category. To qualify for an ICEC, an applicant's documentation must be awarded a minimum of 15 points by the department for each independently established trade, occupation, profession, or business listed on the ICEC application.

(a) The department may award up to ten points for proof that the applicant has current workers' compensation, unemployment insurance, and Department of Revenue accounts for employees in each independently established trade, occupation, profession, or business. The department may award up to six points for proof of two insurance policies or accounts and may award up to three points for proof of one insurance policy or account.

(b) The department may award up to six points for each of the following proofs for each independently established trade, occupation, profession, or business:

(i) contract or memo of understanding that demonstrates applicant's independent contractor status. If the applicant can end a contract at any time without incurring any liability for failing to complete the project that is the subject of the contract, the department cannot award points for the contract under this rule. Separate contracts with different hiring agents may qualify for a maximum of six points. Each contract must include:

- (A) payment based on a completed project;
- (B) beginning and ending dates of the contract;

- (C) liability for failure to complete the project;
- (D) identification of who provides the materials and supplies;
- (E) signatures by both parties; and
- (F) defined body of work, complete project, or end result;
- (ii) signed and dated list of equipment and tools owned or controlled by the applicant with approximate values. The equipment or tool list may be documented by a rental or lease agreement, county documents verifying the business equipment tax paid, or other means;
- (iii) commercial general liability insurance policy or bonding;
- (iv) most recent business tax forms filed within the past three years;
- (v) IRS Form 1099s (miscellaneous income) from multiple hiring agents or two quarterly self-employment tax payments (IRS form 1040ES) within past three years; or
- (vi) trucking company lease agreement.
- (c) The department may award up to three points for each of the following proofs for each independently established trade, occupation, profession, or business:
  - (i) partnership or limited liability partnership agreement signed and dated by all partners that demonstrates:
    - (A) intent to form the partnership;
    - (B) contribution by all partners;
    - (C) a proprietary interest and right of control by the application; and
    - (D) the sharing of profit/loss;
  - (ii) current business license or building permit;
  - (iii) certificate of registration for the business entity issued by the Montana secretary of state;
  - (iv) articles of incorporation, annual report, articles of organization, or other documentation that verifies the applicant is an officer in a corporation, a manager in a manager-managed limited liability company, or a member of a member managed limited liability company;
  - (v) proof of ownership, home occupation license, rental or lease agreement with a statement that the property may be used for business or commercial use, or proof of IRS filing for use of home as a business;
  - (vi) educational certification for unlicensed occupations relevant to the trade, occupation, or profession for which the applicant seeks the ICEC;
  - (vii) current professional license relevant to the trade, occupation, or profession for which the applicant seeks the ICEC;
  - (viii) membership in a relevant professional association or affiliation;
  - (ix) current motor carrier (MC) authority number in applicant's personal or business name;
  - (x) business bank account; or
  - (xi) copies of advertising in a newspaper, phone book, website on the internet, or other venue.
- (d) The department may award up to one-and-one-half points for each of the following proofs for each independently established trade, occupation, profession, or business:
  - (i) federal employer identification number (EIN);

- (ii) Dunn and Bradstreet number;
  - (iii) telephone or utility bill(s) in the business name;
  - (iv) credit card(s) or purchase account(s) in the business name;
  - (v) preprinted business invoices, business cards, or brochures;
  - (vi) proof of order(s) for printed hats, shirts, or other promotional items for the business;
  - (vii) proof of business advertising using a vehicle sign, yard sign, bulletin boards, or posted flyers;
  - (viii) invoices billed to the business name or a bid proposal or estimate, either of which must include the address and phone number of the recipient;
  - (ix) vehicle registration(s) in the business name; or
  - (x) international fuel tax account number (IFTA) in the applicant's personal or business name.
- (e) The applicant may submit any other supporting documentation. The department has discretion to assess the reliability of and determine the point value of any documentation not listed in this rule.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-71-203, 39-71-417, MCA  
IMP: 39-3-201, 39-3-402, 39-51-201, 39-51-204, 39-71-417, 39-71-418, 39-71-419, MCA

REASON: Reasonable necessity exists to adopt this new rule as a way to simplify and clarify the existing ICEC application process. Currently, the application process is fully defined in a single rule. This proposal suggests a rule for each of the application's constituent parts. As such, the point system currently defined at ARM 24.35.111 is proposed to be in its own rule.

