

SUBSTITUTE FOR
SENATE BILL NO. 1037

A bill to license and regulate professional employer organizations; to define certain relationships and allocate certain rights and duties between those relationships; to provide for certain powers and duties for state agencies; to impose certain fees and provide for certain security devices; and to provide for penalties and remedies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

1 Sec. 1. This act shall be known and may be cited as the
2 "Michigan professional employer organization regulatory act".

3 Sec. 3. As used in this act:

4 (a) "Client" means any person who enters into a professional
5 employer agreement with a PEO.

6 (b) "Coemployer" means either a PEO or a client.

1 (c) "Coemployment relationship" means a relationship that is
2 intended to be an ongoing relationship rather than a temporary or
3 project-specific one, wherein the rights, duties, and obligations
4 of an employer arising out of an employment relationship have been
5 allocated between coemployers pursuant to a professional employer
6 agreement.

7 (d) "Covered employee" means an individual having a
8 coemployment relationship with a PEO and a client who has received
9 written notice of coemployment with the PEO and the individual has
10 created a coemployment relationship pursuant to a professional
11 employer agreement. Covered employee includes individuals who are
12 officers, directors, shareholders, partners, and managers of the
13 client to the extent the PEO and the client have expressly agreed
14 in the professional employer agreement that those individuals are
15 considered covered employees and those individuals act as
16 operational managers or perform day-to-day operational services for
17 the client.

18 (e) "Department" means the department of energy, labor, and
19 economic growth.

20 (f) "Director" means the director of the department.

21 (g) "Licensee" means a PEO licensed under this act.

22 (h) "PEO group" means 2 or more PEOs that are majority owned
23 or commonly controlled by the same entity, parent, or controlling
24 person.

25 (i) "Person" means any individual, partnership, corporation,
26 limited liability company, association, or any other legal entity.

27 (j) "Professional employer agreement" means a written contract

1 by and between a client and a PEO that provides for the following:

2 (i) Coemployment of covered employees.

3 (ii) The allocation of employer rights and obligations between
4 the client and the PEO with respect to the covered employees.

5 (iii) Assumption of responsibilities by the PEO and the client
6 as required by this act.

7 (k) "PEO" or "professional employer organization" means any
8 person engaged in the business of providing professional employer
9 services regardless of its use of a descriptive term other than
10 "professional employer organization" or "PEO". PEO does not include
11 any of the following:

12 (i) An arrangement in which a person, whose principal business
13 activity is not entering into professional employer agreements and
14 does not hold itself out as a PEO, shares employees with a commonly
15 owned company within the meaning of section 414(b) and (c) of the
16 internal revenue code of 1986, 26 USC 414.

17 (ii) A provider of temporary help services as defined by
18 section 29 of the Michigan employment security act, 1936 (Ex Sess)
19 PA 1, MCL 421.29.

20 (iii) Independent contractor arrangements by which a person
21 assumes responsibility for the product produced or service
22 performed by that person or his or her agents and retains and
23 exercises primary direction and control over the work performed by
24 the individuals whose services are supplied under such
25 arrangements.

26 (l) "Professional employer service" means the service of
27 entering into a coemployment relationship in which all or a

1 majority of the employees providing services to a client or to a
2 division or work unit of the client are covered employees.

3 Sec. 5. (1) Neither this act nor a professional employer
4 agreement shall affect, modify, or amend any collective bargaining
5 agreement, or the rights or obligations of any client, PEO, or
6 covered employee under any state or federal act.

7 (2) Neither this act nor any professional employer agreement
8 shall do any of the following:

9 (a) Diminish, abolish, or remove rights of covered employees
10 owed to a client or obligations of that client to a covered
11 employee regarding rights or obligations existing prior to the
12 effective date of the professional employer agreement.

13 (b) Affect, modify, or amend any contractual relationship or
14 restrictive covenant between a covered employee and any client in
15 effect at the time a professional employer agreement becomes
16 effective or that is entered into subsequently between a client and
17 a covered employee.

