

JAN 20 2010

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# A BILL FOR AN ACT

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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:

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

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

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 the client company and



1 the professional employer organization pursuant to a  
2 professional employer agreement and this chapter.

3 "Covered employee" means an individual having a  
4 co-employment relationship with a professional employer  
5 organization and a client company who meets all of the following  
6 criteria:

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



1 "Department" means the department of labor and industrial  
2 relations.

3 "Director" means the director of labor and industrial  
4 relations.

5 "Owner controlled insurance program" means an insurance  
6 policy or package of policies purchased by the developer or  
7 owner of a construction project that provides one or more types  
8 of insurance coverage for the owner or developer, any  
9 contractors or subcontractors who perform work for the owner or  
10 developer, and employees of the owner, developer, contractor, or  
11 subcontractor.

12 "Professional employer agreement" means a written contract  
13 by and between a client company and a professional employer  
14 organization that provides for the following:

- 15 (1) The co-employment of covered employees; and  
16 (2) The allocation of employer rights and obligations  
17 between the client company and the professional  
18 employer organization with respect to the covered  
19 employees.

20 "Professional employer organization":

- 21 (1) Means any person engaged in the business of providing  
22 professional employer services. A person engaged in



1 the business of providing professional employer  
2 services shall be subject to this chapter regardless  
3 of whether the person uses such a term or conducts  
4 business expressly as a "professional employer  
5 organization", "PEO", "staff leasing company",  
6 "registered staff leasing company", "employee leasing  
7 company", "administrative employer", or any other such  
8 name; and

9 (2) Shall not include any of the following:

10 (A) Arrangements wherein a person, whose principal  
11 business activity is not entering into  
12 professional employer arrangements and who does  
13 not hold itself out as a professional employer  
14 organization, shares employees with a commonly-  
15 owned company within the meaning of sections  
16 414(b) and (c) of the Internal Revenue Code of  
17 1986, as amended;

18 (B) Independent contractor arrangements by which a  
19 person assumes responsibility for the product  
20 produced or service performed by the person or  
21 the person's agents and retains and exercises  
22 primary direction and control over the work



1 performed by the individuals whose services are  
2 supplied under those arrangements; or

3 (C) The providing of temporary help services.

4 "Professional employer services" means the service of  
5 entering into co-employment relationships under this chapter in  
6 which all or a majority of the employees providing services to a  
7 client company or to a division or work unit of the client  
8 company are covered employees.

9 "Temporary help services" means an arrangement by which a  
10 person recruits and hires its own employees and:

11 (1) Finds other organizations that need the services of  
12 those employees;

13 (2) Assigns those employees to perform work or services  
14 for other organizations to support or supplement the  
15 other organizations' workforces or to provide  
16 assistance in special work situations including but  
17 not limited to employee absences, skill shortages,  
18 seasonal workloads, or special assignments or  
19 projects; and

20 (3) Customarily attempts to reassign the employees to  
21 successive placements with other organizations at the  
22 end of each assignment.



1           §   -2   Duties of the department.   (a)   The department  
2 shall certify that a professional employer organization is in  
3 compliance with this chapter if a professional employer  
4 organization meets all the requirements of this chapter.

5           (b)   The department shall maintain a list that is readily  
6 available to the public by electronic or other means of  
7 professional employer organizations certified under this  
8 chapter.

9           (c)   The department, to the extent practicable, shall  
10 permit the acceptance of electronic filings, including  
11 applications, documents, reports, and other filings required  
12 under this chapter. Rules permitting electronic filing shall  
13 provide for the acceptance of electronic filings and other  
14 assurance by a bonded, independent, and qualified assurance  
15 organization approved by the director; provided that the  
16 assurance organization provides satisfactory assurance of  
17 compliance acceptable to the department consistent with the  
18 requirements of this chapter and rules adopted pursuant to this  
19 chapter. Use of an approved assurance organization by an  
20 applicant shall be optional. Nothing in this subsection shall  
21 limit or change the department's authority to register or



1 terminate registration of a professional employer organization  
2 or to investigate or enforce this chapter.

