

UNEMPLOYMENT INSURANCE TAX STRATEGIES AND FORMS

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I. FACTORS THAT INFLUENCE UNEMPLOYMENT INSURANCE TAX RATES

A. Registration for Michigan Taxes (Form 518): Complete this form if you are starting a new business, reinstating an old business, purchasing/acquiring an existing business, or changing the type of ownership of your business. It is also required if you need to register for any Michigan taxes identified on the form.

1. Corporations, LLCs, and LLPs must enclose a copy of the Articles of Incorporation or Organization.¹
2. You must register for state unemployment tax if you “[h]ave employees performing services in Michigan, [p]lan to have employees working or performing services in Michigan; or [h]ave acquired all/part of the payroll, accounts, services or assets of a business having employees in Michigan.”²
3. Deadline: Mail your Form 518, with Schedules A and B, “at least six weeks, but not more than three months, before you intend to start your business to allow you registration to be processed. Treasury will forward you application to UIA.”³
4. The UIA issues your unemployment account number.

B. Taxable Wage Base:

1. Taxable wage bases are to be unchanged for 2019, the state Department of Talent and Economic Development. Effective

¹ Michigan Department of Treasury, Form 518, p. 1.

² State of Michigan, Michigan Business Taxes Registration Booklet, at p. 3 (https://www.michigan.gov/documents/taxes/518_10-17_605471_7.pdf) (“Registration Booklet”).

³ Form 518 Instructions at p. 3.

January 1, 2019, the standard unemployment-taxable wage base is to be \$9,000 and the modified taxable wage base for delinquent employers is to be \$9,500.

C. Unemployment tax rate: Unemployment tax rates for experienced employers range from .06% to 10.3% in 2019. Rates of the bond-obligation assessment paid by experienced employers range from .72% to 2.42%.

D. Factors considered in establishing unemployment tax rate:

1. Prior Actual Reserve
2. Benefits Charged
 - a. Try to keep low by utilizing strategies listed below.
3. Contributions Paid
 - a. Make payments timely.
4. New Actual Reserve
 - a. If you make voluntary contribution, such that the prior actual reserve plus contributions paid, plus voluntary payment (collectively, actual reserve) is be more than the required reserve, then your ABC calculation should be 0%.
 - b. Voluntary Payment: "Because of the rounding of the Account Building Component (ABC), an irrevocable voluntary payment, as provided under Section 19(d), may reduce a rate by 0.1% or more, thereby saving the employer some unemployment taxes. Voluntary payments must be received by UI within 30 days of the mailing of this notice but no later than the 120th day of the year to be included in the current tax rate calculation.

Voluntary payments can be submitted through your MiWAM account. Checks or money orders MUST be mailed separately...”⁴

5. Experience Rating

- a. Chargeable Benefits Component: 36 months of benefit charges divided by 36 months of taxable payroll, rounded to next higher 0.1%, up to a maximum of 6.3%.⁵
- b. Account Building Component: (required reserve less actual reserve) x ABC multiplier, all divided by last 12 months of total payroll, rounded to the next higher 0.1%, up to a maximum of 3%.⁶
- c. Nonchargeable Benefits Component: As of 2018, “This component does not reflect the experience of the business, but is assigned to recover costs, which are pooled among all employers. Most employers pay a uniform rate of 1%. However, if there are no benefit charges for the last nine years, ending last June 30th, the rate could be as low as 0.06%. This component is applied to the accounts of all contributing employers. Amounts paid based on this component will not appear in the “taxes credited to experience rating account” portion of the rate calculation.”⁷

6. Payroll Tax Base

⁴ 2018 Tax Rate Notice, Michigan Unemployment Insurance Agency.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

E. Recommended practices to limit increases in your unemployment tax rate:

1. Accurately and timely document reason for and circumstances surrounding separation, particularly if one of the reasons includes:

- a. Three (3) consecutive days of no-call, no-show: This is considered voluntary resignation (*not termination*) of employment, making an employee disqualified from receiving unemployment benefits under MCL 421.29(a).
- b. Voluntary Resignation: Confirm acceptance of voluntary resignation initiated by employee, without good cause attributable to employer, which is another reason why an employee would be disqualified from receiving unemployment benefits under MCL 421.29(a). Include reason cited by employee for decision to resign, so long as not attributable to the company (*e.g.*, received offer of alternate employment, to relocate, etc.). Ask employee to sign acknowledgement, if possible.
- c. Negligently losing a requirement of the job of which he or she was informed at the time of hire: This renders the employee disqualified from benefits under MCL 421.29(a).
- d. If an individual fails to secure a statement from a medical professional that continuing in the individual's current job would be harmful to the individual's physical or mental health, has not successfully secured alternative work with the employer, and has not successfully attempted to be placed on a leave of absence to last until the individual's mental or physical health would no longer be harmed by

the current job: This constitutes disqualification under MCL 421.29(a).

