LEGISLATIVE GENERAL COUNSEL
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H.B. 10

EMPLOYMENT SECURITY ACT AMENDMENTS

2005 GENERAL SESSION

STATE OF UTAH

Sponsor: David N. Cox

Steven R. Mascaro LaWanna Lou Shurtliff Peggy Wallace
Karen W. Morgan

LONG TITLE

General Description:

This bill modifies the Employment Security Act as related to employer unemployment experience ratings.

Highlighted Provisions:

This bill:

- conforms state law to newly enacted federal law aimed at prohibiting state unemployment tax avoidance;
- defines taxable wages and unemployment experience for purposes related to an employer's overall basic contribution rate, including the acquisition of the unemployment experience of another employer;
- provides for assignment of rates and unemployment experience transfers upon the transfer or acquisition of a trade or business;
- provides penalties for a person who violates or attempts to violate provisions related to determining the assignment of a contribution rate; and
- provides that a violation may be prosecuted for unemployment insurance fraud.

Monies Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.

Utah Code Sections Affected:

AMENDS:

35A-4-204, as last amended by Chapter 265, Laws of Utah 2001

35A-4-208, as last amended by Chapter 60, Laws of Utah 2000

35A-4-301, as renumbered and amended by Chapter 240, Laws of Utah 1996

35A-4-303, as last amended by Chapter 21, Laws of Utah 2004

REPEALS AND REENACTS:

35A-4-304, as renumbered and amended by Chapter 240, Laws of Utah 1996

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **35A-4-204** is amended to read:

35A-4-204. Definition of employment.

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if one of Subsections (2)(a) through (k) is satisfied.

(a) The service is localized in this state. Service is localized within this state if:

(i) the service is performed entirely within the state; or

(ii) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(b) (i) The service is not localized in any state but some of the service is performed in this state and the individual's base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; or

(ii) the individual's base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(c) (i) (A) The service is performed entirely outside this state and is not localized in any state;

(B) the worker is one of a class of employees who are required to travel outside this

state in performance of their duties; and

(C) (I) the base of operations is in this state; or

(II) if there is no base of operations, the place from which the service is directed or controlled is in this state.

(ii) Services covered by an election under Subsection 35A-4-310(3), and services covered by an arrangement under Section 35A-4-106 between the division and the agency charged with the administration of any other state or federal unemployment compensation law, under which all services performed by an individual for an employing unit are considered to be performed entirely within this state, are considered to be employment if the division has approved an election of the employing unit for whom the services are performed, under which the entire service of the individual during the period covered by the election is considered to be insured work.

(d) (i) The service is performed after December 31, 1977, in the employ of this state or any of its instrumentalities or any county, city, town, school district, or any political subdivision thereof or any of its instrumentalities or any instrumentality or more than one of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions or Indian tribes or tribal units if:

(A) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7);

(B) the service is not excluded from employment by Section 35A-4-205; and

(C) as to any county, city, town, school district, or political subdivision of this state, or any instrumentality of the same or Indian tribes or tribal units, that service is either:

(I) required to be treated as covered employment as a condition of eligibility of employers in this state for Federal Unemployment Tax Act employer tax credit;

(II) required to be treated as covered employment by any other requirement of the Federal Unemployment Tax Act, as amended; or

(III) not required to be treated as covered employment by any requirement of the Federal Unemployment Tax Act, but coverage of the service is elected by a majority of the members of the governing body of the political subdivision or instrumentality or tribal unit in accordance with Section 35A-4-310.

(ii) Benefits paid on the basis of service performed in the employ of this state shall be

financed by payments to the division instead of contributions in the manner and amounts prescribed by Subsections 35A-4-311(2)(a) and (4).

(iii) Benefits paid on the basis of service performed in the employ of any other governmental entity or tribal unit described in this Subsection (2) shall be financed by payments to the division in the manner and amount prescribed by the applicable provisions of Section 35A-4-311.

