

(H. B. 1577)

(No. 114)

(Approved September 16, 2005)

AN ACT

To amend Sections 2, 8, 9, and 15 of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act,” in order to establish the “Puerto Rico Unemployment Insurance Tax Dumping Prevention Act,” and for other purposes.

STATEMENT OF MOTIVES

On August 9, 2004, the United States President signed Public Law No. 108-295, the “SUTA Dumping Prevention Act of 2004,” to amend the Social Security Act. The States, including Puerto Rico, must amend their laws to adopt this new measure whose purpose is to prevent employers from becoming involved in the practice known as SUTA Dumping. The term SUTA Dumping refers to the methods that may be used by commercial enterprises, industries or businesses to evade their state tax responsibility through the transfer or acquisition of a business, to obtain an adjustment in their unemployment risk experience and, therefore, to decrease the taxes they are bound to pay to the Unemployment Insurance Program. This measure shall require that the states approve laws to govern, under certain circumstances, the transfer of the unemployment risk experience history and to impose penalties to those employers who become involved in the SUTA Dumping practice and to the advisers of said industry or business promoting such practice.

Specifically, the bill shall require that the states strengthen their unemployment compensation laws to provide that: (1) if an employer

transfers his/her business to another employer under the same property or control, he/she shall also transfer the unemployment risk experience history; (2) said history shall not be transferred to the person who acquires the business or commercial enterprise if that person is not otherwise an employer and said person acquires the business mostly to obtain a lower tax rate; (3) the employment risk experience may or may not be transferred pursuant to the regulations prescribed by the United States Department of Labor to ensure that higher tax rates are not evaded through the transfer or acquisition of a business; (4) civil as well as criminal penalties shall be imposed to those persons who violate, attempt to violate, or advise others to violate the Commonwealth laws whose purpose is to enforce the requirements stated above. In addition, the states shall establish procedures to identify whether the transfer or acquisition of a business is made for the purpose of evading taxes or SUTA Dumping.

The abovementioned measures shall apply to the states in the certification of payment for taxable years beginning at the end of the twenty-six week period, which shall begin to count on the first day of the state legislature's first regular session, after the approval of this Act. In addition, as of July 15, 2006, the Secretary of Labor shall submit to the Congress a report on the actions taken by the states to enforce these measures and make recommendations to the Congress of any additional action.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.- Abbreviated Title

This Act shall be known as the "Puerto Rico Unemployment Insurance Tax Dumping Prevention Act."

Section 2.- Section 2(i) of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act,” is hereby amended to add a paragraph to Section (2)(i), to read as follows:

“2(i) ‘EMPLOYER’ Effective on January 1, 1972, means:

- (1) Any employment unit which during any day within the current or preceding calendar year has or has had one or more persons under employment;
- (2) Any employment unit for which service as defined in subsection 2(k)(1)(B)(2) of this Act is or had been rendered;
- (3) Any employment unit for which service as defined in Section 2(k)(1)(F) of this Act is or has been rendered;
- (4) Commencing on January 1, 1978, any employment unit for which service is or has been rendered:
 - i. To the Commonwealth or any political subdivision thereof as provided by Section (2)(k)(1)(B)(3);
 - ii. In agricultural endeavors, as defined in subsection 2(k)(1)(E)(2);
 - iii. In domestic work, as defined in Section 2(k)(1)(H).
- (5) Any employment unit other than an employer by virtue of any other paragraph of subsection (1) of this Section, for which service is or has been rendered within the current or preceding calendar year, with respect to which such employment unit is liable for any federal tax against which credit may be granted for taxes that must be paid to a state unemployment fund; or any employment unit which under the provisions of the Federal Unemployment Tax Act (FUTA) must be an employer under this Act as a condition

for the approval of this Act, so that the employers may receive full credit against the tax levied by the federal law.

- (6) Any employment unit, which having become an employer under clauses (1), (2), (3), (4), or (5) of subsection (i) of this Section, has not ceased to be an employer subject to this Act under the provisions of Section 7(d);
- (7) Any employment unit which has chosen to avail itself of the provisions of this Act for the period granted therefor under Section 7(e). The provisions of Section 2(i) shall not apply to years preceding the effective date of this Act. To determine whether an employment unit shall be considered an employer under this Act, there shall be considered the service rendered in its totality for said unit in Puerto Rico and the service rendered for said unit in any other state by virtue of a choice made under a reciprocity agreement between the Secretary and any other agency in charge of the administration of the Federal Act on Unemployment Compensation or of any other state, under the provisions of Section 16 (c).