18 (3) Neither this act nor any professional employer agreement
19 shall affect, modify, or amend any state, local, or federal
20 licensing, registration, certification, or other regulatory
21 requirement applicable to any client or covered employee. A PEO is
22 not considered to be engaged in any occupation, trade, profession,
23 or other activity that is subject to licensing, registration, or
24 certification requirements, or is otherwise regulated by a
25 governmental entity solely by entering into and maintaining a co-
26 employment relationship with a covered employee who is subject to
27 those requirements or regulations.

1 (4) Unless otherwise provided by law and with respect to a
2 bid, contract, purchase order, or agreement entered into with the
3 state or a political subdivision of the state, a client company's
4 status or certification as a small, minority-owned, disadvantaged,
5 or woman-owned business enterprise or as a historically
6 underutilized business is not affected due to the client company's
7 execution of an agreement with a PEO or to the use of the services
8 of a PEO.

9 Sec. 7. (1) Except as otherwise provided in this act, a person
10 shall not provide, advertise, or otherwise hold itself out as
11 providing professional employer services in this state, unless
12 licensed or exempt from licensure under this act.

13 (2) An applicant for licensure shall submit to the department
14 the application fee imposed in section 13 and a completed
15 application providing the following information:

16 (a) The name or names under which the PEO conducts business.

17 (b) The address of the principal place of business of the PEO
18 and the address of each office it maintains within Michigan.

19 (c) The PEO's taxpayer or employer identification number.

20 (d) A list by jurisdiction of each name under which the PEO
21 has operated within the preceding 5 years, including any
22 alternative names, names of predecessors and, if known, successor
23 business entities.

24 (e) A statement of ownership, which shall include the name and
25 evidence of the business experience of any person, individually or
26 acting in concert with 1 or more other persons, owning or
27 controlling, directly or indirectly, 10% or more of the equity

1 interests of the PEO.

2 (f) A statement of management, which shall include the name
3 and evidence of the business experience of any person who serves as
4 president, chief executive officer, or otherwise has the authority
5 to act as senior executive officer of the PEO.

6 (g) A financial statement describing the financial condition
7 of the PEO or PEO group. Before December 31, 2010, applicants may
8 file an unaudited financial statement. On or after January 1, 2011,
9 the financial statement shall be prepared in accordance with
10 generally accepted accounting principles and audited by an
11 independent certified public accountant licensed to practice in the
12 jurisdiction in which such accountant is located and shall be
13 without qualification as to the going concern status of the PEO. A
14 PEO group may submit combined or consolidated audited financial
15 statements to meet the requirements of this subsection. A PEO that
16 has not had sufficient operating history to have audited financials
17 based upon at least 12 months of operating history must meet the
18 financial capacity requirements described in section 15 and present
19 financial statements reviewed by a licensed certified public
20 accountant.

21 (h) A financial audit of the applicant. At the time of
22 application for an initial license, the applicant shall submit the
23 most recent audit, which may not be older than 13 months.
24 Thereafter, a PEO or PEO group shall file on an annual basis,
25 within 270 days after the end of the PEO or PEO group's fiscal
26 year, a succeeding audit. An applicant may apply for an extension
27 with the department except that any request must be accompanied by

1 a letter from the auditors stating the reasons for the delay and
2 the anticipated audit completion date.

3 (i) A certification that the PEO has made an election under
4 section 13m of the Michigan employment security act, 1936 (Ex Sess)
5 PA 1, MCL 421.13m.

6 (3) A person that has been convicted of a felony related to
7 the operation of a PEO shall not own or control, directly or
8 indirectly, a PEO doing business in this state.

9 (4) Each PEO operating within this state on the effective date
10 of this act shall file its completed application and submit the
11 license fee not later than 180 days after the effective date of
12 this act. Initial licensure is valid until the end of the PEO's
13 first fiscal year end that is more than 1 year after the effective
14 date of this act. A PEO not operating within this state on the
15 effective date of this act shall submit its initial licensure
16 application prior to commencement of operations within this state.

