

Exemptions: Do They Make Sense In A No-Fault Workers' Compensation System?

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**Exemptions:
Do they make sense in a no-fault workers' compensation system?**

By Pat Murdo
Legislative Research Analyst

Senate Joint Resolution 17 sought a study of ways to simplify workers' compensation statutes. Among issues to be addressed by the study were the statutory exemptions that allow for opting out of the workers' compensation system. The resolution set forth in its preamble:

WHEREAS, the Montana Legislature believes that the traditional workers' compensation system of compensating injured workers without regard to fault should continue into the future; and

WHEREAS, terms and concepts, such as which employers, employees, and independent contractors are covered by the workers' compensation laws, have become confusing in current statutes; and

WHEREAS, the list of exempted employments of current law may be discriminatory and may undermine a public policy that calls for all employment to be covered by the principles of workers' compensation coverage; and

WHEREAS, Montana employers and employees deserve to have workers' compensation laws that are clear, concise, and understandable.

The "whereas" clauses of Senate Joint Resolution 17 call into question the effectiveness of the Workers' Compensation Act and the Occupational Disease Act of Montana serving as an exclusive remedy that helps to return workers to their jobs,¹ partly because of an increasing number of exemptions. Montana's Constitution states that workers' compensation laws are the exclusive remedy for workers if their employer "provides coverage under the Workmen's Compensation Laws of this state." (Article II, Section 16.)

¹Two points of law are presented here: a legislative policy of getting injured workers back to work as soon as possible after a work-related injury or occupational disease (39-71-105, MCA) and exclusive remedy (39-71-411, MCA). Workers' compensation is intended to be an exclusive remedy that benefits both employers and employees. Employers generally cannot be sued for workplace injuries or deaths under the act. Employees do not have to prove negligence or fault to obtain no-fault remedies for lost wages and medical assistance for injuries. The presumption is that assistance under the Workers' Compensation and Occupational Disease Acts will be provided faster than would occur under a lawsuit-based system.

SJR 17's "whereas" clauses specifically challenge the nature of the exemptions and their impact on the general rule that workers' compensation laws apply to all employment. Exemptions to workers' compensation laws have grown continuously since 1973, when only five exemptions were listed in 39-71-401, MCA. Now at least 22 exemptions exist, along with the exemption for independent contractors. The independent contractor exemption is being studied by a committee appointed by the Department of Labor and Industry under SB 270.

This paper reviews costs and benefits of removing or changing any of the exemptions set forth in 39-71-401, MCA, entitled "Employments covered and employments exempted." Three entities are potentially affected: the workers and their dependents; the people or organizations for which they work; and the state.

Workers -- Some exemptions come at the request of the workers. Independent contractors are a classic example (39-71-401(3), MCA). Another example is the door-to-door salesperson purveying cosmetics or vacuum cleaners (39-71-401(2)(f), MCA).

Employers -- Some exemptions come at the request of employers. Exemptions for newspaper carriers (39-71-401(2)(k), MCA), referees at athletic events (39-71-401(2)(j), MCA), and the officers of a quasi-public or private corporation or the manager of a manager-managed limited liability company who qualifies under 39-71-401(2)(r), MCA, are examples of what can be classified as employer-requested exemptions.

State -- Workers who are exempt from the Workers' Compensation and Occupational Disease Acts may never interact with the state or they may end up applying for various forms of assistance--from food banks, the Temporary Assistance to Needy Families program, or energy assistance. An exempt worker is unlikely to apply for unemployment benefits, because unemployment insurance and workers' compensation exemptions are often parallel.

Public Policy Perspectives

In considering whether any or some exemptions make sense from a public policy perspective, the following are factors to be addressed:

1) Premiums as a Cost of Business

Premiums are an expense that some employers would rather avoid, especially if the risk of a lawsuit is minor. Increases in premiums often depend on factors outside of a business's control, which means that if a business is exempt from paying premiums,

that business does not have to worry about premiums skyrocketing over uncontrollable factors. However, exempting some workers but not others could:

- create an uneven playing field among competitors, between those who obtain workers' compensation and those who are exempt;
- encourage "black market" economies between those that have exemptions and those that do not--indicating some people are not part of the "real" work force;
- create an unbalanced relationship between employer and employee. The original statute for occupational disease recognized such a balance by providing that employers were allowed to "elect" to be bound by the act and certain employees were allowed to reject participation under the Occupational Disease Act (92-1308, R.C.M., 1947).²

2) Shifting of Costs

Workers who are exempt must provide their own medical and financial support after an injury or occupational disease occurs and either:

- 1) work while injured, possibly aggravating his/her condition and causing greater long-term problems; or
- 2) drop out of the work force, possibly applying for public assistance once personal resources have been used to their limits. If not fully recovered, the unemployed worker may have greater problems finding a job.