For the purpose of determining the status of an insured employer as indicated in this Section and in Section 7 of Act No. 74 of June 21, 1956, as amended, known as the 'Puerto Rico Employment Security Act,' every employer on or before filing the report or statement to determine the tax as required by Section 8 of the referred Act and its 'Regulation Number 1, To Regulate the Imposition and Collection of the Tax Levied by the Puerto Rico Employment Security Act,' shall be registered at the Agency in the form provided for such purposes, for the designation of the employer account

number for the payment of taxes or for the reimbursement of paid benefits. In order to be registered, the employer must furnish the required information fully and accurately.”

Section 3.- Section 8(a) of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act” is hereby amended to add clauses (9), (10), (11), (12), (13), (14), and (15).

“Section 8(a) Definitions.- Unless otherwise deduced from the context, the terms expressed hereinbelow shall have the following meanings for purposes of this Section:

- (1) ‘Experience System’ - means the method whereby the tax rate to be paid by each employer shall be computed based on his/her individual experience with regard to unemployment, taxes, and wages paid.
- (2) ‘Year of Experience’ – means the twelve (12)-month period immediately preceding the computation date.
- (3) ‘Computation Date’ – means June 30 of each year, except for the first year of effectiveness of this Act, which shall be December 31, 1991.
- (4) ‘Taxable Wages’ – means the total taxable wages paid by an employer during the year of experience that ends on the computation date.
- (5) ‘Applicable Benefits’ – means the total benefits paid to a claimant charged to an employer’s account during the year of experience.
- (6) ‘Nonapplicable Benefits’ – means the total benefits paid to a claimant not charged to the employer’s account during the year of experience.

(7) 'Tax Rate' – means the tax rate fixed on the basis of experience. The effective date of the rates shall be January 1, of the year following the computation date.

(8) 'Adjustment Factor' – means the product of the division of the total wages for covered employment on any calendar year that ends December 31, by the total wages for covered employment on the calendar year that ended December 31, 1990.

...

(9) The term 'Employer' – shall have the meaning stated in this Act.

(10) The term 'Business' – means a business or part thereof.

(11) The term 'Taxes' – shall have the meaning given to such term by Section 3306(g) of the Internal Revenue Code of 1986.

(12) The term 'Knowingly' – means to have actual knowledge of or to act with deliberate ignorance of or crass disregard for the imposed prohibition.

(13) The term 'Violate or Attempt to Violate' – for purposes of this Section, includes without it being limited to an attempt to evade, misrepresent, or wrongfully or deliberately fail to reveal facts.

(14) The term 'Person' – shall have the meaning given to such term in Section 7701(a)(1) of the Internal Revenue Code of 1986. In addition the term 'person' includes tax return preparer.

(15) The term 'Tax Return Preparer' – for purposes of this Section, is a person who prepares any tax return for profit, or who employs one or more persons who prepare any tax return imposed by this Act for profit, or any refund claim for taxes imposed by this Act. For purposes of this definition, filling out a significant part of the

tax return or refund claim shall be considered as preparation of the refund or refund claim.”

Section 4.- Section 8(g) of Act No. 74 of June 21, 1956, as amended, known as “Puerto Rico Employment Security Act,” is hereby amended to read as follows:

“Section 8(g).- Transfer of Individual Unemployment Risk Experience – Notwithstanding other provisions of this Act, the following shall apply to transfers of individual unemployment risk experience and the designation of tax rates:

(1)

(A) If an employer transfers his/her business, commercial enterprise, or part thereof to another employer, and both employers (at the time of the transfer) substantially share the property, administration, or control thereof, then the unemployment risk experience attributable to the transferred business or commercial enterprise shall be transferred to the employer who acquired the business object of the transfer. The tax rates for both employers shall be once again computed and shall begin to govern immediately after the date of the transfer of the business or commercial enterprise.

