

STATE OF NEVADA
DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION
EMPLOYMENT SECURITY DIVISION

PUBLIC WORKSHOP TRANSCRIPTION/MINUTES
TO SOLICIT COMMENTS ON PROPOSED REGULATIONS
FOR THE NEVADA ADMINISTRATIVE CODE 612
(LCB FILES R199-05, R200-05 AND R201-05)

December 15, 2005

Location of Workshop
Legislative Building
401 S. Carson Street
Room 2135
Carson City, Nevada 89701

Ms. Jones: Good morning. I'd like to call this meeting to order. My name is Cynthia Jones. I am the Administrator of the Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation. With me today, we have Tom Susich, to my left, who is legal counsel. Donna Clark who is our Chief of Contributions. And Steve Zuelke from our Unemployment Insurance Support Services Section. Employment Security Division of the Department of Employment, Training and Rehabilitation is conducting this public meeting and workshop pursuant to Nevada Revised Statutes (NRS) 233B.061, to elicit comments from the general public and all interested parties regarding the adoption of proposed regulations outlined in LCB File Numbers R199-05, R200-05 and R201-05. The proposed regulations amend Chapter 612 of the Nevada Administrative Code (NAC) due to the enactment of Assembly Bill 502 and Senate Bill 111 during the 2005 Legislative Session, affecting Chapter 612 of the Nevada Revised Statutes. There are also proposed regulatory changes to clarify existing regulations and eliminate outdated regulations. Topics include regulations describing common ownership, management and control between business entities, regulations on the conditions and types of transfers of employers' experience records, regulations on the denial of transfer of experience record, regulations amending the timeliness of Division tax adjudication and appeal processes and regulations amending the processes related to claims filed for unemployment compensation. Notice of this meeting was provided in compliance with Nevada Revised Statutes 241.020 and was mailed to all interested parties on the Employment Security Division mailing list. Notice of the meeting was posted at the principal office of the Employment Security Division in Carson City, Nevada, as well as numerous offices throughout the State. In addition, the Notice was

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submitted to the Legislative Counsel Bureau, the Nevada State Library and all county libraries in the State and is posted on the websites of the Department of Employment, Training and Rehabilitation and the Legislative Counsel Bureau. I would now like to turn the workshop over to Ms. Donna Clark, Chief of Contributions, who will provide an overview of the proposed regulation, LCB File Number R200-05, after which I will discuss the other two proposed regulations. After these overviews are presented, the floor will be open to discussion and public comment. Thank you and Donna, would you take over from here, thank you.

Ms. Clark: Thank you, Administrator Jones. For the record, my name is Donna Clark and I serve as the Chief of Contributions for the Unemployment Insurance Program in the State of Nevada. During the 2005 Legislative Session, several statutory changes were adopted under Assembly Bill 502, to conform with the Federal SUTA Dumping Prevention Act of 2004, also known as Public Law 108295. SUTA is an acronym from State Unemployment Tax Act. The statutory changes related to SUTA Dumping were designed to prohibit the manipulation of unemployment insurance tax rates. At the core of the Unemployment Insurance Program is a tax rate system based on experience rating. The intent of an experience rating system is to assign tax rates to employers based on their individual records or experience within the program. Experience rating helps insure an equitable distribution of costs among employers. The practice of SUTA Dumping allows employers to escape their own experience and dump their earned tax obligation on other businesses. This results in an unfair business advantage for companies that engage in the practice and increased tax rates for the businesses that bear the socialized costs attributable to the companies that avoid taxes. This also results in a loss of revenue for the State Unemployment Trust Fund. Before reviewing the regulatory changes related to SUTA Dumping, I would like to provide an overview of the four primary provisions of the SUTA Dumping Prevention Act. The first requirement calls for mandatory rate transfers. Under this provision, whenever there is substantially common ownership, management or control between two employers, and one of these employers transfers its trade or business, including its workforce, to the other employer, unemployment experience must be transferred. This requirement applies to both total and partial transfers of business. Prohibited transfers are defined in the second provision. If the State Unemployment Insurance Agency finds that a person acquired a business solely or primarily for the purpose of obtaining a lower tax rate, the unemployment experience may not be transferred. The third provision requires meaningful civil and criminal penalties for SUTA Dumping. The penalties must be imposed on persons who knowingly violate or attempt to violate SUTA Dumping provisions. These penalties must also be applicable to any person who knowingly gives advice leading to such a violation. The last provision requires states to establish procedures to

detect SUTA Dumping activities. I would now like to review the proposed regulatory changes related to SUTA Dumping contained in our hand out which references LCB File Number R200-05. The first eight sections provide a variety of new regulatory definitions. The first defines a part or portion of an organization, trade or business. It also specifies that the transfer of an employer's workforce is considered a transfer of a trade or business when as a result of such transfer, the transferring employer no longer performs the trade or business and such trade or business is performed by the employer to whom the workforce is transferred. The next two sections provide regulatory guidelines as to the proper reporting of employees by the legal employing entity. Under Nevada Unemployment Compensation Law, wages must be reported and contributions paid by each employing unit for which services are performed. Reporting practices commonly referred to as Common Paymaster or Payrolling are not allowed under Nevada Unemployment Compensation law. The next five sections provide definitions of substantially common ownership, management or control. Employing units that share common ownership, management or control may be subject to mandatory rate transfers. The proposed guidelines also detail some of the objective factors that the Agency may use in determining the existence of this condition between two or more businesses. The final three sections beginning on page three of the handout are existing regulations modified to meet the new requirements for experience rating. The modification to Nevada Administrative Code 612.014 updates the definition of a severable and distinct portion of a business. Changes to Section 612.280 provide the conditions for mandatory transfers of experience record between related entities and preserve the conditions for voluntary transfers between unrelated entities. The final modification to NAC 612.290 clarifies the conditions under which experience records transfers will be prohibited. The proposed guidelines also detail some of the objective factors that the Agency may use in determining if an acquisition or change in business organization was effected solely or primarily to obtain a more favorable tax rate. For the record, I would like to acknowledge an additional change that will be necessary to the final section of Nevada Administrative Code 612.290. The draft modification shown on the handout as Subsection 3.A.1. should be Subsection 4. Also, the draft modification must reflect the provisions of Nevada Revised Statutes 612.250, which provides both a fifteen-day protest period and formal appeal rights to any rate determinations. That concludes my overview. Thank you.

