

PROFESSIONAL EMPLOYER ORGANIZATIONS

2003 GENERAL SESSION

STATE OF UTAH

Sponsor: Ed P. Mayne

This act modifies occupations and professions by providing for registration rather than licensing of Professional Employer Organizations. The act modifies definitions related to Professional Employer Organizations and eliminates the Professional Employer Organization Board. The act provides qualifications for registration and establishes requirements for filing specific information with an application for registration. The act provides for conversion of licensing to registration and establishes and recognizes specific financial requirements, contractual relations, and rights, duties, and obligations. The act modifies provisions related to unlawful conduct regarding Professional Employer Organizations.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

35A-4-202, as last amended by Chapter 265, Laws of Utah 2001

58-59-101, as last amended by Chapter 199, Laws of Utah 1999

58-59-102, as last amended by Chapter 261, Laws of Utah 2002

58-59-301, as last amended by Chapter 199, Laws of Utah 1999

58-59-302, as last amended by Chapter 261, Laws of Utah 2002

58-59-303, as last amended by Chapter 261, Laws of Utah 2002

58-59-308, as last amended by Chapter 261, Laws of Utah 2002

58-59-501, as last amended by Chapter 261, Laws of Utah 2002

58-59-503, as last amended by Chapter 199, Laws of Utah 1999

ENACTS:

58-59-303.5, Utah Code Annotated 1953

REPEALS AND REENACTS:

58-59-305, as last amended by Chapter 199, Laws of Utah 1999

58-59-306, as repealed and reenacted by Chapter 261, Laws of Utah 2002

REPEALS:

58-59-201, as last amended by Chapter 199, Laws of Utah 1999

58-59-307, as last amended by Chapter 199, Laws of Utah 1999

58-59-309, as enacted by Chapter 261, Laws of Utah 2002

58-59-310, as enacted by Chapter 261, Laws of Utah 2002

58-59-401, as last amended by Chapter 261, Laws of Utah 2002

58-59-402, as last amended by Chapter 261, Laws of Utah 2002

58-59-502, as last amended by Chapter 261, Laws of Utah 2002

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **35A-4-202** is amended to read:

35A-4-202. Employing units.

As used in this chapter:

(1) (a) "Employing unit" means:

(i) any individual or type of organization that has or subsequent to January 1, 1935, had

one or more individuals performing services for it within the state including any:

(A) partnership;

(B) association;

(C) trust;

(D) estate;

(E) joint stock company;

(F) insurance company;

(G) limited liability company;

(H) limited liability partnership;

(I) joint venture;

(J) corporation, whether domestic or foreign;

(K) the receiver, trustee in bankruptcy, trustee or successor of any entity listed in

Subsections (1)(a)(i)(A) through (J);

(L) the legal representative of a deceased person; or

(M) a tribal unit; or

(ii) any properly and legally [~~licensed~~] registered employee leasing company as defined by Section 58-59-102.

(b) The department may adopt rules specific to employee leasing companies pursuant to Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(c) All individuals performing services within this state for any employing unit that maintains two or more separate establishments within this state are considered to be performing services for a single employing unit for all the purposes of this chapter.

(d) Each individual employed to perform or to assist in performing the work of any person in the service of an employing unit is considered to be engaged by the employing unit for all the purposes of this chapter whether the individual was hired or paid directly by the employing unit or by the person, provided the employing unit had actual or constructive knowledge of the work.

(2) "Hospital" means an institution that is licensed, certified, or approved by the Department of Health as a hospital.

(3) "Institution of higher education," for the purposes of this section, means an educational institution that:

(a) (i) admits, as regular students only, individuals having a certificate of graduation from a high school or the recognized equivalent of a certificate;

(ii) is legally authorized in this state to provide a program of education beyond high school;

(iii) provides:

(A) an educational program for which it awards a bachelor's or higher degree;

(B) a program that is acceptable for full credit toward a bachelor's or higher degree;

(C) a program of postgraduate or postdoctoral studies; or

(D) a program of training to prepare students for gainful employment in a recognized occupation; and

(iv) is a public or other nonprofit institution.

