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**SUBSTITUTE HOUSE BILL 2246**

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**State of Washington**

**59th Legislature**

**2005 Regular Session**

**By** House Committee on Commerce & Labor (originally sponsored by Representatives Conway and Wood; by request of Employment Security Department)

READ FIRST TIME 03/07/05.

1 AN ACT Relating to ensuring employers pay the contribution rate  
2 they have earned; amending RCW 50.04.245, 50.04.320, 50.24.170,  
3 50.29.062, and 50.12.220; adding new sections to chapter 50.04 RCW;  
4 adding a new section to chapter 50.36 RCW; adding a new section to  
5 chapter 50.29 RCW; creating a new section; recodifying RCW 50.12.220;  
6 and prescribing penalties.

7 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

8 **Sec. 1.** RCW 50.04.245 and 1995 c 120 s 1 are each amended to read  
9 as follows:

10 (1) Subject to the other provisions of this title, personal  
11 services performed for, or for the benefit of, a third party pursuant  
12 to a contract with a temporary services agency, (~~employee-leasing~~  
13 ~~agency,~~) staffing company, services referral agency, or other entity  
14 shall be deemed to be employment for the temporary services agency,  
15 (~~employee-leasing-agency,~~) staffing company, services referral  
16 agency, or other entity when the agency is responsible, under contract  
17 or in fact, for the payment of wages in remuneration for the services  
18 performed. With respect to such services, the temporary services

1 agency, staffing company, services referral agency, or other such  
2 entity will be considered the employer as defined in RCW 50.04.080 and  
3 the employing unit as defined in RCW 50.04.090.

4 (2) For the purposes of this section:

5 (a) "Temporary services agency" or "staffing company" means an  
6 individual or entity (~~(that is engaged in the business of furnishing~~  
7 ~~individuals to perform services on a part time or temporary basis for~~  
8 ~~a third party.~~

9 ~~(b) "Employee leasing agency" means an individual or entity that~~  
10 ~~for a fee places the employees of a client onto its payroll and leases~~  
11 ~~such employees back to the client)) other than a professional employer  
12 organization or an employee leasing agency, that hires its own  
13 employees and assigns them to a client to support or supplement the  
14 client's work force on a temporary basis for special work situations  
15 such as employee absences, temporary skill shortages, seasonal  
16 workloads, and special assignments and projects.~~

17 ~~((+e))~~ (b) "Services referral agency" means an individual or  
18 entity that is engaged in the business of offering the services of an  
19 individual to perform specific tasks for a third party.

20 NEW SECTION. Sec. 2. A new section is added to chapter 50.04 RCW  
21 to read as follows:

22 (1) Subject to the other provisions of this title, personal  
23 services performed for, or for the benefit of, a client employer  
24 pursuant to a written contract with an employee leasing agency,  
25 professional employer organization, or other similar entity shall be  
26 deemed to be employment for the client employer for unemployment  
27 insurance reporting purposes. With respect to such services, the  
28 client employer will be considered the employer as defined in RCW  
29 50.04.080 and the employing unit as defined in RCW 50.04.090.

30 (2) For the purposes of this chapter:

31 (a) "Employee leasing agency" means an individual or entity that  
32 for a fee places the employees of a client onto its payroll and leases  
33 such employees back to the client.

34 (b) "Professional employer organization" means an individual or  
35 entity that provides employment administrative services, benefit  
36 options and administration, and employer liability management and  
37 services to a client employer.

1 (c) "Client employer" means an individual or entity that enters  
2 into a professional employer services agreement with an employee  
3 leasing agency or professional employer organization.

4 (d) "Professional employer services" means services provided by a  
5 professional employer organization for a client pursuant to an  
6 agreement that establishes a coemployment relationship for the  
7 provision of payroll, benefits, and other human resource functions, or  
8 the leasing of employees.

9 NEW SECTION. **Sec. 3.** A new section is added to chapter 50.04 RCW  
10 to read as follows:

11 (1) A common pay agent or common paymaster will not be considered  
12 the employer as defined in RCW 50.04.080 or the employing unit as  
13 defined in RCW 50.04.090.

14 (2) For the purposes of this chapter:

15 (a) A common pay agent is an independent third party who contracts  
16 with, and represents, two or more employers; and who files a combined  
17 tax report for those employers.

18 (b) A common paymaster is two or more employers in which one of the  
19 employers has been designated to disburse wages to concurrently  
20 employed individuals of any of the related companies.

