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SENATE BILL 6359

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State of Washington

59th Legislature

2006 Regular Session

By Senators Kohl-Welles, Parlette and Kline; by request of Employment Security Department

Read first time 01/11/2006. Referred to Committee on Labor, Commerce, Research & Development.

1 AN ACT Relating to ensuring employers do not evade their  
2 contribution rate; amending RCW 50.29.062, 50.12.220, and 50.04.320;  
3 adding a new section to chapter 50.29 RCW; creating new sections; and  
4 declaring an 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 purpose of the transfer or acquisition of  
9 a 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 take effect  
15 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 new employer rate shall be  
19 assigned.

1 (2) If any part of a delinquency for which an assessment is made  
2 under this title is due to an intent to knowingly evade the  
3 successorship provisions of RCW 50.29.062 and this section, then for  
4 the rate year in which the commissioner makes the determination under  
5 this subsection and the following three rate years, the commissioner  
6 shall assign to the employer, and to any business found to be knowingly  
7 promoting the evasion of such provisions, a civil penalty assessment  
8 rate in addition to the assigned rate that increases the array  
9 calculation factor rate for that rate year under RCW 50.29.025 to the  
10 maximum array calculation factor rate plus two percent. In addition,  
11 the employer may be prosecuted under the penalties prescribed in RCW  
12 50.36.020. An employer subject to the civil penalty assessment under  
13 this section must also pay for the employment security department's  
14 reasonable expenses of auditing the employer's books and collecting the  
15 civil penalty assessment.

16 (3) If the person knowingly evading the successorship provisions,  
17 or knowingly attempting to evade these provisions, or knowingly  
18 promoting the evasion of these provisions, is not an employer, the  
19 person is subject to a civil penalty assessment of five thousand  
20 dollars per occurrence. In addition, the person is subject to the  
21 penalties prescribed in RCW 50.36.020 as if the person were an  
22 employer. The person must also pay for the employment security  
23 department's reasonable expenses of auditing his or her books and  
24 collecting the civil penalty assessment.

25 (4) For purposes of this section:

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

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

32 (c) "Transfer or acquisition of a business" includes the transfer  
33 or acquisition of the employer's work force.

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

37 (6) Nothing in this section shall be construed to deny an employer

1 the right to appeal the assessment of a penalty in the manner provided  
2 in RCW 50.32.030.

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

7 (8) The commissioner shall establish procedures to enforce this  
8 subsection.

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

11 Predecessor and successor employer contribution rates shall be  
12 computed in the following manner:

13 (1) If the successor is an employer, as defined in RCW 50.04.080,  
14 at the time of the transfer(~~(, its))~~ or acquisition of a business, the  
15 following applies:

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

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

22 (i) The successor's experience with payrolls and benefits  
23 ~~((including the experience of the acquired business or portion of a~~  
24 ~~business from the date of transfer, as of the regular computation date~~  
25 ~~for that rate year))~~); and

26 (ii) Any experience assigned to the predecessor involved in the  
27 transfer. If only a portion of the business was transferred, then the  
28 experience attributable to the acquired portion is assigned to the  
29 successor.

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

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

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

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

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

6       (A) The contribution rate of the rate class assigned to the  
7 predecessor employer at the time of the transfer for the remainder of  
8 that rate year. Any experience relating to the assignment of that rate  
9 class attributable to the predecessor is transferred to the successor.  
10 Beginning with the January 1<sup>st</sup> following the transfer, the successor's  
11 contribution rate shall be based on a combination of the transferred  
12 experience of the acquired business and the successor's experience  
13 after the transfer; or

14       ~~((b))~~ (B) The contribution rate equal to the average industry  
15 rate as determined by the commissioner, but not less than one percent,  
16 and continuing until the successor qualifies for a different rate in  
17 its own right. Assignment of employers by the commissioner to  
18 industrial classification, for purposes of this subsection, must be in  
19 accordance with established classification practices found in the  
20 ~~("Standard Industrial Classification Manual")~~ North American industry  
21 classification system issued by the federal office of management and  
22 budget to the ~~((third))~~ fourth digit provided in the ~~((standard~~  
23 ~~industrial classification code, or in the))~~ North American industry  
24 classification ~~((code))~~ system.

