

Explanation for LC9896 – Consolidation Option 4 under SJR 17 Work Comp Study

Section 1 – 39-71-118

Subsection 1 – creates new subsections for readability

(1)(a)(iv) – deletes “are included as employees if they are not otherwise covered...” because they are exempt in 39-71-401, and by virtue of inclusion here they are employees.

(2)(e) – excludes from consideration as employees a sole proprietor, a direct seller or a real estate, securities or insurance salesperson paid solely by commission and without a guarantee of minimum earnings. Currently, they are exempt from required work comp coverage under 39-71-401. As 39-71-401 does, this change still allows them to choose work comp coverage. The choice of coverage is more obviously their choice under this statute. Under 39-71-401, the choice of coverage would be, presumably, that of an employer, because under 39-71-401 they are considered employees.

Policy choice: Each group has different considerations for being moved to 39-71-118.

I. Sole proprietors -- An examination of MCA and case annotations indicates sole proprietors are more typically considered employers than employees.¹ A possible conflict is in 33-22-1803, which allows a sole proprietor to be considered an employee:

- (12) "Eligible employee" means an employee who works on a full-time basis with a normal workweek of 30 hours or more, except that at the sole discretion of the employer, the term may include an employee who works on a full-time basis with a normal workweek of between 20 and 40 hours as long as this eligibility criteria is applied uniformly among all of the employer's employees. The term includes a sole proprietor, a partner of a partnership, and an independent contractor if the sole proprietor, partner, or independent contractor is included as an employee under a health benefit plan of a small employer. The term also includes those persons eligible for coverage under 2-18-704. The term does not include an employee who works on a part-time, temporary, or substitute basis.

¹ Sole proprietor – Supreme Court said in *Loos v. Waldo*, 257 M 266, 849 P2d 166, 50 St. Rep. 262 (1993) said that a lower court had not erred in relying exclusively on the independent contractor test to determine whether a claimant was an employee or a sole proprietor (*distinction emphasized*) because the workers' compensation statutes contain no definition of sole proprietor. (*A definition now is included in 39-71-116 – Sole proprietor means the person who has the exclusive legal right or title to or ownership of a business enterprise.*)

More case law also sets up a distinction about being a sole proprietor:

A claimant who argued that 39-71-123 required claimant's income from a massage business be included when calculating benefits for an injury that claimant received while working a single day as an employee on a ranch lost the argument. Annotations for MCA note that: interpreting the section as a whole, the massage business income was properly excluded from the calculations under subsection (4)(c) because claimant was a sole proprietor who elected not to be covered. *David v. St. Comp. Mut. Ins. Fund*, 267 M 435, 884 P2d 778, 51 St. Rep. 1105 (1994), distinguishing *Lovell v. St. Comp. Ins. Fund*, 260 M 279, 860 P2d 95 (1993). *Lovell* was distinguished in *Dunnington v. St. Comp. Ins. Fund*, 2000 MT 349, 303 M 252, 15 P3d 475, 57 St. Rep. 1488 (2000).

Under 15-30-207, notation in Annotations that old fund imposed liability tax on sole proprietors, subchapter S. corporation shareholders, partners of partnerships, and members and managers of limited liability companies – denoting an employer-type relationship.

15-30-256(2) says employment does not include: service performed by sole proprietors. (Income tax withholding)

30-10-202(19) references a sole proprietor “who does not employ other salespersons or investment adviser representatives” – indicating an employer category.

Other assessments include: Under Official comments under the Montana Limited Liability Act (Title 35, Chapter 8, Part 2):

“As a matter of flexibility, a company may be organized and operated with only one member to enable sole proprietors to obtain the benefit of a liability shield. New and important Internal Revenue Service announcements clarify that a one-member limited liability company will not be taxed like a corporation. Nor will it be taxed like a partnership since it lacks at least two members. Rather, a one-member limited liability company is disregarded for Federal tax purposes and its operations are reported on the return of its single owner.”

39-8-207(12) would allow a sole proprietor to receive unemployment insurance benefits under certain circumstances.

A sole proprietor or a working member of a partnership working under a professional employer arrangement may not receive unemployment insurance benefits unless the individual would otherwise be entitled to benefits if the professional employer arrangement did not exist.

II. Direct sellers -- They are excluded from minimum wage and overtime (39-3-406) as well as unemployment insurance 39-51-204 (39-51-204 catchline is “exclusions from definition of employment).

III. Real estate, securities, or insurance salesperson paid solely by commission and without a guarantee of minimum earnings -- They are somewhat like free-lance correspondents, who are exempted under 39-71-401. They may be considered independent or they may be employees – using the logo of a large employer for a business card may reflect employee status. If they are seen as independent, 39-71-118 is the more appropriate place for them. Obtaining work comp coverage would be under their own auspices. If they are seen as quasi-independent agents, responsible to an umbrella employer, they should remain in 39-71-401 as employees.

39-71-118(5)(a) The provisions here are similar to references in 39-71-401. One option is to combine them in 39-71-401.

Policy Choice: Differences in language exist regarding whether a person is a “working member” or “devoting full time” to the business. Specifically -- 39-71-118(5)(a) says a partnership, LLP, sole proprietor or member-managed LLC may elect to include as an employee “any member of the partnership, or limited liability partnership, the owner of the sole proprietorship, or any member of the limited liability company devoting full time to the partnership, limited liability partnership, proprietorship, or limited liability company business.” (emphasis added) 39-71-401(2)(d) references: “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);” ... Elsewhere, 39-51-204, under unemployment insurance, references working members only for a partnership. A choice of language is recommended.

Section 3 – 39-71-401

Subsection (2)(d) – deletes sole proprietors (moved into 39-71-118 as not employees)
Deletes “working” description of members in favor of “devote full time” – arguably a more descriptive, possibly stricter standard.

Subsection (2)(d)(ii) incorporates language from 39-71-118(5)(b)

Subsection (2)(e) – deletes real estate, securities, or insurance salesperson from 39-71-401 and moves them to 39-71-118 (as not employees)

Subsection (2)(f) – deletes direct seller and moves to 39-71-118 (as not employees)

New subsection (2)(f) – this subsection is redundant with 39-71-118(2)(b), so cross-references it.

Subsection (4)(a) – The first sentence is redundant with 39-71-401(1).

Subsection (4)(a) and (b) now serve as a description of how various employers elect coverage and combine election directions from 39-71-118(5) and (6).

39-71-401(4)(a) refers to quasi-public and private corporations or manage-managed limited liability companies.

(4)(b) refers to sole proprietor, partnership, LLPs or member managed liability companies.

(4)(c) covers both groups from language used for each under 39-71-118(5)

(4)(d) broadens explanation to fit all of the above changes.

Section 4 – July is standard effective date for work comp changes.