ISSUE NO. 9

The Montana Administrative Register (MAR or Register), a twice-monthly publication, has three sections. The Proposal Notice Section contains state agencies' proposed new, amended, or repealed rules; the rationale for the change; date and address of public hearing; and where written comments may be submitted. The Rule Adoption Section contains final rule notices which show any changes made since the proposal stage. All rule actions are effective the day after print publication of the adoption notice unless otherwise specified in the final notice. The Interpretation Section contains the Attorney General's opinions and state declaratory rulings. Special notices and tables are found at the end of each Register.

Inquiries regarding the rulemaking process, including material found in the Montana Administrative Register and the Administrative Rules of Montana, may be made by calling the Secretary of State's Office, Administrative Rules Services, at (406) 444-2055.

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SPECIAL NOTICE AND TABLE SECTION

BEFORE THE DEPARTMENT OF AGRICULTURE
OF THE STATE OF MONTANA

In the matter of the adoption of ARM New Rule I relating to the Eurasian Watermilfoil Management Area	)))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On June 3, 2010, at 3:00 p.m. the Montana Department of Agriculture will hold a public hearing in Room 225 of the Scott Hart Building, 303 N. Roberts at Helena, Montana, to consider the proposed adoption of the above-stated rule.

2. The Department of Agriculture will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process and need an alternative accessible format of this notice. If you require an accommodation, contact Department of Agriculture no later than 5:00 p.m. on May 27, 2010, to advise us of the nature of the accommodation that you need. Please contact Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; phone: (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov.

3. The rule as proposed to be adopted provides as follows, new matter underlined, deleted matter interlined:

NEW RULE I EURASIAN WATERMILFOIL MANAGEMENT AREA (1) The Eurasian Watermilfoil Management Area is created covering Noxon and Cabinet Gorge reservoirs, the lower Clark Fork River, and the mouths of tributaries including a 200-foot set back beyond full pool or high water mark beginning at Plains, Montana and extending to the Montana/Idaho border and the land beneath two check stations at the juncture of Highway 2 and 56 with an eighth of a mile extension along the highways in each direction and the juncture of Highway 200 and Highway 28 near Plains with an eighth of a mile extension along the highways in each direction in order to prevent the spread of Eurasian watermilfoil.

(2) The check stations will be mandatory for all water vessels, including live wells and trailers, and the check stations may mandate cleaning if the vessels appear to be potentially contaminated.

AUTH : 80-7-1007, MCA
IMP: 80-7-1007, 80-7-1008, 80-7-1009, 80-7-1010, 80-7-1011, 80-7-1012, 80-7-1014, MCA

Reason: The purpose of the management area is to prevent the spread of Eurasian watermilfoil. Eurasian watermilfoil is a state listed noxious weed. The plant is an extremely aggressive, nonnative aquatic weed that poses a serious threat to Montana's rivers, lakes, and irrigation infrastructure. Eurasian watermilfoil's environmental effects include the reduction of water quality, displacement of native

plant communities, decreased sport fish populations through lower predation success and reduced spawning, and increased habitat for undesirable species such as mosquitoes that may spread diseases to humans and parasites that cause swimmer's itch. Its economic impacts include reduced recreational value through the loss of angling, boating, swimming, water skiing, and nearshore recreation; reduced profitability of agricultural production by clogging ditches, canals, farm ponds, and irrigation equipment; decreased property values; and increased costs for electrical generation and municipal water supplies.

Eurasian watermilfoil currently only infests a limited area in Noxon and Cabinet Gorge Reservoirs in Montana. This is the first established population of Eurasian watermilfoil in the state. The limited number of infested acres permits feasible and cost effective containment. The primary means by which Eurasian watermilfoil can be spread is through plant fragments entrained on watercraft and boat trailers. The high recreational use and movement of watercraft from these water bodies to the rest of Montana combined with the significant impacts of this noxious weed creates a significant risk to Montana. The management area will prevent the spread of Eurasian watermilfoil through the education of boaters and inspection of watercraft and trailers leaving the infested water bodies.

Financial Impact: An accurate estimate of the financial impact is not measurable, but is expected to be trivial to nonexistent as there is no charge for the check stations created by the management area and the most affected individuals will only have their boat cleaned for free.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Cort Jensen at the Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; telephone (406) 444-3144; fax: (406) 444-5409; or e-mail: agr@mt.gov, and must be received no later than 5:00 p.m. on June 10, 2010.

5. Cort Jensen, Department of Agriculture, has been designated to preside over and conduct this hearing.

6. The Department of Agriculture 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, e-mail, and mailing address of the person and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to Montana Department of Agriculture, 303 North Roberts, P.O. Box 200201, Helena, MT 59620-0201; fax: (406) 444-5409; or e-mail: agr@mt.gov or may be made by completing a request form at any rules hearing held by the Department of Agriculture.

7. An electronic copy of this Notice of Proposed Adoption is available through the department's web site at www.agr.mt.gov, under the Administrative Rules section. The department strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

8. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsors were contacted on May 3, 2010 by regular mail, e-mail, and phone. For previous rule projects involving the same bill, the primary sponsor was given appropriate notice.

DEPARTMENT OF AGRICULTURE

/s/ Ron de Yong
Ron de Yong, Director

/s/ Cort Jensen
Cort Jensen, Rule Reviewer

Certified to the Secretary of State, May 3, 2010.

BEFORE THE STATE AUDITOR AND COMMISSIONER OF INSURANCE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 6.6.1906, and the adoption of New Rules I through VI, pertaining to the administration of a new risk pool by Comprehensive Health Care Association and Plan	))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On June 2, 2010, at 10:30 a.m., the State Auditor and Commissioner of Insurance will hold a public hearing in the lower level DLI R&A conference room of the State Auditor's Office, 840 Helena Ave., Helena, Montana, to consider the proposed amendment and adoption of the above-stated rules.

2. The State Auditor and Commissioner of Insurance 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., May 26, 2010, to advise us of the nature of the accommodation that you need. Please contact Darla Sautter, State Auditor's Office, 840 Helena Avenue, Helena, MT, 59601; telephone (406) 444-2726; TDD (406) 444-3246; fax (406) 444-3497; or e-mail dsautter@mt.gov.

3. The rule as proposed to be amended provides as follows, stricken matter interlined, new matter underlined:

6.6.1906 OPERATING RULES FOR THE ASSOCIATION (1) For the purpose of carrying out the provisions and purposes of Title 33, chapter 22, part 15, MCA, Ccomprehensive Hhealth Aassociation and Pplan, the commissioner adopts and incorporates by reference the bylaws of the Montana Ccomprehensive Hhealth Aassociation (MCHA), adopted on July 22, 1987, amended on August 1, 2000, and approved by the commissioner on December 27, 2000, and the operating rules of Montana the MCHA, adopted on June 21, 2004, and approved by the commissioner on July 29, 2004 August 22, 2006. A copy of the bylaws and operating rules is available for inspection at the office of the Commissioner of Insurance, 840 Helena Avenue, Helena, Montana.

(2) The bylaws and operating rules of the MCHA will also apply to the Montana Affordable Care Plan (MACP) risk pool, unless those rules conflict with the Administrative Rules of Montana (ARM) contained in this part, or the Patient Protection and Affordable Care Act (Public Law 111-148).

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

STATEMENT OF REASONABLE NECESSITY: The amendments to this rule are necessary to update the adoption dates for the plan of operation, and to specify that the operating rules and bylaws also govern the new risk pool to the extent that they do not conflict with these administrative rules.

4. The new rules as proposed to be adopted provide as follows:

NEW RULE I ESTABLISHING THE MONTANA AFFORDABLE CARE PLAN

(1) In order to provide immediate access to insurance for uninsured individuals in Montana with a preexisting condition, as described in H.R. 3590, the Patient Protection and Affordable Care Act (PPACA) Section 1101 (Public Law 111-148), the commissioner, or the MCHA with the commissioner's approval, may contract with the U.S. Department of Health and Human Services to establish a new temporary high risk pool plan, "the Montana Affordable Care Plan" (MACP), that will provide coverage for individuals who meet the eligibility criteria established in PPACA.

(2) The MACP will begin accepting applications for coverage on July 1, 2010.

(3) Coverage for the MACP must be provided by a risk pool that is administered and maintained separate and apart from the risk pools for the association plan, including the premium assistance plan (traditional high risk pool), and the association portability plan (portability pool), as defined in 33-22-1501, MCA. Commingling of funds between the existing MCHA pools and the MACP pool is not allowed.

(4) The funding for the MACP high risk pool will consist of money awarded by contract or grant from the federal government and premiums paid by the covered individuals in the MACP. No money from the state of Montana or assessments paid by the association members pursuant to 33-22-1513, MCA, may be used to fund the MACP.

(5) Claims and administrative expenses for the covered individuals in the MACP must be paid solely from the MACP temporary high risk pool.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

NEW RULE II ELIGIBILITY REQUIREMENTS FOR THE MACP HIGH RISK POOL PLAN (1) "Federally defined PPACA high risk pool individual" or "MACP eligible," means an individual who:

(a) is a citizen, or national, of the United States, or is lawfully present in the United States in accordance with the applicable provisions of PPACA;

(b) has not been covered under creditable coverage as defined in 33-22-140, MCA (2009), during the six month period prior to the date on which such individual is applying for coverage under the MACP;

(c) is a Montana resident; and

(d) has a preexisting condition.

(2) A preexisting condition that triggers eligibility for the MACP pool is defined as:

(a) complying with 33-22-1501(7)(a)(iii)(A) and (B), MCA; or

(b) a medical condition identified as a "presumptive condition" by the MCHA; or

(c) as otherwise defined by the U.S. Secretary of Health and Human Services.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

NEW RULE III ENROLLMENT CAPS AND OTHER FUNDING LIMITATIONS

(1) The MCHA board, relying on the advice of a qualified actuary, may propose that the commissioner limit enrollment in the MACP to a specified number of covered individuals. The commissioner shall approve or disapprove the proposed enrollment cap.

(2) The MCHA board and the lead carrier are responsible for setting an appropriate reserve for incurred but not reported claims, and for monitoring the financial condition of the MACP pool. The board shall submit a financial report for the MACP to the commissioner once every quarter, or more often if necessary, or if requested by the commissioner. The first quarterly report must be submitted on October 31, 2010.

(3) If applications for the MACP exceed an enrollment cap set by the commissioner, the MCHA shall create a waiting list for eligible individuals. The date of the application will determine an individual's place on the waiting list.

(4) If actuarial projections indicate that current claims, and incurred but not reported claims, threaten to exceed available revenue for the MACP pool, and if no additional federal funding is forthcoming, the board may recommend that the commissioner dissolve the MACP pool and terminate all coverage issued through that pool. The commissioner shall approve or disapprove the termination of coverage in the MACP pool. If termination of coverage is approved, covered individuals will receive:

(a) a 30 day notice of cancellation; and

(b) an opportunity to enroll in one of the association plans, with no break in coverage.

(i) Individuals who move to an association plan will:

(A) pay the same rates as other individuals covered under that association plan;

(B) be allowed to choose any benefit design currently offered in the traditional high risk pool; and

(C) be given full credit for any annual out-of-pocket expenses already met in the MACP.

(ii) No preexisting condition exclusions will be applied to individuals from the MACP who transfer to an association plan because their coverage was terminated under the provisions of this rule.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

NEW RULE IV MACP BENEFIT PLAN AND RATES (1) The board shall choose an existing benefit design from the association plans or the association portability plans, make any necessary modifications in order to comply with PPACA Section 1101(c)(2), and submit the MACP to the commissioner, who will approve or disapprove the plans.

(2) In order to facilitate enrollment, the board may amend its application for insurance coverage to comply with PPACA and these rules, and use the same application for all three risk pools.

(3) The rates for the MACP shall be established at a standard rate for a standard population. In order to determine that rate, the board shall follow the procedure described in 33-22-1512(1), MCA, for determining the "average premium rate," with no additional mark-up and apply the rating rules described in PPACA Section 1101(c)(2)(C) and (D). The board shall submit its rate recommendation for the MACP to the commissioner, who will approve or disapprove the rates.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

NEW RULE V LEAD CARRIER CONTRACT (1) The board may, with the approval of the commissioner, choose to amend the existing lead carrier contract to include the provision of administrative services for the MACP. Payment for those administrative services may not exceed any cap on administrative fees imposed by the Secretary of the U.S. Department of Health and Human Services.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503, MCA

NEW RULE VI FRAUD, DUMPING AND RECISSION (1) The provisions of 33-1-1202, 33-18-214, and 33-22-1518, MCA, apply to persons who misrepresent their own eligibility status, the eligibility status of any other individual, or who advise another person to misrepresent the eligibility status of any individual.

(2) Rescission of coverage under 33-15-403, MCA, may occur, but only if there was a misrepresentation as to eligibility status on an application that is fraudulent or proven to be an intentional misrepresentation of material fact.

(3) The board, with the approval of the commissioner, may require a reasonable amount of information from applicants in order to verify eligibility status.

AUTH: 33-22-1502, MCA
IMP: 33-22-1502, 33-22-1503 MCA

STATEMENT OF REASONABLE NECESSITY: The U.S. Department of Health and Human Services has requested that the state insurance departments and the high risk pools in those states take on the responsibility of administering a new temporary high risk pool, described in and funded by the Patient Protection and Affordable Care Act (PPACA), P.L. 111-148. The Montana Comprehensive Health Association (MCHA) has the authority "to exercise the powers granted to insurers under the laws of this state," which would include entering into a contract to administer a risk pool

offering health care coverage to eligible individuals. The commissioner has the authority to adopt rules to "carry out the provisions of this part Comprehensive Health Association and Plan," which would include any new activities that the MCHA proposes to engage in.

Establishing the Montana Affordable Care Plan (MACP) is reasonable and necessary because it will be locally administered in Montana and thereby best serve the interests of Montana consumers. These proposed administrative rules are necessary for the establishment of a new temporary Montana high risk pool. Once established under Montana law, the MACP will be able to access the funding that has been allocated to Montana by the federal government to service the claims of this new class of federally eligible individuals. In order to obtain available federal funding, the new temporary high risk pool must be ready to enroll individuals by July 1, 2010. If the state does not act to set up a mechanism to serve eligible Montanans by May 30, 2010, the federal government will establish a federal mechanism to cover those individuals.

A Montana temporary high risk pool will better serve the consumers of this state by allowing them access to: (1) the best discounts from a Montana network of providers; and (2) the expertise of the MCHA board that has 25 years of experience in managing the claims of a large group of high risk individuals. During those 25 years, the MCHA board has developed many mechanisms to provide effective claims cost management, including a disease management program for people with chronic conditions and those facing a serious health crisis, a pharmacy benefit program that effectively manages prescription drug costs, and first-dollar preventative benefits. Effective management of the funding available for this program is critical to making it a success for the Montanans that it will serve. The partnership of the MCHA board and the Office of the Commissioner of Securities and Insurance will establish the foundation for that success. These rules are reasonably necessary to authorize the formation of the MACP, so that it will provide Montanans who are currently "uninsured and uninsurable" with the best opportunity for affordable care until the health insurance exchanges are operational in 2014.

New Rule I allows the MCHA to operate the new risk pool (the MACP), with the approval of the commissioner, for the benefit of the individuals described in PPACA. This rule clarifies that the funding for the MACP is limited to the federal money allocated to Montana for the purpose of operating the new risk pool and the premiums collected from the individuals covered under the MACP. It specifies that no state money and no assessment dollars collected from association member companies can be used for this program. The funding for MACP cannot be commingled with any existing reserves from the other MCHA high risk pools. This rule is reasonably necessary to protect the state of Montana and the association by clearly prohibiting the use of state funding and association member funding to pay for expenses generated by the new risk pool.

New Rule II is reasonably necessary because it adopts the eligibility criteria established in PPACA. In order to receive federal funding, the states must agree to

cover only individuals meeting the eligibility criteria set forth in PPACA in the new temporary high risk pools. New Rule II also defines what is meant by "preexisting condition" for eligibility. Clearly defined eligibility criteria must be in place before opening the MACP for enrollment.

New Rule III gives the commissioner the authority to cap enrollment in the MACP, or even terminate coverage in the event that funding is depleted before the plan ends in 2014. This rule is reasonably necessary to ensure that enrollment does not exceed the federal funding available to cover excess losses in the plan. The board is charged with monitoring the financial solvency of the pool, and alerting the commissioner before the MACP incurs claims that it does not have the ability to pay. New Rule III is also necessary to provide individuals covered in the MACP with an opportunity to have continuous coverage in the traditional high risk pool, if the MACP terminates coverage.

New Rule IV is reasonably necessary to allow the board to modify the application form, policy form, and rates for the existing association plans to meet the minimum requirements for the MACP established by PPACA.

New Rule V is reasonably necessary because it allows the board, with the approval of the commissioner, to amend the existing lead carrier contract to provide services for the MACP. Since the new pool must start up on July 1, 2010, there is not enough time to seek new bids from other third party administrators. In addition, the MCHA board completed a request for proposals for a lead carrier in 2009.

New Rule VI is reasonably necessary to advise prospective applicants, producers, and employers that existing laws regarding unfair referrals to the high risk pool, fraud, and rescission also apply to the MACP. This will deter individuals who do not meet all eligibility criteria from applying for the MACP or misrepresenting their eligibility status. PPACA has similar provisions regarding fraud and unfair referral to the plan.

5. Concerned persons may submit their data, views, or arguments concerning the proposed actions either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Christina L. Goe, General Counsel, State Auditor's Office, 840 Helena Ave., Helena, MT, 59601; telephone (406) 444-2040; fax (406) 444-3497; or e-mail cgoe@mt.gov, and must be received no later than 5:00 p.m., June 10, 2010.

6. Christina L. Goe, General Counsel, has been designated to preside over and conduct this hearing.

7. The department maintains a list of concerned 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 that includes the name and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Such written request may be mailed or delivered

to Darla Sautter, State Auditor's Office, 840 Helena Ave., Helena, Montana, 59601; telephone (406) 444-2726; fax (406) 444-3497; or e-mail dsautter@mt.gov or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor for HB817, 1985, was Les Kitelsman, Billings, MT. After completing an online White Pages search, and checking the Legislative Roster maintained by the Secretary of State's office, no contact information was found.

/s/ Christina L. Goe	/s/ Robert W. Moon
Christina L. Goe	Robert W. Moon
Rule Reviewer	Deputy Insurance Commissioner

Certified to the Secretary of State May 3, 2010.

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.11.203, 24.11.315, 24.11.2407, 24.16.7520, 24.16.7527, 24.35.111, 24.35.121, 24.35.131, 24.35.133, 24.35.141, 24.35.202, 24.35.205, 24.35.206, 24.35.207, 24.35.302, 24.35.303, the adoption of NEW RULES I and II, and the repeal of ARM 24.35.201 all related to independent contractor exemption certificates and employment status determinations by the department	)))))))))))))	NOTICE OF PUBLIC HEARING ON PROPOSED AMENDMENT, ADOPTION, AND REPEAL

TO: All Concerned Persons

1. On June 7, 2010, at 10:00 a.m., the Department of Labor and Industry (department) will hold a public hearing to be held in the first floor conference room (room 104), 1327 Lockey Avenue, Walt Sullivan Building, Helena, Montana to consider the proposed amendment, adoption, and repeal of the above-stated rules.