(b) All colleges and universities in this state are institutions of higher education for purposes of this section.

Section 2. Section **58-59-101** is amended to read:

**CHAPTER 59. PROFESSIONAL EMPLOYER ORGANIZATION
REGISTRATION ACT**

58-59-101. Short title.

This chapter is known as the " Professional Employer Organization [~~Licensing~~]
Registration Act."

Section 3. Section **58-59-102** is amended to read:

58-59-102. Definitions.

In addition to the definitions in Section 58-1-102, as used in this chapter:

~~[(1) "Adjusted net worth" means stockholder's equity determined in accordance with generally accepted accounting principles, increased by the amount of obligations subordinated to claims of general creditors with a remaining term to maturity in excess of three years, and mandatory redeemable preferred stock with a remaining term to redemption in excess of three years and decreased by assets shown on the balance sheet in the form of receivables, loans, advances or similar types of assets receivable from owners, shareholders, partners or officers of the company and decreased by intangible assets not acquired in an arm's length transaction. The owners of the PEO may provide personal or corporate financial statements together with personal or corporate guaranty agreements to supplement the "Adjusted Net Worth" of the PEO.]~~

~~[(2) "Board" means the Professional Employer Organization Board created in Section 58-59-201.]~~

~~[(3) "Change in life count" means the percentage change in the number of lives on a health plan from the beginning to the end of the run-out period.]~~

~~[(4)]~~ (1) "Client" or "client company" means a person or entity [~~that leases any or all of its regular employees from~~] that enters into a professional employer agreement with a professional employer organization.

~~[(5)]~~ (2) [~~"Coemployee"~~] "Coemployer" means [~~a person who is an employee of~~] either

a professional employer organization [~~and of~~] or a client [~~company~~].

(3) "Coemployment relationship" means:

(a) as between coemployers, a relationship whereby the rights, duties, and obligations of an employer which arise out of an employment relationship have been allocated between coemployers under a professional employer agreement and this chapter, and which is intended to be an ongoing relationship, rather than a temporary or project-specific relationship;

(b) as between each PEO and a covered employee as to which a professional employer agreement applies, an employment relationship whereby the PEO is entitled to enforce those rights, and obligated to perform those duties and obligations, allocated to the PEO by the professional employer agreement and this chapter;

(c) as between each client and a covered employee to which a professional employer agreement applies, an employment relationship whereby:

(i) the client is entitled to enforce those rights, and obligated to provide and perform those employer obligations, allocated to the client by the professional employer agreement and this chapter; and

(ii) the client is responsible for any employer right or obligation not otherwise allocated by the professional employer agreement or this chapter; and

(d) as to those rights enforceable by an employee under state law, covered employees are entitled to enforce against the PEO those rights:

(i) allocated to the PEO by the professional employer agreement and this chapter; or

(ii) shared by the PEO and the client under the professional employer agreement and this chapter. All other rights, duties, and obligations enforceable by an employee under state law shall continue to be enforceable against the client under state law.

(4) "Covered employee" means an individual having a coemployment relationship with a PEO and a client who meets all of the following criteria:

(a) the individual has executed an employment agreement with the PEO;

(b) the individual is a party to a coemployment relationship with a PEO and a client; and

(c) the individual's coemployment relationship is pursuant to a professional employer

agreement subject to this chapter. Individuals who are officers, directors, shareholders, partners, and managers of the client are covered employees to the extent the PEO and the client have expressly agreed in the professional employer agreement that the individuals would be covered employees and provided the individuals meet the criteria of this Subsection (4) and act as operational managers or perform services for the client.

~~[(6) "Employment agreement" means the written agreement between a professional employer organization and each of its employees who are employed for the purpose of being coemployees to client companies.]~~

~~[(7)] (5) "Engage in practice as a professional employer organization" means to hold oneself out as a professional employer organization, to coemploy an employee with another person, or to receive any consideration for providing professional employer services or to expect payment of any consideration for providing professional employer services.~~

(6) "Organization" means any individual, partnership, corporation, limited liability company, association, or any other form of legally recognized entity.