- e. Document misconduct as being connected to work (including history of misconduct leading to termination) and not related to performance: This will result in disqualification under MCL 421.29(a). Under the UIA, misconduct includes actions amounting to “willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer’s interests or the employee’s duties and obligations to his employer.” *Carter v. Michigan Employment Security Comm*, 364 Mich 538, 541 (1961). Ask employee to sign acknowledgement, if possible. Keep in mind that “mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good-faith errors in judgment or discretion” are not to be deemed “misconduct” within the meaning of the unemployment compensation statute. *Id.*⁸
2. Retain employees, with low turnover rate.
 3. Provide employees with a legally compliant handbook, and have employee sign an acknowledgement of receipt. This will assist

⁸ See other disqualifying bases in Employer’s Guide to UIA Tax Filings & Responding to Claims (2017 Outline from Tax Symposium for Maddin Hauser).

in establishing misconduct any hearing contesting eligibility, by evidencing that employee was aware of workplace conduct rule/standard of behavior.

4. Coach out: Employees who know they are not meeting expectations (and may suffer adverse consequences such as termination as a result) are more likely to seek alternate employment and voluntarily resign. Have employees sign acknowledgement of receipt of any written warning or summary of coaching conversation.
5. Coach up: Keep employees engaged by showing them your commitment to their advancement within the organization.
6. Do not delay a termination decision, if you know separation is inevitable and absent compelling reasons to delay. The company's portion of unemployment benefits owed, if any, only increases with time. In addition, the likelihood of exposure to other employment related claims increases with such delay.
7. If temporary reduction in force not exceeding 45 calendar days, document accordingly and notify the unemployment agency of the circumstances.
8. Consider allocating payments in excess of amounts otherwise owed (e.g., severance, vacation, PTO) to a specific number of weeks. Benefits owed may be reduced as a result.

II. AVOIDING SUTA DUMPING PENALTIES UPON A TRANSFER OR SALE OF BUSINESS

A. In addition to the Form 518, all employers must also complete a *Liability Questionnaire* (UIA Schedule A) and a *Successorship Questionnaire* (UIA Schedule B).⁹

1. *Liability Questionnaire* (UIA Schedule A): This form requires the employer to identify the UIA account number (if already assigned), Federal Employer Identification Number, identify the date on which employees will first be employed in Michigan, and identification of the employer status as agricultural, domestic/household, nonprofit, governmental agency, Indian tribe and tribal units, Federal Unemployment Tax Act Subjectivity (if subject to FUTA in another state, other than Michigan, then also required to file and pay in Michigan), and elective coverage (e.g., churches which would not otherwise be liable for unemployment taxes).

2. *Successorship Questionnaire* (UIA Schedule B): Not only are all employers required to complete this form (even if the company made no acquisitions), but employers are also required to file an additional Schedule B if, subsequent to completing the initial registration form, the employer transfers “assets (by sale or transfer), organization (payroll/employees), trade (customers/-accounts), or business (products/services), in whole or in part, to a new or previously existing business in Michigan.”¹⁰

B. Successor/Purchaser/Merger: If your business succeeds or replaces an existing business or businesses because of incorporation, purchase or

⁹ UIA Schedule A – Liability Questionnaire.

¹⁰ UIA Schedule B – Successorship Questionnaire.

merger, you must provide the names and account numbers of those previous business(es) by completing and submitting the necessary forms. This allows the State of Michigan to determine whether the transfer of accounts has been completed properly, or if the transfer has resulted in unlawful SUTA Dumping.

- C. Successor Liability: "If you buy or acquire either an existing or discontinued business or its stock of goods, you can be held liable for tax debts incurred by the previous owner. You must withhold sufficient purchase money to cover these tax debts until the previous owner produces a receipt showing the taxes have been paid or a certificate stating that no taxes are due. This certificate may be obtained through the Department of Treasury, Tax Clearance Section. Upon the owner's written waiver of confidentiality; under the Authorization for Disclosure section, at the bottom of page 2 of the *Request for Tax Clearance Application* (Form 5156), Treasury will release a business's know tax liability for purposes of establishing an escrow account to a third party. The Tax Clearance Section can be reached at 517-636-5260."¹¹

1. When two or more businesses are merged, it is really the unemployment "experience" that is merged, and then a new rate is calculated, based on the combined payment and charge histories of the involved companies. That is not the same thing as calculating the "average rate."

