

Part 2

Coemployment Relationship and Professional Employer Services

31A-40-201 Enforceable rights and obligations.

- (1) In a coemployment relationship under a professional employer agreement:
 - (a) a professional employer organization:
 - (i) may only enforce a right of an employer that is specifically allocated to the professional employer organization under the professional employer agreement or this chapter; and
 - (ii) is subject only to an obligation of an employer specifically allocated to the professional employer organization by the professional employer agreement or this chapter; and
 - (b) a client:
 - (i) may enforce a right of an employer:
 - (A) allocated to the client in the professional employer agreement or this chapter; or
 - (B) not specifically allocated to the professional employer organization under the professional employer agreement or this chapter; and
 - (ii) is subject to an obligation of an employer:
 - (A) allocated to the client by the professional employer agreement or this chapter; or
 - (B) not specifically allocated to a professional employer organization by the professional employer agreement or this chapter.
- (2) A right or obligation of a professional employer organization as a coemployer of a covered employee is limited to a right or obligation arising pursuant to the professional employer agreement and this chapter during the term of coemployment of the covered employee by the professional employer organization.

Enacted by Chapter 318, 2008 General Session

31A-40-202 Professional employer agreement -- Specific responsibilities.

- (1) Except as specifically provided in this chapter, a coemployment relationship between a client and a professional employer organization, and between each coemployer and a covered employee, is governed by a professional employer agreement.
- (2)
 - (a) As used in this Subsection (2), unless a professional employer organization expressly agrees to assume liability for the payment in a professional employer agreement, the term "compensation to a covered employee" does not include an obligation between a client and a covered employee for a payment beyond or in addition to the covered employee's salary, draw, or regular rate of pay, such as:
 - (i) a bonus;
 - (ii) a commission;
 - (iii) severance pay;
 - (iv) deferred compensation;
 - (v) profit sharing; or
 - (vi) pay for vacation, sick, or other paid time off.
 - (b) A professional employer agreement shall include the following:
 - (i) the allocation of a right or obligation consistent with Section 31A-40-201;
 - (ii) a requirement that the professional employer organization shall:
 - (A) pay compensation to a covered employee; and
 - (B) withhold, collect, report, and remit one or more of the following:

- (I) a payroll-related tax; and
 - (II) an unemployment insurance contribution; and
 - (C) to the extent that the professional employer organization assumes responsibility in the professional employer agreement, make payments for an employee benefit of a covered employee;
 - (iii) that the professional employer organization has a right to hire, discipline, or terminate a covered employee to the extent necessary to fulfill the professional employer organization's obligations under the professional employer agreement and this chapter;
 - (iv) that the client has a right to hire, discipline, and terminate a covered employee; and
 - (v) the responsibility of the client or professional employer organization related to obtaining workers' compensation coverage for a covered employee in a manner consistent with Section 31A-40-209.
- (3) A professional employer organization shall provide written notice to a covered employee of the general nature of the coemployment relationship between and among the professional employer organization, the client, and the covered employee.
- (4)
- (a) Except to the extent otherwise expressly provided by the professional employer agreement:
 - (i) a client is solely responsible for the quality, adequacy, or safety of a good or service produced or sold in the client's business;
 - (ii) a client is solely responsible for directing, supervising, training, and controlling the work of a covered employee with respect to:
 - (A) a business activity of the client;
 - (B) the discharge of a fiduciary responsibility of the client; or
 - (C) compliance with a licensure, registration, or certification requirement applicable to the client or to the covered employee;
 - (iii) a client is solely responsible for an act, error, or omission of a covered employee with regard to a circumstance described in Subsection (4)(a)(ii);
 - (iv) a client is not liable for an act, error, or omission of:
 - (A) a professional employer organization; or
 - (B) a covered employee, if the covered employee is acting under the express direction and control of the professional employer organization; and
 - (v) a professional employer organization is not liable for an act, error, or omission of:
 - (A) a client; or
 - (B) a covered employee, if the covered employee is acting under the express direction and control of the client.
 - (b) This Subsection (4) may not be interpreted to limit a contractual liability or obligation specifically provided in a professional employer agreement.
 - (c)
 - (i) Unless the conditions of Subsection (4)(c)(ii) are met, 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 one or more of the following carried by the professional employer organization:
 - (A) general liability insurance;
 - (B) a fidelity bond;
 - (C) a surety bond;
 - (D) an employer liability that is not covered by workers' compensation; or
 - (E) liquor liability insurance.

