

1 AN ACT relating to unemployment insurance.

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

3 ➔Section 1. KRS 341.243 is amended to read as follows:

- 4 (1) There is created within the State Treasury a special fund known as the service
5 capacity upgrade fund that shall be administered separate and apart from all public
6 money or funds of the state.
- 7 (2) The service capacity upgrade fund shall be used solely for acquisition and
8 upgrading of the technology base, program integrity functions, and service delivery
9 capacity in support of the programs administered by the Office of Employment and
10 Training. The secretary shall have full power, authority, and jurisdiction over the
11 fund, including all money, property, and securities belonging thereto, and shall
12 perform any act necessary or convenient in the administration of the fund consistent
13 with this section. **Any expenditure of the fund shall be coordinated with and**
14 **approved by the Commonwealth Office of Technology, and nothing in this**
15 **section shall be construed as reducing or limiting the authority of the**
16 **Commonwealth's chief information officer over all technology expenditures.** The
17 secretary shall provide an annual report to the Interim Joint Committee on
18 **Economic Development and Workforce Investment**~~Labor and Industry~~ detailing
19 all receipts and expenditures of the fund.
- 20 (3) Any money collected under the provisions of this section shall be invested at
21 interest in banks or other interest-bearing obligations of the United States.
22 Investments shall at all times be made so that all the assets of the service capacity
23 upgrade fund shall be convertible into cash when needed for the payment of
24 expenses incurred in upgrading the service capacity of the Office of Employment
25 and Training. All interest income received under this section shall be credited to the
26 fund. The State Treasurer shall dispose of securities or other property belonging to
27 the fund only under the direction of the secretary and the secretary of the Finance

1 and Administration Cabinet.

2 (4) Beginning October 1, 2018~~[Effective January 1, 1999]~~, all rates otherwise
3 established under KRS 341.270 and 341.272 shall be adjusted~~[reduced]~~ by
4 subtracting seventy-five thousandths percent (0.075%) from each rate, but only if
5 the unemployment insurance trust fund balance exceeds the balance of the trust
6 fund as of December 31, 2017~~[of the preceding year is equal to or greater than one~~
7 ~~and eighteen hundredths percent (1.18%) of the total wages paid in the state during~~
8 ~~the state fiscal year ended as of June 30 of that year.~~

9 ~~(a) If the trust fund balance as of December 31, 1999, is less than the trust fund balance~~
10 ~~as of December 31, 1998, the amount of the rate reduction for calendar year 2000~~
11 ~~shall be reduced by forty percent (40%) to the level of forty five thousandths~~
12 ~~percent (0.045%).~~

13 ~~(b) If the trust fund balance as of December 31, 2000, is less than the trust fund balance~~
14 ~~as of December 31, 1999, the amount of the rate reduction for calendar year 2001~~
15 ~~shall be forty percent (40%) less than the amount of the rate reduction which was in~~
16 ~~effect in calendar year 2000].~~

17 (5) For any calendar year in which all rates have been reduced in accordance with
18 subsection (4) of this section, all contributory employers shall pay into the service
19 capacity upgrade fund an amount equal to the percentage by which rates were
20 reduced multiplied by their taxable wages paid during that calendar year. Payments
21 shall be made at the same time and in the same manner as prescribed for payment of
22 contributions under KRS 341.260 and all regulations prescribed by the secretary in
23 support of that section. The restrictions in KRS 341.470(1) apply equally to the
24 provisions of this section. Failure to make these payments shall be subject to
25 interest and all other collection actions provided for failure to make contributions
26 under KRS 341.300.

27 (6) All payments required under subsection (5) of this section, along with any interest

1 due to late payment of these assessments, shall be deposited in the service capacity
2 upgrade fund.

3 (7) Notwithstanding subsection (4) of this section, the secretary may exercise his or
4 her discretion to reduce the percentage rate prescribed in subsection (4) of this
5 section or suspend required payments to the service capacity upgrade fund at any
6 time.