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 June 1, 2010, to advise us of the nature of the accommodation that you need. Please contact the Employment Relations Division, Department of Labor and Industry, Attn: Dallas Cox, 1805 Prospect Avenue, P.O. Box 8011, Helena, Montana 59604-8011, fax to the department at (406) 444-9586, TDD (406) 444-5549; or e-mail dcox@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: There is reasonable necessity to amend the following rules in order to update and clarify the rules of the Independent Contractor Central Unit (ICCU) and to ensure that the various substantive programs in the department have administrative rules that appropriately coordinate with the department's overall rules concerning independent contractors. The ICCU rules are being updated to reflect recent statutory changes and to incorporate the experiences of the past five years of operations. There is reasonable necessity to amend the rules to generally update language by using consistent terminology throughout the rules. In addition, there is reasonable necessity to amend or correct authorization and implementation citations as appropriate in the various rules to match the provisions of those rules. This statement of reasonable necessity applies to all of the rules proposed for amendment. More specific reasons or other information are provided with each individual rule proposed for amendment.

4. The rules proposed to be amended provide as follows, stricken material interlined, new material underlined:

24.11.203 DETERMINATION OF EMPLOYMENT STATUS, ~~INCLUDING~~ REGARDING ~~THAT OF~~ INDEPENDENT ~~CONTRACTOR~~ CONTRACTORS

(1) Disputes regarding the employment status of an individual for unemployment insurance, workers' compensation coverage, wage protection and certain tax purposes, ~~including whether that individual is acting as an independent contractor,~~ are regulated by the provisions contained in ARM Title 24, chapter 35~~, subchapters 2 and 3~~.

~~(2) The test for determining whether an individual is acting as an independent contractor for unemployment insurance purposes is that found at ARM 24.35.301 through 24.35.303.~~

AUTH: 39-51-302, MCA
IMP: 39-51-201, 39-51-204, MCA

REASON: The proposed amendments to the ICCU rules regarding independent contractor certification require amendment to this unemployment insurance division rule to clarify that the ICCU rules govern the resolution of disputes regarding an individual's employment status. The entire of ARM Title 24, chapter 35, is devoted to explication of independent contractor eligibility, certification, and appeals processes. Consequently, the department determined that the more general reference to chapter 35 in this rule, rather the specific reference to subchapters 2 and 3, is appropriate. The traditional two-part, A-B test for determining whether an individual is acting as an independent contractor for unemployment insurance purposes is incorporated in the unemployment division rules at ARM 24.11.2407. The amendments to the ICCU rules propose to incorporate the same two-part test at ARM 24.35.202. Therefore, due to the proposed amendments to the ICCU rules included in this notice, the reference in subsection (2) of this rule to ARM 24.35.301 and 24.35.303 is inaccurate and misleading, and, therefore, is proposed for deletion. The proposed amendments to the ICCU rules appropriately characterize ARM 24.35.301 and 24.35.303 as general guidelines regarding employment status and not as "the test for determining" employment status.

24.11.315 APPEAL OF DEPARTMENT DETERMINATIONS (1) An interested party ~~appealing~~ who chooses to appeal a department decision, determination, or redetermination under 39-51-1109 or 39-51-2402, MCA, must file with the department a written notice of appeal within ten days after the department mails the decision ~~was mailed~~ to the interested party's last known address.

(a) If the appeal is of ~~an~~ a determination that an individual is an employee rather than an independent contractor, or vice versa, the department shall forward the appeal to the Independent Contractor Central Unit (ICCU) for a decision, in accordance with ~~determination provided for at~~ ARM Title 24, chapter 35~~, subchapters 2 and 3, the appeal must be filed with the ICCU~~.

(2) The notice of appeal ~~should~~ must contain reasons for the appeal.

(3) The notice of a benefits appeal~~, other than that referenced in ARM 24.11.315(1)(a),~~ must be filed in writing with ~~at~~ the department's office in Helena, either in person, by mail, by facsimile, or by e-mail. Benefit appeal forms may be used and are available upon request.

(4) The notice of a tax appeal~~, other than that referenced in ARM 24.11.315(1)(a),~~ must be filed in writing with the department's office in Helena, either in person, by mail, by facsimile, or by e-mail.

AUTH: 39-51-301, 39-51-302, MCA
IMP: 2-4-201, 39-51-1109, 39-51-2402, 39-51-2407, MCA

REASON: The proposed amendments seek to clarify that all appeals of initial determinations and redeterminations made by the Unemployment Insurance Division must be filed with the Unemployment Insurance Division of the department. However, the amendment distinguishes between the appeal process for disputes regarding unemployment insurance tax contributions and/or benefits from disputes involving determinations of the employment status of workers. The amendment clarifies that the current practice of the department is to forward all appeals disputing the employment status of workers to the ICCU for an ICCU decision. Because the department requires notice when an appeal involves a question of employment status in order to forward those appeals appropriately to the ICCU, the proposed amendment places the burden upon the appellant to ensure that each notice of appeal states the reason(s) for the appeal.

24.11.2407 DETERMINATION OF INDEPENDENT CONTRACTORS--DEPARTMENT PROCEDURES (1) As provided in ~~39-51-201~~ 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. The department shall use the following two-part test ~~is used~~ to determine whether an individual is an independent contractor or an employee:

(a) whether an individual is and ~~will~~ 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) 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.

~~(2)~~ (3) For purposes of this rule, "individual" means a worker who renders service in the course of ~~an~~ 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.

~~(3)~~ (4) To determine whether an independent contractor or employment relationship exists, the department may:

(a) review written contracts between the individual and the employing unit;

(b) interview the individual, co-workers, or the employing unit;
(c) obtain statements from third parties;
(d) examine the books and records of the employing unit;
(e) review filing status on income tax returns; and
(f) make any other investigation necessary to determine ~~if an independent contractor relationship exists~~ employment status.

~~(4)~~ (5) After investigation, the department may issue an initial written determination on whether an individual is an independent contractor. Any person or employing unit aggrieved by this initial determination may request investigation and a ~~determination~~ decision by the department's Independent Contractor Central Unit (ICCU) pursuant to ARM 24.11.203 and ARM Title 24, chapter 35, subchapters 2 and 3, within ten days of notice of the initial determination.

(a) A party is considered to have been given notice on the date a written notice is personally delivered or three days after a written notice is mailed to the party.

(b) The time limits set forth above may be extended for good cause as provided in 39-51-2402~~(4)~~, MCA.

~~(5)~~ (6) Thereafter, the process set out in ARM Title 24, chapter 35, subchapters 2 and 3 controls.

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-201, ~~39-51-1103~~ 39-51-1109, 39-51-2402, MCA

REASON: The proposed amendment to ARM 24.35.206 incorporates the traditional two-part test for determining whether an individual works as an independent contractor or an employee. The department determined that it is reasonable and necessary to repeat the two-part test in the rules governing the administration of the unemployment insurance division in order to affirm that the exact same test for employment status is used by all divisions of the department. In other words, the unemployment insurance division uses the same test for making initial determinations of employment status that the ICCU uses for making employment status decisions. To this end, the four factors used by the Workers' Compensation Court to evaluate whether a hiring agent exerts control over an individual are added to this rule to establish parallel rule construction with ARM 24.35.206.

Inaccurate statutory references and grammatical errors are corrected by this proposed amendment. To bring the language of this rule into conformity with the governing statute, 39-71-415, MCA, the department proposes to replace the term "determination" with the term "decision."

24.16.7520 PROCEDURE FOR ISSUING WAGE CLAIM DETERMINATIONS REGARDING EMPLOYMENT STATUS~~, INCLUDING THAT~~ OF INDEPENDENT CONTRACTOR (1) ~~Disputes~~ Only disputes regarding the employment status of an individual for wage claim purposes, including whether that individual is acting as an independent contractor, shall be forwarded by the department to the Independent Contractor Central Unit (ICCU) for a decision

pursuant to ~~are regulated by the provisions contained in~~ ARM Title 24, chapter 35, subchapters 2 and 3.

(2) The test for determining whether an individual is acting as an independent contractor for wage claim purposes is that found at ARM ~~24.35.301 through 24.35.303~~ 24.35.202.

(3) An independent contractor is not an employee, as defined by 39-3-201 and 39-3-402, MCA, and, therefore, is not subject to wage and hour provisions.

AUTH: 39-3-202, 39-3-403, MCA
IMP: 39-3-201, 39-3-402, MCA

REASON: The proposed amendment is necessary to clarify that the department will forward only those disputes involving independent contractor status to the ICCU for a decision. Disputes over other issues are governed by other rules. The amendment corrects the citation to the rule outlining the test used by the ICCU to determine employment status. The department determined that additional clarity on the distinction between an independent contractor and employee could be achieved by reference to the statutory definitions of "employee" and reiteration of the principle that independent contractors are not subject to wage and hour protections.

24.16.7527 EMPLOYER RESPONSE TO CLAIM (1) through (3) remain the same.

(4) In the event the employer's response contains an allegation that the wage claimant is an independent contractor, a partner, part of a joint venture, or any other employment status other than that of employee, the employment status issue will be referred to the department's Independent Contractor Central Unit for ~~determination~~ a decision pursuant to ARM ~~24.16.7520~~ 24.35.202.

(5) remains the same.

AUTH: 39-3-202, 39-3-403, MCA
IMP: 39-3-209, 39-3-210, 39-3-407, MCA

REASON: With the proposed amendment to ARM 24.35.202, which incorporates the traditional two-part test used by the ICCU to determine whether a worker is an independent contractor or an employee, this proposed amendment corrects the citation to the appropriate ICCU rule. To bring the language of this rule into conformance with the governing statute, 39-71-415, MCA, the department proposes to replace the term "determination" with the term "decision."

24.35.111 APPLICATION FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) ~~As provided in 39-71-417 , MCA, a~~ A person who regularly and customarily performs services at locations other than the person's own fixed business location and who has not elected to be personally bound by the provisions of workers' compensation plan 1, 2, or 3, shall apply for an independent contractor exemption certificate (ICEC). ~~In order to obtain an independent contractor exemption certificate, an~~ The applicant for an ICEC shall submit:

(a) ~~submit~~ a completed ~~department~~ ICEC application affidavit ~~form~~ on a department-approved form bearing the applicant's original notarized signature. The applicant shall swear or affirm ~~in which the applicant swears or affirms~~ under oath that the statements contained in the form and attached documentation are true and accurate to the best of the applicant's ~~ability,~~ knowledge. The application affidavit must include, ~~which includes,~~ but is not limited to:

(i) ~~the~~ applicant's ~~correct~~ name and mailing address;

(ii) ~~the~~ applicant's ~~correct~~ social security number;

(iii) list identifying each trade, occupation, profession, or business for which the applicant ~~is applying; and~~ seeks an ICEC, including:

~~(iv) for each occupation listed, the:~~

(A) business name ~~used~~;

(B) business structure (entity type);

(C) business mailing address and business physical address; and

(D) business telephone number;

(iv) supporting documentation for applicant's independent contractor status in each trade, occupation, profession, or business for which applicant seeks exemption from the Workers' Compensation Act, as set forth by (2);

(b) ~~pay~~ a fee, as required by ARM 24.35.121; and

(c) ~~submit~~ an executed, notarized waiver ~~bearing the applicant's original notarized signature and~~ conforming to the requirements of (3)~~; and~~.

~~(d) submit documentation with the affidavit confirming the applicant is engaged in one or more independently established trades, occupations, professions, or businesses. The applicant's documentation for each trade, occupation, profession, or business must receive 15 points or more to qualify the applicant for an exemption certificate for that trade, occupation, profession, or business. The value awarded to various types of documentation is as set out in (2).~~

(2) ~~Documentation supporting the applicant as independently established in a trade, occupation, profession, or business is divided into point groups as designated below. Each point group is made up of separate categories of documentation. A maximum of two items may be submitted to receive the total points for each category.~~ The applicant shall submit supporting documentation to prove applicant's qualification for an ICEC. The department has the discretion to assess the reliability of the documentation and ~~to~~ award points for ~~the items submitted up to the total points for each category~~ each item of proof as outlined by this rule. Each item of documentation submitted may ~~only~~ count toward points in more than one category. No more than two items of proof may be submitted under each category. To qualify for an ICEC, an applicant's documentation must be awarded a minimum of 15 points by the department for each independently established trade, occupation, profession, or business listed on the ICEC application.

(a) The department may award up to ten ~~point group includes~~ points for proof that the applicant has current workers' compensation, unemployment insurance, and Department of Revenue accounts for employees in each independently established trade, occupation, profession, or business. ~~This documentation is worth up to ten points for all three types of proof submitted together, up to six points for two types of proof, and up to three points for one type of proof.~~ The department may award up to

six points for proof of two insurance policies or accounts and may award up to three points for proof of one insurance policy or account.

(b) The department may award up to six ~~point group includes~~ points for each of the following proofs for each independently established trade, occupation, profession, or business:

(i) ~~a~~ contract or memo of understanding~~. Elements of the contract that may show proof of~~ that demonstrates applicant's independent contractor status. If the applicant can end a contract at any time without incurring any liability for failing to complete the project that is the subject of the contract, the department cannot award points for the contract under this rule. Separate contracts with different hiring agents may qualify for a maximum of six points. Each contract must include ~~but are not limited to~~:

(A) payment based on a completed project ~~basis~~;

(B) ~~an~~ beginning and ending ~~date~~ dates of the contract;

(C) liability for failure to complete the project;

(D) identification of who provides the materials and supplies;

(E) signatures by both parties; and

(F) ~~a~~ defined body of work, complete project, or end result;

(ii) ~~a~~ signed and dated list of equipment and tools owned or controlled by the applicant with approximate ~~value~~ values. ~~This may be demonstrated~~ The equipment or tool list may be documented by a rental or lease agreement, county documents verifying the business equipment tax paid, or other means;

~~(iii) proof of business location ownership, rent or lease. This may be demonstrated by an IRS form filed for claiming use of the home as a business, otherwise known as Form 8829;~~

~~(iv)~~ (iii) ~~a~~ commercial general liability insurance policy or bonding;

~~(v)~~ (iv) ~~filed~~ most recent business tax forms filed within past two years;

~~(vi)~~ (v) ~~two business tax receipts and/or~~ IRS Form 1099s (miscellaneous income) from multiple hiring agents or two quarterly self-employment tax payments (IRS form 1040ES) within past two years; or

~~(vii)~~ (vi) ~~a~~ trucking company lease agreement.

(c) The department may award up to three ~~point group includes~~ points for each of the following proofs for each independently established trade, occupation, profession, or business:

(i) two or more bids, ~~or~~ estimates, proposals, or completed billing invoices issued by the business;

(ii) ~~a~~ partnership or limited liability partnership agreement signed and dated by all partners that demonstrates~~. An applicant that is a working partner in a partnership or limited liability partnership must submit a written partnership agreement signed by all partners. Elements of the agreement that show proof of independent contractor status by virtue of a valid partnership include at least~~:

(A) intent to form the partnership;

(B) contribution by all partners;

(C) a proprietary interest and right of control by the ~~working partner applying for an exemption certificate~~ applicant; and

(D) the sharing of profit/loss;

(iii) application for~~,~~ or ~~an issued~~ current business license or building permit;

(iv) certificate of registration for the business entity issued by the Montana secretary of state;

(v) articles of incorporation, annual report, articles of organization, or other documentation that verifies the applicant is an officer in a corporation or a manager in a manager-managed limited liability company with a minimum of 20 percent ownership held by the applicant;

(vi) proof of ownership, rent, or lease of business location or proof of IRS filing for use of home as a business (IRS Form 8829);

~~(iv)~~ (vii) educational certification for unlicensed occupations or current ~~a~~ professional license relevant to the trade, occupation, or profession for which the applicant seeks the ICEC~~. Applicants who are in a licensed profession must submit proof of compliance with the licensing requirements of that profession~~;

~~(v) a certificate demonstrating the business structure is registered with the Montana Secretary of State;~~

~~(vi) a certificate demonstrating the business has a registered name with the Montana Secretary of State;~~

~~(vii) educational certification;~~

(viii) membership in a relevant professional association or affiliation;~~ or~~

(ix) current motor carrier (MC) authority number in applicant's personal or business name;

(x) business bank account; or

~~(ix)~~ (xi) copies of advertising in a newspaper, phone book,~~ or~~ on the internet, or other venue.

(d) The department may award up to one-and-one-half ~~point group includes~~ points for each of the following proofs for each independently established trade, occupation, profession, or business:

(i) ~~a~~ federal employer identification number ~~(FEIN)~~ (EIN);

(ii) ~~a business bank account~~ Dunn and Bradstreet number;

(iii) ~~a~~ telephone or utility bill(s) in the business name;

(iv) ~~a~~ credit ~~card~~ card(s) or ~~charge account~~ purchase account(s) in the business name;

(v) ~~printed~~ preprinted business invoices, cards, or brochures;

(vi) proof of ~~orders~~ order(s) for printed hats, ~~or~~ shirts, or other promotional items for the business;

(vii) proof of business advertising using a vehicle sign ~~on vehicle~~, ~~in~~ yard sign, bulletin boards, ~~corner lamp post,~~ or posted flyers;~~ or~~

(viii) ~~printed billing~~ invoices billed to the business name;

(ix) vehicle registration(s) in the business name; or

(x) international fuel tax account number (IFTA) in applicant's personal or business name.

(e) The applicant may submit any other supporting documentation. The department has discretion to assess the reliability of and determine the point value of any documentation not listed in this rule.

(3) ~~The department waiver requires the applicant to make the following representations for each trade, occupation, profession, or business for which the applicant is seeking an independent contractor exemption certificate:~~ To execute a waiver, the applicant shall complete the department-approved waiver form. The

waiver form must be signed by the applicant and notarized. The applicant shall represent on the waiver form that:

(a) ~~that~~ the applicant is engaged in each independently established trade, occupation, profession, or business ~~which~~ that is specifically identified on the ~~affidavit~~ application form;

(b) ~~that~~ the applicant is responsible for all taxes related to the applicant's work as an independent contractor;

(c) ~~that~~ the applicant controls the details of how ~~to perform the contracted for~~ services are performed, both under contract and in fact, and ~~that~~ the hiring agent retains only the control necessary to ensure the bargained for end result; and

(d) ~~that~~ the applicant understands and agrees that if the ~~independent contractor exemption certificate~~ ICEC is granted, the applicant ~~waives the applicant's right to and~~ is not eligible for and waives the right to workers' compensation ~~benefits~~ or occupational disease benefits for an injury or occupational disease related to work performed as an independent contractor in each independently established trade, occupation, profession, or business for which the ~~exemption certificate~~ ICEC is granted.

(4) An ~~application that is approved, and for which the exemption certificate is issued, shall be~~ ICEC issued by the department remains in effect for two years unless the department revokes or suspends the ~~exemption certificate~~ ICEC or ~~is notified in writing prior to the expiration date that the exemption certificate holder wishes to have the exemption certificate cancelled~~ the applicant requests in writing that the department cancel the ICEC.

