

Senate Substitute for HOUSE BILL No. 2077

AN ACT concerning employment; creating the professional employer organization registration act.

Be it enacted by the Legislature of the State of Kansas:

Section 1. The provisions of sections 1 through 11, and amendments thereto, shall be known and may be cited as the professional employer organization registration act.

Sec. 2. As used in sections 1 through 11, and amendments thereto:

(a) “Client” means any person who enters into a professional employer agreement with a professional employer organization.

(b) “Co-employer” means either a professional employer organization or a client.

(c) “Co-employment relationship” means a relationship which is intended to be an ongoing relationship rather than a temporary or project specific relationship, and wherein the rights, duties and obligations of an employer which arise out of an employment relationship have been allocated between the employer and a professional employer organization as co-employers pursuant to a professional employer agreement entered into in accordance with the provisions of sections 1 through 11, and amendments thereto. Under a co-employment relationship:

(1) The professional employer organization is entitled to enforce only those employer rights, and is subject to only those employer obligations, that are specifically allocated to the professional employer organization by the professional employer agreement or by the provisions of sections 1 through 11, and amendments thereto;

(2) the client is entitled to enforce those employer rights, and is obligated to provide and perform those employer obligations, that are allocated to such client by the professional employer agreement or by the provisions of sections 1 through 11, and amendments thereto; and

(3) the client also is entitled to enforce any employer right, and is obligated to perform any obligation of an employer, that is not specifically allocated to the professional employer organization by the professional employer agreement or by the provisions of sections 1 through 11, and amendments thereto.

(d) “Commissioner” means the commissioner of insurance.

(e) (1) “Covered employee” means an individual having a co-employment relationship with a professional employer organization and a client, who has received written notice of the co-employment relationship with the professional employer organization and the client, and such co-employment relationship was entered into pursuant to a professional employer agreement entered into in accordance with the provisions of sections 1 through 11, and amendments thereto.

(2) The term “covered employee” shall include individuals who are officers, directors, shareholders, partners or managers of the client, or members of a limited liability company that is a client, if:

(A) The professional employer organization and the client have expressly agreed in the professional employer agreement that such individuals are covered employees;

(B) such individuals satisfy the provisions of paragraph (1); and

(C) such individuals act as operational managers or perform day-to-day operational services for the client.

(f) “Department” means the department of insurance.

(g) “Person” means any individual, partnership, corporation, limited liability company, association or any other form of legally recognized entity.

(h) “Professional employer agreement” means a written contract entered into between a client and a professional employer organization that provides:

(1) For the co-employment of covered employees;

(2) for the allocation of employer rights and obligations between the client and the professional employer organization with respect to covered employees; and

(3) for the professional employer organization and the client to assume the responsibilities required by the provisions of sections 1 through 11, and amendments thereto.

(i) (1) “Professional employer organization” means any person engaged in the business of providing professional employer services. A person engaged in the business of providing professional employer services

shall be considered a “professional employer organization” regardless of such person’s use of the term staff leasing company, administrative employer, employee leasing company or any name other than professional employer organization in describing such person’s business.

(2) For purposes of sections 1 through 11, and amendments thereto, the following shall not be considered a “professional employer organization,” or as providing “professional employment services”:

(A) Arrangements wherein a person, whose principal business activity is not entering into professional employer agreements, and which does not hold itself out as a professional employer organization, shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the internal revenue code;

(B) independent contractor arrangements by which a person assumes responsibility for the product produced or service performed by such person or such person’s agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under such arrangements; and

(C) providing temporary help services.

(j) “Professional employer group” means two or more professional employer organizations that are majority owned or commonly controlled by the same entity, parent or controlling person.

(k) “Professional employer services” means the service of entering into co-employment relationships.

(l) “Registrant” means a professional employer organization registered under the provisions of sections 1 through 11, and amendments thereto.

(m) “Temporary help services” means services consisting of a person:

(1) Recruiting and hiring such person’s own employees;

(2) locating other organizations that need the services of such employees;

(3) assigning such employees:

(A) To perform work at or services for such other organizations to support or supplement such other organizations’ workforces;

(B) to provide assistance in special work situations, including employee absences, skill shortages or seasonal workloads; or

(C) to perform special assignments or projects; and

(4) customarily attempting to reassign such employees to other organizations when such employees finish an assignment.

(n) “Working capital” means current assets less current liabilities, as such terms are used by generally accepted accounting principles.

