

JAN 26 2009

A BILL FOR AN ACT

RELATING TO PROFESSIONAL EMPLOYER ORGANIZATIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The Hawaii Revised Statutes is amended by
2 adding a new chapter to be appropriately designated and to read
3 as follows:

4 "CHAPTER

5 PROFESSIONAL EMPLOYER ORGANIZATIONS

6 § -1 Definitions. As used in this chapter, unless the
7 context indicates otherwise, the following terms shall mean as
8 follows:

9 "Client" means any person who enters into a professional
10 employer agreement with a professional employer organization.

11 "Co-employer" means either a professional employer
12 organization or a client.

13 "Co-employment relationship" means a relationship which is
14 intended to be an ongoing relationship rather than a temporary
15 or project specific one, wherein the rights, duties, and
16 obligations of an employer that arise out of an employment
17 relationship have been allocated between co-employers pursuant



1 to a professional employer agreement and this chapter. In a co-
2 employment relationship:

3 (1) The professional employer organization is entitled to
4 enforce only those employer rights, and is subject to
5 only those obligations specifically allocated to the
6 professional employer organization by the professional
7 employer agreement and this chapter;

8 (2) The client is entitled to enforce those rights, and is
9 obligated to provide and perform those employer
10 obligations allocated to the client by the
11 professional employer agreement and this chapter; and

12 (3) The client is entitled to enforce any right and is
13 obligated to perform any obligation of an employer not
14 specifically allocated to the professional employer
15 organization by the professional employer agreement or
16 this chapter.

17 "Covered employee" means an individual having a co-
18 employment relationship with a professional employer
19 organization and a client who meets all of the following
20 criteria:

- 1 (1) The individual has received written notice of co-
2 employment with the professional employer
3 organization; and
- 4 (2) The individual's co-employment relationship is
5 pursuant to a professional employer agreement subject
6 to this chapter. Individuals who are officers,
7 directors, shareholders, partners, and managers of the
8 client shall be covered employees to the extent that
9 the professional employer organization and the client
10 have expressly agreed in the professional employer
11 agreement that the individuals shall be covered
12 employees and provided that the individuals meet the
13 criteria of this definition and act as operational
14 managers or perform day-to-day operational services
15 for the client.

16 "Department" means the department of commerce and consumer
17 affairs.

18 "Director" means the director of commerce and consumer
19 affairs.

20 "Professional employer organization group" means two or
21 more professional employer organizations that are majority-owned



1 or commonly controlled by the same entity, parent, or
2 controlling person or persons.

3 "Professional employer agreement" means a written contract
4 by and between a client and a professional employer organization
5 that provides for the following:

- 6 (1) The co-employment of covered employees; and
- 7 (2) The allocation of employer rights and obligations
8 between the client and the professional employer
9 organization with respect to the covered employees.

10 "Professional employer organization":

- 11 (1) Means any person engaged in the business of providing
12 professional employer services. A person engaged in
13 the business of providing professional employer
14 services shall be subject to this chapter regardless
15 of whether the person uses such a term or conducts
16 business expressly as a "professional employer
17 organization", "PEO", "staff leasing company",
18 "registered staff leasing company", "employee leasing
19 company", "administrative employer", or any other such
20 name.

- 21 (2) Shall not be deemed to include any of the following:



1 (A) Arrangements wherein a person, whose principal
2 business activity is not entering into
3 professional employer arrangements and that does
4 not hold itself out as a professional employer
5 organization, shares employees with a commonly
6 owned company within the meaning of section
7 414(b) and (c) of the Internal Revenue Code of
8 1986, as amended;

9 (B) Independent contractor arrangements by which a
10 person assumes responsibility for the product
11 produced or service performed by a person or the
12 person's agents and retains and exercises primary
13 direction and control over the work performed by
14 the individuals whose services are supplied under
15 those arrangements; or

16 (C) The providing of temporary help services.

17 "Professional employer services" means the service of
18 entering into co-employment relationships under this chapter in
19 which all or a majority of the employees providing services to a
20 client or to a division or work unit of client are covered
21 employees.



1 "Registrant" means a professional employer organization
2 registered under this chapter.