(5) The department shall approve or deny an ICEC application within 30 days of receipt and notify the applicant in writing.

(6) The department shall retain an incomplete or denied application for a period of six months from the date of receipt and allow the applicant the opportunity to supplement supporting documentation or submit missing components. Upon the written request of applicant, the department shall re-evaluate an application, taking into consideration the supplemental information submitted by applicant. Incomplete applications that have not been approved within six months of receipt by the department will remain denied.

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: The proposed rule amendment is reasonably necessary to clarify the process for ICEC application. The department determined that, in addition to requiring an applicant to provide a business mailing address, the physical location of a business where actual contact with customers occurs is an important and necessary proof of an independently established business.

The department evaluated the proofs submitted as documentation of independent contractor status and found that one proof may serve as evidence under multiple categories. For example, business tax filings (up to six points) often include a federal employer identification number (up to one and one-half points). The

amendment affirms the practice of the ICCU staff to award points in all appropriate categories for each item of proof submitted to the department.

To further cut down on unnecessary paperwork, the amendment clarifies that no more than two items of proof may be submitted under any single category of proof for each trade, occupation, business, or profession listed on an individual's ICEC application. For example, the amendment notes that qualifying contracts submitted as proof of independent contractor status may be awarded a maximum of six points, regardless of the number of qualifying contracts submitted for a particular trade, occupation, profession, or business.

After meeting with stakeholders, the department determined it is prudent and necessary to adjust the point values of certain proofs of independent contractor status. The point value for proof of a business location is decreased from six to three points because the IRS now allows a person to deduct use of a home as a business expense when the home is used for inventory storage only. Conversely, with the increased financial scrutiny spurred by the Homeland Security Act, the department determined that proof of a business banking account deserves three points rather than the prior one and one-half points. The department found that the award of six points for business registration with the Secretary of State to be excessive. Consequently, the proposed amendment replaces the dual provisions, which awarded three points for registration of a business name and three points for registering a business entity with the Montana Secretary of State, with a single provision that awards a total of three points for registration of both business name and business entity.

Proof of professional licensure continues to earn three points. The department determined that parity was needed for occupations that do not require a license, and proposes to award three points for educational certification relevant to an unlicensed trade, occupation, or profession. For truckers, a current motor carrier number in the applicant's personal or business name will be awarded up to three points as clear indicia of independent contractor status.

A Dunn and Bradstreet number will earn an applicant one and one-half points as an indicator that the applicant meets the requirements for federal and state government contracting. Additionally, the department determined that vehicle registration in a business name and an international fuel tax account each deserved one and one-half points as solid indicators of independent business status.

The proposed amendment to ARM 24.35.141 affirms that persons exempt from the provisions of the Workers' Compensation Act may apply for an ICEC, even though they are not required by law to apply. For example, pursuant to Chapter 120, Laws of 2009 (HB204), corporate officers and managers of manager-managed limited liability companies who meet the exemption criteria of 39-41-401(2)(r), MCA, may obtain ICECs from the department if they desire. The rule explicitly allows the department to award three points for proof that an individual is exempt from the mandate of coverage under the Workers' Compensation Act.

The department found that the majority of ICEC applications are denied due to incomplete documentation. The amendment proposes a 30-day deadline for the department to respond to an applicant in writing. In addition, the amendment establishes a six-month window within which an applicant may supplement documentation of independent contractor status submitted to the department in order to qualify for 15 points without needing to reapply. At the end of six months, if a denied application remains incomplete, the applicant may submit a new application with the required fee to start the process over again.

The department considered, but rejected, a proposed rule amendment to award extra points for past possession of an ICEC by the applicant. The department reasoned that a past holder of ICEC has provided sufficient documentation to demonstrate independent contractor status. Because the department is now scanning and retaining ICEC application documentation and, upon renewal, an ICEC holder is required only to update the proof on file with the department, the proposed extra points do little to relieve the already lightened burden upon the applicant. The department determined that an award of extra points for past possession of an ICEC would undermine the integrity of the program, which is based to the extent possible on clear proof of current independent contractor status.

24.35.121 APPLICATION AND RENEWAL FEE FOR INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE ~~(1) For the purposes of this rule, the following definitions apply:~~

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

~~(b) "Renewal application" means an application for renewal of an existing independent contractor exemption certificate held by that person.~~

~~(c) "Subsequent application" means:~~

~~(i) an application submitted for reconsideration following the department's denial of an initial application or renewal application;~~

~~(ii) an application submitted during a current exemption certificate period requesting the deletion, revision, or addition of the trades, occupations, professions, or businesses for which the current exemption certificate was issued; or~~

~~(iii) an application to reinstate an independent contractor exemption certificate that has been suspended, revoked, or terminated.~~

~~(2)~~ (1) A nonrefundable fee of $125 ~~is charged for~~ must be submitted with each initial application, ~~subsequent,~~ each application for reinstatement of a revoked ICEC, and each renewal ~~application~~ affidavit.

~~(3)~~ (2) ~~Exemption certificates~~ ICECs are issued for a two-year period~~, as provided by law~~.

~~(4)~~ (3) The department may charge a $10 fee for the reissuance of a current certificate.

AUTH: 39-71-203, 39-71-401, MCA
IMP: 39-71-120, 39-71-401, 39-71-417, 39-71-418, MCA

REASON: The proposed amendment is reasonably necessary to relocate all definitions to NEW RULE I. Section 39-71-417(3), MCA, requires that the ICEC program be supported entirely by the fees paid by applicants. The proposed amendment clarifies that the fee for the ICEC application is nonrefundable. The department determined that the costs involved in processing a denied application are virtually the same as the costs involved in processing an approved application. The department further determined that "subsequent" applications were no longer necessary due to the proposed amendment to ARM 24.35.111, which allows an applicant to supplement information for department consideration without additional charge during the six-month period following initial submission of an application. Also, during the period that an ICEC is active, an ICEC holder may supplement, amend, or alter an ICEC without charge by adding or deleting specific trades, occupations, professions, or businesses, as necessary. Therefore, the provision related to "subsequent" applications has been deleted. Processing an application for reinstatement involves the same level of effort as an initial application or renewal application. Consequently, the same fee is proposed for reinstatement applications.

Section 39-71-401, MCA, mandates that ICEC application and renewal fees must offset the cost of the administration of the independent contractor certification program. The department analyzed the program costs based upon an average of 8,772 ICEC applications per year since program implementation in 2005 and found that the nonrefundable application fee of $125 remains commensurate with the projected costs of staff time to assist prospective ICEC applicants and to process and administer ICEC applications.

24.35.131 SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) An ~~independent contractor exemption certificate~~ ICEC may be suspended or revoked by the department pursuant to 39-71-418, MCA. The department shall apply the two-part test pursuant to ARM 24.35.202 to determine whether an individual is an independent contractor or an employee.

(2) ~~Regarding suspensions,~~ The department may suspend an ICEC as it applies to a particular hiring agent for whom the ICEC holder works when the department ~~will consider the factors defined in ARM 24.35.302 in order to determine whether an employing unit~~ determines that a hiring agent is either exerting control or retains a right to control to a degree that causes a certificate holder to violate the provisions of 39-71-417, MCA.

(3) ~~Regarding revocations,~~ The department may revoke an ICEC when the department ~~will determine whether~~ determines that a certificate holder fails to meet the test for independent contractor status, set forth by ARM 24.35.202.

(4) The department may revoke an ICEC when the department determines that a certificate holder is uncooperative ~~by considering~~ in light of the following factors:

(a) the department is unable to locate the certificate holder;

(b) the certificate holder refuses to provide information to the department, including, but not limited to, updated contact information for the certificate holder and contact information for each of the certificate holder's hiring agents;

(c) mail sent to the certificate holder is returned to the department; or

(d) any reason the department determines sufficiently egregious to warrant revocation of the ~~exemption certificate~~ ICEC.

~~(4)~~ (5) ~~Certificate holders~~ A person may appeal a department suspension or revocation of ~~the certificate~~ an ICEC in the same manner as that provided for denial of an application pursuant to 39-71-417, MCA.

~~(5) As used in this rule, the following definitions apply:~~

~~(a) "Revoked" and "revocation" mean that the independent contractor exemption certificate is no longer in force or effect.~~

~~(b) "Suspended" and "suspension" mean that the independent contractor exemption certificate is not applicable to a particular job or to a series of jobs for a particular employing unit.~~

(6) A person with a suspended ICEC as applied to a particular hiring agent may apply for reinstatement of the ICEC by submitting proof to the department of the ICEC holder's independent contractor status in relation to the identified hiring agent. The department shall investigate prior to reinstatement of an ICEC to ascertain that independent contractor status is established in fact.

(7) A person whose ICEC has been cancelled by the ICEC holder or revoked by the department may apply for a new ICEC pursuant to ARM 24.35.111.

AUTH: 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 39-51-201, 39-51-204, 39-71-417, 39-71-418, MCA

REASON: There is reasonable necessity to amend ARM 24.35.131 to remove definitions to NEW RULE I as set forth in this notice. The proposed amendments describe the procedure for reapplication when an ICEC has been revoked or suspended. The department determined that it is necessary to include explicit reference to the two-part test for determining employment status, as set forth by the proposed amendment to ARM 24.35.202. While prior ICCU rules referenced a similar two-part test in the administrative rules of the department's unemployment insurance division, the proposed amendment references the new ICCU rule setting for the two-part test. The department determined that it is reasonable for the ICCU rules to incorporate the two-part employment status test because the ICCU is the entity primarily responsible for decision-making on issues of employment status within the department.

Department investigations may reveal that a hiring agent has exerted control or has the right to exert control over a contract worker, thereby undermining the independent contractor status of that worker. The amendment affirms the authority of the department to suspend or revoke an ICEC as it applies to a particular hiring agent. The amendment further provides a mechanism for the suspended ICEC to be reinstated when the ICEC holder rectifies his or her work relationship with a hiring agent by submitting proof to the department that a true independent contractor –

hiring agent work relationship exists, subject to verification by a department investigation.

24.35.133 NOTICE OF SUSPENSION OR REVOCATION OF INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE (1) When the department suspends or revokes an ~~independent contractor exemption certificate pursuant to 39-71-417, MCA,~~ ICEC, the certificate holder's waiver of ~~worker's~~ workers' compensation benefits is no longer effective upon departmental notice to the hiring agent(s) ~~agents as designated in this rule~~.

(2) ~~Regarding a suspension, a~~ A hiring agent is considered to have been given notice of the suspension of ~~the exemption certificate~~ an ICEC on the date a written notice is personally delivered to the hiring agent, or three days after the department mails a written notice ~~is mailed~~ to the hiring agent, whichever is earlier.

(3) Regarding a revocation, if the department has contact information for a given hiring agent, that hiring agent is considered to have been given notice of the revocation of ~~the exemption certificate~~ an ICEC on the date a written notice is personally delivered to the hiring agent, or three days after the department mails a written notice ~~is mailed~~ to the hiring agent, whichever is earlier.

(a) ~~With respect to unknown hiring~~ Hiring agents unknown to the department or potential future hiring agents~~, such hiring agents~~ are deemed to have notice that an ~~exemption certificate~~ ICEC is revoked at the earlier of when:

(i) the department posts notice of the revoked ~~certificate~~ ICEC at its web site; or

(ii) the hiring agent has actual knowledge of the department's revocation of the ~~exemption certificate~~ ICEC.

(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 ~~independent contractor exemption certificate~~ ICEC is (406) ~~444-7734~~ ~~444-~~9029.

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

REASON: There is reasonable necessity to amend ARM 24.35.133 to correct the contact information for the ICCU.

24.35.141 GUIDELINES FOR DETERMINING ~~WHETHER~~ WHEN AN INDEPENDENT CONTRACTOR EXEMPTION CERTIFICATE IS NOT ~~NEEDED~~ REQUIRED (1) The independent contractor exemption from the coverage requirements of the Workers' Compensation Act is available only to individual persons, not to business entities such as corporations or manager-managed limited liability companies. The ~~independent contractor exemption certificate~~ ICEC relieves the person holding the ~~independent contractor exemption certificate~~ ICEC from having to be personally covered by workers' compensation insurance. The ~~independent contractor exemption certificate~~ ICEC does not relieve the owner(s) of a business from ~~having~~ the mandate to provide workers' compensation coverage for all of the employees of the business.

(2) ~~Notwithstanding this rule, any~~ Any person who wishes to ~~obtain~~ apply for an ~~independent contractor exemption certificate~~ ICEC and meets the requirements set forth by ARM 24.35.111 ~~for having an independent contractor exemption certificate~~ may obtain ~~one~~ an ICEC.

(a) persons who regularly and customarily perform services at their own fixed business location may elect to apply for an ICEC even though they are not required by law to do so; and

(b) persons who are exempt from the requirements of the Workers' Compensation Act under 39-71-401, MCA, or excluded from the definition of "employee" at 39-71-118, MCA, may elect to apply for an ICEC even though they are not required by law to do so.

~~(3) As used in this rule, "person" means a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company.~~

~~(4)~~ (3) The following persons generally do not need to obtain ~~the independent contractor exemption certificate provided in 39-71-417, MCA~~ an ICEC:

(a) ~~any~~ a person who is covered by a workers' compensation insurance policy for the work performed; or

(b) ~~persons~~ a person who ~~provide~~ operates their own fixed ~~regular commercial~~ business location where ~~they render~~ the person renders services to the public at large~~;~~ and is free from the control of a hiring agent.

~~(c) persons who use their home as their fixed regular commercial business location where they render services to the public, if the person is able to meet the IRS criteria to claim a business deduction for their home business location on their federal and state tax returns; and~~

~~(d) persons who practice in the traditional learned professions such as medicine, law, and accounting, who provide their own business location but may periodically be called upon to render services to their customers at the customer's location.~~

~~(5) The following persons generally do need to obtain the independent contractor exemption certificate provided in 39-71-417, MCA:~~

~~(a) a person who regularly and customarily performs services at locations other than the person's own fixed business location;~~

~~(b) a person not falling within the provisions of (4) where the person primarily provides personal services for commercial customers at the customer's place of business; and~~

~~(c) a person not falling within the provisions of (4), where the person primarily provides personal services for commercial customers, where the services provided are substantially similar to the customer's business operations.~~

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

REASON: The proposed amendment is reasonably necessary to move all definitions to NEW RULE I. The proposed amendment deletes the provision stating that persons who practice "traditional learned professions" are exempt from the requirement of obtaining an ICEC because those professions are not specifically

exempt by statute. In fact, a physician, lawyer, or accountant may need to apply for an ICEC if the person meets the criteria of 39-71-417, MCA. The department further proposes to eliminate the misleading provision that an ICEC is generally needed by the person who "primarily provides personal services for commercial customers, where the services provided are substantially similar to the customer's business operations." Because such a person is usually an employee of a business and because an employee does not qualify for an ICEC, it is reasonable to delete this confounding direction.

Due to the significant number of individuals who are exempt from the requirements of the Workers' Compensation Act, but who nevertheless elect to apply for an ICEC, the proposed amendment affirms that these individuals are welcome to apply. The supporting documentation submitted by all applicants, whether exempt by operation of law or not, will be evaluated and awarded points by the ICCU in accordance with ARM 24.35.111.

24.35.202 ~~DETERMINATIONS~~ DECISIONS REGARDING EMPLOYMENT STATUS (1) 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) whether the 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 the individual is engaged in an independently established trade, occupation, profession, or business.

(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.

~~(1)~~ (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.

~~(2)~~ (4) Determinations 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. ~~The department will use the criteria in ARM 24.35.302 and 24.35.303 to assess employment status.~~

~~(3)~~ (5) Initial d~~D~~eterminations regarding employment status ~~will generally~~ may be issued by the ~~department's Independent Contractor Central Unit (ICCU).~~ Unemployment Insurance Division or the uninsured employers 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, 24.16.7527, or 42.17.210.

~~(4)~~ (6) ICCU ~~determinations~~ "decisions" regarding employment must be called ~~"determinations"~~ "decisions" and are separate and distinct from both ~~the~~ initial determinations of the department and "orders" defined at ARM 24.29.205.

~~(5)~~ (7) ICCU ~~determinations~~ 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: The proposed amendment is reasonably necessary in order to explicate the two-part test used by the ICCU and other units of the department to determine a person's employment status. The two-part test was formerly set forth by statute at 39-71-120, MCA, which was repealed by the 2005 Legislature (Sec. 13, Chap. 448, L. 2005). The two-part test remained in the administrative rules of the department's Unemployment Insurance Division at ARM 24.11.2407. Although the two-part test has been used as a basis for ICCU decision-making since the ICCU was established in 2005, the test was not referenced in the ICCU's rules. Therefore, the proposed rule amendment reflects current practice of the department.

The proposed amendment deletes reference to the criteria outlined by ARM 24.35.302 and 24.35.303. Both ARM 24.35.302 and 24.35.303 are proposed for amendment in this notice to clarify that the enumerated criteria presented by these two rules provides only general guidance to the public and ICCU on employment status issues. The ICCU does not rely solely upon the elements indentified in ARM 24.35.302 and 24.35.303 for ICCU decision-making regarding employment status. Instead, the ICCU employs the traditional two-part test and the four-part test for control currently used by the Workers' Compensation Court, which are both set forth by this proposed amendment. Elsewhere in this notice, the two-part test in the unemployment insurance rules at ARM 24.11.2407 is amended to bring the language into conformity with the proposed ICCU rule.

The unemployment insurance and uninsured employers units of the department customarily make initial determinations of employment status when conducting an

audit of a putative employer. When a worker or employer disputes the initial determination by the UI auditor, these units will refer the question of employment status to the ICCU for investigation and a decision. However, if the initial determination of employment status is not disputed, the initial determination stands. The amendment acknowledges the binding nature of the initial determinations in the absence of a dispute.

To bring the language of this rule into conformity with the governing statute, 39-71-415, MCA, the department proposes to replace the term "determination" with the term "decision."

24.35.205 BINDING NATURE OF ~~DETERMINATIONS~~ ICCU DECISIONS REGARDING EMPLOYMENT STATUS (1) Unless appealed following mediation pursuant to ~~ARM 24.35.206~~ 39-71-415, MCA, written ~~determinations~~ decisions issued by the ICCU are binding on all parties with respect to employment status issues under the jurisdiction of the ~~Department of Labor and Industry~~ department and the jurisdiction of any other agency which elects to be included as a member of the ICCU. These ~~determinations~~ decisions may affect a party's liability in matters related to unemployment insurance, the Uninsured Employer's Fund, wage and hour issues, the Human Rights Commission, and state income tax withholding.

(2) Neither the department nor any other agency which elects to be included as a member of the ICCU may appeal the ICCU's employment status ~~determination~~ decision.