(e) The service is performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if:

(i) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(8), solely by reason of Section 3306(c)(8) of that act; and

(ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(f) (i) The service is performed outside the United States after December 31, 1971, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of this Subsection (2) or the parallel provisions of another state's law if:

(A) the employer's principal place of business in the United States is located in this state;

(B) the employer has no place of business in the United States but is:

(I) an individual who is a resident of this state;

(II) a corporation that is organized under the laws of this state; or

(III) a partnership or trust in which the number of partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria of Subsections (2)(f)(i)(A) and (B) is met but:

(I) the employer has elected coverage in this state; or

(II) the employer fails to elect coverage in any state and the individual has filed a claim for benefits based on that service under the law of this state.

(ii) "American employer" for purposes of this Subsection (2) means a person who is:

(A) an individual who is a resident of the United States;

(B) a partnership if 2/3 or more of the partners are residents of the United States;

(C) a trust if all of the trustees are residents of the United States;

(D) a corporation organized under the laws of the United States or of any state;

(E) a limited liability company organized under the laws of the United States or of any state;

(F) a limited liability partnership organized under the laws of the United States or of any state; or

(G) a joint venture if 2/3 or more of the members are individuals, partnerships, corporations, limited liability companies, or limited liability partnerships that qualify as American employers.

(g) The service is performed after December 31, 1971:

(i) by an officer or member of the crew of an American vessel on or in connection with the vessel; and

(ii) the operating office from which the operations of the vessel, operating on navigable waters within, or within and without, the United States, is ordinarily and regularly supervised, managed, directed, and controlled within this state.

(h) A tax with respect to the service in this state is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or that, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.

(i) (i) Notwithstanding Subsection 35A-4-205(1)(t), the service is performed:

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry cleaning services, for the driver's principal; or

(B) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and the transmission to the salesman's principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(ii) The term "employment" as used in this Subsection (2) includes services described

in Subsection (2)(i)(i) performed after December 31, 1971, only if:

(A) the contract of service contemplates that substantially all of the services are to be performed personally by the individual;

(B) the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation; and

(C) the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(j) The service is performed after December 31, 1977, by an individual in agricultural labor as defined in Section 35A-4-206.

(k) The service is domestic service performed after December 31, 1977, in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more during any calendar quarter in either the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

[~~(5) Notwithstanding any other provisions of this chapter, and in accordance with rules made by the department, if two or more related corporations concurrently employ the same~~

~~individual and compensate the individual through a common paymaster that is one of the corporations, each corporation:~~]

[~~(a) is considered to have paid as remuneration to the individual only the amounts actually disbursed by it to the individual; and~~]

[~~(b) is not be considered to have paid as remuneration to the individual amounts actually disbursed to the individual by another of the other related corporations.~~]

Section 2. Section **35A-4-208** is amended to read:

35A-4-208. Wages defined.

(1) As used in this chapter, "wages" means wages as currently defined by Section 3306(b), Internal Revenue Code of 1986, with modifications, subtractions, and adjustments provided in Subsections (2), (3), and (4).

(2) For purposes of Section 35A-4-303, "wages" does not include that amount paid to an individual by an employer with respect to employment subject to this chapter that is in excess of 75% of the insured average fiscal year wage, rounded to the next higher multiple of $100, during the fiscal year prior to the calendar year of the payment to the individual by the individual's employer on or after January 1, 1988.

(3) For the purpose of determining whether the successor employer during the calendar year has paid remuneration to an individual with respect to employment equal to the applicable taxable wages as defined by this Subsection (3), any remuneration with respect to employment paid to the individual by a predecessor employer during the calendar year and prior to an acquisition is considered to have been paid by a successor employer if:

(a) the successor employer during any calendar year acquires [~~substantially all the property used in a trade or business~~] the unemployment experience within the meaning of Subsection 35A-4-303(8) or 35A-4-304(3) of a predecessor employer; and

(b) immediately after the acquisition employs in the successor employer's trade or business an individual who immediately prior to the acquisition was employed in the trade or business of the predecessor.

(4) The remuneration paid to an individual by an employer with respect to employment in another state, upon which contributions were required of the employer under the unemployment compensation law of that state, shall be included as a part of the taxable wage base defined in this section.