NEW RULE III INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE

WAIVER (1) To execute a waiver, the applicant shall complete the department-approved waiver form. The waiver form must be signed by the applicant and notarized. The applicant shall represent on the waiver form that:

- (a) the applicant is engaged in each independently established trade, occupation, profession, or business that is specifically identified on the application form;
- (b) the applicant is responsible for all taxes related to the applicant's work as an independent contractor;
- (c) the applicant controls the details of how services are performed, both under contract and in fact, and the hiring agent retains only the control necessary to ensure the bargained for end result; and
- (d) the applicant understands and agrees that if the ICEC is granted, the applicant is not eligible for and waives the right to workers' compensation or occupational disease benefits for an injury or occupational disease related to work performed as an independent contractor in each independently established trade, occupation, profession, or business for which the ICEC is granted.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-71-203, 39-71-417, MCA

IMP: 39-3-201, 39-3-402, 39-51-201, 39-51-204, 39-71-417, 39-71-418, 39-71-419, MCA

REASON: In conformance with proposed modifications to ARM 24.35.111 and New Rule II, this new rule sets forth the requirements of the ICEC waiver. This proposal is designed to simplify the application process, by breaking it down into its constituent parts.

NEW RULE IV SUSPENSION OF CONSTRUCTION CONTRACTOR REGISTRATION (1) A contractor registration may be suspended in circumstances which the department deems necessary. These circumstances include, without limitation, the following:

- (a) false statements regarding any aspect of the construction contractor registration application;
  - (b) suspension is required by law, for example, based on non-payment of child support pursuant to Title 40, chapter 5, part 7, MCA;
  - (c) failure to report a change in status as required by ARM 24.33.142; and
  - (d) failure to maintain workers' compensation coverage, if required.
- (2) In addition to suspension, the department may assess penalties pursuant to the provisions of 39-9-301 and 39-9-401, MCA.

AUTH: 39-9-103, MCA

IMP: 39-9-204, 39-9-301, 39-9-401, MCA

REASON: Reasonable necessity exists to propose this new rule to state the most common bases for suspension of a construction contractor registration. These bases conform to current departmental practice with regard to suspension, and each constitutes a violation of the requirements of the construction contractor registration program.

5. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

24.33.121 CONSTRUCTION CONTRACTOR REGISTRATION FEES

- (1) The fee for the issuance, renewal, or reinstatement of a construction contractor certificate of registration is ~~\$53~~ \$70.
- (a) The fee is nonrefundable for applicants.
  - (b) An applicant will have a maximum of six months to submit the required information for approval. After six months, the applicant must resubmit the ~~\$53~~ \$70 fee and a new application.
- (2) If a business structure changes to require an FEIN (or not require an FEIN), a new application and ~~\$53~~ \$70 application fee must be submitted.

AUTH: 39-9-103, MCA

IMP: 39-9-206, MCA

REASON: Reasonable necessity exists to amend the construction contractor registration fee pursuant to the requirements of 39-9-206(2), MCA, that the "fees must cover the full cost of issuing certificates, filing papers and notices, and administering and enforcing this chapter." As currently set, the fees do not cover the full cost of the construction contractor registration program. The program experienced a loss of \$67,229.76 in fiscal year 2015, with total expenses of \$338,851, a loss of \$90,031.47 in fiscal year 2016, with total expenses of \$409,989, and a loss of \$220,305.97 in fiscal year 2017, with total expenditures of \$521,890. As such, the fees must be increased. Based on the total number of current construction contractor registrations, 10,768, the department estimates approximately \$376,880 in fees per fiscal year. The department expects that, as a result of increasing the fees as proposed, the program will not be able fully to fund its costs, because the registration fee is statutorily capped at \$70. Therefore, while a \$70 fee will likely continue to be insufficient to fully cover the cost of the construction contractor registration program, the increase will more closely meet the statutory requirement to be self-funded.