Sec. 3. (a) Nothing in the provisions of sections 1 through 11, and amendments thereto, or in any professional employer agreement shall:

(1) Affect, modify or amend any collective bargaining agreement, or the rights or obligations of any client, professional employer organization or covered employee under the national labor relations act, 29 U.S.C. § 151 *et seq.*, or the railway labor act, 45 U.S.C. § 151 *et seq.*;

(2) diminish, abolish or remove the rights of covered employees as to a client, or the obligations of such client to a covered employee, whether existing prior to or after the effective date of the professional employer agreement, including, but not limited to, rights and obligations arising from civil rights laws guaranteeing nondiscrimination in employment practices;

(3) 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, nor prohibit or amend any contractual relationship or restrictive covenant that is entered into subsequently between a client and a covered employee. A professional employer organization shall have no responsibility or liability in connection with, or arising out of, any such existing or new contractual relationship or restrictive covenant unless the professional employer organization has specifically agreed otherwise in writing; or

(4) create any new or additional enforceable right of a covered employee against a professional employer organization that is not specifically provided by the professional employer agreement or by the provisions of sections 1 through 11, and amendments thereto.

(b)(1) Nothing in the provisions of sections 1 through 11, and amendments thereto, or in any professional employer agreement shall affect,

modify or amend any local, state or federal licensing, registration or certification requirement applicable to any client or covered employee.

(2) A covered employee who is required to be licensed, registered or certified pursuant to local, state or federal law or rules and regulations shall be deemed to be an employee solely of the client for purposes of any such license, registration or certification requirement.

(3) A professional employer organization shall not be deemed to engage 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 co-employment relationship with a client or covered employee who is subject to such requirements or regulations.

(4) A client shall have the sole right to direct and control the professional or licensed activities of covered employees and of the client's business. Such covered employees and clients shall remain subject to regulation by the regulatory or governmental entity responsible for licensing, registration or certification of such covered employees or clients.

(c) With respect to a bid, contract, purchase order or agreement entered into with the state or a political subdivision of the state, a client's status or certification as a small, minority-owned, disadvantaged or woman-owned business enterprise, a veteran or service-disabled veteran small business or as a historically underutilized business, shall not be affected because the client has entered into a professional employer agreement with a professional employer organization, or uses the services of a professional employer organization.

(d) (1) With respect to any state or local economic development or incentive program, the client shall have access to such program and the client shall not be adversely affected or disqualified because the client:

- (A) Has entered into a professional employer agreement; or
- (B) uses the services of a professional employer organization.

(2) If a state or local economic development or incentive program has any employee-related requirement necessary to qualify for participation in such program, the employees of the client shall be deemed to be employees for the purpose of satisfying such requirement.

Sec. 4. (a) A person engaged in the business of providing professional employer services pursuant to co-employment relationships in which all or a majority of the employees of a client are covered employees shall be registered pursuant to this section.

(b) A person who is not registered pursuant to this section shall not offer or provide professional employer services in this state, and shall not use the names PEO, professional employer organization, staff leasing company, employee leasing company, administrative employer or any other name or title representing professional employer services.

(c) Each applicant for registration shall submit an application to the commissioner in such form and manner as prescribed by the commissioner. The application shall contain the following information:

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

(2) the address of the principal place of business of the professional employer organization, and the address of each office the professional employer organization maintains in this state;

(3) the professional employer organization's taxpayer or employer identification number;

(4) a list, by jurisdiction, of each name under which the professional employer organization has operated in the preceding five years, including any alternative names, names of predecessors and, if known, successor business entities;

(5) a statement of ownership, which shall include the name and evidence of the business experience of any person that, individually, or acting in concert with one or more other persons, owns or controls, directly or indirectly, 15% or more of the equity interest of the professional employer organization;

(6) a statement of management, which shall include the name and evidence of the business experience of any individual who serves as president, chief executive officer or otherwise has the authority to act as senior executive officer of the professional employer organization; and

(7) a financial statement setting forth the financial condition of the

professional employer organization or professional employer group, which shall comply with the provisions of subsection (h).

(d) (1) Each professional employer organization operating within this state as of the effective date of this act shall complete its initial registration not later than 60 days after the effective date of this act. Such initial registration shall be valid until 60 days from the end of the professional employer organization's first fiscal year that is more than one year after the effective date of this act.

