

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA  
RALEIGH, NORTH CAROLINA

**INTERPRETATION NO. 119**

TO: R. F. Martin, Director

FROM: R. B. Overton, Attorney

RE: Interpretation of Section 96-9(c)(4) of the Employment Security Law of North Carolina -Total or Partial Transfer of Experience Rating Account

You have requested an interpretation of the above section of the law, and in connection therewith we advise as follows:

Before a total or partial transfer of an experience rating account may be effected as provided in Section 96-9(c)(4) of the Employment Security Law, it must be determined that liability would have been or was established solely due to Section 96-8(f)(2) of the law. Once it has been determined that liability would have been or was established solely due to Section 96-8(f)(2), the successor may acquire all or that part of the account of the predecessor which relates to the acquired portion of the business.

Total Transfer

A total transfer of the experience rating account may be made if the successor employer acquired all or substantially all of the assets of the predecessor employer, or acquired all or substantially all of the organization, trade, or business of another employer and was held liable as a successor by reason thereof, or would have been held liable by reason of the acquisition of such organization, trade, or business, or substantially all the assets thereof, if he were not already a covered and liable employer. In other words, if the successor employer was a new employing unit and had not been adjudged a covered employer, his liability would have been effectuated upon the acquisition of all or substantially all of the assets of the predecessor employer, or upon the acquisition of the organization, trade, or business of the predecessor employer. However, if the acquiring or successor employing unit is already an employer by reason of his own operation prior to the acquisition of the assets or substantially all of the assets of the predecessor or prior to the acquisition of the organization, trade, or business of the predecessor, then in that event he would have been determined an employer had he not already been adjudicated as such by reason of his own operations, and he may have the experience rating account transferred in toto.

In both instances above set forth the acquiring employer must continue to operate the business acquired. The effective date of such transfer of the experience rating account will depend upon the date of the application for transfer. If the acquiring employer files application for transfer within sixty days after the Commission notifies him of his right to request such transfer, then the effective date will be the date of acquisition. If the

acquiring employer does not make application within the sixty days set forth, the effective date of the transfer will be the first day of the quarter within which such application for transfer was made.

### Partial Transfer

When an employing unit acquires a distinct and severable portion of the organization, trade, or business of an employer as provided in Section 96-8(f)(2), that part of the account of the predecessor employer which relates to the acquired portion of the business may be transferred as of the date of acquisition to the successor employing unit, provided the successor makes application for a transfer within sixty days after the Commission notifies the successor of his right to request such transfer. If the request for transfer is not made within sixty days after the Commission notifies the successor employer of his right to request such transfer, then the effective date of the transfer must be the first day of the calendar quarter in which the application is filed. In this case also the successor employing unit must continue to operate the transferred portion of such organization, trade, or business. We must bear in mind also in connection with the partial transfer of experience rating accounts that no such transfer may be made unless that part transferred is a distinct and severable portion of the organization, trade, or business of another employing unit and that such portion of the organization, trade, or business of another employing unit and that such portion would have been an employer under the provisions of Section 96-8(f)(1) of the law, if such portion had been all of the organization, trade, or business of the predecessor, as Section 96-9(c)(4) specifically provides that "Whenever any individual, group of individuals, or employing unit, who or which, in any manner, succeeds to or acquires substantially all or a distinct and severable portio of the organization, trade, or business of another employing unit as provided in Section 96-8, subsection (f), paragraph (2)." Therefore, it becomes necessary that we examine Section 96-8(f)(2) as it relates to establishing liability by reason of having acquired a part of the organization, trade, or business of another employer. We construe this section to mean that, in determining the status of an employing unit which acquires a part of the organization of another employer, the investigator should look upon the part as if it were the whole and apply the same reasoning and same law that he would apply if the predecessor owned only that part.

For example, A, a covered employer, operates an automobile garage and also an oil distributing business. B purchases the automobile garage. A continues to operate the oil distributing business. C, the investigator for the Commission, in obtaining a status report from B ascertains that B has acquired the garage from A. he thereupon should investigate the payroll records of A, first examining the records for the current year. If it is discovered that the garage part of the business of A employed eight or more people in twenty weeks during the current year, it is not necessary to make further investigation. However, should it appear that the garage did not employ eight individuals in twenty weeks during the current year, the records for the preceding year should be investigated, and so on year for year, continuing back for a period of five years, and if it is discovered that A has employed as many as eight individuals in as many as twenty different weeks in the garage department of his business during any of the preceding five

years, B should be reported as a covered and liable employer by reason of Section 96-8 (f) (2). If it appears that during the preceding calendar year prior to the acquisition of that part of the business A did not employ as many as eight individuals in as many as twenty different weeks in that part and could have terminated his coverage had the part been the whole of his business and had he applied for termination as required by statute, then C should advise B that B has a right to file a written request with the Commission to be relieved of liability as provided in Section 96-8(f)(2), and that such application must be made within sixty days from the acquisition of the business.

### Conclusion

In conclusion we say that before a total or partial transfer of an experience rating account may be affected, the following conditions must be met under the law:

- (1) In order for the total reserve account to be transferred, the acquiring employer must have acquired substantially all of the assets, or all or substantially all of the organization, trade, or business of another employer;
- (2) In order to transfer a part of the reserve account the acquiring employer must have acquired a distinct and severable portion of the organization, trade, or business of another, which would have been a covered employer under the provisions of Section 96-8(f)(1) if such portion had been the whole of the organization, trade, or business of the other; (3) Each such acquiring employer must continue to operate the transferred portion (the whole or part) of such organization, trade, or business acquired.

In investigations to determine status of an employing unit which has acquired a part of the organization, trade, or business of another employer, the investigators may and should, if necessary, cover a period of five years to determine whether or not such part acquired has employed eight or more individuals in twenty different weeks during any of the five calendar years. Also in determining whether or not the acquiring employer may request that the successor ship section (Section 96-8(f)(2)) shall not apply, the investigators should only investigate the payroll records of the part acquired for the preceding calendar year to determine whether or not that part employed as many as eight individuals in as many as twenty different weeks during such preceding year.

Adopted as an official Interpretation of the Commission on July 28, 1953.