

SENATE BILL NO. 308

INTRODUCED BY D. HARVEY, L. MUSZKIEWICZ, E. BOLDMAN, K. KORTUM, K. SULLIVAN, S. DEMAROIS

A BILL FOR AN ACT ENTITLED: "AN ACT REMOVING THE LIMITATION ON WORKERS' COMPENSATION BENEFITS TO NOT EXCEED THE STATE'S AVERAGE WEEKLY WAGE; AND AMENDING SECTIONS 39-71-118, 39-71-701, 39-71-702, 39-71-703, AND 39-71-721, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**Section 1.** Section 39-71-118, MCA, is amended to read:

**"39-71-118. Employee, worker, volunteer, volunteer firefighter, and volunteer emergency care provider defined -- election of coverage.** (1) As used in this chapter, the term "employee" or "worker" means:

(a) each person in this state, including a contractor other than an independent contractor, who is in the service of an employer, as defined by 39-71-117, under any appointment or contract of hire, expressed or implied, oral or written. The terms include aliens and minors, whether lawfully or unlawfully employed, and all of the elected and appointed paid public officers and officers and members of boards of directors of quasi-public or private corporations, except those officers identified in 39-71-401(2), while rendering actual service for the corporations for pay. Casual employees, as defined by 39-71-116, are included as employees if they are not otherwise covered by workers' compensation and if an employer has elected to be bound by the provisions of the compensation law for these casual employments, as provided in 39-71-401(2). Household or domestic employment is excluded.

(b) any juvenile who is performing work under authorization of a district court judge in a delinquency prevention or rehabilitation program;

(c) a person who is receiving on-the-job vocational rehabilitation training or other on-the-job training under a state or federal vocational training program, whether or not under an appointment or contract of hire with an employer, as defined in 39-71-117, and, except as provided in subsection (7), whether or not receiving payment from a third party. However, this subsection (1)(c) does not apply to students enrolled in vocational training programs, as outlined in this subsection, while they are on the premises of a public school or

1 community college.

2 (d) an aircrew member or other person who is employed as a volunteer under 67-2-105;

3 (e) a person, other than a juvenile as described in subsection (1)(b), who is performing community  
4 service for a nonprofit organization or association or for a federal, state, or local government entity under a  
5 court order, or an order from a hearings officer as a result of a probation or parole violation, whether or not  
6 under appointment or contract of hire with an employer, as defined in 39-71-117, and whether or not receiving  
7 payment from a third party. For a person covered by the definition in this subsection (1)(e):

8 (i) compensation benefits must be limited to medical expenses pursuant to 39-71-704 and an  
9 impairment award pursuant to 39-71-703 that is based upon the minimum wage established under Title 39,  
10 chapter 3, part 4, for a full-time employee at the time of the injury; and

11 (ii) premiums must be paid by the employer, as defined in 39-71-117(3), and must be based upon  
12 the minimum wage established under Title 39, chapter 3, part 4, for the number of hours of community service  
13 required under the order from the court or hearings officer.

14 (f) an inmate working in a federally certified prison industries program authorized under 53-30-  
15 132;

16 (g) a volunteer firefighter as described in 7-33-4109 or a person who provides ambulance services  
17 under Title 7, chapter 34, part 1;

18 (h) a person placed at a public or private entity's worksite pursuant to 53-4-704. The person is  
19 considered an employee for workers' compensation purposes only. The department of public health and human  
20 services shall provide workers' compensation coverage for recipients of cash assistance, as defined in 53-4-  
21 201, or for participants in the food stamp program, as defined in 53-2-902, who are placed at public or private  
22 worksites through an endorsement to the department of public health and human services' workers'  
23 compensation policy naming the public or private worksite entities as named insureds under the policy. The  
24 endorsement may cover only the entity's public assistance participants and may be only for the duration of each  
25 participant's training while receiving cash assistance or while participating in the food stamp program under a  
26 written agreement between the department of public health and human services and each public or private  
27 entity. The department of public health and human services may not provide workers' compensation coverage  
28 for individuals who are covered for workers' compensation purposes by another state or federal employment

1 training program. Premiums and benefits must be based upon the wage that a probationary employee is paid  
2 for work of a similar nature at the assigned worksite.

