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\*\*\* Bill No. \*\*\*

Introduced By \*\*\*\*\*

By Request of

A Bill for an Act entitled: "An Act to provide for the Montana Private Sector Occupational Safety and Health Act; assigning administrative, rulemaking, and enforcement duties to the department of labor and industry; providing for a safety advisory council; providing for voluntary safety consultations; providing for safety responsibilities for private sector employers and employees; providing for inspections, citations, monetary penalties, and due process protections; providing for stop-work orders and civil injunctive relief; providing for whistle-blower protection for employees; amending section 39-2-912, MCA; and providing an effective date."

Be it enacted by the Legislature of the State of Montana:

NEW SECTION. **Section 1. Short title -- purpose.**

(1) [Sections 1 through 22] may be cited as the "Montana Private Sector Occupational Safety and Health Act".

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(2) [Sections 1 through 22] allow the state of Montana to administer and enforce occupational safety and health laws for private sector employers in a manner that is at least as effective as the federal occupational safety and health administration's enforcement of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq.

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 22], the following definitions apply:

- (1) "Department" means the department of labor and industry provided for in 2-15-1701.
- (2) "Employee" has the meaning provided in 39-71-118.
- (3) "Employer" has the meaning provided in 39-71-117.
- (4) "Health" means protection against occupational illness.
- (5) "Inspection" means an onsite review of a workplace by the department to determine compliance with standards adopted under [sections 1 through 21].
- (6) "Private sector employee" means an employee of a private sector employer. The term does not include a bona-fide independent contractor.

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(7) "Private sector employer" means any employer that is not a public sector employer. The term includes for-profit and not-for-profit employers.

(8) "Public sector employer" means:

(a) a state agency;

(b) each county in the state;

(c) each municipality in the state;

(d) each school district or community college; and

(e) any other political subdivision of the state.

(9) "Safety" means protection against occupational injury or death.

(10) "Safety consultation services" has the meaning provided in 39-71-1503.

(11) "Standard" means a rule adopted by the department pursuant to [sections 1 through 22] that is designed to promote or ensure safety or health in the workplace.

(12) "State agency" means any branch of government, including a department, board, commission, office, bureau, institution, university system entity, or unit of state government recognized in the state budget.

(13) "Workplace" means any site or location where an employee performs work for the employee's employer.

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NEW SECTION. **Section 3. Administrative**

**authority -- funding.** (1) Once the certification provided for in subsection (6) is made, the department has authority to enforce the provisions of [sections 1 through 22] with respect to private sector employers.

(2) In addition to administering the provisions of [sections 1 through 22], the department may:

- (a) promote occupational safety and health;
- (b) educate employers and employees in occupational safety and health matters;
- (c) conduct research regarding occupational safety and health data, topics, and techniques; and
- (d) investigate occupational injuries, illnesses, and deaths involving private sector employees.

(3) The department may develop and operate a statewide employment safety program. The statewide employment safety program may include but is not limited to:

- (a) a safety awareness component;
- (b) an employee education component;
- (c) an employer education component; and
- (d) industry-specific initiatives.

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(4) The activities of the department under the provisions of [sections 1 through 22] are funded by the occupational safety and health administration fund provided in 50-71-128.

(5) The department may accept, receive, and administer gifts, grants, or other funds from public or private agencies and from the United States for the purpose of carrying out the provisions of [sections 1 through 22]. Funds received by the department under this subsection must be deposited into the fund provided for in 50-71-128.

(6) The governor shall certify to the secretary of state the date upon which the federal occupational safety and health administration enters into an operational status agreement with the department for the department's enforcement of [sections 1 through 21].

NEW SECTION. **Section 4. Applicability of standards -- exceptions.** (1) The standards for safety and health and the enforcement rules adopted pursuant to [sections 1 through 22] apply to all private sector employers in this state and to private sector employees.

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(2) The standards and enforcement rules adopted pursuant to [sections 1 through 22] do not apply to employment by:

(a) public sector employers subject to the provisions of Title 50, chapter 71, part 1;

(b) the federal government and its instrumentalities;

(c) a federally recognized tribal government; or

(d) a tribal government recognized by the state.

**NEW SECTION. Section 5. Duties of private sector**

**employers and private sector employees.** (1) Each private sector employer shall:

(a) furnish a place of employment that is free from recognized hazards that cause or are likely to cause death or serious physical harm to private sector employees;

(b) adopt and use practices, means, methods, operations, and processes that are adequate to render the workplace safe; and

(c) take appropriate actions necessary to protect the life, health, and safety of private sector employees.

