

BEFORE THE DEPARTMENT OF LABOR AND INDUSTRY
STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PUBLIC HEARING ON
ARM 24.11.204, 24.11.445,) PROPOSED AMENDMENT
24.11.451, 24.11.452A, 24.11.454A,)
24.11.457, 24.11.459, 24.11.485,)
24.11.487, 24.11.490, 24.11.2205,)
24.11.2501, and 24.11.2715)
pertaining to unemployment)
insurance)

TO: All Concerned Persons

1. On February 15, 2018, at 9:00 a.m., a public hearing will be held in the Lewis Room, basement of the Walt Sullivan Building, 1315 Lockey Ave, Helena, Montana, to consider the proposed amendment of the above-stated rules.

2. The Department of Labor and Industry (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 February 12, 2018, to advise us of the nature of the accommodation that you need. Please contact Boris Karasch, Unemployment Insurance, 1315 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624; telephone (406) 444-2646; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 444-2993; or BKarasch2@mt.gov.

3. GENERAL STATEMENT OF REASONABLE NECESSITY: As required by 2-4-314, MCA, the Unemployment Insurance Division (division) of the department periodically reviews its administrative rules. The following rules are proposed for amendment to update and clarify various terms and procedures related to unemployment insurance benefit claims. The division handles approximately 130,000 unemployment insurance claims a year. The division monitors how the rules are applied and interpreted by agency staff, claimants, employers, and the various adjudicatory bodies that rule on disputed claims. The division concludes that the proposed amendments are reasonably necessary to improve the efficient and timely processing of claims, and to improve the understanding of employers, workers, and adjudicators, regarding the provisions of the rules. The division further concludes that enough rules needing amendment have accumulated to justify rulemaking at this time. This general statement of reasonable necessity applies to all of the following rules. Additional statements of reasonable necessity are provided following specific rules where appropriate.

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

24.11.204 DEFINITIONS In addition to the terms defined in 39-51-201 through 39-51-205, and 39-51-1121, MCA, the following definitions apply to this chapter, unless context or a particular rule provides otherwise:

(1) through (24) remain the same.

(25) "Job attached" means a claimant is able and available ~~for full-time work and has a definite or approximate date of hire or recall to insured work at 30 or more hours per week, and is either:~~

~~(a) not employed but has a definite or approximate date of hire or recall to insured work at 30 or more hours per week; or~~

~~(b) employed in insured work on a part-time basis, but has a reasonable expectation that the work will become full-time.~~

(26) remains the same.

(27) "Leave of absence" means a cessation of work due to reasons other than an on-the-job injury, requested by the worker and approved by the employer, with an understanding the worker will be returning to work for the employer.

~~(27)~~ (28) "Leaving work," as used in 39-51-2302, MCA, means:

(a) remains the same.

(b) a cessation of employment initiated by the worker, which resulted from the worker's absence from work without an employer-approved leave of absence for:

(i) ~~seven~~ five or more consecutive work days due to a physical or mental condition, which prevented the worker from performing the essential functions of the job ~~with or without a reasonable accommodation;~~ or

(ii) remains the same.

(28) through (46) remain the same but are renumbered (29) through (47).

~~(47)~~ (48) "Temporary layoff" means a suspension of the work relationship between an employer and a worker initiated by the employer due only to a lack of work for the worker to perform and where the employer intends to recall the worker at such time as work becomes available, except for separations from temporary work as defined in ARM 24.11.454A.

(48) through (53) remain the same but are renumbered (49) through (54).

(55) "Valid notice" means a formal, unconditional, specific communication between an individual worker and an employer or authorized agent of an employer that provides notice of the date a worker intends to leave work voluntarily (quit) or notice of the date an employer intends to terminate a worker from employment.

(54) through (63) remain the same but are renumbered (56) through (65).