(3) ~~If~~ When a party appeals the ICCU's employment status ~~determination~~ decision ~~is appealed by a party which has not elected to be included as a member of the ICCU~~, the ~~determination~~ decision is not binding on any party until all appeal rights are exhausted.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 39-3-212, 39-51-1109, 39-71-415, 39-71-417, MCA

REASON: The proposed amendment is necessary because the governing statute, 39-71-415, MCA, uses the term "decision" when referencing a determination of employment status made by the ICCU.

24.35.206 MEDIATION AND APPEAL OF ~~DETERMINATIONS~~ DECISIONS REGARDING EMPLOYMENT STATUS (1) A complaint received by the department or a department request for a decision regarding employment status ~~is~~ may be investigated by the ICCU. The ICCU ~~will~~ shall issue a ~~determination of~~ decision on employment status.

(2) ~~Except as provided in (3) and (4), disputes over an ICCU determination regarding employment status must be mediated by the department, and then, if mediation does not resolve the dispute, may proceed to the Workers' Compensation Court.~~ A party to a dispute, which does not involve workers' compensation benefits, may appeal an ICCU decision on employment status or the denial, revocation, or suspension of an ICEC.

(3) The first step in the appeal process is mandatory mediation. The party requesting mediation shall file a written request for mediation with the ICCU within ~~ten~~ 15 days of notice of the ICCU's ~~determination~~ decision. The request for mediation is effective upon receipt by the department, not upon mailing.

(4) A party is considered to have been given notice of the ICCU decision on the date a written notice is personally delivered or three days after the department mails a written notice ~~is mailed~~ to the party. The ICCU may extend the time limits for a party to submit a written request for mediation ~~may be extended by the ICCU~~ for good cause shown.

~~(3) Disputes regarding the denial, revocation, or suspension of an independent contractor exemption certificate by an applicant or certificate holder must be appealed to the Workers' Compensation Court without mediation as provided by 39-71-417, MCA.~~

~~(4) A dispute between a hiring agent and the department involving the issue of whether a worker is an independent contractor or an employee, but not involving workers' compensation benefits, must be appealed to the Workers' Compensation Court without mediation as provided by 39-71-415, MCA.~~

(5) ~~Whenever a party appeals to~~ Following mediation, a party may appeal an ICCU decision by filing a petition for appeal with the Workers' Compensation Court. The appellant shall serve a copy of the petition by mail ~~under this rule, the party must serve its notice of appeal~~ on all ~~interested~~ parties of record.

(6) A petition for appeal must be received by the Workers' Compensation Court within 30 days of the date the department mailed the mediator's report to the parties. Notice of appeal is effective upon the actual receipt of the petition by the Workers' Compensation Court, not upon mailing.

(7) When a dispute is not resolved through mediation and no petition for appeal is filed with the Workers' Compensation Court, the ICCU's employment status decision is binding on the parties.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 2-4-201, 39-3-216, 39-51-1109, 39-71-415, 39-71-417, 39-71-418, MCA

REASON: The proposed amendment is necessary because the governing statute, 39-71-415, MCA, was substantively amended by Sec. 3, Chapter 117, L. 2007 (SB 108). Section 39-71-415, MCA, now requires parties, first, to bring all disputes regarding the decisions of the ICCU on employment status to the department for mediation and further mandates that, following mediation, a party may appeal an ICCU decision to the Workers' Compensation Court by filing a petition for appeal with the court. The time frames for filings also were changed by the 2007 Legislature. The new filing deadlines are incorporated in the proposed rule amendment.

A petition for appeal to the Workers' Compensation Court initiates de novo proceedings. Consequently, the ICCU shall not transfer the administrative record to the Workers' Compensation Court. The proposed rule amendment clarifies that the party seeking to appeal an ICCU decision must attach a copy of the ICCU decision to the petition for appeal and serve that petition on all parties.

Section 39-71-415, MCA, uses the term "decision" when referencing a determination of employment status made by the ICCU. The proposed amendment brings the rule language into conformity with the statutory language.

24.35.207 TRANSFER OF FILE (1) Upon receiving a ~~notice of~~ request for ~~appeal or~~ mediation, the ICCU shall identify and mark all exhibits relied on in making the employment status ~~determination~~ decision and send ~~copies of its~~ the consecutively numbered administrative record, including the marked exhibits, to the ~~Workers' Compensation Court or the~~ mediator~~, whichever applies, and to the parties of record~~.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 2-4-201, 39-3-216, 39-51-1109, 39-71-415, 39-71-417, 39-71-418, MCA

REASON: The proposed amendment is necessary to clarify that the administrative record will be numbered and transferred to the department mediator upon a request for mediation. Because the ICCU customarily presents the administrative record with consecutively numbered pages, that format has been memorialized in the proposed rule amendment. Because proceedings in the Workers' Compensation Court are de novo, the ICCU will not prepare and send an administrative record to the court.

24.35.302 INDEPENDENT CONTRACTOR -- GUIDELINES REGARDING EVIDENCE OF CONTROL (1) An individual is an employee and not an independent contractor if the hiring agent controls or retains the right to control the way the individual renders services. The following factors ~~must be considered to determine~~ serve as general guidelines when the department evaluates whether control exists:

(a) ~~The~~ the individual is required to follow written or oral instructions concerning when, where, or how work is to be done. Although some individuals, because of skill or expertise, work without receiving instructions, they may still be employees if the employer has the right to give instructions on work performance;

(b) ~~The~~ the success or continuation of a business depends in great part upon the services performed by the individual;

(c) ~~The~~ the hiring agent directs the hiring, supervising, or payment of the individuals assistants;

(d) ~~The~~ the relationship between the individual and the hiring agent is on a frequent, recurring basis, even if irregular or part time;

(e) ~~The~~ the individual is required to perform services at certain established times;

(f) ~~The~~ the work is performed on the business premises or jobsite of the hiring agent. This factor is especially important if the work could be performed elsewhere;

(g) ~~The~~ the hiring agent requires, or has the right to require, the individual to perform services in a certain manner, or in a certain order or sequence;

(h) ~~The~~ the hiring agent requires the individual to submit oral or written reports;

(i) ~~The~~ the individual is paid based on the time spent doing the work rather than a payment for a completed project or end result;

(j) ~~The~~ the individual is paid or reimbursed for travel or other business-related expenses;

(k) ~~The~~ the hiring agent furnishes the facilities, tools, materials, or other equipment to the individual;

(l) ~~The~~ the individual may be discharged at the will of the hiring agent, including the right to discharge for the failure to follow specified rules or methods. A union contract or statute which restricts the right of discharge does not indicate a lack of control;

(m) ~~Training~~ training is provided to the individual by the hiring agent;

(n) ~~The~~ the individual does not realize a profit or suffer a loss as a result of the services performed; ~~or~~

(o) ~~The~~ the individual is prohibited or restricted from working for others or is required to devote primary attention to the hiring agent;

(p) the individual has signed an overly broad noncompetition clause in a contract with a hiring agent; or

(q) other factors that indicate control of the individual by the hiring agent.

(2) remains the same.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 39-3-201, 39-51-201, 39-51-203, 39-51-204, 39-71-417, 39-71-418, MCA

REASON: The proposed amendment is reasonably necessary to clarify that the rule provides only general guidelines for department evaluation of employment status, not definitive criteria for evaluation. The proposed amendment puts the public on notice that an overly-broad noncompetition clause in a contract between an individual and a hiring agent is considered by the department to be a strong indication of excessive control. There also is reasonable necessity to amend the implementation citations to reflect an additional statute that is being implemented by the rule.

24.35.303 INDEPENDENT CONTRACTOR — GUIDELINES REGARDING INDEPENDENTLY ESTABLISHED BUSINESS (1) To be an independent contractor, an individual must be engaged in an independently established trade, occupation, profession, or business. The following factors serve as general guidelines when the department evaluates whether an ~~An~~ independently established business ~~may exist if the individual~~ exists:

(a) the individual has a place of business separate from the hiring agent's place of business;

(b) the individual supplies substantially all of the tools, equipment, supplies, or materials necessary to perform the services;

(c) the individual pays all expenses associated with performing the services, and is not reimbursed by the hiring agent;

(d) the individual has two or more effective contracts to perform services for several different hiring agents;

(e) the individual is paid based on a billing statement or invoice at completion of the services;

(f) the individual performs the services under a written contract that requires complete or partial payment after a certain amount of work is performed, and the contract terminates after a definite time period;

(g) the individual advertises services in telephone books, newspapers, or other media;

(h) the individual files federal or state business tax forms;

(i) the individual has the required customary licenses, registrations, or permits to maintain a business;

(j) the individual may realize a profit or suffer a loss from performing the services for the hiring agent. This factor may be shown if the individual:

(i) hires or pays assistants to perform the services;

(ii) performs the services at facilities owned or leased by the individual;

(iii) has continuing or recurring liabilities associated with performing the services; or

(iv) agrees to perform specific jobs for prices agreed upon in advance and pays expenses associated with the performance of the services;

(k) the individual has an independent contractor exemption certificate;

(l) the individual may not end the relationship at will without incurring liability. An independent contractor agrees to complete a specific job, is responsible for its completion, and may be subject to liability for failing to complete the job in accordance with agreed upon specification; ~~or~~

(m) the individual is not prohibited or restricted from working for others; or

(n) another factor that indicates the existence of an independently established trade, occupation, profession, or business.

(2) The department shall evaluate and weigh the above factors ~~are weighed and evaluated depending on the circumstances of~~ for each case. A combination of these factors may indicate that the individual is customarily engaged in an independently established trade, occupation, profession, or business. Service performed by an individual for pay is considered to be employment until it is shown to the satisfaction of the department that the individual is an independent contractor.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, 39-71-417, MCA
IMP: 39-3-201, 39-51-201, 39-51-203, 39-51-204, 39-71-417, 39-71-418, MCA

REASON: The proposed amendment is necessary to clarify that the rule provides only general guidelines for department evaluation of employment status, not definitive criteria for evaluation whether an individual has established an independent business. There also is reasonable necessity to amend the implementation citations to reflect an additional statute that is being implemented by the rule.

5. The proposed new rules provide as follows:

NEW RULE I 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) "Employment status" means the employment relationship between an individual and a hiring agent.

(3) "Fixed business location" means a principle place of business for any trade, occupation, profession, or business that is designated by the owner as the physical location where customers are directed for any physical contacts with the business and is the actual location where the majority of the business work is regularly performed. More than a place to store inventory or product samples, a fixed business location is where a person engages in work intended for commerce.

(4) "Hiring agent" means the entity that hires an individual to perform services. A hiring agent may be an "employer" as defined in 39-3-201, MCA; 39-51-202, MCA; 39-71-117, MCA; or other legal entity as defined by an "employing unit" in 39-51-201, MCA.

(5) "Incomplete application" means an application submitted for an exemption as an independent contractor that fails to qualify for a minimum of 15 points due to insufficient, missing, unverifiable, or incorrect information; or due to failure to submit an essential component, such as a signed and notarized waiver or required fee.

(6) "Independent Contractor Central Unit" or "ICCU" means the unit located within the department which is 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) "Party" means a person or entity designated by the department as plaintiff or respondent in an ICCU decision-making proceeding. The department, the claimant, employer(s), hiring agent(s), ICEC holders, insurer(s), or agencies of state government may be a party to an ICCU decision-making proceeding or appeal of an ICCU decision to the Workers' Compensation Court.

(11) "Person" means an individual. A person may be a sole proprietor, working member of a partnership, working member of a limited liability partnership, or working member of a member-managed limited liability company. An officer or manager who has elected to apply for an ICEC pursuant to 39-71-417, MCA, is a person for the purposes of these rules.

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

(13) "Revoked" and "revocation" mean that an ICEC is no longer in force or effect.

(14) "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.

(15) "Suspended" and "suspension" mean that a person's ICEC is not applicable to a particular job or to a series of jobs for a particular hiring agent.

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 adopt NEW RULE I to gather all definitions used in ARM Title 24, chapter 35, in a single location. The department determined that a definition for "fixed business location" is necessary to more clearly delineate that physical contact with customers at a defined location is a key component. Consequently, a storage unit or a post office box cannot serve as a "fixed business location" because customer contact is completely absent.

NEW RULE II ICEC RENEWAL, AFFIDAVIT, AND WAIVER (1) Two months prior to the expiration date of an ICEC, the department shall mail an ICEC renewal affidavit 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.

(2) To renew an ICEC, the ICEC holder shall submit the following:

(a) signed and notarized ICEC renewal affidavit on the department-approved form that indicates any changes in independent contractor status;

(b) certification that previously submitted documentation remains valid;

(c) additional documentation supporting independent contractor status, as needed;

(d) a fee, as required by ARM 24.35.121; and

(e) an executed, notarized waiver on the department-approved form.

(3) The department will verify documentation on file and evaluate all new documentation submitted by the ICEC holder. The department will assign point values to documentation, in accordance with ARM 24.35.111.

(4) The department has discretion to assess the reliability of and determine the point value of any documentation not listed in ARM 24.35.111.

(5) If the department is unable to verify any documentation needed to support independent contractor status, the department will notify the ICEC holder in writing within 30 days of receipt of the renewal affidavit.

(6) To qualify for an ICEC renewal, the ICEC holder's documentation must be awarded a minimum of 15 points by the department for each independently established trade, occupation, profession, or business listed on the ICEC renewal affidavit.

(7) An ICEC renewal issued by the department remains in effect for a two-year period unless the department revokes or suspends the ICEC or the ICEC holder requests in writing that the department cancel the ICEC.

(8) An ICEC holder may update the information on file with the department at any time during a current exemption certificate period by requesting in writing the revision of business name(s), business structure, phone number(s), or mailing address.

(9) An ICEC holder may add or change trade(s), occupation(s), profession(s), or business(es) to an ICEC, by executing an affidavit and waiver and submitting sufficient, relevant documentation to qualify for a minimum of 15 points, in accordance with the requirements of ARM 24.35.111.

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 adopt NEW RULE II to implement Chapter 120, Laws of 2009 (HB 204). Chapter 120 provides that the department shall adopt rules regarding the department's retention of documents submitted by applicants in support of an initial or renewal application for an ICEC, thereby reducing the burden on renewal applicants to supply information that has been previously provided to the department as part of the application process.

6. The rule proposed for repeal is as follows:

24.35.201 DEFINITIONS found at ARM page 24-3551.

AUTH: 39-3-202, 39-3-403, 39-51-301, 39-51-302, 39-71-203, MCA
IMP: 39-3-208, 39-3-209, 39-3-210, 39-51-201, 39-51-203, 39-71-120, 39-71-415, MCA

REASON: The repeal of this rule is reasonable and necessary for the purpose of adoption of definitions that apply to the entirety of ARM Title 24, chapter 35, as opposed to in a single subchapter.

7. 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: Dallas Cox, 1805 Prospect Avenue, P.O. Box 8011, Helena, Montana 59604-8011, faxed to the department at (406) 444-9586, TDD (406) 444-5549; or e-mailed to dcox@mt.gov., and must be received no later than 5:00 p.m., June 14, 2010.

8. An electronic copy of this Notice of Public Hearing is available through the department's web site at http://dli.mt.gov/events/calendar.asp, under the Calendar of Events, Administrative Rules Hearings Section. The department strives to make the electronic copy of this Notice of Public Hearing conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned

persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems, and that a person's difficulties in sending an e-mail do not excuse late submission of comments.

9. 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 Department of Labor and Industry, Employment Relations Division, attention: Dallas Cox, 1805 Prospect Avenue, P.O. Box 8011, Helena, Montana 59604-8011, faxed to the department at (406) 444-9586, TDD (406) 444-5549; or e-mail dcox@mt.gov., or may be made by completing a request form at any rules hearing held by the agency.

10. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. Representative Rob Ebinger, the primary sponsor of HB 204, was contacted by the department on August 19, 2009, in writing and by telephone. Department counsel notified Rep. Ebinger that work was beginning on the substantive content and wording of the proposed amendments and new rules presented in this notice. Senator John Esp, who carried HB 204 in the Senate during the 2009 session, was contacted by telephone during the rule drafting process. Senator Vicki Cocchiarella, the primary sponsor in the 2007 Legislature for SB108, which revised the process for appealing an ICCU decision, was also contacted by telephone during the rule drafting phase. The department shared electronic copies of the draft administrative rule amendments prior to publication with Rep. Ebinger, Sen. Esp, and Sen. Cocchiarella. All comments received from bill sponsors were taken into account in drafting this rule notice.

11. The department's Hearings Bureau has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER	/s/ KEITH KELLY
MARK CADWALLADER	Keith Kelly, Commissioner
Alternate Rule Reviewer	DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New Rules I through X pertaining to permissive licensing of drop-in child care facilities	))))	NOTICE OF PUBLIC HEARING ON PROPOSED ADOPTION

TO: All Concerned Persons

1. On June 8, 2010, at 3:00 p.m., the Department of Public Health and Human Services will hold a public hearing in the auditorium of the Department of Public Health and Human Services Building, 111 North Sanders, Helena, Montana, to consider the proposed adoption of the above-stated rules.

2. The Department of Public Health and Human Services will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact Department of Public Health and Human Services no later than 5:00 p.m. on June 1, 2010, to advise us of the nature of the accommodation that you need. Please contact Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; telephone (406) 444-4094; fax (406) 444-9744; or e-mail dphhslegal@mt.gov.

3. The rules as proposed to be adopted provide as follows:

RULE I DEFINITIONS For purposes of [RULES II through X], the following definitions apply:

(1) "Drop-in day care center" or "center" means a day care center which only provides care to children on an irregular, intermittent, and occasional basis and that provides care only when parents are not on the same premises or not immediately available.

(2) "Irregular, intermittent, and occasional basis" means periods of time less than six hours a day and less than four days a week for no more than three consecutive weeks.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-703, 52-2-704, MCA

RULE II APPLICANT REQUIREMENTS FOR DROP-IN DAY CARE CENTERS (1) It is permissible for a drop-in day care center to seek licensure by the department.

(2) An applicant for a drop-in day care center license shall:

(a) meet the requirements for day care centers provided in ARM Title 37, chapter 95 with the exception of:

(i) ARM 37.95.106 regarding licensing application as it applies to the number of fire and evacuation drills;

(ii) ARM 37.95.128 regarding health record forms;

(iii) ARM 37.95.140 regarding immunization requirements;

(iv) ARM 37.95.141 as it pertains to immunization documents;

(v) ARM 37.95.602 regarding program requirements;

(vi) ARM 37.95.611 regarding support services space;

(vii) ARM 37.95.613 regarding materials and equipment including play materials and equipment. However, drop-in day care centers shall comply with ARM 37.96.613(3), (4), and (5) pertaining to high chairs, rest equipment, and telephone provisions; and

(viii) ARM 37.95.619 regarding night care.

(b) meet the requirements of ARM 37.95.106 regarding the submission to the department of:

(i) an annual approved inspection report from the state fire marshal or the fire marshal's designee indicating the fire safety rules have been met; and

(ii) an annual approved inspection report from public health authorities certifying the satisfactory completion of training or a certificate of approval following inspection by local health authorities in accordance with ARM 37.95.205, 37.95.206, 37.95.207, 37.95.210, 37.95.214, 37.95.215, 37.95.220, 37.95.221, 37.95.225, 37.95.226, and 37.95.227.