- D. SUTA Dumping: "A person shall not do either of the following: (a) Transfer the person's trade or business or a portion of the trade or business to another employer for the sole or primary purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under this act. (b) Acquire a trade or business or

¹¹ Registration Booklet at 1.

a part of a trade or business for the sole or primary purpose of obtaining a lower contribution rate than would otherwise apply under this act.”¹²

1. "Trade or business" includes the employer's employees, but the transfer of some or all of an employer's employees to another employer shall be considered a transfer of trade or business for purposes of this section if, as a result of the transfer, the transferring employer no longer performs trade or business with respect to the transferred employees and that trade or business is performed by the transferee employer.
2. Vertical Method: Create a “new” employer who is assigned a “new” employer tax rate of 2.7%, and then transfer to the new employer.
3. Horizontal Method: Transfer employees to a subsidiary with a lower UI tax rate.
4. Acquire Rate Method: Find another employer that has a low UIA tax rate to transfer employees to that employer.¹³

E. Penalty:

1. “In addition to any sanction available under section 54(b) or 54b, if a person knowingly violates or attempts to violate subsection (1), or if a person knowingly advises another person so as to cause a violation of subsection (1), the person is subject to the following:
 - a. If the person is a transferring or acquiring employer, the employer shall be assigned the higher of the following

¹² MCL 421.22b – Michigan Employment Security Act – Transferring trade or business with intent to reduce contribution rate or reimburse payments.

¹³ Michigan Unemployment Insurance Agency – Fact Sheet #114 – (SUTA Dumping) https://www.michigan.gov/documents/uia_FS114-SUTAdumping_103447_7.pdf

contribution rates: (A) The highest contribution rate assignable under this act for the rate year during which the violation or attempted violation occurs and for the 3 rate years immediately following that rate year. (B) If the employer's business is already at the highest rate assignable for a year in which the violation occurs or if the highest rate assignable would result in an increase of less than 2% of taxable wages, an additional penalty rate of 2% of taxable wages for that year.

- b. If the person is not an employer, the person is subject to a civil fine of not more than \$5,000.00.”
 - c. "Knowingly" means having actual knowledge of, or acting with deliberate ignorance or reckless disregard for, the prohibition involved.
2. An employing entity or an owner, director, or officer, who willfully violates or intentionally fails to comply is subject to the following sanctions:
- a. If the unemployment agency determines that an amount has been obtained or withheld as a result of the intentional failure to comply with this act, the unemployment agency may recover the amount obtained as a result of the intentional failure to comply plus damages equal to 3 times that amount.
 - b. The unemployment agency may refer the matter to the prosecuting attorney of the county in which the alleged violation occurred for prosecution. If the unemployment agency has not made its own determination under subdivision (i), the recovery sought by the prosecutor

must include the amount described in subdivision (i) and additional penalties based on the amount at issue.¹⁴

3. An employing unit or an owner, director, officer, or agent of an employing unit, who makes a false statement or representation knowing it to be false, or knowingly and willfully with intent to defraud fails to disclose a material fact, to obtain or increase a benefit or other payment under this act or under the unemployment compensation law of any state to prevent or reduce the payment of benefits to an individual entitled thereto or to avoid becoming or remaining a subject employer, or to avoid or reduce a contribution or other payment required from an employing unit is subject to administrative fines and is punishable as follows:
 - a. Subject to subdivisions (ii) and (iii), the unemployment agency may recover the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact and may also recover damages equal to that amount. For a second or subsequent violation described in this subdivision that occurs after the unemployment agency has sent proper notice of the original violation to the interested parties, the unemployment agency may recover damages equal to 1.5 times the amount obtained.
 - b. Subject to subdivision (iii), if the unemployment agency determines or redetermines or an administrative law judge, the Michigan compensation appellate commission,

¹⁴ MCL 421.54 – Michigan Employment Security Act – Sanctions; penalties
[http://www.legislature.mi.gov/\(S\(ft2c0n3lehtedfktana4ukv3\)\)/mileg.aspx?page=GetObject&objectname=mcl-421-54](http://www.legislature.mi.gov/(S(ft2c0n3lehtedfktana4ukv3))/mileg.aspx?page=GetObject&objectname=mcl-421-54)

or a court orders that an impostor committed identity theft, the unemployment agency shall attempt to recover from the impostor the amount obtained as a result of the knowing false statement or representation or the knowing and willful failure to disclose a material fact and may also recover damages equal to 4 times that amount.

