

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of)
ARM 24.16.7556, 24.35.101,)
24.35.111, 24.35.117, 24.35.133,)
24.35.202, and 24.35.204 and the)
repeal of ARM 24.16.7520 pertaining)
to independent contractors)

TO: All Concerned Persons

1. On August 1, 2024, at 10:00 a.m., a public hearing will be held via remote conferencing to consider the proposed changes to the above-stated rules. There will be no in-person hearing. Interested parties may access the remote conferencing platform in the following ways:

- a. Join Zoom Meeting, <https://mt-gov.zoom.us/j/84997651239>
Meeting ID: 849 9765 1239, Passcode: 984543
-OR-
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656
Meeting ID: 849 9765 1239, Passcode: 984543

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 July 25, 2024, to advise us of the nature of the accommodation that you need. Please contact the department at P.O. Box 1728, Helena, Montana 59624-1728; telephone (406) 444-5466; Montana Relay 711; or e-mail laborlegal@mt.gov.

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

24.16.7556 SPECIAL CIRCUMSTANCES JUSTIFYING MAXIMUM
PENALTY (1) The following conduct by the employer constitutes special
circumstances that justify the imposition of the maximum penalty allowed by law:
(a) and (b) remain the same.
(c) the employer has previously violated similar wage and hour statutes
within three years prior to the date of filing of the wage claim; ~~or~~
(d) the employer has issued an insufficient funds paycheck; or
(e) the employer has incorrectly classified a worker as an independent
contractor, unless it is determined by the department that 39-71-417(7)(d), MCA,
applies.

(2) and (3) remain the same.

AUTH: 39-3-202, 39-3-403, MCA
IMP: 39-3-206, MCA

REASON: There is reasonable necessity to include worker misclassification as a category justifying a maximum penalty to disincentivize the practice. Mischaracterizing a worker as an independent contractor interferes with and chills the worker's right to access benefits and employee protections. Wage and hour, workers' compensation, unemployment insurance, and human rights protections are all conditioned on employee status. When a hiring agent represents to a worker that the worker is not entitled to employment protections, the hiring agent necessarily dissuades the worker from pursuing their protections. The department therefore seeks to discourage misclassification of workers by including this practice as a basis for maximum penalty.

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

~~(1) "Department" means the Montana Department of Labor and Industry.~~

~~(2) through (5) remain the same but are renumbered (1) through (4).~~

~~(6) (5) "Independent Contractor Central Unit" or "ICCU" means the unit located within the department which is the individuals or group responsible for making employment status decisions for the entire department and other agencies that elect to participate in the ICCU. The ICCU evaluates ICEC applications and investigates working relationships identified in complaints and referrals.~~

~~(7) "Independent Contractor Exemption Certificate" or "ICEC" means a certificate issued by the department that signifies a person meets the criteria for an exemption from the provisions of the Workers' Compensation Act for a specific trade, occupation, profession, or business.~~

~~(8) "Individual" means a person who renders service in the course of a trade, occupation, profession, or business.~~

~~(9) "Initial application" means a person's first-time application for exemption as an independent contractor for a particular trade(s), occupation(s), profession(s), or business(es).~~

~~(10) remains the same but is renumbered (6).~~

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

~~(12) remains the same but is renumbered (7).~~

~~(13) "Similarly situated individuals" means people who render services for an employer under circumstances substantially the same as those under which the subject individual's services were performed.~~

~~(14) remains the same but is renumbered (8).~~

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: There is reasonable necessity to repeal the definition of "department" because it is unnecessary to define in rule what is defined in statute. The definition of "ICCU" is proposed to be modified to clarify that the unit is designated as those individuals or groups of individuals within the department who make employment

status determinations. The definition of "independent contractor exemption certificate" is proposed to be stricken because it is not necessary to define a term set forth in statute. The definitions of "individual," "initial application," "renewal application," and "similarly situated individuals" are proposed to be stricken because it is not necessary to define a term which has its common meaning.

24.35.111 APPLICATION FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) The applicant for an ICEC shall submit:

- (a) a completed ICEC application on a department-approved form bearing the applicant's original notarized signature, as required by ARM 24.35.112.
- (b) through (3) remain the same.

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

REASON: There is reasonable necessity to amend this rule to provide that department receipt of an electronic application is sufficient to meet application requirements.

24.35.117 ICEC RENEWAL, AFFIDAVIT DECLARATION, AND WAIVER

~~(1) Two months prior to the expiration date of an ICEC, the department shall mail an ICEC renewal 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. About two months prior to its expiration, the department will remind an ICEC holder of the expiration date of their ICEC.~~

- (2) To renew an ICEC, the ICEC holder shall submit the following:
 - (a) signed ~~and notarized~~ ICEC renewal application on the department-approved form that indicates any changes in independent contractor status;
 - (b) through (d) remain the same.
 - (e) an executed, ~~notarized~~ waiver on the department-approved form.
- (3) through (9) remain the same.

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: There is reasonable necessity to amend this rule to provide that a notarization is not required for a renewal ICEC application. While 39-71-417, MCA, requires a statement under oath, a declaration suffices. The department intends to update its forms for that purpose with adoption of this rule.

24.35.133 NOTICE OF SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) through (3) remain the same.

~~(4) The web site address for the department's independent contractor information is www.mtcontractor.com. The telephone number for verifying the status of an ICEC is (406) 444-9029.~~

AUTH: 39-71-203, 39-71-417, 39-71-418, MCA
IMP: 39-71-418, MCA

REASON: There is reasonable necessity to strike (4) because the web address is no longer accurate, and it is not necessary to place specific contact information in the rule. Information about ICEC status will continue to be present on the department's website.

