

ACT 114

S.B. NO. 817

A Bill for an Act Relating to the Employment Security Law.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. Section 383-66, Hawaii Revised Statutes, is amended to read as follows:

“§383-66 Contribution rates, how determined. (a) The department, for the nine-month period April 1, 1941, to December 31, 1941, and for each calendar year thereafter, except as otherwise provided in this part, shall classify employers in accordance with their actual experience in the payment of contributions and with respect to benefits charged against their accounts with a view to fixing the contribution rates to reflect this experience. The department shall determine the contribution rate of each employer in accordance with the following requirements:

- (1) The standard rate of contributions payable by each employer for any calendar year through 1984 shall be three per cent. For the calendar year 1985 and thereafter, the standard rate of contributions payable by each employer shall be five and four-tenths per cent[-];
- (2) No employer's rate for the calendar year 1942 and for any calendar year thereafter shall be other than the maximum rate unless and until the employer's account has been chargeable with benefits throughout the thirty-six consecutive calendar month period ending on December 31 of the preceding calendar year, except that, for the calendar year 1956 and for each calendar year thereafter, an employer who has not been subject to the law for a sufficient period to meet this requirement may qualify for a rate other than the maximum rate if the employer's account has been chargeable throughout a lesser period but in no event less than the twelve consecutive calendar month period ending on December 31 of the preceding calendar year. For the calendar years 1985 through 1991, the contribution rate for a new or newly covered employer shall be the sum of the employer's basic contribution rate of three and six-tenths per cent and the fund solvency contribution rate determined for that year pursuant to section 383-68(a), until the employer's account has been chargeable with benefits throughout the twelve consecutive calendar month period ending on December 31 of the preceding calendar year; except that no employer's contribution rate shall be greater than five and four-tenths per cent and no employer with a negative reserve ratio shall have a contribution rate less than the employer's basic contribution rate. For calendar years 1992 and thereafter, the contribution rate for a new or newly covered employer shall be the contribution rate assigned to any employer with .0000 reserve ratio, until the employer's account has been chargeable with benefits throughout the twelve consecutive calendar month period ending on December 31 of the preceding calendar year[-];

- (3) Any amount credited to this State under section 903 of the Social Security Act, as amended, which has been appropriated for expenses of administration, whether or not withdrawn from the trust fund, shall be excluded from the fund for the purposes of this paragraph. Any advance that may be made to this State under section 1201 of the Social Security Act, whether or not withdrawn from this trust fund, shall be excluded from the fund for the purposes of this paragraph. No employer's rate shall be reduced in any amount [which] that is not allowable as an additional credit, against the tax levied by the federal Unemployment Tax Act pursuant to section 3302(b) of the federal Internal Revenue Code or pursuant to any other federal statute, successor to section 3302(b), which provides for the additional credit now provided for in section 3302(b)[-];
- (4) If, when any classification of employers is to be made (which may be after the commencement of the period for which the classification is to be made), the department finds that any employer has failed to file any report required in connection therewith or has filed a report that the department finds incorrect or insufficient, the department shall notify the employer thereof by mail addressed to the employer's last known address. Unless the employer files the report or a corrected or sufficient report, as the case may be, within fifteen days after the mailing of the notice, the maximum rate of contributions shall be payable by the employer for the period for which the contribution rate is to be fixed. Effective January 1, 1987, the director, for excusable failure, may redetermine the assignment of the maximum contribution rate in accordance with this section, provided the employer files all reports as required by the department and submits a written request for redetermination before December 31 of the year for which the contribution rate is to be fixed[-];
- (5) For the purpose of sections 383-63 to 383-69, if after December 31, 1939, any employing unit in any manner succeeds to or acquires the organization, trade, or business, or substantially all the assets thereof (whether or not the successor or acquiring unit was an "employing unit", as that term is defined in section 383-1 prior to the acquisition), or after December 31, 1988 and prior to December 31, 1992, acquires a clearly identifiable and segregable portion of the organization, trade, or business of another [which] that at the time of the acquisition was an employer subject to this chapter, and the successor continues or resumes the organization, trade, or business and continues to employ all or nearly all of the predecessor's employees, or the successor continues or resumes the clearly identifiable and segregable portion of the organization, trade, or business and continues to employ all or nearly all of the employees of the clearly identifiable and segregable portion, an application may be made for transfer of the predecessor's experience record. If the predecessor employer has submitted all information and reports required by the department including amended quarterly wage reports identifying the employees transferred or retained and executed and filed with the department before December 31 of the calendar year following the calendar year in which the acquisition occurred on a form approved by the department a waiver relinquishing the rights to all or the clearly identifiable and segregable portion of the predecessor's prior experience record with respect to its separate account, actual contribution payment, and benefit chargeability experience, annual payrolls and other data for the purpose of obtaining a reduced rate, and

requesting the department to permit the experience record to inure to the benefit of the successor employing unit upon request of the successor employing unit, the experience record for rate computation purposes of the predecessor shall thereupon be deemed the experience record of the successor and the experience record shall be transferred by the department to the successor employing unit and shall become the separate account of the employing unit as of the date of the acquisition. Benefits chargeable to the predecessor employer or successor employer in case of an acquisition of a clearly identifiable and segregable portion of the organization, trade, or business, after the date of acquisition on account of employment prior to the date of the acquisition shall be charged to the separate account of the successor employing unit. In case of an acquisition of a clearly identifiable and segregable portion of the organization, trade, or business, the experience record that inures to the benefit of the successor employer shall be determined as follows:

