

Chapter 192-350 WAC

TRANSFER OF BUSINESS

WAC

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WAC 192-350-010 What is a predecessor-successor relationship? (1) This section applies only to those individuals and organizations that meet the definition of an employer contained in RCW 50.04.080.

(2) A predecessor-successor relationship exists when a transfer occurs and one business (successor) acquires all or part of another business (predecessor). It may arise from the transfer of operating assets including, but not limited to, the transfer of one or more employees from a predecessor to a successor. It may also arise from an internal reorganization of affiliated companies. A predecessor-successor relationship also exists when an employer transfers its business to another employer, and both employers are at the time of transfer under substantially common ownership, management or control. Whether or not a predecessor-successor relationship (including a "partial predecessor" or "partial successor" relationship) exists depends on the totality of the circumstances.

(3) **Predecessor.** An employer may be a "predecessor," including a "full predecessor" or "partial predecessor," if, during any calendar year, it transfers any of the following to another individual or organization:

- (a) All or part of its operating assets as defined in subsection (5) of this section; or
- (b) A separate unit or branch of its trade or business.

(4) **Successor.** A "successor" may be either a "full successor" or a "partial successor." An employer may be a "full successor" if, during any calendar year, it acquires substantially all of a predecessor employer's operating assets. It may be a "partial successor" if, during any calendar year, it acquires:

- (a) Part of a predecessor employer's operating assets; or
- (b) A separate unit or branch of a predecessor employer's trade or business.

(5) **Operating assets.** "Operating assets" include the resources used in the normal course of business to produce operating income. They may include resources that are real or personal, and tangible or intangible. Examples include land, buildings, machinery, equipment, stock of goods, merchandise, fixtures, employees, or goodwill. "Goodwill" includes the value of a trade or business based on expected continued customer patronage due to its name, reputation, or any other factor.

(6) **Transfer of assets.** Transfers from a predecessor to a successor employer may occur by sale, lease, gift, or any legal process, except those listed in subsection (13) of this section.

(7) **Simultaneous acquisition.** For purposes of successor simultaneous acquisition, the term "simultaneous" means all transfers that resulted from acquiring or reorganizing the business, beginning when the acquisition started and ending when the primary unit is transferred.

(8) **Common ownership, management and control.** Common ownership, common management and common control must be established when the transfer of a business occurs. In determining whether common ownership, management and control exist, the department may consider:

- (a) Ownership-legal owner for tax and liability purposes;
- (b) Familial relationships;
- (c) Principals;
- (d) Organized structure;
- (e) Day-to-day operations;
- (f) Assets and liabilities;
- (g) Stated business purposes; and
- (h) Other information pertinent to the inquiry.

The employer must meet all three elements, common ownership, common management and common control, for the exemption to apply.

(9) **Substantially common ownership, management or control.** In determining whether substantially common ownership, management or control exists, the department may consider the extent of commonality and similarity between employers based on:

- (a) Ownership-legal owner for tax and liability purposes;
- (b) Familial relationships;
- (c) Principals;
- (d) Corporate officers;
- (e) Organized structure;
- (f) Day-to-day operations;
- (g) Assets and liabilities;
- (h) Stated business purposes; and
- (i) Other information pertinent to the inquiry.

This standard is met when **any** common ownership, management or control exists between the employers.

(10) **Substantially similar businesses.** Substantially similar business are businesses:

(a) In which the products sold or services provided exhibit a high degree of likeness but may be less than identical; and

(b) Which could reasonably be in competition with one another to provide a substantially similar service or a substantially similar product.

(11) A significant purpose of the transfer of business must be more than an incidental purpose, but may be one of many purposes. Evidence of a significant purpose of the transfer of a business may be shown by:

(a) Business records, such as corporate minutes or other documents;

(b) Statements by owners or officers of the business, or by an outside party, such as an accounting firm or tax advisor, made contemporaneous with the transfer; or

(c) Other credible evidence of the employer's intent.

Employers must provide the department evidence of the purpose of the transfer no later than thirty days after the date of transfer.

(12) **Factors.** Factors should be weighed instead of merely adding up the number of individual factors. No single factor is necessarily conclusive. Some of the factors which the department may consider as favoring establishment of a predecessor-successor (including a "full successor" or "partial successor") relationship are:

(a) Whether the employers are in the same or a like business (e.g., providing similar or comparable goods or services or serving the same market);

(b) Whether the asset(s) transferred constitute a substantial or key portion of similar assets for either the predecessor or successor;

(c) Whether the assets were transferred directly and not through an independent third party;

(d) Whether multiple types of assets (e.g., employees, real property, equipment, goodwill) transferred;

(e) Whether a significant number or significant group of employees transferred between employers;

(f) Whether the assets transferred at the same time or in a connected sequence, as opposed to several independent transfers;

(g) Whether the business name of the first employer continued or was used in some way by the second employer;

(h) Whether the second employer retained or attempted to retain customers of the first employer;

(i) Whether there was relative continuity and not a significant lapse in time between the operations of the first and second employers;

(j) Whether there was continuity of management between employers;

(k) Whether the employers shared one or more of the same or related owners;

(l) Whether documents, such as a contract or corporate minutes, show the sale or transfer of a business or a portion of a business; and

(m) Whether other factors indicate that a predecessor-successor relationship exists.

