

Introduced by

Representative Keiser

1 A BILL for an Act to create and enact two new sections to chapter 52-04 and sections  
2 52-04-08.1 and 52-04-08.2 of the North Dakota Century Code, relating to definitions, payment  
3 of unemployment insurance by staffing services, employer restructuring activities, and transfers  
4 of unemployment insurance tax account reserve history; to amend and reenact subsection 4 of  
5 section 52-04-06 and section 52-04-08 of the North Dakota Century Code, relating to voluntary  
6 contributions to lower unemployment insurance tax rates, transfer of unemployment insurance  
7 employer experience history to successor entities, and the transfer of workforce to other  
8 entities; to provide for a legislative council study; and to provide a penalty.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1.** A new section to chapter 52-04 of the North Dakota Century Code is  
11 created and enacted as follows:

12 **Definitions.** As used in this chapter, unless the context otherwise requires:

- 13 1. "Agency" or "bureau" means job service North Dakota.  
14 2. "Client company" means a person that contracts to receive services, within the  
15 course of that person's usual business, from a staffing service or that contracts to  
16 lease any or all of that person's employees from a staffing service.  
17 3. "Knowingly" means having actual knowledge of or acting with deliberate ignorance  
18 or reckless disregard for the prohibition involved.  
19 4. "Staffing service" means an employer in the business of providing the employer's  
20 employees to a client company to perform services within the course of that client  
21 company's usual business. The term includes a professional employer  
22 organization, a staff leasing company, an employee leasing organization, and a  
23 temporary staffing company. The term "staffing service" must be broadly  
24 construed to encompass an entity that offers services provided by a professional

1           employer organization, a staff leasing company, an employee leasing organization,  
2           or a temporary staffing company, regardless of the term used.

3           5. "Temporary staffing" or "temporary staffing service" means an arrangement  
4           through which an employer hires its own employees and assigns the employees to  
5           a client company to support or supplement the client company's workforce in a  
6           special work situation, including an employee's temporary absence; a temporary  
7           skill shortage; a seasonal workload; or a special assignment or project with a  
8           targeted end date.

9           The term does not include an arrangement through which the majority of the  
10           client company's workforce has been assigned by a temporary staffing service for  
11           a period of more than twelve consecutive months.

12           6. "Unemployment insurance tax rate" means the rate calculated or assigned under  
13           sections 52-04-05 and 52-04-06.

14           7. "Violates or attempts to violate" includes intent to evade, misrepresentation, and  
15           willful nondisclosure.

16           8. "Workforce" means some or all of the employees of a transferring employer.

17           **SECTION 2.** A new section to chapter 52-04 of the North Dakota Century Code is  
18 created and enacted as follows:

19           **Staffing services - Payment of unemployment insurance taxes.**

20           1. If a staffing service exclusively provides temporary staffing services, the staffing  
21           service is considered to be the employee's employer and the staffing service shall  
22           pay unemployment insurance taxes at the staffing service's unemployment  
23           insurance tax rate. If a staffing service provides temporary and long-term  
24           employee staffing services, the staffing service is subject to the reporting and tax  
25           requirements associated with the type of employee provided to the client company.

26           2. For the purposes of long-term employee staffing services provided by a staffing  
27           service, the staffing service shall:

28           a. Report quarterly the wages of all employees furnished to each client company  
29           and pay taxes on those wages at the client company's unemployment  
30           insurance tax rate; except as otherwise provided under subsection 3.

- 1           b. Maintain complete and separate records of the wages paid to employees  
2           furnished to each of the client companies. Claims for benefits must be  
3           separately identified by the staffing service for each client company.
- 4           c. Notify the agency of each client company's name and unemployment  
5           insurance account number and the date the staffing service began providing  
6           services to the client company. The staffing service shall provide the agency  
7           with the information required under this subdivision upon entering an  
8           agreement with a client company, but no later than fifteen days from the  
9           effective date of the written agreement.
- 10          d. Supply the agency with a copy of the agreement between the staffing service  
11          and the client company.
- 12          e. Notify the agency upon termination of any agreement with a client company,  
13          but no later than fifteen days from the effective date of the termination.
- 14          f. Share employer responsibilities with the client company, including retention of  
15          the authority to hire, terminate, discipline, and reassign employees. If the  
16          contractual agreement between the staffing service and a client company is  
17          terminated, the employees become the sole employees of the client  
18          company.
- 19          3. For the purposes of long-term employee staffing services provided by a staffing  
20          service, upon authorization of the agency, the staffing service may be considered  
21          to be the employee's employer and the staffing service shall pay unemployment  
22          insurance taxes at the staffing service's unemployment insurance tax rate. The  
23          agency may not make an authorization under this subsection unless one of the  
24          following requirements is met:
- 25           a. In the case of a client company unemployment insurance tax rate that is  
26           higher than the staffing services tax rate:
- 27               (1) The staffing service:
- 28                   (a) Calculates the difference between the staffing service's tax rate  
29                   and the client company's tax rate;

