

CHAPTER 133**(HB 473)**

AN ACT relating to unemployment insurance.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

➔Section 1. KRS 341.070 is amended to read as follows:

As used in this chapter, unless the context clearly requires otherwise, "subject employer" means:

- (1) Any employing unit which in any calendar quarter in either the current or preceding calendar year paid for service in covered employment wages of fifteen hundred dollars (\$1,500) or more.
- (2) Any employing unit which for some portion of a day in each of twenty (20) different calendar weeks, whether or not such weeks are consecutive, in either the current or the preceding calendar year, had in covered employment at least one (1) worker (irrespective of whether the same worker was in employment in each such day).
- (3) Any employing unit for which service in covered employment, as defined in paragraph (d) of subsection (1) of KRS 341.050, is performed.
- (4) Any employing unit for which service in covered employment, as defined in paragraph (e) or (h) of subsection (1) of KRS 341.050, is performed.
- (5) Any employing unit for which service in covered employment, as defined in paragraph (f) or (h) of subsection (1) of KRS 341.050, is performed.
- (6) Any employing unit for which service in covered employment, as defined in paragraph (g) or (h) of subsection (1) of KRS 341.050, is performed.
- (7)
 - (a) Any employing unit that ***is the transferee of all or part of an employing unit that is or has been a subject employer at the time of the transfer; or***~~[succeeds to or acquires the organization, trade, or business, or substantially all of the assets of another employing unit which at the time of such succession or acquisition is a subject employer, or which succeeds to or acquires a portion of the organization, trade, or business of another employing unit, which portion, if treated as a separate employing unit, would be, at the time of the succession or acquisition, a subject employer under subsection (1), (2), or (5) of this section].~~
 - (b) ***Any employing unit that at the time of acquisition of all or part of a trade or business of a subject employer is not or has not previously been a subject employer.***
- (8) Any employing unit for which service is or was performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment fund; or which, as a condition for approval of this chapter for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required, pursuant to such act, to be a "subject employer" under this chapter.
- (9) Any employing unit which has elected to become subject to this chapter, pursuant to subsection (3) of KRS 341.250.
- (10) For purposes of subsections (1) through (6) of this section, covered employment shall include service which would constitute covered employment but for the fact that such service is deemed to be performed entirely within another state pursuant to an election under an arrangement entered into (in accordance with KRS 341.145) by the secretary and an agency charged with the administration of any other state or federal unemployment compensation law.
- (11) Any employing unit which, having become a subject employer under subsections (1) through (9) of this section, has not ceased to be a subject employer under KRS 341.250.
- (12) For purposes of subsections (2), (4), and (5) of this section, if any week includes both December 31 and January 1, the days of that week up to January 1 shall be deemed one (1) calendar week and the days beginning January 1 another week.

- (13) Notwithstanding the provisions of this section or any other provision of this chapter, no employing unit shall be initially determined a subject employer on the basis of covered employment performed more than five (5) calendar years prior to the year in which such determination is made, unless the secretary can show that the records of such employment experience were fraudulently concealed or withheld for the purpose of escaping liability under this chapter.

➔Section 2. KRS 341.190 is amended to read as follows:

- (1) *As used in this section:*

- (a) *"Agent" means one who acts for or in the place of an individual, an employing unit, or a public official by the authority of that individual, employing unit, or public official; and*
- (b) *"Public official" means an official, agency, or public entity within the executive branch of federal, state, or local government who or which has responsibility for administering or enforcing a law, or an elected official in federal, state, or local government.*

- (2) Each employing unit shall keep true and accurate work records of all workers employed by it, of the wages paid by it to each worker, and such other information as the secretary of the Education and Workforce Development Cabinet considers necessary for the proper administration of this chapter. The records shall be open for inspection and subject to being copied by the secretary or his or her authorized representatives at any reasonable time and as often as necessary.

- ~~(3)~~~~(2)~~ The secretary may require any employing unit to furnish to the cabinet at its central office from time to time information concerning the total amounts of wages paid, total number of persons employed, an individual record of each worker employed, an individual record of each worker whose employment has been terminated or who has been laid-off, an individual wage and hour record of each worker employed part time entitled to benefits, and other related matters, including hours worked, which the secretary considers necessary to the effective administration of this chapter.

