

1 **PROFESSIONAL EMPLOYER LICENSING**

2 **AMENDMENTS**

3 1999 GENERAL SESSION

4 STATE OF UTAH

5 **Sponsor: John L. Valentine**

6 AN ACT RELATING TO OCCUPATIONS AND PROFESSIONS; AMENDING AND
7 RENAMING THE EMPLOYEE LEASING COMPANY LICENSING ACT; ADJUSTING THE
8 LICENSURE REQUIREMENTS; REDEFINING EMPLOYEE LEASING COMPANY AS
9 PROFESSIONAL EMPLOYER ORGANIZATION; EXPANDING THE DEFINITION OF
10 UNPROFESSIONAL CONDUCT; AND MAKING TECHNICAL CHANGES.

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

12 AMENDS:

13 **58-59-101**, as enacted by Chapter 140, Laws of Utah 1993

14 **58-59-102**, as last amended by Chapter 201, Laws of Utah 1997

15 **58-59-201**, as last amended by Chapters 12 and 247, Laws of Utah 1994

16 **58-59-301**, as last amended by Chapter 247, Laws of Utah 1994

17 **58-59-302**, as last amended by Chapters 201 and 375, Laws of Utah 1997

18 **58-59-305**, as repealed and reenacted by Chapter 247, Laws of Utah 1994

19 **58-59-306**, as last amended by Chapter 201, Laws of Utah 1997

20 **58-59-307**, as repealed and reenacted by Chapter 247, Laws of Utah 1994

21 **58-59-308**, as renumbered and amended by Chapter 247, Laws of Utah 1994

22 **58-59-402**, as enacted by Chapter 201, Laws of Utah 1997

23 **58-59-501**, as last amended by Chapter 375, Laws of Utah 1997

24 **58-59-502**, as last amended by Chapter 201, Laws of Utah 1997

25 **58-59-503**, as enacted by Chapter 247, Laws of Utah 1994

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

27 Section 1. Section **58-59-101** is amended to read:

28 **58-59-101. Short title.**

29 This chapter is known as the "[Employee Leasing Company] Professional Employer
30 Organization Licensing Act."

31 Section 2. Section **58-59-102** is amended to read:

32 **58-59-102. Definitions.**

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

34 (1) "Adjusted net worth" means stockholder's equity determined in accordance with
35 generally accepted accounting principles, increased by the amount of obligations subordinated to
36 claims of general creditors with a remaining term to maturity in excess of three years, and
37 mandatory redeemable preferred stock with a remaining term to redemption in excess of three
38 years.

39 [(1)] (2) "Board" means the [Employee Leasing Company] Professional Employer
40 Organization Board created in Section 58-59-201.

41 [(2)] (3) "Client company" means a person or entity that leases any or all of its [permanent]
42 regular employees from [an employee leasing company] a professional employer organization.

43 [(3)] "Employee leasing company" or "leasing company" means an individual or business
44 that, under an agreement between the client company and the leasing company and for a fee:]

45 [(a)] places all or substantially all of the regular, full-time employees of the client company
46 on the leasing company's payroll;]

47 [(b)] leases the employees to the client company on an ongoing basis with no restriction or
48 limitation on the duration of employment; and]

49 [(c)] receives funds from a client company or leasing company employees from which the
50 leasing company is obligated to pay taxes, insurance, or benefits on behalf of the employees.]

51 (4) "Employment agreement" means the written agreement between [an employee leasing
52 company] a professional employer organization and each of its employees who are employed for
53 the purpose of being leased as [permanent] regular employees to client companies.

54 (5) "Engage in practice as [an employee leasing company] a professional employer
55 organization" means to hold oneself out as [an employee leasing company] a professional
56 employer organization, to lease an employee to another person, and to receive any consideration
57 for providing employee leasing services or to expect payment of any consideration for providing
58 employee leasing services.

