

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

LCB File No. R200-05

Effective February 23, 2006

EXPLANATION – Matter in *italics* is new; matter in brackets ~~omitted material~~ is material to be omitted.

AUTHORITY: §§1, 3, 4 and 6, NRS 612.220; §§2, 5, 7 and 8, NRS 612.220 and section 1 of Assembly Bill No. 502 of the 73rd Session of the Nevada Legislature, chapter 129, Statutes of Nevada 2005, at page 444 (NRS 612.732).

A REGULATION relating to unemployment compensation; revising provisions relating to unemployment insurance contributions; prohibiting the use of a common paymaster; prohibiting payrolling; revising provisions governing certain transfers of unemployment experience records; and providing other matters properly relating thereto.

Section 1. Chapter 612 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 5, inclusive, of this regulation.

Sec. 2. *The Administrator interprets “a part” of an organization, trade or business as used in NRS 612.545 and “a portion” of a trade or business as used in NRS 612.550 to include, without limitation:*

- 1. A separate division, location or organization of an employing unit;*
 - 2. A portion or percentage of an organization, trade or business of an employing unit;*
- and*
- 3. The transfer of some or all of the workforce of an employer to another employer if, as a result of the transfer, the transferring employer no longer conducts trade or business with*

respect to the transferred workforce but such trade or business is conducted by the employer to which the workforce is transferred.

Sec. 3. 1. *An employing unit shall not engage in the use of a common paymaster. Each employing unit for which services are performed is considered a separate business entity and shall report and pay contributions on wages up to the taxable limit. Any employee who is concurrently employed by more than one employing unit must be reported by each separate employing unit.*

2. As used in this section, “common paymaster” means a business entity that purports to be a single employer of employees who are concurrently employed by a group of related employing units.

Sec. 4. 1. *An employing unit shall not engage in payrolling. Wages must be reported by the employing unit:*

- (a) That has the right to hire and fire the employee;*
- (b) That has the responsibility to control and direct the employee; and*
- (c) For which the employee performs services.*

2. As used in this section, “payrolling” means the practice of designating one employing unit to report the wages of an employee who performs services for another employing unit.

Sec. 5. *In determining whether substantially common ownership, management or control exists between two or more business entities, the Administrator will consider objective factors which may include, without limitation:*

- 1. In determining common ownership:*
 - (a) Whether one business entity has ownership or control over a substantial interest of another business entity;*

- (b) The existence of common ownership of assets necessary to conduct a business enterprise; or*
- (c) The existence of common security or lease arrangements covering assets necessary to conduct a business enterprise, including its workforce.*

2. In determining common management, control by the business entities over:

- (a) Central accounting;*
- (b) Personnel policies;*
- (c) Operating procedures;*
- (d) The financing of business operations;*
- (e) Purchasing;*
- (f) Pricing; or*
- (g) Collections.*

3. In determining common control:

- (a) Whether one or more natural or other persons that control a business enterprise remain in control of the business enterprise after its:*

(1) Acquisition;

(2) Change in form, including, without limitation:

(I) Its change from an individual proprietorship to an association, corporation, estate, limited-liability entity or partnership;

(II) Its change from a partnership to an association, corporation, estate, individual proprietorship or limited-liability entity;

(III) The addition, deletion or change of partners;

(IV) Its change from a limited-liability entity to an association, corporation, estate, individual proprietorship, partnership or to another type of limited-liability entity;

(V) Its change from a corporation to an association, estate, individual proprietorship, limited-liability entity, partnership or to another type of corporation; or

(VI) Any other change from one type of business organization to another type of business organization; or

(3) Transfer to a person with any familial relationship to the transferor; or

(b) Whether there exists a contract pursuant to which the ownership or the stated arrangement of the business enterprise allows or provides for the direction of the internal affairs or conduct of the business enterprise.

Sec. 6. NAC 612.014 is hereby amended to read as follows:

612.014 “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.]~~

Sec. 7. NAC 612.280 is hereby amended to read as follows:

612.280 1. ~~[The]~~ *Transfers of an* 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:~~
~~—(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.~~

~~—(b) The~~ *are mandatory:*

(a) If there is substantially common ownership, management or control between two or more employers and one of the employers transfers all or part of its business, including, without limitation, its workforce, to the other employer.