- ~~(4)~~~~(3)~~ Information obtained from an employing unit or individual and other records made by the cabinet in the administration of this chapter are confidential and shall not be published or be open for public inspection, except as provided below *and in subsections (5) and (6) of this section:*

- (a) 1. *Public officials and the agents and contractors of public officials, ~~Information and records may be made available to public employees~~ in the performance of their **official** duties, **may be provided information and records**, but the **public officials**~~(agency)~~ receiving the information and records shall assure the confidentiality, as required in this section, of all information and records so released. **Official duties do not include solicitation of contributions or expenditures to or on behalf of a candidate for public office or a political party;***
2. *A contractor shall include a temporary staffing engaged by the cabinet for any purpose in connection with the administration of this chapter; and*
3. *Disclosures shall be made under this subsection only if the recipient has entered into a written, enforceable and terminable agreement with the cabinet and has satisfied the safeguards set forth in federal statutes and regulations~~[by entering into a written, enforceable, and terminable agreement with the cabinet and by satisfying the safeguards set forth in the federal confidentiality and disclosure requirements as prescribed by 42 U.S.C. sec. 503, 26 U.S.C. sec. 3304, and 20 C.F.R. sec. 603.9];~~*
- (b) 1. *An individual~~[A claimant]~~ or employing unit ~~for his legal representative~~ shall be provided, upon request, information and records maintained by the cabinet in the administration of **wage records**,~~[his]~~ claim,~~[his]~~ reserve account, ~~[his]~~ reimbursing employer account, or any proceeding under this chapter to which *it is*~~[he is]~~ a party.~~[;]~~*
2. *An agent of an individual or employing unit shall be provided the individual's or employing unit's information and records upon the presentation of a written release or other legally enforceable evidence of the informed consent of the individual or employing unit.*
3. *An attorney retained by an individual or employing unit in any proceeding under this chapter shall be provided the individual's or employing unit's information and records if the attorney asserts in writing that he or she is representing that individual or employing unit.*

4. *An elected official performing constituent services shall be provided the individual's or employing unit's information and records if the official presents reasonable written evidence that the individual or employing unit has authorized the disclosure;*
- (c) *A third party other than an agent, or third party on an ongoing basis, shall be provided the individual or employing unit's information and records if the individual or employing unit to whom the information pertains provides a signed written release which shall specify:*
1. *The information and records to be disclosed;*
 2. *The purpose for which the information and records are sought, specifying the expected service or benefit to the individual signing the release, or specifying their use in the administration or evaluation of the public program to which the release pertains;*
 3. *Assurance that the information and records shall be used solely for that purpose;*
 4. *All parties who may receive the information and records disclosed; and*
 5. *That state government files shall be accessed to obtain information and records.*

Disclosures shall be made under this subsection only if the recipient has entered into a written, enforceable, and terminable agreement with the cabinet and has satisfied the safeguards set forth in federal statutes and regulations;

- (d) *Precedential orders issued by the Unemployment Insurance Commission shall be released provided that Social Security numbers and employer identification numbers have been removed and the disclosure is otherwise consistent with federal and state law;*

~~(e)(e)~~ A public official with authority under state or federal law to obtain the information and records by subpoena, other than a clerk of court on behalf of a litigant, shall be provided information and records upon service of a duly issued subpoena;

~~(f)(d)~~ A federal official, when required for the purposes of oversight and auditing of the unemployment insurance program, shall be provided information and records;

~~(g)(e)~~ Statistical information derived from information and records obtained or made by the cabinet may be **released to the Bureau of Labor Statistics under a cooperative agreement or may be published**, if it in no way reveals the identity of any ~~individual claimant~~ or employing unit; and

~~(h)(f)~~ Nothing in this section shall preclude the secretary or any employee of the cabinet from testifying in any proceeding under this chapter or in any court, or from introducing as evidence information ~~and~~ records obtained or made by the cabinet in an action for violation of state or federal law to which the cabinet is a party or upon order of the court.

