Chapter DWD 115

BUSINESS TRANSFERS

Note: Chapter Ind–UC 115 was renumbered to be chapter ILHR 115 under s. 13.93 (2m) (b) 1. and 2., Register, August, 1987, No. 380; chapter ILHR 115 as it existed on January 31, 1992 was repealed and a new chapter ILHR 115 was created effective February 1, 1992. Chapter ILHR 115 was renumbered Chapter DWD 115 under s. 13.93 (2m) (b) 1., Stats., and corrections made under s. 13.93 (2m) (b) 6. and 7., Stats., Register, June, 1997, No. 498.

DWD 115.001 Definitions. (1) IN GENERAL. Except as provided in sub. (2), unless the context clearly indicates a different meaning, the definitions in ch. DWD 100 apply to this chapter.

(2) Notwithstanding ch. DWD 100 and unless the context clearly indicates a different meaning, in this chapter "employer" means any person who is or becomes subject to the reimbursement financing or contribution requirements of ch. 108, Stats.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92, r. (intro.), (3), (5) to (7), renum. (1), (2), (8), (11) and (12) to be 100.02 (4), (7), (43), (64) and (65), renum. (9) and (10) to be 100.02 (60) and (63) and am., renum. (4) to be (2) and am., cr. (1), Register, September, 1995, No. 477, eff. 10–1–95.

DWD 115.01 Business transfer; methods used in business transfers and in the ordinary course of business; transfer of an asset; transfer of a business activity; total or partial transfer. (1) BUSINESS TRANSFER. Under s. 108.16 (8) (a), Stats., a transfer of business occurs when any asset or business activity is transferred in whole or in part by a transferor to a transferee by any method other than in the ordinary course of business.

(2) METHODS USED IN BUSINESS TRANSFERS. Methods of transferring assets or business activities include gift, sale, lease, inheritance, foreclosure, termination or cancellation of lease, bankruptcy sale, reorganization, merger or consolidation and receivership.

(3) EVENTS WHICH ARE NOT BUSINESS TRANSFERS. Corporate name changes, the election or cancellation of subchapter S status under section 1362 of the internal revenue code by a corporation, the transfer of payroll function only and the transfer of employees between an employee service company and its clients or customers are not transfers of a business. The transfer of shares of corporate stock by a stockholder is not a transfer of business for the corporation which issued the shares. Sale of used equipment or furniture and fixtures which are being replaced or no longer being used are considered transfers in the ordinary course of business rather than business transfers under ch. 108, Stats.

(4) TRANSFER OF AN ASSET. An asset is transferred if ownership, possession or use changes from the transferor to the transferee.

(5) TRANSFER OF A BUSINESS ACTIVITY. For a transfer of a business activity to be a business transfer under this section and s. 108.16 (8) (a), Stats., the business activity after the transfer shall be similar to the business activity before the transfer. In determining whether a business activity has been transferred, continued or resumed, the department shall consider factors which suggest a similarity in business activity including the following:

(a) The existence of the same customers or the same type of customer after the transfer;

(b) The closeness of the transferee's business location to that of the transferor when location is important to the business;

(c) The continued use of the transferor's trade name by the transferee;

(d) A lapse in operation of 6 months or less unless extensive remodeling is involved or the business is seasonal in nature but in no event shall the lapse be considered if greater than 2 years;

(e) Few if any changes in the product or in brand names after the transfer;

(f) The similarity in days and hours of the business under both the transferor and transferee;

(g) The transfer of inventory, expensive plant machinery, heavy equipment or unique assets as opposed to general office furniture and fixtures;

(h) The transfer of key employees or employees with highly technical professional skills;

(i) The transfer of goodwill;

(j) The existence of a noncompetition clause in the contract prohibiting the transferor from engaging in the same kind of business activity in the area; and

(k) The transfer of a license or a franchise.

