

HOUSE BILL No. 6319

November 4, 2004, Introduced by Reps. Minore, Bieda and Dennis and referred to the Committee on Employment Relations, Training and Safety.

A bill to amend 1936 (Ex Sess) PA 1, entitled
"Michigan employment security act,"
by amending section 22 (MCL 421.22).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 22. (a) If an employer subject to this act transfers
2 ~~subsequent to June 30, 1954,~~ any of the **employees, payroll,**
3 **trade, inventory, services, or other** assets of ~~his~~ the
4 **employer's** business by any means otherwise than in the ordinary
5 course of trade, ~~such~~ **the** transfer ~~shall be deemed~~ **is** a
6 "transfer of business" for ~~the~~ purposes of this section if the
7 ~~commission~~ **agency** determines **both of the following:**

8 (1) That the transferee is an employer subject to this act on
9 the transfer date, has become ~~so~~ **subject to this act** as of the
10 transfer date under section ~~41(2)(a)~~ **41(2)(a)**, or elects to
11 become subject **to this act** as of the transfer date under section

1 25. ~~;~~ and

2 (2) That the transferee has acquired and used the
3 transferor's trade name or good will, or that the transferee has
4 continued or within 12 months after the transfer resumed all or
5 part of the business of the transferor either in the same
6 establishment or elsewhere.

7 (b) Notwithstanding ~~the provisions of~~ subsection (a), a
8 transfer ~~of assets~~ to a transferee ~~which~~ **that** involves less
9 than ~~75%~~ **10%** of the transferor's **employees, payroll, trade,**
10 **inventory, services, or other** assets, ~~shall not be deemed~~
11 **calculated as the sum of the percentages of each of those**
12 **categories, is not** a transfer of business unless all of the
13 following occur:

14 (1) The ~~commission~~ **agency** is notified of the transfer ~~of~~
15 ~~assets~~ by the transferor or transferee within 30 days after the
16 end of the quarter in which the transfer occurred.

17 (2) The ~~commission~~ **agency** receives, within 30 days after
18 ~~the~~ **its** request, ~~therefor, a~~ written approval by the
19 transferor and transferee of ~~a rating~~ **an experience** account
20 transfer determined in accordance with ~~the provisions of~~
21 subsection (d).

22 (3) In the case of a transferee who elects under section 25
23 to become subject as of the transfer date, the ~~commission~~
24 **agency** receives the election within 30 days after the mailing of
25 a notice of ~~his~~ **the** right to elect.

26 (c) Notwithstanding any other provisions of this section, ~~if~~
27 ~~an~~ **there is a transfer of business if both of the following**

1 conditions are met:

2 (1) An employer subject to this act transfers ~~subsequent to~~
3 ~~December 31, 1973,~~ any of the **employees, payroll, trade,**
4 **inventory, services, or other** assets of ~~his~~ the employer's
5 business, by any means otherwise than in the ordinary course of
6 trade. ~~to any~~

7 (2) **At the time of transfer the** transferee ~~or transferees~~
8 ~~substantially is~~ owned, **managed, operated,** or controlled, in
9 whole or ~~major~~ part, either directly or indirectly by legally
10 enforceable means or otherwise, by the same interest or interests
11 ~~which owned or controlled that own, manage, operate, or control~~
12 the transferor ~~at the time of such transfer, such transfer shall~~
13 ~~be deemed a "transfer of business" for the purposes of this~~
14 ~~section~~ or any of the **employees, payroll, trade, inventory,**
15 **services, or other assets of the transferor.** For purposes of
16 this subdivision, control by the same interest or interests
17 exists if 1 or more persons, entities, or other organizations
18 controlling the transferor remains in control of the transferee
19 or transferees after a transfer of business or a change in the
20 business form. Evidence of control by the same interest or
21 interests may include, but is not limited to, any of the
22 following changes:

23 (i) A change from an individual proprietorship to a
24 corporation, partnership, limited liability company, association,
25 or estate.

26 (ii) A change from a partnership to an individual
27 proprietorship, corporation, limited liability company,

1 association, or estate or the addition or deletion of partners.

2 (iii) A change from a limited liability company to an
3 individual proprietorship, partnership, corporation, association,
4 or estate or to another limited liability company.