Legislative public policy as stated in 39-71-105(2), MCA, indicates the state has an interest in the return to work of injured employees and makes that policy an objective of the workers' compensation system:

39-71-105(2) -- A worker's removal from the work force due to a work-related injury or disease has a negative impact on the worker, the worker's family, the employer, and the general public. Therefore, it is an objective of the workers' compensation system to return a worker to work as soon as possible after the worker has suffered a work-related injury or disease.

²The relevant language read: "92-1308. Right to compensation exclusive remedy. The right to recover compensation pursuant to the provisions of this act for occupational diseases sustained by an employee and arising out of and in the course of his employment, whether resulting in death, or not, shall be the exclusive remedy therefor against the employer electing to be bound by and subject to this act, except as to such employees as shall reject this act as provided herein."

3) Balancing Employers' and Employees' Interests

The exclusive remedy balances the interests of the employees with the interests of employers. In exchange for not being sued, employers buy workers' compensation insurance to cover employees if they are injured or suffer from an occupational disease. This premise works if there is a concern that an injured employee or worker is likely to file a lawsuit. But the bargain loses impact if one side or the other feels a lawsuit is unlikely. While those who are exempt have recourse to a lawsuit, information is scarce regarding whether lawsuits have been filed by those exempt from the Workers' Compensation and Occupational Disease Acts.

One Montana attorney commented in a March 18, 2004, letter to the Economic Affairs Interim Committee that current law (39-71-119)³ essentially requires anyone who has what is called a "mental/mental"⁴ claim to sue because they are explicitly written out of the workers' compensation system. Sydney McKenna, who represented law officer Gary Stratemeyer in a claim for disability due to a traumatic case in which he was involved, noted that the Workers' Compensation Court agreed that the exclusion of "mental" from the definition of injury violated equal protection. In *Stratemeyer v. Lincoln County*, 276 Mont. 67, 915 P.2d 175 (1996), the Montana Supreme Court overturned the Work Comp Court decision, noting, McKenna said, "that the fundamental basis for workers giving up the right to sue was the employers' promise to pay workers compensation benefits and, without the 'quid pro quo', the exclusive remedy bar would no longer prevent a lawsuit." McKenna went on to state that emergency medical or law enforcement personnel "are putting their mental health on the line each and every day. Yet, if they have an injury because of the trauma that affects their mind, they are not even allowed medical benefits from our workers compensation system. It is not right, just or fair. Also, if the injury is disabling, the worker almost has to sue in order to survive." In asking that the Legislature reconsider the exemption of "mental/mental" cases, McKenna noted, "While these cases are not specifically related to Section 39-71-401 employment exemptions, the result is the same--if a worker is not covered under workers' compensation laws, then that worker will be able to sue the employer directly for injuries suffered on the job. That is not fair for workers and it exposes employers to lawsuits."⁵

³39-71-119(3), MCA, states: "'Injury' or 'injured' does not mean a physical or mental condition arising from:

- (a) emotional or mental stress; or
- (b) a nonphysical stimulus or activity."

⁴39-71-105(5) notes that stress claims are referred to as "mental-mental claims."

⁵Letter from Sydney E. McKenna to the Economic Affairs Committee, March 18, 2004.