(2) Each private sector employee shall comply with the safety and health standards, rules, and orders issued

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pursuant to [section 1 through 22] as they apply to the private sector employee's own actions and conduct.

NEW SECTION. **Section 6. Rulemaking -- variances.** (1)

The department may adopt appropriate standards for safety and health by administrative rule, including:

(a) any safety or health regulations promulgated by the federal occupational safety and health administration; and

(b) standards to ensure that private sector employers have effectively implemented the provisions of the Montana Safety Culture Act, Title 39, chapter 71, part 15.

(2) The department may adopt other rules that are reasonably necessary to implement [sections 1 through 22].

(3) (a) The department may by rule:

(i) provide a procedure to grant a temporary variance from the particular provisions of a standard; and

(ii) permit the temporary use of other or different devices or methods than provided by the standard.

(b) A temporary variance may be granted only if the private sector employer:

(i) has an effective program for complying with the standard as quickly as is practicable;

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(ii) is taking all available steps to safeguard private sector employees against the hazards covered by the standard; and

(iii) is unable to comply with the standard because:

(A) professional or technical personnel needed to implement compliance with the standard are temporarily unavailable;

(B) material or equipment needed to comply with the standard is temporarily unavailable; or

(C) necessary construction or alteration of facilities cannot be completed by the effective date of the standard.

(4) Before the department proposes or amends any rule under subsection (1), it may consult with the safety advisory council provided for in [section 7] and take into consideration the advice and comments of the council concerning the proposed rule change.

NEW SECTION. **Section 7. Safety advisory**

**council -- purpose and structure.** (1) There is a safety advisory council for the purpose of assisting the department with the application and implementation of the Montana Private Sector Occupational Safety and Health Act.



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The council shall work cooperatively with the department and with representatives of private sector employers and private sector employees, as well as members of the interested public, to determine which occupational safety and health standards and related rules meet the needs of the private sector and the public interest in efficiency, cost-effectiveness, and safety.

(2) The council consists of 12 members:

(a) eight members appointed by the governor:

(i) a representative of a statewide association of businesses;

(ii) a representative of a statewide association of small businesses;

(iii) a representative of the building trades;

(iv) a representative of a labor organization that has members employed in manufacturing;

(v) a representative of a labor organization that has members employed in the private sector;

(vi) a representative of a labor organization that has members employed in the building trades;

(vii) a representative of the Montana university system, who has a professional background in occupational safety and health; and

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(vii) an individual with professional experience in occupational safety and health, and who is a member of a nationally recognized organization or society of occupational safety and health professionals; and

(b) the director of the department of commerce, or a person designated by the director;

(c) the commissioner of labor and industry, or a person designated by the commissioner; and

(d) two members of the legislature, who must be selected by the house majority leader, the house minority leader, the senate majority leader, and the senate minority leader. The legislative members may not be of the same political party. The legislative members of the council are not entitled to vote on matters brought before the council.

(3) The appointed council members serve at the pleasure of the governor for terms of 3 years.

(4) The council is allocated to the department for administrative purposes only as provided in 2-15-121.

(5) The council and its members are entitled to compensation as provided in 2-15-122.

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### NEW SECTION. **Section 8. Private sector employer**

**records and reports.** (1) Each private sector employer shall maintain records of occupational injuries, illnesses, and deaths as the department may require by rule.

(2) The department may inspect those records or require that the private sector employer submit those records to the department for its review.

(3) Except as otherwise provided by rule, a private sector employer complies with the requirements of this section if the private sector employer completes and submits a first report of injury form to the department or to the private sector employer's worker's compensation insurer within 30 days of the private sector employer becoming aware of an occupational injury, illness, or death suffered by a private sector employee.

### NEW SECTION. **Section 9. Inspections - safety**

**consultations.** (1) The department may inspect all workplaces of any private sector employer for the purpose of determining whether the private sector employer is in compliance with the safety and health standards that apply to the employer and the employer's workplaces. A department employee conducting an inspection shall, upon request,

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present appropriate credentials to the private sector employer. The department shall invite a representative of the private sector employer and a representative of any labor organization that represents employees of the private sector employer who are working at the workplace that is to be inspected to accompany the department employee on the inspection. The labor organization representative must be on paid status while accompanying the department employee on the inspection.

- (2) An inspection performed pursuant to subsection (1) must be performed:
- (a) periodically without prior notice or scheduling;
  - (b) at the request of the private sector employer;
  - (c) as the result of a complaint of a violation of a safety or health standard at a private sector employer's workplace;
  - (d) as part of a department investigation following a report of an occupational injury, illness, or death; or
  - (e) following the issuance of a citation, after the private sector employer has been given a reasonable opportunity to correct any violation of standards.