3 (d) All records, reports, and other information obtained  
4 from a professional employer organization pursuant to this  
5 chapter, except to the extent necessary for the proper  
6 administration of this chapter by the department, shall be  
7 confidential and shall not be published or made available for  
8 public inspection; provided that information shall be made  
9 available to public employees in the performance of their public  
10 duties.

11 (e) The department, in accordance with chapter 91, shall  
12 adopt rules and prescribe forms necessary to promote the  
13 efficient administration of this chapter.

14 § -3 **Certification requirements.** (a) No person shall  
15 provide, advertise, or otherwise hold oneself out as providing  
16 professional employer services in this State, unless the person  
17 has been certified as compliant with this chapter by the  
18 department pursuant to section -2.

19 (b) Each applicant for certification under this chapter  
20 shall provide the department with the following information:

21 (1) The name or names under which the professional  
22 employer organization conducts business;



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





1 senior executive officer of the professional employer  
2 organization;

3 (7) Proof of valid workers' compensation coverage in  
4 compliance with all laws of this State;

5 (8) Proof of compliance with the Hawaii temporary  
6 disability insurance law;

7 (9) Proof of compliance with the Hawaii prepaid health  
8 care act as regards all covered employees of the  
9 professional employer organization;

10 (10) Proof of compliance with the Hawaii employment  
11 security law, including payment of any applicable  
12 employer liability pursuant to chapter 383; and

13 (11) A financial statement demonstrating that the financial  
14 condition of the professional employer organization is  
15 compliant with section -5. At the time of  
16 application for or renewal of a license, the applicant  
17 shall submit the most recent audit of the applicant,  
18 which shall not be older than thirteen months.

19 Thereafter, a professional employer organization or  
20 professional employer organization group shall file a  
21 succeeding audit within one hundred and eighty days  
22 after the last day of each fiscal year of the



1 professional employer organization or professional  
2 employer organization group and shall file subsequent  
3 audits on an annual basis according to a schedule  
4 determined by the department. An applicant may apply  
5 for an extension with the department; provided that  
6 the request shall be accompanied by a letter from the  
7 auditor stating the reasons for the delay and the  
8 anticipated audit completion date. A professional  
9 employer organization that provides proof to the  
10 agency that it operated in the State prior to  
11 January 1, 2011, shall have twenty-four months from  
12 January 1, 2011, to submit a financial audit as  
13 specified in this section.

14 The financial statement required by this section shall  
15 be prepared in accordance with generally accepted  
16 accounting principles, shall be audited by an  
17 independent certified public accountant licensed to  
18 practice in the State, and shall be without  
19 qualification as to the going concern status of the  
20 professional employer organization. A professional  
21 employer organization without sufficient operating  
22 history to have audited financial statements based



1           upon at least twelve months of operating history shall  
2           present financial statements reviewed by a certified  
3           public accountant.

4           (c) Each professional employer organization operating  
5           within this State as of January 1, 2011, shall complete its  
6           initial certification not later than one hundred and eighty days  
7           after January 1, 2011. The initial registration shall be valid  
8           until one hundred and eighty days after the end of the  
9           professional employer organization's first fiscal year under  
10          registration; provided that the professional employer  
11          organization's first fiscal year ends more than one year after  
12          January 1, 2010.

13          Each professional employer organization initiating  
14          operations in this State on or after January 1, 2011, shall  
15          complete its initial certification prior to commencement of  
16          operations within this State.

17          (d) Within one hundred and eighty days after the end of a  
18          professional employer organization's fiscal year, the  
19          professional employer organization shall apply for  
20          recertification by providing all of the information required by  
21          this section to the department. A registrant's existing



1 registration shall remain in effect during the pendency of an  
2 application for recertification.

3       §   -4   **Fees.** Upon filing an initial registration  
4 statement under this chapter, a professional employer  
5 organization shall pay to the department an initial registration  
6 fee not to exceed \$1,500 to cover the administrative costs  
7 associated with certification. Upon each annual renewal of a  
8 registration statement filed pursuant to this chapter, a  
9 professional employer organization shall pay a renewal fee not  
10 to exceed \$1,500. The fee for electronic filing shall be the  
11 same as for paper filing.