- 1                   (b) Applies the difference to the wages to be earned by the  
2                   employees furnished to the client company in the following  
3                   completed calendar quarter; and
- 4                   (c) Notifies the agency that such application would, if the staffing  
5                   service's tax rate were applied to those same wages, cause a  
6                   reduction in the tax due on those wages which does not exceed  
7                   five hundred dollars.
- 8                   (2) If the reduction under paragraph 1 exceeds five hundred dollars, at the  
9                   written request of the staffing service, the agency may make a written  
10                  determination that it is appropriate to allow the staffing service to use  
11                  the staffing service's unemployment insurance tax rate.
- 12                  b. The staffing service includes in its contract with the client company a  
13                  requirement that if the client company's unemployment insurance tax rate is  
14                  higher than the staffing service's tax rate, the client will arrange to make  
15                  payment to the agency, pursuant to subsection 4 of section 52-04-06, in the  
16                  amount necessary to cause the client company's unemployment insurance  
17                  tax rate should it be recomputed to be determined by the agency to be  
18                  equivalent to the staffing service's unemployment insurance tax rate. Before  
19                  the agency makes an authorization under this subdivision, the agency  
20                  actually must receive payment of the amount required to cause the  
21                  determination that the client company has complied with this subdivision.
- 22                  c. The staffing service demonstrates to the agency that the staffing service has  
23                  entered an agreement with a client company that has an unemployment  
24                  insurance tax rate that is, at the time of execution of the contract, equal to or  
25                  lower than the staffing service's tax rate.
- 26                  4. If a staffing service enters a contract with a client company that has an  
27                  unemployment insurance tax rate that is lower than the staffing service's tax rate,  
28                  the agency shall determine the following year's tax rate for the staffing service by  
29                  calculating a blended reserve ratio using the proportion of that client company's  
30                  total wages paid for up to the previous six years to the total wages paid for up to  
31                  the previous six years for all of that staffing service's client companies whose

- 1           furnished workers are considered the staffing service's employees for  
2           unemployment insurance tax purposes pursuant to subsection 3.
- 3           5. Both a staffing service and client company are considered employers for the  
4           purposes of this title. Both parties to a contract between a staffing service and a  
5           client company are jointly liable for delinquent unemployment insurance taxes, and  
6           the agency may seek to collect such delinquent taxes, and any penalties and  
7           interest due, from either party. This chapter does not modify or impair any other  
8           provisions of the contract between the staffing service and the client company not  
9           relating to the requirements of this subsection concerning liability for payment of  
10           taxes on the wages paid to workers furnished by the staffing service to the client  
11           company, and the means of determining the tax rate to be applied to those wages.
- 12           6. The agency shall determine whether a person is a staffing service. If the agency  
13           determines a person is a staffing service, the agency may further determine if the  
14           person is a temporary staffing service. The agency's determination must be issued  
15           in writing, and within fifteen days of the date of issuance of that determination, a  
16           person aggrieved by that determination may appeal that determination. The  
17           appeal must be heard in the same manner and with the same possible results as  
18           all other administrative appeals under this title. In making a determination under  
19           this subsection, the agency may consider:
- 20           a. The number of client companies with which the staffing service has contracts;  
21           b. The length of time the staffing service has been in existence;  
22           c. The extent to which the staffing service extends services to the general  
23           public;  
24           d. The degree to which the client company and the staffing services are  
25           separate and unrelated business entities;  
26           e. The repetition of officers and managers between the client company and  
27           staffing service;  
28           f. The scope of services provided by the staffing service;  
29           g. The relationship between the staffing service and the client company's  
30           workers;

- 1            h. The written agreement between the staffing service and the client company;  
2            and  
3            i. Any other factor determined relevant by the agency.  
4            7. The agency may require information from any staffing service, including a list of  
5            current client company accounts, staffing assignments, and wage information. A  
6            client company shall provide any information requested by the agency regarding  
7            any staffing service.

