

**MEMORANDUM**

TO: Michael Lynch, Ohio Department of Job and Family Services

FROM: Sydney King, Regulatory Policy Advocate

DATE: December 19, 2013

RE: **CSI Review – Successorship Rule Package (OAC 4141-17-02, 4141-17-03, 4141-17-04, and 4141-17-05)**

On behalf of Lt. Governor Mary Taylor, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This rule package consists of four rules being reviewed by the Ohio Department of Job and Family Services (ODJFS) in accordance with the five-year review requirement of ORC 119.032. The rules provide several methods for successor employers to potentially obtain, voluntarily or automatically, the unemployment tax rate history from a predecessor employer. The rule package was filed with the CSI Office on September 6, 2013, and the comment period for the rules closed on September 12, 2013. No comments were received during the public comment period.

In Ohio, when an employer acquires a business, it may obtain, whether voluntarily or automatically, the unemployment tax rate history of the previous employer. An employer may elect to acquire the unemployment tax rate through voluntarily successorship. Rule 4141-17-02 establishes the requirements when a clearly segregable and identifiable portion of the business is transferred to the acquiring employer. Rule 4141-17-03 establishes the requirements when *substantially all* of the assets are transferred to an acquiring employer. In both circumstances, the acquiring employer is voluntarily electing to obtain the unemployment tax rate history of the

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previous employer.

In contrast, Rule 4141-17-04 establishes the requirements for an automatic successor in interest. If ODJFS determines that a transfer of *all* of the trade or business occurred, the acquiring employer will then automatically assume all of the predecessor employer's liabilities related to unemployment. Once an automatic successorship is determined, ODJFS will revise the contribution rates of the transferee to reflect the result of the successorship.

According to the BIA, stakeholders had an opportunity to comment during the ODJFS policy clearance process. No comments were received. Additionally, ODJFS states that the rules were vetted through the Unemployment Compensation Advisory Council. The UCAC is the representative body for all employer and claimant/employee stakeholder interests. No comments were received during the CSI review period.

The BIA identifies the adverse impact as the time expended by employers to comply by filing the necessary successorship documentation. ODJFS asserts the time will vary depending on the employer and details involved in successorship, but the BIA estimates employers will spend approximately sixty minutes to complete all the necessary documentation. ODJFS states the rules help support the unemployment insurance system and reflect the directives of Chapter 4141 of the Ohio Revised Code. Additionally, two out of every three successorships benefit the acquiring employer because they are obtaining a good experience history and a lower tax rate. ODJFS also provided a justification for the increased tax rates for automatic successorships stating that if a successor employer were allowed to be considered a new business, the negative effect would be absorbed by all employers paying into the unemployment trust fund.

The CSI Office identified an additional adverse impact through individual business owners who have contacted CSI about successorship issues outside of the current rulemaking process. These businesses expressed concerns with ODJFS determinations of automatic successorships for their businesses, which led to higher unemployment tax rates in these specific instances.

Rule 4141-17-04 states the acquiring employer shall become a successor in interest when there is a transfer of "all of the transferor's trade or business." Rule 4141-17-01 (not included in this rule package) states in part that "'trade or business' includes all real, personal and intangible property *integral to the operation of the trade or business...*" (emphasis added). The CSI review resulted in several discussions regarding the standard for determining when an automatic successorship occurs if less than 100 percent of the business is transferred. According to ODJFS, if an asset is not integral or essential to the trade or business, then the failure to transfer that asset to the new employer does not affect the successorship determination. The rule does not explain how determinations are made about whether an asset is integral to the business.

In follow-up discussions, ODFJS provided several examples to illustrate this standard, but the CSI Office expressed concerns about the lack of specificity in the rule, and the potential for subjectivity and confusion around the standard. CSI shared the ODFJS standard and underlying rule language with individuals who had previously contacted the CSI Office, several business organizations, and trade associations in order to understand the extent to which this adverse impact affects businesses. Two individuals expressed concerns about the application of the standard, and in one case about the underlying statute but overall, the business community did not strongly object to the standard. Based on the focus of the comments and the lack of concerns expressed by other business organizations, CSI will not recommend adding more specific parameters to the rule language.

Recommendation

For the reasons explained above, this office does not have any recommendations regarding this rule package.

Conclusion

Based on the above comments, the CSI Office concludes that the Department should proceed with the formal filing of this rule package with the Joint Committee on Agency Rule Review.

cc: Mark Hamlin, Lt. Governor's Office