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BILL ANALYSIS

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Senate Bill 5 (as introduced 1-14-09)
Sponsor: Senator Mark C. Jansen
Committee: Commerce and Tourism

Date Completed: 2-9-09

CONTENT

The bill would amend the Michigan Employment Security Act to prohibit the Unemployment Insurance Agency (UIA) from consolidating or combining the experience and unemployment accounts of separate employer entities into a single account, or assessing a consolidated or combined contribution rate covering two or more entities, unless there had been a transfer of trade or business in violation of Section 22b of the Act or a disregard of the separate legal entities through the commingling of assets. The UIA also could not consolidate or combine separate accounts of employer entities into a single account, or assess a consolidated or combined contribution rate, while a redetermination request or appeal was pending.

Section 22b of the Act contains "SUTA dumping" provisions. "SUTA" means "state unemployment tax act". "SUTA dumping" means transferring a trade or business or a part of a trade or business, solely or primarily for the purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under the Act.

Specifically, Section 22b prohibits a person from doing either of the following:

-- Transferring the person's trade or business, or a portion of it, to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under the Act.
-- Acquiring a trade or business, or a part of a trade or business, for the sole or primary purpose of obtaining a lower contribution rate than otherwise would apply under the Act.

Also, under Section 22b, if an employer transfers all or part of its trade or business to another employer and there is substantially common ownership, management, or control of the two employers at the time of the transfer, the unemployment experience attributable to the transferred trade or business must be transferred to the transferee employer. The UIA must recalculate the contribution rates of both employers and apply the new rates in the same manner as for a transfer of business under the Act. If, after a transfer of experience, the UIA determines that the sole or primary purpose of the transfer of trade or business was to obtain reduced liability for contributions, the employers' experience rating accounts must be combined into a single account and a single rate assigned to it.

Under the bill, unless there had been a transfer of trade or business in violation of Section 22b or a disregard of the separate legal entities through the commingling of bank accounts and other assets and failure to abide by corporate formalities for an unlawful purpose, the

UIA could not consolidate or combine the experience and unemployment accounts of separate employer entities into a single account or assess a consolidated or combined contribution rate covering two or more entities. The bill specifies that Section 22b would not prohibit the UIA from transferring the experience of an employer entity, or combining the experience of two or more employer entities into a single account for coverage after July 1, 2005 (the effective date of Section 22b), if there had been a transfer after that date of all or part of a trade or business for the sole or primary purpose of reducing reimbursement payments in lieu of contributions or the contribution rate as described in Section 22b, or a disregard of the separate legal entities through the commingling of bank accounts and other assets and failure to abide by corporate formalities for an unlawful purpose.

The UIA also could not consolidate or combine the experience or unemployment accounts of employer entities into a single account or assess a consolidated or combined contribution rate while a request for a redetermination, an appeal to the Board of Review, or an appeal to a circuit or appellate court was pending. If the UIA's determination were upheld, the consolidation or combination of the experience account or contribution rate would be retroactive to the date established in the original determination. If the UIA's determination were overturned, the Board of Review or court would have to award the prevailing party its court costs and reasonable attorney fees.

(The Board of Review is an autonomous entity within the Department of Energy, Labor, and Economic Growth, and has the authority to affirm, modify, and reverse decisions of UIA referees.)

Proposed MCL 421.22c Legislative Analyst: Patrick Affholter

FISCAL IMPACT

The U.S. Department of Labor (DOL), Employment and Training Administration has notified the State's Unemployment Insurance Agency within the Department of Energy, Labor, and Economic Growth that there are concerns regarding Michigan's compliance with the Federal law that prohibits SUTA dumping. Under the Federal law, whenever employees are transferred between businesses that have substantially common ownership, management, or control, the experience ratings of the businesses must be combined. Under Michigan law, however, the intent of the transfer is considered and experience ratings are combined only when the sole or primary purpose of the transfer is to reduce the employer's applicable SUTA tax rate. The UIA has informed the DOL that a conformity assurance provision in Michigan law directs that the law be interpreted to meet the minimum requirements of the Federal SUTA dumping legislation, and that this law has permitted the program to be administered in accordance with Federal requirements. The DOL has requested that Michigan law be amended to conform explicitly to the Federal requirements.

Senate Bill 5 would prohibit the combination of rates, unless the firms involved had violated Michigan's existing SUTA dumping statute, or failed to maintain separate legal entities, or the UIA determined that the sole or primary purpose of the transfer was to obtain reduced tax liability. It appears that under Senate Bill 5, the State could be regarded as remaining out of compliance with Federal anti-SUTA dumping requirements. In addition, the bill would add language to prohibit the UIA from combining rates for a company while its case was awaiting consideration in a rate redetermination, or an appeal to the Board of Review or a circuit or appellate court. These provisions could reduce the Agency's efforts to prevent SUTA dumping, decreasing SUTA tax revenue by an unknown amount. If its determination were overturned by the Board or court, the UIA would have to pay the prevailing party's court costs and attorney fees. The potential amount of these costs is unknown.

If Michigan remains out of compliance with Federal law, it is possible that the State will be subject to Federal penalties. The Federal revenue that supports the cost of administering

the Unemployment Insurance Agency could be reduced. This funding totals $136.5 million in FY 2008-09. In addition, the Federal unemployment tax rate paid by Michigan employers could be increased. Currently, the Federal Unemployment Tax Act (FUTA) tax rate of 6.2% (paid on the first $7,000 of taxable wages per employee) is reduced to 0.8% for Michigan employers due to the 5.4% FUTA tax credit awarded to states that are in compliance with the minimum Federal requirements for the unemployment insurance program. If the State remains out of compliance, this credit could be reduced or eliminated.

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