

Act No. 370
Public Acts of 2010
Approved by the Governor
December 22, 2010
Filed with the Secretary of State
December 22, 2010
EFFECTIVE DATE: July 1, 2011

STATE OF MICHIGAN
95TH LEGISLATURE
REGULAR SESSION OF 2010

Introduced by Senator Cropsey

ENROLLED SENATE BILL No. 1037

AN ACT 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:

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

Sec. 3. As used in this act:

- (a) “Client” means any person who enters into a professional employer agreement with a PEO.
- (b) “Coemployer” means either a PEO or a client.
- (c) “Coemployment relationship” means a relationship that is intended to be an ongoing relationship rather than a temporary or project-specific one, wherein the rights, duties, and obligations of an employer arising out of an employment relationship have been allocated between coemployers pursuant to a professional employer agreement.
- (d) “Covered employee” means an individual having a coemployment relationship with a PEO and a client who has received written notice of coemployment with the PEO and the individual has created a coemployment relationship pursuant to a professional employer agreement. Covered employee includes individuals who are officers, directors, shareholders, partners, and managers of the client to the extent the PEO and the client have expressly agreed in the professional employer agreement that those individuals are considered covered employees and those individuals act as operational managers or perform day-to-day operational services for the client.
- (e) “Department” means the department of energy, labor, and economic growth.
- (f) “Director” means the director of the department.
- (g) “Licensee” means a PEO licensed under this act.
- (h) “PEO group” means 2 or more PEOs that are majority owned or commonly controlled by the same entity, parent, or controlling person.
- (i) “Person” means any individual, partnership, corporation, limited liability company, association, or any other legal entity.
- (j) “Professional employer agreement” means a written contract by and between a client and a PEO that provides for the following:
 - (i) Coemployment of covered employees.

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

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

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

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

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

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

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

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

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

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

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

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

(4) 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) A covered employee is not, solely as the result of being a covered employee of a PEO, an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability not covered by worker's compensation, or liquor liability insurance carried by the PEO unless covered employees are included by specific

reference in the professional employer agreement and applicable prearranged employment contract, insurance contract, or bond.

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

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

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

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

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

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

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

- (a) Practices fraud or deceit in obtaining or renewing a license.
- (b) Aids or abets another person in the unlicensed practice of an occupation.
- (c) Engages in activities regulated under this section without obtaining a license or demonstrating exemption from licensure under this act.
- (d) In the case of a licensee or an officer of a licensee, being convicted of a crime relating to the operation of a PEO.
- (e) Engages in false advertising.

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

- (a) Placement of a limitation on a license.
- (b) Suspension of a license.
- (c) Denial of a license or renewal of a license.
- (d) Revocation of a license.
- (e) Imposition of an administrative fine to be paid to the department, not to exceed \$5,000.00.
- (f) Censure.
- (g) Probation.
- (h) A requirement that restitution be made, based upon proofs submitted to and findings made by the hearing examiner after a contested case.

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

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

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

This act is ordered to take immediate effect.

Carol Morey Viventi

Secretary of the Senate

Richard J. Brown

Clerk of the House of Representatives

Approved

.....
Governor