- c. It may also refer a matter to the prosecuting attorney who may impose penalties depending on the amount at issue.
- d. If the employer failed to disclose to the UIA information connecting the transfer of employees to that employer, the penalties are up to 4 times the amount of unemployment taxes saved as a result of the SUTA Dumping, plus interest on the unpaid taxes and interest on the penalties.
- e. If my business advisor knowingly advises me to engage in SUTA Dumping, that person could face a civil fine of up to \$5,000, or conspired with me to give false information or incomplete information to reduce my tax rate, could face a penalty of up to 3 times the amount of the underpaid taxes, plus interest on the penalty.¹⁵

F. Forms to Consider Filing Upon Succession/Purchase/Merger:

- 1. Business Transferor's Notice to Transferee of Unemployment Tax Liability and Rate (Form UIA 1027): Whenever you sell or transfer any part of the payroll, accounts, services or assets of a business. When a business is sold (or otherwise transferred), the buyer (or other transferee) of the business may be liable to

¹⁵ *Id.*

pay the unpaid unemployment taxes and interest, and may receive the unemployment tax rate, penalty, and the benefit charges of the seller.

- a. **Deadline:** The seller, seller's real estate broker or other agent or attorney must deliver the completed Form UIA 1027 to the purchaser of the business at least two business days before the transfer of the business (not including Saturday, Sunday, or legal holiday) before the transferor's acceptance of the transferee's offer to acquire the business to disclose the transferee's outstanding unemployment tax liability
- b. **Penalty:** Failure of the business transferor or transferor's agent to provide correct information is a misdemeanor, punishable by up to 90 days imprisonment and/or fine of up to \$2,500.00. Civil liability for consecutive damages may also apply, as well as other remedies provided by law.

2. Disclosure of Transferor Account (Form UIA 1346)
3. Discontinuance or Transfer of Payroll or Assets in Whole or Part (Form UIA 1772): Required if the sale to the purchaser results in the total transfer of the seller's business.
4. Employer's Report on Partial Transfer of Business (UIA Form 1184)
5. Report and Agreement on Partial Transfer of Business Certification (UIA Form 1184-1)
6. Request for Tax Clearance Application (Form 5156)

III. STRATEGIES FOR COMPLIANCE: DISTINCTIONS BETWEEN EMPLOYEE LEASING COMPANIES

- A. Status Questionnaire for Employee Leasing Companies (UIA Form 1045)
- B. Distinctions between employee leasing companies (ELCs), According to Administration Rule 421.190:¹⁶
 - 1. “Captive provider” means “an employee leasing company which limits itself to providing services and employees to only 1 client entity and the entity’s subsidiaries and affiliates and which does not hold itself out as available to provide leasing services to other client entities that do not share an ownership relationship with the employee leasing company.” R. 421.190(a).
 - a. “Client entity” (aka “work-site employer”) means “the business entity that contracts with an employee leasing company for the purpose of providing employees and related services to the client entity.” R. 421.190(b).
 - 2. “Common paymaster” is found when “different services performed by 1 individual are divided among 2 or more employers that are related through commonality of ownership, and the individual is compensated by 1 of those employers that acts as the common paymaster. ... different employers benefit from the services of the same individual, but these services are reflected in the experience rating of, and the payment of employment taxes by, only 1 of the employers.” R. 421.190(c).

¹⁶ Michigan Unemployment Insurance Agency Administrative Rules (https://www.michigan.gov/documents/uia/Administrative_Rules_505959_7.pdf)

- a. Even though 2 or more related corporations concurrently employ the individual, they are treated as a single employing unit. The common paymaster “shall be the corporation that has the highest Michigan unemployment tax rate. *Id.*

- b. Corporations are related if any one of the following apply at any time during the calendar quarter:
 - i. Corporations are members of a controlled group, as defined in 26 U.S.C. §1563 or would be members if certain stock ownership percentage requirements between corporations were relaxed and certain exclusions made inapplicable.

 - ii. If the corporation does not issue stock either 50% or more of the members of 1 corporation's board of directors or other governing body are members of the other corporation's board of directors or other governing body, or the holders of 50% or more of the voting power to select such members are concurrently the holders of 50% or more of that power with respect to the other corporation.