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

IMP: 39-51-201, 39-51-401, 39-51-504, 39-51-605, 39-51-1218, Title 39, Ch. 51, parts 21 through 25, 39-51-2601, 39-51-3201, 39-51-3202, 39-51-3206, MCA

REASON: There is reasonable necessity to amend the definitions to update and clarify the definitions for the unemployment insurance administrative rules. There is reasonable necessity to define two new terms that are being added to other rules that are being amended. Further, there is reasonable necessity to update the definition section to clarify language and use consistent terminology throughout the unemployment insurance administrative rules.

24.11.445 INACTIVE CLAIMS--REACTIVATING A CLAIM (1) through (1)(b)(ii) remain the same.

(iii) reports hours of work equal to or greater than the claimant's established ~~customary hours~~ hours typically worked; or

(iv) through (4) remain the same.

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

IMP: 39-51-2103, 39-51-2104, 39-51-2401, MCA

REASON: There is reasonable necessity to amend ARM 24.11.445 to clarify and update the rule to match the department's new payment application system.

24.11.451 SIX-WEEK RULE (1) remains the same.

~~(a) when the claimant separates from both full-time and part-time employment in insured work, the department shall adjudicate only the separation from full-time employment; and~~

~~(b) when the claimant separates from insured work with the same employer more than once, the department shall adjudicate only the last separation involving that employer.~~

(a) when the claimant separated from insured work with the same employer more than once, the department shall adjudicate only the last separation involving that employer;

(b) when the claimant is being paid their regular wages during an administrative leave; or

(c) where ARM 24.11.454A applies due to a valid notice.

(2) remains the same.

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

IMP: 39-51-2301, 39-51-2302, 39-51-2303, 39-51-2304, MCA

REASON: There is reasonable necessity to amend ARM 24.11.451 to clarify claimants are not penalized when they were forced to resign from a part-time job due to a lay-off from a full-time job. The proposed changes seek to clarify the rule. The existing version of the rule could lead to problems at the department's office of administrative hearings regarding identification of the separation that is at issue.

24.11.452A ELIGIBILITY FOR BENEFITS (1) through (7) remain the same.

(8) Except as provided in (a), an eligibility decision for a discharge or a claimant leaving work is effective the week of the last date of work.

(a) If the separating action occurs after the last date of work but prior to the next regularly scheduled shift, the separation is effective the latter of:

(i) the week of the separating act;

(ii) the week the claim was filed or reactivated; or

(iii) the week payment request is filed.

(b) Effective dates of separation decisions concerning valid notice are determined under ARM 24.11.454A.

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

IMP: 39-51-504, 39-51-2101, 39-51-2104, 39-51-2115, 39-51-2304, MCA

REASON: There is reasonable necessity to amend ARM 24.11.452A to add (8) which clarifies when an eligibility decision takes effect. Employers and claimants have apparently been confused with the current rule, which has led to confusion about what issues are to be resolved.

24.11.454A LEAVING OR DISCHARGE FROM WORK ~~(1) "Valid notice" means a formal, unconditional, specific communication between an individual worker and an employer or authorized agent of an employer that provides notice of the date a worker intends to leave work voluntarily (quit) or notice of the date an employer intends to terminate a worker from employment.~~

~~(2) Separation from employment occurs on the last day worked by an employee.~~

~~(3) through (5) remain the same but are renumbered (1) through (3).~~

(4) When a worker and an employer agree to temporary employment, the department shall consider the worker to have been laid off due to lack of work when:

(a) the worker completes the assigned work;

(b) a previously agreed upon verbal or written contract ends;

(c) the employer no longer has the same work available to the worker; or

(d) the worker has been hired by a client company of the employer as a result of a verbal or written employment agreement.

~~(6) When a worker agrees to accept employment of limited duration as specified by the employer or by a written employment contract, the department shall consider the worker to have been laid off due to a lack of work at the end of the duration agreed upon and the last day worked.~~

~~(7) When an employer agrees to employ a worker for a limited duration as specified by the worker or by a written employment contract, the department shall consider the worker to have voluntarily left work only when the worker has refused an offer by the employer to continue the same work beyond the limited duration. In the absence of a valid offer by the employer to continue the same work, the department shall consider the worker to have been laid off due to a lack of work on the last day worked.~~

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

IMP: 39-51-2302, 39-51-2303, MCA

REASON: There is reasonable necessity to amend ARM 24.11.454A to move (1), "valid notice," to the definitions rule for clarity. The proposed amendments seek to clarify when a worker is considered to be laid off. These clarifications are necessary because employers have been confused about when a temporary employee was laid off, and the department's treatment of the separation.

