

**STATEMENT TO THE MICHIGAN HOUSE OF REPRESENTATIVES STANDING
COMMITTEE ON COMMERCE – HOUSE BILL 4951**

October 21, 2009

Good Morning. My name is Richard Hooker; I am an attorney and partner with the law firm Varnum, LLP. I and my law firm have represented and/or do represent thousands of Michigan business entities, each of which pays taxes into Michigan's Unemployment Insurance System.

I personally have had the great privilege of serving many of those clients in appeals from Unemployment Agency Tax Rate Calculations and other tax-related Determinations and Notices of Assessment. Each one of those appeals, regardless of the issue involved, has ended in one of three results: 1) the additional tax determined by the Agency was correct and owed; 2) the amount determined by the Agency was incorrect and a lesser amount was owed; or 3) the Agency's Determination was incorrect altogether and no amount of additional tax was owed. No matter the result, however, not one of our clients was required to pay a dime of additional taxes based on the Agency's underlying Determination until the appeal was finally adjudicated.

In the past 4 years, the Agency has sought to add a new arrow to its quiver of remedies in tax liability cases: forced consolidation of separately established, maintained and operated employer entities simply because of common ownership and business purpose. In doing so, the Agency has conveniently ignored the fact its statutory authorization to consolidate on this basis was specifically and consciously stripped from Section 41 of the Act in 1955, and it has effectively turned Michigan corporations law on its head. These, however, are arguments perhaps better suited for Michigan's appellate bodies and courts, than they are for the legislature.¹

What is appropriate for the legislature, we submit, is at very least that portion of H.B. 4951 that would prevent the Agency from unilaterally collapsing and consolidating the accounts of separately established and maintained corporate entities until final adjudication of its underlying Determinations has occurred.

For the past several years, in industries ranging from agriculture, to car dealerships, to employee leasing and staffing firms, the Agency has not simply determined that commonly owned, but separately established corporate entities should be consolidated for UI purposes, it has actually proceeded to do so unilaterally during the pendency of the employers' challenges to those very actions. So much for due process of law!

The first significant problem this creates for the involved employer entities results from the fact the Agency has complete control over the time in which an appeal from a Determination is re-determined, and complete control over the time in which an appeal from a Redetermination is referred to the State Office of Administrative Hearings and Rules. You have already heard testimony from one of our clients who has been waiting over 4 years for their appeals to even be heard by an Administrative Law Judge, let alone finally adjudicated. And they are not alone. In

the meantime, of course, the Agency has proceeded unilaterally to collapse and consolidate multiple employer entities, creating administrative chaos and a complete mismatch between the employers' financial records and the various Tax notices received from the Agency.

The second significant problem this creates arises from the fact the employers are typically faced with either acceding to this unilateral consolidation and paying the extra taxes pending outcome of the appeal or, as is their right under the UI Act, continuing to pay in to the Trust Fund as separate employers at their last lawfully determined rates. The former is, in most cases, a death sentence for the employers financially. The latter, though seemingly acceptable, in turn gives rise to a whole new set of perils, including:

- Collection notices and notices of intent to levy from the Agency, in spite of the employers' appeal, that the Agency claims are computer-generated and cannot be stopped;
- Notices from the IRS that the employers' FUTA credits for state unemployment taxes paid is being denied, due to the Agency's failure to certify to the federal government that all legally required taxes have been paid...even though they have;
- Inability on the part of employees laid off from the employer entities to collect unemployment benefits to which they are otherwise lawfully entitled, because according to the Agency, their employer doesn't exist; and
- Insecurity and reluctance from the employers' commercial lenders, sometimes even the outright calling of commercial notes, a problem that has only gotten worse in a down economy and an environment rapidly filling with failed lending institutions.

Surely, the more correct, just and in line with fundamental due process answer is to tell the Agency, "You cannot do this [consolidate unilaterally] until there has been a final adjudication ordering it." That is in large measure what Michigan employers seek from you in H.B. 4951.

I am advised the Agency and other constituencies have attempted to deter you from this course with such claims as, "It will allow SUTA Dumping," "It will allow bad employers to game the system and harm the UI Trust Fund," and "It will take our statute and UI system out of conformity and compliance with federal requirements." To all of these, I say "Nonsense."

First, the Agency and these constituencies use a brush that is far too broad. You have already heard from at least two employer groups who have been victimized by unilateral consolidation. They're not "bad" employers. On the contrary, they're great employers who find or create jobs for thousands of people, and we are honored to be associated with them.

Second, if an employer or group of employers is gaming the system or involving itself in a SUTA Dumping scheme, go after them using the tools given the Agency and the Attorney General by the legislature in 2005. Those tools are effective, but they require the Agency and the Attorneys General to actually work at enforcement. If those entities are indeed found to be "bad employers" in either respect, remedy their wrongs and assess them the taxes they rightfully owe. And lest the Agency claim that the enforcement process is too slow, allow me to remind

the Committee it is the Agency and the Attorneys General who control not just one, but two key speed components of the appeal process.

Finally, as for any claims of non-conformity or non-compliance with federal requirements, there is no requirement in any federal law, be it the Federal Unemployment Tax Act, the Social Security Act or the SUTA Dumping Prevention Act of 2004, that commonly owned, but separately established and maintained corporate entities be consolidated under any circumstances, let alone during the pendency of a lawful appeal.

In short, these arguments are smokescreens behind which the Agency and these other constituencies hide their real reasons for opposing H.B. 4951: their political disdain for certain industries which are not to their liking and a general lack of resolve to aggressively enforce existing law using the tools that are already there.

H.B. 4951, particularly as it relates to unilateral consolidation of entities before a final adjudication of the underlying issues, promotes nothing more than fundamental fairness and due process of law. Now, of all times, is not the time to be allowing by inaction the use of such employer-unfriendly and outright unjust weapons.

Thank you.

¹ The Agency erroneously relies on Section 40 of the Act in ordering separate entities consolidated. Section 40 deals only with *individual* employing entities having 2 or more different locations in the state, and the employee status of individuals hired by the employee or agent of a reporting employer to perform the work of that employer. Neither situation is present in the Agency consolidation actions we bring before you today. Section 40, therefore, does not vest the Agency with the power to consolidate separate entities merely because they share ownership interests and business purpose.

We are also advised the Agency has claimed the decisions on consolidation have "gone both ways." To date, we are aware of only two administrative rulings, each by the same Administrative Law Judge, in which the Agency's order to consolidate has been upheld. Both are on appeal to the MES Board of Review. To our knowledge, every other ALJ who has considered the issue has either expressly or impliedly rejected the Agency's authority to do so.