7 (8) The secretary shall suspend the reduction of the rate prescribed in subsection (4)
8 of this section at any time when collections for the service capacity upgrade fund
9 exceed a cumulative amount of sixty million dollars (\$60,000,000). At the time
10 payments are suspended, any funds thus far collected under subsection (4) of this
11 section in excess of those necessary to fund technology upgrades, shall be
12 deposited into the unemployment insurance trust fund. Any future collection of
13 past due payments to the service capacity upgrade fund, including any applicable
14 penalty and interest funds, shall be deposited into the penalty and interest fund†

15 ~~The provisions of this section shall expire with regard to rates assigned for calendar~~
16 ~~years beginning after December 31, 2001, and any balance of moneys or property in~~
17 ~~the fund not expended or obligated for purposes consistent with this section by June~~
18 ~~30, 2002, shall be deposited in the unemployment insurance trust fund~~†.

19 ➔Section 2. KRS 341.300 is amended to read as follows:

20 (1) Contributions unpaid on the date on which they are due and payable, as prescribed
21 by the secretary, shall be subject to interest at the rate of one and five-tenths percent
22 (1.5%) per month or fraction thereof, not to exceed ninety percent (90%) of the
23 amount of such contributions, from and after such date until payment is received by
24 the Office of Employment and Training, Department of Workforce Investment,
25 irrespective of whether such delinquency has been reduced to a judgment or not as
26 provided in subsection (2) of this section or is the subject of an administrative
27 appeal or court action. The interest charged for a month, in which the unpaid

1 **contributions remain unpaid, shall be considered accrued and therefore due and**
2 **owing on the first day after the last day of the month in which the balance is due.**

3 Such interest shall be paid into the unemployment compensation administration
4 fund.

5 (2) If, after due notice, any subject employer defaults in any payment of contributions,
6 interest or penalties thereon, the amount due shall be collected by a civil action
7 instituted in the Franklin Circuit Court or the Franklin District Court depending
8 upon the jurisdictional amount in controversy including interest and penalties in the
9 name of the state, and the subject employer adjudged in default shall pay the costs
10 of the action. Civil actions brought under this section shall be heard by the court,
11 without the intervention of a jury, at the earliest possible date, and shall be entitled
12 to preference upon the calendar of the court over all other civil actions except
13 petitions for judicial review under this chapter and cases arising under the workers'
14 compensation law.

15 (3) At or after the commencement of an action under subsection (2) of this section,
16 attachment may be had against the property of the liable subject employer for such
17 contributions, interest, and penalties, without the execution of a bond, or after
18 judgment has been entered an execution may be issued against the property of such
19 employer without the execution of a bond.

20 (4) An action for the recovery of contributions, interest, or penalties under this section
21 shall be barred and any lien therefor shall be canceled and extinguished unless
22 collected or suit for collection has been filed within ten (10) years from the due date
23 of such contributions, except, in the case of the filing of a false or fraudulent report,
24 the contributions due shall not be barred and may at any time be collected by the
25 methods set out in this chapter, including action in a court of competent jurisdiction.

26 ➔Section 3. KRS 341.350 is amended to read as follows:

27 An unemployed worker shall, except as provided in KRS 341.360 and 341.370, be

1 eligible for benefits with respect to any week of unemployment only if:

2 (1) He or she has made a claim for benefits;

3 (2) For an initial claim made on or after January 1, 2012, he or she has served a waiting
4 period of one (1) week, during which he or she has not received benefits. The
5 waiting week period shall be the first compensable week of an initial claim for
6 benefits for which he or she is eligible and qualified to receive benefits under this
7 chapter. A waiting week period shall be required for each benefit year, whether or
8 not consecutive. No more than one (1) waiting week period shall be required in any
9 benefit year. The waiting week shall become compensable once the remaining
10 balance on the claim is equal to or less than the compensable amount for the waiting
11 week;

12 (3) (a) He or she has registered for work with respect to such week in accordance
13 with administrative regulations promulgated~~prescribed~~ by the secretary;
14 and

15 (b) He or she participates in reemployment services, such as job search assistance
16 services, if pursuant to a profiling system established by the secretary, he or
17 she has been determined to be likely to exhaust regular benefits unless:

18 1. The claimant has completed the services to which he or she is referred;
19 or

20 2. There is justifiable cause for the claimant's failure to participate in the
21 services. For the purpose of this section, "justifiable cause" shall be
22 interpreted to mean what a reasonable person would do in like
23 circumstances;

24 (4) He or she is physically and mentally able to work;

25 (5) He or she is available for suitable work, and making such reasonable effort to
26 obtain work as might be expected of a prudent person under like circumstances;