4) "Other" Insurance Availability

A person who is injured on the job while working for someone else may or may not have access to other insurance coverage if workers' compensation is not provided. A worker's own health insurance can provide coverage for medical bills but not for lost wages. The injured person might seek to tap the employer's general liability coverage. But the Independent Insurance Agents of Montana, Inc., indicated in a January 21, 2004, letter to the Economic Affairs Committee that an employer's "general liability" policy may not be available to those who are exempt under 39-71-118 or 39-71-401, MCA. The letter says, in part:

Coverage under an employer's General Liability Policy usually excludes the employer/employee relationship because [of] the expectation that employees will be covered by a Workers' Compensation Policy. The exemption for employees under the General Liability Policy could be bought back through an amendment to the General Liability Policy, but, in most cases, these amendments are not offered by the insurance carrier.⁶

The letter also noted the uninsured employers' fund applies to an "employer who has not properly complied with the provisions of 39-71-401." Thus, the letter said, "there is no coverage for the injured exempted employee under the Uninsured Employer Fund."⁷

Reassessing Exemptions

Given SJR 17's directive to review the Workers' Compensation and Occupational Disease Acts for potential simplification, especially related to the numerous exemptions, the following options are proposed to the Economic Affairs Interim Committee for its consideration. Each option includes a rationale for change, along with costs and benefits and related considerations.

1) Remove all current exemptions (except those for which federal law supersedes) and require coverage.

This option still would recognize that some exclusions would be available, either based on the definitions of workers or on federal law that preempts a coverage requirement for certain occupations. The federal exemptions include:

- 39-71-401(2)(g) -- "employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States" (includes federal workers); and

⁶Letter from Roger McGlenn, executive director of the Independent Insurance Agents of Montana, Inc., to the Economic Affairs Committee, January 21, 2004, Exhibit 6.

⁷*Ibid.*

- 39-71-401(2)(i) -- "employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter."

Also included in the federal exemptions category, since Indian reservations are sovereign under federal treaties, is:

- 39-71-401(2)(m) -- "a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation."

Broadening the base of coverage also may result in lower premiums for some and higher premiums for others, depending on experiences within each group.

Requiring coverage for most occupations also makes claimants comply with the part of the work comp compact in which they forgo tort action in order to gain more speedy medical assistance and assistance with lost wages for injuries or disease related to the workplace. This may not be a big factor, because there are no studies that indicate how many exempt people actually file a lawsuit.

| Option 1: Remove all exemptions (except those for which federal law supersedes) and require coverage. | |
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| Rationale: | <ul style="list-style-type: none"> • If the Workers' Compensation Act is intended to cover all workers in Montana, the provision of exclusions is contrary to the Act's intent. • By removing the exemptions and broadening the base of coverage, the questions are minimized about who is covered and who is not. |
| Costs | <ul style="list-style-type: none"> • Political ramifications for removing exemptions. • Potentially more people trying to avoid coverage, which could increase the costs of the Uninsured Employers' Fund administration. (These costs have fluctuated annually from lows of \$713,000 in FY 1998 to highs of \$842,702 in FY 2001.) • Potentially higher premiums for certain businesses. |

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| Option 1 Benefits | <ul style="list-style-type: none"> • Potentially lower premiums for some employers, due to having a broader overall base. • Potentially fewer court cases that revolve around whether an employee is exempt or not. No more independent contractor exemptions and no more lawsuits over IC status. • This option presumably would result in less confusion than currently exists. Less confusion aids self-administration of the statutes (per 39-71-105(3), MCA). |
| Considerations | <ul style="list-style-type: none"> • The SB 270 Committee is separately examining how to deal with independent contractors. Coordination with this Committee would be necessary under this option. • The recreation industry wants to refine 39-71-118, MCA (the definition of employee) to address the 1996 Montana Supreme Court decision in Connery vs. Liberty Northwest. Coordination would be necessary for this issue, too. |

2) Retain exemption language selectively: for those exempt either under a federal provision, those covered by the independent contractor exemption, or those considered appropriately exempt by the Committee on a case-by-case basis.

Providing broad exemptions has the potential of cost-shifting to society. Cost-shifting can occur whenever the exempt and injured person chooses not to buy health insurance or disability insurance (to cover wages lost while injured) or if the person has insufficient funds to pay for medical care and cover living costs while injured.

