

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

LCB File No. R200-05

January 10, 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.*