8            **SECTION 3. AMENDMENT.** Subsection 4 of section 52-04-06 of the North Dakota  
9 Century Code is amended and reenacted as follows:

- 10           4. a. After each year's rate schedule has been established, an employer may pay  
11           into the fund, or cause to be paid into the fund on the employer's behalf, an  
12           amount in excess of the contributions required to be paid under this section.  
13           That amount must be credited to the employer's separate account. The  
14           employer's rate must be recomputed with the amount paid pursuant to this  
15           subsection included in the calculation only, except as allowed by  
16           subdivision b, if that amount was paid by April thirtieth of that year. Payments  
17           may not be refunded or used as credit in the payment of contributions.  
18           b. An employer that enters a contract with a staffing service, other than a  
19           temporary staffing service, may make the payments authorized by this  
20           subsection at any time during the rate year and the agency will determine if  
21           that payment is adequate to allow the staffing service to comply with  
22           subsection 3 of section 2 of this Act; however, the employer's tax rate will  
23           remain in effect for the remainder of the tax year. The agency will deposit any  
24           payment received pursuant to this subsection immediately and will credit it to  
25           the employer's separate account, but the agency will apply the payment to the  
26           calculation of the employer's tax rate for the following rate year. In order to  
27           take advantage of this subdivision and subsection 3 of section 2 of this Act,  
28           an employer may not be delinquent in its unemployment insurance tax  
29           payments on the date on which the payment authorized by this subdivision is  
30           made.

1           **SECTION 4. AMENDMENT.** Section 52-04-08 of the North Dakota Century Code is  
2 amended and reenacted as follows:

3           **52-04-08. Succession to predecessor's experience record - Impact of substantial**  
4 **common ownership, management, or control.**

- 5           1. An employing unit that in any manner acquires all or part of the organization,  
6 business, trade, workforce, or assets of another employer and continues  
7 essentially the same business activity of the whole or part transferred, ~~must~~ may  
8 upon request be transferred in accordance with ~~such regulations as the bureau~~  
9 ~~may prescribe~~ law and any relevant rules adopted by the agency, the whole or  
10 appropriate part of the experience record, reserve balance, and benefit experience  
11 of the ~~preceding~~ predecessor employer, unless the agency finds that the  
12 employing unit acquired the business solely or primarily for the purpose of  
13 obtaining a lower unemployment insurance tax rate. ~~Provided that if~~ If the  
14 predecessor files a written protest against such transfer within fifteen days of being  
15 notified of the successor's application, the transfer will not be made.
- 16           2. When an employing unit in any manner acquires all or part of the organization,  
17 business, trade, workforce, or assets of another employer, ~~the bureau~~ the agency  
18 shall transfer all or the appropriate part of the experience record, reserve balance,  
19 whether positive or negative, and benefit experience of such predecessor to the  
20 successor if it finds that ~~(a) the predecessor was owned or controlled by or owned~~  
21 ~~or controlled the successor directly or indirectly, by legally enforceable means or~~  
22 ~~otherwise or (b) both the predecessor and successor were owned or controlled~~  
23 ~~either directly or indirectly, by legally enforceable means or otherwise, by the same~~  
24 ~~interests~~ there was, at the time of acquisition, substantially common ownership,  
25 management, or control of the predecessor and the successor.
- 26           3. When a part of an employer's experience record reserve account and benefit  
27 experience is ~~to be~~ transferred under this section, the portion of the experience  
28 record and reserve account transferred must be in the same ratio to the total  
29 experience record and reserve account as the average annual payroll of the  
30 transferred organization, trade, business, workforce, or assets is to the total  
31 average annual payroll of the predecessor.

1           4.    An employing unit's experience record may not be transferred in an amount that  
2                    results in the successor and predecessor portions totaling more than one hundred  
3                    percent of the predecessor's history.

4           **SECTION 5.** Section 52-04-08.1 of the North Dakota Century Code is created and  
5 enacted as follows:

6           **52-04-08.1. Implementation of federal anti-SUTA dumping legislation.** The agency  
7 shall implement section 52-04-08.2 to ensure necessary compliance with section 303(k) of the  
8 Social Security Act [Pub. L. 108-195; 42 U.S.C. 503]. The agency shall adopt rules and  
9 procedures necessary to ensure compliance with that section. The agency may issue  
10 necessary subpoenas, in accordance with sections 52-06-23 and 52-06-25, to carry out its  
11 responsibilities under this chapter.