(6) TOTAL OR PARTIAL TRANSFER. The transfer of a business may be a total transfer or a partial transfer. If only a portion of a business is transferred, the department shall compute and apply the transfer percentage under s. DWD 115.08.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.02 Determining date of transfer. The effective date of a transfer of business shall be the date on which the transferee first has actual operating control over business assets and business activities. In determining the effective date of a transfer of business, the department shall consider:

(1) Legal documents related to the transfer;

(2) Any statements or documents tending to show that actual operating control was transferred on a date earlier than that reflected in legal documents related to the transfer; and

(3) Any other relevant evidence.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.03 Notice to the department of a business transfer; required information to submit; department's investigative powers; resolution of issues. (1) Any time a business is transferred under s. DWD 115.01, the transferor and transferee shall notify the department in writing within 30 days after the date of transfer under s. 108.16 (8) (k), Stats.

(2) The transferor and transferee shall submit in writing any information which the department may request relating to the transfer, or to any transaction which the department has reason to believe may be a transfer, to permit the department to determine

if the transaction is a transfer of business and whether the transaction is a total or partial transfer under this chapter and ch. 108, Stats.

(3) The department may use any other relevant information, however obtained, in order to make a determination regarding a business transfer under this section. Under ss. 108.14 (2) and (2m) and 108.21, Stats., the department may, at any reasonable time, inspect the work records and any other records of an employing unit, or of any entity which the department has reason to believe may be an employing unit, which may show payments for personal services so that the department may determine the status and contribution liability of the employing unit or entity under ch. 108, Stats.

(4) The department may issue determinations, computations, re–computations and appeal tribunal decisions as necessary under ss. 108.09 and 108.10, Stats., in connection with any issue arising under this chapter.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.04 Transferee as successor; non–successor transferee. (1) STANDARD FOR SUCCESSOR. The transferee becomes a successor under s. 108.16 (8), Stats., if:

(a) A transfer of business has occurred under s. DWD 115.01; and

(b) The department finds successorship status under s. DWD 115.05 or 115.06, or the transferee requests successorship status under s. DWD 115.07.

(2) NON–SUCCESSOR TRANSFEREE. If the transferee is not a successor under sub. (1), s. DWD 115.11 applies.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.05 Mandatory successor. The department shall find that a transferee is a mandatory successor under s. 108.16 (8) (e), Stats., if the business transfer satisfies s. DWD 115.01 and if:

(1) At the time of business transfer, the transferor and the transferee are owned or controlled in whole or in substantial part under s. DWD 115.08, either directly or indirectly by legally enforceable means or otherwise, by the same interest or interests under s. DWD 115.08;

(2) The transferee has continued or resumed the business of the transferor either in the same establishment or elsewhere, or the transferee has employed substantially the same employees under s. DWD 115.08 as those the transferor had employed in connection with the business transferred; and

(3) The same financing provisions under s. 108.15, 108.151 or 108.18, Stats., apply to the transferee as applied to the transferor on the date of the transfer.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.06 Transfers involving fiduciaries. (1) TRANSFER TO A FIDUCIARY. The department shall find that a transferee is a mandatory successor under s. 108.16 (8) (c), Stats., if:

(a) The transferee is a legal representative, trustee in bankruptcy or a receiver or trustee of a person, partnership, association or corporation, or a guardian of the estate of a person, or legal representative of a deceased person;

(b) The transferee has continued or resumed the business of the transferor, either in the same establishment or elsewhere, or the transferee has employed substantially the same employees under s. DWD 115.08 as those the transferor had employed in connection with the business transferred; and

(c) The same financing provisions under s. 108.15, 108.151 or 108.18, Stats., apply to the transferee as applied to the transferor on the date of the transfer.

(2) TRANSFER FROM A FIDUCIARY. If the business of a successor employer specified in sub. (1) is transferred, the transferee is deemed a successor under s. 108.16 (8) (d), Stats., if the transferee would have been a successor under s. DWD 115.04 except for the intervening existence of the successor employer under sub. (1).

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.07 Optional successor. (1) STANDARD. A transferee may elect to become a successor under s. 108.16 (8) (b), Stats., if the business transfer satisfies s. DWD 115.01 and if:

(a) The transfer included at least a transfer percentage of 25% of the transferor's total business as determined under s. DWD 115.09;

(b) The same financing provisions under s. 108.15, 108.151 or 108.18, Stats., apply to the transferee as applied to the transferor on the date of the transfer;

(c) The transferee has continued or resumed the business of the transferor either in the same establishment or elsewhere, or the transferee has employed substantially the same employees under s. DWD 115.08 as those the transferor had employed in connection with the business transferred; and

(d) The department has received a timely written application from the transferee requesting successorship status.