3 (i) subject to subsection (11), a member of a religious corporation, religious organization, or  
4 religious trust while performing services for the religious corporation, religious organization, or religious trust, as  
5 described in 39-71-117(1)(d); and

6 (j) a member of the army national guard or air national guard while performing state military duty  
7 as defined in 10-1-1003.

8 (2) The terms defined in subsection (1) do not include a person who is:

9 (a) performing voluntary service at a recreational facility and who receives no compensation for  
10 those services other than meals, lodging, or the use of the recreational facilities;

11 (b) performing services as a volunteer, except for a person who is otherwise entitled to coverage  
12 under the laws of this state. As used in this subsection (2)(b), "volunteer" means a person who performs  
13 services on behalf of an employer, as defined in 39-71-117, but who does not receive wages as defined in 39-  
14 71-123.

15 (c) serving as a foster parent, licensed as a foster care provider in accordance with 52-2-621, and  
16 providing care without wage compensation to no more than six foster children in the provider's own residence.  
17 The person may receive reimbursement for providing room and board, obtaining training, respite care, leisure  
18 and recreational activities, and providing for other needs and activities arising in the provision of in-home foster  
19 care.

20 (d) performing temporary agricultural work for an employer if the person performing the work is  
21 otherwise exempt from the requirement to obtain workers' compensation coverage under 39-71-401(2)(r) with  
22 respect to a company that primarily performs agricultural work at a fixed business location or under 39-71-  
23 401(2)(d) and is not required to obtain an independent contractor's exemption certificate under 39-71-417  
24 because the person does not regularly perform agricultural work away from the person's own fixed business  
25 location. For the purposes of this subsection, the term "agricultural" has the meaning provided in 15-1-  
26 101(1)(a).

27 (3) With the approval of the insurer, an employer may elect to include as an employee under the  
28 provisions of this chapter a volunteer as defined in subsection (2)(b) or a volunteer firefighter as defined in 7-

1 33-4510.

2 (4) (a) If the employer is a partnership, limited liability partnership, sole proprietor, or a member-  
3 managed limited liability company, the employer may elect to include as an employee within the provisions of  
4 this chapter any member of the partnership or limited liability partnership, the owner of the sole proprietorship,  
5 or any member of the limited liability company devoting full time to the partnership, limited liability partnership,  
6 proprietorship, or limited liability company business.

7 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
8 naming the partners, sole proprietor, or members to be covered and stating the level of compensation coverage  
9 desired by electing the amount of wages to be reported, subject to the limitations in subsection (4)(d). A  
10 partner, sole proprietor, or member is not considered an employee within this chapter until notice has been  
11 given.

12 (c) A change in elected wages must be in writing and is effective at the start of the next quarter  
13 following notification.

14 (d) All weekly compensation benefits must be based on the amount of elected wages, subject to  
15 the minimum ~~and maximum~~ limitations of this subsection (4)(d). For premium ratemaking and for the  
16 determination of the weekly wage for weekly compensation benefits, the electing employer may elect an  
17 amount of not less than \$900 a month ~~and not more than 1 1/2 times the state's average weekly wage.~~

18 (5) (a) If the employer is a quasi-public or a private corporation or a manager-managed limited  
19 liability company, the employer may elect to include as an employee within the provisions of this chapter any  
20 corporate officer or manager exempted under 39-71-401(2).

21 (b) In the event of an election, the employer shall serve upon the employer's insurer written notice  
22 naming the corporate officer or manager to be covered and stating the level of compensation coverage desired  
23 by electing the amount of wages to be reported, subject to the limitations in subsection (5)(d). A corporate  
24 officer or manager is not considered an employee within this chapter until notice has been given.

25 (c) A change in elected wages must be in writing and is effective at the start of the next quarter  
26 following notification.