(c) submit to and receive prior approval from the department of a written plan of operation for the drop-in day care center as outlined in [RULE III]; and

(d) operate the drop-in day care center according to the approved plan of operation.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-721, 52-2-722, 52-2-723, 52-2-724, 52-2-731, MCA

RULE III DROP-IN DAY CARE CENTER PLAN OF OPERATION (1) The plan of operation must include:

(a) ages, numbers, and groupings of children to be served;

(b) the proposed method of staffing the drop-in day care center;

(c) the space, materials, equipment, and furnishings to be used at the drop-in day care center;

(d) the hours, days, and months of operation;

(e) the schedule of activity for the children;

(f) a method for ensuring that children are released only to their parents, guardians, or other persons authorized by parents or guardians to pick up children who are properly identified to the drop-in day care center staff;

(g) verification of liability and fire insurance and respective policy expiration dates;

(h) assurances as to how the program intends to comply with the background and protective services check and staff information required by ARM 37.95.106;

(i) assurances as to how the program intends to comply with the caregiver qualification requirements of ARM 37.95.166, 37.95.173, and 37.95.174; and

(j) methods for employing the discipline requirements of ARM 37.95.606.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-723, 52-2-724, 52-2-731, MCA

RULE IV DROP-IN DAY CARE CENTER SPACE REQUIREMENTS

(1) With the exception of outdoor space, the drop-in day care center shall meet the space requirements as outlined in ARM 37.95.610. However, in the absence of an adequate outdoor play area, the center must set aside a greater amount of indoor space for large muscle development activities. Such areas shall contain appropriate play equipment for large muscle development.

(2) If however, the center does have outdoor space available, the center shall still meet those space requirements as defined in ARM 37.95.610.

(3) If outdoor play space is provided, but is inadequate for the maximum number of children, a schedule shall be provided to show how outdoor play time will be made available to all the children. At no time will there be more children in the outdoor play area than the maximum number allowed computed at 75 square feet per child as defined in ARM 37.95.705.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-731, MCA

RULE V EMERGENCY CARDS AND HEALTH HISTORY FORMS (1) Drop-in day care center staff shall require the parent or legal guardian of each child to be placed in care at the center to complete and sign an emergency card and health history form before the child is admitted to the center.

(2) If the center allows enrollment of children without medical verification of immunization status, then the center must post notification of such in a place that is easily visible to parents and legal guardians.

(3) If the parent or legal guardian does not have verification of the child's immunization status, then the parent shall indicate in writing that to the best of the parent's or legal guardian's knowledge and belief, the child is up to date with the schedule of immunizations for the child's age;

(4) Drop-in day care center staff shall ensure that the emergency card and health history form are signed and updated as necessary.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-723, 52-2-731, MCA

RULE VI EMERGENCY SAFETY REQUIREMENTS (1) In addition to the requirements imposed by the fire marshal or the fire marshal's designee, and the requirements of ARM 37.95.121, the following criteria for emergency safety must also be met:

(a) the operator shall ensure that staff members and children practice procedures at least monthly to be used in the event of a fire or other emergency requiring escape from the center;

(b) an operator shall post immediately accessible to each telephone in the center a notice stating the emergency telephone numbers to summon fire, police, and rescue services; and

(c) a prepared emergency evacuation plan which includes:

(i) a diagram of safe routes by which the staff and children may exit each area of the center in the event of a fire or other emergency requiring evacuation of the center; and

(ii) a copy of the plan must be posted in each area in the center.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-731, 52-2-734, MCA

RULE VII MATERIALS AND EQUIPMENT (1) The operator shall make accessible to a child only materials and equipment that are:

(a) developmentally appropriate;

(b) safe;

(c) in good repair;

(d) cleanable;

(e) nontoxic; and

(f) free from known hazards (such as lead paint, etc.).

(2) The operator shall provide to each group of children a sufficient quantity and variety of materials and equipment for activities according to the numbers and ages of the children in the group.

(3) Materials shall be provided for:

(a) vigorous play;

(b) creative and dramatic play;

(c) socialization;

(d) manipulation, including construction materials; and

(e) individual pursuits.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-731, MCA

RULE VIII FOOD SERVICE (1) If the operator furnishes food and beverages for meals and snacks, the food and beverages must meet the child's daily nutritional needs as established by the National Research Council or the USDA Food and Nutrition Service.

(2) Food and beverage must be offered to children according to the following schedule:

(a) if a child is at a drop-in day care center for less than four consecutive hours, the child shall receive at least one snack; and

(b) if a child is at a drop-in day care center for four to six consecutive hours, the child shall receive at least one meal and one snack.

(3) If the center does not provide meals or snacks, then arrangements must be made with the children's parent or legal guardian to provide the food and beverages as indicated in (2).

AUTH: 52-2-704, MCA
IMP: 52-2-702, MCA

RULE IX STAFFING QUALIFICATIONS (1) Each drop-in day care center shall have a director. A director must:

(a) be at least 18 years of age; and

(b) have at least 1,040 hours of paid or unpaid staff supervision experience.

(2) Each drop-in day care center shall have at least one direct care-giving staff who must:

(a) be at least 18 years of age;

(b) have at least two years of satisfactory full-time experience in a related educational, early childhood, or child-care setting; and

(c) be on-site when children are in care.

(3) Other care-giving staff must meet the qualifications outlined in the facilities plan of operation.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-723, 52-2-731, MCA

RULE X CARE OF INFANTS (1) If a drop-in day care center provides care to infants, all requirements contained in ARM Title 37, chapter 95, subchapter 10 shall be met.

AUTH: 52-2-704, MCA
IMP: 52-2-702, 52-2-731, MCA

4. The Department of Public Health and Human Services (the department) is proposing new Rules I through X pertaining to permissive licensing of drop-in day care facilities. As a result of House Bill 324 (HB 324), 2001 Laws of Montana, Chapter 505, the Montana Legislature amended the Montana Child Care Act to allow for the permissive licensing of child care centers that provide care to children on an irregular basis. These facilities are otherwise known as "drop-in day care" facilities.

The legislation also gave the department the authority to adopt rules; however, in developing these voluntary rules, the legislation required the department to provide for exceptions regarding child-to-staff ratios and requirements for immunization which are present in the regulations that currently exist for the other types of regulated child care programs.

The proposed new rules provide the minimum requirements that the department deems as being necessary to protect the health and safety of children placed in drop-in day care facilities.

Rule I

In order to write sufficient rules regarding the licensure of facilities operating on an irregular, intermittent, and occasional basis, it is necessary to define how these facilities differ from the existing regular-based day care facilities.

Because many "drop-in" styles of child care exist at places like health clubs and churches, as a benefit to its members, the department feels it is necessary to specify that the permissive licensure required by HB 324, only applies to those types of facilities where parents are not on the premises or immediately available.

Drop-in day care centers are intended to supplement not substitute care provided in traditional day care centers which provide child care on a more regular basis. Therefore, it is necessary to define what constitutes drop-in day care and to further define what is meant by irregular, intermittent, and occasional basis.

Rule II

The set of requirements which exist in ARM Title 37, chapter 95, are basic (minimum) requirements which were designed to protect the health and safety of children attending a day care center. These rules are the "floor below which one cannot go" and be considered licensed by the state of Montana. Therefore, even though the licensing is considered voluntary and permissive, the department feels that drop-in day care centers should also meet the minimum floor of safety.

HB 324 included exceptions to existing rules and the department has attempted in this rule to apply that requirement. Proposed new Rule II(2)(a)(i) through (viii) define the exceptions as well as includes other requirements that are specific to regular-based day care settings. The legislation required the department to provide exceptions to the rule requiring proof of immunization upon entry into the program, this is outlined in proposed new Rule II(2)(a)(iii) and (iv). In this same respect, the department feels it is necessary to make an exception to the infant health status documentation of which proof of immunization is part of. Therefore, the department has included proposed new Rule II(2)(a)(ii) in the areas of exceptions. Those items delineated in proposed new Rule II(2)(a)(v) through (viii) are specific to regular-based center programs and because of the unique nature of drop-in day care centers, typically are not implemented. As such, the department is not requesting adherence to these provisions.

Rule III

A plan of operation is necessary in order to be licensed by the department so that the department has at least the basic information regarding a drop-in day care center. Without this information, the department has no indication that the center is appropriate for licensure. Also, users of the drop-in day care center can be assured that there are minimum safeguards in place to protect the health and safety of the children at the drop-in day care center.

Rule IV

Child behavior tends to be more constructive when sufficient space is organized to promote developmentally appropriate skills. Crowding has been shown to be associated with increased risk of developing upper respiratory infections. Also, having sufficient space will reduce the risk of injury from simultaneous activities occurring in limited space. It also allows for proper and timely exiting in the event of a fire or other emergent condition.

Rule V

Proposed new Rule V is necessary to provide emergency and health history information in the event of an emergency for the protection and health of the child, other children in the center, and staff. Without this information those in the center could be exposed to greater risk of illness. In the event of an emergency, it is crucial that the parent, guardian, or other emergency contact information be readily available.

Proposed new Rule V(2) is necessary to inform parents and guardians that children without medical verification of immunizations may be allowed in the center. Parents and guardians can then make an informed decision as to the best interests of their child in utilizing drop-in day care center services.

Rule VI

Emergency safety requirements are necessary to protect the children and staff of the drop-in day care center in the event of an emergency. The requirements of proposed new Rule VI ensure that emergency telephone numbers and evacuation routes are displayed and therefore accessible to staff. Requiring staff members and children to practice emergency procedures encourages familiarity with the procedures which should result in a more orderly evacuation during an emergency or unforeseen event.

Rule VII

Proposed new Rule VII provides guidance for the drop-in day care center as to what materials and equipment will be appropriate to provide learning experiences appropriate for the age groups and capabilities of the children in the drop-in day care center. Proposed new Rule VII is necessary to indicate that the center will provide activities and services other than basic child supervision.

Rule VIII

Proposed new Rule VIII is necessary to indicate the requirements for providing meals and snacks at a drop-in day care center. Children have smaller stomachs and therefore do not normally consume as much food per meal or snack as those with larger stomachs. Therefore, children tend to get hungry within a shorter period of time. Providing food to the children in a drop-in day care center using the

guidelines indicated ensures that the children have something to eat at least once every four hours. Preventing excessive hunger and thirst among the children in a drop-in day care center could have positive effects on the child. Hungry children may not be able to resist illness and may have overall poorer health, may demonstrate higher levels of behavior problems such as aggression, hyperactivity, and inability to get along with others. Therefore, the requirements for the provision of snacks and meals are a reasonable requirement.

Rule IX

The staff qualifications of proposed new Rule IX require those direct care-giving drop-in day care center staff to have previous experience in working with children. This is necessary because the children in this care setting are receiving care for limited time periods and there is the potential for a large number of children to be in attendance at one time. The care provider has limited opportunity to get to know the child and to foster a positive rapport. By requiring previous experience in working with children, the caregiver is better prepared to work with children in a short-term setting. The staffing requirements also indicate the logical chain of command for facility staff.

Rule X

It is necessary to include proposed new Rule X to reinforce to drop-in day care providers that caring for infants requires additional considerations and precautions for the health and safety of infants.

5. Concerned persons may submit their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to: Rhonda Lesofski, Department of Public Health and Human Services, Office of Legal Affairs, P.O. Box 4210, Helena, Montana, 59604-4210; fax (406) 444-9744; or e-mail dphhslegal@mt.gov, and must be received no later than 5:00 p.m., June 11, 2010.

6. The Office of Legal Affairs, Department of Public Health and Human Services, has been designated to preside over and conduct this hearing.

7. 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 that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in 5 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available through the Secretary of State's web site at http://sos.mt.gov/ARM/Register. The Secretary of

State strives to make the electronic copy of the notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the Secretary of State works to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

9. The bill sponsor contact requirements of 2-4-302, MCA, apply and have been fulfilled. The primary bill sponsor was contacted by letter on March 11, 2010, sent postage prepaid via USPS, and by telephone and e-mail on March 11, 2010.

/s/ John Koch
Rule Reviewer

/s/ Mary Dalton for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State May 3, 2010.

BEFORE THE SECRETARY OF STATE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 44.3.105, 44.3.106, 44.3.1101, 44.3.1403, 44.3.1701, 44.3.1704, 44.3.1706, 44.3.1707, 44.3.1710, 44.3.1713, 44.3.1717, 44.3.2002, 44.3.2005, 44.3.2012 through 44.3.2016, 44.3.2102, 44.3.2103, 44.3.2109 through 44.3.2111, 44.3.2113 through 44.3.2115, 44.3.2203, 44.3.2302 through 44.3.2304, 44.3.2401, 44.3.2402, and 44.3.2501, repeal of ARM 44.3.2601 and 44.9.313 pertaining to elections	)))))))))))))))	AMENDED NOTICE AND EXTENSION OF COMMENT PERIOD ON PROPOSED AMENDMENT AND REPEAL

TO: All Concerned Persons

1. On November 12, 2009, the Secretary of State published MAR Notice No. 44-2-151 pertaining to the proposed amendment and repeal of the above-stated rules at page 2126 of the 2009 Montana Administrative Register, Issue Number 21.

2. The Secretary of State will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Secretary of State no later than 5:00 p.m. on May 27, 2010, to advise us of the nature of the accommodation that you need. Please contact Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 461-5173; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov.

3. The Secretary of State is extending the comment period because it has corrected some deficiencies in citations of authority and/or implementation for ARM 44.3.1101, 44.3.1701, 44.3.1717, 44.3.2013, 44.3.2115, and 44.3.2303 and revised the statements of reasonable necessity for the proposed amendments to ARM 44.3.1101, 44.3.1701, 44.3.1717, 44.3.2013, 44.3.2113, 44.3.2115, and 44.3.2303 pursuant to e-mailed comments received from David Niss on behalf of the State Administration and Veterans' Affairs Interim Committee. Sections 2-4-305(8)(b) and (c), MCA, require that an agency must use an amended proposal notice to correct any deficiencies in a statement of reasonable necessity. The Secretary of State is proposing other minor amendments to ARM 44.3.1101, 44.3.2102, and 44.3.2302.

4. The Secretary of State proposes that the following rules be further amended as follows, new matter underlined, deleted matter interlined:

44.3.1101 SCHEDULE OF FEES FOR THE CENTRALIZED VOTER FILE

(1) Upon written request, the Secretary of State through its vendor shall furnish, for noncommercial use to private individuals or entities, a list of registered electors as compiled and maintained in its statewide voter database. For the statewide list or available extracts from the statewide list the charge is $1,000.00. For a legislative representative district list the charge is $100.00, for a legislative senate district list the charge is $150.00, or a county list the charge is $200.00, and for the petition signers report the charge is $200.00. For a subscription for ongoing access to the database and all other available extracts or lists the charge is $5,000.00 for one year.

AUTH: 2-15-404, ~~13-2-122,~~ MCA
IMP: 13-2-122, MCA

REASON: This amendment is reasonably necessary to set a charge for the petition signers report commensurate with the amount of time and effort it takes to extract it, which is consistent with the time and effort it takes to produce a county list. The statutory authority and implementation citations ~~was~~ were reviewed and updated.

44.3.1701 EXAMINATION OF VOTING MACHINES AND DEVICES

(1) through (7) remain as proposed.

AUTH: 13-1-202, 13-17-103, 13-17-107, MCA
IMP: 13-1-202, 13-17-101, 13-17-103, MCA

REASON: The addition of (2)(g) is reasonably necessary to provide a definition for an "engineering change order." The amendment to (3) gives the Secretary of State the flexibility to utilize as many electors as deemed necessary for the examination and the amendment to (6) is necessary to specify that the form is prescribed by the Secretary of State. Section 13-1-202, MCA, gives the Secretary of State the statutory authority to "prescribe the design of any election form required by law." The statutory authority and implementation citations were reviewed and updated.

44.3.1717 SEALING BALLOTS AND VOTING SYSTEMS (1) through (3) remain as proposed.

AUTH: 13-1-202, 13-17-211, MCA
IMP: 13-1-202, 13-16-417, 13-17-211, MCA

REASON: The amendment to (2) recognizes the Secretary of State's role in providing testing and security procedures, pursuant to the rulemaking authority in Title 13, chapter 17, MCA. Section 13-1-202, MCA, gives the Secretary of State the statutory authority to "prepare and deliver to the election administrators … written directives and instructions relating to and based on the election laws." The statutory authority and implementation citations were reviewed and updated.

44.3.2013 NOTICE TO APPLICANT OF STATUS OF APPLICATION FOR VOTER REGISTRATION (1) and (2) remain as proposed.

AUTH: 13-1-202, 13-2-109, MCA
IMP: 13-1-202, 13-2-110, MCA

REASON: The amendment to (1) is necessary to strike language that is too specific and unnecessary because the language on the forms is prescribed by the Secretary of State and printed on the forms that the election administrators print from the Montana VOTES database. Section 13-1-202, MCA, gives the Secretary of State the statutory authority to "prescribe the design of any election form required by law." The statutory authority and implementation citations were reviewed and updated.

44.3.2102 DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Current address" means residence address or mailing address. For the purposes of this subchapter, an address is presumed to be current unless proved otherwise.

(2) through (10) remain the same as proposed.

(11) "Polling place manager" means an election official who is responsible for polling place procedures.

AUTH: 13-13-603, MCA
IMP: 13-13-114, 13-13-601, 13-15-107, MCA

44.3.2113 PROVISIONAL VOTING PROCEDURES AT THE POLLING PLACE - CASTING A BALLOT. (1) through (5)(a) remain as proposed.

(b) vote the ballot;

(5)(c) and (5)(d) remain as proposed.

(e) return the provisional ballot outer envelope to an election official, who shall place the provisional ballot outer envelope into an unverified provisional ballot container, and who shall in a primary election, place the unvoted party ballot into an unvoted ballot box or into the provisional ballot outer envelope. The location where the unvoted party ballot is placed must be consistent within a county and must be consistent with direction given by the election administrator.

(6) remains as proposed.

AUTH: 13-13-603, MCA
IMP: 13-13-114, 13-13-601, 13-15-107, MCA

REASON: The amendments to (2), (3), (4) and (5) that substitute the word "individual" for "elector" are reasonably necessary to indicate that an individual may not necessarily be an elector. The amendments to (2), (2)(a), (3)(a) and (5)(b) are to clean up existing language. The amendments to (1), (5)(c) and (5)(e) are to clarify the options for handling voted and unvoted ballots and to conform the rule language to the existing business process utilized by the election administrators. The amendments recognize that the election administrators are responsible for the

administration of elections and allows them the discretion to ensure that provisional votes are handled in a consistent manner with as little delay as possible.

44.3.2115 PROVISIONAL VOTING PROCEDURES - AFTER FINAL DETERMINATION WHETHER OR NOT TO COUNT PROVISIONAL BALLOTS (1) through (2) remain as proposed.

