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**SUBSTITUTE SENATE BILL 6359**

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**State of Washington**

**59th Legislature**

**2006 Regular Session**

**By** Senate Committee on Labor, Commerce, Research & Development  
(originally sponsored by Senators Kohl-Welles, Parlette and Kline; by  
request of Employment Security Department)

READ FIRST TIME 01/30/06.

1 AN ACT Relating to ensuring employers do not evade their  
2 contribution rate; amending RCW 50.29.062 and 50.12.220; adding a new  
3 section to chapter 50.29 RCW; creating new sections; and declaring an  
4 emergency.

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

6 NEW SECTION. **Sec. 1.** A new section is added to chapter 50.29 RCW  
7 to read as follows:

8 (1) If it is found that a significant purpose of the transfer of a  
9 business was to obtain a reduced array calculation factor rate, then  
10 the following applies:

11 (a) If the successor was an employer at the time of the transfer,  
12 then the experience rating accounts of the employers involved shall be  
13 combined into a single account and the employers assigned the higher of  
14 the predecessor or successor array calculation factor rate to take  
15 effect as of the date of the transfer.

16 (b) If the successor was not an employer at the time of the  
17 transfer, then the experience rating account of the acquired business  
18 must not be transferred and, instead, the sum of the rate determined by

1 the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
2 50.29.041 if applicable, shall be assigned.

3 (2) If any part of a delinquency for which an assessment is made  
4 under this title is due to an intent to knowingly evade the  
5 successorship provisions of RCW 50.29.062 and this section, then with  
6 respect to the employer, and to any business found to be knowingly  
7 promoting the evasion of such provisions:

8 (a) The commissioner shall, for the rate year in which the  
9 commissioner makes the determination under this subsection and for each  
10 of the three consecutive rate years following that rate year, assign to  
11 the employer or business the total rate, which is the sum of the  
12 recalculated array calculation factor rate and a civil penalty  
13 assessment rate, calculated as follows:

14 (i) Recalculate the array calculation factor rate as the array  
15 calculation factor rate that should have applied to the employer or  
16 business under RCW 50.29.025 and 50.29.062; and

17 (ii) Calculate a civil penalty assessment rate in an amount that,  
18 when added to the array calculation factor rate determined under (a)(i)  
19 of this subsection for the applicable rate year, results in a total  
20 rate equal to the maximum array calculation factor rate under RCW  
21 50.29.025 plus two percent, which total rate is not limited by any  
22 maximum array calculation factor rate established in RCW  
23 50.29.025(2)(b)(ii);

24 (b) The employer or business may be prosecuted under the penalties  
25 prescribed in RCW 50.36.020; and

26 (c) The employer or business must pay for the employment security  
27 department's reasonable expenses of auditing the employer's or  
28 business's books and collecting the civil penalty assessment.

29 (3) If the person knowingly evading the successorship provisions,  
30 or knowingly attempting to evade these provisions, or knowingly  
31 promoting the evasion of these provisions, is not an employer, the  
32 person is subject to a civil penalty assessment of five thousand  
33 dollars per occurrence. In addition, the person is subject to the  
34 penalties prescribed in RCW 50.36.020 as if the person were an  
35 employer. The person must also pay for the employment security  
36 department's reasonable expenses of auditing his or her books and  
37 collecting the civil penalty assessment.

38 (4) For purposes of this section:

1 (a) "Knowingly" means having actual knowledge of or acting with  
2 deliberate ignorance or reckless disregard for the prohibition involved  
3 and includes, but is not limited to, intent to evade,  
4 misrepresentation, or willful nondisclosure.

5 (b) "Person" means and includes an individual, a trust, estate,  
6 partnership, association, company, or corporation.

7 (c) "Transfer of a business" includes the transfer or acquisition  
8 of substantially all or a portion of the operating assets, which may  
9 include the employer's work force.

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

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

16 (7) All penalties and interest collected under this section shall  
17 be expended solely for prevention, detection, and collection activities  
18 related to evasion of the successorship provisions of RCW 50.29.062 and  
19 this section, and for no other purposes.

20 (8) The commissioner shall establish procedures to enforce this  
21 section.

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

24 Except as provided in section 1 of this act, predecessor and  
25 successor employer contribution rates shall be computed in the  
26 following manner:

27 (1) If the successor is an employer, as defined in RCW 50.04.080,  
28 at the time of the transfer(~~(, its))~~) of a business, the following  
29 applies:

30 (a) The successor's contribution rate shall remain unchanged for  
31 the remainder of the rate year in which the transfer occurs(~~(. From~~  
32 and after)); and

33 (b) Beginning January 1st following the transfer, the successor's  
34 contribution rate for each rate year shall be based on ((its)) a  
35 combination of the following:

36 (i) The successor's experience with payrolls and benefits

1 (~~including the experience of the acquired business or portion of a~~  
2 ~~business from the date of transfer, as of the regular computation date~~  
3 ~~for that rate year~~); and

4 (ii) Any experience assigned to the predecessor involved in the  
5 transfer. If only a portion of the business was transferred, then the  
6 experience attributable to the acquired portion is assigned to the  
7 successor.