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(3) The department may provide a safety consultation at the workplaces of any private sectors employer at the request of the private sector employer.

(4) A private sector employer may not interfere with a department inspection conducted pursuant to this section or a search warrant issued pursuant to [section 10].

(5) The department may not unreasonably interfere with the operations of a private sector employer while conducting an inspection. An unscheduled inspection or execution of a search warrant does not constitute unreasonable interference with the private sector employer's operations.

(5) This section does not authorize the department's employees to engage in a breach of the peace.

NEW SECTION. **Section 10. Search warrants.** (1) The department may apply any district court in the state for a search warrant in order to conduct an inspection pursuant to [section 9].

(2) An inspection warrant application may be made by the department in writing, in person, or, in the case of exigent circumstances, via a telecommunications device.

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(b) The inspection warrant application must be supported by cause for the inspection, and identify the place or places to be inspected. An inspection warrant application must describe the general nature of the operations to be inspected, but does not have to name a specific employer whose operations are to be inspected. An inspection warrant application is not invalid because it does not identify the owner, tenant, or occupant of a workplace that is to be inspected.

(3) Upon demonstration of cause, the district court must issue an inspection warrant. The inspection warrant may provide for a date by which the warrant must be executed and the inspection be conducted.

(4) The department may request the assistance of appropriate local law enforcement agencies in order that the department's employees may peaceably enter the property pursuant to an inspection warrant and conduct an inspection.

### NEW SECTION. **Section 11. Report of inspection -- violations -- penalty -- appeal process.**

(1) (a) The department shall make a written report of each inspection that it conducts under [section 9].

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(b) The inspection report must include a list of violations of standards that the inspector discovered during the inspection. A violation of a standard by a private sector employee is attributable to the private sector employer for the purposes of [sections 1 through 22].

(c) The department shall provide a copy of the inspection report to the private sector employer and to a representative of a labor organization that represents private sector employees at the workplace that was inspected.

(d) The private sector employer shall post a copy of the list of hazards included in the inspection report at one or more visible locations at the workplace that is the subject of the inspection report. The posting must be in a location likely to be seen by employees at that workplace.

(2) The department may issue a written citation to the private sector employer for a violation of a standard. The citation must specify:

- (a) the nature of the violation;
- (b) the standard that was violated; and
- (c) a timeframe within which the private sector employer is required to correct the violation.

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(3) (a) The department may impose upon a private sector employer a monetary penalty of not more than \$700 for each violation that was not committed purposely or knowingly, for which a citation has been issued.

(b) The department may, in its sole discretion, waive or reduce a penalty under this subsection (3) if the private sector employer timely corrects or cures the violation for which the penalty was imposed.

(c) Monetary penalties collected pursuant to this subsection (3) must be deposited into the **[general fund]**.

(4) (a) The department may impose upon a private sector employer a monetary penalty of not more than \$7,000 for each violation that was not committed purposely or knowingly but which constitutes a serious or repeat violation, as defined by rule, for which a citation has been issued.

(b) The department may, in its sole discretion, waive or reduce a penalty under this subsection (4) if the private sector employer timely corrects or cures the violation for which the penalty was imposed.

(c) Monetary penalties collected pursuant to this subsection (4) must be deposited into the **[general fund]**.



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(5) (a) The department may impose upon a private sector employer a monetary penalty of not more than \$70,000 for each violation that is committed purposely or knowingly, for which a citation has been issued.

(b) The department may, in its sole discretion, waive or reduce a penalty under this subsection (5) if the private sector employer timely corrects or cures the violation for which the penalty was imposed.

(c) Monetary penalties collected pursuant to this subsection (5) must be deposited into the **[general fund]**.

(6) (a) A private sector employer may appeal a citation or a penalty.

(b) An appeal to the department must be in writing and made within 30 days of the issuance of the citation.

(c) The appeal of a citation or a penalty is conducted as a contested case under Title 2, chapter 4.

(7) As used in this section, the terms "purposely" and "knowingly" have the same meaning as provided in 45-2-101.

NEW SECTION. **Section 12. Enforcement exemption for small farm and ranch operations - legislative intent.** (1)

The provisions of [sections 9, 10 and 11] are not

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applicable those small farm and ranch operations that qualify under subsection (2).

(2) For the purposes of this section, an enterprise that meets the following conditions constitutes a small farm or ranch:

(a) it employs no more than 10 non-family members employees;

(b) it does not maintain a temporary labor camp; and

(c) its operations are classified under the North American Industry Classification Systems as one of the following:

(i) code 111, crop production;

(ii) code 112, animal production and aquaculture;

(iii) code 115112, soil preparation, planting, and cultivating;

(iv) code 1115113, crop harvesting, primarily by machine; or

(v) codes 115115, farm management services.