59 (6) (a) "Financial responsibility" means a demonstration of a current and expected future
60 condition of financial solvency evidencing a reasonable expectation to the board that an applicant
61 or licensee can successfully engage in business as ~~[an employee leasing company]~~ a professional
62 employer organization without jeopardizing:

63 (i) the interests of the employees of the ~~[leasing company]~~ professional employer
64 organization who are leased to a client company;

65 (ii) the interests of the client company; and

66 (iii) the interests of the public.

67 (b) Financial responsibility may be determined by an evaluation of the total history
68 concerning the licensee or applicant for licensure, including past, present, and expected condition
69 and record of financial solvency and business conduct.

70 (7) "Lease agreement" means the written agreement between ~~[an employee leasing~~
71 ~~company]~~ a professional employer organization and a client company in accordance with which
72 the ~~[leasing company]~~ professional employer organization leases employees to the client company
73 and the client company leases individuals from the ~~[leasing company]~~ professional employer
74 organization.

75 (8) (a) "Professional employer organization," "employee leasing company," or "leasing
76 company" means a person who by contract, or otherwise, agrees to employ a majority of a client's
77 workforce where employer responsibilities for those employees are in fact allocated between or
78 shared by the professional employer organization and the client.

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

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

86 (d) The following arrangements are not professional employer organization arrangements
87 for purposes of this chapter:

88 (i) arrangements wherein a person, whose principal business activity is not entering into
89 professional employer organization arrangements, shares employees with a commonly owned

90 company within the meaning of Sections 414(b) and (c) of the Internal Revenue Code of 1986, as
91 amended, and which does not hold itself out as a professional employer organization;

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

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

102 (iv) any person otherwise subject to licensure under this chapter if, during any fiscal year
103 of the person, the total gross wages paid to employees employed by the person in this state during
104 such period under one or more professional employer organization arrangements do not exceed
105 5% of the total gross wages paid to all employees employed by the person during the same period,
106 and provided further, that the person does not advertise or hold itself out to the public as providing
107 arrangements denominated as "professional employer" or "employee leasing" in this state.

108 [~~(8)~~] (9) "Regular employee" means an individual who is an employee of [~~an employee~~
109 ~~leasing company~~] a professional employer organization for the purpose of being placed by the
110 [~~employee leasing company~~] professional employer organization as a regular full-time or regular
111 part-time employee of a client company.

112 [~~(9)~~] (10) "Represent oneself as [~~an employee leasing company~~] a professional employer
113 organization" means to hold oneself out by any means as [~~an employee leasing company~~] a
114 professional employer organization.

115 [~~(10)~~] (11) "Temporary employee," as may be further defined by rule, means an individual
116 who is an employee of, registered for temporary assignment by, or otherwise associated with a
117 temporary help company that engages in the assignment of individuals as temporary full-time or
118 part-time personnel to fill assignments with a finite ending date to another independent entity.

119 [~~(11)~~] (12) "Temporary help company," as may be further defined by rule, means a person
120 or entity that provides temporary employees to fill assignments with a finite ending date to another

121 independent entity in special, unusual, seasonal, or temporary skill shortage situations.

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

125 ~~[(12)]~~ (14) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-59-501.

126 ~~[(13)]~~ (15) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-59-502.

127 Section 3. Section **58-59-201** is amended to read:

128 **58-59-201. Board.**

129 (1) There is created ~~[an Employee Leasing Company]~~ the Professional Employer
130 Organization Board consisting of:

131 (a) three members who are owners or officers of separate licensed ~~[employee leasing~~
132 ~~companies]~~ professional employer organizations within ~~[the]~~ this state;

133 (b) one member who is an owner or officer of a client company; and

134 (c) one member from the general public.

135 (2) The board shall be appointed and serve in accordance with Section 58-1-201.

136 (3) (a) The duties and responsibilities of the board shall be in accordance with Sections
137 58-1-201 through 58-1-203.

138 (b) The board shall designate one of its members on a permanent or rotating basis to:

139 (i) assist the division in reviewing complaints concerning the unlawful or unprofessional
140 conduct of a licensee; and

141 (ii) advise the division in its investigation of these complaints.

142 (c) A board member who has, under Subsection (3)(b), reviewed a complaint or advised
143 in its investigation is disqualified from participating with the board when the board serves as a
144 presiding officer in an adjudicative proceeding concerning the complaint.