3 "Temporary help services" means services consisting of a
4 person:

- 5 (1) Recruiting and hiring the person's own employees;
- 6 (2) Finding other organizations that need the services of
7 those employees;
- 8 (3) Assigning those employees to perform work at, or
9 services for the other organizations, to support or
10 supplement the other organizations' workforces, or to
11 provide assistance in special work situations such as,
12 but not limited to employee absences, skill shortages,
13 seasonal workloads, or to perform special assignments
14 or projects; and
- 15 (4) Customarily attempting to reassign the employees to
16 other organizations when they finish each assignment.

17 § -2 **Registration requirements.** (a) No person shall
18 provide, advertise, or otherwise hold oneself out as providing
19 professional employer services in this State, unless the person
20 is registered under this chapter.

21 (b) Each applicant for registration under this chapter
22 shall provide the department with the following information:



- 1 (1) The name or names under which the professional
2 employer organization conducts business;
- 3 (2) The address of the principal place of business of the
4 professional employer organization and the address of
5 each office that the professional employer
6 organization maintains in this State;
- 7 (3) The professional employer organization's taxpayer or
8 employer identification number;
- 9 (4) A list, by jurisdiction, of each name under which the
10 professional employer organization has operated in the
11 preceding five years, including any alternative names,
12 names of predecessors and, if known, successor
13 business entities;
- 14 (5) A statement of ownership, which shall include the name
15 and evidence of the business experience of any person
16 that, individually or acting in concert with one or
17 more other persons, owns or controls, directly or
18 indirectly, twenty-five per cent or more of the equity
19 interests of the professional employer organization;
- 20 (6) A statement of management, which shall include the
21 name and evidence of the business experience of any
22 person who serves as president, chief executive



1 officer, or otherwise has the authority to act as
2 senior executive officer of the professional employer
3 organization;

4 (7) Proof of valid workers' compensation coverage; and
5 (8) A financial statement setting forth the financial
6 condition of the professional employer organization or
7 professional employer organization group. At the time
8 of application for a new license, the applicant shall
9 submit the most recent audit of the applicant, which
10 may not be older than thirteen months. Thereafter, a
11 professional employer organization or professional
12 employer organization group shall file on an annual
13 basis, within one hundred and eighty days after the
14 end of the professional employer organization or
15 professional employer organization group's fiscal
16 year, a succeeding audit. An applicant may apply for
17 an extension with the department but the request shall
18 be accompanied by a letter from the auditor stating
19 the reasons for the delay and the anticipated audit
20 completion date. A professional employer organization
21 that provides proof to the agency that it has been
22 operating in the State prior to January 1, 2010, shall



1 have twenty-four months from January 1, 2010, to
2 submit a financial audit as specified in this section.
3 The financial statement shall be prepared in
4 accordance with generally accepted accounting
5 principles audited by an independent certified public
6 accountant licensed to practice in the State, and
7 shall be without qualification as to the going concern
8 status of the professional employer organization. A
9 professional employer organization group may submit
10 combined or consolidated audited financial statements
11 to meet the requirements of this section. A
12 professional employer organization that has not had
13 sufficient operating history to have audited
14 financials based upon at least twelve months of
15 operating history shall meet the financial capacity
16 requirements of section -4 and present financial
17 statements reviewed by a certified public accountant.

18 (c) Each professional employer organization operating
19 within this State as of January 1, 2010, shall complete its
20 initial registration not later than one hundred and eighty days
21 after January 1, 2010. The initial registration shall be valid
22 until one hundred and eighty days after the end of the



1 professional employer organization's first fiscal year under
2 registration; provided that the professional employer
3 organization's first fiscal year ends more than one year after
4 January 1, 2010.

5 Each professional employer organization not operating
6 within this State as of January 1, 2010, shall complete its
7 initial registration prior to commencement of operations within
8 this State.

9 (d) Within one hundred and eighty days after the end of a
10 registrant's fiscal year, the registrant shall renew its
11 registration by notifying the department of any changes in the
12 information provided in the registrant's most recent
13 registration or renewal. A registrant's existing registration
14 shall remain in effect during the pendency of a renewal
15 application.