(2) Each professional employer organization not operating within this state as of the effective date of this act shall complete its initial registration prior to initiating operations within this state. If a professional employer organization not registered in this state becomes aware that an existing client, not based in this state, has employees and operations in this state, the professional employer organization shall either decline to provide professional employer services for those employees, or notify the commissioner within five business days of the professional employer organization's knowledge of this fact and file a limited registration application pursuant to subsection (g), or a full registration if there are more than 50 covered employees employed by such client. The commissioner may issue an interim operating permit for the period of time the application is pending if the professional employer organization is currently registered or licensed by another state, and the commissioner determines it is in the best interests of the potential covered employees.

(e) Within 60 days after the end of a registrant's fiscal year, such registrant shall renew its registration by notifying the commissioner of any changes in the information provided in such registrant's most recent registration or renewal. A registrant's existing registration shall remain in effect for the period of time the renewal application is pending.

(f) Professional employer organizations in a professional employer group may satisfy any reporting and financial requirements of this section on a combined or consolidated basis, provided that each member of the professional employer group guarantees the financial capacity obligations required by section 6, and amendments thereto, of each other member of the professional employer group. In the case of a professional employer group that submits a combined or consolidated audited financial statement, including entities that are not professional employer organizations or that are not in the professional employer group, the controlling entity of the professional employer group under the consolidated or combined statement must guarantee the obligations of the professional employer organizations in the professional employer group.

(g) (1) A professional employer organization is eligible for a limited registration if such professional employer organization:

(A) Submits a written request for limited registration in such form and manner as prescribed by the commissioner;

(B) is domiciled outside this state, and is licensed or registered as a professional employer organization in another state;

(C) does not maintain an office in this state, or directly solicit clients located or domiciled within this state; and

(D) does not have more than 50 covered employees employed or domiciled in this state on any given day.

(2) A limited registration is valid for one year, and may be renewed.

(3) A professional employer organization requesting limited registration under this subsection shall provide the commissioner with such information and documentation as required by the commissioner to show that the professional employer organization qualifies for a limited registration.

(4) The provisions of section 6, and amendments thereto, shall not apply to applicants for limited registration.

(h) At the time of initial registration, the applicant shall submit the most recent audit of the applicant or such applicant's parent holding company, which audit shall not be older than 13 months. Thereafter, a professional employer organization or professional employer group shall file on an annual basis, within 60 days after the end of the professional employer organization's or parent holding company's fiscal year, a succeeding audit. An applicant may apply to the commissioner for an extension of time to submit such audit, but any such request shall be accompanied by a letter from the auditor stating the reasons for the delay and the anticipated audit completion date. For the initial application, if the closing

date of the audited financial statements required by this section is older than three months from the date of the application, the application also shall include updated, though unaudited, financial statements for the most recent quarter. 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 professional employer organization. A professional employer group may submit combined or consolidated audited financial statements to meet the requirements of this section. A professional employer organization that has not had sufficient operating history to have audited financial statements based upon at least 12 months of operating history shall meet the financial capacity requirements of subsection (f) and present financial statements reviewed by a certified public accountant.

(i) The department shall maintain a list of professional employer organizations registered under this section, and such list shall be readily available to the public by electronic or other means.

(j) The commissioner, to the extent practical, shall permit the acceptance of electronic filings, including applications, documents, reports and other filings required by the commissioner under this section. The commissioner may provide for the acceptance of electronic filings and other assurance documents by an independent and qualified entity approved by the commissioner that provides satisfactory assurance of compliance acceptable to the commissioner consistent with, or in lieu of, the requirements of this section and section 6, and amendments thereto. The commissioner shall permit a professional employer organization to authorize such entity approved by the commissioner to act on the professional employer organization's behalf in complying with the registration requirements of this section, including electronic filings of information and payment of registration fees. Use of such an approved entity shall be optional and not mandatory for a registrant. Nothing in this subsection shall limit or change the commissioner's authority to register or terminate registration of a professional employer organization, or to investigate or enforce any provision of sections 1 through 11, and amendments thereto.

Sec. 5. (a) Upon filing an initial application for registration, a professional employer organization shall pay a fee in an amount not to exceed \$1,000.

(b) Upon filing a renewal application for registration, a professional employer organization shall pay a fee in an amount not to exceed \$500.

(c) Upon filing an initial or a renewal application for limited registration, a professional employer organization shall pay a fee in an amount not to exceed \$500.

(d) Upon filing an initial or a renewal application for registration, a professional employer group shall pay a fee in an amount determined by the commissioner and adopted by rules and regulations.

(e) The commissioner shall adopt rules and regulations establishing the fees to be charged pursuant to this section in such amounts as deemed reasonably necessary by the commissioner for the administration of the provisions of sections 1 through 11, and amendments thereto, subject to the limitations on fee amounts set forth in subsections (a), (b) and (c).

