

## CHAPTER 155

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**LABOR AND INDUSTRY**

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**HOUSE BILL 05-1092**

BY REPRESENTATIVE(S) Solano, Borodkin, Carroll M., Cerbo, Coleman, Garcia, Hodge, Marshall, McGihon, Pommer, Ragsdale, and Vigil;  
also SENATOR(S) Takis.

**AN ACT**

**CONCERNING MODIFICATIONS TO THE METHOD OF DETERMINING THE UNEMPLOYMENT INSURANCE TAX RATE OF AN ENTITY THAT ACQUIRES AN EMPLOYER'S BUSINESS FOR PURPOSES OF COMPLYING WITH THE FEDERAL "SUTA DUMPING PREVENTION ACT OF 2004".**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 8-76-104, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

**8-76-104. Transfer of experience - assignment of rates.** (1) (a) AN EMPLOYING UNIT, AS DEFINED IN SECTION 8-70-113 (1) (f), THAT BECOMES AN EMPLOYER BECAUSE IT ACQUIRES ALL OF THE ORGANIZATION, TRADE, OR BUSINESS OR SUBSTANTIALLY ALL OF THE ASSETS OF ONE OR MORE EMPLOYERS SUBJECT TO ARTICLES 70 TO 82 OF THIS TITLE SHALL SUCCEED TO THE ENTIRE EXPERIENCE RATING RECORD OF THE PREDECESSOR EMPLOYER, AND THE ENTIRE SEPARATE ACCOUNT, INCLUDING THE ACTUAL TAXES, BENEFITS, AND PAYROLL EXPERIENCE OF THE PREDECESSOR EMPLOYER, SHALL PASS TO THE SUCCESSOR FOR THE PURPOSE OF DETERMINING THE RATE OF TAXES FOR THE SUCCESSOR.

(b) IF THE SUCCESSOR WAS NOT AN EMPLOYER PRIOR TO THE DATE OF ACQUISITION, THE SUCCESSOR'S RATE SHALL BE THE RATE APPLICABLE TO THE PREDECESSOR EMPLOYER IN THE PERIOD IMMEDIATELY PRECEDING THE DATE OF ACQUISITION IF THERE WAS ONLY ONE PREDECESSOR OR IF THERE WERE MULTIPLE PREDECESSORS WITH IDENTICAL RATES. IF THERE WERE MULTIPLE PREDECESSOR EMPLOYERS WITH RATES THAT WERE NOT IDENTICAL, THE SUCCESSOR'S RATE SHALL BE THE HIGHEST RATE APPLICABLE TO ANY OF THE PREDECESSOR EMPLOYERS IN THE PERIOD IMMEDIATELY PRECEDING THE DATE OF ACQUISITION.

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

(c) IF, AT THE TIME OF TRANSFER, A PERSON WHO IS NOT AN EMPLOYER UNDER THIS SECTION ACQUIRES THE TRADE OR BUSINESS OF AN EMPLOYER AND THE DIVISION FINDS THAT THE SUCCESSOR ACQUIRED THE TRADE OR BUSINESS SOLELY OR PRIMARILY FOR THE PURPOSE OF OBTAINING A LOWER RATE OF CONTRIBUTIONS, THE UNEMPLOYMENT EXPERIENCE OF THE PREDECESSOR EMPLOYER SHALL NOT BE TRANSFERRED TO THE SUCCESSOR AND THE DIVISION SHALL ASSIGN THE SUCCESSOR THE APPLICABLE NEW EMPLOYER RATE DETERMINED PURSUANT TO SECTION 8-76-103 (3).

(2) (a) NOTWITHSTANDING ANY OTHER PROVISION OF SECTIONS 8-76-101 TO 8-76-104, IF THE SUCCESSOR EMPLOYER WAS AN EMPLOYER SUBJECT TO ARTICLES 70 TO 82 OF THIS TITLE PRIOR TO THE DATE OF ACQUISITION AND, AT THE TIME OF THE TRANSFER, THERE IS NO SUBSTANTIAL COMMON OWNERSHIP, MANAGEMENT, OR CONTROL OF THE TWO EMPLOYERS, THE SUCCESSOR'S RATE OF TAX FOR THE REMAINDER OF THE CALENDAR YEAR SHALL BE THE SAME AS THE SUCCESSOR'S RATE IN THE PERIOD IMMEDIATELY PRECEDING THE DATE OF ACQUISITION.