~~(5)(4)~~ Disclosures shall be made under subsection ~~(4)(3)~~ of this section only if:

- (a) The disclosure is necessary for the proper administration of the unemployment insurance program;
- (b) No more than an incidental amount of staff time or a nominal processing cost is required to make the disclosure; or
- (c) The cost of providing the information and records is paid by the recipient prior to the disclosure, consistent with federal laws and regulations, except this requirement shall not apply to disclosures made under subsection ~~(4)(3)(e) and (f)~~ of this section **nor to disclosures made under subsection (4)(e) and (h) of this section** if the cabinet attempts without success to recover the cost of disclosure. For disclosures made to **other public officials**~~public employees~~ under subsection ~~(4)(3)(a)~~ of this section, this requirement shall be met if the **recipient**~~agency~~ provides a reciprocal benefit to the cabinet in the administration of the unemployment insurance program, or if a reasonable reimbursement for the disclosure shall be determined under federal law.

~~(6)(5)~~ **Recipients of information and records disclosed under subsection (4)(a) and (c) of this section may redisclose the information and records only as follows:**

- (a) **To the individual or employing unit who is the subject of the information and records;**
- (b) **To an attorney or duly authorized agent representing the individual or employing unit;**
- (c) **In any civil or criminal proceedings for or on behalf of the recipient;**

- (d) *In response to a subpoena but only as provided in paragraphs (e) and (h) of subsection (4) of this section;*
 - (e) *A public official may redisclose to an agent or contractor, but only if the public official retains responsibility for the uses of the confidential information and records by the agent or contractor and subject to the safeguards set forth in the agreement required under subsection (4) of this section;*
 - (f) *A public official may redisclose to another public official;*
 - (g) *A state or local child support enforcement agency may redisclose to its agent under contract for the purpose of carrying out child support enforcement; or*
 - (h) *When specifically authorized by a written release for redisclosure that meets the requirements of paragraph (c) of subsection (4) of this section.*
- (7) Any disclosure or use of information and records that is inconsistent with the provisions of this section shall be subject to the penalty prescribed in KRS 341.990(11).
- (8) ~~(6)~~ No information ~~and~~~~for~~ records held confidential under subsection (4)~~(3)~~ of this section shall be the subject matter or basis for any suit for slander or libel in any court, but no employer or employee, or his representative, testifying before the commission, the secretary, or any duly authorized representative thereof, shall be exempt from punishment for perjury.

➔Section 3. KRS 341.540 is amended to read as follows:

- (1) As used in this section, unless the context clearly requires otherwise:
 - (a) "Substantially common" or "substantially the same" means that one (1) or more individual or individuals own or exercise pervasive management or control over both the predecessor and successor employing unit. Factors indicating pervasive management or control include, but are not limited to, whether the predecessor and successor share:
 - 1. One (1) or more individuals or family members *as owners*~~in positions of management or ownership~~, on boards of directors, ~~or~~ as shareholders, or executive or other officers; and
 - 2. Titles to property, parent companies, workforce, assets, legal and professional representation, physical location, client pools, marketing services, Web sites, telephone numbers, or e-mail addresses;
 - (b) "Trade" or "business" includes the employing unit's workforce;
 - (c) "Knowingly" means having actual knowledge of, or acting with deliberate ignorance or disregard for, the prohibition involved; and
 - (d) "Violates" or "attempts to violate" includes, but is not limited to, intended evasion, misrepresentation, or willful nondisclosure.
- (2) (a) For the purpose of this chapter, if a subject employer transfers all or part of its trade or business ~~to another employing unit~~, the acquiring employing unit shall be deemed a successor if the transfer is in accordance with administrative regulations promulgated by the secretary, or if the transferring and acquiring employing units have substantially the same *pervasive management*, ownership, ~~management,~~ or control. If an employing unit is deemed a successor, the transferring employing unit shall be deemed a predecessor.
 - (b) *For the purpose of this chapter, if a nonsubject employer acquires all or part of the trade or business of a subject employer, the nonsubject employer shall file an application with the Office of Employment and Training, Department of Workforce Investment to establish an unemployment reserve account within forty-five (45) days of employing personnel. The application will be considered and processed in accordance with administrative regulations promulgated by the secretary and shall require information necessary to determine whether the nonsubject employer is a successor of the subject employer and to establish an initial unemployment contribution rate for the employer. Factors to be considered in the determination of successorship and the fixing of the initial rate shall include but not be limited to the employer's prior unemployment claims history, benefit charges, historical rate charges, and payment penalties assessed in the previous five (5) years, in addition to the factors set forth in subsection (6)(b) of this section. After consideration of these factors, and others that the applicant may submit in justification of an initial rate determination, the*

secretary shall set an appropriate contribution rate. Any determinations of initial unemployment contribution rates made pursuant to this subsection shall not be effective prior to January 1, 2018.