(b) If 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 if there is no substantially common ownership, management or control between 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 the assets, of an employer;

(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; and

(c) The mutual acquiescence of the predecessor and the successor to the 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.

4. The Administrator may waive the time limit set forth in paragraph (b) of subsection 2 for good cause shown.

Sec. 8. NAC 612.290 is hereby amended to read as follows:

612.290 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 ~~is~~ 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 ~~a change in~~ *an acquisition or change of all or part of a* business organization was effected *solely or* primarily to obtain a more favorable contribution rate. *In determining whether an acquisition was primarily for the purpose of obtaining a lower rate of contributions, the Administrator will use objective factors which may include, without limitation:*

(a) The cost of acquiring the business;

(b) Whether the acquiring person continued the business enterprise of the acquired business;

(c) How long the business enterprise was continued; and

(d) Whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted before the acquisition.

4. A protest to the determination of the Division with respect to transfers must be filed not later than 15 days ~~from~~ *after* the date the notice of the determination is mailed.

~~[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.]~~ *An appeal may be filed within 11 days after the date a determination, based on the protest, is mailed by the Division.*

**NOTICE OF ADOPTION OF PROPOSED REGULATION
LCB File No. R200-05**

The Administrator of the Employment Security Division of the Department of Business and Industry adopted regulations assigned LCB File No. R200-05 which pertain to chapter 612 of the Nevada Administrative Code on January 24, 2006.

Notice date: 11/29/05
Hearing date: 1/24/2006

Date of adoption by agency: 1/24/2006
Filing date: 2/23/2006

INFORMATIONAL STATEMENT

DESCRIPTION OF HOW PUBLIC COMMENT WAS SOLICITED

Public Workshops

The Employment Security Division held a public meeting and workshop on December 14, 2005, at the Grant Sawyer Building, 555 East Washington Avenue, Room 4412, Las Vegas, Nevada, and December 15, 2005, at the Legislative Building, 401 S. Carson Street, Room 2135, Carson City, Nevada in compliance with NRS 233B.061. Both workshops were held to consider proposed amendments and additions to the regulations contained in Nevada Administrative Code Chapter 612. Notice of the meetings was mailed on November 29, 2005, to all individuals on the Employment Security Division mailing list. Notice was posted at the principle office of the Employment Security Division in Carson City, as well as numerous offices of the Employment Security Division throughout the state. Additionally, the notice along a with a copy of the proposed regulations were submitted to the Legislative Counsel Bureau, the Nevada State Library, and all county libraries in the state, and was posted on the Web sites of the Department of Employment, Training and Rehabilitation and the Legislative Counsel Bureau.

A total of eight persons attended the public meeting and workshop in Las Vegas, Nevada, on December 14, 2005, including seven staff members of the Department of Employment, Training and Rehabilitation and the Division's legal counsel. Two staff members testified at the workshop regarding new, amended and repealed regulations. No members of the public or interested parties attended or testified at the meeting. No written comments were received.

A total of six persons attended the public meeting and workshop in Carson City, Nevada, on December 15, 2005, including five staff members of the Department of Employment, Training and Rehabilitation and the Division's legal counsel. Two staff members and the Division's legal counsel testified at the workshop regarding new, amended and repealed regulations. No members of the public or interested parties attended or testified at the meeting. No written comments were received. No written comments were received, however, one verbal comment was received expressing concern over the definition of week not including the word "benefit" since the definition is in reference to claims and not a workweek.