(b) IF AN EMPLOYER TRANSFERS ALL OR A PORTION OF ITS TRADE OR BUSINESS TO ANOTHER EMPLOYER AND, AT THE TIME OF THE TRANSFER, THERE IS SUBSTANTIALLY COMMON OWNERSHIP, MANAGEMENT, OR CONTROL OF THE TWO EMPLOYERS, THE UNEMPLOYMENT EXPERIENCE ATTRIBUTABLE TO THE PREDECESSOR EMPLOYER SHALL BE TRANSFERRED TO THE SUCCESSOR EMPLOYER. THE RATES OF BOTH EMPLOYERS SHALL BE RECALCULATED AND MADE EFFECTIVE IMMEDIATELY UPON THE DATE OF THE TRANSFER OF THE TRADE OR BUSINESS. IF, FOLLOWING A TRANSFER EXPERIENCE, THE DIVISION DETERMINES THAT THE PURPOSE OF THE TRANSFER OF THE TRADE OR BUSINESS WAS SOLELY OR PRIMARILY TO OBTAIN A REDUCED LIABILITY FOR CONTRIBUTIONS, THE DIVISION SHALL COMBINE THE EXPERIENCE RATING ACCOUNTS OF THE EMPLOYERS INTO A SINGLE ACCOUNT AND SHALL ASSIGN A SINGLE RATE TO THE ACCOUNT.

(c) IF AN EMPLOYER TRANSFERS ALL OR A PORTION OF ITS TRADE OR BUSINESS TO ANOTHER EMPLOYER AND THE DIVISION FINDS THAT THE SUCCESSOR ACQUIRED THE TRADE OR BUSINESS SOLELY OR PRIMARILY FOR THE PURPOSE OF OBTAINING A LOWER RATE OF CONTRIBUTIONS, THE EXPERIENCE AND RESERVE ACCOUNT ATTRIBUTABLE TO THE PREDECESSOR EMPLOYER SHALL NOT BE TRANSFERRED TO THE SUCCESSOR EMPLOYER AND SHALL REVERT TO THE PREDECESSOR EMPLOYER.

(3) (a) WHENEVER AN EMPLOYER IN ANY MANNER TRANSFERS A CLEARLY SEGREGABLE UNIT OF THE EMPLOYER'S BUSINESS FOR WHICH THE PREDECESSOR EMPLOYER HAS MAINTAINED, IN SUCH FORM AS TO BE SEPARABLE, CONTINUOUS RECORDS OF WAGES, TAXES, AND BENEFITS PAID ON ACCOUNT OF THE SEGREGABLE UNIT, THE PREDECESSOR EMPLOYER AND SUCCESSOR EMPLOYER MAY JOINTLY REQUEST THAT THE DIVISION TRANSFER A PROPORTIONATE SHARE OF TAX, BENEFIT, AND PAYROLL EXPERIENCE ATTRIBUTABLE TO THE UNIT BASED ON THE RATIO OF THE TAXABLE PAYROLLS PAID DURING THE TWELVE CALENDAR QUARTERS IMMEDIATELY PRECEDING THE COMPUTATION DATE OF THE SEGREGABLE UNIT TO THE TOTAL EMPLOYER ACCOUNT PRIOR TO THE NOTICE TO THE DIVISION OF THE TRANSFER. A TRANSFER OF EXPERIENCE MAY NOT BE MADE UNDER THIS SUBSECTION (3) UNLESS THE SEGREGABLE UNIT HAS FOURTEEN CONSECUTIVE QUARTERS OF PAYROLL IMMEDIATELY PRECEDING THE COMPUTATION DATE. IF, AT THE TIME OF THE TRANSFER, THERE IS SUBSTANTIALLY COMMON OWNERSHIP, MANAGEMENT, OR

CONTROL OF THE TWO EMPLOYERS, THE UNEMPLOYMENT EXPERIENCE ATTRIBUTABLE TO THE PREDECESSOR EMPLOYER SHALL BE TRANSFERRED TO THE SUCCESSOR EMPLOYER. THE RATES OF BOTH EMPLOYERS SHALL BE RECALCULATED AND MADE EFFECTIVE IMMEDIATELY UPON THE DATE OF THE TRANSFER OF THE TRADE OR BUSINESS.