24.11.457 LEAVING WORK WITH OR WITHOUT GOOD CAUSE ATTRIBUTABLE TO THE EMPLOYMENT (1) and (1)(a) remain the same.

- (b) the claimant left work that the department determines to be have become unsuitable pursuant to ARM 24.11.485; or
- (c) and (2) remain the same.

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

IMP: 39-51-2302, 39-51-2304, 39-51-2307, MCA

REASON: There is reasonable necessity to amend ARM 24.11.457 in light of the provisions of ARM 24.11.485(3). The department has recently noticed that on occasion, a worker accepts a new, more demanding job which turns out to be beyond the worker's ability to perform. Such a job is not "suitable work," and the department concludes that a worker should not lose benefits because of having accepted an unsuitable job. The rule clarifies that the department may make an after-the-fact determination of the unsuitability of that new job.

24.11.459 ADMINISTRATIVE PENALTY (1) through (2)(a)(i) remain the same.

(ii) the claimant, or the claimant's agent, knew ~~or should have known~~ that the statement or representation was false; and

(iii) through (3)(a) remain the same.

(i) the claimant, or the claimant's agent, had knowledge of ~~or should have had knowledge of~~ the fact in question;

(ii) and (iii) remain the same.

(iv) the claimant, or the claimant's agent, knew ~~or should have known~~ that the fact in question was required to be disclosed to the department for the proper administration of the claim.

(b) through (4)(a) remain the same.

(b) for each week relative to which a claimant has been determined to have made a false statement or representation, as provided in (2), or failed to disclose a material fact, as provided in (3), involving a separation from work, ~~43~~ six weeks of disqualification are imposed; ~~and~~

(c) an additional ~~four~~ eight weeks of disqualification are imposed for each determination, redetermination, or decision, dated within three years of the date of the department's determination under ~~(4)(a)~~ or (b), that imposed a disqualification for any number of weeks pursuant to 39-51-3201(1)(a), MCA; ~~and~~

(d) any weeks of disqualification imposed as provided in (a) and/or (b) must be imposed for each determination and served consecutively, not concurrently.

(5) remains the same.

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

IMP: 39-51-3201, MCA

REASON: There is reasonable necessity to amend ARM 24.11.459 to create more uniform administrative penalties and uniform application of justice between pay card fraud cases and separation fraud cases. The Unemployment Insurance Appeals Board has recently reversed several cases, finding the administrative penalty for separation fraud cases was disproportionately high compared to pay card fraud

cases. The proposed changes are further necessary to bring the knowing requirement of pay card and separation fraud into line with 39-51-3201, MCA.

24.11.485 SUITABLE WORK (1) and (2) remain the same.

(3) To determine whether ~~employment constitutes suitable work a claimant is seeking, or has been offered, suitable work~~, the department shall consider factors including, but not limited to:

(a) through (f)(ii) remain the same.

(iii) suitable work corresponds with the ~~customary hours of work~~ hours typically worked for similar work in the locality or the hours worked by claimant worked during the base period;

(iv) through (4) remain the same.

(a) claimant has made a good faith effort to comply with licensing requirements or governing regulations but has failed to pass the required course(s) or licensing exam; or

(b) claimant has submitted to the department an individualized determination of work unsuitability due to claimant's physical or mental disability, certified and signed by a health care provider; ~~or,~~

~~(c) employer has unreasonably altered hours, terms of employment, working conditions, or claimant's wage by reducing the wage by 20 percent or more, as described by ARM 24.11.457.~~

(5) remains the same.

