

**Fifty-ninth Legislative Assembly of North Dakota  
In Regular Session Commencing Tuesday, January 4, 2005**

HOUSE BILL NO. 1195  
(Representative Keiser)

AN ACT to create and enact two new sections to chapter 52-04 and sections 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment of unemployment insurance by staffing services, employer restructuring activities, and transfers of unemployment insurance tax account reserve history; to amend and reenact subsection 4 of section 52-04-06 and section 52-04-08 of the North Dakota Century Code, relating to voluntary contributions to lower unemployment insurance tax rates, transfer of unemployment insurance employer experience history to successor entities, and the transfer of workforce to other entities; to provide for a legislative council study; 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, unless the context otherwise requires:

1. "Agency" or "bureau" means job service North Dakota.
2. "Client company" means a person that contracts to receive services, within the course of that person's usual business, from a staffing service or that contracts to lease any or all of that person's employees from a staffing service.
3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the prohibition involved.
4. "Staffing service" means an employer in the business of providing the employer's employees to a client company to perform services within the course of that client company's usual business. The term includes a professional employer organization, a staff leasing company, an employee leasing organization, and a temporary staffing company. The term "staffing service" must be broadly construed to encompass an entity that offers services provided by a professional employer organization, a staff leasing company, an employee leasing organization, or a temporary staffing company, regardless of the term used.
5. "Temporary staffing" or "temporary staffing service" means an arrangement through which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation, including an employee's temporary absence; a temporary skill shortage; a seasonal workload; or a special assignment or project with a targeted end date.

The term does not include an arrangement through which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

6. "Unemployment insurance tax rate" means the rate calculated or assigned under sections 52-04-05 and 52-04-06.
7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and willful nondisclosure.

8. "Workforce" means some or all of the employees of a transferring employer.

**SECTION 2.** A new section to chapter 52-04 of the North Dakota Century Code is created and enacted as follows:

**Staffing services - Payment of unemployment insurance taxes.**

1. If a staffing service exclusively provides temporary staffing services, the staffing service is considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. If a staffing service provides temporary and long-term employee staffing services, the staffing service is subject to the reporting and tax requirements associated with the type of employee provided to the client company.
2. For the purposes of long-term employee staffing services provided by a staffing service, the staffing service shall:
  - a. Report quarterly the wages of all employees furnished to each client company and pay taxes on those wages at the client company's unemployment insurance tax rate; except as otherwise provided under subsection 3.
  - b. Maintain complete and separate records of the wages paid to employees furnished to each of the client companies. Claims for benefits must be separately identified by the staffing service for each client company.
  - c. Notify the agency of each client company's name and unemployment insurance account number and the date the staffing service began providing services to the client company. The staffing service shall provide the agency with the information required under this subdivision upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
  - d. Supply the agency with a copy of the agreement between the staffing service and the client company.
  - e. Notify the agency upon termination of any agreement with a client company, but no later than fifteen days from the effective date of the termination.
  - f. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between the staffing service and a client company is terminated, the employees become the sole employees of the client company.
3. For the purposes of long-term employee staffing services provided by a staffing service, upon authorization of the agency, the staffing service may be considered to be the employee's employer and the staffing service shall pay unemployment insurance taxes at the staffing service's unemployment insurance tax rate. The agency may not make an authorization under this subsection unless one of the following requirements is met:
  - a. In the case of a client company unemployment insurance tax rate that is higher than the staffing services tax rate:
    - (1) The staffing service:
      - (a) Calculates the difference between the staffing service's tax rate and the client company's tax rate;
      - (b) Applies the difference to the wages to be earned by the employees furnished to the client company in the following completed calendar quarter; and

