

**PROFESSIONAL EMPLOYER ORGANIZATION
LICENSING ACT AMENDMENTS**

2002 GENERAL SESSION

STATE OF UTAH

Sponsor: Greg J. Curtis

This act modifies the Professional Employer Organization Licensing Act. The act amends the financial filing requirements for professional employer organizations. The act provides that employees of professional employer organizations are not exempt from applicable licensure laws. The act provides standards for health benefit plans offered by professional employer organizations. The act amends the procedure for refusing to renew the license of a professional employer organization. The act amends the definition of unprofessional conduct and makes other technical changes. The act provides for an immediate effective date.

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

AMENDS:

58-59-102, as last amended by Chapter 199, Laws of Utah 1999

58-59-302, as last amended by Chapter 199, Laws of Utah 1999

58-59-303, as last amended by Chapter 1, Laws of Utah 2000

58-59-308, as last amended by Chapter 199, Laws of Utah 1999

58-59-401, as last amended by Chapters 12 and 247, Laws of Utah 1994

58-59-402, as last amended by Chapter 199, Laws of Utah 1999

58-59-501, as last amended by Chapter 199, Laws of Utah 1999

58-59-502, as last amended by Chapter 199, Laws of Utah 1999

ENACTS:

58-59-309, Utah Code Annotated 1953

58-59-310, Utah Code Annotated 1953

REPEALS AND REENACTS:

58-59-306, as last amended by Chapter 199, Laws of Utah 1999

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

Section 1. 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.

~~[(3)]~~ (4) "Client" or "client" company" means a person or entity that leases any or all of its regular employees from a professional employer organization.

(5) "Coemployee" means a person who is an employee of a professional employer organization and of a client company.

~~[(4)]~~ (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 ~~[leased as regular employees]~~ coemployees to client companies.

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

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

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

~~[(ii) the interests of the client company; and]~~

~~[(iii) the interests of the public.]~~

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

(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.

~~[(7) "Lease"]~~ (10) "Professional employer agreement" means the written agreement between a professional employer organization and a client company in accordance with which the professional employer organization [leases employees to the client company and the client company leases individuals from the professional employer organization] establishes the basis for a coemployment relationship with the client company's employees.

~~[(8)]~~ (11) (a) "Professional employer organization[;]" ["employee leasing company," or "leasing company"] or "PEO" means [a person] an organization who by contract[, or otherwise,] 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 professional employer organization and the client.

(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) "Regular employee" means an individual who is an employee of a professional employer~~

~~organization for the purpose of being placed by the professional employer organization as a regular full-time or regular part-time employee of a client company.]~~

~~[(10)]~~ (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.

~~[(11)]~~ (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.

~~[(12)]~~ (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.

~~[(13)]~~ (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.

~~[(14)]~~ (17) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-59-501.

~~[(15)]~~ (18) "Unprofessional conduct" is as defined in Sections 58-1-501 and 58-59-502.

Section 2. Section **58-59-302** is amended to read:

58-59-302. Qualifications for licensure.

Each applicant for licensure as a professional employer organization shall:

- (1) submit an application in a form prescribed by the division;
- (2) 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 Division of Workforce Information and Payment Services in]~~ 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; [~~and~~]

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

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

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

~~[(6)] (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;~~

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

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

~~[(b) the plan uses a third-party administrator licensed by the state in which the third-party administrator is domiciled;]~~

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

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

~~[(8) provide;] (5) for [a] the purpose of having criminal background [check by] checks, provide to the division, the [name] names of:~~

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

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

(c) ~~[any responsible manager of the professional employer organization or other person if the manager or person has]~~ all other individuals who have signatory authority over fiduciary funds~~[;]~~ held by the professional employer organization; and

~~[(9)]~~ (6) provide evidence ~~[satisfactory to the division]~~ 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~~[; and]~~.

~~[(10) provide evidence that the applicant is of good moral character.]~~

Section 3. Section **58-59-303** is amended to read:

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

(1) The division shall issue each license under this chapter in accordance with a one-year renewal cycle established by rule. The division may by rule 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 ~~[in accordance with Section 58-59-306 of each of the following renewal requirements:]~~ of compliance with Subsections 58-59-302(1) through (4) and Sections 58-59-306 and 58-59-310.

~~[(a) current evidence of financial responsibility; and]~~

~~[(b) current evidence of financial responsibility in all self-funded insurance programs.]~~

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

58-59-306. Financial filing requirements.

(1) A professional employer organization shall submit to the division:

(a) on a quarterly basis, a statement from an independent certified public accountant, that all federal, state, and local withholding taxes, unemployment taxes, FICA taxes, workers'

compensation premiums, and employee benefit plan premiums have been paid; and

(b) on an annual basis, audited financial statements prepared by an independent certified public accountant, in accordance with generally accepted accounting practices, that include a review of the payment of all federal, state, and local withholding taxes, unemployment taxes, FICA taxes, workers' compensation premiums, and employee benefit plan premiums.

(2) The audited financial statements required by Subsection (1) shall be adequate for the state and its political subdivisions as long as:

(a) there are no qualifications given in the opinion that the CPA considers material enough to question the stability of the PEO as a going concern; and

(b) the PEO complies with Subsection 58-59-302(4).

Section 5. Section **58-59-308** is amended to read:

58-59-308. No guarantee.

By licensing 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, [~~regular employee~~] 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 6. Section **58-59-309** is enacted to read:

58-59-309. State licensing provisions not exempted.