(b) THE DIVISION MAY TRANSFER THE EXPERIENCE AND PERFORM ALL OTHER ACTS REQUIRED BY THIS SUBSECTION (3). THE PROPORTIONATE SHARE OF THE PREDECESSOR EMPLOYER'S RESERVE ACCOUNT ATTRIBUTABLE TO THE TRANSFERRED UNIT SHALL PASS TO THE SUCCESSOR EMPLOYER.

(c) THE EXPERIENCE RATE ESTABLISHED FOR THE PREDECESSOR EMPLOYER FOR ALL UNITS OF THE BUSINESS SHALL CONTINUE IN EFFECT FOR THE REMAINDER OF THE CALENDAR YEAR IN WHICH THE TRANSFER IS MADE, AND, FOR SUCCEEDING CALENDAR YEARS, IT SHALL BE COMPUTED ON THE EXPERIENCE OF THOSE UNITS RETAINED.

(d) IF THE SUCCESSOR WAS AN EMPLOYER PRIOR TO THE EFFECTIVE DATE OF THE TRANSFER, THE EXPERIENCE RATE FOR THE CALENDAR YEAR IN WHICH THE TRANSFER IS MADE SHALL BE THE SAME AS THAT PREVIOUSLY ESTABLISHED WITHOUT REFERENCE TO THE ACQUIRED SEGREGABLE UNIT, AND, FOR SUCCEEDING CALENDAR YEARS, IT SHALL BE COMPUTED ON THE COMBINED EXPERIENCE OF ALL UNITS OF THE SUCCESSOR'S BUSINESS.

(e) IF THE SUCCESSOR WAS NOT AN EMPLOYER PRIOR TO THE EFFECTIVE DATE OF TRANSFER AND TWO OR MORE SEGREGABLE UNITS ARE SIMULTANEOUSLY TRANSFERRED TO THE SUCCESSOR BY A SINGLE EMPLOYER, THE SUCCESSOR'S TAX RATE SHALL BE COMPUTED FROM THE COMBINED TAX, BENEFIT, AND PAYROLL EXPERIENCE OF THE UNITS.

(f) IF THE SUCCESSOR WAS NOT AN EMPLOYER PRIOR TO THE EFFECTIVE DATE OF TRANSFER AND TWO OR MORE SEGREGABLE UNITS ARE SIMULTANEOUSLY TRANSFERRED TO THE SUCCESSOR BY DIFFERENT EMPLOYERS, THE SUCCESSOR'S TAX RATE SHALL BE THE HIGHEST RATE APPLICABLE TO ANY OF THE UNITS UNLESS THE RATES WITH RESPECT TO THE TRANSFERRED UNITS ARE IDENTICAL.

(g) THE TRANSFER OF EXPERIENCE WITH RESPECT TO A SEGREGABLE UNIT SHALL BE OF NO FORCE AND EFFECT UNLESS AN APPLICATION FOR THE TRANSFER, SIGNED BY BOTH THE PREDECESSOR EMPLOYER AND THE SUCCESSOR EMPLOYER, IS FILED WITH THE DIVISION IN THE FORM AND MANNER PRESCRIBED BY THE DIRECTOR BY RULE. THE APPLICATION SHALL BE FILED WITHIN SIXTY DAYS AFTER THE NOTICE OF EMPLOYER LIABILITY FROM THE DIVISION IS MAILED OR TRANSMITTED BY ELECTRONIC MEANS TO THE SUCCESSOR EMPLOYER. THE NOTICE SHALL CONTAIN INFORMATION PERTAINING TO SEGREGABLE UNIT TRANSFERS.

(h) WHENEVER A PREDECESSOR EMPLOYER AND A SUCCESSOR EMPLOYER JOINTLY REQUEST THAT THE DIVISION TRANSFER THE PROPORTIONATE SHARE OF TAX, BENEFIT, AND PAYROLL EXPERIENCE ATTRIBUTABLE TO A CLEARLY SEGREGABLE UNIT TO THE SUCCESSOR EMPLOYER, THE PREDECESSOR EMPLOYER SHALL FURNISH TO THE DIVISION ANY INFORMATION REQUESTED BY THE DIVISION FOR SUCH PURPOSE.

