

SENATE BILL No. 1037

December 17, 2009, Introduced by Senator CROPSEY and referred to the Committee on Commerce and Tourism.

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 may be cited and shall be known 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.

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

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

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

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

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

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

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

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

1 (j) "Professional employer agreement" means a written contract
2 by and between a client and a PEO that provides for the following:

3 (i) Coemployment of covered employees.

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

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

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

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

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

21 (l) "Professional employer service" means the service of
22 entering into a coemployment relationship in which all or a
23 majority of the employees providing services to a client or to a
24 division or work unit of the client are covered employees.

25 Sec. 5. (1) Neither this act nor a professional employer
26 agreement shall affect, modify, or amend any collective bargaining
27 agreement, or the rights or obligations of any client, PEO, or

1 covered employee under any state or federal act.

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

4 (a) Diminish, abolish, or remove rights of covered employees
5 owed to a client or obligations of that client to a covered
6 employee regarding rights or obligations existing prior to the
7 effective date of the professional employer agreement.

8 (b) Affect, modify, or amend any contractual relationship or
9 restrictive covenant between a covered employee and any client in
10 effect at the time a professional employer agreement becomes
11 effective or that is entered into subsequently between a client and
12 a covered employee.

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

23 (4) For purposes of determination of a tax credit, economic
24 incentive, or other benefit provided by this state or any other
25 government entity that is based on employment, covered employees
26 are considered employees solely of the client. A client is entitled
27 to the benefit of a tax credit, economic incentive, or other

benefit arising as the result of the employment of covered employees of that client. Notwithstanding the fact that the PEO is the W-2 reporting employer, the client shall continue to qualify for that tax credit, economic incentive, or benefit. If the grant or amount of a tax credit, economic incentive, or benefit is based on the number of employees, then each client shall be treated as employing only those covered employees co-employed by the client, but covered employees working for other clients of the PEO shall not be counted. Each PEO shall provide, upon request by a client or an agency or department of this state, employment information reasonably required by the agency or department responsible for administering the tax credit, economic incentive, or benefit that is necessary to support the request, claim, application, or other action by a client seeking the tax credit, economic incentive, or benefit.

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

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

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

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

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

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

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

12 (e) A statement of ownership, which shall include the name and
13 evidence of the business experience of any person, individually or
14 acting in concert with 1 or more other persons, owning or
15 controlling, directly or indirectly, 10% or more of the equity
16 interests of the PEO.

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

21 (g) A financial statement describing the financial condition
22 of the PEO or PEO group. Before December 31, 2010, applicants may
23 file an unaudited financial statement. On or after January 1, 2011,
24 the financial statement shall be prepared in accordance with
25 generally accepted accounting principles and audited by an
26 independent certified public accountant licensed to practice in the
27 jurisdiction in which such accountant is located and shall be

1 without qualification as to the going concern status of the PEO. A
2 PEO group may submit combined or consolidated audited financial
3 statements to meet the requirements of this subsection. A PEO that
4 has not had sufficient operating history to have audited financials
5 based upon at least 12 months of operating history must meet the
6 financial capacity requirements described in section 15 and present
7 financial statements reviewed by a licensed certified public
8 accountant.

9 (h) A financial audit of the applicant. At the time of
10 application for an initial license, the applicant shall submit the
11 most recent audit, which may not be older than 13 months.
12 Thereafter, a PEO or PEO group shall file on an annual basis,
13 within 270 days after the end of the PEO or PEO group's fiscal
14 year, a succeeding audit. An applicant may apply for an extension
15 with the department except that any request must be accompanied by
16 a letter from the auditors stating the reasons for the delay and
17 the anticipated audit completion date.

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

21 (3) Each PEO operating within this state on the effective date
22 of this act shall file its completed application and submit the
23 license fee not later than 180 days after the effective date of
24 this act. Initial licensure is valid until the end of the PEO's
25 first fiscal year end that is more than 1 year after the effective
26 date of this act. A PEO not operating within this state on the
27 effective date of this act shall submit its initial licensure

1 application prior to commencement of operations within this state.

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

6 (5) PEOs in a PEO group may satisfy the reporting and
7 financial requirements on a combined or consolidated basis provided
8 that each member of the PEO group guarantees the obligations under
9 this act of each other member of the PEO group. In the case of a
10 PEO group that submits a combined or consolidated audited financial
11 statement, including entities that are not PEOs or that are not in
12 the PEO group, the controlling entity of the PEO group under the
13 consolidated or combined statement must guarantee the obligations
14 of the PEOs in the PEO group. The department shall determine
15 whether the requirements of this subsection are satisfied.