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

146 **58-59-301. License required -- License issuance.**

147 (1) A license is required to engage in practice as ~~[an employee leasing company]~~ a
148 professional employer organization, except as specifically provided in Section 58-1-307 or
149 58-59-305.

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

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

153 **58-59-302. Qualifications for licensure.**

154 Each applicant for licensure as [~~an employee leasing company~~] a professional employer
155 organization shall:

156 (1) submit an application in a form prescribed by the division;

157 (2) pay a fee as determined by the department under Section 63-38-3.2;

158 (3) provide documentation that the applicant is properly registered with:

159 (a) the Division of Corporations and Commercial Code;

160 (b) the Division of Workforce Information and Payment Services in the Department of
161 Workforce Services, for the purposes of Title 35A, Chapter 4, Employment Security Act;

162 (c) the State Tax Commission;

163 (d) the Internal Revenue Service; and

164 (e) any other agency identified by rule that is determined by the division and the board as
165 necessary for a person engaged in practice as [~~an employee leasing company~~] a professional
166 employer organization;

167 (4) provide documentation satisfactory to the division and the board that employees leased
168 by the [~~employee leasing company~~] professional employer organization to any client company are
169 covered by workers' compensation insurance pursuant to Section 34A-2-103;

170 (5) provide evidence to the division and the board of financial responsibility, as this
171 evidence is prescribed by rule;

172 (6) [~~in the case of an employee leasing company that is commencing or reentering business~~
173 ~~as an employee leasing company,~~] submit to the division [~~and the board~~] a certified audit
174 performed by an independent certified public accountant showing at least \$50,000 adjusted net
175 worth [~~as starting capital~~] or 5% of total adjusted liabilities, whichever is greater;

176 (7) provide evidence satisfactory to the division [~~and the board~~] of the financial
177 responsibility of any self-funded or partially self-funded insurance plan as defined by rule[;] which
178 meets the following requirements:

179 (a) the self-funded or partially self-funded plan has purchased adequate excess loss
180 insurance to prevent material adverse impact on the financial condition of the professional
181 employer organization;

182 (b) the plan uses a third-party administrator licensed by the state in which the third party

183 administrator is domiciled;

184 (c) the self-funded nature of the self-funded or partially self-funded plan is disclosed to
185 each eligible employee; and

186 (d) all self-funded or partially self-funded plan assets, including participant contributions,
187 are held in a trust account;

188 (8) provide, for a criminal background check by the division, the name of:

189 (a) any person who has control of or a controlling interest in, as defined in Section
190 16-10a-102, the [~~leasing company~~] professional employer organization;

191 (b) any officer or director of the [~~leasing company~~] professional employer organization;
192 and

193 (c) any responsible manager of the [~~leasing company~~] professional employer organization
194 or other person if the manager or person has signatory authority over fiduciary funds;

195 (9) provide evidence satisfactory to the division [~~and the board~~] that the responsible
196 managers of the [~~leasing company~~] professional employer organization have education and
197 experience in the conduct of business that demonstrate a reasonable expectation that the [~~company~~]
198 professional employer organization will be managed with the skill and expertise necessary to
199 protect the interests of its employees, client companies, and the public; and

200 (10) provide evidence that the applicant is of good moral character.

201 Section 6. Section **58-59-305** is amended to read:

202 **58-59-305. Exemptions from licensure.**

203 In addition to the exemptions from licensure in Section 58-1-307[;] the following are
204 exempt from licensure under this chapter:

205 (1) related companies under common ownership that are not individually considered
206 [employee leasing companies] professional employer organizations under this chapter [~~may,~~
207 ~~without being licensed in accordance with this chapter,]~~ which combine employees of one
208 commonly owned company with employees of another commonly owned company on either a
209 temporary or regular basis[;] and

210 (2) a professional employer organization which employs less than 25 employees working
211 within this state which is not domiciled in this state.

212 Section 7. Section **58-59-306** is amended to read:

213 **58-59-306. Financial responsibility.**

214 (1) To maintain a license in good standing, [~~an employee leasing company~~] a professional
215 employer organization shall demonstrate financial responsibility.

