

LCB File No. R200-05

**PROPOSED REGULATION OF THE EMPLOYMENT SECURITY
DIVISION OF THE DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION**

(This draft replaces the one posted 11/29/05)

**NOTICE OF INTENT TO ACT UPON A REGULATION
Notice of Hearing for the Adoption of A Regulation of the
Employment Security Division of the
Department of Employment, Training and Rehabilitation**

The Employment Security Division of the Department of Employment, Training and Rehabilitation will hold a public hearing at 10:00 A.M., on Tuesday, January 24, 2006, at:

Live Meeting: Legislative Building
 401 S. Carson Street, Room 2135
 Carson City, NV 89701

Video Conference: Grant Sawyer Building
 555 East Washington Avenue, Room 4412
 Las Vegas, NV 89101

The purpose of the hearing is to receive comments from all interested persons regarding the adoption of several regulations that pertain to Chapter 612 of the Nevada Administrative Code.

The following information is provided pursuant to the requirements of NRS 233B.0603:

1. Statement of need and purpose

The majority of the regulations are required to align the Nevada Administrative Codes with the modifications made to Chapter 612 of the Nevada Revised Statutes with the enactment of Assembly Bill 502 and Senate Bill 111. Also included are required regulations as prescribed by Chapter 233B of the Nevada Revised Statutes.

Additionally, regulations are being proposed to clarify existing regulations and to revise or repeal processes that have been rendered archaic by the transition to a remote unemployment insurance claim filing processes.

2. Substance of the proposed regulation

Assembly Bill 502 established both mandatory and prohibited transfers of experience records in an effort to combat the practice of "SUTA Dumping" or rate manipulation, where employers are able to escape their earned experience record. The regulations provide definitions and outline procedures that either require or prohibit the transfer of experience records between business

entities. Also provided are regulations relating to common ownership, management or control between businesses.

Assembly Bill 502 also modified the time frame for an employer to file a protest to a notice of unemployment insurance claim from 10 days to 11 days. The regulation also extends the time for any interested party to file an appeal to a determination issued by the Division from 10 days to 11 days.

Senate Bill 111 clarified the intent of existing law to insure that employers provide the Division with all information needed to issue a determination of eligibility for unemployment benefits when a claim is filed.

New regulations are proposed concerning the filing and disposition of petitions for declaratory orders and advisory opinions concerning the applicability of statutes, regulations or decisions of the Administrator. There is also a new regulation concerning the filing of a petition for the adoption, filing, amendment or repeal of a regulation.

Additional changes include amendments to Section 612.016, which defines a “week” for purposes of receipt of benefits. Section 612.090 and 612.094 codify existing interpretation and practices to make them less ambiguous. Removal and modification of language in Sections 612.100 and 612.110 eliminates processes rendered obsolete by the transformation to remote claim filing and defines processes established by transition to remote claims. The changes to language in Section 612.120 clarify expectations of the Division relating to the passage of Senate Bill 111 in the 2005 Nevada Legislature, as well as clarifying a modification made to NRS 612.551 in 1998. Repealing Section 612.180 removes a process established in 1955 that is viewed as irrelevant to current needs. Finally, the modification of language in Section 612.190 recognizes the impact of the Workforce Investment Act, while the language in 612.510 acknowledges the name change of the organization providing consultation and input for a number of programs administered by the Employment Security Division.

3. Estimated economic effect

The economic effect on the unemployment insurance trust fund resulting from the adoption of regulations related to SUTA Dumping Prevention Act of 2004 and Senate Bill 502 is unknown. The remaining regulations are expected to have no economic impact.

(A) Effect on business

There are no adverse effects on business, either immediate or long-term for any of the regulations. The long-term beneficial effect will be to eliminate the ability of business entities to manipulate or dump their experience rate resulting in tax avoidance. Such tax avoidance schemes burden the remainder of the employers with the costs of the program.

The regulations do not create a direct or significant economic effect upon small businesses or upon the formation or operation of such businesses.

(B) Effect on the public

There are no immediate adverse or beneficial effects on the public. The long-term benefits of the regulations associated with transfer of experience record will help ensure that equity is maintained among the employers that contribute to the unemployment insurance fund.

The regulations requesting employers to provide all information needed to insure a correct determination will reduce the amount of overpayments that are sometimes created and lessen the financial impact of benefit overpayments on the trust fund as a whole.

4. Estimated cost

There are no additional costs involved in enforcing the proposed regulations, since funds are provided by the U.S. Department of Labor to administer the Unemployment Insurance Program.

5. Overlap or duplication

None of the proposed regulations overlap or duplicate any regulations of other state or local government agencies.