~~[(8) "Excess Reserves" means assets of a health benefit plan less all liabilities including accrued liabilities of the health benefit plan as shown on a financial statement of the plan prepared according to generally accepted accounting practices.]~~

~~[(9) "Medical trend" means the medical component of the most current Consumer Price Index (CPI) 12 month change as of the last month that the run-out is calculated.]~~

~~[(10)] (7) "Professional employer agreement" means [the] a written [agreement] contract by and between [a professional employer organization and] a client [company in accordance with which the professional employer organization establishes the basis for a coemployment relationship with the client company's employees.] and a PEO that provides:~~

(a) for the coemployment of covered employees;

(b) for the allocation and sharing between the client and the PEO of employer responsibilities, including hiring, firing, and disciplining, with respect to the covered employees; and

(c) that the PEO and the client assume the responsibilities required by this chapter.

~~[(H)]~~ (8) (a) "Professional employer organization" or "PEO" means [an] any organization [who by contract agrees to employ a majority of a client's workforce where employer responsibilities for those employees are in fact allocated between or shared by the] engaged in the business of providing professional employer [organization and the client] services.

(b) An organization engaged in the business of providing professional employer services is subject to registration under this chapter regardless of its use of the term "professional employer organization," "PEO," "staff leasing company," "registered staff leasing company," "employee leasing company," or any other name.

(c) The following are not considered to be professional employer organizations or professional employment services for purposes of this chapter:

(i) arrangements wherein an organization, whose principal business activity is not entering into professional employer arrangements and which does not hold itself out as a PEO, shares employees with a commonly owned company within the meaning of Sections 414(b) and (c) of the Internal Revenue Code of 1986, as amended;

(ii) arrangements by which an organization assumes responsibility for the product produced or service performed by the person or the person's agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under the arrangements; or

(iii) providing temporary help services.

~~[(b) The employer responsibilities are considered to be allocated between or shared by the professional employer organization and the client whenever the agreement between the client and the professional employer organization expressly provides for such allocation or sharing or whenever a factual analysis of the client's business reveals such allocation or sharing.]~~

~~[(c) The term "professional employer organization arrangement" shall be liberally construed so as to include any and all arrangements meeting the criteria for professional employer organizations regardless of the term used.]~~

~~[(d) The following arrangements are not professional employer organization~~

~~arrangements for purposes of this chapter:]~~

~~[(i) arrangements wherein a person, whose principal business activity is not entering into professional employer organization arrangements, shares employees with a commonly owned company within the meaning of Sections 414(b) and (c) of the Internal Revenue Code of 1986, as amended, and which does not hold itself out as a professional employer organization;]~~

~~[(ii) arrangements by which a person assumes responsibility for the product produced or service performed by that person or his agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under the arrangements;]~~

~~[(iii) a temporary help arrangement, whereby an organization hires its own employees and assigns them to a client to support or supplement the client's workforce in special work situations such as employee absences, temporary skill shortages, seasonal workloads, and special assignments and projects; provided, however, that the temporary help arrangement excludes arrangements where the majority of the client's work force has been assigned by a temporary help organization for a period of more than 12 consecutive months; and]~~

~~[(iv) any person otherwise subject to licensure under this chapter if, during any fiscal year of the person, the total gross wages paid to employees employed by the person in this state during such period under one or more professional employer organization arrangements do not exceed 5% of the total gross wages paid to all employees employed by the person during the same period, and provided further, that the person does not advertise or hold itself out to the public as providing arrangements denominated as "professional employer" or "employee leasing" in this state.]~~

(9) "Professional employer services" means the service of entering into coemployment relationships under this chapter in which all or a majority of the employees providing services to a client or to a division or work unit of a client are covered employees.

(10) "Temporary help services" means services consisting of an organization:

(a) recruiting and hiring its own employees;

(b) finding other organizations that need the services of those employees;

(c) assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects with a definite ending date; and

(d) customarily attempting to reassign the employees to other organizations when they finish each assignment by a definite ending date.