17 (5) Within 180 days after the end of a licensee's fiscal year,
18 the licensee shall renew its license by submitting a renewal
19 application to the department providing any changes in the
20 information provided in the licensee's prior application.

21 (6) PEOs in a PEO group may satisfy the reporting and
22 financial requirements on a combined or consolidated basis provided
23 that each member of the PEO group guarantees the obligations under
24 this act of each other member of the PEO group. In the case of a
25 PEO group that submits a combined or consolidated audited financial
26 statement, including entities that are not PEOs or that are not in
27 the PEO group, the controlling entity of the PEO group under the

1 consolidated or combined statement must guarantee the obligations
2 of the PEOs in the PEO group. The department shall determine
3 whether the requirements of this subsection are satisfied.

4 (7) The department shall, to the extent practical, allow the
5 acceptance of electronic filings, including applications,
6 documents, reports, and other filings required under this act. The
7 department may allow for the acceptance of electronic filings and
8 other assurance by an independent and qualified assurance
9 organization that provides satisfactory assurance of compliance
10 acceptable to the department consistent with, or in lieu of, the
11 requirements of this section and sections 9 and 15, and other
12 requirements of this act. The department shall allow a PEO to
13 authorize an assurance organization, approved by the director, to
14 act on the PEO's behalf in complying with the licensure
15 requirements of this act including, but not limited to, electronic
16 filings of information and payment of license fees. Use of an
17 approved assurance organization is optional. This subsection does
18 not limit or change the department's authority to license, to
19 rescind, revoke, or deny a license, or to investigate or enforce
20 any provision of this act.

21 Sec. 9. (1) The department may issue a limited PEO license. A
22 PEO seeking limited licensure under this section shall submit to
23 the department a properly executed and completed application on a
24 form provided by the department and license fee for limited
25 licensure.

26 (2) A PEO is eligible for a limited license upon meeting the
27 following conditions:

1 (a) Is domiciled outside Michigan and is licensed or otherwise
2 regulated as a PEO in another state.

3 (b) Does not maintain an office in Michigan or does not
4 directly solicit clients located or domiciled within Michigan.

5 (c) Does not have more than 50 covered employees employed or
6 domiciled in Michigan on any given day.

7 (3) A limited license is valid for 1 year and may be renewed.

8 (4) Section 15 does not apply to applicants for limited
9 licensure.

10 Sec. 11. The department shall maintain a list of PEOs licensed
11 under this act. The list shall be readily available to the public
12 by electronic or other means.

13 Sec. 13. (1) The department may charge an application fee for
14 initial licensure, not to exceed \$1,500.00 for an individual
15 license and \$1,500.00 for a PEO group license.

16 (2) Except in the case of an initial license, a license issued
17 under this act shall be issued for a term of 3 years. The per year
18 license fee is \$1,500.00 for an individual license and \$1,500.00
19 for a PEO group license. The renewal license fee shall include the
20 license fee representing the 3-year term.

21 (3) The department may adjust the license fees under this
22 section every 3 years by an amount determined by the state
23 treasurer to reflect the cumulative annual percentage change in the
24 Detroit consumer price index and rounded to the nearest dollar. As
25 used in this subsection, "Detroit consumer price index" means the
26 most comprehensive index of consumer prices available for the
27 Detroit area by the bureau of labor statistics of the United States

1 department of labor.

