



## FINDINGS OF FACT

Brawner Builders, Inc., was started in 2007 by Sam Negabahn as a sub-chapter "S" corporation. The business is a minority-owned, start-up enterprise. Mr. Negabahn initially engaged MBP Management for administrative, payroll, and office support services in addition to providing mentoring. MBP is a three-person (John Murphy, Jeffrey Bird and Jay Phillips) partnership which provides these types of services to new businesses. It began operating in 2004. MBP remains in business doing management consulting/administration/payroll, etc.

All employees of Brawner Builders were paid through MBP, but managed, directed and controlled by Mr. Negabahn. Mr. Negabahn was the sole shareholder, owner, and operator of Brawner Builders throughout.

When he applied for an unemployment insurance account, Mr. Negabahn listed Mr. Bird and Mr. Murphy as corporate officers on his registration form. Neither man has any actual management role in Brawner Builders. A corporate entity is required to have corporate officers

Brawner Builder's business grew significantly and in late 2009, Mr. Negabahn took all personnel matters "in-house" and discontinued its relationship with MBP. The employees were shown as "transferred" from MBP to Brawner Builders, and as a result, the Agency classified Brawner Builders as a successor employer.

## CONCLUSIONS OF LAW

*Maryland Code Annotated, Labor and Employment Article, Section 8-610(a)(1)* provides that an employing unit that meets the qualifications of this subsection shall be assigned an earned rate of contribution that is based on the experience of the employing unit.

*Section 8-610(a) (2)* provides that an employing unit qualifies under this subsection if, and during each of the three rating years immediately preceding the computation date, the employing unit: (i) had an earned rating record that was chargeable with benefits; and (ii) reports taxable wages as required by *Section 8-626* of this subtitle for the three rating years immediately preceding the computation date.

*Maryland Code Annotated, Labor and Employment Article, Section 8-612(b)* provides that for an employing unit that qualifies under *Section 8-610(a) (2)* of this subtitle, the Secretary shall compute a benefit ratio by:

- (1) Adding the regular, work sharing and extended benefits that were chargeable to the earned rating record of the employing unit and paid during the three rating years immediately preceding the computation date; and
- (2) Dividing the figure determined under item (1) of this subsection by the total of the reported taxable wages for the same period. This creates a benefit ratio which is applied to a Table of Contribution Rates.

*Maryland Code Annotated, Labor and Employment Article, Section 8-613(a) (3) (ii)* defines “reorganized employer” as an employer that otherwise changes its trade name or business identity under any of the same ownership.

*Maryland Code Annotated, Labor and Employment Article, Section 8-613(a) (4)* defines “successor employer” as an employer that acquires, by sale or otherwise, all or part of the assets, business, organization or trade of another employer.

*Maryland Code Annotated, Labor and Employment Article, Section 8-613(d)* provides that if a successor employer was an employing unit before acquiring the assets, business, organization or trade of a predecessor employer that is an employing unit, and has no common ownership, management, or control with the predecessor employer:

- (1) the successor employer shall continue to pay contributions at the previously assigned rate from the date of transfer through the next December 31;
- (2) beginning on the January 1 after the transfer, and for each calendar year thereafter, the rate of contribution of the successor employer shall be based on its experience with payrolls and benefit charges in combination with the proportionate share of payrolls and benefit charges acquired from the predecessor employer.

*Maryland Code Annotated, Labor and Employment Article, Section 8-613* provides:

- (a) (1) In this section the following terms have the meanings indicated.
  - (2) “Business” or “trade” includes the employer’s workforce.
  - (3) “Reorganized employer” means:
    - (i) an employer that alters its legal status, including changing from a sole proprietorship or a partnership to a corporation; or
    - (ii) an employer that otherwise changes its trade name or business identity while remaining under any of the same ownership.
  - (4) “Successor employer” means an employer that acquires, by sale or otherwise, all or part of the assets, business, organization, or trade of another employer.
- (b) (1) A reorganized employer shall be liable for all contributions, interest, and penalties owed by the employing unit before the reorganization.
  - (2) A reorganized employer shall continue to pay contributions at the contribution rate of the employing unit before the reorganization from the date of the reorganization through the next December 31.
  - (3) Beginning on the January 1 after the reorganization, the rate of contribution of the reorganized employer shall be based on its experience with payrolls and benefit charges, in combination with the experience with payrolls and benefit charges of the employing unit before the reorganization.
- (c) If a successor employer was not an employing unit before acquiring the assets, business, organization, or trade of a predecessor employer that is an employing unit, and has no common ownership, management, or control with the predecessor employer, then the successor employer shall be considered a new employing unit and shall be assigned a contribution rate in accordance with § 8-609 of this subtitle.