(4)(a) IN DETERMINING WHETHER THE TRADE OR BUSINESS WAS ACQUIRED SOLELY

OR PRIMARILY FOR THE PURPOSE OF OBTAINING A LOWER RATE OF CONTRIBUTIONS, THE DIVISION SHALL USE OBJECTIVE FACTORS THAT MAY INCLUDE, WITHOUT LIMITATION, THE COST OF ACQUIRING THE TRADE OR BUSINESS, WHETHER AND FOR HOW LONG THE SUCCESSOR CONTINUED THE BUSINESS ENTERPRISE OF THE ACQUIRED TRADE OR BUSINESS, AND WHETHER A SUBSTANTIAL NUMBER OF NEW EMPLOYEES WERE HIRED FOR PERFORMANCE OF DUTIES UNRELATED TO THE BUSINESS ACTIVITY CONDUCTED PRIOR TO THE ACQUISITION.

(b) THE DIVISION MAY VOID A RATE DETERMINATION IF IT FINDS THAT A SUCCESSOR HAS NO BUSINESS EXISTENCE SEPARATE AND APART FROM THE PREDECESSOR AND SHOULD NOT HAVE BEEN ESTABLISHED AS A SEPARATE EMPLOYER FOR UNEMPLOYMENT COMPENSATION PURPOSES. UNDER THE CIRCUMSTANCES DESCRIBED IN THIS PARAGRAPH (b), THE EXPERIENCE AND RESERVE ACCOUNT ATTRIBUTABLE TO THE PREDECESSOR EMPLOYER SHALL NOT BE TRANSFERRED TO THE SUCCESSOR EMPLOYER AND SHALL REVERT TO THE PREDECESSOR EMPLOYER.

(5) WHEN DETERMINING WHETHER ONE OR MORE EMPLOYERS HAVE COMMON OWNERSHIP, MANAGEMENT, OR CONTROL, THE DIVISION MAY CONSIDER FACTORS SUCH AS STOCK OWNERSHIP, OFFICERS, EMPLOYEES, PAYROLL SYSTEMS, AND COMMON BUSINESS INTERESTS.

(6) THE DIVISION SHALL ESTABLISH PROCEDURES TO IDENTIFY THE TRANSFER OR ACQUISITION OF A BUSINESS OR TRADE FOR PURPOSES OF THIS SECTION.

(7) NOTWITHSTANDING ANY PROVISION OF SECTION 8-70-113 TO THE CONTRARY, ANY SUBJECT EMPLOYER WHOSE ENTIRE RESERVE ACCOUNT HAS BEEN TRANSFERRED TO A SUCCESSOR EMPLOYER, AS PROVIDED IN SUBSECTION (1) OF THIS SECTION, SHALL IMMEDIATELY CEASE TO BE A SUBJECT EMPLOYER AND SHALL THEREAFTER BECOME A SUBJECT EMPLOYER ONLY UPON ANY FUTURE EMPLOYMENT EXPERIENCE.

(8) A TRANSFER OF EXPERIENCE SHALL NOT OCCUR WHEN A WORK-SITE EMPLOYER'S ACCOUNT IS MADE INACTIVE AS A RESULT OF ENTERING INTO A CONTRACT WITH AN EMPLOYEE LEASING COMPANY, AS DEFINED IN SECTION 8-70-114 (2), OR WHEN A CONTRACT BETWEEN A WORK-SITE EMPLOYER AND AN EMPLOYEE LEASING COMPANY IS TERMINATED.

(9) WHEN ANY PART OF THE PREDECESSOR EMPLOYER'S TRADE OR BUSINESS UTILIZES THE SERVICES OF NINETY PERCENT OR MORE OF THE TOTAL NUMBER OF EMPLOYEES IN COVERED EMPLOYMENT ON THE PAYROLL FOR EACH OF THE FOUR PAY PERIODS IMMEDIATELY PRECEDING THE TRANSFER TO A SUCCESSOR EMPLOYER, THE ENTIRE SEPARATE ACCOUNT, INCLUDING THE ACTUAL TAX, BENEFIT, AND PAYROLL EXPERIENCE OF THE PREDECESSOR EMPLOYER, SHALL PASS TO THE SUCCESSOR EMPLOYER FOR THE PURPOSE OF THE RATE OF COMPUTATION OF THE SUCCESSOR.