2 Sec. 15. Unless otherwise exempt under this act, each PEO or
3 collectively each PEO group shall submit to the department evidence
4 of and maintain either of the following:

5 (a) A minimum of \$100,000.00 in working capital, as defined by
6 generally accepted accounting principles, as reflected in the
7 financial statements submitted to the department with the initial
8 licensure and each annual renewal. A PEO or PEO group with less
9 than \$100,000.00 in working capital at renewal has 180 days to
10 eliminate the deficiency in a manner acceptable to the department.
11 During that 180-day period, the PEO or PEO group shall submit
12 quarterly financial statements to the department accompanied by an
13 attestation of the chief executive officer that all wages, taxes,
14 worker's compensation premiums, and employee benefits have been
15 paid by the PEO or members of the PEO group.

16 (b) A bond, irrevocable letter of credit, or securities with a
17 minimum market value of \$100,000.00, acceptable to the department.
18 The bond shall be held by a depository designated by the department
19 to secure payment by the PEO of all taxes, wages, benefits, or
20 other entitlements due to, or regarding, covered employees, if the
21 PEO or PEO group does not make those payments when due. For any PEO
22 or PEO group whose annual financial statements do not indicate
23 positive working capital, the amount of the bond shall be
24 \$100,000.00 plus an amount sufficient to cover the deficit in
25 working capital.

26 Sec. 17. (1) Each professional employer agreement shall
27 include the following provisions:

1 (a) The responsibility of the PEO to pay wages to covered
2 employees; to withhold, collect, report and remit payroll-related
3 and unemployment taxes; and, to the extent the PEO has assumed
4 responsibility in the professional employer agreement, to make
5 payments for employee benefits for covered employees. For purposes
6 of this subdivision, wages do not include any obligation between a
7 client and a covered employee for payments beyond, or in addition
8 to, the covered employee's salary, draw, or regular rate of pay,
9 including bonuses, commissions, severance pay, deferred
10 compensation, profit sharing, or vacation, sick, or other paid time
11 off pay, unless the PEO has expressly agreed to assume liability
12 for those payments in the professional employer agreement.

13 (b) The hiring, disciplining, and termination by the PEO of a
14 covered employee, as may be necessary to fulfill the PEO's
15 responsibilities under this act and the professional employer
16 agreement. The client may also hire, discipline, and terminate a
17 covered employee.

18 (c) The responsibility of the client and the PEO to comply
19 with the worker's disability compensation act of 1969, 1969 PA 317,
20 MCL 418.101 to 418.941.

21 (2) Each professional employer agreement shall provide that
22 the PEO provide written notice to each covered employee affected by
23 the agreement regarding the general nature of the coemployment
24 relationship between and among the PEO, the client, and that
25 covered employee.

26 Sec. 19. (1) Except to the extent otherwise expressly provided
27 for by the professional employer agreement, the following apply:

1 (a) A client is solely responsible for the quality, adequacy,
2 or safety of the goods or services produced or sold in the client's
3 business.

4 (b) A client is solely responsible for directing, supervising,
5 training, and controlling the work of the covered employees with
6 respect to the business activities of the client and is solely
7 responsible for the acts, errors, or omissions of the covered
8 employees regarding those activities.

9 (c) A client is not liable for the acts, errors, or omissions
10 of a PEO or of any covered employee of the client and a PEO when
11 the covered employee is acting under the express direction and
12 control of the PEO.

13 (d) A PEO is not liable for the acts, errors, or omissions of
14 a client or of any covered employee of the client when the covered
15 employee is acting under the express direction and control of the
16 client.

17 (2) This section does not limit any contractual liability or
18 obligation specifically provided in the written professional
19 employer agreement.

20 (3) A covered employee is not, solely as the result of being a
21 covered employee of a PEO, an employee of the PEO for purposes of
22 general liability insurance, fidelity bonds, surety bonds,
23 employer's liability not covered by worker's compensation, or
24 liquor liability insurance carried by the PEO unless covered
25 employees are included by specific reference in the professional
26 employer agreement and applicable prearranged employment contract,
27 insurance contract, or bond.

1 (4) A PEO is not considered engaged in the sale of insurance
2 or in acting as a third party administrator by offering, marketing,
3 selling, administering, or providing professional employer services
4 that include services and employee benefit plans for covered
5 employees.