~~[(12) "Represent oneself as a professional employer organization" means to hold oneself out by any means as a professional employer organization.]~~

~~[(13) "Run-out" means claims paid during the six-month period at the fiscal year end of the PEO for dates of service prior to that same six-month period, less amounts reimbursed or to be reimbursed by a reinsurance carrier or reimbursements from any other source for such claims.]~~

~~[(14) "Temporary employee," as may be further defined by rule, means an individual who is an employee of, registered for temporary assignment by, or otherwise associated with a temporary help company that engages in the assignment of individuals as temporary full-time or part-time personnel to fill assignments with a finite ending date to another independent entity.]~~

~~[(15) "Temporary help company," as may be further defined by rule, means a person or entity that provides temporary employees to fill assignments with a finite ending date to another independent entity in special, unusual, seasonal, or temporary skill shortage situations.]~~

~~[(16) "Total adjusted liabilities" means total liabilities as stated in an audited financial statement less obligations subordinated to claims of general creditors with a remaining term to maturity in excess of three years.]~~

~~[(17)]~~ (11) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-59-501.

~~[(18) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-59-502.]~~

Section 4. Section **58-59-301** is amended to read:

Part 3. Registration

58-59-301. Registration required.

~~[(1)]~~ A ~~[license]~~ registration is required to engage in practice as a professional employer organization, except as specifically provided in Section 58-1-307 ~~[or 58-59-305]~~.

~~[(2) The division shall issue to persons qualified under the provision of this chapter a license as a professional employer organization.]~~

Section 5. Section **58-59-302** is amended to read:

58-59-302. Qualifications for registration.

~~(1) Each [applicant for licensure] registrant as a professional employer organization shall:~~

~~[(1)] (a) submit an application in a form prescribed by the division; and~~

~~[(2)] (b) pay a fee as determined by the department under Section 63-38-3.2[;].~~

~~[(3) provide documentation that the applicant is properly registered with:]~~

~~[(a) the Division of Corporations and Commercial Code;]~~

~~[(b) the Department of Workforce Services, for the purposes of Title 35A, Chapter 4, Employment Security Act;]~~

~~[(c) the State Tax Commission; and]~~

~~[(d) the Internal Revenue Service;]~~

~~[(4) submit to the division a certified audit performed by an independent certified public accountant showing at least an adjusted net worth of \$50,000 or 5% of total adjusted liabilities, whichever is greater;]~~

~~[(5) for the purpose of having criminal background checks, provide to the division, the names of:]~~

~~[(a) all individuals who have control of or a controlling interest in, as defined in Section 16-10a-102, the professional employer organization;]~~

~~[(b) all officers and directors of the professional employer organization; and]~~

~~[(c) all other individuals who have signatory authority over fiduciary funds held by the professional employer organization; and]~~

~~[(6) provide evidence that the responsible managers of the professional employer organization have education and experience in the conduct of business that demonstrate a reasonable expectation that the professional employer organization will be managed with the skill and expertise necessary to protect the interests of its employees, client companies, and the~~

public.]

(2) (a) Any two or more professional employer organizations held under the common control of any other person or persons acting in concert may be registered as a professional employer organization group.

(b) A professional employer organization group may satisfy any reporting and financial requirements under this chapter on a consolidated basis.

Section 6. Section **58-59-303** is amended to read:

58-59-303. Term of registration -- Expiration -- Renewal.

(1) The division shall issue each [~~license~~] registration under this chapter in accordance with a one-year renewal cycle established by rule.

(2) The division may by rule, in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, extend or shorten a renewal period by as much as six months to stagger the renewal cycles it administers.

~~[(2) At the time of renewal the licensee shall show satisfactory documentation of compliance with Subsections 58-59-302(1) through (4) and Sections 58-59-306 and 58-59-310.]~~

~~[(3) Each license automatically expires on the expiration date shown on the license unless renewed by the licensee in accordance with Section 58-1-308.]~~

Section 7. Section **58-59-303.5** is enacted to read:

58-59-303.5. Information to be filed by registrants.