21 **Sec. 4.** RCW 50.04.320 and 1998 c 162 s 1 are each amended to read  
22 as follows:

23 (1) For the purpose of payment of contributions, "wages" means the  
24 remuneration paid by one employer during any calendar year to an  
25 individual in its employment under this title or the unemployment  
26 compensation law of any other state in the amount specified in RCW  
27 50.24.010. If an employer (hereinafter referred to as a successor  
28 employer) during any calendar year acquires substantially all or a  
29 portion of the operating assets, and/or the employees of another  
30 employer (hereinafter referred to as a predecessor employer) or the  
31 operating assets, and/or the employees, used in a separate unit of a  
32 trade or business of a predecessor employer, and immediately after the  
33 acquisition employs in the individual's trade or business an individual  
34 who immediately before the acquisition was employed in the trade or  
35 business of the predecessor employer, then, for the purposes of  
36 determining the amount of remuneration paid by the successor employer

1 to the individual during the calendar year which is subject to  
2 contributions, any remuneration paid to the individual by the  
3 predecessor employer during that calendar year and before the  
4 acquisition shall be considered as having been paid by the successor  
5 employer.

6 (2) For the purpose of payment of benefits, "wages" means the  
7 remuneration paid by one or more employers to an individual for  
8 employment under this title during his base year: PROVIDED, That at  
9 the request of a claimant, wages may be calculated on the basis of  
10 remuneration payable. The department shall notify each claimant that  
11 wages are calculated on the basis of remuneration paid, but at the  
12 claimant's request a redetermination may be performed and based on  
13 remuneration payable.

14 (3) For the purpose of payment of benefits and payment of  
15 contributions, the term "wages" includes tips (~~(which are)~~) received  
16 (~~(after January 1, 1987,)~~) while performing services which constitute  
17 employment, and which are reported to the employer for federal income  
18 tax purposes.

19 (4)(a) "Remuneration" means all compensation paid for personal  
20 services including commissions and bonuses and the cash value of all  
21 compensation paid in any medium other than cash. The reasonable cash  
22 value of compensation paid in any medium other than cash and the  
23 reasonable value of gratuities shall be estimated and determined in  
24 accordance with rules prescribed by the commissioner. Remuneration  
25 does not include payments to members of a reserve component of the  
26 armed forces of the United States, including the organized militia of  
27 the state of Washington, for the performance of duty for periods not  
28 exceeding seventy-two hours at a time.

29 (b) Previously accrued compensation, other than severance pay or  
30 payments received pursuant to plant closure agreements, when assigned  
31 to a specific period of time by virtue of a collective bargaining  
32 agreement, individual employment contract, customary trade practice, or  
33 request of the individual compensated, shall be considered remuneration  
34 for the period to which it is assigned. Assignment clearly occurs when  
35 the compensation serves to make the individual eligible for all regular  
36 fringe benefits for the period to which the compensation is assigned.

37 (c) Settlements or other proceeds received by an individual as a  
38 result of a negotiated settlement for termination of an individual

1 written employment contract prior to its expiration date shall be  
2 considered remuneration. The proceeds shall be deemed assigned in the  
3 same intervals and in the same amount for each interval as compensation  
4 was allocated under the contract.

5 (d) Except as provided in (c) of this subsection, the provisions of  
6 this subsection (4) pertaining to the assignment of previously accrued  
7 compensation shall not apply to individuals subject to RCW 50.44.050.

8 **Sec. 5.** RCW 50.24.170 and 1945 c 35 s 105 are each amended to read  
9 as follows:

10 (1) The commissioner shall prescribe regulations for the  
11 establishment, maintenance, and dissolution of joint accounts by two or  
12 more employers, and shall, in accordance with such regulations and upon  
13 application by two or more employers to establish such account, or to  
14 merge their several individual accounts in a joint account, maintain  
15 such joint account as if it constituted a single employer's account.

16 (2) Individuals or entities defined under section 2 or 3 of this  
17 act may not participate in joint accounts.

18 **Sec. 6.** RCW 50.29.062 and 2003 2nd sp.s. c 4 s 18 are each amended  
19 to read as follows:

20 Predecessor and successor employer contribution rates shall be  
21 computed in the following manner:

22 (1) If the successor is an employer, as defined in RCW 50.04.080,  
23 at the time of the transfer(~~, its~~) the following applies:

24 (a) Except as provided in (b) of this subsection:

25 (i) The successor's contribution rate shall remain unchanged for  
26 the remainder of the rate year in which the transfer occurs(~~-~~); and

27 ((~~From and after~~)) (ii) Beginning January 1st following the  
28 transfer, the successor's contribution rate for each rate year shall be  
29 based on (~~its~~) a combination of the following:

30 (A) The successor's experience with payrolls and benefits  
31 ((~~including the experience of the acquired business or portion of a~~  
32 business from the date of transfer, as of the regular computation date  
33 for that rate year)); and

34 (B) Any experience assigned to the predecessor involved in the  
35 transfer. If only a portion of the business was transferred, then the

1 experience attributable to the acquired portion is assigned to the  
2 successor.