12       §   -5   **Financial capability.** (a) All professional  
13 employer organizations shall maintain positive working capital  
14 of no less than \$100,000 as defined by generally accepted  
15 accounting principles as reflected in the financial statements  
16 submitted to the department for annual certification. As an  
17 alternative, a professional employer organization may provide to  
18 the department a bond, irrevocable letter of credit, or  
19 securities with a minimum market value in an amount sufficient  
20 to cover the difference between the professional employer  
21 organization's actual working capital and the amount required by  
22 this section.



1 (b) A bond provided pursuant to this section shall be held  
2 by a depository designated by the department and shall be of  
3 sufficient amount to secure the payment by the professional  
4 employer organization of all taxes, wages, benefits, or other  
5 entitlements with respect to covered employees. A professional  
6 employer organization that provides proof to the department that  
7 it has been operating in the State prior to January 1, 2011  
8 shall have twenty-four months from January 1, 2011 to comply  
9 with this section.

10 § -6 **Co-employment relationship.** In a co-employment  
11 relationship:

12 (1) The professional employer organization is entitled to  
13 enforce only those employer rights, and is subject to  
14 only those obligations, specifically allocated to the  
15 professional employer organization by the professional  
16 employer agreement and this chapter;

17 (2) The client company is entitled to enforce those  
18 rights, and is obligated to provide and perform those  
19 employer obligations, allocated to the client company  
20 by the professional employer agreement and this  
21 chapter; and



1           (3) The client company is entitled to enforce any right  
2           and is obligated to perform any obligation of an  
3           employer not specifically allocated to the  
4           professional employer organization by the professional  
5           employer agreement or this chapter.

6           § -7 **General requirements.** (a) Except as otherwise  
7 provided in this chapter, the co-employment relationship between  
8 the client company and the professional employer organization  
9 and between each co-employer and each covered employee shall be  
10 governed by the professional employer agreement. Each  
11 professional employer agreement shall specify the following:

12           (1) The professional employer organization shall be  
13           responsible to pay wages to covered employees; to  
14           withhold, collect, report and remit payroll-related  
15           and unemployment taxes; and, to the extent the  
16           professional employer organization has assumed  
17           responsibility in the professional employer agreement,  
18           to make payments for employee benefits for covered  
19           employees. As used in this section, the term "wages"  
20           does not include any obligation between a client  
21           company and a covered employee for payments beyond or  
22           in addition to the covered employee's salary, draw, or



1 regular rate of pay, such as bonuses, commissions,  
2 severance pay, deferred compensation, profit sharing,  
3 vacation leave, sick leave, or other compensation for  
4 paid time off, unless the professional employer  
5 organization has expressly agreed to assume liability  
6 for those payments in the professional employer  
7 agreement; and

8 (2) The professional employer organization shall have a  
9 right to hire, discipline, and terminate a covered  
10 employee as may be necessary to fulfill the  
11 professional employer organization's responsibilities  
12 under this chapter and the professional employer  
13 agreement. The client company shall have a right to  
14 hire, discipline, and terminate a covered employee.

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

17 (1) A client company shall be solely responsible for the  
18 quality, adequacy, or safety of the goods or services  
19 produced or sold in the client company's business;

20 (2) A client company shall be solely responsible for  
21 directing, supervising, training, and controlling the  
22 work of the covered employees with respect to the



1 business activities of the client company and shall be  
2 solely responsible for the acts, errors, or omissions  
3 of the covered employees with regard to those  
4 activities;

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

10 (4) A professional employer organization shall not be  
11 liable for the acts, errors, or omissions of a client  
12 company or a covered employee of the client company  
13 when the covered employee acts under the express  
14 direction and control of the client company;

15 (5) Nothing in this subsection shall serve to limit any  
16 contractual liability or obligation specifically  
17 provided in the written professional employer  
18 agreement; and

19 (6) A covered employee is not, solely as the result of  
20 being a covered employee of a professional employer  
21 organization, an employee of the professional employer  
22 organization for purposes of general liability





1 insurance, fidelity bonds, surety bonds, employer's  
2 liability exclusive of workers' compensation, or  
3 liquor liability insurance carried by the professional  
4 employer organization unless the covered employees are  
5 included by specific reference in the professional  
6 employer agreement and applicable prearranged  
7 employment contract, insurance contract, or bond.