| Option 2: Selective exemptions | |
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| Rationale | <p>Certain exemptions seem to make sense. Those whose employment is covered by federal law, for example. The rationale for certain other exemptions is not so obvious. Some exemptions may be more appropriately reclassified within the definition of workers, employees, and volunteers. Other exemptions may be weighed on merits considered by the Committee.</p> |
| Costs | <ul style="list-style-type: none"> • Political ramifications for removing exemptions. • Shifted costs by nonexempt persons who end up not covered by medical insurance or disability insurance. Society may pay for an exempt, injured person either through Medicaid, through Temporary Assistance to Needy Families (if unemployment is long-term due to injury) or through cost-shifting if the exempt person is injured and unable to pay medical bills so that medical care providers shift costs to those with health insurance. |

| <p>Option 2 Costs</p> | <ul style="list-style-type: none"> Potentially higher premiums for certain workers. Examples below show projected costs of coverage for selected positions, as calculated by the Montana State Fund: <table border="1" data-bbox="479 325 1419 630"> <thead> <tr> <th><u>Position</u></th> <th><u>Tier 3 rate</u></th> <th><u>Payroll estimate</u></th> <th><u>Manual premium*</u></th> </tr> </thead> <tbody> <tr> <td>Jockeys</td> <td>\$36.07</td> <td>\$25,000</td> <td>\$9,017.50</td> </tr> <tr> <td>Real estate/Insurance agents</td> <td>\$ 0.74</td> <td>\$25,000</td> <td>\$185.00</td> </tr> <tr> <td>Petroleum land professionals</td> <td>\$1.27</td> <td>\$25,000</td> <td>\$317.50</td> </tr> <tr> <td>Amateur ath. team, noncontact</td> <td>\$12.90</td> <td>\$25,000</td> <td>\$3,225.00</td> </tr> <tr> <td>Amateur ath. team, contact sports</td> <td>\$23.45</td> <td>\$25,000</td> <td>\$5,862.50</td> </tr> <tr> <td>School athletics, employees</td> <td>\$5.48</td> <td>\$25,000</td> <td>\$1,370.00</td> </tr> </tbody> </table> <p><i>*Manual premium equals payroll, divided by 100, multiplied by the manual rate.</i></p> | <u>Position</u> | <u>Tier 3 rate</u> | <u>Payroll estimate</u> | <u>Manual premium*</u> | Jockeys | \$36.07 | \$25,000 | \$9,017.50 | Real estate/Insurance agents | \$ 0.74 | \$25,000 | \$185.00 | Petroleum land professionals | \$1.27 | \$25,000 | \$317.50 | Amateur ath. team, noncontact | \$12.90 | \$25,000 | \$3,225.00 | Amateur ath. team, contact sports | \$23.45 | \$25,000 | \$5,862.50 | School athletics, employees | \$5.48 | \$25,000 | \$1,370.00 |
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| <u>Position</u> | <u>Tier 3 rate</u> | <u>Payroll estimate</u> | <u>Manual premium*</u> | | | | | | | | | | | | | | | | | | | | | | | | | | |
| Jockeys | \$36.07 | \$25,000 | \$9,017.50 | | | | | | | | | | | | | | | | | | | | | | | | | | |
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| <p>Benefits</p> | <ul style="list-style-type: none"> Less confusion in statutes regarding coverage because of fewer exemptions. Potentially lower premiums for some employers, due to having a broader overall base. Potentially fewer court cases that revolve around whether an employee is exempt or not. More consistent application of the workers' compensation law. Potentially more realistic cost of employment borne by employer. | | | | | | | | | | | | | | | | | | | | | | | | | | | | |
| <p>Considerations</p> | <p>The following exemptions are allowed under 39-71-401(2). The exemptions listed in bold are proposed to be considered for deletion.</p> <p>(a) household and domestic employment;</p> <p>(b) casual employment as defined in 39-71-116;</p> <p>(c) employment of a dependent member of an employer's family for whom an exemption may be claimed by the employer under the federal Internal Revenue Code;</p> <p>(d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3);</p> <p>(e) employment of a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings;</p> <p>(f) employment as a direct seller as defined by 26 U.S.C. 3508;</p> <p>(g) employment for which a rule of liability for injury, occupational disease, or death is provided under the laws of the United States;</p> <p>(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105;</p> <p>(i) employment with a railroad engaged in interstate commerce, except that railroad construction work is included in and subject to the provisions of this chapter;</p> | | | | | | | | | | | | | | | | | | | | | | | | | | | | |