- (ii) A covered employee is considered an employee of the professional employer organization for a purpose described in Subsection (4)(c)(i) if the covered employee is included by specific reference for that purpose in:
 - (A) the professional employer agreement; and
 - (B) a prearranged employment contract, insurance contract, or bond.

Enacted by Chapter 318, 2008 General Session

31A-40-203 Covered employee.

- (1)
 - (a) An individual is a covered employee of a professional employer organization if the individual is coemployed pursuant to a professional employer agreement subject to this chapter.
 - (b) An individual who is a covered employee under a professional employer agreement is a covered employee, whether or not the professional employer organization provides the notice required by Subsection 31A-40-202(3), the earlier of the day on which:
 - (i) the employee is first compensated by the professional employer organization; or
 - (ii) the client notifies the professional employer organization of a new hire.
- (2) An individual who is an officer, director, shareholder, partner, or manager of a client is a covered employee:
 - (a) to the extent that the client and the professional employer organization expressly agree in the professional employer agreement that the individual is a covered employee;
 - (b) if the conditions of Subsection (1) are met; and
 - (c) if the individual acts as an operational manager or performs day-to-day an operational service for the client.

Amended by Chapter 290, 2014 General Session

Amended by Chapter 300, 2014 General Session

31A-40-204 Rights and obligations unaffected -- Licensed, registered, or certified occupations or professions.

- (1) This chapter does not and a professional employer agreement may not affect, modify, or amend a:
 - (a) collective bargaining agreement; or
 - (b) right or obligation of a client, professional employer organization, or covered employee under:
 - (i) the federal National Labor Relations Act, 29 U.S.C. Sec. 151 et seq.;
 - (ii) the federal Railway Labor Act, 45 U.S.C. Sec. 151 et seq.; or
 - (iii) a state law similar to a federal law described in this Subsection (1)(b).
- (2)
 - (a) A professional employer agreement may not:
 - (i) diminish, abolish, or remove a right of a covered employee to a client or an obligation of the client to a covered employee that exists on or before the day on which the professional employer agreement takes effect;
 - (ii) affect, modify, or amend a contractual relationship or restrictive covenant between a covered employee and a client in effect on the day on which the professional employer agreement takes effect; or
 - (iii) prohibit or amend a contractual relationship or restrictive covenant that is entered into between a covered employee and a client after the day on which the professional employer agreement takes effect.

- (b) A professional employer organization is not responsible or liable in connection with, or arising out of, a contractual relationship or restrictive covenant described in Subsection (2)(a) unless the professional employer organization specifically agrees to be responsible in writing.
- (3) This chapter does not and a professional employer agreement may not create an enforceable right of a covered employee against a professional employer organization that is not specifically provided by the professional employer agreement or this chapter.
- (4)
 - (a) Except as provided in this Subsection (4), this chapter does not and a professional employer agreement may not affect, modify, or amend a state, local, or federal license, registration, or certification requirement applicable to a client or a covered employee.
 - (b) If a covered employee is required by federal or state law to be licensed, registered, or certified, the covered employee is considered to be solely an employee of the client for purposes of the license, registration, or certification requirement.
 - (c) A professional employer organization is not considered to engage in an activity that is subject to licensing, registration, or certification by a local, state, or federal government or is regulated by a local, state, or federal government solely by entering into or maintaining a coemployment relationship with a covered employee who is:
 - (i) subject to licensing, registration, or certification; or
 - (ii) regulated by the local, state, or federal government.
 - (d) A client has the sole right to direct or control a professional, licensed, registered, or certified activity of:
 - (i) a covered employee; and
 - (ii) the client's business.
 - (e) Notwithstanding this chapter, a covered employee and client remain subject to regulation by the local, state, or federal government responsible for licensing, registration, or certification of the covered employee or client.

Enacted by Chapter 318, 2008 General Session

31A-40-205 Financial capability.