216 (2) Financial responsibility shall be demonstrated on:

217 (a) a quarterly basis by providing the division [~~and the board~~] with:

218 (i) evidence from an independent certified public accountant, in a form prescribed by the
219 division, that all federal, state, and local withholding taxes, unemployment taxes, FICA taxes,
220 workers' compensation premiums, and employee benefit plan premiums have been paid; and

221 (ii) any other relevant information the division [~~or board~~] considers appropriate; and

222 (b) an annual basis by providing the division [~~and the board~~] with:

223 (i) [~~a~~] an audited financial statement prepared in a form prescribed by the division by an
224 independent certified public accountant that includes a review of the payment of all federal, state,
225 and local withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums,
226 and employee benefit plan premiums; and

227 (ii) any other relevant information the division [~~or board~~] considers appropriate.

228 (3) (a) In addition to quarterly evidence or an annual financial statement required under
229 Subsection (2), the division [~~and board~~] may request a licensee to submit a certified audit
230 performed by an independent certified public accountant if:

231 (i) a licensee fails to submit quarterly evidence or a financial statement as required by
232 Subsection (2);

233 (ii) the division [~~and board have~~] has reason to believe that the evidence or financial
234 statement submitted by a licensee under Subsection (2):

235 (A) is incomplete or misleading; or

236 (B) contains evidence of:

237 (I) a material financial irregularity; or

238 (II) the failure of the licensee to fully and timely pay a tax or premium identified in
239 Subsection (2) for which it is obligated to pay; or

240 (iii) the division [~~or board~~] receives information from a state or federal agency or other
241 person of:

242 (A) a material financial irregularity; or

243 (B) the failure of the licensee to fully and timely pay a tax or premium identified in
244 Subsection (2) for which it is obligated to pay.

245 (b) The division [~~and the board~~] may require that an audit requested under Subsection
246 (3)(a) not be performed by an independent certified public accountant who has previously prepared
247 quarterly evidence or an annual financial statement for the licensee.

248 (4) An independent certified public accountant shall submit documentation required under
249 Subsections (2) and (3) directly to the division before reviewing the documentation with the
250 licensee.

251 Section 8. Section **58-59-307** is amended to read:

252 **58-59-307. Records and reports protected.**

253 Notwithstanding Title 63, Chapter 2, Government Records Access and Management Act,
254 financial information submitted to the division [~~or the board~~] by or at the request and direction of
255 an applicant or licensee for the purpose of supporting a representation of financial responsibility
256 [~~shall be~~] is confidential [and are], is not for public inspection, and [~~shall~~] is not [be] subject to
257 discovery in civil or administrative proceedings.

258 Section 9. Section **58-59-308** is amended to read:

259 **58-59-308. No guarantee.**

260 By licensing and regulating [~~employee leasing companies~~] professional employer
261 organizations under this chapter, the state:

262 (1) does not guarantee any right, claim, or defense of any [~~employee leasing company~~]
263 professional employer organization, client company, regular employee, or other person;

264 (2) does not guarantee the financial responsibility or solvency of any [~~employee leasing~~
265 company] professional employer organization; and

266 (3) does not waive any right, claim, or defense of immunity that it may have under Title
267 63, Chapter 30, Utah Governmental Immunity Act, or other law.

268 Section 10. Section **58-59-402** is amended to read:

269 **58-59-402. Court intervention.**

270 If a professional employer organization is operating without a license or the financial
271 condition of a licensee [or unlicensed employee leasing company] is impaired to the extent of
272 posing a significant threat to the public, the division may file a complaint in district court asking
273 for:

274 (1) injunctive relief;

275 (2) the appointment of a receiver;

276 (3) the sale of the [licensee's] company to a third party;

277 (4) the liquidation of the [licensee's] company; and

278 (5) any other appropriate remedy.