5 (iv) A change from a corporation to an individual
6 proprietorship, partnership, limited liability company,
7 association, or estate or to another corporation.

8 (v) A change from any form to another form.

9 (d) Except as provided in subsection (f), if there is a
10 transfer of business, the unemployment experience attributable to
11 the transferred business shall be transferred to, and combined
12 with, the unemployment experience attributable to the employer to
13 which the business is transferred, as follows:

14 (1) ~~-(d)(1)-~~ In the case of a transfer of business, ~~as~~
15 ~~defined in subsections (a), (b), and (c), the commission~~
16 **agency** shall assign the transferor's ~~rating~~ **experience** account,
17 or a pro rata part ~~thereof~~ **of the account**, to the transferee.
18 The ~~commission~~ **agency** shall make ~~such~~ **the** assignment as of
19 the date on which the business ~~was~~ **is** transferred or as of June
20 30 of the year in which the business ~~was~~ **is** transferred,
21 whichever date is earlier. The pro rata part of the transferor's
22 ~~rating~~ **experience** account to be assigned to the transferee
23 shall be determined on the basis of the percentage relationship
24 to the nearest 1/2 of 1% ~~of that~~ the insured payroll for the 4
25 completed calendar quarters immediately ~~prior to~~ **before** the
26 date of transfer properly allocable to the transferred portion of
27 the business ~~—~~ **bears** to the insured payroll for the same period

1 allocable to the entire business of the transferor immediately
 2 ~~prior to~~ **before** the date of the transfer.

3 (2) When the ~~commission~~ **agency** transfers an employer's
 4 ~~rating~~ **experience** account in whole or in part under this
 5 section, it shall also transfer a proportionate share of the
 6 amount of the total wages and wages subject to contributions
 7 under this act paid by the transferor and properly allocable to
 8 the ~~transferred~~ **transfer of** business; and ~~such~~ **the**
 9 transferred account shall be ~~liable to be charged~~ **chargeable**
 10 for all benefit payments based on employment in the business or
 11 portion thereof transferred.

12 (3) In determining whether the transferee ~~is a "qualified~~
 13 ~~employer"~~ **qualifies for a contribution rate that includes a**
 14 **chargeable benefits component** under section 19, the experience of
 15 the transferred account shall be ~~deemed to be~~ **included as** part
 16 of the experience of the transferee's ~~rating~~ **experience**
 17 account. If on the date of the transfer the transferee ~~was a~~
 18 ~~"qualified employer"~~ **qualified for a contribution rate that**
 19 **included a chargeable benefits component** and the transferor ~~was~~
 20 **did not** ~~a "qualified employer"~~ because of the provisions of
 21 section 19(a)(1), the transferee shall not thereby lose ~~his~~ **the**
 22 **qualified** status. ~~as a "qualified employer"~~.

23 (e) In the case of a transfer of business as defined in
 24 subsections (a), (b), and (c) of this section, **contribution rates**
 25 **are determined, as follows:**

26 (1) The rates of contributions applicable to the transferor
 27 and transferee for **the** calendar year ~~subsequent to~~ **after** the

1 calendar year ~~containing~~ **of the** transfer ~~date~~ shall be
 2 respectively determined in accordance with section 19. In case
 3 of a transfer of part of an employer's ~~rating~~ **experience**
 4 account under subsection (d), the rate of contributions
 5 applicable to the transferor and transferee shall not be changed
 6 for the portion of the current calendar year remaining on the
 7 transfer date. In case of a transfer of an employer's entire
 8 ~~rating~~ **experience** account under subsection (d), **all of the**
 9 **following apply:**

10 (i) ~~(a) the~~ **The** transferor shall have no further interest
 11 in the ~~rating~~ **experience** account. ~~—, his~~

12 (ii) **The transferor's** coverage shall be terminated as of the
 13 effective date of the transfer under section ~~24 (b), and if he~~
 14 **24(b).**

15 (iii) **If the transferor** again becomes an employer as defined
 16 in section 41 in the same calendar year in which ~~his~~ coverage
 17 ~~has been thus~~ **is** terminated, ~~his~~ **the transferor's**
 18 contribution rate for the remainder of the calendar year shall be
 19 2.7% as provided in section 19. ~~—; and (b) the~~

20 (iv) **The** rate of contributions applicable to the transferee
 21 shall not be changed for the portion of the current calendar year
 22 remaining on the transfer date.