27 (6) His or her base-period wages in that calendar quarter of his or her base period in

1 which such wages were highest are equal to at least one thousand five hundred
2 dollars (\$1,500)~~seven hundred fifty dollars (\$750)~~, and his or her total base-
3 period wages are not less than one and one-half (1-1/2) times the base-period wages
4 paid to him or her in such quarter and he or she was paid base-period wages in the
5 last six (6) months of his or her base period equal to at least eight (8) times his or
6 her weekly benefit rate with a minimum of one thousand five hundred dollars
7 (\$1,500)~~seven hundred fifty dollars (\$750)~~ earned outside the high quarter.
8 Beginning on January 1, 2020, and continuing on January 1 in even-numbered
9 years thereafter, the secretary shall adjust the minimum base-period wages at a
10 rate that is directly proportional to the average percentage change in the
11 Consumer Price Index for All Urban Consumers (CPI-U) for the two (2) previous
12 calendar years;

13 (7) An otherwise eligible worker shall not be denied benefits under subsection (5) of
14 this section or because of his or her failure to actively seek work, nor disqualified
15 under paragraph (a) of subsection (1) of KRS 341.370 with respect to any week he
16 or she is in training with the approval of the secretary.

17 (8) Notwithstanding any other provisions of this chapter, no otherwise eligible worker
18 shall be denied benefits for any week because he or she is in training approved
19 under 19 U.S.C. sec. 2296 (Section 236(a)(1) of the Trade Act of 1974), nor shall
20 such worker be denied benefits by reason of leaving work to enter such training
21 provided such work is not suitable employment, or because of the application to any
22 such week in training of provisions in this law (or any applicable federal
23 unemployment compensation law) relating to availability for work, active search for
24 work, or refusal to accept work. For purpose of this subsection, the term "suitable
25 employment" shall mean employment of a substantially equal or higher skill level
26 than the worker's past adversely affected employment as defined in 19 U.S.C. sec.
27 2319 (Trade Act of 1974), and wages for such work are not less than eighty percent

1 (80%) of the workers' average weekly wage as determined for purposes of the Trade
2 Act of 1974.

3 (9) The foregoing eligibility requirements and the conditions of benefit
4 disqualifications imposed by KRS 341.370 shall be strictly construed. Nothing in
5 this section, excepting subsection (6) of this section, nor in KRS 341.360 or
6 341.370 shall affect the establishment of a "benefit year."

7 ➔Section 4. KRS 341.360 is amended to read as follows:

8 (1) No worker may be paid benefits for any week of unemployment:

9 (a) With respect to which a strike or other bona fide labor dispute which caused
10 him to leave or lose his employment is in active progress in the establishment
11 in which he is or was employed, except that benefits may be paid unless the
12 employer notifies the Office of Employment and Training, Department of
13 Workforce Investment, in writing within seven (7) days after the beginning of
14 such alleged strike or labor dispute of the alleged existence of such strike or
15 labor dispute. For the purpose of this subsection, a lockout shall not be
16 deemed to be a strike or a bona fide labor dispute and no worker shall be
17 denied benefits by reason of a lockout;

18 (b) For which he has received or is seeking unemployment compensation under
19 an unemployment compensation law of another state or of the United States,
20 except as otherwise provided by an arrangement between this state and such
21 other state or the United States; but if the appropriate agency of such state or
22 of the United States finally determines that he is not entitled to such
23 unemployment compensation, this subsection shall not apply; ~~or~~

24 (c) 1. Which, when based on service in an instructional, research, or principal
25 administrative capacity in an institution of higher education as defined in
26 KRS 341.067(2) or in an educational institution as defined in KRS
27 341.067(4), begins during the period between two (2) successive