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| <p>Option 2 Considerations, continued</p> | <p>(j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;</p> <p>(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered. As used in this subsection, "freelance correspondent" is a person who submits articles or photographs for publication and is paid by the article or by the photograph. As used in this subsection, "newspaper carrier":</p> <p style="padding-left: 40px;">(i) is a person who provides a newspaper with the service of delivering newspapers singly or in bundles; but</p> <p style="padding-left: 40px;">(ii) does not include an employee of the paper who, incidentally to the employee's main duties, carries or delivers papers.</p> <p>(l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e);</p> <p>(m) a person who is employed by an enrolled tribal member or an association, business, corporation, or other entity that is at least 51% owned by an enrolled tribal member or members, whose business is conducted solely within the exterior boundaries of an Indian reservation;</p> <p>(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;</p> <p>(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing services under a license issued by the board of horseracing while on the grounds of a licensed race meet;</p> <p>(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;</p> <p>(q) a person who performs services as a petroleum land professional. As used in this subsection, a "petroleum land professional" is a person who:</p> <p style="padding-left: 40px;">(i) is engaged primarily in negotiating for the acquisition or divestiture of mineral rights or in negotiating a business agreement for the exploration or development of minerals;</p> <p style="padding-left: 40px;">(ii) is paid for services that are directly related to the completion of a contracted specific task rather than on an hourly wage basis; and</p> <p style="padding-left: 40px;">(iii) performs all services as an independent contractor pursuant to a written contract.</p> <p>(r) an officer of a quasi-public or a private corporation or manager of a manager-managed limited liability company who qualifies under one or more of the following provisions ...</p> <p>(s) a person who is an officer or a manager of a ditch company as defined in 27-1-731;</p> |
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| <p>Option 2 Considerations, continued</p> | <p>(t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;</p> <p>(u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian;</p> <p>(v) employment of a person who is not an employee or worker in this state.</p> |
| <p>Explanations</p> | <p>The following discussion points are provided for the list of exemptions that are proposed to be revoked:</p> <p>(h) employment of a person performing services in return for aid or sustenance only, except employment of a volunteer under 67-2-105, MCA;</p> <ul style="list-style-type: none"> • Volunteers under 67-2-105, MCA, are air search and rescue volunteers who receive no wages but are to be covered by workers' compensation insurance. • This provision originally was included in 1973 when only five other exemptions existed. Exception added in 1985. • Approximately 43% of other states do not mention such an exclusion. <p>(j) employment as an official, including a timer, referee, umpire, or judge, at an amateur athletic event;</p> <ul style="list-style-type: none"> • Passed in 1985. • Concern expressed that the costs of coverage were too high (\$5,000 to \$7,000 a year) for organizations like Babe Ruth baseball. • Officials were said to have liability insurance, which covers negligence of the official but no health or lost wages insurance. • Approximately 75% of other states do not mention such exclusions. <p>(k) employment of a person performing services as a newspaper carrier or freelance correspondent if the person performing the services or a parent or guardian of the person performing the services in the case of a minor has acknowledged in writing that the person performing the services and the services are not covered.</p> <ul style="list-style-type: none"> • Partially stems from a court case in which the Billings Gazette was sued after a newspaper carrier's girlfriend was injured while helping deliver papers. The girlfriend claimed she should have been covered by workers' compensation. • Most of the state's larger newspapers supported the exemption. • Opposed by the AFL-CIO. • Newspapers individually offer accident insurance policies to carriers, which also covers subcontractors on newspaper route. The Independent Record circulation office said in 2004 approximately 95%-99% of its carriers bought that coverage. • Approximately 82% of other states do not have such an exclusion. |