(5) As used in this chapter, "wages" does not include:

(a) the amount of any payment, including any amount paid by an employer for insurance or annuities, or into a fund, to provide for a payment, made to, or on behalf of, an employee or any of the employee's dependents under a plan or system established by an employer that makes provision for:

(i) (A) the employer's employees generally;

(B) the employer's employees generally and their dependents;

(C) a class or classes of the employer's employees; or

(D) a class or classes of the employer's employees and their dependents; and

(ii) on account of:

(A) sickness or accident disability, but, in the case of payments made to an employee or any of the employee's dependents Subsection [~~(6)~~] (5)(a)(i) excludes from wages only payments that are received under a workers' compensation law;

(B) medical or hospitalization expenses in connection with sickness or accident disability; or

(C) death;

(b) any payment on account of sickness or accident disability, or medical or hospitalization expenses in connection with sickness or accident disability, made by an employer to, or on behalf of, an employee after the expiration of six calendar months following the last calendar month in which the employee worked for the employer;

(c) the payment by an employing unit, without deduction from the remuneration of the individual in its employ, of the tax imposed upon an individual in its employ under Section 3101, Internal Revenue Code, with respect to domestic services performed in a private home of the employer or for agricultural labor;

(d) any payment made to, or on behalf of, an employee or the employee's beneficiary:

(i) from or to a trust described in Section 401(a), Internal Revenue Code, that is exempt from tax under Section 501(a), Internal Revenue Code, at the time of the payment, except for a payment made to an employee of the trust as remuneration for services rendered as an employee and not as a beneficiary of the trust;

(ii) under or to an annuity plan that at the time of the payment is a plan described in Section 403(a), Internal Revenue Code;

(iii) under a simplified employee pension, as defined in Section 408(k)(l), Internal Revenue Code, other than any contributions described in Section 408(k)(6), Internal Revenue Code;

(iv) under or to an annuity contract described in Section 403(b), Internal Revenue Code, except for a payment for the purchase of the contract that is made by reason of a salary reduction agreement whether or not the agreement is evidenced by a written instrument;

(v) under or to an exempt governmental deferred compensation plan as defined in Section 3121(v)(3), Internal Revenue Code; or

(vi) to supplement pension benefits under a plan or trust described in Subsections [~~(6)~~] (5)(d)(i) through (v) to take into account a portion or all of the increase in the cost of living, as determined by the Secretary of Labor, since retirement, but only if the supplemental payments are under a plan that is treated as a welfare plan under Section 3(2)(B)(ii) of the Employee Income Security Act of 1974; or

(e) any payment made to, or on behalf of, an employee or the employee's beneficiary under a cafeteria plan within the meaning of Section 125, Internal Revenue Code, if the payment would not be treated as wages under a cafeteria plan.

Section 3. Section **35A-4-301** is amended to read:

35A-4-301. Definitions.

As used in this part:

(1) "Benefit cost rate" means benefit costs of all individuals paid in a calendar year, as defined in Subsection (2), including the state's share of extended benefit costs, divided by the total wages paid by all employers subject to contributions in the same calendar year, calculated to four decimal places, disregarding the remaining fraction, if any.

(2) "Benefit costs" means the net money payments made to individuals who were employed by employers subject to contributions, excluding extended benefit costs, as provided in this chapter with respect to unemployment.

(3) "Computation date" means July 1 of any year, beginning July 1, 1984.

(4) "Contribution year" means any calendar year beginning on January 1 and ending on December 31.

[~~(5) "Cut-off date" means February 15 with respect to contribution rates effective for calendar years occurring after December 31, 1982.~~]

[~~(6)~~] (5) "Fiscal year" means the year beginning with July 1 of one year and ending June 30 of the next year. For example, fiscal year 1992 begins July 1, 1991, and ends June 30, 1992.

[~~(7)~~] (6) "New employer" means any employer [~~other than a reopening employer,~~] who has been an employer as defined in this chapter and whose account has been chargeable with benefits for less than one fiscal year immediately preceding the computation date.

[~~(8)~~] (7) "Payroll" means total wages.