- (c) Notifies the agency that such application would, if the staffing service's tax rate were applied to those same wages, cause a reduction in the tax due on those wages which does not exceed five hundred dollars.
    - (2) If the reduction under paragraph 1 exceeds five hundred dollars, at the written request of the staffing service, the agency may make a written determination that it is appropriate to allow the staffing service to use the staffing service's unemployment insurance tax rate.
  - b. The staffing service includes in its contract with the client company a requirement that if the client company's unemployment insurance tax rate is higher than the staffing service's tax rate, the client will arrange to make payment to the agency, pursuant to subsection 4 of section 52-04-06, in the amount necessary to cause the client company's unemployment insurance tax rate should it be recomputed to be determined by the agency to be equivalent to the staffing service's unemployment insurance tax rate. Before the agency makes an authorization under this subdivision, the agency actually must receive payment of the amount required to cause the determination that the client company has complied with this subdivision.
  - c. The staffing service demonstrates to the agency that the staffing service has entered an agreement with a client company that has an unemployment insurance tax rate that is, at the time of execution of the contract, equal to or lower than the staffing service's tax rate.
4. If a staffing service enters a contract with a client company that has an unemployment insurance tax rate that is lower than the staffing service's tax rate, the agency shall determine the following year's tax rate for the staffing service by calculating a blended reserve ratio using the proportion of that client company's total wages paid for up to the previous six years to the total wages paid for up to the previous six years for all of that staffing service's client companies whose furnished workers are considered the staffing service's employees for unemployment insurance tax purposes pursuant to subsection 3.
5. Both a staffing service and client company are considered employers for the purposes of this title. Both parties to a contract between a staffing service and a client company are jointly liable for delinquent unemployment insurance taxes, and the agency may seek to collect such delinquent taxes, and any penalties and interest due, from either party. This chapter does not modify or impair any other provisions of the contract between the staffing service and the client company not relating to the requirements of this subsection concerning liability for payment of taxes on the wages paid to workers furnished by the staffing service to the client company, and the means of determining the tax rate to be applied to those wages.
6. The agency shall determine whether a person is a staffing service. If the agency determines a person is a staffing service, the agency may further determine if the person is a temporary staffing service. The agency's determination must be issued in writing, and within fifteen days of the date of issuance of that determination, a person aggrieved by that determination may appeal that determination. The appeal must be heard in the same manner and with the same possible results as all other administrative appeals under this title. In making a determination under this subsection, the agency may consider:
- a. The number of client companies with which the staffing service has contracts;
  - b. The length of time the staffing service has been in existence;
  - c. The extent to which the staffing service extends services to the general public;
  - d. The degree to which the client company and the staffing services are separate and unrelated business entities;

- e. The repetition of officers and managers between the client company and staffing service;
  - f. The scope of services provided by the staffing service;
  - g. The relationship between the staffing service and the client company's workers;
  - h. The written agreement between the staffing service and the client company; and
  - i. Any other factor determined relevant by the agency.
7. The agency may require information from any staffing service, including a list of current client company accounts, staffing assignments, and wage information. A client company shall provide any information requested by the agency regarding any staffing service.

**SECTION 3. AMENDMENT.** Subsection 4 of section 52-04-06 of the North Dakota Century Code is amended and reenacted as follows:

4. a. After each year's rate schedule has been established, an employer may pay into the fund, or cause to be paid into the fund on the employer's behalf, an amount in excess of the contributions required to be paid under this section. That amount must be credited to the employer's separate account. The employer's rate must be recomputed with the amount paid pursuant to this subsection included in the calculation only, except as allowed by subdivision b, if that amount was paid by April thirtieth of that year. Payments may not be refunded or used as credit in the payment of contributions.
- b. An employer that enters a contract with a staffing service, other than a temporary staffing service, may make the payments authorized by this subsection at any time during the rate year and the agency will determine if that payment is adequate to allow the staffing service to comply with subsection 3 of section 2 of this Act; however, the employer's tax rate will remain in effect for the remainder of the tax year. The agency will deposit any payment received pursuant to this subsection immediately and will credit it to the employer's separate account, but the agency will apply the payment to the calculation of the employer's tax rate for the following rate year. In order to take advantage of this subdivision and subsection 3 of section 2 of this Act, an employer may not be delinquent in its unemployment insurance tax payments on the date on which the payment authorized by this subdivision is made.