3 (b) If it is found that a sole or primary purpose of the transfer  
4 of the business was to obtain a reduced array calculation factor rate,  
5 then the experience rating accounts of the employers involved shall be  
6 combined into a single account and the employers assigned the higher of  
7 the predecessor or successor array calculation factor rate effective as  
8 of the date of the transfer.

9 ~~((For transfers before January 1, 2005, the following applies))~~  
10 If the successor is not an employer at the time of the transfer((-)),  
11 the following applies:

12 (a) For transfers before January 1, 2005:

13 (i) Except as provided in (ii) of this subsection (2)(a), the  
14 successor shall pay contributions at the lowest rate determined under  
15 either of the following:

16 ~~((a)(i) For transfers before January 1, 1997, the contribution~~  
17 ~~rate of the rate class assigned to the predecessor employer at the time~~  
18 ~~of the transfer for the remainder of that rate year and continuing~~  
19 ~~until the successor qualifies for a different rate in its own right;~~

20 ~~(ii) For transfers on or after January 1, 1997,)) (A) The~~  
21 contribution rate of the rate class assigned to the predecessor  
22 employer at the time of the transfer for the remainder of that rate  
23 year. Any experience relating to the assignment of that rate class  
24 attributable to the predecessor is transferred to the successor.  
25 Beginning with the January 1<sup>st</sup> following the transfer, the successor's  
26 contribution rate shall be based on a combination of the transferred  
27 experience of the acquired business and the successor's experience  
28 after the transfer; or

29 ~~((b)) (B) The contribution rate equal to the average industry~~  
30 ~~rate as determined by the commissioner, but not less than one percent,~~  
31 ~~and continuing until the successor qualifies for a different rate in~~  
32 ~~its own right. Assignment of employers by the commissioner to~~  
33 ~~industrial classification, for purposes of this subsection, must be in~~  
34 ~~accordance with established classification practices found in the~~  
35 ~~("Standard Industrial Classification Manual") North American industry~~  
36 ~~classification system issued by the federal office of management and~~  
37 ~~budget to the ~~((third)) fourth digit provided in the ~~((standard~~~~~~

1 ~~industrial classification code, or in the~~) North American industry  
2 classification code system.

3 ~~((3) For transfers before January 1, 2005, if the successor is not~~  
4 ~~an employer at the time of the transfer and))~~ (ii) If the successor  
5 simultaneously acquires the business or a portion of the business of  
6 two or more employers in different rate classes, its rate from the date  
7 the transfer occurred until the end of that rate year and until it  
8 qualifies in its own right for a new rate, shall be the rate of the  
9 highest rate class applicable at the time of the acquisition to any  
10 predecessor employer who is a party to the acquisition, but not less  
11 than one percent.

12 ~~((4))~~ (b) For transfers on or after January 1, 2005~~(, the~~  
13 ~~following applies if the successor is not an employer at the time of~~  
14 ~~the transfer))~~:

15 ~~((a))~~ (i) Except as provided in ~~((b))~~ (ii) through (iv) of this  
16 subsection (2)(b), the successor shall pay contributions:

17 ~~((i))~~ (A) At the contribution rate ~~((determined for))~~ assigned to  
18 the predecessor employer at the time of the transfer for the remainder  
19 of ~~((the))~~ that rate year. Any experience attributable to the  
20 predecessor relating to the assignment of the predecessor's rate class  
21 is transferred to the successor. ~~((On and after))~~

22 (B) Beginning January 1st following the transfer, ~~((the~~  
23 ~~successor's))~~ based on an array calculation factor rate ~~((shall be~~  
24 ~~based on))~~ that is a combination of the transferred experience of the  
25 acquired business and the successor's experience after the transfer~~((~~  
26 ~~or~~

27 ~~((ii) At))~~ if qualified under RCW 50.29.010(6) by including the  
28 transferred experience. If not qualified under RCW 50.29.010(6), the  
29 contribution rate shall equal ~~((to))~~ the sum of the rates determined by  
30 the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
31 50.29.041, if applicable, and continuing until the successor qualifies  
32 for a different rate in its own right.

