

SERVICE BULLETIN



Amendment to Alabama SUTA Dumping Provisions

TO: T&T Clients
FROM: Kris Thorngren
RE: Alabama Amends Law
DATE: November 11, 2008

A recent amendment to Alabama Employment Security Law makes the state law consistent with federal anti-SUTA dumping provisions.

The federal SUTA Dumping Prevention Act of 2004 was enacted to curb abuses by some employers and prevent manipulation of state unemployment tax rates by such actions as transferring payroll from one legal entity to another for the purpose of avoiding a tax rate based on experience. All states were required to conform to the new federal law.

Alabama passed legislation in 2005 to be consistent with the federal provisions, but the U.S. Department of Labor found that one section of the 2005 law was not in conformity. Failure to fix this issue would have potentially increased the amount of federal unemployment taxes paid by Alabama businesses by an estimated \$700 million annually. SB147 was adopted on May 16, 2008, taking effect immediately, and resolving the conformity problem.

When an Alabama employer transfers its trade or business, or a portion thereof, to another entity, and when there is substantially common ownership, management, or control between the two entities, a transfer of unemployment experience is required. This prevents the “dumping” of less favorable experience by moving employees/payroll to an affiliated company with more favorable experience and/or a lower tax rate. The tax rates of both employers are recalculated and the new tax rates are effective on the date of transfer.

Further, when a company which was not previously an employer acquires the trade or business of another company, and when the Alabama Division of Industrial Relations determines that this acquisition was done solely or primarily for the purpose of obtaining a lower unemployment tax rate, the Division will disallow a transfer of unemployment experience and assign the new employer tax rate (currently 2.70%) to the acquiring company. This prevents buying a “shell company” just to obtain its unemployment tax rate.

The full text of SB147 is attached for your reference. If there are any questions please contact us.



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SERVICE BULLETIN

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1 SB147

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4 ENROLLED, An Act,

5 To amend Section 25-4-8, Code of Alabama 1975,
6 relating to unemployment compensation, to provide further for
7 the recalculation of unemployment rates when there is a
8 transfer to an employer in which there is substantial common
9 ownership, management, or control with the employer making the
10 transfer.

11 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

12 Section 1. Section 25-4-8, Code of Alabama 1975, is
13 amended to read as follows:

14 "§25-4-8.

15 "(a) "Employer," as used in this chapter, prior to
16 January 1, 1978, shall mean any employing unit which was so
17 defined in this chapter prior to such date.

18 "After December 31, 1977, except as otherwise
19 provided in this chapter, "employer," as used in this chapter
20 shall mean:

21 "(1) Any employing unit which, after December 31,
22 1977:

23 "a. In any calendar quarter in either the current or
24 preceding calendar year paid, for service in employment, wages
25 of \$1,500.00 or more; or

1 "b. For some portion of a day in each of 20
2 different calendar weeks, whether or not such weeks were
3 consecutive, in either the current or the preceding calendar
4 year, had in employment at least one individual (irrespective
5 of whether the same individual was in employment in each such
6 day).

7 "(2) Any employing unit which, having become an
8 employer under this chapter, has not under Sections 25-4-130
9 and 25-4-131 ceased to be an employer subject to this chapter.

10 "(3) For the effective period of its election
11 pursuant to Section 25-4-131, any other employing unit which
12 has elected to become fully subject to this chapter.

13 "(4) Any employing unit (whether or not an employing
14 unit at the time of acquisition) which:

15 "a. Acquired the organization, trade, or business,
16 or substantially all the assets thereof, of another employing
17 unit which at the time of such acquisition was an employer
18 subject to this chapter; or

19 "b. Acquired a segregable part of the organization,
20 trade, or business of another employing unit which at the time
21 of such acquisition was an employer subject to this chapter;
22 provided, that such segregable part would have been an
23 employer subject to this chapter if such part had constituted
24 its entire organization, trade, or business.

1 "(5) Any employing unit which acquires the
2 organization, trade, or business, or substantially all of the
3 assets thereof of another employing unit (not an employer
4 subject to this chapter) and which, if the employment record
5 of such employing unit subsequent to such acquisition,
6 together with the employment record of the acquired unit prior
7 to such acquisition, both within the same calendar year, would
8 be sufficient to constitute an employing unit an employer
9 subject to this chapter.

10 "(6) Any employing unit not an employer by reason of
11 any other paragraph of this section:

12 "a. For which, within either the current or
13 preceding calendar year, service is or was performed with
14 respect to which such employing unit is held liable by the
15 federal government for any federal tax against which credit
16 may be taken for contributions required to be paid into a
17 state unemployment fund; or

18 "b. Which, as a condition for approval of this
19 chapter for full tax credit against the tax imposed by the
20 Federal Unemployment Tax Act, is required, pursuant to such
21 Federal Unemployment Tax Act, to be an "employer" under this
22 chapter.

23 "(7) Any employing unit for which service in
24 employment as defined in paragraph (a)(2)a of Section 25-4-10
25 is performed after December 31, 1971, or for which service in

1 employment as defined in paragraph (a)(2)b of Section 25-4-10
2 is performed after December 31, 1977; provided, however, that
3 such service is not excluded from the definition of
4 "employment" by any of the provisions of subsection (b) of
5 Section 25-4-10.

6 "(8) Any employing unit for which service in
7 employment as defined in subdivision (a)(3) of Section 25-4-10
8 is performed after December 31, 1971.

9 "(9) Any employing unit for which agricultural labor
10 as defined in subdivision (b)(1) of Section 25-4-10 is
11 performed after December 31, 1977, but only if the provisions
12 of paragraph (a)(4)a of Section 25-4-10 are met.

