



Commonwealth of Puerto Rico
DEPARTMENT OF LABOR AND HUMAN RESOURCES

August 16, 2000

Re: Inquiry No. 14797

This is in reference to your inquiry regarding Act No. 74 of June 21, 1956, as amended, known as the Puerto Rico Employment Security Act, and to Act No. 139 of June 30, 1968, as amended, known as the Disability Benefits Act. The purpose of your inquiry is to "request a ruling in connection with the unemployment and disability insurance wage base limitations covered by a predecessor employer with respect to a successor employer."

Your inquiry is submitted on behalf of a firm engaged in the operation of a hotel ("the Predecessor") that has executed an agreement to sell the property ("the Hotel") to another firm ("the Successor"), which will continue to operate the hotel after the sale has been completed ("the Closing"). The relevant facts, as described in your inquiry, are the following:

Predecessor will cease the ownership of Hotel, upon execution of the Closing, whereas Successor will uninterruptedly continue with the operations and management of Hotel on the day following the cease date.

The operations carried out by the Successor will be identical to the ones previously conducted by the Predecessor. Successor will acquire all the property held by Predecessor and the hospitality operations will continue to take place in the same facilities Predecessor uses. Furthermore, Successor will continue to [employ] substantially all, if not all[,] of Predecessor[']s employees.

The unemployment and disability insurance payments made pursuant to the Puerto Rico Employment Security Act of 1956, as amended (hereinafter referred to as the "PRESA") and the Disability Benefits Act of 1968, as

amended (hereinafter referred to as the "DBA") by Predecessor is expected to have covered the \$7,000 and \$9,000 annual taxable wage base, respectively[,] of most employees.

DISCUSSION

Both the PRESA and the DBA are silent as to the treatment that the payments made by an employer, with respect to the unemployment and disability insurance wage base limitation, will have at the time a successor employer will continue to employ the same employees. However, the Department of Labor has sometimes taken the position that the predecessor and successor employer should be regarded as two different employers and thus, the wages paid by the predecessor employer should not be considered for purposes of determining the wage base limitation for unemployment and disability insurance of the successor employer.

Before going any further, it is important to define the term "successor" employer. To these effects [sic] Section 8(g) of the PRESA refers to a successor employer as one that succeeds or acquires from an employer the organization, commerce, or business, or substantial assets of one of these. The term successor employer it is [sic] also defined as an employer that acquires substantially all property used in a trade or business of another employer (predecessor) or in a separate unit of its trade or business, and immediately after the acquisition employs individuals who worked for the predecessor immediately before and during the same calendar year of the acquisition. [Citations omitted]. Based on the above, [our client], is a successor employer with respect to [the previous corporation].

As previously mentioned, neither the PRESA nor the DBA provide for the treatment of the wages paid by a predecessor employer for purposes of computing the wage base limitation of a successor employer. However, both legislations [sic] contain provisions which treat successor employers as a continuing employer. For example, Section 8 of the PRESA, provides for a different treatment at the time of determining an employer's experience rate for purposes of computing its unemployment insurance tax liability, if it is considered a successor employer. To these effects [sic] Section 8(g)(1) of the PRESA establishes that if the successor was not an employer at the time of acquisition, as happens to be in our case, the successor employer will pay the unemployment insurance tax based on the predecessor's experience rate. Also, Section 9(h) of the DBA provides that a successor employer will be liable for the contributions, interest or penalties due, or accrued and unpaid by a predecessor employer.

In addition, it is important to mention that the legislative intent of Act 52 of August 9, 1991 (hereinafter referred to as the [sic] "Act 52"), which added to Section 8 of the PRESA the provisions with respect to successor employers, also provides as one of its purposes that "in addition to providing tax relief to employers, the purpose of the law is to assure an equitable distribution of the costs associated with the unemployment compensation system."

In general, federal cases and rulings, although not binding authority in Puerto Rico, are considered persuasive and accorded substantial weight in the interpretation of the equivalent provisions of the Puerto Rico law. Therefore, we will examine the federal legislation for purposes of our analysis and discussion.

For federal payroll tax purposes, when a successor and predecessor employer relationship as described above exists, the wages paid during the calendar year by the predecessor are taken into account in order to calculate the successor's liability under the Federal Insurance Contributions Act (hereinafter referred to as the "FICA") and the Federal Unemployment Tax Act (hereinafter referred to as the "FUTA"). That is, the wages paid by the predecessor employer can be counted by the successor employer in figuring the wage base limits for FICA and FUTA purposes. [Citation omitted].

In our particular circumstances, the previously discussed federal payroll legislation should be considered a determinative factor for the conclusion of the issue at hand, in light of the influence and relation of the FICA and FUTA with the Puerto Rico payroll tax law. In fact, the legislative intent of Act 15 of May 25, 1985 (hereinafter referred to as the [sic] "Act 15"), which amended the PRESA, provides that "Puerto Rico is part of the Federal-State Employment Security System and its unemployment compensation insurance act must conform to the Federal Unemployment Contributions Act, Public Law 97-248, the 1982 Tax Equity and Fiscal Responsibility Act, which amended the FUTA."

In conclusion, when [the] PRESA and the DBA refer to successor employers, both legislations [sic] treat them as a continuing employer and not as a new employer. Therefore, the unemployment and disability insurance wage base limitations covered by a Predecessor employer should be considered at the time of computing the successor employer's liability. Also, the latter is not in accordance with the scheme proposed by the Department of Labor which does not achieve the legislative intent of assuring an equitable distribution of the unemployment insurance cost.

The federal treatment, highly persuasive if not determinative on this matter, which takes into account the payments made by the predecessor for purposes of computing the successor employer's responsibility, supports our position and clarifies the issue beyond any doubt. The \$7,000 and \$9,000 annual taxable wage base limitation of the predecessor employer should be considered for purposes of computing the tax liability of the successor employer, thus conforming the local payroll legislation with the federal legislation in accordance with the legislative intent of Act 15.

Furthermore, it is our understanding that the Puerto Rico Department of Labor and Human Resources in the past has issued similar rulings to this inquiry acknowledging the fact that Puerto Rico is part of the Federal-State Employment Security System and that not allowing a successor employer to credit previous payments made by a predecessor employer during the same calendar year to the same employees would result in tax collections in excess of the \$7,000 and \$9,000 unemployment and disability insurance wage base limitations, respectively, without providing any additional benefits to such employees, whose benefits are limited by law to those levels.

Based on the above facts, we respectfully request your determination so that the payments made by [the predecessor employer] for purposes of computing the unemployment and disability insurance wage base limitations with respect to [the successor employer].

As you state, the Department of Labor and Human Resources has issued a number of rulings in similar cases during the past two years. Said rulings have been consistent in allowing the successor employer to receive credit for payments made by the predecessor employer during the same calendar year. In the first place, we regard the federal rulings in analogous cases as a compelling consideration, given Puerto Rico's inclusion in the Federal-State Employment Security System. Moreover, we believe a denial of such credit would lead to an inequitable result, yielding tax collections in excess of the \$7,000 and \$9,000 unemployment and disability insurance wage base limitations, respectively, despite the fact that the benefits to which employees are entitled are limited by law to those levels, and thus cannot be exceeded. Based on that reasoning, we conclude that the successor employer is entitled to credit for payments made by the predecessor employer in this case.

We trust the foregoing is responsive to your inquiry.

Cordially,



Maria C. Marina Durán
Solicitor of Labor