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

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

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

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

19 ~~(ii) For transfers on or after January 1, 1997,))~~

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

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

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

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

13       ~~((a)) (i) Except as provided in ((b)) (ii) and (iii) of this~~  
14 ~~subsection (2)(b), the successor shall pay contributions:~~

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

20       (B) Beginning January 1st following the transfer, the successor's  
21 contribution rate for each rate year shall be based on an array  
22 calculation factor rate ((shall be based on the transferred experience  
23 of the acquired business and the successor's experience after the  
24 transfer; or

25       ~~(ii) At)) that is a combination of the following: The successor's~~  
26 ~~experience with payrolls and benefits; and any experience assigned to~~  
27 ~~the predecessor involved in the transfer. If only a portion of the~~  
28 ~~business was transferred, then the experience attributable to the~~  
29 ~~acquired portion is assigned to the successor if qualified under RCW~~  
30 ~~50.29.010(6) by including the transferred experience. If not qualified~~  
31 ~~under RCW 50.29.010(6), the contribution rate shall equal ((to)) the~~  
32 ~~sum of the rates determined by the commissioner under RCW 50.29.025(2)~~  
33 ~~(c)(ii) and (d)(ii), and 50.29.041, if applicable, and continuing until~~  
34 ~~the successor qualifies for a different rate ((in its own right)),~~  
35 including the transferred experience.

36       ~~((b)) (ii) If there is a substantial continuity of ownership,~~  
37 ~~control, or management by the successor of the business of the~~  
38 ~~predecessor, the successor shall pay contributions at the contribution~~

1 rate determined for the predecessor employer at the time of the  
2 transfer for the remainder of that rate year. Any experience  
3 attributable to the predecessor relating to the assignment of the  
4 predecessor's rate class is transferred to the successor. (~~On and~~  
5 ~~after~~) Beginning January 1st following the transfer, the successor's  
6 array calculation factor rate shall be based on a combination of the  
7 transferred experience of the acquired business and the successor's  
8 experience after the transfer.

9 (~~(e)~~) (iii) If the successor simultaneously acquires the business  
10 or a portion of the business of two or more employers with different  
11 contribution rates, the successor's rate from the date the transfer  
12 occurred until the end of that rate year and until it qualifies in its  
13 own right for a new rate, shall be the sum of the rates determined by  
14 the commissioner under RCW 50.29.025(2) (a) and (b), and 50.29.041,  
15 applicable at the time of the acquisition, to the predecessor employer  
16 who, among the parties to the acquisition, had the largest (~~taxable~~)  
17 total payroll in the completed calendar quarter immediately preceding  
18 the date of transfer, but not less than the sum of the rates determined  
19 by the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
20 50.29.041, if applicable.

21 (~~(5)~~) (3) With respect to predecessor employers:

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

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

37 (4) For purposes of this section, "transfer of a business" means  
38 the same as section 1(4)(c) of this act.

1       **Sec. 3.** 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 complete manner  
4 a report required by RCW 50.12.070, or the rules adopted pursuant  
5 thereto, the employer shall be subject to a penalty to be determined by  
6 the commissioner, but not to exceed two hundred fifty dollars or ten  
7 percent of the quarterly contributions for each such offense, whichever  
8 is less.

9       (b) If an employer knowingly misrepresents to the employment  
10 security department the amount of his or her payroll upon which  
11 contributions under this title are based, the employer shall be liable  
12 to the state for up to ten times the amount of the difference in  
13 contributions paid, if any, and the amount the employer should have  
14 paid and for the reasonable expenses of auditing his or her books and  
15 collecting such sums. Such liability may be enforced in the name of  
16 the department.

17       ~~((c) If any part of a delinquency for which an assessment is made  
18 under this title is due to an intent to evade the successorship  
19 provisions of RCW 50.29.062, then for the calendar year in which the  
20 commissioner makes the determination under this subsection, the  
21 commissioner shall assign to the employer, and to any business found to  
22 be promoting the evasion of such provisions, the contribution rate  
23 determined for that calendar year under RCW 50.29.025, including the  
24 solvency surcharge, if any, for rate class 20 or rate class 40, as  
25 applicable, plus two percent.))~~

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

36       (3) Penalties shall not accrue on contributions from an estate in  
37 the hands of a receiver, executor, administrator, trustee in  
38 bankruptcy, common law assignee, or other liquidating officer

1 subsequent to the date when such receiver, executor, administrator,  
2 trustee in bankruptcy, common law assignee, or other liquidating  
3 officer qualifies as such, but contributions accruing with respect to  
4 employment of persons by a receiver, executor, administrator, trustee  
5 in bankruptcy, common law assignee, or other liquidating officer shall  
6 become due and shall be subject to penalties in the same manner as  
7 contributions due from other employers.

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

14 (5) Any decision to assess a penalty as provided by this section  
15 shall be made by the chief administrative officer of the tax branch or  
16 his or her designee.

17 (6) Nothing in this section shall be construed to deny an employer  
18 the right to appeal the assessment of any penalty. Such appeal shall  
19 be made in the manner provided in RCW 50.32.030.

20 NEW SECTION. **Sec. 4.** The commissioner of the employment security  
21 department may adopt rules necessary to implement this act.

22 NEW SECTION. **Sec. 5.** 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. 6.** If any provision of this act or its  
33 application to any person or circumstance is held invalid, the  
34 remainder of the act or the application of the provision to other  
35 persons or circumstances is not affected.



1        NEW SECTION.   **Sec. 7.**   This act is necessary for the immediate  
2   preservation of the public peace, health, or safety, or support of the  
3   state government and its existing public institutions, and takes effect  
4   immediately.

5        NEW SECTION.   **Sec. 8.**   This act is remedial in nature and shall be  
6   applied retroactively to January 1, 2006.

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