24.35.202 DECISIONS REGARDING EMPLOYMENT STATUS (1) Subject to ARM 24.35.203, ~~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) and (b) remain the same.

~~(2) To determine whether a hiring agent exerts control over an individual, the department shall evaluate:~~

~~(a) direct evidence of right or exercise of control;~~

~~(b) method of payment;~~

~~(c) furnishing of equipment; and~~

~~(d) right to fire.~~

~~(3) To determine the employment status of an individual, the department may:~~

~~(a) review written contracts between the individual and the hiring agent;~~

~~(b) interview and obtain statements from the individual, co-workers, and the hiring agent;~~

~~(c) obtain statements from third parties;~~

~~(d) examine the books and records of the hiring agent;~~

~~(e) review filing status on income tax returns;~~

~~(f) perform onsite visits; and~~

~~(g) make any other investigation necessary to determine employment status.~~

~~(4) 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) (2) Initial determinations regarding employment status may be issued by 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. Initial determinations are binding unless appealed to the ICCU by applicable law.~~

~~(6) ICCU "decisions" regarding employment must be called "decisions" and are separate and distinct from both initial determinations of the department and "orders" defined at ARM 24.29.205.~~

~~(7) (3) ICCU decisions regarding employment status are binding on the department and on any other agency which elects to be included as a member of the~~

department's ICCU, subject to the limitations contained in ARM 24.35.205(3). This does not include any agency which is merely appearing before the ICCU as a party in an employment status case (for example the state compensation insurance fund), and has not elected to be included as a member of the ICCU.

~~(8) The department may apply its decisions regarding employment status to similarly situated individuals.~~

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: There is reasonable necessity to strike (2) through (4) because it is not necessary to state that the ICCU will apply applicable law to its determinations. Such is required. Sections (1) and (5) are proposed to be amended in favor of simplicity and to avoid unnecessary cross-references. Section (6) is proposed to be stricken because it is unnecessary to define a document title by rule. Section (7) is proposed to be amended to remove an unnecessary example of a party. Section (8) is proposed to be stricken because ICCU decisions are fact-intensive inquiries. To the extent a dispute presents similar facts, it is unnecessary to state in rule what is the fundamental purpose of the ICCU—to establish standardized decision-making for independent contractor disputes.

24.35.204 MISREPRESENTATIONS REGARDING INDEPENDENT CONTRACTOR STATUS (1) For purposes of this rule and the implementation of 39-51-203(4) and 39-71-419(1)(e), MCA, and requirements in certain instances not to determine status based "solely" on the lack of an ICEC, the ICCU will evaluate a worker's status pursuant to ARM 24.35.202: if one or more category of 39-71-417(7)(d), MCA applies, the ICCU will evaluate the worker's status pursuant to 39-71-417(4), MCA.

~~(a) the worker applied to the department for an ICEC prior to filing the present claim for workers' compensation or unemployment insurance benefits or prior to the present audit or investigation by the department and the application for ICEC is pending determination by the department;~~

~~(b) the worker provided the hiring agent a forged ICEC;~~

~~(c) the hiring agent took affirmative steps to verify the worker's independent contractor status, verified the worker to be an independent contractor by holding an independent contractor exemption certificate, and has documentation of the same; or~~

~~(d) the ICEC expires during the working relationship which is at issue in the present claim for workers' compensation or unemployment insurance benefits or audit or investigation by the department.~~

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

IMP: 39-51-201, 39-51-203, 39-71-419, MCA

REASON: There is reasonable necessity to amend this rule in light of changes made by Senate Bill 22 (2023) to determinations about ICEC status. The statutory provisions for applicability and meaning of the ICEC are utilized for purpose of the "not solely" determination.

4. The rule proposed to be repealed is as follows:

24.16.7520 PROCEDURE FOR ISSUING WAGE CLAIM
DETERMINATIONS REGARDING EMPLOYMENT STATUS OF INDEPENDENT
CONTRACTOR

AUTH: 39-3-202, 39-3-403, 39-71-417, MCA

IMP: 39-3-201, 39-3-402, 39-71-417, MCA

REASON: There is reasonable necessity to repeal this rule because it is duplicative of ARM 24.35.202 and 24.35.203 which provide that units of the department may make initial determinations of worker status as well as the procedure for final determinations of status.

5. Concerned persons may present their data, views, or arguments at the hearing. Written data, views, or arguments may also be submitted at dli.mt.gov/rules or P.O. Box 1728, Helena, Montana 59624. Comments must be received no later than 5:00 p.m., August 2, 2024.

6. An electronic copy of this notice of public hearing is available at dli.mt.gov/rules and rules.mt.gov.

7. The agency maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by the agency. Persons wishing to have their name added to the list may sign up at dli.mt.gov/rules or by sending a letter to P.O. Box 1728, Helena, Montana 59624 and indicating the program or programs about which they wish to receive notices.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on February 2, 2024, by electronic mail.

9. Pursuant to 2-4-111, MCA, the agency has determined that the rule changes proposed in this notice will not have a significant and direct impact upon small businesses.

10. Department staff has been designated to preside over and conduct this hearing.

/s/ QUINLAN L. O'CONNOR
Quinlan L. O'Connor
Rule Reviewer

/s/ SARAH SWANSON
Sarah Swanson, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State June 25, 2024.