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

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

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

1       ~~((i))~~ (A) At the contribution rate ~~((determined for))~~ assigned to  
2 the predecessor employer at the time of the transfer for the remainder  
3 of ~~((the))~~ that rate year. Any experience attributable to the  
4 predecessor relating to the assignment of the predecessor's rate class  
5 is transferred to the successor. ~~((On and after))~~

6       (B) Beginning January 1st following the transfer, the successor's  
7 contribution rate for each rate year shall be based on an array  
8 calculation factor rate ~~((shall be based on the transferred experience~~  
9 ~~of the acquired business and the successor's experience after the~~  
10 ~~transfer; or~~

11       ~~((ii) At))~~ that is a combination of the following: The successor's  
12 experience with payrolls and benefits; and any experience assigned to  
13 the predecessor involved in the transfer. If only a portion of the  
14 business was transferred, then the experience attributable to the  
15 acquired portion is assigned to the successor if qualified under RCW  
16 50.29.010(6) by including the transferred experience. If not qualified  
17 under RCW 50.29.010(6), the contribution rate shall equal ~~((to))~~ the  
18 sum of the rates determined by the commissioner under RCW 50.29.025(2)  
19 (c)(ii) and (d)(ii), and 50.29.041, if applicable, and continuing until  
20 the successor qualifies for a different rate ~~((in its own right))~~,  
21 including the transferred experience.

22       ~~((b))~~ (ii) If there is a substantial continuity of ownership,  
23 control, or management by the successor of the business of the  
24 predecessor, the successor shall pay contributions at the contribution  
25 rate determined for the predecessor employer at the time of the  
26 transfer for the remainder of that rate year. Any experience  
27 attributable to the predecessor relating to the assignment of the  
28 predecessor's rate class is transferred to the successor. ~~((On and~~  
29 ~~after))~~ Beginning January 1st following the transfer, the successor's  
30 array calculation factor rate shall be based on a combination of the  
31 transferred experience of the acquired business and the successor's  
32 experience after the transfer.

33       ~~((e))~~ (iii) If the successor simultaneously acquires the business  
34 or a portion of the business of two or more employers with different  
35 contribution rates, the successor's rate from the date the transfer  
36 occurred until the end of that rate year and until it qualifies in its  
37 own right for a new rate, shall be the sum of the rates determined by  
38 the commissioner under RCW 50.29.025(2) (a) and (b), and 50.29.041,

1 applicable at the time of the acquisition, to the predecessor employer  
2 who, among the parties to the acquisition, had the largest (~~taxable~~)  
3 total payroll in the completed calendar quarter immediately preceding  
4 the date of transfer, but not less than the sum of the rates determined  
5 by the commissioner under RCW 50.29.025(2) (c)(ii) and (d)(ii), and  
6 50.29.041, if applicable.

7 ~~((+5))~~ (3) With respect to predecessor employers:

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

11 ~~((+6))~~ (b) In all cases, (~~from and after~~) beginning January 1<sup>st</sup>  
12 following the transfer, the predecessor's contribution rate or(~~-~~  
13 ~~beginning January 1, 2005,~~) the predecessor's array calculation factor  
14 for each rate year shall be based on its experience with payrolls and  
15 benefits as of the regular computation date for that rate year  
16 (~~including~~) excluding the experience of the (~~acquired~~) transferred  
17 business or transferred portion of business (~~up to the date of~~  
18 ~~transfer~~) as that experience has transferred to the successor:  
19 PROVIDED, That if all of the predecessor's business is transferred to  
20 a successor or successors, the predecessor shall not be a qualified  
21 employer until it satisfies the requirements of a "qualified employer"  
22 as set forth in RCW 50.29.010.

23 (4) For purposes of this section, "transfer or acquisition of a  
24 business" means the same as section 1(4)(c) of this act.

25 **Sec. 3.** RCW 50.12.220 and 2004 c 97 s 1 are each amended to read  
26 as follows:

27 (1)(a) If an employer fails to file in a timely and complete manner  
28 a report required by RCW 50.12.070, or the rules adopted pursuant  
29 thereto, the employer shall be subject to a penalty to be determined by  
30 the commissioner, but not to exceed two hundred fifty dollars or ten  
31 percent of the quarterly contributions for each such offense, whichever  
32 is less.

33 (b) If an employer knowingly misrepresents to the employment  
34 security department the amount of his or her payroll upon which  
35 contributions under this title are based, the employer shall be liable  
36 to the state for up to ten times the amount of the difference in  
37 contributions paid, if any, and the amount the employer should have

1 paid and for the reasonable expenses of auditing his or her books and  
2 collecting such sums. Such liability may be enforced in the name of  
3 the department.

4 ~~((c) If any part of a delinquency for which an assessment is made  
5 under this title is due to an intent to evade the successorship  
6 provisions of RCW 50.29.062, then for the calendar year in which the  
7 commissioner makes the determination under this subsection, the  
8 commissioner shall assign to the employer, and to any business found to  
9 be promoting the evasion of such provisions, the contribution rate  
10 determined for that calendar year under RCW 50.29.025, including the  
11 solvency surcharge, if any, for rate class 20 or rate class 40, as  
12 applicable, plus two percent.))~~

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

23 (3) Penalties shall not accrue on contributions from an estate in  
24 the hands of a receiver, executor, administrator, trustee in  
25 bankruptcy, common law assignee, or other liquidating officer  
26 subsequent to the date when such receiver, executor, administrator,  
27 trustee in bankruptcy, common law assignee, or other liquidating  
28 officer qualifies as such, but contributions accruing with respect to  
29 employment of persons by a receiver, executor, administrator, trustee  
30 in bankruptcy, common law assignee, or other liquidating officer shall  
31 become due and shall be subject to penalties in the same manner as  
32 contributions due from other employers.