33 ~~((b))~~ (ii) If there is a substantial continuity of ownership,  
34 control, or management by the successor of the business of the  
35 predecessor, the successor shall pay contributions at the contribution  
36 rate determined for the predecessor employer at the time of the  
37 transfer for the remainder of that rate year. Any experience  
38 attributable to the predecessor relating to the assignment of the

1 predecessor's rate class is transferred to the successor. (~~On and~~  
2 ~~after~~) Beginning January 1st following the transfer, the successor's  
3 array calculation factor rate shall be based on a combination of the  
4 transferred experience of the acquired business and the successor's  
5 experience after the transfer.

6 (~~(e)~~) (iii) If the successor simultaneously acquires the business  
7 or a portion of the business of two or more employers with different  
8 contribution rates, the successor's rate from the date the transfer  
9 occurred until the end of that rate year and until it qualifies in its  
10 own right for a new rate, shall be the sum of the rates determined by  
11 the commissioner under RCW 50.29.025(2) (a) and (b), and 50.29.041,  
12 applicable at the time of the acquisition, to the predecessor employer  
13 who, among the parties to the acquisition, had the largest (~~taxable~~)  
14 total payroll in the completed calendar quarter immediately preceding  
15 the date of transfer, but not less than the sum of the rates determined  
16 by the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
17 50.29.041, if applicable.

18 (~~(5)~~) (iv) The experience attributable to the predecessor  
19 employer shall not be transferred to the successor employer if the  
20 successor employer is found to have acquired the business solely or  
21 primarily for the purpose of obtaining a lower array calculation factor  
22 rate. Instead, the new employer rate will be assigned.

23 (3) With respect to predecessor employers:

24 (a) The contribution rate on any payroll retained by a predecessor  
25 employer shall remain unchanged for the remainder of the rate year in  
26 which the transfer occurs.

27 (~~(6)~~) (b) In all cases, (~~from and after~~) beginning January 1st  
28 following the transfer, the predecessor's contribution rate or(~~or~~  
29 ~~beginning January 1, 2005,~~) the predecessor's array calculation factor  
30 for each rate year shall be based on its experience with payrolls and  
31 benefits as of the regular computation date for that rate year  
32 (~~including~~) excluding the experience of the (~~acquired~~) transferred  
33 business or transferred portion of business (~~up to the date of~~  
34 ~~transfer~~) as that experience has transferred to the successor:  
35 PROVIDED, That if all of the predecessor's business is transferred to  
36 a successor or successors, the predecessor shall not be a qualified  
37 employer until it satisfies the requirements of a "qualified employer"  
38 as set forth in RCW 50.29.010.

1       **Sec. 7.** RCW 50.12.220 and 2004 c 97 s 1 are each amended to read  
2 as follows:

3       ~~(1)((a)) If an employer fails to file ((in)) a timely ((and~~  
4 ~~complete manner a)) report as required by RCW 50.12.070, or the rules~~  
5 ~~adopted pursuant thereto, ((the employer shall be subject to a penalty~~  
6 ~~to be determined by the commissioner, but not to exceed two hundred~~  
7 ~~fifty dollars or ten percent of the quarterly contributions for each~~  
8 ~~such offense, whichever is less.~~

9       **(b)** the employer is subject to a penalty of twenty-five dollars  
10 per violation, unless the penalty is waived by the department.

11       **(b)** An employer who files an incomplete or incorrectly formatted  
12 tax and wage report as required by RCW 50.12.070 shall receive a  
13 warning letter for the first occurrence. For subsequent occurrences,  
14 the employer is subject to a penalty as follows:

15       **(i)** When no contributions are due, the second occurrence is subject  
16 to a seventy-five dollar penalty, the third occurrence is subject to a  
17 one hundred fifty dollar penalty, and for the fourth occurrence and  
18 thereafter, a penalty of two hundred fifty dollars will be assessed.

19       **(ii)** When contributions are due, the second occurrence is subject  
20 to a penalty of ten percent of the quarterly contributions due, but not  
21 less than seventy-five dollars, the third occurrence is subject to a  
22 penalty of ten percent of the quarterly contributions due, but not less  
23 than one hundred fifty dollars, and for the fourth occurrence and  
24 thereafter, a penalty of two hundred fifty dollars will be assessed.

25       **(2)** If an employer knowingly misrepresents to the employment  
26 security department the amount of his or her payroll upon which  
27 contributions under this title are based, the employer shall be liable  
28 to the state for up to ten times the amount of the difference in  
29 contributions paid, if any, and the amount the employer should have  
30 paid and for the reasonable expenses of auditing his or her books and  
31 collecting such sums. Such liability may be enforced in the name of  
32 the employment security department.