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

IMP: 39-51-2101, 39-51-2112, 39-51-2115, 39-51-2304, MCA

REASON: There is reasonable necessity to amend ARM 24.11.485 to clarify when a claimant can leave work with good cause because of changed circumstances. The proposed changes are necessary because hearing officers, unemployment insurance staff, and claimants appear to be confused or otherwise misunderstand what constitutes "good cause attributable to employment." There is reasonable necessity to remove (4)(c) from the rule because the subject is already addressed by ARM 24.11.457.

24.11.487 CUSTOMARY HOURS TYPICALLY WORKED (1) ~~The department shall determine the customary hours of work per week for each claimant during the base period of the claim. Customary hours may be established by:~~

~~(a) contractual agreement between the employer and the claimant;~~

~~(b) verbal or written statement by the employer to the claimant at the time of hire or as modified by the employer during the period of employment; or~~

~~(c) a department determination according to the following calculations:~~

~~(i) for claimants willing or required to seek and accept full-time work, the department shall add the hours worked during each week of work in the base period for all employers and divide by the number of weeks of work in the base period;~~

~~(ii) for claimants authorized to seek part-time work, the department shall add the hours worked during each week of part-time work in the base period for all~~

~~employers and divide by the number of weeks of part-time work in the base period; and~~

~~(iii) when the computation results in a fraction or portion of a whole number, the department shall round down the result to the lower whole number to determine claimant's customary hours of work.~~

~~(2) (1) When a claimant files for a week of benefits and reports hours of work equal to or greater than claimant's customary hours hours typically worked, the department shall determine that no unemployment exists and pay no benefits for the week.~~

~~(3) remains the same but is renumbered (2).~~

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

IMP: 39-51-2101, 39-51-2115, MCA

REASON: There is reasonable necessity to amend ARM 24.11.487 to clarify the rule. The department has concluded that the proposed changes more accurately reflect the statute. Furthermore, the proposed changes simplify the way in which hours typically worked are determined.

24.11.490 LEAVE OF ABSENCE (1) remains the same.

~~(2) When a A separation from employment as defined in ARM 24.11.204 occurs during an employer-approved leave of absence or after the agreed return date, the department shall determine the reasons for the separation based on evidence provided by the claimant, the employer, and other sources when either the claimant or the employer determines the claimant is not returning to work for the employer. The separation may be a lay-off if the claimant offers to return to work and no suitable work is available. The department's determination dictates whether an otherwise qualified claimant is eligible for benefits.~~

~~(3) When a worker does not return to work upon the agreed return date, the department shall determine whether the claimant voluntarily left work or was discharged from employment. If discharged from employment, the department shall determine whether the discharge occurred for misconduct.~~

~~(4) When a worker returns to work upon the agreed return date or offers to return to work during an employer-approved leave of absence, whichever occurs first, and finds suitable work is not available, the department shall determine whether the claimant is eligible for benefits due to a temporary or permanent lay-off.~~

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

IMP: 39-51-2112, MCA

REASON: There is reasonable necessity to amend ARM 24.11.490 in order to coordinate with the proposed amendments to ARM 24.11.204 and ARM 24.11.454A. The definition of the term "leave of absence" is being removed from ARM 24.11.490 and added to the definitions rule, ARM 24.11.204, and the rule is being re-phrased to better explain how circumstances related to leaving work may affect benefit entitlement.

24.11.2205 EXPERIENCE-RATING RECORD TRANSFER (1) When a new business entity is formed and it acquires assets, employees, business, organization, or trade from another employer, the new business entity is classified as a successor employer. The procedures for transferring an employer's experience-rating record are described in 39-51-1219, MCA. For purposes of this rule, predecessor employer and successor employer are used in the same manner and have the same meaning as those terms have in 39-51-1219, MCA.

(2) remains the same.