[~~(9)~~] (8) "Qualified employer" means any employer who was an employer as defined in this chapter during each quarter of the prior fiscal year immediately preceding the computation date.

[~~(10)~~] (9) "Qualifying period" means the four fiscal years immediately preceding the contribution year on or after January 1, 1985. If four fiscal years of data are not available, the qualifying period is the lesser number of fiscal years for which data are available, but not less than one fiscal year.

[~~(11)~~] (10) "Reserve" means that amount of money in the fund which has been appropriated or is subject to appropriation by the Legislature, exclusive of moneys transferred to the fund under the Federal Employment Security Administrative Financing Act of 1954, 42 U.S.C. 1101 et seq.

(11) "Taxable wages" means all remuneration paid by an employer to employees for insured work that is subject to unemployment insurance contributions.

(12) "Total wages" means all remuneration paid by an employer to employees for insured work.

(13) "Unemployment experience" means all factors, including benefit costs and taxable wages, which bear a direct relation to an employer's unemployment risk.

Section 4. Section **35A-4-303** is amended to read:

35A-4-303. Determination of contribution rates.

(1) (a) On or before January 1 of each year beginning January 1, 1985, an employer's basic contribution rate will be the same as the employer's benefit ratio, determined by dividing the total benefit costs charged back to an employer during the immediately preceding four fiscal years by the total taxable wages of the employer for the same time period, calculated to four decimal places, disregarding the remaining fraction, if any.

(b) In calculating the basic contribution rate under Subsection (1)(a):

(i) if four fiscal years of data are not available, the data of three fiscal years shall be divided by the total taxable wages for the same time period;

(ii) if three fiscal years of data are not available, the data of two fiscal years shall be divided by the total taxable wages for the same time period; or

(iii) if two fiscal years of data are not available, the data of one fiscal year shall be divided by the total taxable wages for the same time period.

(2) (a) On or before January 1 of each year beginning with January 1, 1985, all social costs as defined in Subsection 35A-4-307(1) applicable to the immediately preceding four fiscal years shall be divided by the total taxable wages of all employers subject to contributions for the same time period, calculated to four decimal places, disregarding the remaining fraction, if any.

(b) In calculating the social contribution rate under Subsection (2)(a):

(i) if four fiscal years of data are not available, the data of three fiscal years shall be divided by the total taxable wages for the same time period; or

(ii) if three fiscal years of data are not available, the data of two fiscal years shall be divided by the total taxable wages for the same time period.

(c) On or after January 1, 2000, the social contribution rate shall be:

(i) set at 0.0010 for any rate year in which the reserve factor established in Subsection (3)(c) is equal to or less than 1.0000; or

(ii) calculated by dividing all social costs as defined in Subsection 35A-4-307(1) applicable to the preceding four fiscal years by the total taxable wages of all employers subject to contributions for the same time period, calculated to four decimal places, disregarding any remaining fraction, for any rate year in which the reserve factor established in Subsection (3)(c) is greater than 1.0000.

(d) (i) The social contribution rate for the rate year beginning January 1, 2004, is set at .003.

(ii) On or after January 1, 2005, the social contribution rate shall be calculated by dividing all social costs as defined in Subsection 35A-4-307(1) applicable to the preceding four fiscal years by the total taxable wages of all employers subject to contributions for the same period, calculated to four decimal places, disregarding any remaining fraction.

(iii) Notwithstanding Subsection (2)(d)(ii), the social contribution rate for only the rate year beginning January 1, 2005, may not exceed .004.

(3) (a) On or before January 1 of each year beginning with January 1, 1985, the reserve factor shall be computed under Subsection (3)(b). For purposes of computing the reserve factor:

(i) the five-year average benefit cost rate is calculated by:

(A) determining the five highest benefit cost rates experienced in the 25 years ending December 31 one year prior to the computation date;

(B) adding together the rates determined under Subsection (3)(a)(i)(A); and

(C) dividing the amount under Subsection (3)(a)(i)(B) by five, calculated to four decimal places, disregarding the remaining fraction, if any;

(ii) the minimum adequate reserve fund balance is calculated by:

(A) multiplying the five-year average benefit cost rate by 1.5; and

(B) multiplying the amount under Subsection (3)(a)(ii)(A) by total wages of the fiscal year ending prior to the computation date, rounded to the nearest dollar;

(iii) the maximum adequate reserve fund balance is calculated by:

(A) multiplying the five-year average benefit cost rate by 2.0; and

(B) multiplying the amount under Subsection (3)(a)(iii)(A) by the total wages used under Subsection (3)(a)(ii)(B), rounded to the nearest dollar; and

(iv) the computation date is the January 1 on which the reserve factor is calculated.