27 (d) For the purposes of an election under this subsection (5), all weekly compensation benefits  
28 must be based on the amount of elected wages, subject to the minimum ~~and maximum~~ limitations of this

1 subsection (5)(d). For premium ratemaking and for the determination of the weekly wage for weekly  
2 compensation benefits, the electing employer may elect an amount of not less than \$200 a week ~~and not more~~  
3 ~~than 1&#8201;1/2 times the state's average weekly wage.~~

4 (6) Except as provided in Title 39, chapter 8, an employee or worker in this state whose services  
5 are furnished by a person, association, contractor, firm, limited liability company, limited liability partnership, or  
6 corporation, other than a temporary service contractor, to an employer, as defined in 39-71-117, is presumed to  
7 be under the control and employment of the employer. This presumption may be rebutted as provided in 39-71-  
8 117(3).

9 (7) (a) A student currently enrolled in an elementary, secondary, or postsecondary educational  
10 institution who is participating in work-based learning activities and who is paid wages by the educational  
11 institution or business partner is the employee of the entity that pays the student's wages for all purposes under  
12 this chapter.

13 (b) An elementary or secondary student who is not paid wages by the business partner or the  
14 educational institution in which the student is enrolled is a volunteer for whom coverage must be provided. The  
15 business partner and the educational institution shall mutually determine and agree in writing whether the  
16 business partner or the educational institution shall elect coverage for the student.

17 (8) For purposes of this section, an "employee or worker in this state" means:

18 (a) a resident of Montana who is employed by an employer and whose employment duties are  
19 primarily carried out or controlled within this state;

20 (b) a nonresident of Montana whose principal employment duties are conducted within this state  
21 on a regular basis for an employer;

22 (c) a nonresident employee of an employer from another state engaged in the construction  
23 industry, as defined in 39-71-116, within this state; or

24 (d) a nonresident of Montana who does not meet the requirements of subsection (8)(b) and whose  
25 employer elects coverage with an insurer that allows an election for an employer whose:

26 (i) nonresident employees are hired in Montana;

27 (ii) nonresident employees' wages are paid in Montana;

28 (iii) nonresident employees are supervised in Montana; and

1 (iv) business records are maintained in Montana.

2 (9) An insurer may require coverage for all nonresident employees of a Montana employer who do  
3 not meet the requirements of subsection (8)(b) or (8)(d) as a condition of approving the election under  
4 subsection (8)(d).

5 (10) (a) An ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer  
6 nontransporting medical unit, as defined in 50-6-302, in service to a town, city, or county may elect to include as  
7 an employee within the provisions of this chapter a volunteer emergency care provider who serves public safety  
8 through the ambulance service not otherwise covered by subsection (1)(g) or the paid or volunteer  
9 nontransporting medical unit. The ambulance service or nontransporting medical unit may purchase workers'  
10 compensation coverage from any entity authorized to provide workers' compensation coverage under plan No.  
11 1, 2, or 3 as provided in this chapter.

12 (b) If there is an election under subsection (10)(a), the employer shall report payroll for all  
13 volunteer emergency care providers for premium and weekly benefit purposes based on the number of  
14 volunteer hours of each emergency care provider, but no more than 60 hours, times the state's average weekly  
15 wage divided by 40 hours.

16 (c) An ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer  
17 nontransporting medical unit, as defined in 50-6-302, may make a separate election to provide benefits as  
18 described in this subsection (10) to a member who is either a self-employed sole proprietor or partner who has  
19 elected not to be covered under this chapter, but who is covered as a volunteer emergency care provider  
20 pursuant to subsection (10)(a). When injured in the course and scope of employment as a volunteer emergency  
21 care provider, a member may instead of the benefits described in subsection (10)(b) be eligible for benefits at  
22 an assumed wage of the minimum wage established under Title 39, chapter 3, part 4, for 2,080 hours a year. If  
23 the separate election is made as provided in this subsection (10), payroll information for those self-employed  
24 sole proprietors or partners must be reported and premiums must be assessed on the assumed weekly wage.

25 (d) A volunteer emergency care provider who receives workers' compensation coverage under this  
26 section may not receive disability benefits under Title 19, chapter 17, if the individual is also eligible as a  
27 volunteer firefighter.

