

IC 22-4-11.5

Chapter 11.5. Assignment of Employer Contribution Rates and Transfers of Employer Experience Accounts

IC 22-4-11.5-1

Applicability

Sec. 1. Notwithstanding any other provision of this article, this chapter applies to the assignment of contribution rates and transfers of employer experience accounts after December 31, 2005.

As added by P.L.98-2005, SEC.9.

IC 22-4-11.5-2

"Administrative law judge"

Sec. 2. As used in this chapter, "administrative law judge" means a person employed by the commissioner under IC 22-4-17-4.

As added by P.L.98-2005, SEC.9. Amended by P.L.108-2006, SEC.16.

IC 22-4-11.5-3

"Person"

Sec. 3. As used in this chapter, "person" has the meaning set forth in section 7701(a)(1) of the Internal Revenue Code.

As added by P.L.98-2005, SEC.9.

IC 22-4-11.5-4

"Trade or business"

Sec. 4. As used in this chapter, "trade or business" includes an employer's workforce.

As added by P.L.98-2005, SEC.9.

IC 22-4-11.5-5

"Violates or attempts to violate"

Sec. 5. As used in this chapter, "violates or attempts to violate" includes the intent to evade a higher employer contribution rate in connection with a transfer of a trade or business through misrepresentation or willful nondisclosure of information relevant to the transfer.

As added by P.L.98-2005, SEC.9. Amended by P.L.108-2006, SEC.17.

IC 22-4-11.5-6

"Knowingly"; "recklessly"

Sec. 6. As used in this chapter:

(1) "knowingly" has the meaning set forth in IC 35-41-2-2(b);
and

(2) "recklessly" has the meaning set forth in IC 35-41-2-2(c).

As added by P.L.98-2005, SEC.9.

IC 22-4-11.5-7

Transferring all or part of trade or business; successor employers

with substantially common ownership, management, or control

Sec. 7. (a) This section applies to a transfer of a trade or business that meets the following requirements:

(1) An employer transfers all or a portion of the employer's trade or business to another employer.

(2) At the time of the transfer, the two (2) employers have substantially common ownership, management, or control.

(b) The successor employer shall assume the experience account balance of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the transfer.

(c) The contribution rates of both employers shall be recalculated, and the recalculated rate made effective on the effective date of the transfer described in subsection (a).

(d) The payroll of the predecessor employer on the effective date of the transfer, and the benefits chargeable to the predecessor employer's original experience account after the effective date of the transfer, must be divided between the predecessor employer and the successor employer in accordance with rules adopted by the department under IC 4-22-2.

(e) Any written determination made by the department is conclusive and binding on both the predecessor employer and the successor employer unless one (1) employer files or both employers file a written protest with the department setting forth all reasons for the protest. A protest under this section must be filed not later than fifteen (15) days after the date the department sends the initial determination to the employers. The protest shall be heard and determined under this section and IC 22-4-32-1 through IC 22-4-32-15. The predecessor employer, the successor employer, and the department shall be parties to the hearing before the liability administrative law judge and are entitled to receive copies of all pleadings and the decision.

As added by P.L.98-2005, SEC.9. Amended by P.L.108-2006, SEC.18.

IC 22-4-11.5-8

Transfers solely to obtain lower employer contribution rate

Sec. 8. (a) If the department determines that an employing unit or other person that is not an employer under IC 22-4-7 at the time of the acquisition has acquired an employer's trade or business solely or primarily for the purpose of obtaining a lower employer contribution rate, the employing unit or other person:

(1) may not assume the experience account balance of the predecessor employer for the resources and liabilities of the predecessor employer's experience account that are attributable to the acquisition; and

(2) shall pay the applicable contribution rate as determined under this article.

(b) In determining whether an employing unit or other person acquired a trade or business solely or primarily for the purpose of

obtaining a lower employer contribution rate under subsection (a), the department shall consider the following factors:

- (1) The cost of acquiring the trade or business.
- (2) Whether the employing unit or other person continued the business enterprise of the acquired trade or business, including whether the predecessor employer is no longer performing the same trade or business and the trade or business is performed by the employing unit to whom the workforce is transferred. An employing unit is considered to continue the business enterprise if any one (1) of the following applies:

- (A) The predecessor employer and the employing unit are corporations that are members of a "controlled group of corporations", as defined in Section 1563 of the Internal Revenue Code (generally parent-subsidary or brother-sister controlled groups), or would be members if Section 1563(a)(4) and 1563(b) of the Internal Revenue Code did not apply and if the phrase "more than fifty percent (50%)" were substituted for the phrase "at least eighty percent (80%)" wherever it appears in Section 1563(a) of the Internal Revenue Code.