6. Federal regulations

The regulations associated with the SUTA Dumping provisions enacted in Assembly Bill 502 are a result of the SUTA Dumping Prevention Act, PL108-295, unanimously passed by congress and signed into law by the President in August 2004. States were required to change their statutes to be consistent with federal law.

The amendment to the regulations from 10 day to 11 days on the timelines for the tax, adjudication and appeals processes are indirectly a result of a United States Department of Labor requirement that determinations of eligibility be issued within 21 days of the date the question of eligibility is discovered. The Nevada Rules of Civil Procedure changed their interpretation of the counting of the 10-day time limit, which would have jeopardized the Employment Security Division's ability to comply with this federal requirement.

The remaining amendments and the repealed regulation are not directly due to any federal law or regulation that requires the changes.

7. Summary of provisions more stringent than the federal regulations

Not applicable.

8. New or increased fee

The regulations do not establish a new fee or increase an existing fee.

Persons wishing to comment on the proposed action of the Employment Security Division may appear at the scheduled public hearing or may address comments, data, views or arguments in written form to the Department of Employment, Training and Rehabilitation, Employment Security Division, 500 East Third Street, Carson City, Nevada 89713. Written submissions must be received by the Employment Security Division on or before January 24, 2006. If no person

who is directly affected by the proposed action appears to request time to make an oral presentation, the Employment Security Division may proceed to immediately act upon any written submissions.

A copy of this notice and the regulations to be adopted will be on file at the State Library, 100 Stewart Street, Carson City, Nevada, for inspection by members of the public during business hours. Additional copies of the notice and the regulations to be adopted will be available at the Department of Employment, Training and Rehabilitation, Employment Security Division, 500 East Third Street, Carson City, Nevada 89713, all the administrative offices in Las Vegas, all Job-Connect offices throughout the state, the Reno and Las Vegas field audit offices and appeals offices, and at all of the main county libraries, for inspection and copying by members of the public during business hours.

This notice and the text of the proposed regulations are also available in the State of Nevada Register of Administrative Regulations, which is prepared and published monthly by the Legislative Counsel Bureau pursuant to NRS 233B.0653 and on the Internet at <http://www.leg.state.nv.us> and <http://detr.state.nv.us>. Copies of this notice and the proposed regulation will also be mailed to members of the public upon request, telephone (775) 684-3909. A reasonable fee may be charged for copies if it is deemed necessary. This does not apply to a public body subject to the Open Meeting Law. Upon adoption of any regulation, the agency, if requested to do so by an interested person, either before adoption or within 30 days thereafter, will issue a concise statement of the principal reasons for and against its adoption or incorporate therein its reason for overruling the consideration urged against its adoption.

We are pleased to make reasonable accommodations for members of the public who require special accommodations or assistance at the hearing. If special arrangements are necessary, please notify the Employment Security Division in writing at 500 East Third Street, Carson City, Nevada 89713, or call Joyce Golden at (775) 684-3909 (for deaf and hearing impaired dial 711 or call 1-800-326-6868 for Relay Nevada), or send a fax to (775) 684-3910 on or before January 24, 2006.

This notice of the public hearing and a copy of the proposed regulation have been posted at the following locations:

Nevada State Library, 100 Stewart Street, Carson City, NV 89701
Legislative Building, 401 South Carson Street, Carson City, NV 89701
Grant Sawyer State Building, 555 E. Washington Ave., Las Vegas, NV 89101
Legislative Counsel Bureau Web Site
Department of Employment, Training and Rehabilitation Web Site
All County Libraries in Nevada
Employment Security Division, State Administrative Office, 500 East Third Street, Carson City, NV 89710
Employment Security Division Southern Administrative Office, 101 Convention Center Dr., Suite 925, Las Vegas, NV 89109
Unemployment Insurance Contributions, 1320 South Curry Street, Carson City, NV 89710
Reno Field Audit Office, 1325 Corporate Blvd, Suite B, Reno, NV 89502
Las Vegas Field Audit Office, 3405 S. Maryland Parkway, Las Vegas, NV 89109
Reno Appeals Office, 1325 Corporate Blvd, Suite C, Reno, NV 89502
Las Vegas Appeals Office, 1820 E Sahara, Suite 301, Las Vegas, NV 89104
Reno Casual Labor Office, 420 Galletti Way, Sparks, NV 89431
Las Vegas Casual Labor Office, 1001 North A Street, Las Vegas, NV 89106