16 (e) Professional employer organizations in a professional
17 employer organization group may satisfy registration
18 requirements on a combined or consolidated basis; provided that
19 each member of the professional employer organization group
20 guarantees the obligations under this chapter of each other
21 member of the professional employer organization group. In the
22 case of a professional employer organization group that submits



1 a combined or consolidated audited financial statement that
2 includes entities that are not professional employer
3 organizations or that are not in the professional employer
4 organization group, the controlling entity of the professional
5 employer organization group under the consolidated or combined
6 statement shall guarantee the obligations of the professional
7 employer organizations in the professional employer organization
8 group.

9 (f) The department shall maintain a list of professional
10 employer organizations registered under this chapter that is
11 readily available to the public by electronic or other means.

12 (g) The department may prescribe forms necessary to
13 promote the efficient administration of this section.

14 (h) The department, to the extent practicable, shall
15 permit by adoption of rules in accordance with chapter 91 the
16 acceptance of electronic filings, including the applications,
17 documents, reports, and other filings required under this
18 chapter. The department, by adoption of rules, may provide for
19 the acceptance of electronic filings and other assurance by a
20 bonded, independent, and qualified assurance organization
21 approved by the director; provided that the assurance
22 organization provides satisfactory assurance of compliance



1 acceptable to the department consistent with the requirements of
2 this chapter and the rules adopted thereunder. Use of an
3 approved assurance organization shall be optional and not
4 mandatory for a registrant. Nothing in this subsection shall
5 limit or change the department's authority to register or
6 terminate registration of a professional employer organization
7 or to investigate or enforce this chapter.

8 (i) All records, reports, and other information obtained
9 from a professional employer organization pursuant to this
10 chapter, except to the extent necessary for the proper
11 administration of this chapter by the department, shall be
12 confidential and shall not be published or made available for
13 public inspection other than to public employees in the
14 performance of their public duties.

15 § -3 Fees. (a) Upon filing an initial registration
16 statement under this chapter, a professional employer
17 organization shall pay to the department an initial registration
18 fee not to exceed \$1,500. Upon each annual renewal of a
19 registration statement filed pursuant to this chapter, a
20 professional employer organization shall pay a renewal fee not
21 to exceed \$1,500. The department shall determine by rule any
22 fee to be charged for a group registration. A professional



1 employer organization seeking to register electronically shall
2 pay an initial and annual fee not to exceed \$1,500.

3 § -4 **Financial capability.** (a) Each professional
4 employer organization or collectively, each professional
5 employer organization group, shall maintain positive working
6 capital as defined by generally accepted accounting principles
7 at registration as reflected in the financial statements
8 submitted to the department with the initial registration and
9 each annual renewal. A professional employer organization that
10 provides proof to the agency that it has been operating in the
11 State prior to January 1, 2010, shall have twenty-four months
12 from January 1, 2010, to prove compliance with this section.

13 (b) As an alternative to subsection (a), a professional
14 employer organization or professional employer organization
15 group may provide a bond, irrevocable letter of credit, or
16 securities with a minimum market value in an amount sufficient
17 to cover the deficit that provides proof of positive working
18 capital to the department. The bond shall be held by a
19 depository designated by the department and shall be of
20 sufficient amount to secure the payment by the professional
21 employer organization of all taxes, wages, benefits, or other
22 entitlements with respect to the covered employees.



1 § -5 General requirements. (a) Except as specifically
2 provided in this chapter, the co-employment relationship between
3 the client and the professional employer organization, and
4 between each co-employer and each covered employee, shall be
5 governed by the professional employer agreement. Each
6 professional employer agreement shall specify the following:

- 7 (1) The professional employer organization shall have
8 responsibility to pay wages to covered employees; to
9 withhold, collect, report and remit payroll-related
10 and unemployment taxes; and, to the extent the
11 professional employer organization has assumed
12 responsibility in the professional employer agreement,
13 to make payments for employee benefits for covered
14 employees. As used in this section, the term "wages"
15 does not include any obligation between a client and a
16 covered employee for payments beyond or in addition to
17 the covered employee's salary, draw, or regular rate
18 of pay, such as bonuses, commissions, severance pay,
19 deferred compensation, profit sharing, or vacation,
20 sick, or other paid time off pay, unless the
21 professional employer organization has expressly

1 agreed to assume liability for those payments in the
2 professional employer agreement; and

3 (2) The professional employer organization shall have a
4 right to hire, discipline, and terminate a covered
5 employee, as may be necessary to fulfill the
6 professional employer organization's responsibilities
7 under this chapter and the professional employer
8 agreement. The client shall have a right to hire,
9 discipline, and terminate a covered employee.