AUTH: 13-1-202, 13-13-603, MCA
IMP: 13-1-202, 13-15-107, MCA

REASON: The amendment to (1) is necessary to ~~change~~ conform to existing ~~rule~~ federal Help America Vote Act survey requirements ~~to record and report~~ and to ensure proper recordkeeping of provisional voting information. Section 13-1-202, MCA, gives the Secretary of State the statutory authority to "prepare and deliver to the election administrators … written directives and instructions relating to and based on the election laws." The statutory authority and implementation citations were reviewed and updated.

44.3.2302 DEFINITIONS As used in this subchapter, unless the context clearly indicates otherwise, the following definitions apply:

(1) "Current address" means residence address or mailing address. For the purposes of this subchapter, an address is presumed to be current unless proved otherwise.

(2) through (8) remain as proposed.

AUTH: 13-13-603, MCA
IMP: 13-13-201, 13-13-214, 13-13-241, 13-13-602, 13-15-107, MCA

44.3.2303 ABSENTEE OR MAIL BALLOT ELECTOR IDENTIFICATION FORM (1) remains as proposed.

AUTH: 13-1-202, 13-13-603, MCA
IMP: 13-1-202, 13-13-201, 13-13-603, MCA

REASON: The amendment is reasonably necessary to ensure that the instructions are in the form prescribed by the Secretary of State. Section 13-1-202, MCA, gives the Secretary of State the statutory authority to "prescribe the design of any election form required by law." The statutory authority and implementation citations were reviewed and updated.

5. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Jorge Quintana, Secretary of State's Office, P.O. Box 202801, Helena, Montana, 59620-2801; telephone (406) 461-5173; fax (406) 444-4249; TDD/Montana Relay Service (406) 444-9068; or e-mail jquintana@mt.gov, and must be received no later than 5:00 p.m., June 11, 2010.

/s/ JORGE QUINTANA
Jorge Quintana
Rule Reviewer

/s/ LINDA MCCULLOCH
Linda McCulloch
Secretary of State

Dated this 3rd day of May, 2010.

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I on Transportation of Hazardous Materials and the amendment of 18.8.202, 18.8.431, 18.8.432, 18.8.1501, 18.8.1502, and 18.8.1505 pertaining to Definitions, Motor Carriers Operating Interstate, Maximum Allowable Weights, Maximum Allowable Weights on the Noninterstate, Transportation of Hazardous Materials, Federal Motor Carrier Safety Rules and Safety Inspection Program	)	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On March 25, 2010 the Department of Transportation published MAR Notice No. 18-124 pertaining to the proposed adoption and amendment of the above-stated rules at page 674 of the 2010 Montana Administrative Register, Issue Number 6.

2. The department has amended the above-stated rules as proposed.

The department has adopted the above-stated rule as proposed: New Rule I (18.8.1503).

3. No comments or testimony were received.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Jim Lynch
Jim Lynch
Director
Department of Transportation

Certified to the Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the adoption of NEW RULE I, and the repeal of ARM 24.16.201, 24.16.202, 24.16.203, 24.16.204, 24.16.205, and 24.16.206, regarding employment of persons in an executive, administrative, or professional capacity	)))))))	NOTICE OF ADOPTION AND REPEAL

TO: All Concerned Persons

1. On March 11, 2010, the Department of Labor and Industry (department) published MAR Notice No. 24-16-241 regarding the proposed adoption and repeal of the above-stated rules at page 594 of the 2010 Montana Administrative Register, Issue Number 5.

2. On April 2, 2010, the department held a public hearing in Helena at which members of the public made comments. In addition, written comments were received during the comment period.

3. The department has thoroughly considered the comments and testimony received. A summary of the comments received and the department's responses are as follows:

Comment 1: Three commenters, including one speaking on behalf of the Governor's administration, stated their support for the proposed new rule.

Response 1: The department acknowledges the commenter's support.

Comment 2: Several other commenters expressed general support for the proposed new rule and proposed repeals, but opposed setting the weekly salary threshold at a level higher than what is provided under the federal regulations ($455 per week).

Response 2: The department acknowledges the commenter's support for portions of the proposed new rule.

Comment 3: A commenter opposed the proposed weekly salary threshold of Montana's statewide average weekly wage and noted that although Montana has one of the lowest average incomes in the nation, the proposed salary threshold would be the second highest in the country. The commenter also noted that Montana would become one of only five states that have established a weekly salary threshold higher than the federal level, and provided data to support that statement.

Response 3: The department acknowledges the commenter's data supports his position. In light of all of the comments received, the department has amended

NEW RULE I (24.16.211) to delete Montana's average weekly wage as the weekly salary threshold, and will incorporate by reference the federal threshold of $455 per week.

Comment 4: Several commenters stated that in their experience, businesses have greater worker productivity by paying relatively low weekly salaries, but with larger incentive payments than with higher weekly salaries and lower incentives. The commenters objected to the proposal to raise the weekly salary threshold to the state's average weekly wage, and claimed that it would prevent employers from using incentive pay as a tool to increase productivity.

Response 4: The department acknowledges the comments, and will not be adopting the state's average weekly wage as the weekly salary threshold.

Comment 5: Several commenters stated that setting the weekly salary threshold at a level higher than what is provided under the federal regulations would effectively remove the ability of an employer to provide incentive pay for exempt managers and sales staff. Some commenters stated that if Montana used a higher salary threshold, employers with multi-state operations would have problems providing equitable compensation for comparable positions within the company, and that it would be a disincentive for continued Montana operations. Other commenters stated that if Montana adopted the state's average weekly wage as the weekly salary threshold, some employers would end up laying off a portion of its workforce or reducing the hours of work available for their employees. The commenters generally characterized the proposed weekly salary threshold as an effort to force employers to pay higher salaries than employers believed were appropriate.

Response 5: The department respectfully disagrees with the commenter's conclusion that employers would have been forced to pay higher salaries. Employers would still have had the discretion about whether to pay employees on a salary basis (which would potentially exempt those employees from the minimum wage and overtime provisions of law) or to pay employees on a basis that conforms to the minimum wage and overtime requirements of existing law. However, the department acknowledges that the issue of "incentive pay" does not easily integrate into the traditional salary basis analysis. The department considered amending the proposed new rule to provide for a methodology that would take incentive pay into account for the salary basis test, but has concluded that there are too many questions and details about how that would work to adopt the rule changes in a reasonable time. The department has concluded that in light of all of the comments it received, it will not adopt a weekly salary threshold level that is greater than the federal level.

Comment 6: Some commenters noted that all of the persons speaking as proponents at the public hearing were employees of government entities.

Response 6: The department considers the substantive merits of the data, arguments and view of persons commenting on rules without discriminating for or

against a speaker because of the speaker's affiliation with a particular employer, organization, or interest group. The department does not accept that it should discount or devalue the comments of a person simply based upon the person's occupation or employment status.

Comment 7: A commenter stated that if the higher salary threshold was adopted, his business would be forced to hire college graduates for exempt management positions instead of hiring inexperienced non-college graduates and train those workers himself.

Response 7: The department notes that nothing in the proposed rule requires that an exempt manager have a given level of formal education or training, and individual businesses remain free to make the hiring decisions that management believes to be in the best interests of the business.

Comment 8: A commenter noted that in 1991 Montana exempted from overtime certain outside sales personnel involved in the sales of office supplies, computers and equipment, and urged that Montana's labor laws mirror federal regulations.

Response 8: The department's ability to adopt rules is limited by its legislative authority. Outside sales are covered by the federal regulations being incorporated by reference. As noted above, the department is removing the higher weekly salary threshold from the rule.

Comment 9: A commenter suggested that if the department believes that the weekly salary threshold should be set at the state's average weekly wage, the department should propose legislation to that effect, rather than adopting it via rule.

Response 9: The department has decided not to adopt in this rulemaking project the state's average weekly wage as the weekly salary threshold. The department will consider the commenter's suggestion of using the legislative process instead of rulemaking should it decide to propose a higher weekly salary threshold at some point in the future.

Comment 10: Commenters asked on what date the department announces the state's average weekly wage, and how that information is disseminated.

Response 10: The state's average weekly wage is calculated annually by the department on a calendar year basis, by not later than May 31 (and typically a week or so before the end of May). Dissemination of the state's average weekly wage is via department web site posting and via e-mail to interested persons. If the state's average weekly wage had been selected as the salary threshold amount (which it is not), press releases would also have announced the calculation, similar to the way in which the department announces changes to the state minimum wage.

Comment 11: A commenter suggested that the department provide an economic analysis of the impact on small businesses of adopting a weekly salary threshold

higher than that established by federal regulation. The commenter noted that an economic analysis of the effect on small businesses is required under federal rulemaking, but not for Montana rulemaking.

Response 11: Because the department is not adopting a higher weekly salary threshold than currently provided under federal regulation, there is no adverse economic impact to small employers due to the department's adoption of the rule. The department notes that for federal rulemaking purposes, a "small employer" is one that has less than 500 employees. The department believes that it would be an inefficient use of agency resources to provide an after-the-fact economic analysis of a proposal that is not being adopted.

4. Having considered the comments received, the department has adopted the following rule as proposed, but with the following changes from the original proposal, new matter underlined, deleted matter interlined:

NEW RULE I (24.16.211) EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES (1) and (2) remain the same.

(3) The following federal regulations are adopted by reference:

(a) 29 CFR part 541, subpart A, as in effect on July 1, 2009.

(b) 29 CFR part 541, subpart B, as in effect on July 1, 2009~~, except the dollar threshold amount in 29 CFR 541.100(a)(1) is changed to the amount specified in (5)~~.

(c) 29 CFR part 541, subpart C, as in effect on July 1, 2009~~, except the dollar threshold amount in 29 CFR 541.200(a)(1) is changed to the amount specified in (5)~~.

(d) 29 CFR part 541, subpart D, as in effect on July 1, 2009~~, except the dollar threshold amount in 29 CFR 541.300(a)(1) is changed to the amount specified in (5)~~.

(e) 29 CFR part 541, subpart F, as in effect on July 1, 2003.

(f) 29 CFR part 541, subpart G, as in effect on July 1, 2009~~, except:~~

~~(i) the dollar threshold amount in 29 CFR 541.600(a) is changed to the amount specified in (5);~~

~~(ii) the amounts in 29 CFR 541.600(b) are adjusted to a comparable amount based on a minimum weekly salary of the amount specified in (5); and~~

~~(iii) the dollar threshold amount in 24 CFR 541.601(b) is changed to the amount specified in (5)~~.

(g) 29 CFR part 541, subpart H, as in effect on July 1, 2009.

(4) remains the same.

~~(5) The dollar threshold amount to be used in each rule is a weekly salary rate equal to the state's average weekly wage, as established annually by the department.~~

(6) remains the same, but is renumbered as (5).

AUTH: 39-3-403, MCA
IMP: 39-3-401, 39-3-406, 39-3-408, MCA

5. The department has repealed the following rules as proposed:

24.16.201 EXECUTIVE

24.16.202 ADMINISTRATIVE

24.16.203 PROFESSIONAL

24.16.204 EMPLOYEE EMPLOYED IN A BONA FIDE EXECUTIVE CAPACITY

24.16.205 EMPLOYEE EMPLOYED IN A BONA FIDE ADMINISTRATIVE CAPACITY

24.16.206 EMPLOYEE EMPLOYED IN A BONA FIDE PROFESSIONAL CAPACITY

6. The rule changes identified in this notice are effective May 14, 2010.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2010

BEFORE THE BOARD OF MASSAGE THERAPY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of [Proposed New Rule IV, MAR Notice No. 24-155-1] definitions, and the adoption of NEW RULES I and II, pertaining to licensure requirements	)))))	NOTICE OF AMENDMENT AND ADOPTION

TO: All Concerned Persons

1. On March 11, 2010, the Board of Massage Therapy (board) published MAR notice no. 24-155-2 regarding the public hearing on the proposed amendment and adoption of the above-stated rules, at page 602 of the 2010 Montana Administrative Register, issue no. 5.

2. On April 1, 2010, a public hearing was held on the proposed amendment and adoption of the above-stated rules in Helena. Several comments were received by the April 9, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: One commenter opposed the requirement in New Rule I for two letters attesting to the applicant's good moral character. The commenter stated that the letters are meaningless, the requirement is too invasive, and that the disciplinary questions on the license application provide enough information to prove or disprove good moral character.

RESPONSE 1: The board concluded that there is value in requiring letters of good moral character as they are similar in purpose to letters of recommendation commonly used in employment applications. The letters also provide the board with additional witnesses to an applicant's good moral character, and the requirement does not present a real barrier to licensure. The board is adopting this rule exactly as proposed.

COMMENT 2: One commenter opposed New Rule II and stated that certification boards, such as the National Certification Board for Therapeutic Massage and Bodywork (NCBTMB), are not appropriate to set curriculum guidelines for state regulatory boards because they may change guidelines without input from the boards. The commenter also stated that if the board intends to accept distance education as part of entry-level license qualifications, the board should further clarify acceptable criteria for distance education.

RESPONSE 2: Section 37-33-502(2)(a), MCA, requires the board to accept the curriculum guidelines of programs accredited by the National Commission for

Certifying Agencies (NCCA), of which NCBTMB is one. New Rule II implements the statutory mandate by naming NCBTMB and setting forth the basic curriculum guidelines of NCBTMB for the guidance of future applicants and programs. Since NCBTMB is accredited by NCCA and permits 300 hours of distance learning, then 300 hours of distance learning would satisfy licensure requirements and must be accepted by the board. New Rule II also clarifies that the curriculum guidelines of other programs can be accepted on a case-by-case basis.

The board notes that it is not clear in the proposed language of New Rule II that the NCBTMB is an accredited program. Therefore, the board is amending this rule accordingly to clarify the matter.

4. The board has amended ARM 24.155.301 exactly as proposed.

5. The board has adopted NEW RULE I (24.155.608) exactly as proposed.

6. The board has adopted NEW RULE II (24.155.605) with the following changes, stricken matter interlined, new matter underlined:

NEW RULE II CURRICULUM GUIDELINES (1) The ~~Board of Massage Therapy has recognized the program curriculum guidelines of the~~ National Certification Board for Therapeutic Massage and Bodywork ~~as~~ is a program currently accredited by the National Commission for Certifying Agencies and its curriculum guidelines ~~meeting or exceeding~~ meet or exceed the requirements of 37-33-502, MCA. ~~The recognized~~ Those curriculum guidelines are as follows:

(a) through (2) remain as proposed.

BOARD OF MASSAGE THERAPY
MICHAEL EAYRS, CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
AND THE BOARD OF MEDICAL EXAMINERS
STATE OF MONTANA

In the matter of the amendment of ARM 24.101.413 renewal dates, 24.156.601, 24.156.603, 24.156.605, 24.156.615, 24.156.617, 24.156.618, and 24.156.628 medical examiners-licensure, 24.156.802 through 24.156.807, 24.156.809, and 24.156.810 telemedicine, 24.156.1002, 24.156.1004, and 24.156.1006 podiatry, 24.156.1301, 24.156.1302, 24.156.1305, 24.156.1306, and 24.156.1308 nutrition practice, 24.156.1402, 24.156.1411, and 24.156.1413 acupuncture, 24.156.1618 through 24.156.1620, 24.156.1622, 24.156.1623, and 24.156.1626 physician assistant-scope of practice, the repeal of 24.156.610 reciprocity, and the adoption of NEW RULE I pertaining to board report obligations	))	NOTICE OF AMENDMENT, REPEAL, AND ADOPTION

TO: All Concerned Persons

1. On December 10, 2009, the Department of Labor and Industry (department) and the Board of Medical Examiners (board) published MAR notice no. 24-156-73 regarding the public hearing on the proposed amendment, repeal, and adoption of the above-stated rules, at page 2340 of the 2009 Montana Administrative Register, issue no. 23.

2. On January 5, 2010, a public hearing was held on the proposed amendment, repeal, and adoption of the above-stated rules in Helena. Numerous comments were received by the January 13, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENTS 1 THROUGH 4 PERTAIN TO ARM 24.156.615:

COMMENT 1: Several commenters stated that it is unfair to force retired physicians who maintain licensure solely to write prescriptions for family members to go inactive and/or take the SPEX examination. The commenters were concerned that after devoting their careers to medicine these doctors would be penalized and asked how

writing prescriptions for cough syrup or osteoporosis medication for family members would harm the public.

RESPONSE 1: Noting that the board's position paper on writing prescriptions for family members is posted on the board's web site, the board is not amending ARM 24.156.615(4) and (5) at this time.

COMMENT 2: Two commenters suggested striking "in this state" from ARM 24.156.615(4), stating that being out of active practice in any state or jurisdiction should be the standard.

RESPONSE 2: The board appreciates all comments made during the rulemaking process. Following consideration of all comments, the board is not amending ARM 24.156.615(4) and (5) at this time.

COMMENT 3: Two commenters asked whether retired physicians may write prescriptions and whether maintaining continuing medical education (CME) is sufficient for renewing as an active licensee.

RESPONSE 3: The board recommends reading the board's position paper on prescribing for family members on its web site and notes that CME is not a requirement for license renewal in Montana.

COMMENT 4: One commenter opposed the proposed language in ARM 24.156.615(5), and suggested alternate language regarding retired physicians with no intention to actively engage in the practice of medicine.

RESPONSE 4: The board appreciates all comments made during the rulemaking process. Following consideration of all comments, the board is not amending ARM 24.156.615(5) at this time.

COMMENTS 5 THROUGH 7 PERTAIN TO ARM 24.156.617:

COMMENT 5: Several commenters opposed the amendments to ARM 24.156.617, stating that requiring the Special Purpose Examination (SPEX) for physicians who have not maintained an active Montana license for more than two years is difficult, outdated, and useless, and that maintaining CME or having proof of current board certification is a better indicator of competency.

RESPONSE 5: The board is considering the trend towards continued competency and board recertification. Following consideration of all comments, the board is not amending ARM 24.156.617(3)(a) at this time.

COMMENT 6: Two individuals stated that requiring the SPEX examination would drive away physician applicants from Montana and urged the board to look to Nevada's competency-based requirements, and California, which has a fee-free volunteer license that can be reactivated by paying the active license fee.

RESPONSE 6: The board appreciates all comments made during the rulemaking process and acknowledges that the Federation of State Medical Boards (FSMB) is exploring continued competency. Following consideration of all comments, the board is not amending ARM 24.156.617(3)(a) at this time.

COMMENT 7: Two commenters urged the board to require the SPEX examination only to reactivate a license on inactive status for more than two years, as set forth in ARM 24.156.618, but not to maintain an inactive license.

RESPONSE 7: The board agrees that the SPEX was intended in the event of reactivation, not for maintenance of an inactive license. Following consideration of all comments, the board is not amending ARM 24.156.617(3)(a) at this time.

COMMENT 8: A few commenters supported the proposed amendments to the physician assistant rules in ARM 24.156.1622 and 24.156.1623.

RESPONSE 8: The board appreciates all comments received during the rulemaking process.

COMMENT 9: A few commenters asserted that the current rules on both supervision and chart review are working well and should not be changed. One person questioned whether the commenter should be "up in arms" regarding the physician assistant amendments proposed at ARM 24.156.1622 and 24.156.1623.

RESPONSE 9: The board appreciates all comments made during the rulemaking process.