24.33.131 EVIDENCE OF COMPLIANCE WITH LAWS (1) through (1)(b)(iii) remain the same.

(iv) Montana is listed in section 3A on the insurance policy's declarations page as the state under which laws the policy affords coverage;

(v) through (d) remain the same.

AUTH: 39-9-103, MCA

IMP: 39-9-201, MCA

REASON: Reasonable necessity exists to amend this rule to incorporate specifically the requirement that Montana be listed in section 3A of the insurance declaration page due to confusion which has existed. It has long been required that Montana be listed on the declaration page; however, the department has discovered that, while this requirement is widely known, it is not universally known. As such, the department seeks to make explicit this requirement.

24.33.142 REPORTING CERTIFICATE CHANGES (1) through (1)(c) remain the same.

(d) change in status of certificate as stated pursuant to ARM 24.33.151(1);

(e) phone number;

(f) addition to ownership; ~~and~~

(g) workers' compensation insurance carrier change or cancellation;-

(h) business name; or

(i) any change in principal(s) of the business.

(2) remains the same.

AUTH: 39-9-103, MCA

IMP: 39-9-201, 39-9-206, 39-9-301, 39-9-303, MCA

REASON: Reasonable necessity exists to amend (1)(d) to clarify for the public what is meant by a change in "status" that must be reported to the department. Reasonable necessity exists to insert new (1)(h) and (i) to ensure that contractors report to the department when a business or applicant name is changed.

24.33.151 CERTIFICATES OF REGISTRATION (1) through (1)(b) remain the same.

(c) "LEASED EMPLOYEES" means the contractor uses employees ~~from an employee-leasing firm~~ of a professional employer organization, as defined at 39-8-102, MCA. These employees are presumably covered with workers' compensation and unemployment insurance through the leasing company.

(d) remains the same.

(2) Along with a certificate, each certificate holder will receive a construction contractor registration wallet card and a vehicle decal. The department shall review requests for more than one decal or card on an individual basis.

(3) remains the same

AUTH: 39-9-103, MCA

IMP: 39-9-204, MCA

REASON: Reasonable necessity exists to modify (1)(c) to clarify the meaning of "employee leasing firm" as a professional employer organization. Reasonable necessity exists to modify (2) to correct a typographical omission.

24.35.101 DEFINITIONS For the purposes of ARM Title 24, chapter 35, the following definitions apply:

(1) through (10) remain the same.

~~(11) "Person" means an individual. A person may be a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company. An officer or manager who has elected to apply for an ICEC pursuant to 39-71-417, MCA, is a person for the purposes of these rules.~~

(11)(12) "Renewal affidavit application" means an application for renewal of an existing ICEC held by that person.

(13) through (15) remain the same but are renumbered (12) through (14).

AUTH: 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA

IMP: 39-51-201, 39-51-204, 39-71-105, 39-71-409, 39-71-417, 39-71-418, MCA

REASON: Reasonable necessity exists to strike (11) because it is duplicative of statute. Reasonable necessity exists to modify (12) to clarify the renewal application is an application, not an affidavit.

24.35.111 APPLICATION FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) ~~A person who regularly and customarily performs services at locations other than the person's own fixed business location and who~~

has not elected to be personally bound by the provisions of workers' compensation plan 1, 2, or 3, shall apply for an independent contractor exemption certificate (ICEC). The applicant for an ICEC shall submit:

(a) a completed ICEC application affidavit on a department-approved form bearing the applicant's original notarized signature, as required by [NEW RULE III]. The applicant shall swear or affirm under oath that the statements contained in the form and attached documentation are true and accurate to the best of the applicant's knowledge. The application affidavit must include, but is not limited to:

- (i) applicant's name and mailing address;
  - (ii) applicant's social security number;
  - (iii) list identifying each trade, occupation, profession, or business for which the applicant seeks an ICEC, including:
    - (A) business name;
    - (B) business structure (entity type);
    - (C) business mailing address and business physical address; and
    - (D) business telephone number;
  - (iv) supporting documentation for applicant's independent contractor status in each trade, occupation, profession, or business for which applicant seeks exemption from the Workers' Compensation Act, as set forth by (2);
- (b) a fee, as required by ARM 24.35.121; and
- (c) an executed, notarized waiver conforming to the requirements of [NEW RULE III] (3).