33       ~~((e))~~ **(3)(a)** If any part of a delinquency for which an assessment  
34 is made under this title is due to an intent to evade the successorship  
35 provisions of RCW 50.29.062, then for the calendar year in which the  
36 commissioner makes the determination under this subsection, the  
37 commissioner shall assign to the employer, and to any business found to  
38 be promoting the evasion of such provisions, the contribution rate

1 determined for that calendar year under RCW 50.29.025, including the  
2 solvency surcharge, if any, for rate class 20 or rate class 40, as  
3 applicable, plus two percent. Such employer must also pay for the  
4 employment security department's reasonable expenses of auditing his or  
5 her books and collecting such sums.

6 (b) If the person evading the successorship provisions, or  
7 promoting the evasion of such provisions, is not an employer, such  
8 person shall be subject to the penalties prescribed in RCW 50.36.020 as  
9 if the person were an employer, and be liable for the employment  
10 security department's reasonable expenses of auditing his or her books  
11 and collecting such sums.

12 (c) The commissioner shall establish procedures to enforce this  
13 subsection.

14 (3) For purposes of this section, the term "knowingly" means having  
15 actual knowledge of or acting with deliberate ignorance or reckless  
16 disregard for the prohibition involved and, includes, but is not  
17 limited to, intent to evade, misrepresentation, or willful  
18 nondisclosure.

19 ~~((+2))~~ (4) If contributions are not paid on the date on which they  
20 are due and payable as prescribed by the commissioner, there shall be  
21 assessed a penalty of five percent of the amount of the contributions  
22 for the first month or part thereof of delinquency; there shall be  
23 assessed a total penalty of ten percent of the amount of the  
24 contributions for the second month or part thereof of delinquency; and  
25 there shall be assessed a total penalty of twenty percent of the amount  
26 of the contributions for the third month or part thereof of  
27 delinquency. No penalty so added shall be less than ten dollars.  
28 These penalties are in addition to the interest charges assessed under  
29 RCW 50.24.040.

30 ~~((+3))~~ (5) Penalties shall not accrue on contributions from an  
31 estate in the hands of a receiver, executor, administrator, trustee in  
32 bankruptcy, common law assignee, or other liquidating officer  
33 subsequent to the date when such receiver, executor, administrator,  
34 trustee in bankruptcy, common law assignee, or other liquidating  
35 officer qualifies as such, but contributions accruing with respect to  
36 employment of persons by a receiver, executor, administrator, trustee  
37 in bankruptcy, common law assignee, or other liquidating officer shall

1 become due and shall be subject to penalties in the same manner as  
2 contributions due from other employers.

3 ~~((4))~~ (6) Where adequate information has been furnished to the  
4 department and the department has failed to act or has advised the  
5 employer of no liability or inability to decide the issue, penalties  
6 shall be waived by the commissioner. Penalties may also be waived for  
7 good cause if the commissioner determines that the failure to  
8 ~~((timely))~~ file timely and complete reports or pay contributions was  
9 not due to the employer's fault.

10 ~~((5))~~ (7) Any decision to assess a penalty as provided by this  
11 section shall be made by the chief administrative officer of the tax  
12 branch or his or her designee.

13 ~~((6))~~ (8) Nothing in this section shall be construed to deny an  
14 employer the right to appeal the assessment of any penalty. Such  
15 appeal shall be made in the manner provided in RCW 50.32.030.

16 NEW SECTION. Sec. 8. RCW 50.12.220 is recodified as a new section  
17 in chapter 50.36 RCW.

18 NEW SECTION. Sec. 9. A new section is added to chapter 50.29 RCW  
19 to read as follows:

20 The commissioner of the employment security department may adopt  
21 such rules as are necessary to implement this act.

22 NEW SECTION. Sec. 10. If any part of this act is found to be in  
23 conflict with federal requirements that are a prescribed condition to  
24 the allocation of federal funds to the state or the eligibility of  
25 employers in this state for federal unemployment tax credits, the  
26 conflicting part of this act is inoperative solely to the extent of the  
27 conflict, and the finding or determination does not affect the  
28 operation of the remainder of this act. Rules adopted under this act  
29 must meet federal requirements that are a necessary condition to the  
30 receipt of federal funds by the state or the granting of federal  
31 unemployment tax credits to employers in this state.

32 NEW SECTION. Sec. 11. If any provision of this act or its  
33 application to any person or circumstance is held invalid, the

1 remainder of the act or the application of the provision to other  
2 persons or circumstances is not affected.

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