Nevada JobConnect-Carson City, 1929 North Carson Street, Carson City, NV 89701
Nevada JobConnect-Elko, 172 Sixth Street, Elko, NV 89801
Nevada JobConnect-Ely, 480 Campton Street, Ely, NV 89301
Nevada JobConnect-Fallon, 121 Industrial Way, Fallon, NV 89406
Nevada JobConnect-Henderson, 119 Water Street, Henderson, NV 89015
Nevada JobConnect-Las Vegas, 3405 South Maryland Parkway, Las Vegas, NV 89109
Nevada JobConnect-North Las Vegas, 2827 Las Vegas Boulevard North, Las Vegas, NV 89030
Nevada JobConnect-Reno Town Mall, 4001 South Virginia Street, Suite H-1, Reno, NV 89502
Nevada JobConnect-Sparks, 1675 E. Prater Way, Suite 103 Sparks, NV 89431
Nevada JobConnect-Winnemucca, 475 Haskell St., Suite 1, Winnemucca, NV 89445

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NEVADA ADMINISTRATIVE CODE 612

EXPLANATION –matter in *italics* is new.

Chapter 612 of NAC is hereby amended by adding thereto the provisions set forth ____ to ____, inclusive, of this regulation:

New Section (NRS 612.545 as amended by AB502, Section 14; AB 502, Section 15)

A part or portion of the organization, trade or business defined.

A “part or portion of the organization, trade or business” means a separate division, location or organization or a portion or percentage of the organization, trade or business of an employing unit that has been identified as such by the employing unit. A transfer of some or all of an employer’s workforce to another employer shall be considered a transfer of a trade or business when, as a result of such transfer, the transferring employer no longer performs the trade or business with respect to the transferred workforce and such trade or business is performed by the employer to whom the workforce is transferred.

New Section (NRS 612.055, 612.060, 612.220)

Common Paymaster defined

A common paymaster is a business entity that purports to be a single employer of employees who are concurrently employed by a group of related employing units. Nevada Unemployment Compensation Law does not recognize the common paymaster; each legal business entity is a separate employing unit. Wages must be reported, and contributions paid on wages up to the taxable limit, by each employing unit for which services are performed. Employees who are concurrently employed must be reported under each separate employing unit.

New Section (NRS 612.055, 612.060, 612.220)

Payrolling defined

1. Payrolling is defined as the practice of designating one employing unit to report the wages of an individual that performs services for another employing unit. Wages are reportable by the employing unit that has the right to hire and fire the employee, who has the responsibility to control and direct the employee; and for whom the employee performs the service. Payrolling is not permitted under either Federal Unemployment Law or Nevada Unemployment Compensation Law.

New Section (AB502, Section 1)

Substantially defined.

Substantially is such evidence that a reasonable mind might accept as adequate to support a conclusion.

New Section (AB502, Section 1)

Common defined.

Common is the shared relationship between two or more entities.

New Section (AB502, Section 1)

Ownership defined.

Ownership is the legal ability to make decisions on behalf of the business.

New Section (AB502, Section 1)

Management defined.

Management is the appointment of employee(s) to administer the affairs of an employing unit by direction or control or an employee having general power or being invested with the general conduct and control of his employer's business.

New Section (AB502, Section 1))

Control defined.

Control is the power or authority to manage, direct, supervise, restrict, regulate, govern, administer, or oversee.

New Section (AB502, Section 1)

Determination of Substantially Common Ownership, Management or Control.

In determining the existence of substantially common ownership, management or control, the administrator shall use objective factors, which may include, but not be limited to:

1. Ownership exists when there is a substantial interest in an organization conducting a business enterprise; ownership of assets necessary to conduct a business enterprise; security arrangements or lease arrangements covering assets necessary to conduct a business enterprise, including workers.

2. Continuity of control exists if one or more persons, entities, or other organizations controlling a business enterprise remain in control of a business enterprise after an acquisition or change in form or there is a transfer to persons with any familial relationship to the transferors. Evidence of continuity of control includes, but is not limited to, changes of an individual proprietorship to a corporation, partnership, limited-liability entity, association, or estate; a partnership to an individual proprietorship, corporation, limited-liability entity, association, estate, or the addition, deletion, or change of partners; a limited liability entity to an individual proprietorship, partnership, corporation, association, estate, or to another limited-liability entity; a corporation to an individual proprietorship, partnership, limited-liability entity, association, estate, or to another corporation or from any form to another form; or, contract when the ownership, stated arrangements, or contract provide for or allow direction of the internal affairs or conduct of the business enterprise.

3. Management consists of, but is not limited to, control over the central accounting, personnel policies, operating procedures, financing of business operations, purchasing, pricing and collections.

