
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:

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



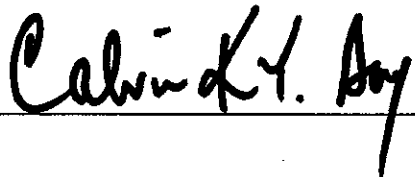
1 contained in a contract or agreement directly between the client
 2 company and the assigned employee in which no professional
 3 employment organization is involved. [~~Notwithstanding any~~
 4 ~~statute, local ordinance, executive order, rule, or regulation~~
 5 ~~to the contrary, where the laws, 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

JAN 21 2010



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.