Public Hearing

In compliance with NRS 233B.0603, a public hearing was held on January 24, 2006, at the Legislative Building, 401 S. Carson Street, Room 2135, Carson City, Nevada. The hearing was also video conferenced to the Grant Sawyer Building, 555 East Washington Avenue, Room 4412, Las Vegas, Nevada. A copy of the Notice of Intent to Adopt a Regulation was submitted to the Legislative Counsel Bureau and the Nevada State Library on December 22, 2005, providing at least 30 days notice of the Employment Security Division's intention to adopt the regulations. The notice included a copy of the proposed regulations and contained a statement of the need and purpose of the regulations. It further specified a time and location for a public hearing, at which interested individuals would be given the opportunity to present their views, or to submit any oral or written evidence. Notice of the public hearing was mailed on December 23, 2005, to all individuals on the Employment Security Division mailing list. Notice was posted at the principal office of the Employment Security Division in Carson City, as well as numerous offices of the Employment Security Division throughout the state. Additionally, the notice was submitted to all county libraries in the state, posted on the Department of Employment, Training and Rehabilitation web site, and published in three newspapers.

A total of six persons attended the public hearing. Cynthia A. Jones, Administrator of the Employment Security Division of the Department of Employment, Training, and Rehabilitation, presided over the hearing. Five staff from the Department of Employment, Training and Rehabilitation and the Division's legal counsel attended the meeting. Two staff members provided testimony during the hearing. No members of the public or interested parties attended or testified at the meeting. No written comments were received.

Copies of the minutes from the public workshop and the public hearing, as well as this summary, may be obtained from Joyce Golden, Employment Security Division, 500 East Third Street, Carson City, Nevada 89713, telephone (775) 684-3909, and are also being made available on the Department's web site at <http://www.nvdetr.org>

DESCRIPTION OF HOW COMMENT WAS SOLICITED FROM AFFECTED BUSINESSES

Comment was solicited from affected businesses in the same manner as for the public, as indicated above.

REASON FOR ADOPTION WITHOUT CHANGE

The regulation was adopted without change. The division received one verbal comment, subsequent to the public workshops, regarding NAC 612.016. A suggestion was made to change the term in this section to "benefit week" rather than "week". Even though this chapter of administrative code applies only to unemployment insurance benefits, the commenter felt employers might be confused that this definition meant workweek. After careful consideration, the division has chosen not to accept this suggestion. To do so would be to define a term, being "benefit week," which is not used otherwise in these regulations. Leaving the defined term as "week" results in a consistent and harmonious reading of the regulations governing unemployment insurance as "week" is used throughout as it applies to benefit eligibility.

ESTIMATED ECONOMIC EFFECT

Business which it is to regulate

The economic effect on the unemployment insurance trust fund resulting from the adoption of regulations related to the SUTA Dumping Prevention Act of 2004 and changes in responses from employers on claims for unemployment compensation is unknown.

Beneficial effects

The regulations provide for definitions and outline procedures that either require or prohibit the transfer of experience records between business entities. Additionally, some of the changes clarify existing regulations and revise or repeal processes that have been rendered archaic by the transition to a remote unemployment insurance claim filing process. Also included, are regulations prescribed by Chapter 233B of the Nevada Revised Statutes regarding advisory opinions and declaratory orders issued by the Administrator.

Adverse effects

There are no anticipated adverse immediate or long-term effects on the businesses which the regulations are to regulate.

Immediate and long-term effects

The immediate and long-term beneficial effect is the elimination of the ability of business entities to escape their earned experience record through the practice of "SUTA Dumping" or rate manipulation. Such tax avoidance schemes burden the remainder of the employers with the costs of the program.

Public

Beneficial effects

The regulations associated with the transfer of experience record will help ensure that equity is maintained among the employers that contribute to the unemployment insurance fund.

Adverse effects

There are no anticipated adverse effects upon the public.

Immediate and long-term effects

There are no immediate effects upon the public. The long-term effect is the assurance of a more equitable distribution of costs among employers by eliminating the ability of business entities to manipulate their experience records and avoid unemployment insurance taxes.

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

ESTIMATED COST TO ENFORCE THE REGULATION

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

REGULATIONS OF OTHER STATE OR GOVERNMENT AGENCIES

The proposed regulations do not overlap or duplicate regulations of other state or government agencies.

FEDERAL REGULATIONS

There are no federal regulations that regulate the same activity.

NEW FEE OR INCREASING AN EXISTING FEE

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