

Fifty-ninth  
Legislative Assembly  
of North Dakota

## HOUSE BILL NO. 1195

Introduced by

Representative Keiser

A BILL for an Act to create and enact a new section to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact section 52-04-08 of the North Dakota Century Code, relating to transfer of unemployment insurance employer experience history to successor entities and the transfer of workforce to other entities; and to provide a penalty.

### BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

**SECTION 1.** A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

**Definitions. As used in this chapter:**

1. "Agency" means job service North Dakota.
2. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
3. "Legal entity" means a corporation, limited liability company, partnership, unincorporated association, or other organization legally recognized as able to own property and employ an individual.
4. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.
5. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.
6. "Workforce" means some or all of the employees of a transferring entity.

**SECTION 2. AMENDMENT.** Section 52-04-08 of the North Dakota Century Code is amended and reenacted as follows:

**52-04-08. Succession to predecessor's experience record - Service supplier  
defined - Client's tax experience not transferred - Reporting of workers' wages.**

1. ~~An~~ Upon request, an employing unit that in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer and continues essentially the same business activity of the whole or part transferred; ~~must upon request~~ may be transferred in accordance with ~~such regulations as the bureau may prescribe~~ law and any relevant rules adopted by the agency, the whole or appropriate part of the experience record, reserve balance, and benefit experience of the ~~preceding~~ predecessor employer, unless the agency finds that the employing unit acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. ~~Provided that if~~ If the predecessor files a written protest against such transfer within fifteen days of being notified of the successor's application, the transfer will not be made.
2. This chapter does not allow the transfer of the experience record of a client that is an employer liable to pay contributions on wages paid under this title to a service supplier. A worker contracted for by a client from a service supplier is considered to be employed by the client. If the client is not an employer at the time of entering the contract for a worker with the service supplier, the agency shall make a determination of status of that client with the worker contracted for considered to be the client's employees. This subsection is applicable unless it is shown by appropriate evidence to the agency that the worker is and will continue to be, under the exclusive direction and control of the service supplier, both under a written contract and in fact. As used in this subsection and subsection 3:
  - a. "Client" means any entity, regardless of whether that entity would have been a reimbursing or contributory employer as defined by this title without consideration of any worker supplied by a service supplier, that utilizes any worker who has been contracted for and supplied by a service supplier. The client may have the right to control the manner and means by which the worker performs work on its behalf.
  - b. "Service supplier" means any entity that is engaged in the business of contracting with a client to provide a worker to perform services for the client.

1           A temporary help firm is not a service supplier except as provided in  
2           subdivision c.

3           c.   "Temporary help firm" has the definition stated in section 52-06-02, unless a  
4           client entity has transferred any of its workforce to the temporary help firm, in  
5           which case the temporary help firm is considered a service supplier.

6           3.   a.   For a contract to provide evidence as to whether a worker is under the  
7           exclusive direction and control of a service supplier, the contract must specify  
8           all of the following:

9           (1)   The service to be performed by the worker, on behalf of the service  
10           supplier for the client.

11           (2)   The fee the client must pay for the service. The fee must be large  
12           enough to cover the actual costs of the worker's wages and fringe  
13           benefits, plus provide a reasonable profit on the service performed for  
14           the client.

15           (3)   That the service supplier has the exclusive right to determine the  
16           number of workers needed to provide the service for the client and to  
17           direct and control any worker in the performance of the service.

18           (4)   That the service supplier has the exclusive right to hire, fire, discipline,  
19           and reassign any worker to another position or client without the  
20           consent of the contracting client.

21           b.   If a worker supplied by a service supplier is a corporate officer of the client, or  
22           the manager of a client that is a limited liability company treated as a  
23           corporation for purposes of federal income taxation, the worker is considered  
24           the employee of the client and not the service supplier.

25           c.   If the worker supplied by the service supplier is a sole owner of, or partner in,  
26           the client entity, the worker is considered the employee of the client and not of  
27           the service supplier.

28           d.   If the worker supplied by the service supplier is an individual who, or whose  
29           spouse, child, or parent or any combination of those individuals, holds a  
30           one-fourth or greater ownership interest in the client entity, the worker is  
31           considered the employee of the client and not of the service supplier.