8 (c) A temporary help services company may provide  
9 professional employer services provided that the temporary help  
10 services company meets the requirements of this chapter.

11 § -8 **Workers' compensation.** (a) A certified  
12 professional employer organization shall have the sole  
13 responsibility to obtain workers' compensation coverage that  
14 complies with applicable laws for covered employees. Workers'  
15 compensation coverage for covered employees may be obtained by  
16 either one master policy issued to the professional employer  
17 organization by a carrier authorized to do business in this  
18 State, or by the professional employer organization through a  
19 duly authorized self insurance program.

20 (b) A client company may sponsor coverage for covered  
21 employees under its own workers' compensation policy only



1 through a duly authorized self insurance program or through  
2 coverage under an owner controlled insurance program.

3 (c) Upon the termination of a professional employer  
4 agreement, a client company's experience rating will be  
5 determined as follows:

6 (1) If the client's relationship with the professional  
7 employer organization is terminated less than sixty  
8 months after its inception, the client company shall  
9 revert to the experience rating used prior to the  
10 relationship; and

11 (2) If the client company's relationship with the  
12 professional employer organization is terminated sixty  
13 months or more after its inception, the client company  
14 shall assume a new employer experience rating.

15 (d) The protection of the exclusive remedy provision of  
16 the workers' compensation law shall apply to the professional  
17 employer organization, the client company, and to all covered  
18 employees and other employees of the client irrespective of  
19 which co-employer obtains the workers' compensation coverage.  
20 Exclusive remedy protection shall extend for both coverage A and  
21 coverage B of a workers' compensation policy.



1           §   -9 **Benefit plans.** (a) A client company and a  
2 professional employer organization shall each be deemed an  
3 employer for purposes of sponsoring retirement and welfare  
4 benefit plans for covered employees.

5           (b) If a professional employer organization offers its own  
6 covered employees a health benefit plan that is not fully  
7 insured by an insurer authorized to conduct the business of  
8 insurance in the State of Hawaii, that health benefit plan  
9 shall:

- 10           (1) Comply with the Hawaii prepaid healthcare act;
- 11           (2) Be administered by an administrator licensed under  
12           chapter 431;
- 13           (3) Hold all plan assets, including participant  
14           contributions, in a trust account;
- 15           (4) Provide sound reserves for the health benefit plan as  
16           determined using generally accepted actuarial  
17           standards as set forth in an actuarial opinion filed  
18           with the insurance commissioner and prepared and  
19           signed by a qualified actuary who is a member in good  
20           standing of the American Academy of Actuaries;
- 21           (5) Annually submit current audited financial statements  
22           to the insurance commissioner;



- 1           (6) At the discretion of the insurance commissioner,  
2           possess a written commitment, binder, or policy for  
3           stop-loss insurance that:
- 4           (A) Is issued by an insurer authorized to conduct the  
5           business of insurance in Hawaii; and
- 6           (B) Meets specific and total coverage requirements  
7           established by the insurance commissioner;
- 8           (7) Be subject to audit for compliance with the  
9           requirements of this section by the insurance division  
10          as determined by the insurance commissioner; and
- 11          (8) Provide written notice to each covered employee  
12          participating in the health benefit plan that the  
13          health benefit plan is self-insured or not fully  
14          insured and is subject to the federal Employee  
15          Retirement Income Security Act of 1974, 29 U.S.C. 1001  
16          et seq.

17          § -10 **Unemployment compensation insurance.** (a) For  
18 purposes of unemployment insurance under chapter 383, covered  
19 employees of a certified professional employer organization are  
20 considered the employees of the professional employer  
21 organization which shall be responsible for the payment of  
22 contributions, penalties, and interest on wages paid to its



1 covered employees during the term of the applicable professional  
2 employer agreement.