- (1) Except as provided in Subsection (2) or (4), as of the day a person applies for licensure or renewal of a license and at all times while licensed, a professional employer organization or collectively a professional employer organization group shall:
 - (a) have at least \$100,000 in working capital as determined by generally accepted accounting principles; or
 - (b) provide to the commissioner one of the following in an amount equal to or greater than an amount calculated by subtracting the amount of working capital of the professional employer organization or professional employer organization group from \$100,000:
 - (i) a bond;
 - (ii) an irrevocable letter of credit;
 - (iii) one or more credits or securities as determined by the market value of the credits or securities; or
 - (iv) a combination of Subsections (1)(b)(i) through (iii).
- (2)
 - (a) Except as provided in Subsection (2)(c), the license of a professional employer organization or professional employer organization group terminates 180 days from the day on which the commissioner finds that the professional employer organization has less than \$100,000 in working capital, unless the professional employer organization or professional employer

organization group eliminates the deficiency within 180 days of the day on which the commissioner makes the finding.

- (b) During the 180-day period described in Subsection (2)(a), the professional employer organization or professional employer organization group shall submit quarterly to the commissioner:
 - (i) a quarterly financial statement; and
 - (ii) an attestation that:
 - (A) is signed by:
 - (I) the chief executive officer or a controlling person of the professional employer organization; or
 - (II) for a professional employer organization group, the chief executive officer or chief financial officer of each member of the professional employer organization group; and
 - (B) states that all of the following are paid for a covered employee when due by the professional employer organization or each member of the professional employer organization group:
 - (I) compensation;
 - (II) a benefit;
 - (III) a payroll-related tax;
 - (IV) an unemployment insurance contribution;
 - (V) withholding of compensation for a covered employee;
 - (VI) workers' compensation premium; or
 - (VII) another assessment paid by a professional employer organization to or on behalf of a covered employee under a professional employer agreement.
- (c) The license of a professional employer organization or professional employer organization group terminates on the day on which the commissioner finds that the professional employer organization:
 - (i) has negative working capital; and
 - (ii)
 - (A) is incapable of continued operations; or
 - (B) poses an immediate threat to the public welfare.
- (3) A bond, letter of credit, or security described in Subsection (1) shall:
 - (a) be held as designated by the commissioner; and
 - (b) secure payment by the professional employer organization or the professional employer organization group of the following payments or other entitlements due to or with respect to a covered employee, if the professional employer organization or each member of the professional employer organization group does not make a payment when due:
 - (i) compensation of a covered employee;
 - (ii) a benefit for a covered employee;
 - (iii) payroll-related taxes;
 - (iv) unemployment insurance contributions; and
 - (v) workers' compensation premiums.
- (4) A professional employer organization is exempt from this section if the professional employer organization is licensed:
 - (a) through an assurance organization in accordance with Section 31A-40-303; or
 - (b) under this chapter with a small operation license in accordance with Section 31A-40-304.

Enacted by Chapter 318, 2008 General Session

31A-40-206 Professional employer service not insurance.

- (1) A professional employer organization licensed under this chapter is not considered engaged in the sale of insurance or as acting as a third party administrator when the professional employer organization engages in one or more of the following with respect to a professional employer service:
 - (a) offering;
 - (b) marketing;
 - (c) selling;
 - (d) administering; or
 - (e) providing.
- (2) Subsection (1) applies to a professional employer service that includes an employee benefit plan for a covered employee.

Enacted by Chapter 318, 2008 General Session

31A-40-207 Taxation.

- (1)
 - (a) A covered employee whose service is subject to a sales or use tax under Title 59, Chapter 12, Sales and Use Tax Act, is considered the employee of the client for purposes of imposing and collecting the sales or use tax on the service performed by the covered employee.
 - (b) This chapter may not be interpreted to relieve a client of a sales or use tax liability with respect to a good or service of the client.
- (2)
 - (a) If the amount of a tax or fee described in Subsection (2)(b) is determined on the basis of the gross receipts of a professional employer organization, only an administrative fee collected by the professional employer organization is considered gross receipts.
 - (b) This Subsection (2) applies to:
 - (i) a tax on a professional employer service;
 - (ii) a business license fee; or
 - (iii) another fee or charge.
- (3) A taxing entity shall assess a tax assessed on a per capita or per employee basis:
 - (a) on a client for a covered employee; and
 - (b) on the professional employer organization for an employee of the professional employer organization who is not a covered employee coemployed with a client.
- (4) If a tax is imposed or calculated on the basis of total payroll, the professional employer organization is eligible to apply a small business allowance or exemption available to the client for a covered employee for the purpose of computing the tax.