(1) Nothing in this chapter exempts a client of a PEO, nor a coemployee, from any state, local, or federal license or registration requirement.

(2) Any individual who must be licensed, registered, or certified according to law and who is a coemployee of a PEO and a client is considered an employee of the client for purposes of that license, registration, or certification.

(3) A PEO does not engage in an occupation, trade, or profession that is licensed, certified, or otherwise regulated by a governmental entity solely by entering into a professional employer

arrangement with a client company or a coemployee.

Section 7. Section **58-59-310** is enacted to read:

58-59-310. Health benefit plans.

If a PEO offers any self-funded or partially self-funded health benefit plan, the PEO shall:

(1) use a third-party administrator licensed by the Utah State Insurance Department;

(2) hold all self-funded or partially self-funded plan assets, including participant contributions, in a trust account;

(3) provide to the division a list of the trustees of the plan;

(4) provide to the division a statement from a certified actuary that:

(a) the plan maintains stop loss insurance that:

(i) has an aggregate stop loss provision; and

(ii) has a specific attachment point on an individual person, per plan year, in an amount not greater than \$60,000 if the plan has 500 covered coemployees, \$90,000 if the plan has between 501 and 1000 covered coemployees, \$125,000 if the plan has over 1000 covered coemployees, and \$250,000 if the plan has more than 1000 covered coemployees and the plan has in reserves 100% of the statutory liability, except that the limits of the attachment points shall increase annually by twice the percentage of the medical trend beginning with the licenses given or renewed in the year 2004; and

(b) the plan has at least 50% of its statutory liability held in the plan trust within two months of the license renewal date where the plan's statutory liability is calculated as the run-out multiplied by the change in life count multiplied by the medical trend;

(5) provide to the division a statement from a certified actuary indicating the run-out, the change in life count, the medical trend, and the statutory liability of the plan, where the plan's statutory liability is the run-out increased by the change in life count, then increased by the medical trend; and

(6) provide an audited financial statement evidencing that the PEO's plan has excess reserves of at least 50% of its statutory liability held in the plan trust as of the end of the fiscal year of the PEO, and if the excess reserves are not met, the PEO may supplement the proof that it has come into

compliance with the requirement.

Section 8. Section **58-59-401** is amended to read:

58-59-401. Grounds for denial of license and disciplinary proceedings.

(1) If at the time of renewal, a PEO fails to comply with the requirements of licensure for any reason, the division may put the PEO on probation until such time as the PEO comes into compliance with the licensure requirements or 90 days from the license renewal date, whichever comes first. If the PEO fails to cure any default within 90 days of the license renewal date, the division may refuse to renew the license of a licensee.

(2) The division may refuse to issue a license to an applicant, [refuse to renew the license of a licensee,] revoke, suspend, restrict, or place on probation the license of a licensee, issue a public or private reprimand to a licensee, and issue cease and desist orders in accordance with Section 58-1-401.

Section 9. Section **58-59-402** is amended to read:

58-59-402. Court intervention.

If a professional employer organization is operating without a license [~~or the financial condition of a licensee is impaired to the extent of posing a significant threat to the public~~], the division may file a complaint in district court asking for[~~†~~] injunctive relief or any other remedy considered appropriate by the court.

~~[(1) injunctive relief;]~~

~~[(2) the appointment of a receiver;]~~

~~[(3) the sale of the company to a third party;]~~

~~[(4) the liquidation of the company; and]~~

~~[(5) any other appropriate remedy.]~~

Section 10. Section **58-59-501** is amended to read:

58-59-501. Unlawful conduct.

Unlawful conduct includes:

- (1) engaging in practice as a professional employer organization without a license;
- (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 ~~[eligible plan participants]~~ 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) providing ~~[leased employees]~~ 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) any willful, fraudulent, or deceitful act by a licensee, caused by a licensee, or at a licensee's direction, that causes material injury to a client company or ~~[employee leased to]~~ 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 ~~[leased employees]~~ coemployees in accordance with Utah law pursuant to Section 34A-2-103;

(8) 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 ~~[an employee leasing company]~~ a professional employer organization; and

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

Section 11. Section **58-59-502** is amended to read:

58-59-502. Unprofessional conduct.

Unprofessional conduct includes:

~~[(1) failing to establish, maintain, or demonstrate financial responsibility and management competence while licensed as a professional employer organization;]~~

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

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

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

~~[(5) failing to maintain and make available, upon request, to the division and the licensee's workers' compensation insurance carrier;]~~

~~[(a) the name and federal identification number of each client company;]~~

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

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

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

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

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

(a) the sale or transfer of a majority of the ~~[employee leasing contracts]~~ professional employer contracts of the licensee;

(b) the sale or transfer of a majority of the physical assets of the licensee;

(c) the sale or transfer of more than 25% of the ownership interest of a licensee by any means including the sale, transfer, or issuance of a member interest in a limited liability company, the sale,

transfer, or issuance of a member interest in a partnership, the sale, transfer, or issuance of a ownership interest in a licensee in any other manner other than the sale or transfer of publicly traded shares of a corporation affected through a public exchange or market; and

(d) entering into one or more contracts, other than [~~employee lease~~] professional employer agreements with [~~employee leasing~~] clients, which commits the licensee to make future payments to any person or persons in amounts which in total exceed the equity of the business for payment of service provided to or for the licensee.

Section 12. **Effective date.**

If approved by two-thirds of all the members elected to each house, this act takes effect upon approval by the governor, or the day following the constitutional time limit of Utah Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto, the date of veto override.