28 (e) An ambulance service not otherwise covered by subsection (1)(g) or a nontransporting medical

1 unit, as defined in 50-6-302, that does not elect to purchase workers' compensation coverage for its volunteer  
2 emergency care providers under the provisions of this section shall annually notify its volunteer emergency care  
3 providers that coverage is not provided.

4 (f) (i) The term "volunteer emergency care provider" means a person who is licensed by the board  
5 of medical examiners as provided in Title 50, chapter 6, part 2, and who serves the public through an  
6 ambulance service not otherwise covered by subsection (1)(g) or a paid or volunteer nontransporting medical  
7 unit, as defined in 50-6-302, in service to a town, city, or county.

8 (ii) The term does not include a volunteer emergency care provider who serves an employer as  
9 defined in 7-33-4510.

10 (g) The term "volunteer hours" means the time spent by a volunteer emergency care provider in  
11 the service of an employer or as a volunteer for a town, city, or county, including but not limited to training time,  
12 response time, and time spent at the employer's premises.

13 (11) The definition of "employee" or "worker" in subsection (1)(i) is limited to implementing the  
14 administrative purposes of this chapter and may not be interpreted or construed to create an employment  
15 relationship in any other context."

16

17 **Section 2.** Section 39-71-701, MCA, is amended to read:

18 **"39-71-701. Compensation for temporary total disability -- exception.** (1) Subject to the limitation  
19 in 39-71-736 and subsection (4) of this section, a worker is eligible for temporary total disability benefits:

20 (a) when the worker suffers a total loss of wages as a result of an injury and until the worker  
21 reaches maximum healing; or

22 (b) until the worker has been released to return to the employment in which the worker was  
23 engaged at the time of the injury or to employment with similar physical requirements.

24 (2) The determination of temporary total disability must be supported by a preponderance of  
25 objective medical findings.

26 (3) Weekly compensation benefits for injury producing temporary total disability are 66 2/3% of the  
27 wages received at the time of the injury. ~~The maximum weekly compensation benefits may not exceed the~~  
28 ~~state's average weekly wage at the time of injury.~~ Temporary total disability benefits must be paid for the

1 duration of the worker's temporary disability. The weekly benefit amount may not be adjusted for cost of living  
2 as provided in 39-71-702(5).

3 (4) If the treating physician releases a worker to return to the same, a modified, or an alternative  
4 position that the individual is able and qualified to perform with the same employer at an equivalent or higher  
5 wage than the individual received at the time of injury, the worker is no longer eligible for temporary total  
6 disability benefits even though the worker has not reached maximum healing. A worker requalifies for  
7 temporary total disability benefits if the modified or alternative position is no longer available to the worker for  
8 any reason except for the worker's incarceration as provided for in 39-71-744, resignation, or termination for  
9 disciplinary reasons caused by a violation of the employer's policies that provide for termination of employment  
10 and if the worker continues to be temporarily totally disabled, as defined in 39-71-116.

11 (5) In cases in which it is determined that periodic disability benefits granted by the Social Security  
12 Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not  
13 below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week,  
14 which amount is to be calculated from the date of the disability social security entitlement.

15 (6) If the claimant is awarded social security benefits, the insurer may, upon notification of the  
16 claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to  
17 recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from  
18 agreeing to a repayment plan.

19 (7) A worker may not receive both wages and temporary total disability benefits without the written  
20 consent of the insurer. A worker who receives both wages and temporary total disability benefits without written  
21 consent of the insurer is guilty of theft and may be prosecuted under 45-6-301."

22

23 **Section 3.** Section 39-71-702, MCA, is amended to read:

24 **"39-71-702. Compensation for permanent total disability.** (1) If a worker is no longer temporarily  
25 totally disabled and is permanently totally disabled, as defined in 39-71-116, the worker is eligible for  
26 permanent total disability benefits. Permanent total disability benefits must be paid for the duration of the  
27 worker's permanent total disability, subject to 39-71-710.