(b) (i) The reserve factor is one if the actual reserve fund balance as of June 30 preceding the computation date is:

(A) equal to or greater than the minimum adequate reserve fund balance; and

(B) equal to or less than the maximum adequate reserve fund balance.

(ii) If the actual reserve fund balance as of June 30 preceding the computation date is less than the minimum adequate reserve fund balance, the reserve factor shall be the greater of:

(A) 2.0000 minus an amount equal to the actual reserve fund balance divided by the minimum adequate reserve fund balance, calculated to four decimal places, disregarding the remaining fraction, if any; or

(B) the reserve factor calculated in the prior year.

(iii) The reserve factor is 2.0000 if:

(A) the actual reserve fund balance as of June 30 preceding the computation date is:

(I) insolvent; or

(II) negative; or

(B) there is an outstanding loan from the Federal Unemployment Account.

(iv) If the actual reserve fund balance as of June 30 preceding the computation date is more than the maximum adequate reserve fund balance, the reserve factor shall be calculated by:

(A) dividing the actual reserve fund balance by the maximum adequate reserve fund balance, calculated to four decimal places, disregarding the remaining fraction, if any; and

(B) subtracting the amount under Subsection (3)(b)(iv)(A) from 2.0000.

(c) Beginning January 1, 2000, the division shall by administrative decision set the reserve factor at a rate that shall sustain an adequate reserve. For the purpose of setting the reserve factor:

(i) the adequate reserve is defined as between 17 and19 months of benefits at the average of the five highest benefit cost rates in the last 25 years;

(ii) the reserve factor shall be 1.0000 if the actual reserve fund balance as of June 30 preceding the computation date is determined to be an adequate reserve;

(iii) the reserve factor will be set between 0.5000 and 1.0000 if the actual reserve fund balance as of June 30 preceding the computation date is greater than the adequate reserve;

(iv) the reserve factor will be set between 1.0000 and 1.5000 if the actual reserve fund balance as of June 30 prior to the computation date is less than the adequate reserve;

(v) if the actual reserve fund balance as of June 30 preceding the computation date is insolvent or negative or if there is an outstanding loan from the Federal Unemployment Account, the reserve factor will be set at 2.0000 until the actual reserve fund balance as of June 30 preceding the computation date is determined to be an adequate reserve;

(vi) the reserve factor will be set on or before January 1 of each year; and

(vii) monies made available to the state under Section 903 of the Social Security Act, as amended, which are received on or after January 1, 2004, may not be considered in establishing the reserve factor under this section for the rate year 2005 or any subsequent rate year.

(4) (a) Until January 1, 1995, an employer's overall contribution rate is the employer's

basic contribution rate multiplied by the reserve factor, if there is a reserve factor, calculated to four decimal places, disregarding any further fraction, plus the social contribution rate, and rounded up to the next higher multiple of .10%, but not more than a maximum overall contribution rate of 8.0% and not less than 1% for new employers.

(b) On or after January 1, 1995, an employer's overall contribution rate is the employer's basic contribution rate multiplied by the reserve factor, calculated to four decimal places, disregarding any further fraction, plus the social contribution rate, and rounded to three decimal places, disregarding any further fraction, if the fourth decimal place is .0004 or less, or rounding up to the next higher number, if the fourth decimal place is .0005 or more, but not more than a maximum overall contribution rate of 8.0% and not less than 1% for new employers.