**SECTION 4. 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 - Impact of substantial common ownership, management, or control.**

1. 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~~ may upon request 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 ~~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. When an employing unit in any manner acquires all or part of the organization, business, trade, workforce, or assets of another employer, ~~the bureau~~ the agency shall transfer all or

the appropriate part of the experience record, reserve balance, whether positive or negative, and benefit experience of such predecessor to the successor if it finds that ~~(a) the predecessor was owned or controlled by or owned or controlled the successor directly or indirectly, by legally enforceable means or otherwise or (b) both the predecessor and successor were owned or controlled either directly or indirectly, by legally enforceable means or otherwise, by the same interests~~ there was, at the time of acquisition, substantially common ownership, management, or control of the predecessor and the successor.

3. When a part of an employer's experience record reserve account and benefit experience is ~~to be~~ transferred under this section, the portion of the experience record and reserve account transferred must be in the same ratio to the total experience record and reserve account as the average annual payroll of the transferred organization, trade, business, workforce, or assets is to the total average annual payroll of the predecessor.
4. An employing unit's experience record may not be transferred in an amount that results in the successor and predecessor portions totaling more than one hundred percent of the predecessor's history.

**SECTION 5.** Section 52-04-08.1 of the North Dakota Century Code is created and enacted as follows:

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

**SECTION 6.** Section 52-04-08.2 of the North Dakota Century Code is created and enacted as follows:

**52-04-08.2. Transfers of unemployment insurance experience - Recalculation of rates - Definitions - Civil and criminal penalties.** Notwithstanding any other provision of law, the following applies regarding assignment of penalty tax rates and transfers and acquisitions of businesses:

1.
  - a. If an employer transfers all or a part of its 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 if, 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 that 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 were hired for performance of duties unrelated to the business activity conducted before acquisition.

3. If a person knowingly acts or attempts to transfer or acquire a trade or business solely or primarily for the purpose of obtaining a lower unemployment insurance tax rate or knowingly violates any other provision of this chapter related to determining the assignment of an unemployment insurance tax rate, or if a person knowingly advises another person in a way that results in a violation of those provisions, the person is subject to the civil penalties provided in this subsection.
  - a. If the person is an employer, the employer must be assigned, in lieu of that employer's experience rate, the highest rate assignable under this chapter for the rate year during which the violation or attempted violation occurred and the three rate years immediately following that rate year. However, if the employer's experience rate is already at the highest rate for any year of that four-year period or if the amount of increase in the person's experience rate imposed under this subdivision would be less than two percent for any year of the four-year period, the penalty unemployment insurance tax rate for the year must be determined by adding a rate increment of two percent of taxable wages to the calculated experience rate.
  - b. If the person is not an employer, the person is subject to a civil penalty of not more than twenty-five thousand dollars. Any civil penalty collected must be deposited in the penalty and interest account established under section 52-04-22.
4. In addition to the civil penalty imposed under subsection 3, any person that knowingly violates this section or knowingly attempts to violate this section is guilty of a class C felony.

**SECTION 7. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER ORGANIZATIONS.** The legislative council shall consider studying, during the 2005-06 interim, the feasibility and desirability of requiring professional employer organizations operating in North Dakota to register with the state. The study must include consideration of how other states address the issue of registration of professional employer organizations. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixtieth legislative assembly.

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Speaker of the House

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President of the Senate

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Chief Clerk of the House

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Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Fifty-ninth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1195.

House Vote:      Yeas    83      Nays    4      Absent    7

Senate Vote:    Yeas    47      Nays    0      Absent    0

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Chief Clerk of the House

Received by the Governor at \_\_\_\_\_ M. on \_\_\_\_\_, 2005.

Approved at \_\_\_\_\_ M. on \_\_\_\_\_, 2005.

\_\_\_\_\_  
Governor

Filed in this office this \_\_\_\_\_ day of \_\_\_\_\_, 2005,

at \_\_\_\_\_ o'clock \_\_\_\_\_ M.

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Secretary of State