(2) The applicant shall submit supporting documentation to prove applicant's qualification for an ICEC. The department has the discretion to assess the reliability of the documentation and award points for each item of proof as outlined by this rule. Each item of documentation submitted may count toward points in more than one category. No more than two items of proof may be submitted under each category. To qualify for an ICEC, an applicant's documentation must be awarded a minimum of 15 points by the department for each independently established trade, occupation, profession, or business listed on the ICEC application.

(a) The department may award up to ten points for proof that the applicant has current workers' compensation, unemployment insurance, and Department of Revenue accounts for employees in each independently established trade, occupation, profession, or business. The department may award up to six points for proof of two insurance policies or accounts and may award up to three points for proof of one insurance policy or account.

(b) The department may award up to six points for each of the following proofs for each independently established trade, occupation, profession, or business:

(i) contract or memo of understanding that demonstrates applicant's independent contractor status. If the applicant can end a contract at any time without incurring any liability for failing to complete the project that is the subject of the contract, the department cannot award points for the contract under this rule. Separate contracts with different hiring agents may qualify for a maximum of six points. Each contract must include:

- (A) payment based on a completed project;
- (B) beginning and ending dates of the contract;

- ~~(C) liability for failure to complete the project;~~
- ~~(D) identification of who provides the materials and supplies;~~
- ~~(E) signatures by both parties; and~~
- ~~(F) defined body of work, complete project, or end result;~~
- ~~(ii) signed and dated list of equipment and tools owned or controlled by the applicant with approximate values. The equipment or tool list may be documented by a rental or lease agreement, county documents verifying the business equipment tax paid, or other means;~~
- ~~(iii) commercial general liability insurance policy or bonding;~~
- ~~(iv) most recent business tax forms filed within past two years;~~
- ~~(v) IRS Form 1099s (miscellaneous income) from multiple hiring agents or two quarterly self-employment tax payments (IRS form 1040ES) within past two years; or~~
- ~~(vi) trucking company lease agreement.~~
- ~~(c) The department may award up to three points for each of the following proofs for each independently established trade, occupation, profession, or business:~~
  - ~~(i) two or more bids, estimates, proposals, or completed billing invoices issued by the business;~~
  - ~~(ii) partnership or limited liability partnership agreement signed and dated by all partners that demonstrates:~~
    - ~~(A) intent to form the partnership;~~
    - ~~(B) contribution by all partners;~~
    - ~~(C) a proprietary interest and right of control by the applicant; and~~
    - ~~(D) the sharing of profit/loss;~~
  - ~~(iii) application for or current business license or building permit;~~
  - ~~(iv) certificate of registration for the business entity issued by the Montana secretary of state;~~
  - ~~(v) articles of incorporation, annual report, articles of organization, or other documentation that verifies the applicant is an officer in a corporation or a manager in a manager-managed limited liability company with a minimum of 20 percent ownership held by the applicant;~~
  - ~~(vi) proof of ownership, rent, or lease of business location or proof of IRS filing for use of home as a business (IRS Form 8829);~~
  - ~~(vii) educational certification for unlicensed occupations or current professional license relevant to the trade, occupation, or profession for which the applicant seeks the ICEG;~~
  - ~~(viii) membership in a relevant professional association or affiliation;~~
  - ~~(ix) current motor carrier (MC) authority number in applicant's personal or business name;~~
  - ~~(x) business bank account; or~~
  - ~~(xi) copies of advertising in a newspaper, phone book, on the internet, or other venue.~~
- ~~(d) The department may award up to one and one-half points for each of the following proofs for each independently established trade, occupation, profession, or business:~~
  - ~~(i) federal employer identification number (EIN);~~