Enacted by Chapter 318, 2008 General Session

31A-40-208 Benefit plan.

- (1) A client and a professional employer organization licensed under this chapter shall each be considered an employer for purposes of sponsoring a retirement or welfare benefit plan for a covered employee.
- (2)
 - (a) A fully insured welfare benefit plan offered to a covered employee of a single professional employer organization licensed under this chapter is to be treated as a single employer welfare benefit plan for purposes of this title and rules made under this title.

- (b) The single professional employer organization that sponsors the fully insured welfare plan is exempt from the registration requirements under this title for:
 - (i) an insurance provider; or
 - (ii) an employer welfare fund or plan.
- (3) For purposes of Chapter 30, Individual, Small Employer, and Group Health Insurance Act:
 - (a) a professional employer organization licensed under this chapter is considered the employer of a covered employee; and
 - (b) all covered employees of one or more clients participating in a health benefit plan sponsored by a single professional employer organization licensed under this chapter are considered employees of that professional employer organization.
- (4) A professional employer organization licensed under this chapter may offer to a covered employee a health benefit plan that is not fully insured by an authorized insurer, only if:
 - (a) the professional employer organization has operated as a professional employer organization for at least one year before the day on which the professional employer organization offers the health benefit plan; and
 - (b) the health benefit plan:
 - (i) is administered by a third-party administrator licensed to do business in this state;
 - (ii) holds all assets of the health benefit plan, including participant contributions, in a trust account;
 - (iii) has and maintains reserves that are sound for the health benefit plan as determined by an actuary who:
 - (A) uses generally accepted actuarial standards of practice; and
 - (B) is an independent qualified actuary, including not being an employee or covered employee of the professional employer organization;
 - (iv) provides written notice to a covered employee participating in the health benefit plan that the health benefit plan is self-insured or is not fully insured;
 - (v) consents to an audit:
 - (A) on a random basis; or
 - (B) upon a finding of a reasonable need by the commissioner; and
 - (vi) provides for continuation of coverage in compliance with Section 31A-22-722.
- (5) The cost of an audit described in Subsection (4)(b)(v) shall be paid by the sponsoring professional employer organization.
- (6) A plan of a professional employer organization described in Subsection (4) that is not fully insured:
 - (a) is subject to the requirements of this section; and
 - (b) is not subject to another licensure or approval requirement of this title.

Amended by Chapter 138, 2016 General Session

31A-40-209 Workers' compensation.

- (1) In accordance with Section 34A-2-103, a client is responsible for securing workers' compensation coverage for a covered employee.
- (2) Subject to the requirements of Section 34A-2-103, if a professional employer organization obtains or assists a client in obtaining workers' compensation insurance pursuant to a professional employer agreement:
 - (a) the professional employer organization shall ensure that the client maintains and provides workers' compensation coverage for a covered employee in accordance with Subsection

- 34A-2-201(1) or (2) and rules of the Labor Commission, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;
- (b) the workers' compensation coverage may show the professional employer organization as the named insured through a master policy, if:
 - (i) the client is shown as an insured by means of an endorsement for each individual client;
 - (ii) the experience modification of a client is used; and
 - (iii) the insurer files the endorsement with the Division of Industrial Accidents as directed by a rule of the Labor Commission, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act;
 - (c) at the termination of the professional employer agreement, if requested by the client, the insurer shall provide the client records regarding the loss experience related to workers' compensation insurance provided to a covered employee pursuant to the professional employer agreement; and
 - (d) the insurer shall notify a client if the workers' compensation coverage for the client is terminated.
- (3) In accordance with Section 34A-2-105, the exclusive remedy provisions of Section 34A-2-105 apply to both the client and the professional employer organization under a professional employer agreement regulated under this chapter.
- (4) Notwithstanding the other provisions in this section, an insurer may choose whether to issue:
- (a) a policy for a client; or
 - (b) a master policy with the client shown as an additional insured by means of an individual endorsement.

