

Experience Rating

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OBJECTIVE

This Practice Directive explains the basis and purposes of the Board’s experience rating system and aids in the interpretation of *Assessment Manual Items: AP1-42-1 through AP1-42-3*.

INTERPRETATIVE GUIDELINES

Section 42 of the *Workers Compensation Act* authorises the Board to adopt “a system of experience rating”; and, under that authority, in 2000, the Board enacted the ER2000 experience rating program which operates by comparing the claim-cost to payroll ratio of a firm to that of the firm’s rate group. Based on that comparison of experience, the assessment rate of the firm is adjusted in relation to its actual claim-cost experience. Better experience than the rate group provides a firm with a discount, and poorer experience requires the firm to pay a surcharge.

The firm for experience rating purposes is the legal entity operating the business.

I THE INTENT OF EXPERIENCE RATING POLICY

As stated in the “Explanatory Notes” to *AP1-42-1*, “[t]he experience rating program attempts to promote positive safety attitudes and to provide equity through a system of recognition and accountability for claims costs. The goal is to encourage employers with high injury costs to reduce them, and to encourage employers with low injury costs to keep them low. The desired outcome is a reduction in the social and economic costs of work-related injuries and diseases.”

II THE MECHANISM OF MOTIVATION

The mechanism used to motivate firms to reduce the social and economic costs of workplace injuries and disease is variance in firms' assessment rates, which can be four-fold – from between 50% to 200% of a given base rate. Thus, on the 2007 average aggregate base rate of \$1.69 per \$100 of assessable payroll, the variance can be \$2.53, being the difference between 85¢ and \$3.38.

III ASSESSMENT RATES – CLASSIFICATION AND EXPERIENCE RATING

Section 36 of the *Act* mandates the Board to “continue and maintain the accident fund for payment of the compensation, outlays and expenses under [Part 1 of the *Act*] and for payment of expenses incurred in administering Part 3 of [the *Act*]”. In order to discharge this mandate and to apportion such payments and expenses among firms in an equitable and practicable manner, the Board has established the following two-stage process for determining an individual firm's assessment rate:

- (a) Firstly, through the Employer Classification System, the Board classifies the individual firm into a classification unit on the basis of the industry in which the firm is operating, on the assumption that firms undertaking the same industrial activity are exposed to similar risks. This ensures that firms competing in the same industry pay assessments at the same base rate; which is determined, in part, on the collective claims experience of all firms in the classification unit.
- (b) Secondly, through experience rating, the individual firm's premium is adjusted on the basis of whether the firm's claims-cost to payroll ratio is above or below the average of its rate group.

IV TRANSFER OF EXPERIENCE RATING DATA

API-42-3 allows for the movement of experience rating data between firms if the following two-part test is met:

- (a) the firms are affiliated, and
- (b) a significant portion or aspect of one firm's business operations move to the other.

A consequence of such a transfer is that each of the “original firm” and the “successor firm” will draw upon the original firm's historical experience rating data for two to four years. Thereafter, as each firm has and will continue to garner its own experience rating data, their net assessment rates may diverge.

A Affiliation

In *API-42-3*, affiliation is described disjunctively; and, therefore, firms are affiliated if:

- (a) directly or indirectly through one or more intermediaries or by other means, one firm controls the other firm, or both firms are controlled by the same person or group of persons, **or**
- (b) the firms are controlled by family members, immediate, extended, or equivalent.

(a) Control

Experience rating policy is founded upon a tenet that the individual or entity which controls a firm directs or causes the direction of the management of that firm's business operations; and, in particular, the health and safety regime of the firm.

(b) Family members

For these purposes:

- (a) An immediate family member is an individual in the nuclear family (i.e., a parent, sibling, spouse, or child).
- (b) An extended family member is an individual who is not an immediate family member but is related by blood or marriage, (e.g., a grandparent, an uncle, or a sister-in-law).
- (c) An equivalent to a family member is an individual in a close, non-sanguineous relationship (e.g., foster parent, an in-law's parent).

B Significant portion or aspect of business operations

(a) Business operations

Business operations are defined to be the "commercial, industrial, or professional activities of a firm; which generally comprise its assets and activities respecting property, plant(s), equipment, products, or services". Thus, as a rule, business operations involve a firm's tangible assets, for it is generally only these assets which are utilized in the interrelated series of actions that result in the firm's product or service.

(b) Significant portion or aspect

A "significant portion or aspect" of business operations is comprised of three distinct elements:

- (a) A portion is a quantitative measure of a business, for example a percentage of sales or two out of five trucks.
- (b) An aspect is a qualitative measure, for example a firm's steep slope roofing operations.
- (c) The adjective significant denotes a meaningful or appreciable portion or aspect.

There can be no definitive list as to what constitutes a significant portion or aspect of business operations, for the determination of the same is fact driven and therefore rooted in the circumstances of the individual case. However, and situationally, each of the following may constitute the transfer of a significant portion or aspect of business operations:

- the transfer of major revenue-producing equipment;
- the transfer of an asset or assets which would, in effect, limit the transferor from conducting its business operations in the same manner as before the transfer;
- the transfer of a critical agreement or contract;
- the transfer of business opportunity;
- the transfer of a principal or of an essential worker;
- the transfer of workers under the same or similar terms of employment.

C Move to another firm

It is critical to appreciate that the second branch of the two-part test for transfer of experience rating uses the term “move” as opposed to “transfer”; for all that is necessary in the former is the movement of operations, while the latter may suggest the removal of operations from one firm and placement in another. That is, policy by its deliberate use of the term “move” does not necessarily require that the transferor cease its carrying-on or conduct of the moved operations.

ADJUDICATIVE GUIDELINES

The following general descriptions must be kept in mind when determining whether to transfer experience rating data:

Asset sale or transfer – The sale or transfer of a firm's assets, including, but not limited to, the whole or part of its property, plant, equipment, or operations. Any form of business entity can undertake an asset sale. In an asset sale, the ownership of the firm does not change.

Ownership sale – The sale of a firm. Generally, only a corporation can be sold and this is effected by the sale of the shares of the corporation. In an ownership sale, there is a change in the ownership of the firm, but not the business: the firm owned

the business prior to the sale of the firm and continues to own the business after the sale of the firm.

Guideline 1 – In an ownership sale, the firm’s experience rating continues with the firm.

Guideline 2 – Generally, in an asset sale or transfer, experience rating data will not move to the new owner of the business operations.

Guideline 3 – As an exception to Guideline 2, experience rating data may move if:

- (a) Business operations are sold or transferred to an affiliated firm.
- (b) Business operations have, in effect, been apportioned or split between two or more affiliated firms.
- (c) The change in ownership of business operations has been in form only and not in substance. For example, the nature of the legal entity controlling the business operations changes (a proprietorship incorporates, or a company changes to partnership), but there is no substantive change in the business operations or the individuals who control the original and successor firms’ business operations.
- (d) Each of the “original firm” and the “successor firm” is a publicly traded company, and it is anticipated that the successor firm will continue the business operations unchanged by preserving the undertaking, management, staff, plant, equipment, location, and customers or clients.

APPENDIX "A"