- 1 academic years, or during a similar period between two (2) regular
2 terms, whether or not successive, or during a period of paid sabbatical
3 leave provided for in the individual's contract, if the worker performs
4 such services in the first of such academic years or terms and if there is a
5 contract or a reasonable assurance that the worker will perform such
6 services in any such capacity for any institution or institutions of higher
7 education or an educational institution in the second of such academic
8 years or such terms; or
- 9 2. Which, when based on service other than as defined in subparagraph 1.
10 of this paragraph, in an institution of higher education or an educational
11 institution, as defined in KRS 341.067(2) or (4), begins during the
12 period between two (2) successive academic years or terms, if the
13 worker performs such services in the first of such academic years or
14 terms and there is a reasonable assurance that the worker will perform
15 such services in the second of such academic years or terms; except that
16 if benefits are denied to any worker under this paragraph and such
17 worker was not offered an opportunity to perform such services for such
18 institution of higher education or such educational institution for the
19 second of such academic years or terms, such worker shall be entitled to
20 a retroactive payment of benefits for each week for which the worker
21 filed a timely claim for benefits and for which benefits were denied
22 solely by reason of this paragraph; or
- 23 3. Which, when based on service in any capacity defined in subparagraphs
24 1. and 2. of this paragraph, begins during an established and customary
25 vacation period or holiday recess if the worker performs any such
26 services in the period immediately before such vacation period or
27 holiday recess, and there is a reasonable assurance that such worker will

1 perform any such services in the period immediately following such
2 vacation period or holiday recess; or

3 4. Based on service in any capacity defined in subparagraph 1. or 2. of this
4 paragraph when such service is performed by the worker in an institution
5 of higher education or an educational institution, as defined in KRS
6 341.067(2) or (4), while the worker is in the employ of an educational
7 service agency, and such unemployment begins during the periods and
8 pursuant to the conditions specified in subparagraphs 1., 2., and 3. of
9 this paragraph. For purposes of this paragraph, the term "educational
10 service agency" means a governmental agency or governmental entity
11 which is established and operated exclusively for the purpose of
12 providing such services to one (1) or more institutions of higher
13 education or educational institutions;

14 **Notwithstanding any other provision of this paragraph,**~~except that~~ any benefits
15 paid to a worker based on service other than as defined in **subparagraph**
16 ~~subsection (1)(e)}~~1. of this **paragraph**~~section~~ performed in an institution of
17 higher education as defined in KRS 341.067(2) shall be deemed to have been paid
18 as a result of Office of Employment and Training, Department of Workforce
19 Investment, error and not recoverable by the cabinet or such institution if such
20 payment is improper by virtue of the retroactive application to October 30, 1983, of
21 **subparagraph** ~~subsection (1)(e)}~~2. of this **paragraph**~~section~~; **or**

22 **(d) With respect to which the worker is suspended from work for misconduct,**
23 **as defined in KRS 341.370(6), connected with the work.**

24 (2) Benefits shall not be paid to any individual on the basis of any services,
25 substantially all of which consist of participating in sports or athletic events or
26 training or preparing to so participate, for any week which commences during the
27 period between two (2) successive sport seasons or similar periods and there is a

1 reasonable assurance that such individual will perform such services in the later of
2 such seasons or similar periods.

3 (3) (a) Benefits shall not be paid on the basis of services performed by an alien unless
4 such alien is an individual who was lawfully admitted for permanent residence
5 at the time such services were performed, was lawfully present for purposes of
6 performing such services, or was residing in the United States under color of
7 law at the time such services were performed, including an alien who was
8 lawfully present in the United States as a result of the application of the
9 provisions of Section 203(a)(7) or Section 212(d)(5) of the Immigration and
10 Nationality Act.

11 (b) Any data or information required of individuals applying for benefits to
12 determine whether benefits are not payable to them because of their alien
13 status shall be uniformly required from all applicants for benefits.

14 (c) In the case of an individual whose application for benefits would otherwise be
15 approved, no determination that benefits to such individual are not payable
16 because of his alien status shall be made except upon a preponderance of the
17 evidence.

18 ~~[(4) With respect to which the worker is suspended from work for misconduct, as
19 defined in KRS 341.370(6), connected with the work.]~~

20 ➔Section 5. KRS 341.540 is amended to read as follows:

21 (1) As used in this section, unless the context clearly requires otherwise:

22 (a) "Substantially common" or "substantially the same" means that ***there is***
23 ***identifiable or demonstrative commonality or similarity of ownership,***
24 ***familial relationships, principals or corporate officers, day-to-day***
25 ***operations, assets and liabilities, and stated business***~~one (1) or more~~
26 ~~individual or individuals own or exercise pervasive management or control~~
27 ~~over both the predecessor and successor employing unit. Factors indicating~~

1 pervasive management or control include, but are not limited to, whether the
2 predecessor and successor share:

3 1. ~~One (1) or more individuals or family members as owners, on boards of~~
4 ~~directors, as shareholders, or executive or other officers; and~~

5 2. ~~Titles to property, parent companies, workforce, assets, legal and~~
6 ~~professional representation, physical location, client pools, marketing~~
7 ~~services, Web sites, telephone numbers, or e-mail addresses];~~

8 (b) "Trade" or "business" includes **but is not limited to a commercial enterprise**
9 **or establishment; any entity engaged in the supplying, production, or**
10 **manufacturing of goods, commodities, or services; any entity engaged in**
11 **commerce, sale for profit, or the providing of goods, personnel, or services**
12 ~~[the employing unit's workforce];~~

13 (c) "Knowingly" means having actual knowledge of, or acting with deliberate
14 ignorance or disregard for, the prohibition involved;~~[and]~~

15 (d) "Violates" or "attempts to violate" includes, but is not limited to, intended
16 evasion, misrepresentation, or willful nondisclosure; **and**

17 **(e) "Person" has the same meaning as in Section 7701(a)(1) of the Internal**
18 **Revenue Code.**

19 (2) (a) For the purpose of this chapter, if a subject employer transfers all or part of its
20 trade or business, the acquiring employing unit shall be deemed a successor if
21 the transfer is in accordance with administrative regulations promulgated by
22 the secretary, or if **there is substantially common ownership, management,**
23 **or control of the subject employer and employing unit**~~[the transferring and~~
24 ~~acquiring employing units have substantially the same pervasive management,~~
25 ~~ownership, or control]]. If an employing unit is deemed a successor, the~~
26 transferring employing unit shall be deemed a predecessor.

27 (b) For the purpose of this chapter, if a nonsubject employer acquires all or part of

1 the trade or business of a subject employer, the nonsubject employer shall file
2 an application with the Office of Employment and Training, Department of
3 Workforce Investment to establish an unemployment reserve account within
4 forty-five (45) days of employing personnel. The application will be
5 considered and processed in accordance with administrative regulations
6 promulgated by the secretary and shall require information necessary to
7 determine whether the nonsubject employer is a successor of the subject
8 employer and to establish an initial unemployment contribution rate for the
9 employer. Factors to be considered in the determination of successorship and
10 the fixing of the initial rate shall include but not be limited to the *nonsubject*
11 employer's prior unemployment claims history, benefit charges, historical rate
12 charges, and payment penalties assessed in the previous five (5) years, in
13 addition to the factors set forth in subsection (6)(b) of this section. After
14 consideration of these factors, and others that the applicant may submit in
15 justification of an initial rate determination, the secretary shall set an
16 appropriate contribution rate. Any determinations of initial unemployment
17 contribution rates made pursuant to this subsection shall not be effective prior
18 to January 1, 2018.

19 (3) (a) Notwithstanding subsection (2)(b) of this section, Any successor to the trade
20 or business of a subject employer shall assume the resources and liabilities of
21 the predecessor's reserve account, including interest, and shall continue the
22 payment of all contributions and interest due under this chapter, except that
23 the successor shall not be required to assume the liability of any delinquent
24 contributions and interest of a predecessor or predecessors unless the cabinet
25 notifies the successor of the delinquency within six (6) months after the
26 department has notice of the succession; and

27 (b) Any nonsubject employer that is deemed a successor in whole or part ~~upon~~

1 ~~submission of the application referred to in subsection (2)(b) of this section~~
2 shall be allowed to make a one (1) time voluntary payment to pay off or
3 reduce the negative reserve assumed from the predecessor. This payment shall
4 be made within sixty (60) days of receipt of the first notice of a negative
5 predecessor reserve account. This one (1) time voluntary payment cannot
6 exceed the amount of negative reserve assumed by the successor.

7 (4) The liability for delinquent contributions and interest imposed upon the successor
8 by subsection (3) of this section shall be secondary to the liability of the predecessor
9 or predecessors, and if the delinquency has been reduced to judgment, the order of
10 execution on the judgment shall be as follows:

- 11 (a) Against the assets, both real and personal, of the predecessor or predecessors;
- 12 (b) Against the assets, both real and personal, of the business acquired; and
- 13 (c) Against the assets, both real and personal, of the successor or acquirer.