Chapter 612 of NAC is hereby amended as follows:

NAC 612.014 Severable and distinct portion of the organization, trade or business” defined. ([NRS 612.220](#)) “Severable and distinct portion of the organization, trade or business” means a separate division, location or organization of an employing unit that has been identified as such by the employing unit. ~~[The term does not include merely a portion or percentage of the organization, trade or business as a whole, or merely a portion or percentage of employees of the employing unit.]~~

NAC 612.280 Transfer of experience record: Conditions; type of transfer. ([NRS 612.220](#), [612.550](#) as amended by AB 502, section 15)

1. ~~[The]~~ **Transfers of** experience record ~~[of an employer will be transferred to a successor as of the effective date of a change in business organization or legal entity if]~~ **are mandatory:**

(a) ~~[The employing unit as a successor acquires the entire, or a severable and distinct portion of the organization, trade or business, or substantially all of the assets relating to an employer subject to the law, if the mutual acquiescence of the predecessor and the successor to transfer is properly executed and filed with the employment security division within 1 year after the date of the issuance by the division of official notice of eligibility to transfer.]~~ **Whenever there is substantially common ownership, management or control of two or more employers and one of the employers transfers all or part of its business, including its workforce, to the other employer.**

(b) The receiver, trustee, executor, administrator or other representatives, under designation or order of a court, succeeds to the assets of a predecessor employer to carry on pending liquidation or reorganization.

2. ~~[The transfer]~~ **Transfers** of an experience record ~~[of a severable and distinct portion of an organization, trade or business will be completed if the successor employer provides evidence of the acquisition to the division within 1 year after the date of issuance by the division of official notice of eligibility to transfer]~~ **are voluntary whenever there is substantially no common, ownership, management or control of two or more employers and,**

(a) **A successor employer acquires the entire, or a severable and distinct portion of the organization, trade or business, or substantially all of the assets relating to an employer subject to the law, and**

(b) **Proper notice of any change in the organization, trade or business is filed with the division within 90 days immediately following the effective date of the change. The administrator, at his discretion, may waive this time limit for good cause.**

(c) **The mutual acquiescence of the predecessor and the successor to transfer is properly executed and the successor provides evidence of the acquisition to the division within 1 year after the date of the issuance by the division of official notice of eligibility to transfer.**

3. In a partial transfer, the successor employer shall provide the amount of taxable wages reported by the separated unit for the previous 3 calendar years. The division will allocate benefit charges and contributions paid to the separated unit in the same proportion that total taxable payrolls attributable to the separated unit bear to the total taxable payrolls attributable to the operations retained by the transferring employer during the same period.

NAC 612.290 Transfer of experience record: Completion; notification; denial. (NRS 612.220, 612.550 as amended by AB 502, section 15)

1. When a total transfer of an experience record has been completed:

(a) Payrolls, contributions paid and benefit charges must be transferred to and be a part of the experience record of the successor. Benefits paid, based on the payrolls of the predecessor, must then be charged to the experience record of the successor. If a claimant for unemployment benefits has been paid wages for the base period by the predecessor employer, the wages shall be deemed to have been paid by the successor employer.

(b) The predecessor, as a transferring employer, may not retain the rate previously determined for him but will be classed as a new employer with respect to any employment after the date of the completed transfer.

2. The contribution rate for a successor who qualifies for the transfer of an experience record for the period beginning with the date of the transfer and ending with the next effective date of contribution rates is:

(a) The contribution rate applicable to the transferring employer with respect to the period immediately preceding the date of the transfer, if:

(1) The acquiring employer was not, before the transfer, a subject employer; and

(2) Only one transferring employer, or only transferring employers having identical rates, are involved;

(b) A new rate, computed on the experience of the transferring employer or, in the case of a partial transfer, the experience attributable to the part of the business transferred, combined with the experience of the acquiring employer as of the regular computation date for the rate period in which the transfer occurs; or

(c) The rate of contribution for a newly subject employer. A computation for a contribution rate must be made in all transfers involving a severable and distinct portion of an organization, trade or business.

3. No transfer of an experience record and rate will be completed if ~~[it appears to the satisfaction of]~~ the administrator *determines* that *an acquisition or* change ~~[in]~~ *of all or part of a* business organization was effected *solely or* primarily to obtain a more favorable contribution rate.

(a) In determining whether an acquisition was primarily for the purpose of obtaining a lower rate of contributions, the administrator shall use objective factors which may include, but not be limited to, the cost of acquiring the business, whether the acquiring person continued the business enterprise of the acquired business, how long such business enterprise was continued, or whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

4. A protest to the determination of the division with respect to transfers must be filed not later than 15 days from the date the notice of the determination is mailed. *An appeal may be filed within 11 days from the date a determination, based on the protest, is mailed by the division.*

~~[5. No transfer of an experience record is considered unless proper notice of any change in the organization, trade or business is filed with the division within 90 days immediately following the effective date of the change. The administrator, at his discretion, may waive this time limit for good cause.]~~