(c) On or after January 1, 2000, an employer's overall contribution rate is the employer's basic contribution rate multiplied by the reserve factor established according to Subsection (3)(c), calculated to four decimal places, disregarding the remaining fraction, plus the social contribution rate established according to Subsection (2)(c), and calculated to three decimal places, disregarding the remaining fraction, but not more than a maximum overall contribution rate of 8.0%, plus the applicable social contribution rate and not less than 1.1% for new employers.

(d) On or after January 1, 2004, an employer's overall contribution rate is the employer's basic contribution rate multiplied by the reserve factor established according to Subsection (3)(c), calculated to four decimal places, disregarding the remaining fraction, plus the social contribution rate established according to Subsection (2)(d), and calculated to three decimal places, disregarding the remaining fraction, but not more than a maximum overall contribution rate of 9.0%, plus the applicable social contribution rate and not less than 1.1% for new employers.

(e) The overall contribution rate does not include the addition of any penalty applicable to an employer as a result of delinquency in the payment of contributions as provided in Subsection [~~(10)~~] (9).

(f) The overall contribution rate does not include the addition of any penalty applicable to an employer assessed a penalty rate under Subsection 35A-4-304(5)(a).

(5) Except as provided in Subsection [~~(10)~~] (9), each new employer shall pay a

contribution rate based on the average benefit cost rate experienced by employers of the major industry as defined by department rule to which the new employer belongs, the basic contribution rate to be determined as follows:

(a) Except as provided in Subsection (5)(b), on or before January 1 of each year, the basic contribution rate to be used in computing the employer's overall contribution rate is the benefit cost rate which is the greater of:

(i) the amount calculated by dividing the total benefit costs charged back to both active and inactive employers of the same major industry for the last two fiscal years by the total taxable wages paid by those employers that were paid during the same time period, computed to four decimal places, disregarding the remaining fraction, if any; or

(ii) 1%.

(b) If the major industrial classification assigned to a new employer is an industry for which a benefit cost rate does not exist because the industry has not operated in the state or has not been covered under this chapter, the employer's basic contribution rate shall be 5.4%. This basic contribution rate is used in computing the employer's overall contribution rate.

[~~(6) (a) A reopening employer's basic contribution rate is the average overall contribution rate for all employers in the state, but not less than 1%, until such time as the reopening employer becomes a qualified employer as defined in Section 35A-4-301.~~]

[~~(b) The average overall contribution rate for all employers in the state shall be defined by rule.~~]

[~~(c) The reopening employer is an employer that is not substantially related to or affiliated with the predecessor employer and that acquires, for the purpose of reopening, substantially all the assets of a business or operating component of a business that has been closed or substantially closed for 90 days or more of its normal operating period immediately prior to the acquisition.~~]

[~~(d) A business or operating component of a business has been substantially closed if:~~]

[~~(i) its normal production has been stopped;~~]

[~~(ii) a majority of its workers have been laid off; and~~]

[~~(iii) the services of remaining employees are devoted to the protection and disposition of assets and inventory or administrative duties.~~]

[~~(7)~~] (6) Notwithstanding any other provision of this chapter, and except as provided in

Subsection [~~(8)~~] (7), if an employing unit that moves into this state is declared to be a qualified employer because it has sufficient payroll and benefit cost experience under another state, a rate shall be computed on the same basis as a rate is computed for all other employers subject to this chapter if that unit furnishes adequate records on which to compute the rate.

[~~(8)~~] (7) An employer who begins to operate in this state after having operated in another state shall be assigned the maximum overall contribution rate until the employer acquires sufficient experience in this state to be considered a "qualified employer" if the employer is:

(a) regularly engaged as a contractor in the construction, improvement, or repair of buildings, roads, or other structures on lands;

(b) generally regarded as being a construction contractor or a subcontractor specialized in some aspect of construction; or

(c) required to have a contractor's license or similar qualification under Title 58, Chapter 55, Utah Construction Trades Licensing Act, or the equivalent in laws of another state.