6 (5) A client and a PEO are each considered an employer for
7 purposes of sponsoring retirement and welfare benefit plans for its
8 covered employees. A fully insured welfare benefit plan offered to
9 the covered employees of a single PEO shall be treated, for
10 purposes of state law, as a single employer welfare benefit plan.

11 (6) For purposes of this state or any political subdivision of
12 this state and except as otherwise specifically provided for PEO
13 arrangement by law, covered employees whose services are subject to
14 sales tax are considered the employees of the client for purposes
15 of collecting and levying sales tax on the services performed by
16 the covered employee. This act does not relieve a client of any
17 sales tax liability with respect to its goods or services.

18 (7) Except as otherwise specifically provided for PEO
19 arrangement by law, a tax or assessment imposed upon professional
20 employer services or any business license or other fee that is
21 based upon gross receipts shall allow a deduction from the gross
22 income or receipts of the business derived from performing
23 professional employer services that is equal to that portion of the
24 fee charged to a client that represents the actual cost of wages
25 and salaries, benefits, worker's compensation insurance, payroll
26 taxes, withholding, or other assessments paid to, or on behalf of,
27 a covered employee by the professional employer organization under

1 a professional employer agreement.

2 (8) Except as otherwise specifically provided for PEO
3 arrangement by law, a tax assessed, assessment, or mandated
4 expenditure on a per capita or per employee basis shall be assessed
5 against the client for covered employees and against the
6 professional employer organization for its employees who are not
7 covered employees co-employed with a client. Benefits or monetary
8 consideration that meet the requirements of mandates imposed on a
9 client and that are received by covered employees through the PEO,
10 either through payroll or through benefit plans sponsored by the
11 PEO, shall be credited against the client's obligation to fulfill
12 those mandates.

13 (9) Except as otherwise specifically provided for PEO
14 arrangement by law and in the case of a tax or an assessment
15 imposed or calculated upon the basis of total payroll, the
16 professional employer organization is eligible to apply any small
17 business allowance or exemption available to the client for the
18 covered employees for the purpose of computing the tax.

19 Sec. 21. (1) A person who commits 1 or more of the following
20 is subject to the penalties prescribed under subsection (2):

21 (a) Practices fraud or deceit in obtaining or renewing a
22 license.

23 (b) Aids or abets another person in the unlicensed practice of
24 an occupation.

25 (c) Engages in activities regulated under this section without
26 obtaining a license or demonstrating exemption from licensure under
27 this act.

1 (d) In the case of a licensee or an officer of a licensee,
2 being convicted of a crime relating to the operation of a PEO.

3 (e) Engages in false advertising.

4 (2) After notice and opportunity for hearing under the
5 administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to
6 24.328, the department shall do 1 or more of the following upon the
7 determination of a violation of this act, a rule adopted under this
8 act, or an order issued under this act:

9 (a) Placement of a limitation on a license.

10 (b) Suspension of a license.

11 (c) Denial of a license or renewal of a license.

12 (d) Revocation of a license.

13 (e) Imposition of an administrative fine to be paid to the
14 department, not to exceed \$5,000.00.

15 (f) Censure.

16 (g) Probation.

17 (h) A requirement that restitution be made, based upon proofs
18 submitted to and findings made by the hearing examiner after a
19 contested case.

20 Sec. 23. A person who knowingly and willfully violates this
21 act, or who aids and abets, directly or indirectly, the violation
22 of this act, is guilty of a misdemeanor punishable by imprisonment
23 for not more than 1 year or a fine of not more than \$10,000.00, or
24 both.

25 Sec. 25. The department shall promulgate consistent and
26 necessary rules under the administrative procedures act of 1969,
27 1969 PA 306, MCL 24.201 to 24.328, as considered necessary to

Senate Bill No. 1037 as amended September 23, 2010

1 implement this act.

Sec. 27. This act takes effect <<July 1, 2011>>.