23 (2) A transferee ~~or transferees, having~~ **that has** no rate of
 24 contributions applicable immediately ~~prior to~~ **before** the
 25 transfer date ~~—~~ shall, beginning with the first day of the
 26 quarter in which the transfer occurs, be assigned the same rate
 27 of contributions ~~which was applicable~~ **that applied** to the

1 transferor on the date of the transfer and a contribution rate of
2 2.7% for any portion of the calendar year ~~prior to~~ **before** the
3 first day of the quarter in which the transfer occurs.

4 (3) ~~Where~~ **If** transfers of businesses simultaneously involve
5 2 or more transferors and a single transferee who has no rate of
6 contributions applicable immediately ~~prior to~~ **before** the
7 transfer date, ~~such~~ **the** transferee shall be assigned a
8 contribution rate beginning ~~with~~ the first day of the quarter
9 in which the transfers occur based upon the ~~rating~~ **experience**
10 account percentage determined by the transferred ~~rating~~
11 **experience** account balances and the total and insured payrolls
12 properly allocable to the transferee as of the date on which the
13 businesses were transferred, or as of June 30 of the year in
14 which the businesses were transferred, whichever is earlier, and
15 a contribution rate of 2.7% for any portion of the calendar year
16 ~~prior to~~ **before** the first day of the quarter in which the
17 transfers occur. If none of the transferors was an employer
18 entitled to an adjusted contribution rate, then a contribution
19 rate of 2.7% shall apply to the transferee for the calendar year
20 in which the transfers occur.

21 (f) An employer shall not transfer employees or payroll to a
22 newly created or existing employer for the sole or primary
23 purpose of obtaining or attempting to obtain a more favorable
24 contribution rate. Failure of an employer to complete a
25 registration report to determine employer liability under this
26 act or failure of an employer to provide accurate and complete
27 information on a registration report to determine employer

1 liability under this act is prima facie evidence of intent to
2 obtain a contribution rate in violation of this subsection. An
3 employer that violates this subsection is subject to the
4 penalties provided in section 54(b). The amount of the penalty
5 or damages for a violation of this subsection shall be calculated
6 based on the greater of the amount of unemployment tax the
7 employer actually avoids or the amount that the employer
8 attempted to avoid for 1 tax year.

9 (g) An individual or business organization shall not assist,
10 advise, or encourage an employer to transfer employees or payroll
11 in violation of subsection (f). An individual or business
12 organization that violates this subsection is subject to the
13 penalties in section 54b.

14 (h) The agency shall promulgate rules to define the
15 circumstances in which there is a presumption that a transfer of
16 employees to another employer is made or attempted with the
17 intent to obtain a lower contribution rate. The rules shall
18 include circumstances that encompass the practices commonly known
19 as "SUTA dumping", "common paymaster", "payrolling", and "captive
20 provider". To the extent consistent with state law, agency rules
21 shall coordinate with federal unemployment tax rules to preserve
22 the full tax credit against the tax imposed by 26 USC 3301 to
23 3311.

24 (i) This section does not require the transfer of an
25 experience account from a client entity to either a temporary
26 help firm or an employee leasing company, as those terms are
27 defined in rule R 421.190 of the Michigan administrative code,

1 when payroll is transferred in the normal course of business from
2 the client entity to the temporary help firm or to the employee
3 leasing company.

4 Enacting section 1. This amendatory act does not take
5 effect unless all of the following bills of the 92nd Legislature
6 are enacted into law:

7 (a) Senate Bill No. _____ or House Bill No. 6316 (request
8 no. 07154'04).

9 (b) Senate Bill No. _____ or House Bill No. 6317 (request
10 no. 07155'04).

11 (c) Senate Bill No. _____ or House Bill No. 6318 (request
12 no. 07156'04).

13 (d) Senate Bill No. _____ or House Bill No. 6320 (request
14 no. 07158'04).