(13) **Exceptions.** A predecessor-successor relationship will not exist:

(a) For the purposes of chapter 50.24 RCW (payment of taxes), when the property is acquired through court proceedings, including bankruptcies, to enforce a lien, security inter-

est, judgment, or repossession under a security agreement unless the court specifies otherwise;

(b) For the purposes of chapter 50.29 RCW (experience rating):

(i) When any four consecutive quarters, one of which includes the acquisition date, pass without reportable employment by the predecessor, successor, or a combination of both; or

(ii) When a significant purpose of the transfer of a business or its operating assets is for the employer to move or expand an existing business, or for an employer to establish a substantially similar business under common ownership, management and control.

(14) **Burden of proof.** The department has the burden to prove by a preponderance of the evidence that a business is the successor or partial successor to a predecessor business. However, if a business fails to respond to requests for information necessary to determine a predecessor-successor relationship, the department may meet its burden by applying RCW 50.12.080 to determine the necessary facts.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 13-09-010, § 192-350-010, filed 4/5/13, effective 5/6/13; WSR 12-23-087, § 192-350-010, filed 11/20/12, effective 12/21/12; WSR 10-23-064, § 192-350-010, filed 11/12/10, effective 12/13/10. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-010, filed 11/21/07, effective 1/1/08.]

WAC 192-350-020 What are examples of when a predecessor-successor relationship exists? The following examples are intended to illustrate factors that the department may consider in determining whether or not a predecessor-successor relationship exists.

(1) Business A, a sole proprietor widget manufacturer, sells its operations to new business B, a corporation. B plans to continue in the same type of widget manufacturing business as A. The sale includes the name of the business, goodwill, existing inventory, manufacturing equipment, and an ongoing lease. All employees of A transfer to B. This is a predecessor-successor relationship.

(2) Business A, a sole proprietorship retailer, goes out of business. It decides to sell some of its assets, including a company car. Business B, a retailer in a different business, decides to buy the car. It does not acquire any other assets, including employees, from A. Even though B has acquired an asset from A, there is no predecessor-successor relationship because the only relationship is a single asset which is incidental to the primary business of the employers.

(3) Business A and business B are independent corporations, but subdivisions of another entity C. C reorganizes and decides to eliminate A, lay off some employees, and transfer the remaining employees to B. B is the successor to A.

(4) Business A, a small sole proprietorship taxicab company, sells its one taxicab to business B, a much larger taxicab company. No employees transfer, but B tries to retain as much of A's customer base as possible. B is in the same business as A and is in a predecessor-successor relationship.

(5) Business A, a large taxicab company, sells one of its many taxicabs to business B, a small sole proprietorship taxicab company. No employees transfer, but B tries to retain as much of A's customer base as possible. B is in the same busi-

ness as A and has acquired part of a predecessor employer's operating assets, so B is a partial successor.

(6) Business A, a sit-down restaurant for families which operates in a leased facility, closes. A month later business B, a family restaurant operating under a different name and under a new lease reopens in the same location. One of five servers laid off when business A closed is rehired by business B. If this is the full extent of the relationship between business A and business B, this is not a predecessor-successor relationship. Examples of some of the factors which might change this to a predecessor-successor relationship are: If business B shares some of the same ownership with business A; the extent to which they advertise the same, use the same suppliers, maintain the same restaurant motif and decor, or use the same menu; the extent to which they use the same equipment and dishes; the extent to which the terms of the new lease appear to continue the previous one; and the extent to which other key employees continue from one employer to the other.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-020, filed 11/21/07, effective 1/1/08.]

WAC 192-350-030 Predecessor-successor transfers through intermediaries. When operating assets are transferred from one employer to another by using an intermediary whose role is to arrange or assist the transfer process (RCW 50.04.320 and 50.29.062), the department will decide on a case-by-case basis whether a predecessor-successor relationship exists. The fact that an intermediary was used does not preclude the existence of a predecessor-successor relationship.

In determining if a predecessor-successor relationship exists, the department will consider the intent of the parties involved and the economic reality of the transactions, as opposed to the strict legal format of the multiple transfers.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-030, filed 11/21/07, effective 1/1/08.]