Ms. Jones: Thank you, Donna. I would now like to discuss LCB File Number R201-05. The changes to Section 120 of NAC 612 have been proposed to align the Nevada Administrative Code to changes effected in NRS Chapter 612 in AB502 and SB111 during the 2005 Legislative Session. References to response times to various Agency actions or determinations have been

changed from ten days to eleven days, due to changes in the Nevada Rules of Civil Procedure. The word “any” has been changed to “all relevant” as relates to facts submitted related to a claimant’s separation from employment, availability for work or other information that would otherwise affect an individual’s eligibility for unemployment insurance benefits. LCB File Number R199-05 makes various housekeeping changes to Nevada Administrative Code 612. The new sections propose in the front of the regulation are to adopt mandatory regulations required of all agencies to be in compliance with NRS Chapter 233B, the Administrative Procedures Act. NAC 612.120 is amended in this set of regulations to provide guides to employers regarding the definition of all relevant facts, which was discussed under LCB File Number R201-05. The remainder changes are to align the regulations to current practice and amend outdated references to programs or procedures that are no longer in existence. We do have a couple of technical changes on this proposed set of regulations. The section that I discussed describing all relevant facts, it has been recommended by the Legislative Counsel Bureau that that be moved to LCB File Number R201-05, where the term all relevant facts appears for consistency. In addition, legal counsel would like to discuss an amendment to the new sections of File 199-05 for the proposed regulations related to the Administrative Procedures Act. Thank you. Tom?

Mr. Susich: Yes, my name is Tom Susich. I’m the legal counsel for the Nevada Employment Security Division. The proposed regulations provide for compliance with NRS 233B.120. 233B.120 provides that all agencies of the State must have a procedure for providing advisory opinions and declaratory judgments. 233B, however, only applies to the Employment Security Division in some aspects. NRS 233B.039 3a provides that Chapter 233B does not apply to Chapter 612 of NRS for the distribution of regulations by and the judicial review of decisions of the Employment Security Division. Therefore, to the extent that advisory opinions and declaratory judgments conflict with the statutes contained in NRS 612, NRS 612 must be the procedure that we follow. NRS 612.245 specifically provides that the Administrator will make determinations regarding whether or not an employer is an employing unit and the status of its employees. It also provides pursuant to AB502 that the Administrator may, upon his own motion or upon the application of an employing unit, make a determination that substantially common ownership, management or control exists between any two or more employers. Those types of determinations are subject to appeal rights which have to go through a series of reviews within the Agency and then on into the courts, pursuant to Petition for Judicial Review. And that is the very type of determination which I believe NRS 233B.039, 3a, is talking about. Therefore, it would be my intent to submit language for inclusion in the proposed regulation that would clearly indicate that determinations regarding whether or not a

company or entity is an employer, whether or not an employee has the rights to benefits, or whether or not there is common ownership, management and control between two or more employers are issues that have to be determined pursuant to the statute, NRS Chapter 612, and therefore would not be subject to either advisory opinions or declaratory judgments. Further, with regard to advisory opinions, any advisory opinion that is issued by the Administrator concerning any issue which is related to an appealable matter would not be binding upon the Agency, the Referee, the Board of Review or the courts, and therefore would only be an informational type decision, not something that can be relied upon later if the matter is contested through the normal hearings process. So I will provide proposed language attempting to establish or make that clear in the regulation.

Ms. Jones: Thank you, Mr. Susich. I appreciate it. I have one last amendment to the proposed regulations to offer. LCB File 199-05, again NAC 612.120, Subsection 4, we have a couple of technical changes that need to be made. The last line of that proposed new section stating that if the claimant is found to quit employment with his employing unit solely to seek or accept other employment, the phrase “seek or” needs to be struck so that it reads “quit his employing unit solely to accept other employment” in addition, the statutory reference needs to be corrected. The statutory reference at the end of that section should be NRS 612.551, Subsection 3. These changes are necessary in order for the proposed regulation to be consistent and read harmoniously with the Nevada Revised Statutes. This is the end of the Division’s formal presentation regarding our proposed regulations. We would like to open the floor for public comment or input. Are there any members of the public here who would like to provide comment on the proposed regulations? Seeing none, Ms. Richards, have you receive any written comments regarding the proposed regulations?

Ms. Richards: Joan Richards for the Employment Security Division. No, I have not received any written comments.

Ms. Jones: Thank you, Ms. Richards. It appears we have no members of the public here to provide testimony regarding these proposed regulations. Therefore, I call this meeting and public workshop to a close. Thank you.