28 (2) The determination of permanent total disability must be supported by a preponderance of

1 objective medical findings.

2 (3) Weekly compensation benefits for an injury resulting in permanent total disability are 66 2/3%  
3 of the wages received at the time of the injury. ~~The maximum weekly compensation benefits may not exceed~~  
4 ~~the state's average weekly wage at the time of injury.~~

5 (4) In cases in which it is determined that periodic disability benefits granted by the Social Security  
6 Act are payable because of the injury, the weekly benefits payable under this section are reduced, but not  
7 below zero, by an amount equal, as nearly as practical, to one-half the federal periodic benefits for the week,  
8 which amount is to be calculated from the date of the disability social security entitlement.

9 (5) A worker's benefit amount must be adjusted for a cost-of-living increase on the next July 1 after  
10 104 weeks of permanent total disability benefits have been paid and on each succeeding July 1. The  
11 adjustment must be the percentage increase, if any, in the state's average weekly wage as adopted by the  
12 department over the state's average weekly wage adopted for the previous year.

13 (6) A worker may not receive both wages and permanent total disability benefits without the written  
14 consent of the insurer. A worker who receives both wages and permanent total disability benefits without written  
15 consent of the insurer is guilty of theft and may be prosecuted under 45-6-301.

16 (7) If the claimant is awarded social security benefits, the insurer may, upon notification of the  
17 claimant's receipt of social security benefits, suspend biweekly compensation benefits for a period sufficient to  
18 recover any resulting overpayment of benefits. This subsection does not prevent a claimant and insurer from  
19 agreeing to a repayment plan."  
20

21 **Section 4.** Section 39-71-703, MCA, is amended to read:

22 **"39-71-703. Compensation for permanent partial disability.** (1) If an injured worker suffers a  
23 permanent partial disability and is no longer entitled to temporary total or permanent total disability benefits, the  
24 worker is entitled to a permanent partial disability award if that worker:

25 (a) has an actual wage loss as a result of the injury; and

26 (b) has a permanent impairment rating as determined by the sixth edition of the American medical  
27 association Guides to the Evaluation of Permanent Impairment for the ratable condition. The ratable condition  
28 must be a direct result of the compensable injury or occupational disease that:

1 (i) is not based exclusively on complaints of pain;

2 (ii) is established by objective medical findings; and

3 (iii) is more than zero.

4 (2) When a worker receives a Class 2 or greater class of impairment as converted to the whole  
5 person, as determined by the sixth edition of the American medical association Guides to the Evaluation of  
6 Permanent Impairment for the ratable condition, and has no actual wage loss as a result of the compensable  
7 injury or occupational disease, the worker is eligible to receive payment for an impairment award only.

8 (3) The permanent partial disability award must be arrived at by multiplying the percentage arrived  
9 at through the calculation provided in subsection (5) by 400 weeks.

10 (4) A permanent partial disability award granted an injured worker may not exceed a permanent  
11 partial disability rating of 100%.

12 (5) The percentage to be used in subsection (4) must be determined by adding all of the following  
13 applicable percentages to the whole person impairment rating:

14 (a) if the claimant is 40 years of age or younger at the time of injury, 0%; if the claimant is over 40  
15 years of age at the time of injury, 1%;

16 (b) for a worker who has completed less than 12 years of education, 1%; for a worker who has  
17 completed 12 years or more of education or who has received a high school equivalency diploma, 0%;

18 (c) if a worker has no actual wage loss as a result of the industrial injury, 0%; if a worker has an  
19 actual wage loss of \$2 or less an hour as a result of the industrial injury, 10%; if a worker has an actual wage  
20 loss of more than \$2 an hour as a result of the industrial injury, 20%. Wage loss benefits must be based on the  
21 difference between the actual wages received at the time of injury and the wages that the worker earns or is  
22 qualified to earn after the worker reaches maximum healing.

23 (d) if a worker, at the time of the injury, was performing heavy labor activity and after the injury the  
24 worker can perform only light or sedentary labor activity, 5%; if a worker, at the time of injury, was performing  
25 heavy labor activity and after the injury the worker can perform only medium labor activity, 3%; if a worker was  
26 performing medium labor activity at the time of the injury and after the injury the worker can perform only light or  
27 sedentary labor activity, 2%.