[(3) It is the intent of the legislature that the department construe the provisions of this section in a manner that is consistent with the enforcement policies applicable to small farms and ranches as applied by the federal Occupational Safety and Health Administration.]

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NEW SECTION. **Section 13. Judicial review.** An employer aggrieved as the result of a contested case may seek judicial review as provided under Title 2, chapter 4.

NEW SECTION. **Section 14. Stop-work orders.** (1) The department may order a private sector employer to immediately and temporarily stop work at a particular workplace if a department inspector who has personally observed the workplace and the hazards that are present determines that:

(a) the conditions or operations that are present at the workplace constitute a violation of a standard established by the department;

(b) the violation poses an immediate and substantial risk of serious bodily injury or death to a private sector employee or a member of the public; and

(c) the private sector employer or a private sector employee who is present at the workplace is unable or unwilling to:

(i) immediately correct the violation; or

(ii) suspend the unsafe operation until the violation is corrected.

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(2) The temporary stop-work order must be in writing and specify:

- (a) the location of the workplace;
- (b) the specific standard that is being violated;
- (c) the nature of the risk posed by the violation;
- (d) the date and the time that the temporary stop-work order is issued; and
- (e) the name, employment address, and work telephone number of the person issuing the temporary stop-work order.

(3) The temporary stop-work order is effective upon communication or delivery to any one of the following:

- (a) the private sector employer's onsite supervisor at the workplace;
- (b) the private sector employer's manager in charge of workplace operations; or
- (c) the chief executive of the private sector employer.

(4) A copy of the temporary stop-work order must be promptly posted by the department at the workplace. A posted temporary stop-work order may not be removed by any person while it is in effect.

(5) A temporary stop-work order is effective for 72 hours unless:

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(a) the violation is corrected to the satisfaction of the department; or

(b) the temporary stop-work order is stayed by order of a district court judge following actual notice to the department and the private sector employer.

(6) The violation of a temporary stop-work order or the unauthorized removal of a posted copy of a temporary stop-work order is punishable as a contempt of court.

(7) As used in this section, the term "serious bodily injury" has the same meaning as provided in 45-2-101.

NEW SECTION. **Section 15. Injunctive relief.** In addition to any remedies available under [sections 1 through 22], the department may institute and maintain in the name of the state an action for injunctive relief as provided in Title 27, chapter 19, to:

(1) immediately restrain a private sector employer and private sector employees from engaging in any activity for which the department has issued a temporary stop-work order pursuant to [section 14];

(2) enjoin a violation of [sections 1 through 22];

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(3) enjoin a violation of a rule, including a safety or health standard, adopted under [sections 1 through 21];  
or

(4) require compliance with [sections 1 through 22], including compliance with any rules adopted under [sections 1 through 22].

NEW SECTION. **Section 16. Retaliation prohibited.**

(1) A private sector employer may not retaliate against a private sector employee who:

(a) contacts the department with a complaint of a violation of a standard in the workplace;

(b) cooperates with the department in the performance of an inspection or an investigation; or

(c) testifies or cooperates with the department in any case arising out of:

(i) an inspection;

(ii) an investigation;

(iii) a citation;

(iv) a temporary stop-work order; or

(v) a civil action seeking injunctive relief.

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(2) A private sector employee who has been retaliated against in violation of this section may file a complaint as provided for by [section 17].

NEW SECTION. **Section 17. Complaint of retaliation -- informal investigation.** (1) A private sector employee who has been retaliated against in violation of [section 16] may file a written complaint with the department within **[90]** days of the retaliatory act.

(2) Upon receipt of the written complaint, the department shall conduct an informal investigation of the complaint as the department deems appropriate. The department shall determine whether there is reasonable cause to believe that the allegations are supported by a preponderance of the evidence.

(3) The department shall, within 10 business days following receipt of a filed complaint, notify a respondent that the respondent is the subject of a filed complaint. The notification must be in writing and must include a copy of the filed complaint. If requested, the department shall also provide the parties with all other information related to the complaint in the possession of the department that is not currently in the possession of the parties or a

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party. The department shall make known to the parties the fact that information is available upon request. The department may not investigate a complaint until it has received notice that the respondent has received the department's notification of the complaint.

(4) If the department determines that the inclusion of documents or information obtained by the department would seriously impede the rights of a person or the proper investigation of the complaint, the information may be excluded from the notification by providing a written summary of the information. The written summary must include sufficient information to give maximum effect to the intent of this chapter.