(1) Each registrant shall file the following information with the division with its initial application and with each renewal application:

(a) the name or names under which the PEO conducts business;

(b) the address of the principal place of business of the PEO and the address of each office it maintains in the state;

(c) the PEO's taxpayer or employer identification number;

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

(e) a statement of ownership, which shall include the name of all individuals that, individually or acting in concert with one or more other persons, owns or controls, directly or indirectly, 10% or more of the equity interests of the PEO; and

(f) a statement of management, which shall include the name of all officers and any person who has the authority to act as a senior executive officer of the PEO.

(2) A professional employer organization which is domiciled outside of the state and employs less than 50 employees who are employed or domiciled in the state is not required to file the information required under Subsections (1)(e) and (f).

Section 8. Section **58-59-305** is repealed and reenacted to read:

58-59-305. Conversion from licensee to registrant.

The division shall convert the existing license of each professional employer organization, which is licensed as of the effective date of this act, to a registration under this chapter.

Section 9. Section **58-59-306** is repealed and reenacted to read:

58-59-306. Financial requirements, contractual relations, and allocation of rights, duties, and obligations.

(1) Nothing contained in this chapter or in any professional employer agreement shall affect, modify, or amend any collective bargaining agreement, or the rights or obligations of any client, PEO, or covered employee under the federal National Labor Relations Act, the federal Railway Labor Act, or similar state law.

(2) Nothing contained in this chapter or any professional employer agreement shall affect, modify, or amend any state, local, or federal licensing, registration, or certification requirement applicable to any client or covered employee.

(a) A covered employee who must be licensed, registered, or certified according to law or regulation is considered solely an employee of the client for purposes of license, registration, or certification requirement.

(b) A PEO may not be considered 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 coemployment relationship with a covered employee who is subject to the requirements or regulation.

(c) Unless otherwise expressly agreed to by the client in the professional employer agreement, a client has the sole right to direct and control the professional or licensed activities of covered employees and of the client's business.

(3) With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, a client company's status or certification as a small, minority-owned, disadvantaged, or woman-owned business enterprise or as a historically underutilized business is not affected because the client company has entered into an agreement with a registrant or uses the services of a registrant.

(4) (a) At least quarterly, a PEO shall have an independent certified public accountant, licensed to practice in the jurisdiction in which the PEO is domiciled, review the PEO's records and prepare a statement indicating whether all federal, state, and local withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums, and employee benefit plan premiums have been paid.

(b) The PEO must provide the statement to a client upon request from the client.

(5) (a) Except as specifically provided in this chapter, the coemployment relationship between the client and the PEO, and between each coemployer and each covered employee, shall be governed by the professional employer agreement.

(b) Nothing contained in any professional employer agreement or this chapter shall be considered to:

(i) diminish, abolish, or remove the rights of covered employees as to clients or obligations of the client as to a covered employee, existing prior to the effective date of a professional employer agreement;

(ii) terminate an employment relationship existing prior to the effective date of a professional employer agreement; or

(iii) create any new or additional enforceable right of a covered employee against a PEO not specifically allocated to the PEO in the professional employer agreement or this chapter.

(c) Each professional employer agreement shall include the following:

(i) (A) the PEO shall reserve a right of direction and control over the covered employees;

and

(B) the client may retain the right to exercise the direction and control over covered employees as is necessary to conduct the client's business, to discharge any fiduciary responsibility which it may have, or to comply with any applicable licensure requirements;

(ii) the PEO shall have responsibility to:

(A) pay agreed upon wages and salaries to covered employees;

(B) withhold, collect, report, and remit payroll-related and unemployment taxes; and

(C) the extent the PEO has assumed responsibility in the professional employer agreement, to make payments for employee benefits for covered employees;

(iii) the PEO and the client shall both have a right to hire, terminate, and discipline the covered employees; and

(iv) the responsibility to obtain workers' compensation coverage for covered employees, from a carrier licensed to do business in Utah and otherwise in compliance with all applicable requirements, shall be specifically allocated to the client in the professional employer agreement.

(d) Except as specifically provided in this chapter or in the professional employer agreement, in each coemployment relationship:

(i) the client may exercise all rights and is obligated to perform all duties and responsibilities otherwise applicable to an employer in an employment relationship;

(ii) (A) the PEO may exercise only those rights, and is obligated to perform only those duties and responsibilities, specifically required by this chapter or set forth in the professional employer agreement; and

(B) the rights, duties, and obligations of the PEO as coemployer with respect to any covered employee is limited to those arising under the professional employer agreement and this chapter during the term of coemployment by the PEO of the covered employee; and

(iii) unless otherwise expressly agreed by the PEO and the client in a professional employer agreement, 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.