- (3) (a) *Notwithstanding subsection (2)(b) of this section, any successor to the trade or business of a subject employer shall assume the resources and liabilities of the predecessor's reserve account, including interest, and shall continue the payment of all contributions and interest due under this chapter, except that the successor shall not be required to assume the liability of any delinquent contributions and interest of a predecessor or predecessors unless the cabinet notifies the successor of the delinquency within six (6) months after the department has notice of the succession; and*
- (b) *Any nonsubject employer that is deemed a successor in whole or part upon submission of the application referred to subsection (2)(b) of this section shall be allowed to make a one (1) time voluntary payment to pay off or reduce the negative reserve assumed from the predecessor. This payment shall be made within sixty (60) days of receipt of the first notice of a negative predecessor reserve account. This one (1) time voluntary payment cannot exceed the amount of negative reserve assumed by the successor.*
- (4) The liability for delinquent contributions and interest imposed upon the successor by subsection (3) of this section shall be secondary to the liability of the predecessor or predecessors, and if the delinquency has been reduced to judgment, the order of execution on the judgment shall be as follows:
- (a) Against the assets, both real and personal, of the predecessor or predecessors;
- (b) Against the assets, both real and personal, of the business acquired; and
- (c) Against the assets, both real and personal, of the successor or acquirer.
- (5) (a) Notwithstanding the provisions of subsection (3) of this section, any successor to a portion of the trade or business of a subject employer, who is, or by reason of the transfer becomes, a subject employer, shall assume the resources and liabilities of the predecessor's reserve account in proportion to the percentage of the payroll or employees assignable to the transferred portion. In calculating the transferred portion, the secretary shall utilize the last four (4) calendar quarters preceding the date of transfer for workers employed by the successor subsequent to that date. The taxable payroll, benefit charges and the potential benefit charges shall be assumed by the successors in a like proportion.
- (b) Notwithstanding the provisions of paragraph (a) of this subsection, if any employing unit succeeds to a portion of the trade or business of another employing unit; becomes, by reason of that succession, a subject employer with substantially the same ownership, management, or control as the predecessor employing unit; and lays off or terminates more than one-half (1/2) of the original employees transferred within six (6) months of the date of transfer; then the succession and creation of the new employing unit shall be voided, and the benefits attributable to the lay-offs or terminations shall be charged to the reserve account of the original employing unit.
- (6) (a) The contribution rate of a successor in whole or in part, which was a subject employer prior to succession, shall not be affected by the transfer of the reserve account for the remainder of the rate year in which succession occurred; except that the rate of the successor shall be recalculated and made effective upon the first day of the calendar quarter immediately following the date of the transfer if there is substantially common ownership, management, or control of the predecessor and successor.
- (b) The contribution rate of a successor in whole or in part, which was not a subject employer prior to succession, shall be ***determined by a review of the application required by subsection (2)(b) of this section***, ~~for the calendar year in which succession occurred, the same rate as that of its predecessor;~~ except if the secretary finds, after a thorough investigation based on the use of objective factors, including but not limited to:
1. The cost of acquiring the business;
 2. How long the original business enterprise was continued; and
 3. Whether a substantial number of new employees were hired for performance of duties unrelated to the business activity prior to acquisition;

that the succession was solely for the purpose of obtaining a rate lower than that prescribed in KRS 341.270(1) and 341.272 for a new employing unit, then the unemployment experience of the predecessor shall not be transferred, the rate for a new employing unit shall be assigned, and the

employing unit shall be otherwise deemed a successor for the purpose of KRS 341.070(7) and subsection (3) of this section.