1           4. When an employing unit in any manner acquires all or part of the organization,  
2           business, trade, workforce, or assets of another employer, the ~~bureau~~ agency shall  
3           transfer all or the appropriate part of the experience record, reserve balance,  
4           whether positive or negative, and benefit experience of such predecessor to the  
5           successor if it finds that ~~(a) the predecessor was owned or controlled by or owned~~  
6           ~~or controlled the successor directly or indirectly, by legally enforceable means or~~  
7           ~~otherwise or (b) both the predecessor and successor were owned or controlled~~  
8           ~~either directly or indirectly, by legally enforceable means or otherwise, by the same~~  
9           ~~interests~~ there was, at the time of acquisition, substantially common ownership,  
10          management, or control of the predecessor and the successor.

11          5. When a part of an employer's experience record reserve account and benefit  
12          experience is ~~to be~~ transferred under this section, the portion of the experience  
13          record and reserve account transferred must be in the same ratio to the total  
14          experience record and reserve account as the average annual payroll of the  
15          transferred organization, trade, business, or assets is to the total average annual  
16          payroll of the predecessor.

17          6. An employing unit's experience record may not be transferred in an amount that  
18          results in the successor and predecessor portions totaling more than one hundred  
19          percent of the predecessor's history.

20          **SECTION 3.** Section 52-04-08.1 of the North Dakota Century Code is created and  
21          enacted as follows:

22          **52-04-08.1. Implementation of federal anti-SUTA dumping legislation.** The agency  
23          shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the  
24          Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and  
25          procedures necessary to ensure compliance with that section. The agency may issue  
26          necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its  
27          responsibilities under this chapter.

28          **SECTION 4.** Section 52-04-08.2 of the North Dakota Century Code is created and  
29          enacted as follows:

30          **52-04-08.2. Transfers of unemployment insurance experience - Recalculation of**  
31          **rates - Definitions - Civil and criminal penalties.** Notwithstanding any other provision of

law, the following apply regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1. a. If an employer transfers its trade or business, or a portion of the trade or business, to another employer and, at the time of the transfer, there is substantially common ownership, management, or control of the two employers, the unemployment experience attributable to the transferred trade or business is transferred to the employer to which the business is transferred. The rates of both employers must be recalculated and made effective on the first day of the quarter in which the transfer took effect. The transfer of any of the employer's workforce to another employer is considered a transfer of trade or business under this subsection when, as a result of the transfer, the transferring employer no longer performs the trade or business in which the transferred workforce was engaged, and the trade or business is performed by the employer to which the workforce was transferred.
- b. If, following a transfer of experience under subdivision a, the agency determines that a substantial purpose of the transfer of trade or business was to obtain a reduced unemployment insurance tax rate, the experience ratings of the employers involved must be combined into a single account and a single unemployment insurance tax rate must be assigned to that account.
2. If a person, who at the time of acquisition is not an employer under this title, acquires the trade or business of an employer, the unemployment experience of the acquired business may not be transferred to that person if the agency finds that the person acquired the business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate. Instead, the person must be assigned the applicable new employer rate calculated under section 52-04-05. In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate, the agency shall use objective factors which may include the cost of acquiring the business, whether the person continued the business enterprise of the acquired business, how long the business enterprise was continued, and whether a substantial number of new employees

1           were hired for performance of duties unrelated to the business activity conducted  
2           before acquisition.

3           3. If a person knowingly acts or attempts to transfer or acquire a trade or business  
4           solely or primarily for the purpose of obtaining a lower unemployment insurance tax  
5           rate, or knowingly violates any other provision of this chapter related to determining  
6           the assignment of an unemployment insurance tax rate, or if a person knowingly  
7           advises another person in a way that results in a violation of those provisions, the  
8           person is subject to the civil penalties provided in this subsection.

9           a. If the person is an employer, the employer must be assigned, in lieu of that  
10           employer's experience rate, the highest rate assignable under this chapter for  
11           the rate year during which the violation or attempted violation occurred and  
12           the three rate years immediately following that rate year. However, if the  
13           employer's experience rate is already at the highest rate for any year of that  
14           four-year period or if the amount of increase in the person's experience rate  
15           imposed under this subdivision would be less than two percent for any year of  
16           the four-year period, the penalty unemployment insurance tax rate for the year  
17           must be determined by adding a rate increment of two percent of taxable  
18           wages to the calculated experience rate.

19           b. If the person is not an employer, the person is subject to a civil penalty of not  
20           more than twenty-five thousand dollars. Any civil penalty collected must be  
21           deposited in the penalty and interest account established under section  
22           52-04-22.

23           4. In addition to the civil penalty imposed by subsection 3, any person that knowingly  
24           violates this section or knowingly attempts to violate this section is guilty of a  
25           class C felony.