- ~~(ii) Dunn and Bradstreet number;~~
- ~~(iii) telephone or utility bill(s) in the business name;~~
- ~~(iv) credit card(s) or purchase account(s) in the business name;~~
- ~~(v) preprinted business invoices, cards, or brochures;~~
- ~~(vi) proof of order(s) for printed hats, shirts, or other promotional items for the business;~~
- ~~(vii) proof of business advertising using a vehicle sign, yard sign, bulletin boards, or posted flyers;~~
- ~~(viii) invoices billed to the business name;~~
- ~~(ix) vehicle registration(s) in the business name; or~~
- ~~(x) international fuel tax account number (IFTA) in applicant's personal or business name.~~

~~(e) The applicant may submit any other supporting documentation. The department has discretion to assess the reliability of and determine the point value of any documentation not listed in this rule.~~

~~(3) To execute a waiver, the applicant shall complete the department-approved waiver form. The waiver form must be signed by the applicant and notarized. The applicant shall represent on the waiver form that:~~

~~(a) the applicant is engaged in each independently established trade, occupation, profession, or business that is specifically identified on the application form;~~

~~(b) the applicant is responsible for all taxes related to the applicant's work as an independent contractor;~~

~~(c) the applicant controls the details of how services are performed, both under contract and in fact, and the hiring agent retains only the control necessary to ensure the bargained for end result; and~~

~~(d) the applicant understands and agrees that if the ICEC is granted, the applicant is not eligible for and waives the right to workers' compensation or occupational disease benefits for an injury or occupational disease related to work performed as an independent contractor in each independently established trade, occupation, profession, or business for which the ICEC is granted.~~

~~(4) An ICEC issued by the department remains in effect for two years unless the department revokes or suspends the ICEC or the applicant requests in writing that the department cancel the ICEC.~~

~~(5) and (6) remain the same but are renumbered (2) and (3).~~

AUTH: ~~39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA~~

IMP: ~~39-51-201, 39-51-204, 39-71-105, 39-71-409, 39-71-417, 39-71-418,~~  
MCA

REASON: Reasonable necessity exists to modify (1) because it is duplicative of statute. In addition, the section is modified to narrow the rule to the specific requirements of application. Reasonable necessity exists to strike (2) through (4) because of the proposal to adopt new rules containing this information. The department hopes to shorten the length of each rule for the purpose of achieving clarity for each segment of the ICEC application, simplicity, and modernization of the administrative rules pertaining to the certificate. Reasonable necessity exists to

modify the authorizing and implementing statutes to reflect the proposed narrowing of the scope of the rule.

24.35.117 ICEC RENEWAL, AFFIDAVIT, AND WAIVER (1) Two months prior to the expiration date of an ICEC, the department shall mail an ICEC renewal affidavit application and waiver to the ICEC holder at the address on file with the department. The department shall prepare a renewal form for each ICEC holder that incorporates the most current information in the possession of the department regarding the ICEC holder's independent contractor status and lists the documentation on file with the department that supports independent contractor status.

(2) To renew an ICEC, the ICEC holder shall submit the following:

(a) signed and notarized ICEC renewal affidavit application on the department-approved form that indicates any changes in independent contractor status;

(b) through (e) remain the same.

(3) The department will verify documentation on file and evaluate all new documentation submitted by the ICEC holder. The department will assign point values to documentation, in accordance with ~~ARM 24.35.114~~ [NEW RULE II].

(4) The department has discretion to assess the reliability of and determine the point value of any documentation not listed in ~~ARM 24.35.114~~ [NEW RULE II].

(5) If the department is unable to verify any documentation needed to support independent contractor status, the department will notify the ICEC holder in writing within 30 days of receipt of the renewal affidavit application.