- (c) The contribution rate for a successor which becomes a subject employer through the simultaneous transfer, either in whole or in part, of two (2) or more predecessor reserve accounts shall be the rate determined in accordance with the provisions of KRS 341.270, by combining the reserve accounts succeeded to as of the computation date for determining rates for the calendar year in which succession occurred.
 - (d) The contribution rate of a successor which succeeds, either in whole or in part, to a predecessor's reserve account after a computation date, but prior to the beginning of the calendar year immediately following that computation date, shall be the rate determined in accordance with KRS 341.270, by effecting the transfer of the reserve account as of the computation date immediately preceding the date of succession.
- (7) Notwithstanding KRS 341.270, the contribution rate for an employing unit that knowingly violates or attempts to violate the provisions of this section or any other provision of the chapter related to determining the assignment of a contribution rate shall be the highest rate assignable under this chapter for the calendar year during which the violation or attempted violation occurred and the three (3) calendar years immediately following that year. If that employer's rate is already at the highest assignable rate, or if the amount of increase in the employer's rate would be less than an additional two percent (2%) for that year, then a penalty rate of contributions of an additional two percent (2%) of taxable wages shall be imposed for each year.
- (8) In addition to the penalties prescribed in subsection (7) of this section and KRS 341.990(9), any person who knowingly violates this section shall be subject to the penalties stipulated under KRS 341.990.
- (9) (a) The secretary shall establish procedures to identify the transfer of a business for purposes of this section.
- (b) ***The secretary shall have the authority and discretion to set a contribution rate upon the providing of justification by a subject employer and consideration of relevant factors, including but not limited to the factors set forth in subsections (2) and (6)(a) of this section.***

➔Section 4. KRS 341.614 is amended to read as follows:

- (1) Effective January 1, 2014, there shall be a surcharge upon all subject contributing employers for any year there are insufficient funds in the unemployment compensation administration fund for the payment of interest on advances under Title XII of the Social Security Act or for the repayment of money, including any interest thereon, received from any source related to the payment of interest on such advances.
 - (2) (a) The surcharge shall be twenty-two hundredths of one percent (0.22%) of the first nine thousand six hundred dollars (\$9,600) in wages paid to each worker by a subject contributing employer or his predecessor with respect to covered employment during any calendar year.
 - (b) Effective January 1, 2015, and each calendar year thereafter, the secretary shall adjust the surcharge percentage rate based on any increase to the taxable wage base for that calendar year as provided in KRS 341.030(7). The purpose of the adjustment shall be to maintain costs per worker comparable to the original surcharge. Any reduction in the surcharge percentage rate shall correspond to the increase to the taxable wage base for that calendar year and shall be rounded up to the nearest one-hundredth of one percent (0.01%).
 - (c) Notwithstanding paragraph (b) of this subsection, the secretary may reduce the surcharge percentage rate or suspend the surcharge for any calendar year based on the balance of the unemployment insurance interest payment fund and the projected amount due for interest on advances under Title XII of the Social Security Act and for repayment of money, including any interest thereon, received from any source related to the payment of interest on such advances.
- (3) The surcharge established in this section shall be due and payable at the same time and in the same manner as employer contributions. Any surcharge collected shall be deposited in the unemployment insurance interest payment fund.
- (4) Any surcharge unpaid on the date on which it is due and payable, pursuant to subsection (3) of this section, shall be subject to interest at the rate of one and one-half percent (1.5%) per month or fraction thereof, not to exceed ninety percent (90%) of the amount of such surcharge, from and after such date until payment is received by the cabinet, regardless of whether such delinquency has been reduced to a judgment or not as

provided in subsection (6) of this section or is the subject of an administrative appeal or court action. The interest collected shall be deposited in the unemployment insurance interest payment fund.

