

SUTA DUMPING

FREQUENTLY ASKED QUESTIONS

1. What is “SUTA Dumping”?

SUTA Dumping was further defined by a new law in 2005 as “transferring a trade or business, or a part of a trade or business, solely or primarily for the purpose of reducing the contribution rate or reimbursement payments in lieu of contributions required under this act [that is, the *Michigan Employment Security Act*]. It is characterized by the abandonment of an employer’s unemployment insurance “experience” (history of payroll and unemployment benefit payouts).

It is important to note, however, that SUTA Dumping is a new name for a broad group of tax avoidance practices that include tax manipulation, illegal under the new 2005 law and already illegal under previously-existing law.

A Fact Sheet describing SUTA Dumping in greater detail is available on the Unemployment Insurance Agency’s website:

www.michigan.gov/uia

2. What can I use as an indicator that I may have engaged in SUTA Dumping?

In general, SUTA Dumping occurs if you have transferred employees to another of your own businesses, or to another business, or to a newly created business, and the transfer resulted in a lower unemployment insurance tax rate applicable to those employees. If the proper disclosures are made to the Agency, the transfer of employees should not, in general, result in a lower tax rate, and if it does, that may be an indication that SUTA Dumping may have occurred.

3. When would penalties apply to me, or to my business advisor, for my having engaged in SUTA Dumping, and how much are the penalties?

If I knowingly transferred or acquired some or all of a business with the sole or primary purpose of reducing an unemployment insurance tax rate, then my unemployment tax rate would be increased to the maximum possible rate, but it would be increased in any event by not less than 2.0%.

In addition, the UIA would likely apply penalties to an employer for engaging in SUTA Dumping if the employer **failed to disclose** to the UIA information connecting the transfer of employees to that employer. The penalties are up to 4 times the amount of unemployment taxes saved as a result of the SUTA Dumping, plus interest on the unpaid taxes and interest on the penalties.

If my business advisor knowingly advises me to engage in SUTA Dumping, that person could face a civil fine of up to \$5,000, and if the UIA considers that my business advisor conspired with me to give false information or incomplete information to reduce my tax rate, my business advisor could face a penalty of up to 3 times the amount of the underpaid taxes, plus interest on the penalty.

4. What Forms do I use to disclose information to the UIA to connect the transfers of my employees between two separate or related companies, and how do I get copies of those Forms?

It is important that when you transfer your employees to another employer, or another subsidiary of your own company, you file with the Agency Form UIA 1772, "Discontinuance or Disposition of Business or Assets."

It is equally important that when you are an existing business and you acquire employees from another employer or from another subsidiary of your company, you file UIA Schedule B, directly with the UIA. If you are a new business and are acquiring employees of another employer or of a subsidiary of yours, you must file Michigan Treasury Form 518, as well as UIA Schedules A and B. The Treasury Department will forward a copy of the Form 518 and UIA Schedules A and B to the UIA. If you are a Professional Employer Organization (PEO), you also need to complete Forms UIA 1045 and 1045A, even if there is no common ownership between the PEO and its client entities.

All of these forms are available on the UIA's website. You can also request these forms by calling UIA Employer Customer Relations at 1-800-638-3994.

5. If I transfer some or all of my employees to another business I own, but transfer less than 75% of the assets, there's no transfer of business and I don't have to file any forms with the UIA to report that transfer, right?

No, that's not right. In general, if there is a transfer of assets OR a transfer of payroll (organization) between two business entities substantially owned, managed, or controlled by the same individuals, then there is a transfer of business that must be reported to the UIA by means of UIA Schedule B, "Successorship Questionnaire."

6. If I own a company and want to bring about management and cost efficiencies by forming a new company, can I transfer some or all of my employees to that company, and then lease the employees back to my original company?

Although you can form that kind of leasing company, it is known as a “captive provider” because you are leasing your own employees back to yourself. A captive provider arrangement is not recognized for unemployment insurance purposes, so the UIA will consider those employees as still being the employees of your original company, rather than of your captive leasing company.

7. If I own several companies and want to bring about management and cost efficiencies by forming a new company, can I transfer some or all of my employees to that company, and then lease the employees back to my original companies?

Again, although you can form that kind of leasing company, it is known as a “captive provider” because you are leasing your own employees back to yourself. A captive provider arrangement is not recognized for unemployment insurance purposes, so the UIA will consider those employees as still being the employees of your original companies, rather than of your captive leasing company.

However, you can always merge two or more of your companies and transfer employees between them, as long as you make the required disclosures to the UIA. The acquiring company must complete UIA Schedule B, and Form 518 if a new company is being formed, and Form UIA 1772 must be completed by the company the workers are leaving. This will ensure that the unemployment “experience” associated with those employees transfers with them.

8. I’ve heard that the UIA is aggressively enforcing the provisions of the *Michigan Employment Security Act* that prohibit “SUTA Dumping.” But am I safe from any penalties for SUTA Dumping if the things I did to reorganize my business (and that the Agency is calling “SUTA Dumping”) were recommended to me by my legal or financial advisor?