(6) To qualify for an ICEC renewal, the ICEC holder's documentation must be awarded a minimum of 15 points by the department for each independently established trade, occupation, profession, or business listed on the ICEC renewal affidavit application.

(7) remains the same.

(8) An ICEC holder may update the information on file with the department at any time during a current independent contractor exemption certificate period by requesting in person, over the phone, by e-mail, or in writing the revision of business name(s), business structure, phone number(s), or mailing address.

(9) An ICEC holder may add or change trade(s), occupation(s), profession(s), or business(es) to an ICEC, by executing an affidavit and waiver and submitting sufficient, relevant documentation to qualify for a minimum of 15 points, in accordance with the requirements of ~~ARM 24.35.114~~ [NEW RULE II]. When an addition is made pursuant to this section (9), the expiration date of the ICEC is not changed.

AUTH: 39-51-301, 39-51-302, 39-71-203, 39-71-409, 39-71-417, MCA

IMP: 39-51-201, 39-51-204, 39-71-105, 39-71-409, 39-71-417, 39-71-418,

MCA

REASON: Reasonable necessity exists to amend (8) to clarify appropriate means of communication for the purpose of updating ICEC information with the department. Reasonable necessity exists to amend (9) to clarify existing departmental practice

that, because no fee is required to amend an ICEC to add or change the trade, occupation, profession, or business of the ICEC holder, the expiration date of the ICEC is not extended through the change. Other changes to this section—the striking of "affidavit" in favor of "application"—bring this rule into conformity with proposed amendments to ARM 24.35.101.

24.35.121 APPLICATION AND RENEWAL FEE FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) A nonrefundable fee of \$125 must be submitted with each initial application, each application for reinstatement of a revoked ICEC, and each renewal ~~affidavit~~ application.

(2) and (3) remain the same.

AUTH: 39-71-203, 39-71-401, MCA

IMP: ~~39-71-120~~, 39-71-401, 39-71-417, 39-71-418, MCA

REASON: Reasonable necessity exists to amend (1) to conform with proposed amendments to ARM 24.35.101. Reasonable necessity exists to modify the implementation statutes to strike 39-71-120, MCA, because that statute has been repealed.

24.35.131 SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE ~~(1) An ICEC may be suspended or revoked by the department pursuant to 39-71-418, MCA. The department shall apply the two-part test pursuant to ARM 24.35.202 to determine whether an individual is an independent contractor or an employee.~~

~~(2) The department may suspend an ICEC as it applies to a particular hiring agent for whom the ICEC holder works when the department determines that a hiring agent is either exerting control or retains a right to control to a degree that causes a certificate holder to violate the provisions of 39-71-417, MCA.~~

~~(3) The department may revoke an ICEC when the department determines that a certificate holder fails to meet the test for independent contractor status, set forth by ARM 24.35.202.~~

~~(4) (1) The department may revoke an ICEC when the department determines that a certificate holder is uncooperative in light of the following factors it is necessary to do so. The following are examples when the department may revoke an ICEC:~~

~~(a) the department is unable to locate the certificate holder or mail sent to the certificate holder at the address on file with the department is returned;~~

~~(b) the certificate holder fails to cooperate with the department, including without limitation: refuses to provide information to the department, including, but not limited to, updated contact information for the certificate holder and contact information for each of the certificate holder's hiring agents;~~

~~(i) failure to provide information to the department upon request;~~

~~(ii) failure to complete a worker relationship questionnaire upon request; or~~

~~(iii) failure to notify the department of changes in contact information;~~

~~(c) mail sent to the certificate holder is returned to the department; or~~

(c) when revocation is required by law, for example for non-payment of child support pursuant to Title 40, chapter 5, part 7, MCA; or

(d) remains the same.

~~(5) A person may appeal a department suspension or revocation of an ICEC in the same manner as that provided for denial of an application pursuant to 39-71-417, MCA.~~

(6) and (7) remain the same but are renumbered (2) and (3).