12           **SECTION 6.** Section 52-04-08.2 of the North Dakota Century Code is created and  
13 enacted as follows:

14           **52-04-08.2. Transfers of unemployment insurance experience - Recalculation of**  
15 **rates - Definitions - Civil and criminal penalties.** Notwithstanding any other provision of law,  
16 the following applies regarding assignment of penalty tax rates and transfers and acquisitions  
17 of businesses:

18           1.    a.    If an employer transfers all or a part of its trade or business to another  
19                    employer and at the time of the transfer there is substantially common  
20                    ownership, management, or control of the two employers, the unemployment  
21                    experience attributable to the transferred trade or business is transferred to  
22                    the employer to which the business is transferred. The rates of both  
23                    employers must be recalculated and made effective on the first day of the  
24                    quarter in which the transfer took effect. The transfer of any of the employer's  
25                    workforce to another employer is considered a transfer of trade or business  
26                    under this subsection if, as a result of the transfer, the transferring employer  
27                    no longer performs the trade or business in which the transferred workforce  
28                    was engaged, and the trade or business is performed by the employer to  
29                    which the workforce was transferred.

30            b.    If, following a transfer of experience under subdivision a, the agency  
31                    determines that a substantial purpose of the transfer of trade or business was



1                   to obtain a reduced unemployment insurance tax rate, the experience ratings  
2                   of the employers involved must be combined into a single account and a  
3                   single unemployment insurance tax rate must be assigned to that account.

4           2. If a person, who at the time of acquisition is not an employer under this title,  
5           acquires the trade or business of an employer, the unemployment experience of  
6           the acquired business may not be transferred to that person if the agency finds  
7           that the person acquired the business solely or primarily for the purpose of  
8           obtaining a lower unemployment insurance tax rate. Instead, the person must be  
9           assigned the applicable new employer rate calculated under section 52-04-05. In  
10           determining whether the business was acquired solely or primarily for the purpose  
11           of obtaining a lower unemployment insurance tax rate, the agency shall use  
12           objective factors that may include the cost of acquiring the business, whether the  
13           person continued the business enterprise of the acquired business, how long the  
14           business enterprise was continued, and whether a substantial number of new  
15           employees were hired for performance of duties unrelated to the business activity  
16           conducted before acquisition.

17           3. If a person knowingly acts or attempts to transfer or acquire a trade or business  
18           solely or primarily for the purpose of obtaining a lower unemployment insurance  
19           tax rate or knowingly violates any other provision of this chapter related to  
20           determining the assignment of an unemployment insurance tax rate, or if a person  
21           knowingly advises another person in a way that results in a violation of those  
22           provisions, the person is subject to the civil penalties provided in this subsection.

23           a. If the person is an employer, the employer must be assigned, in lieu of that  
24           employer's experience rate, the highest rate assignable under this chapter for  
25           the rate year during which the violation or attempted violation occurred and  
26           the three rate years immediately following that rate year. However, if the  
27           employer's experience rate is already at the highest rate for any year of that  
28           four-year period or if the amount of increase in the person's experience rate  
29           imposed under this subdivision would be less than two percent for any year of  
30           the four-year period, the penalty unemployment insurance tax rate for the

1                    year must be determined by adding a rate increment of two percent of taxable  
2                    wages to the calculated experience rate.

3                    b. If the person is not an employer, the person is subject to a civil penalty of not  
4                    more than twenty-five thousand dollars. Any civil penalty collected must be  
5                    deposited in the penalty and interest account established under section  
6                    52-04-22.

7                    4. In addition to the civil penalty imposed under subsection 3, any person that  
8                    knowingly violates this section or knowingly attempts to violate this section is guilty  
9                    of a class C felony.

10                    **SECTION 7. LEGISLATIVE COUNCIL STUDY - PROFESSIONAL EMPLOYER**

11                    **ORGANIZATIONS.** The legislative council shall consider studying, during the 2005-06 interim,  
12 the feasibility and desirability of requiring professional employer organizations operating in  
13 North Dakota to register with the state. The study must include consideration of how other  
14 states address the issue of registration of professional employer organizations. The legislative  
15 council shall report its findings and recommendations, together with any legislation required to  
16 implement the recommendations, to the sixtieth legislative assembly.