13 "(10) Any employing unit for which domestic service
14 in employment as defined in paragraph (a)(4)b of Section
15 25-4-10 is performed after December 31, 1977.

16 "(11)a. In determining whether or not an employing
17 unit for which service other than domestic service is also
18 performed is an employer under this section other than under
19 subdivision (10) of this subsection, the wages paid to, or the
20 employment of, an employee performing domestic service after
21 December 31, 1977, shall not be taken into account.

22 "b. In determining whether or not an employing unit
23 for which service other than agricultural labor is also
24 performed is an employer under this section other than under
25 subdivisions (7) and (8) of this subsection, the wages paid

1 to, or the employment of, an employee performing service in
2 agricultural labor after December 31, 1977, shall not be taken
3 into account. If an employing unit is determined an employer
4 of agricultural labor, such employing unit shall be determined
5 an employer for the purposes of subdivision (1) of this
6 subsection.

7 "c. The provisions of paragraphs a and b of this
8 subdivision notwithstanding, for the purposes of Sections
9 25-4-51, 25-4-52, 25-4-53, and 25-4-54, any employing unit
10 which is or becomes subject to the provisions of any
11 subdivision of this subsection other than subdivisions (9) or
12 (10) shall, upon becoming subject to subdivisions (9) or (10)
13 or if, at the time of becoming subject to any other
14 subdivision is already subject to subdivisions (9) or (10), be
15 a single employing unit.

16 "(12) The term employer shall also include any
17 Indian tribe, as herein defined, for which service in
18 employment is performed.

19 "(b) For the purposes of this section, if any week
20 includes both December 31 and January 1, the days of that week
21 up to January 1 shall be deemed one calendar week and the days
22 beginning January 1 another such week.

23 "(c) Notwithstanding any other provision of law, the
24 following shall apply regarding assignment of rates and
25 transfers of experience:

1 "(1) If an employer transfers its trade or business,
2 or a portion thereof, to another employer and, at the time of
3 the transfer, there is substantially common ownership,
4 management, or control of the two employers, then the
5 unemployment experience attributable to the transferred trade
6 or business shall be transferred to the employer to whom such
7 trade or business is so transferred. The rates of both
8 employers shall be recalculated and made effective in
9 accordance with the date such transfer or transfers occurred.

10 "(2) Whenever a person who is not an employer under
11 this section at the time it acquires the trade or business of
12 an employer, the unemployment experience of the acquired trade
13 or business shall not be transferred to such person if the
14 director finds that such person acquired the trade or business
15 solely or primarily for the purpose of obtaining a lower rate
16 of contributions. Instead, such person shall be assigned the
17 applicable new employer rate under Section 25-4-51(a)(2). In
18 determining whether the trade or business was acquired solely
19 or primarily for the purpose of obtaining a lower rate of
20 contributions, the director shall use objective factors which
21 may include the cost of acquiring the trade or business,
22 whether the person continued the business enterprise of the
23 acquired trade or business, how long such business enterprise
24 was continued, or whether a substantial number of new

1 employees were hired for the performance of duties unrelated
2 to the business activity conducted prior to acquisition.

3 "(3) a. If a person knowingly violates or attempts
4 to violate subdivisions (1) and (2) or any other provision of
5 this section related to determining the assignment of a
6 contribution rate, or if a person knowingly advises another
7 person in a way that results in a violation of such provision,
8 the person shall be subject to the following penalties:

9 "1. If the person is an employer, then such employer
10 shall be assigned the highest rate assignable under this
11 section for the tax rate year during which such violation or
12 attempted violation occurred and the three tax rate years
13 immediately following the rate year. Notwithstanding the
14 foregoing, if the person's business is already at such highest
15 tax rate for any year, then a penalty rate of contributions of
16 two percent above the maximum tax rate shall be imposed for
17 such year and the immediately following three tax rate years.

18 "2. If the person is not an employer, such person
19 shall be subject to a civil monetary penalty of not more than
20 ten thousand dollars (\$10,000) or 10 percent of any under
21 reported amount, whichever is greater. All fines shall be
22 deposited in the penalty and interest account established
23 under Section 25-4-142(b).

24 "b. For purposes of this section, the following
25 terms shall have the following meanings:

1 "1. Knowingly means having actual knowledge of or
2 acting with deliberate ignorance or reckless disregard for the
3 prohibition involved.

4 "2. Violates or attempts to violate includes, but is
5 not limited to, intent to evade, misrepresentation, or willful
6 nondisclosure.

7 "3. Person has the meaning given the term by §7701
8 (a)(1) of the Internal Revenue Code of 1986.

9 "4. Trade or business includes the employer's
10 workforce.

11 "In addition to the penalty imposed herein, any
12 violation of this section may be prosecuted as a Class C
13 felony. The director shall establish procedures to identify
14 the transfer or acquisition of a trade or business for
15 purposes of this section.

16 "This section shall be interpreted and applied in
17 such a manner as to meet the minimum requirements contained in
18 any guidelines or regulations issued by the United States
19 Department of Labor."

20 Section 2. This act shall become effective
21 immediately following its passage and approval by the
22 Governor, or its otherwise becoming law.

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President and Presiding Officer of the Senate

Speaker of the House of Representatives

SB147

Senate 30-APR-08

I hereby certify that the within Act originated in and passed the Senate.

McDowell Lee
Secretary

House of Representatives

Passed: 08-MAY-08

By: Senator Bedford