COMMENTS 10 THROUGH 15 PERTAIN TO ARM 24.156.1622:

COMMENT 10: Numerous commenters opposed the amendments to ARM 24.156.1622, to require physician assistants (PAs) gain a year of experience in either an emergency room or rural acute care prior to practicing in these settings. The commenters stated that proposed amendments to this rule go beyond ensuring that PAs practice consistent with training and experience, would prohibit all PAs not currently working in an ER or rural acute care setting from ever doing so, and would force Montana PAs out of state for the required training. The commenters also stated that PAs work in ERs in all 50 states and the District of Columbia and that this amendment is unprecedented and a setback.

RESPONSE 10: The board is aware of differences in practice in frontier areas in Montana and seeks to protect the public by ensuring the PAs are adequately trained to provide ER care in rural Montana. Following consideration of all comments, the board decided to not amend this rule at this time.

COMMENT 11: Two commenters opposed the year experience requirement and described their early training in clinics and emergency rooms shadowing physicians

and mid-level practitioners. The commenters asserted that doctors, advanced practice registered nurses, and others are available for consultations and to train PAs in these settings.

RESPONSE 11: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1622 at this time.

COMMENT 12: Several commenters opposed the amendment to ARM 24.156.1622, saying it would be an inaccessible barrier to ER and rural care in rural Montana. The commenters also asserted the experience requirement would be a disservice to Montanans who would have to dial 911 instead of going to a facility staffed by a PA.

RESPONSE 12: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1622 at this time.

COMMENT 13: Four commenters stated that they would never have been hired in rural clinics if they had needed the year of experience and stated that there is nothing magical about a year's experience, since it can be so different. The commenters also described the back-up they had in their first year as proof that PAs can function as new grads.

RESPONSE 13: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1622 at this time.

COMMENT 14: Several commenters asserted that recruitment of PAs will become even more difficult with the experience requirement and that the amendment will adversely affect the placement of PAs in locum tenens and moonlighting positions.

RESPONSE 14: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1622 at this time.

COMMENT 15: A commenter from a facility with a small number of PAs described how nurses are trained in that facility and asked the board to consult with rural hospitals before amending this rule.

RESPONSE 15: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1622 at this time.

COMMENTS 16 THROUGH 20 PERTAIN TO ARM 24.156.1623:

COMMENT 16: Several commenters opposed the amendment to ARM 24.156.1623 requiring that PAs have 100% chart review for the first three months following a new supervision agreement. The commenters stated that physician oversight and supervision is sufficient under the current rule and that the physician/PA team should determine if training and experience is adequate for the delegated medical services.

RESPONSE 16: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1623 at this time.

COMMENT 17: Three commenters stated that supervision should be individualized and that solo PAs can assure good patient outcomes with individualized supervision plans. The commenters asked the board to also consider practice setting and the sufficiency of training in the curricula of acute care and emergency medicine.

RESPONSE 17: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1623 at this time.

COMMENT 18: Numerous commenters opposed the amendments to ARM 24.156.1623, stating that 100% chart review is a dramatic departure from current requirements, would pose a hardship on physician-PA teams in Montana, that doctors would spend an inordinate amount of time signing charts, and experienced PAs would be treated like new graduates. The commenters asserted that physicians might reconsider utilizing PAs in their practices and health care may be harmed by this rigid restriction that strains practice oversight.

RESPONSE 18: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1623 at this time.

COMMENT 19: One commenter suggested requiring 100% chart review except when the agreement being replaced was in effect for a minimum of three months.

RESPONSE 19: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1623 at this time.

COMMENT 20: Several commenters opposed the 100% chart review requirement, stating that it would restrict access to rural health care. The commenters also noted the backwards nature of the requirement as the national trend is toward fewer restrictions on PAs in practice. A few commenters pointed out that PAs do not practice independently and are not thrust into practice in rural areas without adequate training, especially graduates of local training programs. One commenter noted that 60% of Rocky Mountain College's 2008 PA program graduates were successful in first-year rural settings and that 40% of rural care facilities utilize PAs, where between 20 and 25% are new graduates.

RESPONSE 20: The board appreciates all comments made in the rulemaking process. Following consideration of all comments, the board decided to not amend ARM 24.156.1623 at this time.

4. The board has amended ARM 24.101.413, 24.156.601, 24.156.603, 24.156.605, 24.156.618, 24.156.628, 24.156.802, 24.156.803, 24.156.804, 24.156.805, 24.156.806, 24.156.807, 24.156.809, 24.156.810, 24.156.1002, 24.156.1004, 24.156.1006, 24.156.1301, 24.156.1302, 24.156.1305, 24.156.1306, 24.156.1308, 24.156.1402, 24.156.1411, 24.156.1413, 24.156.1618, 24.156.1619, 24.156.1620, and 24.156.1626 exactly as proposed.

5. The board has amended ARM 24.156.615 and 24.156.617 with the following changes, stricken matter interlined, new matter underlined:

24.156.615 RENEWALS (1) through (3) remain as proposed.

(4) A physician with a permanent ~~an active~~ license ~~who is~~ not actively engaged in the practice of medicine in this state or absent from this state for a period of one or more ~~than two~~ years ~~and who does not choose to practice medicine in Montana,~~ may ~~not renew as an active licensee, but may~~ renew as an inactive licensee and pay the inactive fee listed in ARM 24.156.601.

(5) A physician with a permanent ~~an active~~ license ~~who is~~ not engaged in the practice of medicine and who has retired from practice may ~~not~~ renew this license as an ~~active licensee, but may renew as an~~ inactive-retired licensee and pay the fee listed in ARM 24.156.601. A retired license may not be reactivated. The individual must reapply for a new original license.

(6) remains as proposed.

24.156.617 LICENSE CATEGORIES (1) through (3) remain as proposed.

(a) To renew a license on inactive status, a physician must pay a fee prescribed by the board, and complete the renewal prior to the date set by ARM 24.101.413 ~~, and, if the physician has not actively practiced for two years, pass the Special Purpose Exam (SPEX) given by the Federation of State Medical Boards~~.

(4) through (4)(b) remain as proposed.

6. The board did not amend ARM 24.156.1622 and 24.156.1623 as proposed.

7. The board has repealed ARM 24.156.610 exactly as proposed.

8. The board has adopted NEW RULE I (24.156.1309) exactly as proposed.

BOARD OF MEDICAL EXAMINERS
DWIGHT THOMPSON, PA-C,
CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2010

BEFORE THE BOARD OF PRIVATE SECURITY
DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of ARM 24.182.301 definitions, 24.182.401 fee schedule, 24.182.420 firearms, 24.182.421 requalification, 24.182.501 application, 24.182.503 experience requirements, 24.182.505 written examination, 24.182.507 temporary permit, 24.182.511 trainee, 24.182.520 firearms licensure, and 24.182.2301 unprofessional conduct	)	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On March 11, 2010, the Board of Private Security (board) published MAR notice no. 24-182-32 regarding the public hearing on the proposed amendment of the above-stated rules, at page 606 of the 2010 Montana Administrative Register, issue no. 5.

2. On April 5, 2010, a public hearing was held on the proposed amendment of the above-stated rules in Helena. Several comments were received by the April 13, 2010, deadline.

3. The board has thoroughly considered the comments received. A summary of the comments received and the board's responses are as follows:

COMMENT 1: Several commenters opposed the fee increases in ARM 24.182.401 and encouraged the board to investigate budget cuts or a more efficient use of resources instead of raising fees. The commenters referred generally to the current economic recession, asserted that a fee increase would negatively affect small businesses in particular, and stated that the magnitude of the increase was unreasonable.

RESPONSE 1: Prior to proposing any fee increases and following considerable discussion of the board's budget, the board determined that the proposed fee increases are necessary to generate enough revenue to cover expenses and comply with the statutory mandate of 37-1-134, MCA, to set and maintain fees commensurate with program costs. The fee increase will generate only enough revenue to cover the board's actual costs and any lesser increase would leave the board's continued operation in peril. While aware of current economic stressors, the board is also mindful of its duty to regulate for the protection of the public.

The board has investigated and made budget cuts, specifically to indefinitely suspend the board-provided training, hold meetings for a single day rather than having two-day meetings, and use technology to facilitate meetings and reduce the

travel and per diem costs. The board also notes that both the department and the board continually seek and implement ways to reduce costs associated with board functions. Examples of this are the recent shift to using electronic board books instead of paper ones, and having some board meetings by telephone conference, instead of in-person attendance. The board is amending ARM 24.182.401 exactly as proposed.

COMMENT 2: One commenter questioned why the board is proposing to strike the renewal fee in ARM 24.182.401 for training program certification.

RESPONSE 2: The board is striking the renewal provision from this rule because training program certifications are not renewable. If a training program changes, licensees are required to reapply for certification.

COMMENT 3: One commenter supported the proposed amendment to ARM 24.182.420 to no longer restrict firearms by type and caliber, but asked whether the change would open the door to allow shotguns, rifles, or subcompact rifles for security use.

RESPONSE 3: The board approves firearm curricula for each firearm type on a case-by-case basis and if a curriculum is approved for shotguns, rifles, or other firearms, then these firearms would be allowed for security use. To list all types of firearms that it might possibly approve would be overly burdensome.

COMMENT 4: A commenter supported the amendments to ARM 24.182.421, clarifying that armed licensees may requalify with either a Montana POST certified firearms instructor or a Montana licensed certified firearms instructor.

RESPONSE 4: The board appreciates all comments received during the rulemaking process.

COMMENT 5: A commenter opposed the limitation on renewal of trainee licenses proposed in ARM 24.182.511(5), stating that there may not be enough demand in the market to allow a trainee to gain the required work hours to be eligible to take the test in that amount of time. The commenter suggested the board instead monitor the total amount of all trainee hours via quarterly time sheets, and deny renewal only when a trainee exceeds the minimum required hours to take the exam.

RESPONSE 5: The board notes that some individuals have held trainee licenses for several years, without ever applying to become fully licensed as a private investigator. The board concluded that limiting trainee licenses to five total years and requiring trainees to test for private investigator licensure within a year after meeting the other minimum requirements, furthers legislative intent and the public's protection. Therefore, the board is amending ARM 24.182.511 exactly as proposed.

4. The board has amended ARM 24.182.301, 24.182.401, 24.182.420, 24.182.421, 24.182.501, 24.182.503, 24.182.505, 24.182.507, 24.182.511, 24.182.520, and 24.182.2301 exactly as proposed.

BOARD OF PRIVATE SECURITY
HOLLY DERSHEN-BRUCE,
CHAIRPERSON

/s/ DARCEE L. MOE
Darcee L. Moe
Alternate Rule Reviewer

/s/ KEITH KELLY
Keith Kelly, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the adoption of New Rule I - CLXVIII, amendment of 37.5.117, 37.5.304, 37.95.127, 37.95.227, 37.106.2506, 37.111.104, 37.111.123, 37.111.305, 37.111.339, 37.111.504, 37.111.523, and repeal of 37.111.1001, 37.111.1002, 37.111.1003, 37.111.1010, 37.111.1011, 37.111.1012, 37.111.1013, 37.111.1021, 37.111.1022, 37.111.1023, 37.111.1024, 37.111.1025, 37.111.1101, 37.111.1102, 37.111.1105, 37.111.1112, 37.111.1113, 37.111.1114, 37.111.1115, 37.111.1130, 37.111.1131, 37.111.1132, 37.111.1133, 37.111.1138, 37.111.1139, 37.111.1140, 37.111.1141, 37.111.1142, 37.111.1143, 37.111.1147, 37.111.1148, 37.111.1149, 37.111.1150, 37.111.1151, 37.111.1152, 37.111.1153, 37.111.1154, 37.111.1155, 37.111.1156, 37.111.1158, 37.111.1159, 37.111.1160, and 37.111.1161 pertaining to swimming pools, spas, and other water features	)	CORRECTED NOTICE OF ADOPTION, AMENDMENT, AND REPEAL

TO: All Concerned Persons

1. On May 14, 2009, the Department of Public Health and Human Services published MAR Notice No. 37-471 pertaining to the proposed adoption, amendment, and repeal of the above-stated rules at page 604 of the 2009 Montana Administrative Register, Issue Number 9, and on July 16, 2009 published MAR Notice No. 37-471 pertaining to the notice of the second public hearing and extension of comment period on proposed adoption, amendment, and repeal on page 1104 of the 2009 Montana Administrative Register, Issue Number 13. On January 14, 2010 the department published the notice of adoption, amendment, and repeal at page 80 of the 2010 Montana Administrative Register, Issue Number 1.

2. This corrected notice is being filed to correct errors in ARM 37.5.117, 37.111.104, 37.111.123, Rule VI (37.115.302), Rule VIII (37.115.305), Rule XIV (37.115.311), Rule XXII (37.115.323), Rule XXXVI (37.115.517), Rule XLIV (37.115.603), Rule LV (37.115.804), Rule LXXXIX (37.115.1308), Rule XCIII (37.115.1313), Rule XCV (37.115.1315), Rule XCVIII (37.115.1403), Rule CV (37.115.1507), Rule CVII (37.115.1602), Rule CXVII (37.115.1805), Rule CXXXVI (37.115.1828), and Rule CLXVII (37.115.2209)

3. The following rules are corrected as follows, new material underlined, deleted material interlined:

37.5.117 CERTAIN TITLE 50 PROGRAMS AND OTHER PROGRAMS FOR WHICH NO PROCEDURE IS OTHERWISE SPECIFIED: APPLICABLE HEARING PROCEDURES (1) through (1)(n) remain as adopted.

(o) requests for departmental review of final grievance decisions by contractors under the ~~Children's Health Insurance Plan (CHIP)~~ Healthy Montana Kids (HMK) Plan;

(n) through (v) remain as adopted.

AUTH: 50-1-202, 53-2-201, 53-6-113, MCA
IMP: 41-3-1103, 41-3-1142, 42-10-104, 50-1-202, 50-4-612, 50-5-103, 50-6-103, 50-6-402, 50-15-102, 50-15-103, 50-15-121, 50-15-122, 50-31-104, 50-52-102, 50-53-103, 52-2-111, 53-2-201, 53-4-1004, 53-6-101, 53-6-111, 53-6-113, 53-6-402, 53-20-305, 53-24-208, MCA

37.111.104 PRECONSTRUCTION REVIEW (1) through (1)(d) remain as adopted.

(e) location and detail of laundry facilities including description of equipment, floor and wall finish material, and a flow chart indicating the route of laundry through sorting, washing, drying, ironing, folding, and storage;

(f) specifications for a swimming pool, spa, or other water feature to serve the establishment unless the ~~swimming~~ pool, spa, or other water feature has been previously approved by the department;

(g) through (3) remain as adopted.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

37.111.123 ~~SWIMMING~~ POOLS, SPAS, AND OTHER FEATURES (1) The department adopts and incorporates by reference ARM Title 37, chapter 115, subchapters 1 through 22, stating construction and operating requirements for ~~swimming~~ pools, spas, and other water features. A copy of ARM Title 37, chapter 115, subchapters 1 through 22 may be obtained from the Department of Public Health and Human Services, Health Policy and Services Division, Food and Consumer Safety Section, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951.

(2) remains as adopted.

AUTH: 50-51-103, MCA
IMP: 50-51-103, MCA

RULE VI (37.115.302) HEALTH AND SAFETY VIOLATIONS THAT MAY REQUIRE IMMEDIATE POOL CLOSURE (1) through (1)(b) remain as adopted.

(c) except during lap swimming or competitive swimming, no guard line is in place at the break between the shallow and deep ends of the swimming pool, spa, or other water feature; ~~or~~

(i) through (3) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE VIII (37.115.305) PLAN REVIEW REQUIRED FOR POOLS, SPAS, AND OTHER WATER FEATURES (1) through (1)(b) remain as adopted.

(2) All plans and specifications ~~listed in [RULE XI]~~ for new facilities and all plans and specifications pertaining to any planned changes or additions to existing facilities shall be submitted as attachments to a plan review checklist form. The forms are available from the department by contacting the Department of Public Health and Human Services, Food and Consumer Safety Section, 1400 Broadway, P.O. Box 202951, Helena, MT 59620-2951 or at www.fcss.mt.gov.

(3) through (4) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-103, MCA

RULE XIV (37.115.311) FEE TABLE

Table 1.

Type	Design Volume	Plan Review Fees	Pre-opening Inspections and Interim Visit Fees
Pool, Spa, Wading Pool, Spray Attraction, Lazy River, Others	Less than 4,000 gallons~~;~~	$200	$60
Pool, Spa, Wading Pool, Spray Attraction, Lazy River, Others	4,000 – 9,999 gallons	$400	$80
Pool, Spa, Wading Pool, Spray Attraction, Lazy River, Others	10,000 gallons or more	$600	$100

Review Fees for a Substantial Modification to Existing Filtration or Disinfection systems		$75	
Engineering Review		$75	

AUTH: 50-53-103, MCA
IMP: 50-53-103, MCA

RULE XXII (37.115.323) UNAPPROVED CONSTRUCTION OR INSTALLATION (1) remains as adopted.

(2) If construction on the pool shell, pool piping, or ~~an other~~ another component associated solely with the pool, spa, or other water features begins before the plan is submitted for review and approved, the construction must cease immediately until the plans, specifications, and applicable fees provided for in these rules are submitted, the review is completed, and the project is approved.

(3) and (4) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-103, MCA

RULE XXXVI (37.115.517) DECK AREAS (1) All swimming pools constructed after ~~the~~ March 1, 2010 or operated by a municipality shall have a deck surrounding it that is a minimum width of six feet of unobstructed deck area as measured from the pool edge.

(2) through (6) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE XLIV (37.115.603) BARRIERS FOR SPLASH DECKS (1) Splash decks and interactive play attractions built after ~~the~~ March 1, 2010 must have a barrier that is at least 60 inches high around the deck. Splash decks built before March 1, 2010 must install a barrier meeting this requirement by March 1, 2010.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE LV (37.115.804) DIVING BOARDS - DIVING ENVELOPE DESIGN REQUIREMENTS (1) Swimming pools having diving equipment shall be designed to comply with the design requirements of Figure 2 and to provide at least the minimum water depth required in Table 3 found in ARM 37.115.805.

Figure 2 remains as adopted.

