

1 **PROFESSIONAL EMPLOYER ORGANIZATIONS**

2 2003 GENERAL SESSION

3 STATE OF UTAH

4 **Sponsor: Ed P. Mayne**

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

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

15 AMENDS:

16 **35A-4-202**, as last amended by Chapter 265, Laws of Utah 2001

17 **58-59-101**, as last amended by Chapter 199, Laws of Utah 1999

18 **58-59-102**, as last amended by Chapter 261, Laws of Utah 2002

19 **58-59-301**, as last amended by Chapter 199, Laws of Utah 1999

20 **58-59-302**, as last amended by Chapter 261, Laws of Utah 2002

21 **58-59-303**, as last amended by Chapter 261, Laws of Utah 2002

22 **58-59-308**, as last amended by Chapter 261, Laws of Utah 2002

23 **58-59-501**, as last amended by Chapter 261, Laws of Utah 2002

24 **58-59-503**, as last amended by Chapter 199, Laws of Utah 1999

25 ENACTS:

26 **58-59-303.5**, Utah Code Annotated 1953

27 REPEALS AND REENACTS:



28 **58-59-305**, as last amended by Chapter 199, Laws of Utah 1999

29 **58-59-306**, as repealed and reenacted by Chapter 261, Laws of Utah 2002

30 REPEALS:

31 **58-59-201**, as last amended by Chapter 199, Laws of Utah 1999

32 **58-59-307**, as last amended by Chapter 199, Laws of Utah 1999

33 **58-59-309**, as enacted by Chapter 261, Laws of Utah 2002

34 **58-59-310**, as enacted by Chapter 261, Laws of Utah 2002

35 **58-59-401**, as last amended by Chapter 261, Laws of Utah 2002

36 **58-59-402**, as last amended by Chapter 261, Laws of Utah 2002

37 **58-59-502**, as last amended by Chapter 261, Laws of Utah 2002

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

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

40 **35A-4-202. Employing units.**

41 As used in this chapter:

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

43 (i) any individual or type of organization that has or subsequent to January 1, 1935, had
44 one or more individuals performing services for it within the state including any:

45 (A) partnership;

46 (B) association;

47 (C) trust;

48 (D) estate;

49 (E) joint stock company;

50 (F) insurance company;

51 (G) limited liability company;

52 (H) limited liability partnership;

53 (I) joint venture;

54 (J) corporation, whether domestic or foreign;

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

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

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

58 (M) a tribal unit; or

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

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

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

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

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

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

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

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

79 (iii) provides:

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

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

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

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

85 (iv) is a public or other nonprofit institution.

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

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

89 **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;

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

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

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

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

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

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

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

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

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

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

143 (c) the individual's coemployment relationship is pursuant to a professional employer
144 agreement subject to this chapter. Individuals who are officers, directors, shareholders,
145 partners, and managers of the client are covered employees to the extent the PEO and the client
146 have expressly agreed in the professional employer agreement that the individuals would be
147 covered employees and provided the individuals meet the criteria of this Subsection (4) and act
148 as operational managers or perform services for the client.

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

152 ~~[(7)]~~ (5) "Engage in practice as a professional employer organization" means to hold
153 oneself out as a professional employer organization, to coemploy an employee with another
154 person, or to receive any consideration for providing professional employer services or to
155 expect payment of any consideration for providing professional employer services.

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

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

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

163 ~~[(10)]~~ (7) "Professional employer agreement" means ~~[the]~~ a written [agreement]
164 contract by and between [a professional employer organization and] a client [company in
165 accordance with which the professional employer organization establishes the basis for a
166 coemployment relationship with the client company's employees.] and a PEO that provides:

167 (a) for the coemployment of covered employees;

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

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

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

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

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

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

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

191 (iii) providing temporary help services.