(B) If after the transfer of experience is made pursuant to paragraph (A), the Director finds that the true purpose of the transfer of the business or commercial enterprise was to obtain a lower tax rate, the accounts in the experience system of the employers involved in the transfer shall be combined to become one account and said account shall be designated with the highest (standard) tax rate under the Law.

- (C) The transfer of some or all workers from one employer to another shall be deemed to be a commercial enterprise or business transfer if as a result of said transfer the employer who made the transfer stops operating the commercial enterprise or business due to the transfer of the workers and said commercial enterprise or business is operated by the employer to whom said workers were transferred.
- (2) If a person is not an employer under this Act at the time of the acquisition of the business or commercial enterprise from an employer, the unemployment risk experience of the acquired business shall not be transferred to said person if the Agency finds that said person acquired that business solely or primarily for the purpose of obtaining a lower tax rate. But instead the highest tax rate under this Act shall be designated to said person for a sufficient period of time so that his/her tax rate may be computed in accordance with his/her unemployment risk experience under this Act. When determining whether the business was acquired for the purpose of obtaining a lower tax rate, the Agency may employ objective factors to include the cost of the acquired business or commercial enterprise, whether the person remained as head of the acquired business or trade, the time during which the business or commercial enterprise was kept, or whether a substantial number of new employees were contracted to perform duties unrelated to the activities carried out in the business before the acquisition.
- (3) If a person or employer simultaneously acquires the business or part of a business of two (2) or more employers with different tax rates, the tax rate of the successor after the date of the transfer until the end of

such taxable year and until the latter acquires sufficient experience so that his/her tax rate be computed in accordance with his/her unemployment risk experience under this Act, shall be the sum of the rates determined by the Agency under Section 8(f) of this Act. At the time of the acquisition, this rate shall apply to the predecessor employer who among the parties in the acquisition has the highest payroll (taxable wages) in the calendar quarter that ended immediately preceding the date of the transfer, but it shall not be lower than the sum of the rates determined by the Agency under 8(f).

- (4) When a person or employer acquires the individual unemployment risk experience of an employer or person, the acquirer shall assume the position of the predecessor and continue with the employer account of the predecessor, and the acquirer as well as the predecessor shall jointly and severally be responsible for any sum on account of taxes, interests, or penalties unpaid by the predecessor.
- (5) In those cases whereby a part of the business or commercial enterprise is transferred, the acquirer shall assume the position of the predecessor and receive shares equal to the acquired portion of the unemployment risk experience account of the predecessor. The predecessor shall continue to be responsible for the payment of taxes, for reimbursements in lieu of the payment of taxes, for interest and for penalties. Both the acquirer and the predecessor shall jointly and severally be responsible for the obligations in proportion to the transferred portion of the business or commercial enterprise.
- (6) Any person who contracts with a taxpaying employer so that such person may obtain the work force of said employer and who provides him/her, for a fee, workers for the insured employer, at the effective

date of the contract, shall be assigned to the account of the taxpaying employer. Said person shall keep said account apart and separate from any other taxable account of the person, and shall identify the same as stipulated by the Agency. During the term of the contract, the taxable account shall be deemed to be the person's account for the purposes of this Act. The workers provided by the taxpaying employer and any other worker provided by said person to the taxpaying employer shall appear in a detailed wages report under the taxable account and said person shall pay any tax imposed under the tax rate computed for said account.

- (7) If any person or employer fails to register or to offer accurate and complete information as needed to be registered as employer or to determine his/her insured status under this Act, shall be deemed prima facie evidence of the intention to obtain a tax rate in violation of this Section. An employer or person who violates this subsection shall incur in a civil penalty of one thousand (1,000) dollars or the payment of the sum of all taxes to the unemployment insurance evaded by the employer or person or the sum that the employer or person attempted to evade during the taxable year, whichever is higher. For these effects, the term 'person' shall have the meaning given to such a term in Section 8(a).
- (8) A natural or juridical person may not aid, orient, advise, or urge an employer to transfer his/her employees or payrolls in violation of this Section. The persons who violate this subsection shall be subject to the penalties provided in subsection 15(C) of this Act.

