

HOUSE BILL NO. 1195

Introduced by

Representative Keiser

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

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

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

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

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

1 **52-04-08. Succession to predecessor's experience record - Service supplier**
2 **defined - Client's tax experience not transferred - Reporting of workers' wages.**

3 1. ~~An~~ Upon request, an employing unit that in any manner acquires all or part of the
4 organization, business, trade, workforce, or assets of another employer and
5 continues essentially the same business activity of the whole or part transferred;
6 ~~must upon request~~ may be transferred in accordance with ~~such regulations as the~~
7 ~~bureau may prescribe~~ law and any relevant rules adopted by the agency, the
8 whole or appropriate part of the experience record, reserve balance, and benefit
9 experience of the ~~preceeding~~ predecessor employer, unless the agency finds that
10 the employing unit acquired the business solely or primarily for the purpose of
11 obtaining a lower unemployment insurance tax rate. ~~Provided that if~~ If the
12 predecessor files a written protest against such transfer within fifteen days of being
13 notified of the successor's application, the transfer will not be made.

14 2. This chapter does not allow the transfer of the experience record of a client that is
15 an employer liable to pay contributions on wages paid under this title to a service
16 supplier. A worker contracted for by a client from a service supplier is considered
17 to be employed by the client. If the client is not an employer at the time of entering
18 the contract for a worker with the service supplier, the agency shall make a
19 determination of status of that client with the worker contracted for considered to
20 be the client's employees. This subsection is applicable unless it is shown by
21 appropriate evidence to the agency that the worker is and will continue to be, under
22 the exclusive direction and control of the service supplier, both under a written
23 contract and in fact. As used in this subsection and subsection 3:

24 a. "Client" means any entity, regardless of whether that entity would have been a
25 reimbursing or contributory employer as defined by this title without
26 consideration of any worker supplied by a service supplier, that utilizes any
27 worker who has been contracted for and supplied by a service supplier. The
28 client may have the right to control the manner and means by which the
29 worker performs work on its behalf.

30 b. "Service supplier" means any entity that is engaged in the business of
31 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

- 1 law, the following apply regarding assignment of penalty tax rates and transfers and
2 acquisitions of businesses:
- 3 1. a. If an employer transfers its trade or business, or a portion of the trade or
4 business, to another employer and, at the time of the transfer, there is
5 substantially common ownership, management, or control of the two
6 employers, the unemployment experience attributable to the transferred trade
7 or business is transferred to the employer to which the business is
8 transferred. The rates of both employers must be recalculated and made
9 effective on the first day of the quarter in which the transfer took effect. The
10 transfer of any of the employer's workforce to another employer is considered
11 a transfer of trade or business under this subsection when, as a result of the
12 transfer, the transferring employer no longer performs the trade or business in
13 which the transferred workforce was engaged, and the trade or business is
14 performed by the employer to which the workforce was transferred.
- 15 b. If, following a transfer of experience under subdivision a, the agency
16 determines that a substantial purpose of the transfer of trade or business was
17 to obtain a reduced unemployment insurance tax rate, the experience ratings
18 of the employers involved must be combined into a single account and a
19 single unemployment insurance tax rate must be assigned to that account.
- 20 2. If a person, who at the time of acquisition is not an employer under this title,
21 acquires the trade or business of an employer, the unemployment experience of
22 the acquired business may not be transferred to that person if the agency finds that
23 the person acquired the business solely or primarily for the purpose of obtaining a
24 lower unemployment insurance tax rate. Instead, the person must be assigned the
25 applicable new employer rate calculated under section 52-04-05. In determining
26 whether the business was acquired solely or primarily for the purpose of obtaining
27 a lower unemployment insurance tax rate, the agency shall use objective factors
28 which may include the cost of acquiring the business, whether the person
29 continued the business enterprise of the acquired business, how long the business
30 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.