16 (6) The department shall, to the extent practical, allow the
17 acceptance of electronic filings, including applications,
18 documents, reports, and other filings required under this act. The
19 department may allow for the acceptance of electronic filings and
20 other assurance by an independent and qualified assurance
21 organization that provides satisfactory assurance of compliance
22 acceptable to the department consistent with, or in lieu of, the
23 requirements of this section and sections 9 and 15, and other
24 requirements of this act. The department shall allow a PEO to
25 authorize an assurance organization, approved by the director, to
26 act on the PEO's behalf in complying with the licensure
27 requirements of this act including, but not limited to, electronic

1 filings of information and payment of license fees. Use of an
2 approved assurance organization is optional. This subsection does
3 not limit or change the department's authority to license, to
4 rescind, revoke, or deny a license, or to investigate or enforce
5 any provision of this act.

6 Sec. 9. (1) The department may issue a limited PEO license. A
7 PEO seeking limited licensure under this section shall submit to
8 the department a completed application and license fee for limited
9 licensure.

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

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

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

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

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

19 (4) Section 15 does not apply to applicants for limited
20 licensure.

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

24 Sec. 13. (1) The department may charge an application fee for
25 initial licensure, not to exceed \$250.00 for an individual license
26 and \$500.00 for a PEO group license.

27 (2) Except in the case of an initial license, a license issued

1 under this act shall be issued for a term of 3 years. The per year
2 license fee is \$100.00 for an individual license and \$250.00 for a
3 PEO group license. The renewal license fee shall include the
4 license fee representing the 3-year term.

5 (3) The department may adjust the license fees under this
6 section every 3 years by an amount determined by the state
7 treasurer to reflect the cumulative annual percentage change in the
8 Detroit consumer price index and rounded to the nearest dollar. As
9 used in this subsection, "Detroit consumer price index" means the
10 most comprehensive index of consumer prices available for the
11 Detroit area by the bureau of labor statistics of the United States
12 department of labor.

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

16 (a) Positive working capital, which is considered to be
17 current assets minus current liabilities, as defined by generally
18 accepted accounting principles and as reflected in the financial
19 statements submitted to the department with the initial licensure
20 and each annual renewal.

21 (b) A PEO or group that does not have positive working capital
22 may provide a bond, irrevocable letter of credit, or securities
23 with a minimum market value equaling the deficiency plus
24 \$100,000.00. That bond shall be held by a depository designated by
25 the department to secure payment by the PEO of all taxes, wages,
26 benefits, or other entitlement due to, or regarding, covered
27 employees, if the PEO or PEO group does not make those payments

1 when due.

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

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

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

21 (c) The responsibility to obtain workers' compensation
22 insurance coverage under the workers disability compensation act of
23 1969, 1969 PA 317, MCL 418.101 to 418.941, for covered employees
24 shall be specifically allocated in the professional employer
25 agreement to either the client or to the PEO. To the extent
26 workers' compensation is provided by either the client or the PEO,
27 the exclusive remedy provisions of the workers disability

1 compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941,
2 shall apply to the client, the PEO, and for all covered employees
3 and other employees irrespective of which co-employer obtains that
4 workers' compensation coverage.

5 (2) Each professional employer agreement shall provide that
6 the PEO provide written notice to each covered employee affected by
7 the agreement regarding the general nature of the coemployment
8 relationship between and among the PEO, the client, and that
9 covered employee.

10 Sec. 19. The responsibility to obtain workers' compensation
11 coverage for covered employees as required by law shall be
12 specifically allocated in the professional employer agreement to
13 either the client or the PEO. Coverage for both the directly
14 employed workers of a client and the covered employees of that
15 client must be all in the residual or all in the voluntary market.
16 In addition, workers' compensation coverage for covered employees
17 may be obtained by either the client through a standard workers'
18 compensation policy or through duly authorized self-insurance, by
19 the PEO through a duly authorized self-insurance program through a
20 master policy issued to the PEO by a carrier authorized to do
21 business in this state, or through a multiple coordinated policy
22 issued by a carrier authorized to do business in this state in the
23 name of the PEO or the client.

24 Sec. 21. (1) Except to the extent otherwise expressly provided
25 for by the professional employer agreement, the following apply:

26 (a) A client is solely responsible for the quality, adequacy,
27 or safety of the goods or services produced or sold in the client's

1 business.

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

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

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

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

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

26 (4) A PEO is not considered engaged in the sale of insurance
27 or in acting as a third party administrator by offering, marketing,

1 selling, administering, or providing professional employer services
2 that include services and employee benefit plans for covered
3 employees.

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

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

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

27 (8) Except as otherwise specifically provided for PEO

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

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

17 Sec. 23. (1) A person who commits 1 or more of the following
18 is subject to the penalties prescribed under subsection (2):

19 (a) Practices fraud or deceit in obtaining or renewing a
20 license.

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

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

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

1 (2) After notice and opportunity for hearing under the
2 administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to
3 24.328, the department shall do the following upon the
4 determination of a violation of this act, a rule adopted under this
5 act, or an order issued under this act:

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

7 (b) Suspension of a license.

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

9 (d) Revocation of a license.

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

12 (f) Censure.

13 (g) Probation.

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

17 Sec. 25. This act takes effect January 1, 2010.