- (5) A lien of the same nature and having the same force, effect, and priority as provided in KRS 341.310 shall commence on all property of a subject contributing employer delinquent in the payment of any surcharge or interest thereon.
- (6) If, after due notice, any subject contributing employer defaults in payment of any surcharge or interest thereon, the amount due may be collected by a civil action instituted in the Franklin Circuit Court or the Franklin District Court depending on the jurisdictional amount in controversy, including interest and penalties, in the name of the state, and the subject contributing employer adjudged in default shall pay the costs of the action. Civil actions brought under this section shall be heard by the court, without the intervention of a jury, at the earliest possible date and shall be entitled to preference on the calendar of the court over all other civil actions, except petitions for judicial review under this chapter and cases arising under the Kentucky workers' compensation law.
- (7) At or after the commencement of an action under subsection (6) of this section, attachment may be had against the property of the liable subject contributing employer for such surcharge and interest without execution of a bond, or, after judgment has been entered, an execution may be issued against the property of such employer without the execution of a bond.
- (8) An action for the recovery of a surcharge or interest thereon under this section shall be barred, and any lien therefor shall be canceled and extinguished, unless collected or suit for collection has been filed within ten (10) years from the due date of such surcharge.
- (9) Notwithstanding subsection (6) of this section, any delinquent surcharge or interest thereon may be collected in accordance with the levy and distraint provisions of this chapter.
- (10) ***Any delinquent surcharge or interest collected after July 31, 2017, shall not be subject to the credit provisions contained in KRS 341.612 and shall be deposited into the penalty and interest account.***

➔Section 5. KRS 341.990 is amended to read as follows:

- (1) Except as otherwise provided in subsection (11) of this section, any employee of any state agency who violates any of the provisions of KRS 341.110 to 341.230 shall be guilty of a Class B misdemeanor.
- (2) Any person subpoenaed to appear and testify or produce evidence in an inquiry, investigation, or hearing conducted under this chapter who fails to obey the subpoena shall be guilty of a Class B misdemeanor.
- (3) Any subject employer, or officer or agent of a subject employer, who violates subsection (1) of KRS 341.470 shall be guilty of a Class A misdemeanor.
- (4) Any person who violates subsection (2) of KRS 341.470 shall be guilty of a Class A misdemeanor.
- (5) Any person who knowingly makes a false statement or representation of a material fact or knowingly fails to disclose a material fact to the secretary to obtain or increase any benefit under this chapter or under an employment security law of any other state, or of the federal government, either for himself or for any other person, business entity, or organization shall be guilty of a Class A misdemeanor unless the value of the benefits procured or attempted to be procured is one hundred dollars (\$100) or more, in which case he shall be guilty of a Class D felony.
- (6)
 - (a) Any person who knowingly makes a false statement or representation, or who knowingly fails to disclose a material fact to prevent or reduce the payment of benefits to any worker entitled thereto, or to avoid becoming or remaining subject to this chapter, or to avoid or reduce any payment required of an employing unit under this chapter shall be guilty of a Class A misdemeanor unless the liability avoided or attempted to be avoided is one hundred dollars (\$100) or more, in which case he shall be guilty of a Class D felony.
 - (b) Any person who willfully fails or refuses to furnish any reports required, or to produce or permit the inspection or copying of records required in this chapter shall be guilty of a Class B misdemeanor. Each such false statement, representation or failure and each day of failure or refusal shall constitute a separate offense.

- (7) In any prosecution for the violation of subsection (5) or (6) of this section, it shall be a defense if the person relied on the advice of an employee or agent of the Office of Employment and Training, Department of Workforce Investment.
- (8) Any person who willfully violates any provision of this chapter or any rule or regulation under it, the violation of which is made unlawful or the observance of which is required under the terms of this chapter, and for which no specific penalty is prescribed in this chapter or in any other applicable statute, shall be guilty of a violation. Each day the violation continues shall constitute a separate offense.
- (9) In addition to the higher rates imposed under KRS 341.540(7), any person, whether or not an employing unit, who knowingly advises or assists an employing unit in the violation or attempted violation of KRS 341.540 or any other provision of this chapter related to determining the assignment of a contribution rate shall be subject to a civil monetary penalty of not less than five thousand dollars (\$5,000).
- (10) Proceeds from all penalties imposed under subsection (9) of this section and KRS 341.540 shall be deposited in the unemployment compensation administration account and shall be expended solely for the cost of administration of this chapter consistent with KRS 341.240.
- (11) Any person who violates the confidentiality provision in KRS 341.190~~(4)(3)~~ shall be guilty of a Class A misdemeanor.

Signed by Governor March 27, 2017.