WAC 192-350-040 What notice must a predecessor or partial predecessor provide to the department? (1) A predecessor or partial predecessor that quits or disposes of a business is liable for unemployment taxes under RCW 50.24.210. The predecessor or partial predecessor may give notice through the master business license; otherwise, it shall notify the department in writing within thirty days. The notice shall include the predecessor's or partial predecessor's department registration number and the name and contact information for the successor. All unemployment taxes payable are due immediately and shall be paid within ten days.

(2) A partial predecessor that does not quit or dispose of a business shall give written notice to the department within thirty days. The notice shall include the predecessor's or partial predecessor's department registration number and the name and contact information for the successor.

(3) In addition, a predecessor or partial predecessor shall provide the department with requested information about the transfer under WAC 192-350-060.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-040, filed 11/21/07, effective 1/1/08.]

(4/5/13)

WAC 192-350-050 What notice must a successor or partial successor provide to the department? (1) A successor or partial successor may be liable for unemployment taxes under RCW 50.24.210.

(2) A successor or partial successor may notify the department through the business license application that it bought, leased, or acquired all or part of an existing business. Otherwise, a successor or partial successor shall notify the department in writing within thirty days. The notice shall include the successor's or partial successor's department registration number and the name of the predecessor.

(3) In addition, a successor or partial successor shall provide the department with requested information about the transfer under WAC 192-350-060.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 12-04-018, § 192-350-050, filed 1/24/12, effective 2/24/12. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-050, filed 11/21/07, effective 1/1/08.]

WAC 192-350-060 What are the consequences if an employer fails to respond to requests for information related to a predecessor-successor designation? (1) Thirty days after mailing a request for information to an employer regarding a predecessor-successor relationship, the department may determine if a predecessor-successor relationship exists based on the information available at that time.

(2) The department may send a letter to a predecessor or successor employer to determine a partial transfer of experience. A partial successor or predecessor employer must respond to the letter within thirty days of the mailing date. The response must show the percentage of operating assets transferred to the partial successor. Operating assets include the employees of the business.

(3) If the employer does not respond, the department may apply RCW 50.12.080 to determine necessary facts. In addition, for subsequent rate years the commissioner may estimate the percentage of operating assets transferred based on the best available information, which may include employment reports filed. That percentage will transfer to the successor until it provides compelling evidence to change the estimate. Any change in the estimate will be prospective only.

[Statutory Authority: RCW 50.12.010 and 50.12.040. WSR 12-23-087, § 192-350-060, filed 11/20/12, effective 12/21/12. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-060, filed 11/21/07, effective 1/1/08.]

WAC 192-350-070 What effect does a predecessor-successor relationship have on tax rates? (1) Under RCW 50.29.062(1), if the successor is an employer at the time of the transfer of a business, the successor's tax rate shall remain unchanged for the rest of the calendar year. Beginning on January 1 of the year after the transfer and until the successor qualifies for its own rate, the successor's tax rate for each rate year shall combine the successor's experience with the experience of the predecessor or the relevant portions of the partial predecessor.

(2)(a) Under RCW 50.29.062 (2)(b), if the successor is not an employer at the time of the transfer of a business and if the transfer occurs after January 1, 2005, the successor's tax rate for the rest of the calendar year shall be the same as the predecessor employer at the time of the transfer. Any experi-

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ence attributable to the predecessor shall be transferred to the successor.

(b) Under RCW 50.29.062 (2)(b)(ii), if there is a substantial continuity of ownership, control, or management by the successor, beginning on January 1 after the transfer, the successor's tax rate shall be based on a combination of the successor's experience and the transferred experience from the predecessor.

(c) Under RCW 50.29.062 (2)(b)(i), if there is not a substantial continuity of ownership, control, or management by the successor, beginning on January 1 after the transfer, the successor's tax rate shall be assigned under RCW 50.29.062 (2)(b)(i)(B). However, if the predecessor terminates business on December 31st of any year and the successor begins business on January 1st of the next year, the department will calculate tax rates as if the transfer occurred on January 1st. Therefore, the department will assign a tax rate to the predecessor for January 1st and that rate will transfer to the successor.

(3) If the successor simultaneously acquires businesses from two or more employers with different tax rates, the successor's tax rate shall be assigned under RCW 50.29.062 (2)(b)(iii).

(4) The tax rate on any payroll retained by a predecessor employer shall remain unchanged for the rest of the rate year in which the transfer occurs. Beginning on January 1 after the transfer, the predecessor's tax rate shall be assigned under RCW 50.29.062 (3)(b).

(5) Changes in rate class for a predecessor or successor are effective only for the rate year the information was provided and for subsequent rate years.

(6) This section does not apply to a transfer of less than one percent of a business.