14 (5) (a) Notwithstanding the provisions of subsection (3) of this section, any successor
15 to a portion of the trade or business of a subject employer, who is, or by
16 reason of the transfer becomes, a subject employer, shall assume the resources
17 and liabilities of the predecessor's reserve account in proportion to the
18 percentage of the payroll or employees assignable to the transferred portion. In
19 calculating the transferred portion, the secretary shall utilize the last four (4)
20 calendar quarters preceding the date of transfer for workers employed by the
21 successor subsequent to that date. The taxable payroll, benefit charges and the
22 potential benefit charges shall be assumed by the successors in a like
23 proportion.

24 (b) Notwithstanding the provisions of paragraph (a) of this subsection, if any
25 employing unit succeeds to a portion of the trade or business of another
26 employing unit; becomes, by reason of that succession, a subject employer
27 with substantially the same ownership, management, or control as the

1 predecessor employing unit; and lays off or terminates more than one-half
2 (1/2) of the original employees transferred within six (6) months of the date of
3 transfer; then the succession and creation of the new employing unit shall be
4 voided, and the benefits attributable to the lay-offs or terminations shall be
5 charged to the reserve account of the original employing unit.

6 (6) (a) The contribution rate of a successor in whole or in part, which was a subject
7 employer prior to succession, shall not be affected by the transfer of the
8 reserve account for the remainder of the rate year in which succession
9 occurred; except that the rate of the successor shall be recalculated and made
10 effective upon the first day of the calendar quarter immediately following the
11 date of the transfer if there is substantially common ownership, management,
12 or control of the predecessor and successor.

13 (b) The contribution rate of a successor in whole or in part, which was not a
14 subject employer prior to succession, shall be determined by a review of the
15 application required by subsection (2)(b) of this section, except if the secretary
16 finds, after a thorough investigation based on the use of objective factors,
17 including but not limited to:

- 18 1. The cost of acquiring the business;
 - 19 2. How long the original business enterprise was continued; and
 - 20 3. Whether a substantial number of new employees were hired for performance
21 of duties unrelated to the business activity prior to acquisition;
- 22 that the succession was solely for the purpose of obtaining a rate lower than
23 that prescribed in KRS 341.270(1) and 341.272 for a new employing unit,
24 then the unemployment experience of the predecessor shall not be transferred,
25 the rate for a new employing unit shall be assigned, and the employing unit
26 shall be otherwise deemed a successor for the purpose of KRS 341.070(7) and
27 subsection (3) of this section.

- 1 (c) The contribution rate for a successor which becomes a subject employer
2 through the simultaneous transfer, either in whole or in part, of two (2) or
3 more predecessor reserve accounts shall be the rate determined in accordance
4 with the provisions of KRS 341.270, by combining the reserve accounts
5 succeeded to as of the computation date for determining rates for the calendar
6 year in which succession occurred.
- 7 (d) The contribution rate of a successor which succeeds, either in whole or in part,
8 to a predecessor's reserve account after a computation date, but prior to the
9 beginning of the calendar year immediately following that computation date,
10 shall be the rate determined in accordance with KRS 341.270, by effecting the
11 transfer of the reserve account as of the computation date immediately
12 preceding the date of succession.
- 13 (7) Notwithstanding KRS 341.270, the contribution rate for an employing unit that
14 knowingly violates or attempts to violate the provisions of this section or any other
15 provision of the chapter related to determining the assignment of a contribution rate
16 shall be the highest rate assignable under this chapter for the calendar year during
17 which the violation or attempted violation occurred and the three (3) calendar years
18 immediately following that year. If that employer's rate is already at the highest
19 assignable rate, or if the amount of increase in the employer's rate would be less
20 than an additional two percent (2%) for that year, then a penalty rate of
21 contributions of an additional two percent (2%) of taxable wages shall be imposed
22 for each year.
- 23 (8) In addition to the penalties prescribed in subsection (7) of this section and KRS
24 341.990(9), any person who knowingly violates this section shall be subject to the
25 penalties stipulated under KRS 341.990.
- 26 (9) (a) The secretary shall establish procedures to identify the transfer of a business
27 for purposes of this section.

1 (b) The secretary shall have the authority and discretion to set *an initial*^[a]
2 contribution rate upon the providing of justification by a subject employer and
3 consideration of relevant factors, including but not limited to the factors set
4 forth in subsections (2) and (6)(a) of this section.