3 (b) Covered employees of a certified professional employer  
4 organization shall be eligible to receive unemployment  
5 compensation benefits pursuant to chapter 383. All covered  
6 employee benefits shall be drawn against the unemployment  
7 insurance account of the professional employer organization.

8 (c) The professional employer organization shall report  
9 and pay all required contributions to the unemployment  
10 compensation fund using its own state employer account number  
11 and contribution rate.

12 § -11 Enforcement. (a) It shall be a violation of this  
13 chapter to:

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

20 (2) Knowingly provide false or fraudulent information to  
21 the department in conjunction with any registration,  
22 renewal, or report required pursuant to this 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) Conviction of a crime involving fraud or deceit that  
4 relates to the operation of a professional employer  
5 organization;

6 (2) Knowingly making a material misrepresentation to the  
7 department or other governmental agency; or

8 (3) Wilfully violating this chapter or any order or rule  
9 of the department pursuant to this chapter.

10 (c) If the director finds, after notice and an opportunity  
11 to be heard, that a professional employer organization or a  
12 controlling person of a professional employer organization has  
13 violated this chapter, the director shall impose one or more of  
14 the following penalties:

15 (1) Denial of certification;

16 (2) Revocation, restriction, or refusal to renew  
17 certification;

18 (3) An administrative fine in an amount not to exceed  
19 \$1,000 for each violation;

20 (4) Conditions on a certification under this chapter; or

21 (5) Order the immediate cessation of operations.



1           §   -12   Conflict with chapter 373K. In case of any  
2 conflict between this chapter and chapter 373K, this chapter  
3 shall prevail."

4           SECTION 2. Section 373K-2, Hawaii Revised Statutes, is  
5 amended by amending subsection (a) to read as follows:

6           "(a) Where any client company uses the services of  
7 assigned employees and co-employs assigned employees with a  
8 professional employment organization, the client company and the  
9 professional employment organization, with respect to the  
10 assigned employees, shall not be exempt from the requirements of  
11 any federal, state, or county law, including labor or employment  
12 laws, collective bargaining rights, anti-discrimination  
13 provisions, or other laws with respect to the protection and  
14 rights of employees, including chapters 377 and 378, that would  
15 apply to the assigned employees if the assigned employees were  
16 employees of the client company alone, and were not co-employees  
17 of the professional employment organization.

18           These employee rights shall not be abrogated by any  
19 contract or agreement between the client company and the  
20 professional employment organization, or the professional  
21 employment organization and the assigned employee, which  
22 contains terms or conditions that could not be lawfully



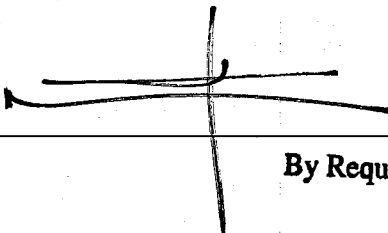
1 contained in a contract or agreement directly between the client  
 2 company and the assigned employee in which no professional  
 3 employment organization is involved. [~~Notwithstanding any~~  
 4 ~~statute, local ordinance, executive order, rule, or regulation~~  
 5 ~~to the contrary, where the laws, rights, and protections~~  
 6 ~~referred to in this section define or require a determination of~~  
 7 ~~the "employer",]~~ For purposes of chapter 237, the employer shall  
 8 be deemed to be the client company and not the professional  
 9 employment organization. The department of labor and industrial  
 10 relations shall notify the department of taxation in writing of  
 11 any violation of this subsection."

12 SECTION 3. Statutory material to be repealed is bracketed  
 13 and stricken. New statutory material is underscored.

14 SECTION 4. This Act shall take effect on January 1, 2011.

15

INTRODUCED BY:

  
 \_\_\_\_\_  
 By Request





**Report Title:**

Professional Employer Organizations

**Description:**

Requires professional employer organizations to become certified by the department labor and industrial relations. Allocates responsibility for compliance with relevant labor laws between professional employer organizations and client companies. Establishes regulatory requirements.

*The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.*