28 (6) The weekly benefit rate for permanent partial disability is 66 2/3% of the wages received at the

1 time of injury, but the rate may not exceed one-half the state's average weekly wage. The weekly benefit  
2 amount established for an injured worker may not be changed by a subsequent adjustment in the state's  
3 average weekly wage for future fiscal years.

4 (7) An undisputed impairment award may be paid biweekly or in a lump sum at the discretion of  
5 the worker. Lump sums paid for impairments are not subject to the requirements of 39-71-741, except that  
6 lump-sum payments for benefits not accrued may be reduced to present value at the rate established by the  
7 department pursuant to 39-71-741(5).

8 (8) If a worker suffers a subsequent compensable injury or injuries to the same part of the body,  
9 the award payable for the subsequent injury may not duplicate any amounts paid for the previous injury or  
10 injuries.

11 (9) If a worker is eligible for a rehabilitation plan, permanent partial disability benefits payable  
12 under this section must be calculated based on the wages that the worker earns or would be qualified to earn  
13 following the completion of the rehabilitation plan.

14 (10) As used in this section:

15 (a) "heavy labor activity" means the ability to lift over 50 pounds occasionally or up to 50 pounds  
16 frequently;

17 (b) "medium labor activity" means the ability to lift up to 50 pounds occasionally or up to 25 pounds  
18 frequently;

19 (c) "light labor activity" means the ability to lift up to 20 pounds occasionally or up to 10 pounds  
20 frequently; and

21 (d) "sedentary labor activity" means the ability to lift up to 10 pounds occasionally or up to 5  
22 pounds frequently."

23

24 **Section 5.** Section 39-71-721, MCA, is amended to read:

25 **"39-71-721. Compensation for injury causing death -- limitation.** (1) (a) If an injured employee  
26 dies and the injury was the proximate cause of the death, the beneficiary of the deceased is entitled to the  
27 same compensation as though the death occurred immediately following the injury. A beneficiary's eligibility for  
28 benefits commences after the date of death, and the benefit level is established as set forth in subsection (2).

1 (b) The insurer is entitled to recover any overpayments or compensation paid in a lump sum to a  
2 worker prior to death but not yet recouped. The insurer shall recover the payments from the beneficiary's  
3 biweekly payments as provided in 39-71-741(5).

4 (2) To beneficiaries as defined in 39-71-116(4)(a) through (4)(d), weekly compensation benefits for  
5 an injury causing death are 66 2/3% of the decedent's wages. ~~The maximum weekly compensation benefit may~~  
6 ~~not exceed the state's average weekly wage at the time of injury.~~ The minimum weekly compensation benefit is  
7 50% of the state's average weekly wage, but in no event may it exceed the decedent's actual wages at the time  
8 of death.

9 (3) To beneficiaries as defined in 39-71-116(4)(e) and (4)(f), weekly benefits must be paid to the  
10 extent of the dependency at the time of the injury, subject to a maximum of 66 2/3% of the decedent's wages.  
11 ~~The maximum weekly compensation may not exceed the state's average weekly wage at the time of injury.~~

12 (4) If the decedent leaves no beneficiary, a lump-sum payment of \$3,000 must be paid to the  
13 decedent's surviving parent or parents.

14 (5) If any beneficiary of a deceased employee dies, the right of the beneficiary to compensation  
15 under this chapter ceases. Death benefits must be paid to a surviving spouse for 500 weeks subsequent to the  
16 date of the deceased employee's death or until the spouse's remarriage, whichever occurs first. After benefit  
17 payments cease to a surviving spouse, death benefits must be paid to beneficiaries, if any, as defined in 39-71-  
18 116(4)(b) through (4)(d).

19 (6) In all cases, benefits must be paid to beneficiaries.

20 (7) Benefits paid under this section may not be adjusted for cost of living as provided in 39-71-  
21 702."

22 - END -