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

280 **58-59-501. Unlawful conduct.**

281 Unlawful conduct includes:

282 (1) engaging in practice as [~~an employee leasing company~~] a professional employer
283 organization without a license;

284 (2) offering an employee a self-funded medical program, unless:

285 (a) the program provides its benefits under an employee benefit plan that complies with
286 29 U.S.C. Sec. 1143 et seq.; and

287 (b) the program is maintained for the sole benefit of eligible plan participants;

288 (3) misrepresenting that any self-funded medical program it offers is other than
289 self-funded;

290 (4) offering to its employees any self-funded or partially self-funded medical plan without
291 delivering to each plan participant a summary plan description that accurately describes terms of
292 the plan, including disclosure that the plan is self-funded or partially self-funded;

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

296 (6) any willful, fraudulent, or deceitful act by a licensee, caused by a licensee, or at a
297 licensee's direction, that causes material injury to a client company or employee leased to a client
298 company;

299 (7) failing to maintain or ensure that client companies maintain in full force and effect
300 required workers' compensation insurance on all leased employees in accordance with Utah law
301 pursuant to Section 34A-2-103;

302 (8) failing to pay in a timely manner any federal or state income tax withholding, FICA,
303 unemployment tax, employee insurance benefit premium, workers' compensation premium, or
304 other obligation due and payable directly as a result of engaging in business as an employee leasing
305 company; and

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

307 employee.

308 Section 12. Section **58-59-502** is amended to read:

309 **58-59-502. Unprofessional conduct.**

310 Unprofessional conduct includes:

311 (1) failing to establish, maintain, or demonstrate financial responsibility and management
312 competence while licensed as ~~[an employee leasing company]~~ a professional employer
313 organization;

314 (2) failing to maintain proper registration with any agency for which registration is
315 required as a condition of licensure under this chapter;

316 (3) failing to maintain current lease agreements and employment agreements in appropriate
317 form and content as required under this chapter;

318 (4) failing to inform the division of a change in ownership, in the address of its owners or
319 officers, or in its principal business address or change in any responsible manager of the
320 professional employer organization who has signatory authority over company funds within ten
321 days after the change;

322 (5) failing to maintain and make available, upon request, to the division and the licensee's
323 workers' compensation insurance carrier:

324 (a) the name and federal identification number of each client company;

325 (b) the number and, if good cause is shown, the names of all covered employees provided
326 to each client company; and

327 (c) the total eligible wages and workers' compensation premiums due to the carrier for the
328 employees provided to each client company; [and]

329 (6) failing within 30 days to notify the division and the licensee's workers' compensation
330 insurance carrier of the initiation or termination of a relationship with a client company[-];

331 (7) failing within ten days to notify the division of the failure to pay when due an amount
332 exceeding \$5,000 of any of the following obligations: any federal or state income tax, withholding
333 tax, FICA, unemployment tax, employee insurance benefit premium, or worker compensation
334 premium; and

335 (8) any of the following events unless the licensee first obtains written approval from the
336 division for that event:

337 (a) the sale or transfer of a majority of the employee leasing contracts of the licensee;

- 338 (b) the sale or transfer of a majority of the physical assets of the licensee;
- 339 (c) the sale or transfer of more than 25% of the ownership interest of a licensee by any
- 340 means including the sale, transfer, or issuance of a member interest in a limited liability company,
- 341 the sale, transfer, or issuance of a member interest in a partnership, the sale, transfer, or issuance
- 342 of a ownership interest in a licensee in any other manner other than that the sale or transfer of
- 343 publicly traded shares of a corporation affected through a public exchange or market; and
- 344 (d) entering into one or more contracts, other than employee lease agreements with
- 345 employee leasing clients, which commits the licensee to make future payments to any person or
- 346 persons in amounts which in total exceed the equity of the business for payment of service
- 347 provided to or for the licensee.

Section 13. 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 [~~(3)~~] (4) is guilty of a third degree felony.

(2) Any person who violates Subsections 58-59-501[~~(4)~~] (5) through [~~(9)~~] (10) 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.

Legislative Review Note
as of 2-15-99 3:34 PM

A limited legal review of this legislation raises no obvious constitutional or statutory concerns.

Office of Legislative Research and General Counsel