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| <p>Option 2 Explanations, continued</p> | <p>(l) cosmetologist's services and barber's services as defined in 39-51-204(1)(e);</p> <ul style="list-style-type: none"> • A cosmetologist or barber who is employed should be considered an employee. A cosmetologist or barber who leases space from another can be eligible for an independent contractor exemption. The either/or option recognizes that employers are responsible for employees and that independent contractors are not employees. • Approximately 67% of other states do not have such an exclusion. <p>(n) employment of a jockey who is performing under a license issued by the board of horseracing from the time that the jockey reports to the scale room prior to a race through the time that the jockey is weighed out after a race if the jockey has acknowledged in writing, as a condition of licensing by the board of horseracing, that the jockey is not covered under the Workers' Compensation Act while performing services as a jockey;</p> <ul style="list-style-type: none"> • The specifics of the subsection leave out other potential times for injury. • A jockey may work for several people and be eligible for an independent contractor's exemption. • Approximately 60% of other states do not have such an exemption. <p>(o) employment of a trainer, assistant trainer, exercise person, or pony person who is performing services under a license issued by the board of horseracing while on the grounds of a licensed race meet;</p> <ul style="list-style-type: none"> • The testimony for this statute was that many people performing these jobs see themselves as self-employed. That would make them eligible for an independent contractor's exemption. • Approximately 61% of other states do not have such an exemption. <p>(p) employment of an employer's spouse for whom an exemption based on marital status may be claimed by the employer under 26 U.S.C. 7703;</p> <ul style="list-style-type: none"> • The spouse may be one of several employees but the only one for whom workers' compensation is not paid. Potential unequal treatment issue. • Approximately 57% of other states do not have such an exclusion. <p>(q) a person who performs services as a petroleum land professional.</p> <ul style="list-style-type: none"> • The final provision requires the petroleum land professional to be an independent contractor. There is therefore no need for a separate exemption. • Approximately 65% of other states do not have a similar exemption. |
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| <p>Option 2 Explanations, continued</p> | <p>(t) service performed by an ordained, commissioned, or licensed minister of a church in the exercise of the church's ministry or by a member of a religious order in the exercise of duties required by the order;</p> <ul style="list-style-type: none"> • There's a question of whether such a requirement interferes with church/state separation versus a question of whether individuals under this provision are separated out for special treatment. • There is also a question of whether a religious order could require participation in an occupation--such as home construction--as part of the "duties required by the order". • There is a question of whether medical or lost wages would be borne by society at large if a member of a religious order were to become injured and unable to work. If the costs are not borne by society, then society may not have a reason to impose a work comp requirement. • Approximately 75% of other states do not have such an exemption. <p>(u) service performed to provide companionship services, as defined in 29 CFR 552.6, or respite care for individuals who, because of age or infirmity, are unable to care for themselves when the person providing the service is employed directly by a family member or an individual who is a legal guardian;</p> <ul style="list-style-type: none"> • This type of service is highly susceptible to back injuries because of the need to help lift patients. Requiring the employee to have an independent contractor's license, if providing care for more than one client, would make the employee more aware that workers' compensation coverage is not available unless purchased independently. • The potential for shifting medical costs to society is high because of the high probability that people hired on an individual basis are less likely to have applicable training, which could lead to more likelihood of injuries. They also may be less likely to have skills for other types of jobs. • The cost of premiums for individuals who need such service may be too high, particularly in rural areas where agencies do not offer temporary assistance personnel. |
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3) Require coverage for those current exemptions (except for those who are federally exempt) who do not qualify for an independent contractor exemption. This would mean that only IC-eligible people would be exempt.

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| <p>Option 3: Allow independent contractor (and federal) exemptions only</p> | |
| <p>Rationale</p> | <p>Those who have to file for an IC exemption will know that they are not covered.</p> |

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| Option 3 Costs | <ul style="list-style-type: none"> • Those who have an IC exemption may still end up shifting medical and lost-wage costs to society if they do not provide self-coverage for workers' compensation. • Costs for workers' compensation insurance or other kinds of insurance, or the costs of medical assistance and lost wages, are borne by the individual (until they aren't). • Potential for continued lawsuits to determine whether someone is an employee or an independent contractor. |
| Benefits | <p>Less confusion regarding who must be covered for workers' compensation, provided that they meet the test for being an independent contractor.</p> |
| Considerations | <p>Coordination required with SB 270 Committee, which is studying criteria for being an independent contractor.</p> |

4) Move all current exemptions that do not qualify for a federal or an IC exemption under the definition of employee in 39-71-118(2), MCA, the subsection describing who is not an employee under workers' compensation laws.