 - iii. Fifty percent or more of 1 corporation's officers are concurrently officers of the other corporation.

 - iv. Thirty percent or more of 1 corporation's employees are concurrently employees of the other corporation. Corporations are considered related for an entire calendar quarter if 1 of the requirements listed in paragraphs (i) to (iv) of this subdivision is satisfied. Concurrent employment

means the contemporaneous existence of an employment relationship between an individual and 2 or more corporations. R. 421.190(c)

3. An Employee leasing company (ELC) (aka a Professional Employer Organization (PEO) means, “an independently established business entity that does all of the following: (i) provides employees to a client entity. (ii) Pays the wages of employees. (iii) Reports and withholds applicable taxes from the wages of the employees. (iv) Administers the benefits for the employees. (v) Provides other payroll, human resources, and other management assistance services that are agreed upon with its client entity. The employees provided to the client entity may have previously been employed directly by the client entity. The relationship between the client entity and ELC is intended to be long-term or continuing, rather than temporary or intermittent, and the employees are, generally, not subject to reassignment. The majority of the workers at a client entity's worksite, or a majority of workers in a specialized group within that workforce, consists of employees assigned by the leasing company. R. 421.190(d)

a. An ELC that meets all of the above requirements will be considered the employer of the leased employees if: an ELC that meets the requirements of section 41 of the act is a liable employer and responsible to pay unemployment taxes on the employees leased to the client entity. For unemployment tax purposes in Michigan, the ELC, and the client entity, is the employer of the leased employees if all of the following conditions are met:

i. An employing entity representing itself to be an ELC shall comply with the requirements of this rule

to be considered by the agency to be an ELC for purposes of the act and this rule. If the agency determines the entity is not an ELC within the meaning of this rule, then the payroll of workers at the client entity will be assigned or reassigned to the client entity and the client entity's prior experience rating will be reinstated.

- ii. The ELC shall administer all payroll and all benefit services for the client entity, pay the wages of the workers, and have the right, both in contract and in fact, to hire, promote, reassign, discipline, and terminate the leased workers. The ELC cannot delegate the rights to the client entity. The client entity's officers may be considered employees of the leasing company when they are acting as operational managers, or performing services, for the client entity.
- iii. The ELC retains the right to exercise direction and control over the daily activities of the workers or can delegate the right to the client entity.
- iv. Neither the ELC nor any individual owner of the ELC, nor owners of the ELC in the aggregate, has an ownership interest of more than 20% in the client entity, including the client entity's subsidiaries and affiliates, and the client entity does not have more than 20% ownership interest in the ELC.

- v. Neither the ELC nor any individual owner or other employee of the ELC has direct or indirect control over the client entity.
 - vi. The ELC does not limit itself to providing services and employees to any 1 client entity, including that entity's subsidiaries and affiliates, but holds itself out to the public in general as available to provide leasing services. The ELC shall not be a captive provider of employee services. R. 421.190(2)(a - f)
 - b. An ELC that does not meet the definition should report any workers it is leasing back to the client company under the UIA account number of the client company, rather than under the ELC account number.
4. “Payrolling is the practice of establishing a related or associated company for the purposes of reassigning the employee payroll functions from 1 business entity to the related business entity, usually to take advantage of the lower unemployment tax rate of the related business entity. Direction and control of the involved employees are not transferred along with the payroll to the related business entity, and the related entity is not an employee leasing company. The related business entity to which the payroll is assigned is not the employer for unemployment insurance tax purposes. The entity for which services are performed and which exercises direction and control over the employee is the employer.” R. 421.190(1)(e)
5. “Temporary help firm” means “an employer whose primary business is to provide a client entity with the temporary services of 1 or more individuals under contract with the employer. Employment with a temporary help firm is characterized by a

series of limited-term assignments of an individual to a client entity based on a written or oral contract between the temporary help firm and the client entity. The assignment is usually for a specified period. A separate written or oral employment contract exists between the temporary help firm and each individual it hires as an employee. The employee of the temporary help firm is subject to reassignment by the temporary help firm. Completion of an assignment for the client entity by an employee employed by the temporary help firm does not, in itself, terminate the employment contract between the temporary help firm and the individual. A temporary help firm that meets the requirements of section 41 of the act is a liable employer and shall pay unemployment taxes on its employees.” R. 421.190(1)(f)

- C. Depending on which category best describes the relationship, create a Management/Service Agreement to confirm the respective roles and responsibilities.