

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Department of Job and Family Services

Regulation/Package Title: 4141-17 Successorship Rules Package

Rule Number(s): 4141-17-02, 4141-17-03, 4141-17-04, 4141-17-05

Date: October 24, 2018

Rule Type:

☐ New

☒ Amended

☒ 5-Year Review

☐ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Amended Substitute Senate Bill 3 of the 130th General Assembly changed the enforcing statute for the adoption, amendment or rescission of unemployment compensation rules from Ohio Revised Code (ORC) Section 4141.14 to ORC Section 119.03. These rules reflect the statutory change. Rules 4141-17-02, 4141-17-03 and 4141-17-05 have minor language content changes for grammatical purposes, better clarity, and to meet Legislative Service Commission guidelines. Rule 4141-17-04 has no language content changes.

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Rule 4141-17-02 Voluntary successorship: clearly segregable and identifiable portion. This rule explains and clarifies that the transfer of a portion of a trade or business results in the transferee becoming a successor in interest if several requirements are met.

Rule 4141-17-03 Voluntary successorship: substantially all of the assets. This rule explains and clarifies that the transfer of substantially all of a trade or business results in the transferee becoming a successor in interest if several requirements are met.

Rule 4141-17-04 Automatic successorship. This rule explains that the transferee shall become a successor in interest by law where: (1) there is a transfer of all the transferor's trade or business located in Ohio; and (2) at the time of the transfer the transferor is a liable employer under Chapter 4141 of the ORC.

Rule 4141-17-05 Mandatory partial transfer of experience. This rule clarifies that if an employer has transferred a portion of its trade or business to another employer and, at the time of the transfer, both employers are under substantially common ownership, management, or control, then the unemployment experience and outstanding debt attributable to the transferred portion of the trade or business shall be transferred to the transferee.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

Section 4141.13 of the ORC is the statute authorizing the Agency to adopt these rules.

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

Yes, all four of the rules implement federal guidelines as directed by the Department of Labor pursuant to the Federal Unemployment Tax Act. 26 USC 3301 through 26 USC 3311.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

No, none of the rules include provisions exceeding federal requirements.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

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These rules provide the way for a successor employer to obtain the unemployment experience tax rate history from a predecessor employer. This is generally done as part of a purchase of the trade or business from a seller employer to a buyer employer. The key point to keep in mind with the issue of successorship is that approximately two out of every three successorships benefit the successor employer because they are obtaining a good experience history and a lower unemployment tax rate. On the other hand, in about one out of every three successorships the successor employer obtains an unfavorable experience history resulting in a higher unemployment tax rate. However, if the successor employer were allowed to be considered a new business, the unfavorable experience history and higher tax rate would be absorbed by all the Ohio employers paying into the unemployment trust fund. So, it is appropriate, fair, and equitable for the buyer employer that made the decision to obtain the trade or business from the seller employer to absorb the unemployment experience tax rate history, whether it is a positive or negative history. Proper due diligence to investigate the unemployment experience tax rate history of a seller employer is extremely important for any potential buyer of a trade or business.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes? All of these rules are clarifying in nature. Therefore, the success can be measured by how well the regulated community understands the underlying process. The Department believes these particular provisions are helpful to and well understood by the regulated community, as there has been substantial compliance. These rules have been in place for at least five years, and in some cases for many years, with the full knowledge and cooperation of employers. The Department has proposed only minor language content changes for better clarity, grammatical purposes, and to meet Legislative Service Commission guidelines, for three of these four rules. No substantive changes have been proposed for any of these rules. The Agency will measure the success of these rules through continued compliance with ORC 119.03, 4141.13, 4141.14, 4141.24, 4141.48 and through compliance with federal guidelines as directed by the Department of Labor pursuant to the Federal Unemployment Tax Act, 26 USC 3301 through 3311.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation. The Agency's clearance process allows all employer and claimant/employee stakeholder interests to review and comment on any rule online. The Ohio Chamber of Commerce, Policy Matters Ohio, and the National Federation of Independent Business (NFIB) are among those stakeholders that the Agency has identified as receiving clearance notification of this rule.

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8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency? The Agency received no comments or questions during the online clearance time period from October 25, 2018 through November 1, 2018.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed? No scientific data was used to develop the rules or the measurable outcomes of the rules.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives? None. These rules reflect the directives of the Federal Department of Labor (DOL) pursuant to the Federal Unemployment Tax Act and Chapter 4141 of the Ohio Revised Code (ORC) under the purview of the Ohio General Assembly. Specifically, these rules further explain and clarify the directives of ORC Section 4141.24 (F).

11. Did the Agency specifically consider a performance-based regulation? Please explain.
No, this would not apply because the Agency is directed by the DOL and the ORC.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation? The Agency's legal and subject matter experts carefully review all rule language to ensure no redundancy or duplication occurs. This includes a review by attorneys and subject matter experts in the Agency's Office of Unemployment Insurance Operations, a separate review done by the Agency's Office of Legal and Acquisition Services, and a separate review done by the Agency's Office of Legislation.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community. The Agency's plan for implementation is to strictly follow federal guidelines as defined by the DOL and by the Ohio General Assembly through the ORC.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community; 222,725 Ohio employers have active accounts with the Agency, file quarterly reports, and pay a contribution tax into the Ohio Unemployment Compensation Trust Fund each year as required by Federal and State Law. There were 3,919 successorships processed by the Agency during the twelve month period ending September 30, 2018.

b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); -- The time expended by employers to comply by filing the necessary successorship documentation per ORC Section 4141.24(F).

c. Quantify the expected adverse impact from the regulation.

The time requirements will vary depending on the employer and the details involved in the successorship. Based on consultation with the Office of Unemployment Insurance Operation's Contribution Tax Section, and their analysis and experience with the employer business community, it will take an employer approximately a maximum of sixty minutes to complete all the necessary documentation and paperwork for a successorship. The actual time expended will vary depending on how simple or complex the successorship is. The more straightforward successorships will take as little as five minutes while the more complicated successorships will take as long as sixty minutes.

15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

To the extent that these rules may impose an adverse impact to the regulated business community, the justification points to the Agency's statutory requirements as identified in ORC Sections 119.03, 4141.13, 4141.14, 4141.24, 4141.48, and in the federal guidelines as directed by the Department of Labor pursuant to the Federal Unemployment Tax Act, 26 USC 3301 through 3311.

Regulatory Flexibility

16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain. No, the intent of the unemployment compensation rules is to treat all Ohio employers equally. The Federal Department of Labor and the Ohio General Assembly structured these rules in such a manner so that the Agency does not have discretionary authority to allow different standards, based upon size, for the various employers paying into the Unemployment Trust Fund.

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17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation? The Agency allows for a waiver of fines (interest) and penalties for paperwork violations and first-time offenders by request. The request may be made in writing, online, or by phone.

18. What resources are available to assist small businesses with compliance of the regulation? The Agency has an online website located at <http://jfs.ohio.gov/ouc/uctax/index.stm> as well as telephone assistance at (614) 466-2319 where small businesses may contact the unemployment tax contribution division or, if they have audit related questions, the unemployment compliance division. Small businesses may also refer to the Employer's Guide to Ohio Unemployment Insurance online at <http://www.odjfs.state.oh.us/forms/num/JFS08201/pdf/>. Finally, employers may ask questions through the Employer Resource Information Center (ERIC) by telephone at 614-466-2319 extension 22484 or by electronic mail at AskERIC@jfs.ohio.gov.