AUTH: 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA

IMP: 39-51-201, 39-51-204, 39-71-417, 39-71-418, MCA

REASON: Reasonable necessity exists to strike (1) through (3) because they are duplicative of statute and are therefore unnecessary to be restated. Reasonable necessity exists to modify (4) to clarify the intent of the current rule and to enhance the readability of the rules. Reasonable necessity exists to strike (5) because it is duplicative of statute.

24.35.202 DECISIONS REGARDING EMPLOYMENT STATUS (1) Subject to [NEW RULE I], ~~When~~ when the ICCU or another unit of the department evaluates an individual's employment status, the department shall apply a two-part test to determine whether an individual is an independent contractor or an employee. The department shall evaluate:

(a) through (3) remain the same.

(4) ~~Determinations~~ Decisions regarding employment status must comply with the criteria for an independent contractor found at 39-71-417, MCA, as well as with existing law on partnership, joint ventures, and other employment entities.

(5) Initial determinations regarding employment status may be issued by ~~the Unemployment Insurance Division or the uninsured employers~~ any unit of the department or by the Department of Revenue. Initial determinations of employment status by the department are binding on the parties unless a party disputes the determination, pursuant to ARM 24.11.2407, or 24.16.7527, ~~or~~ 42.17.210.

(6) through (8) remain the same.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA

IMP: 39-3-208, 39-3-209, 39-3-210, 39-51-201, 39-51-203, 39-71-415, 39-71-417, 39-71-418, MCA

REASON: Reasonable necessity exists to modify (1) to ensure conformity with proposed New Rule I. Reasonable necessity exists to modify (4) to reflect that ICCU decisions are "decisions" rather than "determinations." Reasonable necessity exists to modify (5) to clarify the various units and bureaus which may make initial worker status determinations, and to reflect that ARM 42.17.210, a rule of the Department of Revenue, has been repealed. It is the department's intention that, when an ICEC is not required by 39-71-417, MCA, the department will conduct an analysis pursuant to the AB Test.

24.35.205 BINDING NATURE OF ICCU DECISIONS REGARDING EMPLOYMENT STATUS (1) Unless appealed following mediation pursuant to 39-71-415, MCA, written decisions issued by the ICCU are binding on all parties with respect to employment status issues under the jurisdiction of the department and the jurisdiction of any other agency which elects to be included as a member of the ICCU. These decisions may affect a party's liability in matters related to unemployment insurance, the Uninsured Employer's Fund, wage and hour issues, ~~the Human Rights Commission~~ human rights, and state income tax withholding. (2) and (3) remain the same.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA

IMP: 39-3-212, 39-51-1109, 39-71-415, 39-71-417, MCA

REASON: Reasonable necessity exists to modify (1) to note that ICCU decisions are binding for purposes of human rights generally, rather than simply for the Human Rights Commission.

24.35.206 MEDIATION AND APPEAL OF DECISIONS REGARDING EMPLOYMENT STATUS ~~(1) A complaint received by the department or a department request for a decision regarding employment status may be investigated by the ICCU. The ICCU shall issue a decision on employment status.~~

~~(2) A party to a dispute, which does not involve workers' compensation benefits, may appeal an ICCU decision on employment status or the denial, revocation, or suspension of an ICEG.~~

~~(3) The first step in the appeal process is mandatory mediation.~~

(1) After issuance of a decision, a dissatisfied The party requesting mediation shall file a written request for mediation with the ICCU within 15 days of ~~notice~~ the mailing of the ICCU's decision. The request for mediation is effective upon receipt by the department, not upon mailing. It is the obligation of the requesting party to ensure timely receipt of the request for mediation by the ICCU.

(2) A request for mediation may be filed in the following ways:

(a) by mail to P.O. Box 8011; Helena, MT 59604;

(b) by electronic mail to [iccuappeal@mt.gov](mailto:iccuappeal@mt.gov); or

(c) by facsimile to (406) 444-3465.

(3) Upon receiving a request for mediation, the ICCU shall provide the mediator a copy of its decision and any other documents it deems relevant.