(e) With respect to each professional employer agreement entered into by a PEO, the PEO shall provide written notice to each covered employee affected by the agreement of the general nature of the coemployment relationship between and among the PEO, the client, and the covered employee.

(f) (i) Except to the extent otherwise expressly provided by the applicable professional employer agreement:

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

(B) a client is 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 those activities; and

(C) a client is not liable for the acts, errors, or omissions of a PEO, or of any covered employee of the client and a PEO when the covered employee is acting under the express direction and control of the PEO.

(ii) Nothing in this Subsection (5)(f) shall serve to limit any contractual liability or obligation specifically provided in a professional employer agreement, nor shall this Subsection (5)(f) in any way limit the liabilities and obligations of any PEO or client as defined elsewhere in this chapter.

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

(g) A registrant under this chapter is not engaged in the sale of insurance by offering, marketing, selling, administering, or providing PEO services or employee benefit plans for covered employees.

(h) (i) (A) Covered employees whose services are subject to sales tax are considered the employees of the client for purposes of collecting and levying sales tax on the services performed by the covered employees.

(B) Nothing contained in this chapter shall relieve a client of any sales tax liability with respect to its goods or services.

(ii) No portion of a PEO fee to a client that represents pass-through amounts to be paid for covered employee wages, employment-related taxes, withholding, or benefits is subject to any sales or excise tax.

(i) (i) A client and a PEO shall each be considered an employer for purposes of sponsoring retirement and welfare benefit plans for its covered employees.

(ii) A fully insured welfare benefit plan offered to the covered employees of a single PEO is considered a single employer welfare benefit plan and may not be considered a multiple employer welfare arrangement, and is exempt from the licensing requirements contained in Title 31A, Insurance Code.

(iii) PEOs are exempt from Title 31A, Chapter 30, Individual, Small, and Group Employer Health Insurance Act.

(iv) (A) Any PEO offering workers' compensation coverage, a health benefit plan, or any other insurance plan, must comply with all federal and state laws applicable to these products.

(B) If the PEO chooses to use a third-party administrator for the receipt and payment of health benefit claims, that third-party administrator must be licensed to do business in the state under Title 31A, Insurance Code.

(C) Anything pertaining to the insurance products referred to in this section or the use of an unlicensed third-party administrator is subject to administrative penalties and forfeitures under Title 31A, Insurance Code.

(v) If a PEO offers to its covered employees any health benefit plan which is not fully

insured by an authorized insurer, the plan shall:

(A) utilize a third-party administrator licensed by the Utah State Insurance Department;

and

(B) hold all plan assets, including participant contributions, in a trust account.

(vi) If a PEO offers to its covered employees any health benefit plan which is not fully insured by an authorized insurer, the PEO shall:

(A) represent that such plan is not fully insured; and

(B) deliver to each plan participant a summary plan description that accurately describes the terms of the plan, including disclosure that the plan is self-funded or partially self-funded.

(vii) (A) The Department of Insurance may audit on a random basis, or upon finding a reasonable need, any health benefit plan which is not fully insured by an authorized insurer.

(B) The cost of the audit shall be borne by the PEO if there is material noncompliance.

(j) (i) The client in a coemployment relationship shall secure workers' compensation benefits for the covered employees by complying with Subsection 34A-2-201(1) or (2) and commission rules under Subsection 34A-2-103(3)(a).

(ii) Every authorized insurer who offers or provides Workers' Compensation Insurance coverage to a PEO, its client companies, or both shall comply with Title 31A, Chapter 19a, Utah Rate Regulation Act, and Chapter 21, Insurance Contracts in General, prior to the issuance of an insurance policy.

(iii) The exclusive remedy provisions of Sections 34A-2-105 and 34A-3-102 apply to both the client company and the PEO in a coemployer relationship under this section.