(5) The respondent shall file an answer to a complaint filed with the department within 10 business days of the respondent's receipt of the complaint. An answer may be a response simply admitting or denying the allegations without further specificity or requesting additional information from the department. The time for filing an answer may be extended by a showing of good cause.

(6) The department shall commence proceedings within 30 days after receipt of a complaint.



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(7) After the informal investigation, the department shall issue a finding on whether there is reasonable cause to believe that a preponderance of the evidence supports the charging party's allegation of retaliation. The finding must be issued within 180 days after a complaint is filed.

(8) If the department finds that there is no reasonable cause to believe that retaliation occurred, it shall issue a notice of dismissal and dismiss the case from the department's administrative process. The complaining party may commence a civil action in district court within 90 days after the receipt of the notice of dismissal. The action may seek the same remedies as available under [section 19].

(9) If the department finds that there is reasonable cause to believe that retaliation occurred the department shall certify the complaint for hearing pursuant to [section 17].

NEW SECTION. **Section 18. Contested case.** (1) The department shall hold a contested case hearing on a complaint that is certified for hearing under [section 17]. The department shall serve notice of the hearing and a copy of the complaint on the parties.

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(2) If the parties mutually agree to extend the time for hearing beyond 12 months after the complaint is filed, then the parties shall stipulate to a schedule for proceedings to be established by the department. The department shall, not later than 395 days after the complaint was filed, set a date for an administrative hearing in the case in accordance with the stipulated schedule. After a hearing date is set, the department may, in its sole discretion, issue a continuance of the hearing date only upon a showing of good cause.

(3) The hearing must be held by the department in the county where the unlawful conduct is alleged to have occurred unless a party requests and is granted a change of venue for good cause shown.

(4) The case in support of the complaint may be presented before the department by the complaining party, an attorney representing the complaining party, or the department on behalf of the complaining party. The hearing must be held in accordance with the applicable portions of the Montana Rules of Civil Procedure.

(5) If the case is not settled, fully decided on order or motion, or otherwise resolved, after a hearing, the hearings officer shall issue a written decision.

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(6) All hearings conducted under this section may, upon stipulation of the parties, be heard telephonically.

(7) Within 30 days after the department issues a final agency decision in writing under subsection (5), a party may petition a district court for judicial review of the final agency decision as provided in 2-4-702.

NEW SECTION. **Section 19. Procedure upon decision finding discrimination -- remedies.** (1) If the hearings officer finds that a party against whom a complaint was filed has engaged in the retaliatory practice alleged in the complaint, the department shall order the party to refrain from engaging in the retaliatory conduct. The order may:

(a) prescribe conditions on the accused's future conduct relevant to the type of retaliatory practice found;

(b) require any reasonable measure to correct the discriminatory practice and to rectify any harm, pecuniary or otherwise, to the person retaliated against;

(c) require a report on the manner of compliance.

(2) The order may not require the payment of punitive damages.

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### NEW SECTION. **Section 20. Confidentiality of**

**trade secrets.** Trade secrets of an employer that are protected by the Uniform Trade Secrets Act pursuant to Title 30, chapter 14, part 4, may not be disclosed by the department.

### NEW SECTION. **Section 21. Safety consultation**

**services.** The department may, in its sole discretion, provide onsite safety consultation services to private sector employers that request onsite safety consultation services.

### NEW SECTION. **Section 22. Occupational safety and**

**health administration funding.** The costs of administering and enforcing [sections 1 through 22] are funded by the occupational safety and health administration fund, as provided by 50-71-128.

**Section 23.** Section 39-2-912, MCA, is amended to read:

**"39-2-912. Exemptions.** This part does not apply to a discharge:

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(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for:

(a) filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, political belief, color, marital status, and other similar grounds; or

(b) engaging in any safety-related protected activity provided for in [section 15].

(2) of an employee covered by a written collective bargaining agreement or a written contract of employment for a specific term."

{Internal References to 39-2-912:

39-2-902 x 39-2-911x 44-1-806x }

NEW SECTION. Section 24. {standard} Saving clause.

[This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. Section 25. {standard} Severability. If a part of [this act] is invalid, all valid parts that are

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severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 26. {standard} Codification.**

[Sections 1 through 22] are intended to be codified as an integral part of Title 50, chapter 71, and the provisions of Title 50, chapter 71, apply to [sections 1 through 22].

NEW SECTION. **Section 27. {standard} Effective date.**

[This act] is effective July 1, 2019.

-END-

prepared by:

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