(2) WRITTEN APPLICATION; TIMELY RECEIPT; WITHDRAWAL. (a) The department shall consider as timely under sub. (1) (d) any written application from the transferee or its representative which is received by the department on or before: July 31 of the year in which the transfer date is January 1 to March 31; October 31 of the year in which the transfer date is April 1 to June 30; January 31 of the year following the year in which the transfer date is July 1 to September 30; and April 30 of the year following the year in which the transfer date is October 1 to December 31, unless par. (b) applies.

(b) If the due date of the written application would otherwise be a Saturday, Sunday or legal holiday under state or federal law, the due date is the next following day which is not a Saturday, Sunday or legal holiday under state or federal law. The department shall also consider as timely any application which if mailed is either postmarked no later than the applicable due date or received by the department no later than 3 days after that due date.

(c) The transferee may withdraw its application requesting successorship status if a written withdrawal is received by the department before the issuance of an initial determination regarding its application or within 21 days after issuance.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.08 Owned or controlled in substantial part; the same interest or interests; employed substantially the same employees. (1) OWNED OR CONTROLLED IN SUBSTANTIAL PART. The conditions of s. DWD 115.04 (1) are satisfied if 50% or more of both entities are owned or controlled, either directly or indirectly, by the same interest or interests.

(2) THE SAME INTEREST OR INTERESTS. The department shall presume, unless shown to the contrary, that the same interest or interests includes the spouse, child or parent of the individual who owned or controlled the business, or any combination of more than one of them. To overcome the presumption that these are the same interest or interests, it must be established that:

(a) Usual and customary sales procedures were followed;

(b) All transactions were at fair market value and similar to those available to unrelated parties under similar circumstances;

(c) The spouse, child or parent of the individual who owned or controlled the business was not employed by the business in the 12–month period prior to the transfer in a position in which he or she was able to make management decisions;

(d) The individual who owned or controlled the business prior to the transfer has no ownership interest, either directly or indirectly, in the transferee; and

(e) The individual who owned or controlled the business prior to the transfer is not employed by the transferee in a position in which he or she is able to make management decisions.

(3) EMPLOYED SUBSTANTIALLY THE SAME EMPLOYEES. The conditions of s. DWD 115.05 (2), 115.06 (1) (b) or 115.07 (1) (c) that the transferee has employed substantially the same employees as those the transferor had employed are met if 50% or more of the employees employed by the transferor in connection with the business transferred work for the transferee.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.09 Determining transfer percentage; minimum transfer percentage; estimating transfer percentage; applying transfer percentage. (1) DETERMINING TRANSFER PERCENTAGE. The transfer percentage is computed by dividing the payroll in the transferred portion of the transferor's business prior to the transfer date by the transferor's total payroll. The transfer percentage is not based on the number of employees taken over by the transferee, but rather on the payroll incurred in the transferred portion prior to the transfer date. The payroll for overhead and combined positions shall be allocated in the same proportion as the direct payrolls involved, or on such other reasonable basis as may better correspond with and reflect the facts of the transfer.

(2) MINIMUM TRANSFER PERCENTAGE. Optional successorship requires a minimum transfer percentage of 25%. Mandatory successorship does not require any minimum transfer percentage.

(3) ESTIMATING THE TRANSFER PERCENTAGE. When the transferor does not provide information at the department's request or the information provided is not sufficiently specific or accurate, the department shall estimate the transfer percentage based on the best available information.

(4) APPLYING THE TRANSFER PERCENTAGE. For any partial transfer, whether optional or mandatory, the department shall:

(a) Apply the transfer percentage to the positive or negative balance in the employer's account of the transferor as of the transfer date and to the appropriate June 30 balances of the transferor;

(b) Apply the transfer percentage to the transferor's payroll prior to the transfer date as needed to correctly calculate the transferee's contribution rates; and

(c) Transfer the amounts so calculated to the employer's account of the transferee.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.10 Effects of successorship. (1) EMPLOYER STATUS. (a) A transferor which is no longer an employer after a transfer of business has occurred shall submit contribution reports and payments which may be outstanding on the date of transfer or which become due subsequent to that date for a quarter including the transfer date.