[~~(9)~~] (8) (a) If an employer[~~, other than a reopening employer,~~] acquires the business or all or substantially all the assets of another employer and the other employer had discontinued operations upon the acquisition or transfers its trade or business, or a portion of its trade or business, under Subsection 35A-4-304(3)(a):

(i) for purposes of determining and establishing the acquiring party's qualifications for an experience rating classification, the payrolls of both employers during the qualifying period shall be jointly considered in determining the period of liability with respect to:

(A) the filing of contribution reports;

(B) the payment of contributions; and

(C) after January 1, 1985, the benefit costs of both employers; [~~and~~]

(ii) the transferring employer shall be divested of the transferring employer's [~~payroll~~] unemployment experience[~~.~~] provided the transferring employer had discontinued operations, but only to the extent as defined under Subsection 35A-4-304(3)(c); and

(iii) if an employer transfers its trade or business, or a portion of its trade or business, as defined under Subsection 35A-4-304(3), the transferring employer may not be divested of its employer's unemployment experience.

(b) Any employing unit or prospective employing unit that acquires the [~~payroll~~]

unemployment experience of an employer shall, for all purposes of this chapter, be an employer as of the date of acquisition.

(c) Notwithstanding Section 35A-4-310, when a transferring employer, as provided in Subsection [~~(9)~~] (8)(a), is divested of the employer's [~~payroll~~] unemployment experience by transferring all of the employer's business to another and by ceasing operations as of the date of the transfer, the transferring employer shall cease to be an employer, as defined by this chapter, as of the date of transfer.

[~~(10)~~] (9) (a) A rate of less than 8% shall be effective January 1 of any contribution year on or after January 1, 1985, but before January 1, 1988, and a rate of less than the maximum overall contribution rate on or after January 1, 1988, only with respect to new employers and to those qualified employers who, except for amounts due under division determinations that have not become final, paid all contributions prescribed by the division with respect to the four consecutive calendar quarters in the fiscal year immediately preceding the computation date on or after January 1, 1985.

(b) Notwithstanding Subsections (1), (5), (6), [~~(7),~~] and [~~(9)~~] (8), on or after January 1, 1988, any employer who fails to pay all contributions prescribed by the division with respect to the four consecutive calendar quarters in the fiscal year immediately preceding the computation date, except for amounts due under determinations that have not become final, shall pay a contribution rate equal to the overall contribution rate determined under the experience rating provisions of this chapter, plus a surcharge of 1% of wages.

(c) Any employer who pays all required contributions shall, for the current contribution year, be assigned a rate based upon the employer's own experience as provided under the experience rating provisions of this chapter effective the first day of the calendar quarter in which the payment was made.

(d) Delinquency in filing contribution reports shall not be the basis for denial of a rate less than the maximum contribution rate.

Section 5. Section **35A-4-304** is repealed and reenacted to read:

35A-4-304. Special provisions regarding transfers of unemployment experience and assignment rates.

(1) As used in this section:

(a) "Knowingly" means having actual knowledge of or acting with deliberate ignorance

or reckless disregard for the prohibition involved.

(b) "Person" has the meaning given that term by Section 7701(a)(1) of the Internal Revenue Code of 1986.

(c) "Trade or business" includes the employer's workforce.

(d) "Violate or attempt to violate" includes intent to evade, misrepresentation, or willful nondisclosure.

(2) Notwithstanding any other provision of this chapter, Subsections (3) and (4) shall apply regarding assignment of rates and transfers of unemployment experience.

(3) (a) If an employer transfers its trade or business, or a portion of its trade or business, to another employer and, at the time of the transfer, there is common ownership, management, or control of the employers, then the unemployment experience attributable to each employer shall be combined into a common experience rate calculation.

(b) The contribution rates of the employers shall be recalculated and made effective upon the date of the transfer of trade or business as determined by division rule in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) (i) If one or more of the employers is a qualified employer at the time of the transfer, then all employing units that are party to a transfer described in Subsection (3)(a) of this section shall be assigned an overall contribution rate under Subsection 35A-4-303(4)(d), using combined unemployment experience rating factors, for the rate year during which the transfer occurred and for the subsequent three rate years.