(7) This section does not apply if there is "SUTA dumping" under RCW 50.29.063.

[Statutory Authority: RCW 50.12.010, 50.12.040. WSR 10-23-064, § 192-350-070, filed 11/12/10, effective 12/13/10. Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-070, filed 11/21/07, effective 1/1/08.]

WAC 192-350-080 How does the department determine the percentage of operating assets transferred to a partial successor? The department will determine the percentage of operating assets transferred primarily by considering employees transferred. The department will first consider the number of employees transferred, but may also consider the total salaries and wages involved in the transfer and other factors.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-080, filed 11/21/07, effective 1/1/08.]

WAC 192-350-090 When does an employer quit or dispose of a business for purposes of successor liability? (RCW 50.24.210.) For purposes of RCW 50.24.210, an employer is considered to have quit business or disposed of its business or stock of goods if it disposes of substantially all of its operating assets. An employer is also considered to have quit business or disposed of its business or stock of goods if it transfers operating assets and retains only assets that do not have substantial net value or that are lower in value than total unemployment taxes, penalties, and interest

owed. If an employer quits business or disposes of its business or stock of goods and has more than one successor, all successors are jointly and severally liable for any unemployment taxes due unless the employer and all successors have notified the department in writing and the department has approved apportioning any unemployment tax liability between the successors.

[Statutory Authority: RCW 50.12.010, 50.12.040. WSR 10-23-064, § 192-350-090, filed 11/12/10, effective 12/13/10.]

WAC 192-350-100 What is "SUTA dumping" and what are the consequences if a significant purpose for the transfer of a business is SUTA dumping? (1) Congress enacted the "SUTA Dumping Act of 2004" to establish nationwide minimum standards for curbing unlawful manipulation of unemployment taxes by employers. "SUTA" stands for state unemployment tax acts. Federal law describes "SUTA dumping" as the practice by some employers and financial advisors of manipulating state unemployment experience tax rating systems so that employers pay lower state unemployment insurance taxes than their unemployment experience would otherwise allow. Most frequently, it involves merger, acquisition, or restructuring schemes, especially those that shift workforce or payroll.

To comply with federal requirements, Washington enacted RCW 50.29.063, which imposes higher unemployment insurance tax rates on employers if a significant purpose of the transfer of a business was to obtain a lower tax rate. The law also imposes penalties if the intent was to knowingly evade successorship tax provisions or to knowingly promote the evasion of successorship tax provisions.

(2) Examples of SUTA dumping include an employer with a high tax rate because of its experience that:

(a) Dissolves the business in its present structure and reorganizes into a new entity to obtain a lower tax rate;

(b) Buys a smaller business with a low rate, then transfers employees to the smaller business to obtain the low rate; or

(c) Reorganizes and intentionally gives a false description of its business to obtain a lower rate based on a lower industry average.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-100, filed 11/21/07, effective 1/1/08.]

WAC 192-350-110 What elements must the department prove to establish "SUTA dumping"? (1) In order to prove SUTA dumping, the department must prove by a preponderance of the evidence that:

(a) A business is a successor or partial successor to a predecessor business under WAC 192-350-010; and

(b) A significant purpose for the transfer of a business was to obtain a lower tax rate under RCW 50.29.063(1).

(2) A "significant purpose" must be more than an incidental purpose, but may be one of many purposes. The department may show that a significant purpose for the transfer was to obtain a lower tax rate by factors such as:

(a) Business records, such as corporate minutes or other documents, show that a lower tax rate was considered as part of the decision for the transfer;

(b) An outside party, such as an accounting firm or tax advisor, recommended the transfer in order to lower the tax rate; or

(c) The employer knew or should have known that transfer of employees to the successor would lower the tax rate and the actual effect of the transfer was to lower taxes significantly.

(3) For additional penalties under RCW 50.29.063 (2) or (3), the department must also prove that an employer intended to knowingly evade or knowingly evaded successorship provisions or that a nonemployer knowingly promoted the evasion of successorship provisions. "Knowingly" means having actual knowledge or acting with deliberate ignorance or reckless disregard for the prohibitions. "Knowingly" includes an intent to evade, misrepresentation, or willful non-disclosure.

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-110, filed 11/21/07, effective 1/1/08.]

WAC 192-350-120 What penalties apply if there is intent to knowingly evade successorship or knowingly promote the evasion of successorship provisions? If the department determines that there was intent to knowingly evade successorship or knowingly promote the evasion of successorship provisions, it may assess penalties under RCW 50.29.063 (2) and (3).

[Statutory Authority: RCW 50.12.010, 50.12.040, and 50.29.064. WSR 07-23-131, § 192-350-120, filed 11/21/07, effective 1/1/08.]