~~(4) A party is considered to have been given notice of the ICCU decision on the date a written notice is personally delivered or three days after the department mails a written notice to the party. The ICCU may extend the time limits for a party to submit a written request for mediation for good cause shown.~~

~~(5) Following mediation, a party may appeal an ICCU decision by filing a petition for appeal with the Workers' Compensation Court. The appellant shall serve a copy of the petition by mail on all parties of record.~~

~~(6) A petition for appeal must be received by the Workers' Compensation Court within 30 days of the date the department mailed the mediator's report to the~~

~~parties. Notice of appeal is effective upon the actual receipt of the petition by the Workers' Compensation Court, not upon mailing.~~

~~(7) When a dispute is not resolved through mediation and no petition for appeal is filed with the Workers' Compensation Court, the ICCU's employment status decision is binding on the parties.~~

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417,  
MCA

IMP: 2-4-201, 39-3-216, 39-51-1109, 39-71-415, 39-71-417, 39-71-418,  
MCA

REASON: Reasonable necessity exists to propose to strike (1) and (2) because they are duplicative of statute. Reasonable necessity exists to amend (3) (proposed to be (1)) to clarify that the timeline to request mediation of an ICCU decision begins to run upon the ICCU mailing of the decision, as stated on the certificate of service. Proposed (2) is proposed to be amended to clarify the ways in which requests for mediation can be processed. Proposed (3) includes the requirements for file transmittal upon receipt of a request for mediation. Reasonable necessity exists to strike current (4) because it has created complication and confusion regarding the actual time to request mediation of decisions of the ICCU. Reasonable necessity exists to strike (5) through (7) because they are duplicative of 39-71-415, MCA.

6. The department proposes to repeal the following rules:

24.33.101 CONTRACTOR REGISTRATION APPLICATION REQUIREMENTS

AUTH: 39-9-103, MCA  
IMP: 39-9-102, 39-9-201, MCA

REASON: Reasonable necessity exists to repeal this rule to simplify and shorten the administrative rules. Section 39-9-201, MCA requires applicants for a contractor registration to apply using a departmental form, and sets forth the minimum requirements for such a form. However, the statute does not require adoption of an administrative rule to determine the contents of that form. As such, in the interests of ensuring the application requirements are kept up-to-date with the needs of Montana contractors and the department, removing this provision from the administrative rules will simplify the updating process.

24.35.141 GUIDELINES FOR DETERMINING WHEN AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE IS NOT REQUIRED

AUTH: 39-71-203, 39-71-417, MCA  
IMP: 39-71-417, MCA

REASON: Reasonable necessity exists to repeal this rule because it is duplicative of statute and in the interests of shortening and simplifying the administrative rules.

24.35.207 TRANSFER OF FILE

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417,  
MCA

IMP: 2-4-201, 39-3-216, 39-51-1109, 39-71-415, 39-71-417, 39-71-418,  
MCA

REASON: Reasonable necessity exists to repeal this rule to simplify and shorten the administrative rules. In particular, the proposed amendment of ARM 24.35.206 includes the pertinent provisions of this rule. As such, this rule would become duplicative.

7. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Tracy Gonzalez, Department of Labor and Industry, P.O. Box 8011, Helena, Montana, 59624; telephone (406) 444-9585; fax (406) 444-3465; or e-mail [tgonzalez@mt.gov](mailto:tgonzalez@mt.gov), and must be received no later than 5:00 p.m., March 9, 2018.

8. 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 59624-1728, faxed to the department at (406) 444-1394, e-mailed to [mcadwallader@mt.gov](mailto:mcadwallader@mt.gov), or may be made by completing a request form at any rules hearing held by the agency.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the adoption, amendment, and repeal of the above-referenced rules will not significantly and directly impact small businesses.

11. The Office of Administrative Hearings has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER  
Mark Cadwallader  
Rule Reviewer

/s/ GALEN HOLLENBAUGH  
Galen Hollenbaugh  
Commissioner of Labor  
Department of Labor and Industry

Certified to the Secretary of State January 30, 2018.