(10) (a) IF A PERSON KNOWINGLY VIOLATES OR ATTEMPTS TO VIOLATE ANY PROVISION OF THIS SECTION IN ORDER TO OBTAIN A LOWER CONTRIBUTION RATE, THE PERSON SHALL PAY ALL OWED TAXES WITH APPLICABLE PENALTIES AND INTEREST AND MAY BE SUBJECT TO THE PENALTIES SET FORTH IN PARAGRAPH (c) OF THIS SUBSECTION (10).

(b) IF A PERSON KNOWINGLY ADVISES ANOTHER PERSON IN A WAY THAT RESULTS

IN A VIOLATION OF PARAGRAPH (a) OF THIS SUBSECTION (10), THE PERSON MAY BE SUBJECT TO THE PENALTIES SET FORTH IN PARAGRAPH (c) OF THIS SUBSECTION (10).

(c) IF THE PERSON WHO VIOLATES THIS SECTION AS DESCRIBED IN PARAGRAPH (a) OR (b) OF THIS SUBSECTION (10) IS AN EMPLOYER, THE DIVISION MAY ASSIGN THE EMPLOYER THE HIGHEST CONTRIBUTION RATE ASSIGNABLE UNDER THIS ARTICLE FOR THE RATE YEAR DURING WHICH THE VIOLATION OR ATTEMPTED VIOLATION OCCURRED AND THE NEXT THREE YEARS. IF, DURING THE RATE YEAR IN WHICH A VIOLATION OCCURS, THE SUBJECT EMPLOYER WAS ASSIGNED THE HIGHEST CONTRIBUTION RATE, OR THE AMOUNT OF THE RATE INCREASE WOULD BE LESS THAN TWO AND SEVEN-TENTHS PERCENT FOR THE RATE YEAR, THE DIVISION MAY IMPOSE A PENALTY CONTRIBUTION RATE OF TWO AND SEVEN-TENTHS PERCENT OF TAXABLE WAGES FOR THAT RATE YEAR AND THE NEXT THREE YEARS. IF THE PERSON IS NOT AN EMPLOYER, THE PERSON MAY BE SUBJECT TO A CIVIL FINE OF NOT MORE THAN FIVE THOUSAND DOLLARS, WHICH SHALL BE DEPOSITED IN THE UNEMPLOYMENT REVENUE FUND CREATED IN SECTION 8-77-106.

(d) IN ADDITION TO ANY PENALTY IMPOSED PURSUANT TO PARAGRAPHS (a), (b), AND (c) OF THIS SUBSECTION (10), ANY VIOLATION OF THIS SECTION MAY BE PROSECUTED AS A CLASS 1 MISDEMEANOR PURSUANT TO SECTION 18-1.3-501, C.R.S.

(11) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "KNOWINGLY" OR "WILLFULLY" MEANS BEING AWARE THAT ONE'S CONDUCT IS PRACTICALLY CERTAIN TO CAUSE THE RESULT OR HAVING RECKLESS DISREGARD FOR THE PROHIBITION INVOLVED.

(b) "PERSON" MEANS ANY INDIVIDUAL, TRUST, ESTATE, PARTNERSHIP, ASSOCIATION, COMPANY, CORPORATION, JOINT VENTURE, LIMITED LIABILITY COMPANY, OR OTHER LEGAL OR COMMERCIAL ENTITY.

(c) "TRADE" OR "BUSINESS" INCLUDES AN EMPLOYER'S WORK FORCE.

(d) "VIOLATES OR ATTEMPTS TO VIOLATE" INCLUDES, BUT IS NOT LIMITED TO, INTENT TO EVADE, MISREPRESENTATION, OR WILLFUL NONDISCLOSURE.

**SECTION 2. Effective date - applicability.** This act shall take effect July 1, 2005, and shall apply to acquisitions and transfers occurring on or after January 1, 2006.

**SECTION 3. Safety clause.** The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Approved: May 25, 2005