(b) If not already an employer, a successor becomes an employer subject to ch. 108, Stats., on the date of transfer and is liable for contributions or payments in lieu of contributions, whichever is applicable, from that date.

(2) TRANSFER OF EMPLOYER'S ACCOUNT BALANCE. (a) *Total successorship.* When a transfer of business results in a total successorship, the successor shall take over and continue the transferor's account, including its positive or negative balance under s. 108.16 (8) (f), Stats.

(b) *Partial successorship.* When a transfer of business results in a partial successorship, the successor shall take over and continue the transferor's account, including its positive or negative balance, in an amount determined by the transfer percentage under s. 108.16 (8) (f), Stats.

(3) TRANSFER OF RATE EXPERIENCE. (a) *Successor not an employer at time of transfer.* If the successor was not an employer at the time of transfer under ch. 108, Stats., the department shall assign to the successor, as of the date of transfer, the basic contribution rate assigned or assignable to the transferor on the date of transfer under s. 108.16 (8) (g), Stats. If there are several transfers of business on the same date of transfer to a single successor, the basic rate which will be assigned to the successor may not be higher than the highest basic rate which applied to any of the transferors of which the transferee is a successor for the year in which the transfer occurred.

(b) *Successor an employer at time of transfer.* If the successor was an employer at the time of transfer under ch. 108, Stats., the successor shall retain the assigned rate for the calendar year of the transfer. For subsequent years as required by s. 108.18, Stats., the department shall assign a rate which reflects the combined experience of the transferor and successor. For the purposes of s. 108.18, Stats., the department shall determine the experience of the successor's account by allocating to that account the respective proportions of the transferor's payroll and benefits properly assignable to the business transferred.

(4) PAYROLL BASE. For the calendar year of the transfer, employment in the transferred business becomes employment performed for the successor under s. 108.16 (8) (i), Stats. The successor shall compute exclusions in excess of the payroll base as though only one employer existed for that entire year.

(5) TRANSFER OF LIABILITY FOR CONTRIBUTIONS OR PAYMENTS IN LIEU OF CONTRIBUTIONS. The transferor and successor shall be jointly and severally liable for any of the transferor's liability for contributions or payments in lieu of contributions at the time of the transfer under s. 108.16 (8) (f), Stats. The liability of the successor shall be proportioned to the extent of the transferred business as determined by the transfer percentage.

(6) TRANSFER OF BENEFIT LIABILITY. (a) *Total successorship.* When a transfer of business results in a total successorship, all benefits paid after the transfer date shall be charged to the employer's account of the successor, even though based on prior services for the transferor in the transferred business under s. 108.16 (8) (i), Stats.

(b) *Partial successorship.* When a transfer of business results in a partial successorship, any benefits charged to the transferor after the transfer date for employees of the transferred business shall be credited to the employer's account of the transferor and recharged to the employer's account of the successor.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.

DWD 115.11 Non-successor transferee. (1) STANDARD. A transferee which is not a successor under ch. 108, Stats., and this chapter becomes an employer as of the date of transfer under s. 108.16 (8) (j), Stats., when the following conditions are met:

(a) A transfer of business has occurred under s. DWD 115.01; and

(b) The transferee is not currently an employer subject to ch. 108, Stats.

(2) EFFECTS OF A TRANSFER WITHOUT SUCCESSORSHIP. (a) The transferee becomes subject to ch. 108, Stats., on the date of transfer and is liable for contributions or payments in lieu of contributions, whichever is applicable, from that date.

(b) The transferee shall be assigned an initial or new employer rate for the first 2 years under s. 108.18 (2), Stats.

(c) The first contribution report shall be due from the transferee on the due date specified in s. DWD 110.06 (3), (4) and (5) for the quarter following the quarter in which the transfer occurred or January 31 for those becoming liable in the fourth quarter of the preceding year.

History: Cr. Register, January, 1992, No. 433, eff. 2–1–92.