(ii) If none of the employing units is a qualified employer at the time of the transfer, then all employing units that are a party to the transfer described in Subsection (3)(a) shall be assigned the highest overall contribution rate applicable at the time of the transfer to any employer who is a party to the acquisition for the rate year during which the transfer occurred and for subsequent rate years until the time when one or more of the employing units is a qualified employer.

(iii) Once one or more employing units described in Subsection (3)(c)(ii) is a qualified employer, all the employing units shall be assigned an overall rate under Subsection 35A-4-303(4)(d), using combined unemployment experience rating factors for subsequent rate years, not to exceed three years following the year of the transfer.

(d) The transfer of some or all of an employer's workforce to another employer shall be

considered a transfer of its trade or business when, as the result of the transfer, the transferring employer no longer performs trade or business with respect to the transferred workforce, and the trade or business is now performed by the employer to whom the workforce is transferred.

(4) (a) Whenever a person is not an employer under this chapter at the time it acquires the trade or business of an employer, the unemployment experience of the acquired business shall not be transferred to that person if the division finds that the person acquired the business solely or primarily for the purpose of obtaining a lower rate of contributions.

(b) The person shall be assigned the applicable new employer rate under Subsection 35A-4-303(5).

(c) In determining whether the business was acquired solely or primarily for the purpose of obtaining a lower rate of contributions, the division shall use objective factors which may include:

(i) the cost of acquiring the business;

(ii) whether the person continued the business enterprise of the acquired business;

(iii) how long the business enterprise was continued; or

(iv) whether a substantial number of new employees were hired for performance of duties unrelated to the business activity conducted prior to acquisition.

(5) (a) If a person knowingly violates or attempts to violate Subsection (3) or (4) or any other provision of this chapter related to determining the assignment of a contribution rate, or if a person knowingly advises another person in a way that results in a violation of any of those subsections or provisions, the person is subject to the following penalties:

(i) (A) If the person is an employer, then the employer shall be assigned an overall contribution rate of 5.4% for the rate year during which the violation or attempted violation occurred and for the subsequent rate year.

(B) If the person's business is already at 5.4% for any year, or if the amount of increase in the person's rate would be less than 2% for that year, then a penalty surcharge of contributions of 2% of taxable wages shall be imposed for the rate year during which the violation or attempted violation occurred and for the subsequent rate year.

(ii) (A) If the person is not an employer, the person shall be subject to a civil penalty of not more than $5,000.

(B) The fine shall be deposited in the penalty and interest account established under

Section 35A-4-506.

(b) (i) In addition to the penalty imposed by Subsection (5)(a), a violation of this section may be prosecuted as unemployment insurance fraud.

(ii) The determination of the degree of an offense shall be measured by the total value of all contributions avoided or reduced or contributions sought to be avoided or reduced by the unlawful conduct as applied to the degrees listed under Subsection 76-8-1301(2)(a).

(6) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the division shall make rules to identify the transfer or acquisition of a business for purposes of this section.

(7) This section shall be interpreted and applied in a manner that meets the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.

Section 6. **Effective date.**

If approved by two-thirds of all the members elected to each house, this bill takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.

Legislative Review Note
as of 12-7-04 8:42 AM

Based on a limited legal review, this legislation has not been determined to have a high probability of being held unconstitutional.

Office of Legislative Research and General Counsel

Interim Committee Note
as of 12-08-04 11:46 AM

The Workforce Services and Community and Economic Development Interim Committee recommended this bill.

Fiscal Note

Bill Number HB0010

Employment Security Act Amendments

10-Jan-05
2:48 PM

State Impact

This bill makes State Unemployment Tax Avoidance (SUTA) dumping illegal and conforms with federal law. Enforcement will cost $353,000 from the federal Unemployment Operating Grant, but is expected to generate about $10,000,000 that will flow to Unemployment Insurance Contributions.

	FY 2006 Approp.	FY 2007 Approp.	FY 2006 Revenue	FY 2007 Revenue
Restricted Funds	$353,000	$257,000	$10,000,000	$3,000,000
TOTAL	**$353,000**	**$257,000**	**$10,000,000**	**$3,000,000**

Individual and Business Impact

Office of the Legislative Fiscal Analyst