10 (b) Except to the extent otherwise expressly provided by
11 the applicable professional employer agreement:

12 (1) A client shall be solely responsible for the quality,
13 adequacy, or safety of the goods or services produced
14 or sold in client's business;

15 (2) A client shall be solely responsible for directing,
16 supervising, training, and controlling the work of the
17 covered employees with respect to the business
18 activities of the client and shall be solely
19 responsible for the acts, errors, or omissions of the
20 covered employees with regard to those activities;

21 (3) A client shall not be liable for the acts, errors, or
22 omissions of a professional employer organization or a



1 covered employee of the client and the professional
2 employer organization when the covered employee is
3 acting under the express direction and control of the
4 professional employer organization;

5 (4) A professional employer organization shall not be
6 liable for the acts, errors, or omissions of a client
7 or a covered employee of the client when the covered
8 employee is acting under the express direction and
9 control of the client;

10 (5) Nothing in this subsection shall serve to limit any
11 contractual liability or obligation specifically
12 provided in the written professional employer
13 agreement;

14 (6) A covered employee is not, solely as the result of
15 being a covered employee of a professional employer
16 organization, an employee of the professional employer
17 organization for purposes of general liability
18 insurance, fidelity bonds, surety bonds, employer's
19 liability exclusive of workers' compensation, or
20 liquor liability insurance carried by the professional
21 employer organization unless the covered employees are
22 included by specific reference in the professional



1 employer agreement and applicable prearranged
2 employment contract, insurance contract, or bond.

3 § -6 **Workers' compensation.** The protection of the
4 exclusive remedy provision of the workers' compensation law
5 shall apply to the professional employer organization, the
6 client, and to all covered employees and other employees of the
7 client irrespective of which co-employer obtains the workers'
8 compensation coverage. Exclusive remedy protection shall extend
9 for both coverage A and coverage B of a workers' compensation
10 policy.

11 § -7 **Enforcement.** (a) No person may:

12 (1) Offer or provide professional employer services or use
13 the names PEO, professional employer organization,
14 staff leasing, employee leasing, administrative
15 employer, or other title representing professional
16 employer services without first becoming registered
17 pursuant to this chapter; or

18 (2) Knowingly provide false or fraudulent information to
19 the department in conjunction with any registration,
20 renewal, or in any report required pursuant to this
21 chapter.



- 1 (b) Disciplinary action may be taken by the department
2 against any person for a violation of subsection (a) or for:
- 3 (1) Being convicted of a crime that relates to the
4 operation of a professional employer organization and
5 involves fraud or deceit;
 - 6 (2) Knowingly making a material misrepresentation to the
7 department or other governmental agency; or
 - 8 (3) Willfully violating this chapter or any order issued
9 by or rule adopted by the department pursuant to this
10 chapter.
- 11 (c) If the director finds, after notice and an opportunity
12 to be heard, that a professional employer organization or a
13 controlling person of a professional employer organization has
14 violated this Act, the director shall impose one or more of the
15 following disciplinary actions:
- 16 (1) A denial of an application for registration;
 - 17 (2) Revocation, restriction, or refusal to renew a
18 registration;
 - 19 (3) Imposition of an administrative fine in an amount not
20 to exceed \$1,000 for each violation;
 - 21 (4) Probation, subject to specified conditions; or
 - 22 (5) A cease order.



1 § -8 Conflict with chapter 373K. In case of any
2 conflict between this chapter and chapter 373K, this chapter
3 shall prevail."

4 SECTION 2. This Act shall take effect on January 1, 2010.
5

INTRODUCED BY:

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Report Title:

Professional Employer Organization

Description:

Requires professional employer organizations to register with the department of commerce and consumer affairs.