~~Table 3.~~

~~Pool Type~~	~~Minimum Dimensions~~								~~Minimum width of pool at:~~		
	~~D1~~	~~D2~~	~~R~~	~~L1~~	~~L2~~	~~L3~~	~~L4~~	~~L5~~	~~Pt.A~~	~~Pt.B~~	~~Pt.C~~
~~VI~~	~~7'-0"~~	~~8'-6"~~	~~5'6"~~	~~2'-6"~~	~~8'-0"~~	~~10'-6"~~	~~7'-0"~~	~~28'-0"~~	~~16'-0"~~	~~18'-0"~~	~~18'-0"~~
~~VII~~	~~7'-6"~~	~~9'-0"~~	~~6'-0"~~	~~3'-0"~~	~~9'-0"~~	~~12'-0"~~	~~4'-0"~~	~~28'-0"~~	~~18'-0"~~	~~20'-0"~~	~~20'-0"~~
~~VIII~~	~~8' 6"~~	~~10'-0"~~	~~7' 0"~~	~~4' 0"~~	~~10' 0"~~	~~15' 0"~~	~~2' 0"~~	~~31' 0"~~	~~20' 0"~~	~~22' 0"~~	~~22' 0"~~
~~IX~~	~~11'0"~~	~~12'-0"~~	~~8'-6"~~	~~6'-0"~~	~~10'-6"~~	~~21'-0"~~	~~0~~	~~37'-6"~~	~~22'-0"~~	~~24'-0"~~	~~24'-0"~~
~~NOTE: For definition of pool types see definitions in [RULE XXIII]~~											

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE LXXXIX (37.115.1308) WATER CHEMISTRY PARAMETERS

(1) Water chemistry, temperature, and clarity measurements must fall within the parameters set forth in Table ~~7~~ 6:

Table 6.

Parameter	Acceptable range	Ideal range	Maximum
Chlorine	2-8ppm	3-5ppm	8ppm
Combined chlorine	0 to 0.5ppm	0.0	0.5ppm
Bromine	2-10ppm	2-8ppm	10ppm
Total Alkalinity	60-220ppm (varies by chemical type and pool surface)	80-100ppm for Cal Hypo, lithium hypo, and sodium hypochlorite; 100-120ppm for Sodium dichlor, trichlor, chlorine gas and bromine compounds	220ppm
Oxygen Reduction Potential (ORP or HRR, which stands for High Resolution Reduction)	650 minimum millivolts (mV)	650-750 minimum millivolts (mV)	no maximum
pH	7.2-7.8	7.4-7.6	7.2-7.8 for all pools, spas, or other water features except flow through hot springs, which may have a pH up to

			9.4
Cyanuric Acid (allowed only in outdoor pools)	0-100ppm	10-50ppm	100ppm
Calcium Hardness	Pools 150-1,000ppm	Pools 200-400ppm; Spas 150-250ppm	Pools 1,000ppm Spas 800ppm
Temperature	Varies	Varies	Spas 104°F Pools 100°F EXCEPTION: flow through hot spring pools and spas, which may have a maximum temperature of 100°F and 106°F
Clarity	In the deepest part of the pool, spa, or other water feature, the main drain shall be clearly visible and sharply defined. NTUs must be in the range of 0.0-1.0	In the deepest part of the pool, spa, or other water feature, the main drain shall be clearly visible and sharply defined. NTUs must be less than .5	NTUs up to 1.0

(2) and (3) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE XCIII (37.115.1313) SATURATION INDEX (1) The following equation and ARM 37.115.1314, Table ~~8~~ 7 shall be used to calculate the saturation index: the saturation index equals pH plus temperature factor (TF) plus calcium factor (CF), plus alkalinity factor (AF) minus 12.1. (SI=(pH + TF + CF + AF) - 12.1.)

(2) through (5) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE XCV (37.115.1315) WATER CLARITY (1) remains as adopted.

(2) When the licenseholder or operator disputes the department's determination that a pool, spa, or other water feature does not meet clarity requirement as defined in (1) ~~or (2)~~, the department may use an NTU reading to

make its final determination. A pool will be determined to have sufficient clarity only where the NTU reading is 1.0 NTU or less.

(3) through (3)(c) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE XCVIII (37.115.1403) SPA SIGNS (1) through (1)(c) remain as adopted.

(d) "Warning - people using prescription medications and/or having the following medical conditions should consult with their physician before entering the spa: pregnancy, heart disease, diabetes, high blood pressure, or other serious medical condition"; ~~and~~

(e) remains as adopted.

(f) "Staying in a spa too long may result in dizziness, fainting, and nausea"; and

(g) through (4) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE CV (37.115.1507) TELEPHONE REQUIRED (1) remains as adopted.

(2) Emergency supplies required in ~~[RULE CV (37.115.1507]~~ ARM 37.115.1505 must be located in a place where the person making a call for emergency medical services can conveniently render assistance after making the call or while on the telephone with emergency services.

(3) through (3)(e) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE CVII (37.115.1602) WHEN LIFEGUARDS ARE NOT REQUIRED

(1) Except as provided in ~~[RULE CVII (37.115.1602)]~~ ARM 37.115.1601, privately owned public pools, spas, and other water features, are not required to have a lifeguard on duty if:

(a) and (b) remain as adopted.

(2) A tourist home providing a pool, spa, or other water feature to its guests must post a sign as required in ARM 37.115.301, but is exempt from the requirements of (1)(b).

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE CXVII (37.115.1805) DROP WATER SLIDES (1) through (1)(c) remains as adopted.

(d) The area from the slide terminus outward six feet in front of the slide terminus must have a depth as established from Table ~~9~~ 8. The slide must be

constructed so the rider enters the water in this six foot area. If the depth of the catch pool is five feet or less, the bottom of the catch pool must have a maximum slope of one inch in 12 inches (1:12), and the slide must be located at least five feet from any change to steeper slopes of the pool bottom.

(2) remains as adopted.

(3) If the water slide flume ends in a swimming pool, the water level shall not be lowered more than one inch when the flume pump is operating.

Table ~~9~~ 8. (Table remains as adopted.)

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE CXXXVI (37.115.1828) SPA ENTRY REQUIREMENTS (1) Spa steps that meet the requirements of these rules must be provided when the spa is more ~~that~~ than two feet deep.

(2) through (4) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 50-53-101, 50-53-102, 50-53-103, 50-53-104, 50-53-106, 50-53-107, MCA

RULE CLXVII (37.115.2209) LIMITS ON CONSIDERATION OF PRIOR VIOLATIONS (1) remains as adopted.

(a) satisfactory corrective action was taken and accepted by the department; or~~,~~

(b) and (2) remain as adopted.

(a) the history of past violations taken together with the current violations supports a penalty as severe as the level of adverse action imposed by or requested by the department; or

(b) through (4) remain as adopted.

AUTH: 50-53-103, MCA
IMP: 2-4-612, 26-1-103, 26-1-501, 26-1-502, 26-1-602, 26-1-605, 26-1-606, 26-1-623, MCA

4. The department is correcting grammatical, typographical, and nonsubstantive changes in this notice of correction to avoid any future confusion.

In ARM 37.5.117(1)(o) the department is updating program name "Children's Health Insurance Plan (CHIP)" to Healthy Montana Kids (HMK) Plan. No substantive change is intended.

In ARM 37.111.104(1)(e) a comma is being inserted after the word folding and in (1)(f) the words swimming are being struck and commas added after the words pool. No substantive change is intended.

In ARM 37.111.123 the word swimming is being struck from the catchphrase. In (1) the word swimming is being struck and a comma inserted after the word pools. No substantive change is intended.

In Rule VI(1)(c) (37.115.302) following the word "feature;" the word "or" was inadvertently left in and should have been omitted. No substantive change is intended.

In Rule VIII(2) (37.115.305) the words "listed in [RULE XI]" were inadvertently left in the adopted notice and should have been removed as Rule XI is not being adopted.

In Rule XIV (37.115.311) in Table 1 under Design Volume the semicolon following the word "gallons" was inadvertently left in and should have been omitted.

The department is correcting a typographical error in Rule XXII(2) (37.115.323). The words "an other" should have read "another".

In Rule XXXVI (37.115.517)(1) the word "the" was inadvertently left in and is being struck.

In Rule XLIV (37.115.603) the word "the" was inadvertently left in and is being struck.

In Rule LV(1) (37.115.804) the language "found in ARM 37.115.805" is being added and no substantive change is intended. Table 3 was inadvertently omitted from the adopted notice and should have been shown as struck out.

The department is correcting a typographical error in Rule LXXXIX(1) (37.115.1308). The text "Table 7" should have been shown as struck out and replaced with new text "Table 6". In the table under "combined chlorine maximum column" 0. was inadvertently struck out and should have been left it. It should read 0.5ppm.

The department is correcting a typographical error in Rule XCIII(1) (37.115.1313). The text "Table 8" should have been shown as struck out and replaced with new text "Table 7".

In Rule XCV(1) (37.115.1315) the words "or (2)" were inadvertently left in and have been struck. No substantive change is intended.

In Rule XCVIII(1)(d) (37.115.1403) the word "and" was inadvertently left in and is being struck. In the adopted notice in (1)(f) there was text added that was not underlined. The underlining has been added to show the new text.

In Rule CV(2) (37.115.1507) a typographical error resulted in an incorrect cross-reference to "[RULE CV (37.115.1507]". The correct cross-reference should have been to "ARM 37.115.1505". No substantive change is intended.

In Rule CVII(1) (37.115.1602) a typographical error resulted in an incorrect cross-reference to "[RULE CVII (37.115.1602]". The correct cross-reference should have been to "ARM 37.115.1601". In the adopted notice in (2) new text "ARM 37.115.301" was added but not shown as underlined. The underlining has been added in to show the new text.

The department is correcting a typographical error in Rule CXVII(1)(d) and (3) (37.115.1805). The text "Table 9" should have been shown as struck out and replaced with new text "Table 8".

The department is correcting a typographical error in Rule CXXXVI(1) (37.115.1828). The word "that" should have been "than". No substantive change is intended.

The department is correcting a typographical and grammatical error in Rule CLXVII(1)(a) and (2)(a) (37.115.2209). In (1)(a) following the word "department" a semicolon should be inserted and following the word "or" the comma should be struck. In (2)(a) following the word "department;" a semicolon should be added as new text.

5. Replacement pages for the corrected notice were submitted to the Secretary of State on May 3, 2010.

6. All other rule changes adopted and amended remain the same.

/s/ Shannon McDonald
Rule Reviewer

/s/ Laurie Lamson for
Anna Whiting Sorrell, Acting Director
Public Health and Human Services

Certified to the Secretary of State May 3, 2010.

BEFORE THE DEPARTMENT OF PUBLIC
HEALTH AND HUMAN SERVICES OF THE
STATE OF MONTANA

In the matter of the amendment of ARM 37.12.401 pertaining to laboratory testing fees	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On February 25, 2010, the Department of Public Health and Human Services published MAR Notice No. 37-499 pertaining to the proposed amendment of the above-stated rule at page 488 of the 2010 Montana Administrative Register, Issue Number 4.

2. The department has amended the above-stated rule as proposed.

3. No comments or testimony were received.

/s/ Shannon McDonald
Rule Reviewer

/s/ Mary Dalton for
Anna Whiting Sorrell, Director
Public Health and Human Services

Certified to the Secretary of State May 3, 2010.

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.4.1604 relating to tax credits for corporations	)))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On March 25, 2010, the department published MAR Notice No. 42-2-821 regarding the proposed amendment of the above-stated rule at page 694 of the 2010 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 22, 2010, to consider the proposed amendment. No one appeared at the hearing to testify and no comments were received.

3. The department amends ARM 42.4.1604 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of Rule I (ARM 42.4.2905) and amendments of 42.4.1702, 42.4.2501, 42.4.2502, 42.4.2503, 42.4.2504, 42.4.2601, 42.4.2602, 42.4.2605, 42.4.2701, 42.4.2703, 42.4.2704, 42.4.2705, 42.4.2706, 42.4.2707, 42.4.2708, 42.4.2802, 42.4.2902, 42.4.2903, 42.4.2904, 42.4.3003, 42.4.3102, 42.4.3202, 42.4.3303, 42.4.3304, 42.4.3305, and 42.4.3306 relating to tax credits for corporations and individual taxpayers	))	NOTICE OF ADOPTION AND AMENDMENT

TO: All Concerned Persons

1. On March 25, 2010, the department published MAR Notice No. 42-2-822 regarding the proposed adoption and amendment of the above-stated rules at page 697 of the 2010 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 22, 2010, to consider the proposed adoption and amendment. No one appeared at the hearing to testify and no comments were received.

3. The department adopts New Rule I (ARM 42.4.2905) and amends ARM 42.4.1702, 42.4.2501, 42.4.2502, 42.4.2503, 42.4.2504, 42.4.2601, 42.4.2602, 42.4.2605, 42.4.2701, 42.4.2703, 42.4.2704, 42.4.2705, 42.4.2706, 42.4.2707, 42.4.2708, 42.4.2802, 42.4.2902, 42.4.2903, 42.4.2904, 42.4.3003, 42.4.3102, 42.4.3202, 42.4.3303, 42.4.3304, 42.4.3305, and 42.4.3306 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the amendment of ARM 42.4.301, 42.4.302, 42.4.303, 42.4.401, 42.4.402, 42.4.403, 42.4.404, 42.4.501, 42.4.502, 42.4.601, 42.4.602, 42.4.603, 42.4.702, and 42.4.703 relating to individual taxpayer's tax credits	))))))))	NOTICE OF AMENDMENT

TO: All Concerned Persons

1. On March 25, 2010, the department published MAR Notice No. 42-2-823 regarding the proposed amendment of the above-stated rules at page 714 of the 2010 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 22, 2010, to consider the proposed amendment. No one appeared at the hearing to testify and no comments were received.

3. The department amends ARM 42.4.301, 42.4.302, 42.4.303, 42.4.401, 42.4.402, 42.4.403, 42.4.404, 42.4.501, 42.4.502, 42.4.601, 42.4.602, 42.4.603, 42.4.702, and 42.4.703 as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State May 3, 2010

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF MONTANA

In the matter of the adoption of New Rule I (ARM 42.20.172) relating to property tax assessment reviews	)))	NOTICE OF ADOPTION

TO: All Concerned Persons

1. On March 25, 2010, the department published MAR Notice No. 42-2-824 regarding the proposed adoption of the above-stated rule at page 731 of the 2010 Montana Administrative Register, issue no. 6.

2. A public hearing was held on April 19, 2010, to consider the proposed adoption. No one appeared at the hearing to testify and no comments were received.

3. The department adopts New Rule I (ARM 42.20.172) as proposed.

4. An electronic copy of this adoption notice is available through the department's site on the World Wide Web at www.mt.gov/revenue, under "for your reference"; "DOR administrative rules"; and "upcoming events and proposed rule changes." The department strives to make the electronic copy of this adoption notice conform to the official version of the notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the notice and the electronic version of the notice, only the official printed text will be considered. In addition, although the department strives to keep its web site accessible at all times, concerned persons should be aware that the web site may be unavailable during some periods, due to system maintenance or technical problems.

/s/ Cleo Anderson
CLEO ANDERSON
Rule Reviewer

/s/ Dan R. Bucks
DAN R. BUCKS
Director of Revenue

Certified to Secretary of State May 3, 2010

NOTICE OF FUNCTION OF ADMINISTRATIVE RULE REVIEW COMMITTEE

Interim Committees and the Environmental Quality Council

Administrative rule review is a function of interim committees and the Environmental Quality Council (EQC). These interim committees and the EQC have administrative rule review, program evaluation, and monitoring functions for the following executive branch agencies and the entities attached to agencies for administrative purposes.

Economic Affairs Interim Committee:

- Department of Agriculture;
- Department of Commerce;
- Department of Labor and Industry;
- Department of Livestock;
- Office of the State Auditor and Insurance Commissioner; and
- Office of Economic Development.

Education and Local Government Interim Committee:

- State Board of Education;
- Board of Public Education;
- Board of Regents of Higher Education; and
- Office of Public Instruction.

Children, Families, Health, and Human Services Interim Committee:

- Department of Public Health and Human Services.

Law and Justice Interim Committee:

- Department of Corrections; and
- Department of Justice.

Energy and Telecommunications Interim Committee:

- Department of Public Service Regulation.

Revenue and Transportation Interim Committee:

- Department of Revenue; and
- Department of Transportation.

State Administration and Veterans' Affairs Interim Committee:

- Department of Administration;
- Department of Military Affairs; and
- Office of the Secretary of State.

Environmental Quality Council:

- Department of Environmental Quality;
- Department of Fish, Wildlife, and Parks; and
- Department of Natural Resources and Conservation.

These interim committees and the EQC have the authority to make recommendations to an agency regarding the adoption, amendment, or repeal of a rule or to request that the agency prepare a statement of the estimated economic impact of a proposal. They also may poll the members of the Legislature to determine if a proposed rule is consistent with the intent of the Legislature or, during a legislative session, introduce a bill repealing a rule, or directing an agency to adopt or amend a rule, or a Joint Resolution recommending that an agency adopt, amend, or repeal a rule.

The interim committees and the EQC welcome comments and invite members of the public to appear before them or to send written statements in order to bring to their attention any difficulties with the existing or proposed rules. The mailing address is P.O. Box 201706, Helena, MT 59620-1706.

HOW TO USE THE ADMINISTRATIVE RULES OF MONTANA AND THE MONTANA ADMINISTRATIVE REGISTER

Definitions:

Administrative Rules of Montana (ARM) is a looseleaf compilation by department of all rules of state departments and attached boards presently in effect, except rules adopted up to three months previously.

Montana Administrative Register (MAR or Register) is a soft back, bound publication, issued twice-monthly, containing notices of rules proposed by agencies, notices of rules adopted by agencies, and interpretations of statutes and rules by the Attorney General (Attorney General's Opinions) and agencies (Declaratory Rulings) issued since publication of the preceding register.

Use of the Administrative Rules of Montana (ARM):

Known Subject

1. Consult ARM Topical Index.
   Update the rule by checking the accumulative table and the table of contents in the last Montana Administrative Register issued.

Statute

2. Go to cross reference table at end of each number and title which lists MCA section numbers and department corresponding ARM rule numbers.

ACCUMULATIVE TABLE

The Administrative Rules of Montana (ARM) is a compilation of existing permanent rules of those executive agencies that have been designated by the Montana Administrative Procedure Act for inclusion in the ARM. The ARM is updated through December 31, 2009. This table includes those rules adopted during the period January 1, 2010, through March 31, 2010, and any proposed rule action that was pending during the past six-month period. (A notice of adoption must be published within six months of the published notice of the proposed rule.) This table does not include the contents of this issue of the Montana Administrative Register (MAR or Register).

To be current on proposed and adopted rulemaking, it is necessary to check the ARM updated through December 31, 2010, this table, and the table of contents of this issue of the MAR.

This table indicates the department name, title number, rule numbers in ascending order, catchphrase or the subject matter of the rule, and the page number at which the action is published in the 2009 and 2010 Montana Administrative Register.

To aid the user, the Accumulative Table includes rulemaking actions of such entities as boards and commissions listed separately under their appropriate title number.

GENERAL PROVISIONS, Title 1

1.2.419 Scheduled Dates for the 2010 Montana Administrative Register, p. 1586, 2031

ADMINISTRATION, Department of, Title 2

2.21.215 and other rules - Annual Leave Policy, p. 804
2.21.305 and other rules - Disaster and Emergency Leave Policy, p. 808
2.21.617 and other rules - Holidays - Holiday Pay, p. 1, 646
2.21.1801 and other rules - Exempt Compensatory Time Policy, p. 811
2.21.5005 and other rules - Reduction in Work Force, p. 253, 908
2.21.6606 and other rules - Employee Records Management, p. 256, 1070
2.21.6702 and other rules - Incentive Award Program, p. 590, 1072
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