- (9) A determination made under Section 708(g) shall be made within the next five (5) years after the facts that motivated the determination have occurred.
- (10) The Secretary and the Director are hereby authorized to conduct audits to verify compliance of the law in the cases stated under this Section, without their being subject to the criteria provided in the audit procedures as to the selection of employers. Any person other than an employer who makes an acquisition as provided by subsection 708(g)(2) and who changes the nature of the acquired business or commercial enterprise, shall be audited automatically, in order to verify any violation of this Act.
- (11) For purposes of this Section, the procedures to identify cases in which there may be a presumption that the transfer of employees to another employer is made in an attempt or for the purpose of obtaining a lower tax rate shall be established. The rules shall include those cases that constitute practices commonly known as SUTA Dumping, pursuant to Section 303(k)(1)(E) of the ‘Social Security Act, SSA.’
- (12) This Section shall be construed and applied so that it complies with the minimum requirements contained in any handbook or regulations published by the United States Department of Labor.”

Section 5.- Section 9 of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act,” is hereby amended to read as follows:

“Collection of delinquent or contested taxes

(a) ...

(b)

(c)

(d)

(e)

(f)

(g)

(h) Liability of a person to whom a commercial enterprise of business is transferred, guarantor, and contractor.-

(1) Any individual or organization, including the types of organizations described in Section 702(i) to (j) of this Act, whether or not an employment unit, which acquires the organization, commercial enterprise or business from an employer, shall be liable in an amount not to exceed the reasonable value of the acquired organization, commercial enterprise or business, for any taxes, interest or penalties due or accrued and unpaid by said employer, and the amount of such obligation shall, in addition, constitute a lien against the property or capital so acquired which shall be given preference over all other liens; Provided, that the lien shall not be valid against a person who acquires from that employer or employment unit any interest in the property or capital acquired in good faith, for a price and without legal knowledge of the existing lien. The Secretary shall, upon a request made after the acquisition is completed, furnish the acquirer with a written statement indicating the amount of taxes, interest or penalties due or accrued and unpaid by any employer as of the date of such acquisition, and the amount of the obligation of the successor or the

amount of the lien shall in no case exceed the amount of the obligation disclosed by such a statement. The foregoing legal measures shall be in addition to all other existing measures against the employer or the acquirer of the commercial enterprise or business.

...”

Section 6.- Section 15 of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act,” is hereby amended, clauses (c)(1), (2), (3), and (4) are hereby added, subsections (c) and (d) are hereby renamed, and a new subsection (e) is hereby added to read as follows:

“Penalties for action or omission

(a) ...

(b) Misrepresentation by employment unit or employer. Any employment unit, employer, or any officer or agent of an employment unit or employer, as well as any other person, who gives a false statement or information knowing them to be false, or who knowingly conceals a material fact so as to defraud an individual with the purpose of avoiding or reducing the payment of benefits to which such an individual would otherwise be entitled, or to avoid becoming or remaining an employer subject to this chapter, or to avoid or reduce any taxes or other payments required from an employment unit under this chapter or under the Employment Security Act of any state or of the Federal Government, or of any foreign government, or who willfully fails or refuses to pay any taxes or make other payment or to furnish any reports required hereunder or to produce or permit the

inspection or the acquisition of copies of reports as required hereunder, shall be sanctioned with a term of imprisonment of one (1) year or with a fine of up to five thousand (5,000) dollars, or both penalties at the discretion of the court and each instance of providing information or statements, or of concealment of a material fact, and each day such failure or refusal to provide the information required continues shall constitute a separate offense.

(c) In addition to any other penalty fixed by this Act, if any person violates or attempts to violate, evades, or attempts to evade any of the provisions of this Act, including misrepresentation, or if the person knowingly causes another person to violate subsections 8(g)(1), 8(g)(2), 8(g)(7) or 8(g)(10), or any other provision of this Act regarding the determination of the tax rate designation, shall be imposed the following penalties:

(1) If the person is an employer, such employer shall be immediately designated with the maximum tax rate under this Act for the taxable year in which said violation or attempted violation occurred and for the three (3) taxable years following said year. However, if the business or commercial enterprise is under the maximum tax rate for any of the three (3) taxable years, then an additional two (2) percent penalty shall be imposed to the maximum tax over the taxable wages for said year(s).