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

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

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

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

9 (1) For the purpose of payment of contributions, "wages" means the  
10 remuneration paid by one employer during any calendar year to an  
11 individual in its employment under this title or the unemployment  
12 compensation law of any other state in the amount specified in RCW  
13 50.24.010. If an employer (hereinafter referred to as a successor  
14 employer) during any calendar year acquires substantially all or a  
15 portion of the operating assets, which may include the employees of  
16 another employer (hereinafter referred to as a predecessor employer) or  
17 the operating assets, which may include the employees, used in a  
18 separate unit of a trade or business of a predecessor employer, and  
19 immediately after the acquisition employs in the individual's trade or  
20 business an individual who immediately before the acquisition was  
21 employed in the trade or business of the predecessor employer, then,  
22 for the purposes of determining the amount of remuneration paid by the  
23 successor employer to the individual during the calendar year which is  
24 subject to contributions, any remuneration paid to the individual by  
25 the predecessor employer during that calendar year and before the  
26 acquisition shall be considered as having been paid by the successor  
27 employer.

28 (2) For the purpose of payment of benefits, "wages" means the  
29 remuneration paid by one or more employers to an individual for  
30 employment under this title during his base year: PROVIDED, That at  
31 the request of a claimant, wages may be calculated on the basis of  
32 remuneration payable. The department shall notify each claimant that  
33 wages are calculated on the basis of remuneration paid, but at the  
34 claimant's request a redetermination may be performed and based on  
35 remuneration payable.

36 (3) For the purpose of payment of benefits and payment of  
37 contributions, the term "wages" includes tips (~~which are~~) received



1 ((~~after January 1, 1987,~~)) while performing services which constitute  
2 employment, and which are reported to the employer for federal income  
3 tax purposes.

4 (4)(a) "Remuneration" means all compensation paid for personal  
5 services including commissions and bonuses and the cash value of all  
6 compensation paid in any medium other than cash. The reasonable cash  
7 value of compensation paid in any medium other than cash and the  
8 reasonable value of gratuities shall be estimated and determined in  
9 accordance with rules prescribed by the commissioner. Remuneration  
10 does not include payments to members of a reserve component of the  
11 armed forces of the United States, including the organized militia of  
12 the state of Washington, for the performance of duty for periods not  
13 exceeding seventy-two hours at a time.

14 (b) Previously accrued compensation, other than severance pay or  
15 payments received pursuant to plant closure agreements, when assigned  
16 to a specific period of time by virtue of a collective bargaining  
17 agreement, individual employment contract, customary trade practice, or  
18 request of the individual compensated, shall be considered remuneration  
19 for the period to which it is assigned. Assignment clearly occurs when  
20 the compensation serves to make the individual eligible for all regular  
21 fringe benefits for the period to which the compensation is assigned.

22 (c) Settlements or other proceeds received by an individual as a  
23 result of a negotiated settlement for termination of an individual  
24 written employment contract prior to its expiration date shall be  
25 considered remuneration. The proceeds shall be deemed assigned in the  
26 same intervals and in the same amount for each interval as compensation  
27 was allocated under the contract.

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

31 NEW SECTION. **Sec. 5.** The commissioner of the employment security  
32 department may adopt rules necessary to implement this act.

33 NEW SECTION. **Sec. 6.** If any part of this act is found to be in  
34 conflict with federal requirements that are a prescribed condition to  
35 the allocation of federal funds to the state or the eligibility of  
36 employers in this state for federal unemployment tax credits, the

1 conflicting part of this act is inoperative solely to the extent of the  
2 conflict, and the finding or determination does not affect the  
3 operation of the remainder of this act. Rules adopted under this act  
4 must meet federal requirements that are a necessary condition to the  
5 receipt of federal funds by the state or the granting of federal  
6 unemployment tax credits to employers in this state.

7 NEW SECTION. **Sec. 7.** If any provision of this act or its  
8 application to any person or circumstance is held invalid, the  
9 remainder of the act or the application of the provision to other  
10 persons or circumstances is not affected.

11 NEW SECTION. **Sec. 8.** This act is necessary for the immediate  
12 preservation of the public peace, health, or safety, or support of the  
13 state government and its existing public institutions, and takes effect  
14 immediately.

15 NEW SECTION. **Sec. 9.** This act is remedial in nature and shall be  
16 applied retroactively to January 1, 2006.

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