(k) (i) For purposes of Title 35A, Chapter 4, Employment Security Act, covered employees of a registered PEO are considered the employees of the PEO, which shall be responsible for the payment of contributions, penalties, and interest on wages paid by the PEO to its covered employees during the term of the applicable professional employer agreement.

(ii) The PEO shall report and pay all required contributions to the unemployment compensation fund using its state employer account number and the contribution rate of the PEO.

(iii) On the termination of a contract between a PEO and a client or the failure by a PEO

to submit reports or make tax payments as required by this chapter, the client shall be treated as a new employer without a previous experience record unless that client is otherwise eligible for an experience rating.

Section 10. Section **58-59-308** is amended to read:

58-59-308. No guarantee.

By [~~licensing~~] registering and regulating professional employer organizations under this chapter, the state:

- (1) does not guarantee any right, claim, or defense of any professional employer organization, client company, coemployee, or other person;
- (2) does not guarantee the financial responsibility or solvency of any professional employer organization; and
- (3) does not waive any right, claim, or defense of immunity that it may have under Title 63, Chapter 30, Utah Governmental Immunity Act, or other law.

Section 11. Section **58-59-501** is amended to read:

Part 5. Penalties

58-59-501. Unlawful conduct.

Unlawful conduct includes:

- (1) engaging in practice as a professional employer organization without a [~~license~~] registration;
- (2) offering an employee a self-funded medical program, unless [~~:(a) the program provides its benefits under an employee benefit plan that complies with 29 U.S.C. Sec. 1143 et seq.; and (b)]~~ the program is maintained for the sole benefit of participating coemployees;
- (3) misrepresenting that any self-funded medical program it offers is other than self-funded;
- (4) offering to its employees any self-funded or partially self-funded medical plan without delivering to each plan participant a summary plan description that accurately describes terms of the plan, including disclosure that the plan is self-funded or partially self-funded;
- (5) diversion of funds paid by a client to the professional employer organization,

designated as payment for payroll or any related payroll taxes or employee benefits or insurance, to any other purpose or use other than designated. In cases where a client has defaulted on the professional employer agreement or otherwise failed to pay the PEO, the PEO may allocate the deficient payment to the portions of the invoice it determines and not be in violation of this section;

~~[(5)]~~ (6) providing coemployees to any client company under any provision, term, or condition that is not contained in a clearly written agreement between the professional employer organization and client company;

~~[(6)]~~ (7) any willful, fraudulent, or deceitful act by a [licensee] PEO, caused by a [licensee] PEO, or at a [licensee's] PEO's direction, that causes material injury to a client company or coemployee of a client company;

~~[(7)] failing to maintain or ensure that client companies maintain in full force and effect required workers' compensation insurance on all coemployees in accordance with Utah law pursuant to Section 34A-2-103;]~~

(8) upon collecting cleared funds from the client, failing to pay in a timely manner any federal or state income tax withholding, FICA, unemployment tax, employee insurance benefit premium, workers' compensation premium, or other obligation due and payable directly as a result of engaging in business as a professional employer organization; and

(9) failing to comply with federal law regarding any employee benefit offered to an employee.

Section 12. Section **58-59-503** is amended to read:

58-59-503. Penalty for unlawful conduct.

(1) Any person who violates Subsections 58-59-501(1) through ~~[(4)]~~ (5) is guilty of a third degree felony.

(2) Any person who violates Subsections 58-59-501~~[(5)]~~(6) through (9) is guilty of a class A misdemeanor.

(3) Any person who has engaged in unlawful conduct may be assessed the costs associated with the investigations, disciplinary proceedings, court proceedings, or other actions to

enforce the provisions of this [~~act~~] chapter.

Section 13. **Repealer.**

This act repeals:

Section **58-59-201, Board.**

Section **58-59-307, Records and reports protected.**

Section **58-59-309, State licensing provisions not exempted.**

Section **58-59-310, Health benefit plans.**

Section **58-59-401, Grounds for denial of license or renewal -- Disciplinary proceedings.**

Section **58-59-402, Court intervention.**

Section **58-59-502, Unprofessional conduct.**