(2) This employer shall also reimburse fifty (50) percent of the taxes unpaid or which he/she has attempted not to pay plus the interest and penalties resulting from said amount.

- (3) If a person other than an employer knowingly acquires a business or commercial enterprise solely or primarily for the purpose of obtaining a lower tax rate, such person shall be subject to a civil fine of ten thousand (10,000) dollars or to the payment of fifty (50) percent of the taxes unpaid or which he/she has attempted not to pay, whichever is higher, and said action shall be deemed to be a felony with a maximum penalty of three (3) years of imprisonment or a fine of fifteen thousand (15,000) dollars, or both penalties, at the discretion of the court.
- (4) If the Agency finds that any person, commercial entity, or tax return preparer (as defined in Section 8(g)(14)) knowingly urges or advises another person or commercial entity to violate any of the provisions of this Act, any of the above shall be imposed a penalty of five thousand (5,000) dollars or ten (10) percent of the amount resulting from any tax deficiency, with the respective penalties and interest, whichever is greater, in addition to any other penalties provided by this Act, and shall be guilty of a felony and be sanctioned with a maximum term of imprisonment of five (5) years or with a fine of twenty-five thousand (25,000) dollars, or both penalties, at the discretion of the court.

(d) Noncompliance with a Subpoena

Any person who without a just cause fails to appear or refuses to appear and testify or answer any inquiry or to produce books, papers, correspondence, memoranda, and other records, if being able to do so, in response to a subpoena of the Secretary or of his/her duly authorized representative or of an arbiter, shall be

sanctioned with a maximum term of imprisonment of thirty (30) days or with a fine of not less than two hundred (200) dollars nor greater than one thousand (1,000) dollars, or both penalties, at the discretion of the court, and each day such a failure or refusal continues shall constitute a separate offense.

(e) The penalties under these subsections shall be in addition to any other penalty and be subject to the same collection procedures that apply to due and unpaid taxes. The penalties shall be paid to the Agency within thirty (30) calendar days after the determination is made and be accredited to the Unemployment Fund. The determination of a penalty shall be final unless the employer files an appeal within thirty (30) days after the determination is made. The procedures for appeals shall be carried out pursuant to Section 6(f) of the 'Employment Security Act,' also known as Act No. 74 of June 21, 1956, as amended.

(f) Violation of Laws, Rules, and Regulations

...

(g) Unauthorized Disclosure of Information

..."

Section 7.- Conflict with Federal Requirements

If it is determined that any part of this Act is in conflict with federal requirements that are a condition for the appropriation of federal funds to the state, or if the employers eligibility in that state for obtaining credits against the federal unemployment tax (FUTA), such part of this Act in conflict is hereby declared inoperable only to the extent such a conflict and finding or determination do not affect the operability of the remaining text of the Act. The rules under this Act shall meet the federal requirements that are a

necessary condition for the allocation of federal funds to the state or the granting of credit for the federal unemployment tax (FUTA) in this jurisdiction.

Section 8.- Severability

If any provision of this Act or application thereof were declared invalid, said declaration shall not affect the remaining provisions nor the application thereof, which shall remain effective without the provisions declared invalid and, for this purpose the provisions of this Act are severable.

Section 9.- Liberal Interpretation

The powers and faculties conferred by this Act to the Secretary of Labor and Human Resources through the Employment Security Bureau shall be construed liberally so as to expedite the implementation of the purposes of this Act.

Section 10.- Effectiveness

This Act shall take effect on July 1, 2005.

CERTIFICATION

I hereby certify to the Secretary of State that the following Act No. 114 (H.B. 1577) of the 2nd Session of the 15th Legislature of Puerto Rico:

AN ACT to amend Sections 2, 8, 9, and 15 of Act No. 74 of June 21, 1956, as amended, known as the “Puerto Rico Employment Security Act,” in order to establish the “Puerto Rico Unemployment Insurance Tax Dumping Prevention Act,” and for other purposes,

has been translated from Spanish to English and that the English version is correct.

In San Juan, Puerto Rico, today 8th of December of 2006.

Francisco J. Domenech
Director