

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

In the matter of the amendment of)
ARM 24.11.2407 and 24.35.203 and)
the adoption of New Rule I pertaining)
to independent contractors)

NOTICE OF PUBLIC HEARING ON
PROPOSED AMENDMENT AND
ADOPTION

TO: All Concerned Persons

1. On October 8, 2021, at 9:00 a.m., the Department of Labor and Industry (department) will hold a public hearing via remote conferencing to consider the proposed amendment and adoption of 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/82935651559>, Meeting ID: 829 3565 1559, Passcode: 473585; or
- b. Dial by telephone, +1 406 444 9999 or +1 646 558 8656, Meeting ID: 829 3565 1559, Passcode: 473585.

The hearing will begin with a brief introduction by department staff to explain the use of the videoconference and telephonic platform. All participants will be muted except when it is their time to speak.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m., on October 1, 2021, to advise us of the nature of the accommodation that you need. Please contact Tracy Gonzalez, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604; telephone (406) 444-9585; facsimile (406) 444-4140; Montana TTD (406) 444-5549; or e-mail tgonzalez2@mt.gov.

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

24.11.2407 DETERMINATION OF INDEPENDENT CONTACTORS –
DEPARTMENT PROCEDURES ~~(1) As provided in 39-51-204, MCA, an individual found to be an independent contractor pursuant to 39-71-417, MCA, is considered to be an independent contractor for the purposes of unemployment insurance. If an individual is not required to obtain an independent contractor exemption certificate because the individual regularly and customarily performs services at his or her own fixed business location, or if an individual is exempt from 39-71-417, MCA, by other sections of the workers' compensation act, the department shall apply the guidance set out in ARM Title 24, chapter 35, subchapters 2 and 3 and use the following two-part test to determine whether an individual is an independent contractor or an employee:~~

~~(a) whether an individual is and shall continue to be free from control or direction over the performance of the services, both under contract and in fact; and
(b) whether an individual is engaged in an independently established trade, occupation, profession, or business.~~

~~(2) When evaluating the status of an individual who possesses an independent contractor exemption certificate, the department shall apply the two-part test in (1)(a) and (b). The department may recommend the suspension of an individual's independent contractor exemption certificate for a specific business relationship when the department determines that an employing unit exerts or retains a right of control to the degree that the certificate holder fails to qualify for independent contractor designation. The department may recommend certificate revocation when the department determines the certificate holder has violated the provisions of 39-71-418, MCA.~~

~~(3) 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.~~

~~(4) For purposes of this rule, "individual" means a worker who renders service in the course of a trade, occupation, profession, or business, and "employing unit" means the individual or other legal entity as described in the definition of "employing unit" in 39-51-201, MCA, that hired one or more individuals.~~

(1) The department applies the requirements set out in ARM Title 24, chapter 35, to make initial determinations regarding employment status.

(5) through (7) remain the same but are renumbered (2) through (4).

AUTH: 39-51-301, 39-51-302, MCA

IMP: 39-51-201, 39-51-204, 39-51-1109, 39-51-2402, 39-71-418, MCA

REASON: Reasonable necessity exists to amend this rule for brevity and clarity, and to eliminate duplicative language between this rule and those of the ICCU.

24.35.203 DETERMINATIONS WHERE EXEMPTION CERTIFICATE MANDATORY (1) Except as provided in [New Rule I], ~~When 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) through (4) remain the same.

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 amend this rule to recognize the new requirements set forth in New Rule I.

4. The proposed new rule is as follows:

NEW RULE I 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:

(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, 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 adopt this rule to clarify the requirements of Senate Bill 367 from the 2021 legislative session. The bill potentially impacts the holdings in *McCone Cnty. v. ICCU*, 2021 MTWCC 19, and *Reule v. UEF*, 2017 MTWCC 3. Senate Bill 367 does not change the conclusive presumption of independent contractor status for a worker holding and working under an ICEC, as required by 39-71-417, MCA. Instead, it creates questions for those who do not have an ICEC, though statutorily required to do so to be an independent contractor. This rule, therefore, clarifies the instances in which a worker's status is determined pursuant to the AB test, rather than the conclusive presumption based on ICEC status. In all disputes regarding worker status which do not fall within one of the four instances of this rule and when an ICEC is required, worker status will continue to be determined based on ICEC status. Through consideration of these four options for application of the AB test, worker status is not determined "solely" through lack of ICEC.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Tracy Gonzalez, Employment Relations Division, P.O. Box 8011, Helena, Montana 59604; facsimile (406) 444-4140; or e-mail tgonzalez2@mt.gov, and must be received no later than 5:00 p.m., October 8, 2021.

6. 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 contact person in paragraph 2 above.

7. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted on May 27, 2021, by electronic mail.

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

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

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

/s/ LAURIE ESAU
Laurie Esau, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State August 31, 2021.