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| Option 4: Move all nonfederal exemptions, except for ICs, into definitions of workers, volunteers, etc. | |
| Rationale | <p>This would minimize the list of exemptions under 39-71-401(2) but expand the list of who is or is not an employee under 39-71-118. The effect would be to combine in one place (under the definition of employee) those who are not employees and therefore not required to be covered by work comp insurance.</p> |
| Costs | <ul style="list-style-type: none"> • Confusion could result while people accustomed to old listings learn where to look for exemptions. • Potential for unintended consequences because an exempt occupation would be reclassified as not an employee, worker, or volunteer. |
| Benefits | <p>The approach could improve self-administration for the average person regarding whether he or she requires workers' compensation coverage.</p> |

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| <p>Option 4 Considerations</p> | <p>If the definitions list in 39-71-116, MCA, is expanded (under one of the simplification proposals before the Committee), the cross-references would be improved and a first-time visitor would have a better idea of the number of statutes that are necessary to review regarding whether workers' compensation coverage is personally necessary. Improved definitions in 39-71-116, MCA, may mean that no further changes are necessary for the definition of employees, etc., in 39-71-118.</p> <p>If the Committee chooses to move certain exemptions to 39-71-118, the definition of an employee, the following changes are suggested:</p> <ul style="list-style-type: none"> • 39-71-401(2)(d), which refers to "employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company, except as provided in subsection (3)" -- those who are independent contractors. • 39-71-401(2)(e), which refers to "a real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings." These are not necessarily employees. • 39-71-401(2)(f), which refers to direct sellers. These are not necessarily employees. • 39-71-401(2)(h), which refers to persons "performing services in return for aid or sustenance only," except for air search and rescue volunteers. These are not necessarily employees. |
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5) Refine the list of exemptions to put similar exemptions together.

| <p>Option 5: Consolidate exemptions that are similar but keep all exemptions</p> | |
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| <p>Rationale</p> | <p>The exemptions on limited liability company employees/owners, etc., are in two separate places in 39-71-401. Subsection (2)(d) refers to employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, and working members of a member-managed limited liability company (LLC)--except for independent contractors. Subsection (2)(r) goes into detail on officers of quasi-public or private corporations or the manager of a manager-managed LLC, with a list of detailed provisions. Sections 39-71-118(5) and 39-71-401(4)(a), MCA, allow coverage for those allowed exemptions in 39-71-401(2)(d) or (2)(r). By combining the references in one unit, there might be less confusion and a recognition that the differences are there on purpose.</p> |

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| Option 5 Costs | Potential for unintended consequences if there are substantive reasons that the subsections are separate. Subsection (2)(d) was approved in 1987. Subsection (2)(r) was approved in 1995. |
| Benefits | One-stop shopping. |

6) Keep all exemptions without any changes.

| Option 6: No change to exemptions | |
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| Rationale | The system may be confusing, but those who are accustomed to dealing with the system know how it works. Smaller changes, such as a more complete cross-referencing within the definition section (39-71-116, MCA) may be sufficient to help address whatever current confusion exists. Further study of the implications of changing exemptions may be warranted, either on a case-by-case basis or in total. |
| Costs | <ul style="list-style-type: none"> • Continued confusion regarding who is and is not covered. • Continued reliance on courts for determination of status. |
| Benefits | <ul style="list-style-type: none"> • Status quo minimizes confusion from change. • Changes would require internal costs in the insurance industry to determine if coverage is required or not. |

Summary

The Legislative Council assigned to the Economic Affairs Committee the study set forth in SJR 17, requiring a review of the Workers' Compensation and Occupational Disease Acts to determine whether the Acts could be simplified. The introductory "whereas" clauses specifically mention concerns about the numerous exemptions that have developed under the Acts and suggested that some of the exemptions may be discriminatory. The clauses also said the exemptions seem to undermine the "public policy that calls for all employment to be covered by the principles of workers' compensation coverage."

The Economic Affairs Committee has several options before it to address the exemptions provided in the definitions of employee, worker, volunteer, and volunteer firefighter (39-71-118, MCA) and in the employments covered and exempted (39-71-401, MCA). Among these options are:

- Remove all exemptions, except those for which federal law supersedes, and require workers' compensation coverage for all other employment.
- Retain certain exemptions, based on public policy perspectives, including:
 - the cost of premiums and the impact on employers;
 - the cost-shifting impacts on health insurance costs, health care costs, and the public coffers;
 - a balancing of employers' and employees' interests; and
 - the availability of other insurance coverage.
- Allow only independent contractor and federally required exemptions;
- Move all nonfederal exemptions, except for ICs, into the definition of employees, workers, volunteers, and volunteer firefighters;
- Consolidate exemptions that are similar, but keep all exemptions; or
- Make no changes to exemptions.

Simplification of Montana's workers' compensation and occupational disease statutes is no simple task. The risk of unintended consequences is possible whether action is taken or not.

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