Amended by Chapter 290, 2014 General Session

Amended by Chapter 300, 2014 General Session

31A-40-210 Unemployment compensation insurance.

- (1) For purposes of Title 35A, Chapter 4, Employment Security Act, a covered employee of a professional employer organization licensed under this chapter is considered the employee of the professional employer organization.
- (2) The professional employer organization described in Subsection (1) shall pay a contribution, penalty, or interest required under Title 35A, Chapter 4, Employment Security Act, on wages, as defined in Section 35A-4-208, paid by the professional employer organization to the covered employee during the term of the professional employer agreement.
- (3) A professional employer organization shall report and pay a required contribution to the unemployment compensation fund when due using the state employer account number and the contribution rate of the professional employer organization.
- (4) Unless a client is otherwise eligible for an experience rating, the Unemployment Insurance Division of the Department of Workforce Services shall treat a client as a new employer without a previous experience record beginning on the day on which:
 - (a) a professional employer agreement between the client and a professional employer organization terminates; or
 - (b) the professional employer organization fails to submit a report or make a tax payment when due as required by this chapter.

Enacted by Chapter 318, 2008 General Session

31A-40-211 Employment related economic incentives -- Employment information -- Client's status.

- (1) Notwithstanding the other provisions of this chapter, for purposes of determining eligibility for an employment related economic incentive, a covered employee is considered only an employee of the client.
- (2)
 - (a) If eligibility for an employment related economic incentive relates to a covered employee, the client is entitled to the employment related economic incentive if the client is otherwise eligible for the employment related economic incentive.
 - (b) A professional employer organization is not eligible for an employment related economic incentive described in Subsection (2)(a).
- (3) If eligibility for or the amount of an employment related economic incentive is determined on the basis of the number of employees, a client is treated as employing only:
 - (a) a covered employee coemployed by the client under the professional employer agreement; or
 - (b) an employee solely employed by the client.
- (4) Subject to a confidentiality provision in federal or state law, a professional employer organization shall provide employment information:
 - (a) upon the request of:
 - (i) the client; or
 - (ii) the governmental entity administering an employment related economic incentive; and
 - (b) reasonably required for:
 - (i) administration of an employment related economic incentive; or
 - (ii) necessary to support any of the following by a client seeking an employment related economic incentive:
 - (A) a request;
 - (B) a claim;
 - (C) an application; or
 - (D) another action.
- (5) With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, the fact that the client enters into a professional employer agreement does not affect the client's status or certification as a:
 - (a) small business;
 - (b) minority-owned business;
 - (c) disadvantaged business;
 - (d) woman-owned business; or
 - (e) historically underutilized business.

Enacted by Chapter 318, 2008 General Session

31A-40-212 Determination of joint employers -- Franchisors excluded.

- (1)
 - (a) For purposes of determining whether two or more persons are considered joint employers under this chapter, an administrative ruling of a federal executive agency may not be considered a generally applicable law unless that administrative ruling is determined to be generally applicable by a court of law, or adopted by statute or rule .
 - (b) Nothing in this Subsection (1) prohibits the commissioner, in making policy decisions and taking enforcement action, from applying an administrative ruling or opinion issued by the United States Department of Labor that decides or opines on whether an employee welfare

benefit plan is established and maintained for a single employer, multiple employer, or co-employer under the Employee Retirement Income Security Act of 1974, 29 U.S.C. Sec. 1001 et seq.

- (2)
- (a) For purposes of this chapter, a franchisor is not considered to be an employer of:
 - (i) a franchisee; or
 - (ii) a franchisee's employee.
 - (b) With respect to a specific claim for relief under this chapter made by a franchisee or a franchisee's employee, this Subsection (2) does not apply to a franchisor under a franchise that exercises a type or degree of control over the franchisee or the franchisee's employee not customarily exercised by a franchisor for the purpose of protecting the franchisor's trademarks and brand.

Enacted by Chapter 370, 2016 General Session