(3) ~~An experience-rating record is automatically transferred from the predecessor employer to the successor employer if the ownership, management, or control of the successor entity is substantially the same as the predecessor entity both employers are under substantially common ownership, management, or control. Such a~~ An experience-rating record includes the amount of contributions paid, benefits charged, and taxable wages reported. For purposes of transferring the experience rating, "substantially the same" means at least 50 percent of the successor entity is owned, managed, or controlled by the same persons or entities who owned, managed, or controlled the predecessor entity.

(a) Substantially common ownership, management, or control is present when a person serves in any of the following positions for both the predecessor and successor:

(i) sole proprietor (includes spouse, children, and parents of sole proprietor);

(ii) partner of a partnership;

(iii) member of a limited liability company;

(iv) chief executive officer;

(v) chief financial officer;

(vi) any corporate officer;

(vii) any shareholder owning, directly or indirectly, more than 50 percent of a corporation's stock; or

(viii) board members.

(4) remains the same.

(5) A transfer of the experience-rating record between a professional employer organization and its client is not allowed unless the client and the professional employer organization have common ownership, management, or control.

AUTH: 39-8-201, 39-51-301, 39-51-302, MCA

IMP: 39-8-201, 39-51-1219, MCA

REASON: There is reasonable necessity to amend ARM 24.11.2205 to clarify the concept of "substantial common ownership" because the previous definition was too broad, and led to confusion and misinterpretations of the rule by employers and department staff.

24.11.2501 WAGES (1) through (1)(d) remain the same.

(e) the cash value of all other types of non-cash payments is the market value of the item or service received;

(e) through (h) remain the same but are renumbered (f) through (i).

(2) and (3) remain the same.

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

REASON: There is reasonable necessity to amend ARM 24.11.2501 because the previous version of the rule leaves out non-cash payments. The proposed changes clarify what may constitute wages and include market value of the item or service. In addition, there is reasonable necessity to update the implementation citation to better reflect the statutes being implemented by the rule.

24.11.2715 DUE DATE AND APPLICATION OF TAXES (1) and (1)(a) remain the same.

~~(b) administrative fund tax;~~

~~(c) interest; then~~

~~(d) penalty.~~

(b) special administrative assessment under 39-51-404(3), MCA;

(c) special administrative assessment under 39-51-404(5), MCA;

(d) penalties assessed under 39-51-1301, MCA, for failure to file reports or make payments in a timely manner;

(e) interest; and then

(f) miscellaneous penalties.

(2) remains the same.

AUTH: 39-51-301, 39-51-302, MCA
IMP: 39-51-1103, 39-51-1110, MCA

REASON: There is reasonable necessity to amend ARM 24.11.2715 to clarify and update the rule to match the department's new payment application system programming.

5. Concerned persons may present their data, views, or arguments either orally or in writing at the hearing. Written data, views, or arguments may also be submitted to Boris Karasch, Unemployment Insurance, 1315 Lockey Avenue, P.O. Box 1728, Helena, Montana 59624; telephone (406) 444-2646; Montana Relay 1 (800) 253-4091; TDD (406) 444-2978; facsimile (406) 444-2993; or BKarasch2@mt.gov., and must be received no later than 5:00 p.m., February 23, 2018.

6. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request, which includes the name and e-mail or mailing address of the person to receive notices, and specifies the particular subject matter or matters regarding which the person wishes to receive notices. Such written request may be mailed or delivered to the Department of Labor and Industry, attention: Mark Cadwallader, 1315 E. Lockey Avenue, P.O. Box 1728, Helena, Montana 59624-1728, faxed to the department at (406) 444-1394, e-

mailed to mcadwallader@mt.gov, or may be made by completing a request form at any rules hearing held by the agency.

7. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

8. Regarding the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-stated rules will not significantly and directly impact small businesses.

9. The Office of Administrative Hearings has been designated to preside over and conduct this hearing.

/s/ MARK CADWALLADER
Mark Cadwallader
Alternate Rule Reviewer

/s/ GALEN HOLLENBAUGH
Galen Hollenbaugh, Commissioner
DEPARTMENT OF LABOR AND INDUSTRY

Certified to the Secretary of State January 16, 2018.