(f) There is hereby created the professional employer organization fee fund. The commissioner shall remit all moneys received from fees or penalties to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the professional employer organization fee fund. All expenditures from the professional employer organization fee fund shall be for the purposes of the administration of the provisions of sections 1 through 11, and amendments thereto, and shall be made in accordance with appropriation acts upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the commissioner, or the commissioner's designee.

Sec. 6. Except as provided by subsections (g) and (j) of section 4, and amendments thereto, each professional employer organization, or collectively each professional employer group shall either:

(a) Maintain positive working capital upon registration as reflected in

the financial statements submitted to the commissioner with the initial registration application and each renewal application; or

(b) for a professional employer organization or professional employer group that does not have sufficient positive working capital as required in subsection (a), submit a bond, irrevocable letter of credit or securities with a minimum market value in an amount equal to the sum of the amount that would be necessary for such professional employer organization or professional employer group to comply with subsection (a) plus \$100,000 to the commissioner at such time as the professional employer organization or professional employer group does not have sufficient working capital. Such bond shall be held by a depository designated by the commissioner securing payment by the professional employer organization of all taxes, wages, benefits or other entitlement due to or with respect to covered employees, if the professional employer organization does not make such payments when due.

Sec. 7. (a) No person shall knowingly enter into a co-employment relationship in which less than a majority of the employees of the client in this state are covered employees, or in which less than half of the payroll of the client in this state is attributable to covered employees.

(b) Except as otherwise provided in sections 1 through 11, and amendments thereto, or in the professional employer agreement, in each co-employment relationship:

(1) The client shall be entitled to exercise all rights and shall be obligated to perform all duties and responsibilities otherwise applicable to an employer in an employment relationship;

(2) the professional employer organization shall be entitled to exercise only those rights and obligated to perform only those duties and responsibilities specifically required by the provisions of sections 1 through 11, and amendments thereto, or in the professional employer agreement. The rights, duties and obligations of the professional employer organization as co-employer with respect to any covered employee shall be limited to those arising pursuant to the professional employer agreement or as required by the provisions of sections 1 through 11, and amendments thereto, during the term of co-employment by the professional employer organization of such covered employee; and

(3) the client retains the exclusive right to direct and control the covered employees as is necessary to conduct the client's business, to discharge any of the client's fiduciary responsibilities or to comply with any licensure requirements applicable to the client or to the covered employees.

(c) Except as otherwise provided in sections 1 through 11, and amendments thereto, the co-employment relationship between the client and the professional employer organization, and between each co-employer and each covered employee, shall be governed by the professional employer agreement. Each professional employer agreement shall include the following:

(1) The allocation of rights, duties and obligations as described in this section;

(2) that the professional employer organization shall have the responsibility to pay wages to covered employees, to withhold, collect, report and remit payroll-related and unemployment taxes and, to the extent the professional employer organization has assumed such responsibility in the professional employer agreement, to make payments for employee benefits for covered employees;

(3) that, in addition to the client's right to hire, discipline and terminate a covered employee, the professional employer organization shall have a right to hire, discipline and terminate a covered employee only as may be necessary to fulfill the professional employer organization's responsibilities under the provisions of sections 1 through 11, and amendments thereto, or the professional employer agreement.

(d) For purposes of this section, 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, such as bonuses, commissions, severance pay, deferred compensation, profit sharing or vacation, sick or other paid time off pay, unless the professional employer organization has expressly agreed to assume liability for such payments in the professional employer agreement.

(e) With respect to each professional employer agreement entered into by a professional employer organization, such professional employer organization shall provide written notice to each covered employee affected by such agreement. The professional employer organization shall provide and the client is required to post the following notices in a conspicuous place at the client's worksite:

(1) Notice of the general nature of the co-employment relationship between and among the professional employer organization, the client and such covered employees; and

(2) any notices required by the state relating to unemployment compensation and minimum wages.