- (A) Wages, as used in section 383-61, attributable to the clearly identifiable and segregable portion shall be for the period beginning with the most recent three consecutive calendar years immediately preceding the determination of rates under ~~[section]~~ sections 383-63 to 383-69 and through the date of acquisition; and
- (B) Reserve balance attributable to the clearly identifiable and segregable portion shall be the amount determined by dividing the wages, as used in section 383-61, of the clearly identifiable and segregable portion in the three calendar years (or that lesser period as the clearly identifiable and segregable portion may have been in operation) immediately preceding the computation date of the rating period prior to which the acquisition occurred by the total taxable payrolls of the predecessor for the three-year period (or that lesser period as the clearly identifiable and segregable portion may have been in operation) and multiplying the quotient by the reserve balance of the predecessor employer calculated as of the acquisition date[-];

~~[Provided]~~ provided the waiver or waivers required herein are filed with the department within sixty days after the date of acquisition, the successor employing unit, unless already an employer subject to this chapter, shall be subject from the date of acquisition to the rate of contribution of the predecessor or of two or more predecessors if they have the same contribution rate. If there are two or more predecessors having different contribution rates, the successor shall be subject to the rate prescribed for new or newly covered employers under paragraph (2) until the next determination of rates under sections 383-63 to 383-69, at which time the experience records of the predecessors and successor shall be combined and shall be deemed to be the experience record of a single employing unit and the successor's rate shall thereupon be determined upon the basis of the combined experience. If the successor at the time of the transfer is an employer subject to this chapter, the rate of contribution to which the successor is then subject shall remain the same until the next determination of rates under sections 383-63 to 383-69, at which time the experience records of the predecessor and successor shall be combined and shall be deemed to be the experience record of a single employing unit and the successor's rate shall thereupon be determined upon the basis of the combined experience. For the purpose of determination of rates under sections 383-63 to 383-69 of all successor employing units, waivers as required herein, if not previously filed as hereinabove pro-

vided, shall be filed with the department not later than March 1 of the year for which the rate is determined; provided that no waiver shall be accepted by the department for filing unless the employing unit executing the waiver has filed all reports and paid all contributions required by this chapter[-];

- (6) The department may prescribe rules for the establishment, maintenance, and dissolution of joint accounts by two or more employers, and, in accordance with the rules and upon application by two or more employers to establish such an account, or to merge their several individual accounts in a joint account, shall maintain the joint account as if it constituted a single employer's account. The rules shall be consistent with the federal requirements for additional credit allowance in section 3303 of the federal Internal Revenue Code and consistent with this chapter[-];
- (7) Whenever there is an amendment to this chapter which, if immediately effective, would change an employer's rate of contributions, the rate of the employer shall be changed in accordance with the amendment and the new rate shall apply for the remainder of the calendar year beginning with the calendar quarter immediately following the effective date of the amendment providing for the change, unless otherwise provided by the amendment[-];
- (8) For the purposes of this section "contribution rate" shall mean the basic contribution rate as defined in section 383-68 when applied to calendar year 1978 or any calendar year thereafter[-]; and
- (9) For the purposes of this section, the terms "employing unit," "employer," "predecessor," and "successor" shall include both the singular and the plural of each term. Nothing in this section shall prevent two or more successor employing units, which each succeed to or acquire a clearly identifiable and segregable portion of a predecessor employing unit, from gaining the benefit of the clearly identifiable and segregable portion of the predecessor's experience record[-];

[Provided] provided that the terms of this section are complied with, nothing herein shall bar a predecessor employer from waiving the rights to all or the clearly identifiable and segregable portion of the predecessor's prior experience record in favor of a successor employer where the successor acquired a clearly identifiable and segregable portion of the predecessor's organization, trade, or business after December 31, 1988 and prior to December 31, 1992.

(b) Notwithstanding any other provision of this chapter, the following shall apply regarding assignment of rates and transfers of experience:

- (1) If an employing unit transfers its organization, trade, or business, or a portion thereof, to another employing unit and, at the time of the transfer, there is substantially common ownership, management, or control of the two employing units, both employing units shall file a notification of the transfer with the department on a form approved by the department within thirty days after the date of the transfer. The department shall transfer the experience records attributable to the transferred organization, trade, or business to the employing unit to whom the organization, trade, or business is transferred. The rates of both employing units shall be recalculated and made effective beginning with the calendar quarter immediately following the date of the transfer of the organization, trade, or business;
- (2) If a person is not an employing unit as defined in section 383-1 at the time it acquires the organization, trade, or business of another employing unit, both the person and the employing unit shall file a notification

of the acquisition with the department on a form approved by the department within thirty days after the date of the acquisition. If the department determines at the time of the acquisition or thereafter, based on objective factors that may include:

- (A) The cost of acquiring the organization, trade, or business;
 - (B) Whether the person continued the activity of the acquired organization, trade, or business;
 - (C) How long the organization, trade, or business was continued; or
 - (D) Whether a substantial number of new employees were hired for performance of duties unrelated to the organization, trade, or business activity conducted prior to the acquisition, that the acquisition was solely or primarily for the purpose of obtaining a lower rate of contribution, the person shall not be assigned the lower rate and shall be assigned the contribution rate for a new or newly covered employer pursuant to subsection (a)(2) instead;
- (3) An employing unit or person who is not an employing unit shall be subject to penalties under paragraph (4) or (5) if the employing unit or person who is not an employing unit:
- (A) Knowingly violates or attempts to violate this subsection or any other provision of this chapter related to determining the assignment of a contribution rate;
 - (B) Makes any false statement or representation or fails to disclose a material fact to the department in connection with the transfer or acquisition of an organization, trade, or business; or
 - (C) Knowingly advises another employing unit or person in a way that results in a violation or attempted violation of this subsection;
- (4) If the person is an employing unit:
- (A) The employing unit shall be subject to the highest rate assignable under this chapter for the calendar year during which the violation or attempted violation occurred and for the consecutive three calendar years immediately following; or
 - (B) If the employing unit is already at the highest rate or if the amount of increase in the employing unit's rate would be less than two per cent for the calendar year during which the violation or attempted violation occurred, a penalty equal to contributions of two per cent of taxable wages shall be imposed for the calendar year during which the violation or attempted violation occurred and the consecutive three calendar years immediately following. Any penalty amount collected in excess of the maximum contributions payable at the highest rate shall be deposited in the special unemployment insurance administration fund in accordance with section 383-127;
- (5) If the person is not an employing unit, the person shall be subject to a penalty of not more than \$5,000. The penalty shall be deposited in the special unemployment insurance administration fund in accordance with section 383-127;
- (6) For purposes of this subsection, the following definitions shall apply:
- (A) "Knowingly" means having actual knowledge of or acting with deliberate ignorance or reckless disregard for the requirements or prohibition involved;
 - (B) "Violates or attempts to violate" includes, but is not limited to, intent to evade, misrepresentation, or wilful nondisclosure;

- (C) “Person” shall have the same meaning as defined in section 6601(a)(1) of the Internal Revenue Code of 1986, as amended; and
- (D) “Organization, trade, or business” shall include the employer’s workforce;
- (7) In addition to the civil penalties imposed by paragraphs (4) and (5), any violation of this section may be prosecuted under sections 383-142 and 383-143. No existing civil or criminal remedy for any wrongful action that is a violation of any statute or any rule of the department or the ordinance of any county shall be excluded or impaired by this section;
- (8) The department shall establish procedures to identify the transfer or acquisition of an employing unit for the purposes of this section; and
- (9) This section shall be interpreted and applied in a manner to meet the minimum requirements contained in any guidance or regulations issued by the United States Department of Labor.”

SECTION 2. Section 383-142, Hawaii Revised Statutes, is amended to read as follows:

“§383-142 Employing units. Any employing unit or any officer or agent of an employing unit or any other person who makes a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact, to prevent or reduce the payment of benefits to any individual entitled thereto, or to avoid becoming or remaining a subject employer or to avoid or reduce any contribution or other payment required from an employing unit under this chapter or under the unemployment compensation law of any state or of the federal government, or who wilfully fails or refuses to make any such contributions or other payment or to furnish any reports required hereunder or to produce or permit the inspection or copying of records as required hereunder, or who wilfully fails to establish, maintain, or preserve records of all individuals in [his] the employer’s employ [which] that show the total amount of wages paid for each pay-period to each [sueh] individual while in [his] the employer’s employ, or who wilfully fails to establish, maintain, or preserve any other record, as required by this chapter or any rule or regulation adopted hereunder, shall be [fined not less than \$20 nor more than \$200, or imprisoned not more than sixty days, or both;] charged with a misdemeanor, and subject to a fine of not more than \$10,000; and each [sueh] false statement or representation or failure to disclose a material fact, or failure to establish, maintain, or preserve records, and each day of such a failure or refusal shall constitute a separate offense.”

SECTION 3. Section 383-143, Hawaii Revised Statutes, is amended to read as follows:

“§383-143 General penalty. Any person who wilfully violates this chapter or any order, rule, or regulation thereunder, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which a penalty is neither prescribed in this chapter nor provided by any other applicable statute, shall be [~~fined not less than \$20 nor more than \$200, or imprisoned not more than sixty days, or both~~] charged with a misdemeanor, and subject to a fine of not more than \$10,000; and each day [sueh] the violation continues shall be deemed to be a separate offense.”

SECTION 4. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

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SECTION 5. This Act shall take effect upon its approval.

(Approved June 9, 2005.)