The law imposes penalties on an employer who “knowingly” engages in SUTA Dumping. It defines “knowingly” as “having actual knowledge of, or acting with deliberate ignorance or reckless disregard for, the prohibition involved.” Therefore, an employer cannot assert his or her reliance on the advice of an attorney or accountant to evade penalties otherwise applicable for SUTA Dumping.

Also, if a business Advisor tells you that a few simple “paper changes” can lower your unemployment tax rate, be cautious. Ask the Agency for an opinion as to whether these changes will be regarded as “SUTA Dumping” subjecting you to possible penalties.

If a business Advisor tells you not to share with the Agency, or others, the details about how you saved money on your unemployment insurance taxes, or requires you to sign a “nondisclosure agreement” assuring you will not disclose such information to the Agency or others, be suspicious. The Advisor may be encouraging you to engage in SUTA Dumping that could ultimately subject you to the severe penalties of the law.

9. If the decisions I make about reorganizing my business to take advantage of efficiencies, or to save money on worker’s disability compensation or the single business tax are perfectly legitimate for those purposes, why does the UIA call some of these same practices “SUTA Dumping?”

Bear in mind that what may be legal in one area of the law may be illegal in another area of the law, and it is not a defense that what you did when you engaged in SUTA Dumping contrary to the unemployment compensation law (*Michigan Employment Security Act*) was not illegal under some other area of Michigan law. So, if you attempt to save money for worker’s disability compensation or the single business tax, you still need to pay your correct unemployment insurance taxes.

10. If I know that the UIA is currently looking at my business practices for possible SUTA Dumping, what should I do while the investigation proceeds?

First, you should ask the Agency for information about the tax rate at which you should pay while the matter is under investigation or under appeal.

If you do not wish to wait for the Agency to provide such information, you should pay at the highest rate you had before you lowered your unemployment tax rate by the practices the UIA is investigating. For a dual employer, like a Professional Employer Organization (PEO), you should report any workers you are leasing back to a new client company under the UIA Account Number of the client company, rather than under your number. If it is ultimately determined that the workers can be reported under your number, adjustments can be made at that time to retroactively report the workers under your account number.

Also, you should co-operate fully in answering the questions and providing the documents required by the UIA’s Field Auditor.

11. I received a Determination from the UIA that I owe a penalty equal to 4 times the amount of the unemployment tax that I fraudulently failed to pay. I cannot afford to pay such a high penalty. How can I get the Agency to reduce that penalty?

The Agency offers employers payment plans to allow penalties and even underlying tax and interest liabilities to be paid off over several years. However, the Agency takes into consideration an employer's cooperation in the Agency's investigation when looking at mitigating the penalties, and the Agency has reduced the penalties by as much as 87% with co-operative employers.

12. I may have been overzealous in attempting to reduce my unemployment taxes, and I realize that now. What should I do to head off any possible penalties being imposed by the UIA?

Call the Agency's SUTA Dumping Unit at 313-456-2172 and make an appointment to come in and discuss the matter with the experts. If you voluntarily come forward and it turns out you do owe some back taxes, the Agency will likely assess little or no penalty on your company.

13. I am an employer, or possibly a dual employer or PEO, and I am planning to transfer some of my employees to another company (whether owned or controlled by the same interests as the first company, or not). Does the unemployment experience (benefit payout and tax payment history) associated with the transferred employees transfer to the new company?

If there are common ownership, management, or control interests, the rates of both companies would be blended and recalculated. If the companies do not have common ownership, management, or control, and the company receiving the employees is a new company, then there could be a partial rate transfer to it. But, if the PEO is a "captive provider" because it leases employees only to clients owned or controlled by the same interests, then the UIA will treat all the employees as working for the client company, not for the PEO. The UIA does not recognize a "captive provider" as the employer of the leased employees.

14. I am a dual employer and share employment responsibilities of my employees with another company. I retain the right to manage the day-to-day operations of the employees, and the other employer retains the right to hire and fire these same employees. By becoming a dual employer, have I left behind the unemployment benefit liabilities I had built up while the employees were solely my employees?

No, as a dual employer you remain responsible, along with the other employer, for your previously incurred unemployment tax liability. If the other employer agrees to pay the unemployment taxes but then defaults in doing so, you would still be responsible for paying them.

15. I am already a co-employer (that is I am either the client entity of a PEO, or I am the PEO), and I transfer my organization or payroll to another co-employer . What is my unemployment insurance rate?

Because the two entities are “co-employers,” they share some common control. When employees are transferred between them, their rates will be blended.

16. When the Agency says that I will be getting a “blended rate” when I merge two or more of my companies, does that mean I’ll get the average rate of the two or more companies?

The unemployment “experience” includes all of the state unemployment taxes paid by the involved companies primarily in the previous 5 years, and all of the unemployment benefits charged to the involved companies primarily in the previous 5 years. Most of the unemployment tax rate is calculated by using this past 5 years of “experience.”

When two or more businesses are merged, it is really the unemployment “experience” that is merged, and then a new rate is calculated, based on the combined payment and charge histories of the involved companies. That is not the same thing as calculating the “average rate.”

WHEN IN DOUBT ABOUT WHAT CONSTITUTES SUTA DUMPING, OR HOW TO AVOID IT, CONTACT THE UIA’S SUTA DUMPING UNIT AT 313-456-2172.