(d) If a successor employer was an employing unit before acquiring the assets, business, organization, or trade of a predecessor employer that is an employing unit, and has no common ownership, management, or control with the predecessor employer:

(1) the successor employer shall continue to pay contributions at the previously assigned rate from the date of the transfer through the next December 31;

(2) beginning on the January 1 after the transfer, and for each calendar year thereafter, the rate of contribution of the successor employer shall be based on its experience with payrolls and benefit charges in combination with the proportionate share of payrolls and benefit charges acquired from the predecessor employer; and

(3) if two or more successor employers receive the transfer, beginning on the January 1 after the transfer, and for each calendar year thereafter, the rate of contribution of each successor employer shall be based on its experience with payrolls and benefit charges in combination with the proportionate share of payrolls and benefit charges acquired from the predecessor employer.

(e) (1) Notwithstanding any other provision of this title, if a successor employer has any common ownership, management, or control with the predecessor employer, the contribution rate of the successor employer beginning as of the quarter in which the date of transfer occurred through the next December 31 shall be based on the successor employer's experience with payrolls and benefit charges in combination with the payrolls and benefit charges of the predecessor employer.

(2) If the transfer of assets, business, organization, or trade was a partial transfer of the predecessor employer's business and the predecessor employer remains in business, beginning on the January 1 after the transfer, and for each calendar year thereafter, the rate of contribution of the successor employer shall be based on its experience with payrolls and benefit charges in combination with the proportionate share of payrolls and benefit charges acquired from the predecessor employer.

(3) If the predecessor employer does not remain in business after the transfer of all or part of the assets, business, organization, or trade of the predecessor employer, and there is one successor employer, then the rate of contribution of the successor employer beginning on the January 1 after the transfer, and for each calendar year thereafter, shall be based on the successor employer's experience with payrolls and benefit charges in combination with the payrolls and benefit charges of the predecessor employer.

(4) (i) If the predecessor employer does not remain in business after the transfer of all or part of the assets, business, organization, or trade of the predecessor employer, and there are two or more successor employers receiving the transfer, then the rate of contribution for each of the successor employers beginning on the January 1 after the transfer, and for each calendar year thereafter, shall be based on the successor employer's experience with payrolls and benefit charges in combination with the proportionate share of payrolls and benefit charges acquired from the predecessor employer.

(ii) Any remaining portion of the predecessor employer's experience shall be transferred to the successor employers according to each successor employer's proportionate share of the payroll.

(f) If a predecessor employer does not remain in business after the transfer of all or part of the assets, business, organization, or trade of the predecessor employer:

(1) the successor employer is liable for all contributions, interest, and penalties owed by the predecessor employer at the time of the transfer; and

(2) if two or more successor employers receive the transfer, the successor employers shall be liable in the same proportion as the payroll record of the unit being transferred is to the total business of the predecessor employer. [emphasis added]

*COMAR 09.32.01.21(C)* states in pertinent part:

Common ownership, management, or control exists between the successor employer and the predecessor employer when any person serves in any of the following positions in both the predecessor and successor employer:

- (1) Sole proprietor, which includes spouse, children, and parents of a sole proprietor;
- (2) Partner of a partnership;
- (3) Member of a limited liability company;
- (4) Chief Executive Officer;
- (5) Chief Financial Officer;
- (6) Any corporate officer; or
- (7) Any shareholder owning, directly or indirectly, more than 50 percent of a corporation's stock. [emphasis added]

### EVALULATION OF EVIDENCE

At all times material to this matter, Brawner Builders, Inc., through Mr. Negabahn, was the party responsible for directing, managing and controlling all workers. MBP functioned as a Professional Employer Organization, processing payroll, providing administrative office support services, and mentoring Mr. Negabahn's new business venture. MBP reported these workers as its own employees and paid taxes on those wages. The funds from which the wages were paid, however, came from Brawner Builders.

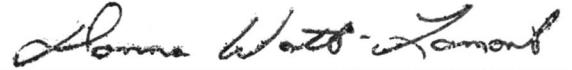
This is a fairly common business model for new businesses. Mr. Negabahn did not have the operational experience to feel comfortable running that part of his business. His expertise was in the construction business and that was where he focused his attention for the first few years. Contracting with MBP allowed Mr. Negabahn to grow his business while he learned the other aspects, and utilize MBP's expertise in office administration and personnel matters.

Mr. Bird and Mr. Murphy were shown as corporate officers on the employer's application for a tax number. While neither Mr. Bird nor Mr. Murphy had management responsibilities, they were corporate officers and, as such, are indicative of common ownership, management or control, under *COMAR 09.32.01.21(C)*.

While it may seem to operate to the employer's disadvantage, the law is clear. The workers were transferred, on paper, from MBP Management to Brawner Builders, Inc. Brawner Builders, Inc., has corporate officers in common with partners or MBP. Brawner Builders, Inc., thus is a successor employer for unemployment insurance tax purposes.

**DECISION**

The Board affirms Review Determination Number 1480032. The tax rates for Brawner Builders, Inc., was properly calculated for calendar years 2009 through 2014.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

YJ

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