- (B) The predecessor employer and the employing unit are entities that are part of an affiliated group, as defined in Section 1504 of the Internal Revenue Code, except that the ownership percentage in Section 1504(a)(2) of the Internal Revenue Code shall be determined using fifty percent (50%) instead of eighty percent (80%).

- (C) A predecessor employer and an employing unit are entities that do not issue stock, either fifty percent (50%) or more of the members of one (1) entity's board of directors (or other governing body) are members of the other entity's board of directors (or other governing body), or the holders of fifty percent (50%) or more of the voting power to select these members are concurrently the holders of fifty percent (50%) or more of that power with respect to the other entity.

- (D) Fifty percent (50%) or more of one (1) entity's officers are concurrently officers of the other entity.

- (E) Thirty percent (30%) or more of one (1) entity's employees are concurrently employees of the other entity.

- (3) The length of time the employing unit or other person continued the business enterprise of the acquired trade or business.

- (4) Whether a substantial number of new employees were hired to perform duties unrelated to the business enterprise that the trade or business conducted before the trade or business was acquired.

- (5) Whether the predecessor employer and the employing unit are united by factors of control, operation, or use.

- (6) Whether a new employing unit is being created solely to obtain a lower contribution rate.

- (c) Any written determination made by the department is

conclusive and binding on the employing unit or other person, unless the employing unit or other person files a written protest with the department setting forth all reasons for the protest. A protest under this section must be filed not later than fifteen (15) days after the date the department sends the initial determination to the employing unit or other person. The protest shall be heard and determined under this section and IC 22-4-32-1 through IC 22-4-32-15. The department and the employing unit or other person shall be parties to the hearing before the liability administrative law judge and are entitled to receive copies of all pleadings and the decision.

As added by P.L.98-2005, SEC.9. Amended by P.L.108-2006, SEC.19; P.L.175-2009, SEC.16.

IC 22-4-11.5-9

Violation of chapter; civil penalties

Sec. 9. (a) A person who knowingly or recklessly:

- (1) violates or attempts to violate:
 - (A) section 7 or 8 of this chapter; or
 - (B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate; or
- (2) advises another person in a way that results in a violation of:
 - (A) section 7 or 8 of this chapter; or
 - (B) any other provision of this article related to determining the assumption or assignment of an employer's contribution rate;

is subject to a civil penalty under this chapter.

(b) If the department determines that an employer (as defined under IC 22-4-7) is subject to a civil penalty under subsection (a)(1), the department shall assign an employer contribution rate equal to one (1) of the following as a civil penalty:

- (1) The highest employer contribution rate assignable under this article for the year in which the violation occurred and the following three (3) years.
- (2) An additional employer contribution rate of two percent (2%) of the employer's taxable wages (as defined in IC 22-4-4-2) for the year in which the violation occurred and the following three (3) years, if:
 - (A) an employer is already paying the highest employer contribution rate at the time of the violation; or
 - (B) the increase in the contribution rate described in subdivision (1) is less than two percent (2%).

(c) If the department determines that a person who is not an employer (as defined in IC 22-4-7) is subject to a civil penalty under subsection (a)(2), the department shall assess a civil penalty of not more than five thousand dollars (\$5,000).

(d) All civil penalties collected under this section shall be deposited in the unemployment insurance benefit fund established by IC 22-4-26-1.

(e) Any written determination made by the department is

conclusive and binding on the employing unit, employer, or person unless the employing unit, employer, or person files a written protest with the department setting forth all reasons for the protest. A protest under this section must be filed not later than fifteen (15) days after the date the department sends the initial determination to the employing unit, employer, or person. The protest shall be heard and determined under this section and IC 22-4-32-1 through IC 22-4-32-15. The employing unit, employer, or person, and the department shall be parties to the hearing before the liability administrative law judge and are entitled to receive copies of all pleadings and the decision.

As added by P.L.98-2005, SEC.9. Amended by P.L.108-2006, SEC.20.

IC 22-4-11.5-10

Violation of chapter; Class C misdemeanor

Sec. 10. In addition to any other penalty imposed, a person who knowingly, recklessly, or intentionally violates this chapter commits a Class C misdemeanor.

As added by P.L.98-2005, SEC.9. Amended by P.L.1-2006, SEC.342; P.L.108-2006, SEC.21.

IC 22-4-11.5-11

Commissioner procedures to identify violators; applicability of federal Department of Labor regulations

Sec. 11. (a) The commissioner shall establish procedures to identify the transfer or acquisition of a business for purposes of this chapter.

(b) The interpretation and application of this chapter must meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.

As added by P.L.98-2005, SEC.9.