(f) Except as otherwise provided in the professional employer agreement:

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

(2) a client shall be solely responsible for directing, supervising, training and controlling the work of the covered employees with respect to the business activities of the client and solely responsible for the acts, errors or omissions of the covered employees with regard to such activities;

(3) a client shall not be liable for the acts, errors or omissions of a professional employer organization, or of any covered employee of the client and a professional employer organization when such covered employee is acting under the express direction and control of the professional employer organization;

(4) nothing in this subsection shall limit any contractual liability or obligation specifically provided in a professional employer agreement;

(5) a covered employee is not, solely as the result of being a covered employee of a professional employer organization, an employee of the professional employer organization for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation or any other liability insurance carried by the professional employer organization unless the covered employee is included for such purposes by specific reference in the professional employer agreement and in any applicable prearranged employment contract, insurance contract or bond;

(6) a professional employer organization shall not sell, solicit or negotiate insurance on behalf of a client, covered employee or other employee of a client except through a person or entity licensed to do so pursuant to state law;

(7) a professional employer organization shall sponsor health and workers' compensation plans for its covered employees only on a fully insured basis from an insurance carrier admitted to do business in this state, and if any such health or workers' compensation policies are canceled or non-renewed, the professional employer organization shall so notify all clients affected within seven days that such clients no longer have health or workers' compensation insurance, as applicable on such client's employees;

(8) for purposes of this state or any county, municipality or other political subdivision thereof:

(A) Covered employees whose services are subject to sales tax shall be deemed the employees of the client for purposes of collecting and levying sales tax on the services performed by the covered employee, and nothing in the provisions of sections 1 through 11, and amendments thereto, shall be construed to relieve a client of any sales tax liability with respect to such client's goods or services;

(B) any tax or assessment imposed upon professional employer services or any business license or other fee which 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, workers' compensation, 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;

(C) any tax assessed or 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, and any benefits or monetary consideration that meets the requirements of mandates imposed on a client and that are received by covered employees through the professional employer organization either through payroll or through benefit plans sponsored by the professional employer organization shall be credited against the client's obligation to fulfill such mandates; and

(D) in the case of a tax or an assessment imposed or calculated upon the basis of total payroll, the professional employer organization shall be 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. 8. A client and a professional employer organization shall each be deemed an employer under the laws of this state for purposes of sponsoring retirement and employee welfare benefit plans for its covered employees.

Sec. 9. (a) It shall be a violation of the provisions of sections 1 through 11, and amendments thereto:

(1) For a person to knowingly offer or provide professional employer services or use the names PEO, professional employer organization, staff leasing, employee leasing, administrative employer or other title representing professional employer services without registering in accordance with section 4, and amendments thereto;

(2) for a person to knowingly provide false or fraudulent information to the commissioner in conjunction with any registration application, renewal or in any report required under the provisions of sections 4 or 6, and amendments thereto;

(3) for a person to knowingly make a material misrepresentation to the commissioner, or other governmental agency to which such person is required to submit a report or information;

(4) for a professional employer organization or a controlling person of a professional employer organization to be convicted of a crime:

(A) That relates to the operation of a professional employer organization;

(B) that relates to the ability of the professional employer organization or a controlling person of a professional employer organization to operate a professional employer organization; or

(C) pursuant to 18 U.S.C. § 1033; or

(5) for a person to willfully violate any provision of sections 1 through 11, and amendments thereto, or any rule or regulation adopted by the commissioner pursuant thereto.

(b) Upon a finding, and after notice and an opportunity for a hearing, that a professional employer organization, or a controlling person of a professional employer organization, or a person offering professional employer services has committed a violation under this section, the commissioner may:

(1) Deny the application for registration;

(2) revoke, restrict or refuse to renew a registration;

(3) impose a civil fine in an amount not to exceed \$10,000 for each material violation of the provisions of sections 1 through 11, and amendments thereto;

(4) place the registrant on probation for such period of time and subject to such conditions as the commissioner shall specify; or

(5) issue an order to cease and desist those professional employer organization activities and services specified in such order.

(c) The provisions of this section shall be subject to the Kansas judicial review act.

Sec. 10. The commissioner is hereby authorized to and shall adopt such rules and regulations as the commissioner deems necessary to implement and enforce the provisions of sections 1 through 11, and amendments thereto.

Sec. 11. If any provision of sections 1 through 11, and amendments thereto, or any portion thereof, is declared invalid or unconstitutional, such invalidity shall not affect the validity or constitutionality of the remaining provisions of sections 1 through 11, and amendments thereto.

Sec. 12. This act shall take effect and be in force from and after January 1, 2014, and its publication in the statute book.

I hereby certify that the above BILL originated in the HOUSE, and was adopted by that body

HOUSE adopted
Conference Committee Report _____

Speaker of the House.

Chief Clerk of the House.

Passed the SENATE
as amended _____

SENATE adopted
Conference Committee Report _____

President of the Senate.

Secretary of the Senate.

APPROVED _____

Governor.