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

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

200 ~~[(d) The following arrangements are not professional employer organization~~
201 ~~arrangements for purposes of this chapter:]~~

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

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

211 ~~[(iii) a temporary help arrangement, whereby an organization hires its own employees~~
212 ~~and assigns them to a client to support or supplement the client's workforce in special work~~
213 ~~situations such as employee absences, temporary skill shortages, seasonal workloads, and~~

214 special assignments and projects; provided, however, that the temporary help arrangement
215 excludes arrangements where the majority of the client's work force has been assigned by a
216 temporary help organization for a period of more than 12 consecutive months; and]

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

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

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

228 (a) recruiting and hiring its own employees;

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

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

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

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

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

242 [~~(14) "Temporary employee," as may be further defined by rule, means an individual~~
243 ~~who is an employee of, registered for temporary assignment by, or otherwise associated with a~~
244 ~~temporary help company that engages in the assignment of individuals as temporary full-time~~

245 or part-time personnel to fill assignments with a finite ending date to another independent
246 entity.]

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

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

253 [(17)] (11) "Unlawful conduct" is as defined in Sections 58-1-501 and 58-59-501.

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

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

256 **Part 3. Registration**

257 **58-59-301. Registration required.**

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

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

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

263 **58-59-302. Qualifications for registration.**

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

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

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

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

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

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

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

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

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

276 liabilities, whichever is greater;]

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

279 [~~(a) all individuals who have control of or a controlling interest in, as defined in Section~~
280 ~~16-10a-102, the professional employer organization;]~~

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

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

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

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

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

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

295 **58-59-303. Term of registration -- Expiration -- Renewal.**

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

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

301 [~~(2) At the time of renewal the licensee shall show satisfactory documentation of~~
302 ~~compliance with Subsections 58-59-302(1) through (4) and Sections 58-59-306 and~~
303 ~~58-59-310.]]~~

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

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

307 **58-59-303.5. Information to be filed by registrants.**308 (1) Each registrant shall file the following information with the division with its initial
309 application and with each renewal application:310 (a) the name or names under which the PEO conducts business;311 (b) the address of the principal place of business of the PEO and the address of each
312 office it maintains in the state;313 (c) the PEO's taxpayer or employer identification number;314 (d) a list by jurisdiction of each name under which the PEO has operated in the
315 preceding five years, including any alternative names, names of predecessors and, if known,
316 successor business entities;317 (e) a statement of ownership, which shall include the name of all individuals that,
318 individually or acting in concert with one or more other persons, owns or controls, directly or
319 indirectly, 10% or more of the equity interests of the PEO; and320 (f) a statement of management, which shall include the name of all officers and any
321 person who has the authority to act as a senior executive officer of the PEO.322 (2) A professional employer organization which is domiciled outside of the state and
323 employs less than 50 employees who are employed or domiciled in the state is not required to
324 file the information required under Subsections (1)(e) and (f).325 Section 8. Section **58-59-305** is repealed and reenacted to read:326 **58-59-305. Conversion from licensee to registrant.**327 The division shall convert the existing license of each professional employer
328 organization, which is licensed as of the effective date of this act, to a registration under this
329 chapter.330 Section 9. Section **58-59-306** is repealed and reenacted to read:331 **58-59-306. Financial requirements, contractual relations, and allocation of rights,**
332 **duties, and obligations.**333 (1) Nothing contained in this chapter or in any professional employer agreement shall
334 affect, modify, or amend any collective bargaining agreement, or the rights or obligations of
335 any client, PEO, or covered employee under the federal National Labor Relations Act, the
336 federal Railway Labor Act, or similar state law.337 (2) Nothing contained in this chapter or any professional employer agreement shall

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

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

343 (b) A PEO may not be considered to engage in any occupation, trade, profession, or
344 other activity that is subject to licensing, registration, or certification requirements, or is
345 otherwise regulated by a governmental entity solely by entering into and maintaining a
346 coemployment relationship with a covered employee who is subject to the requirements or
347 regulation.

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

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

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

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

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

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

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

369 professional employer agreement;

370 (ii) terminate an employment relationship existing prior to the effective date of a

371 professional employer agreement; or

372 (iii) create any new or additional enforceable right of a covered employee against a

373 PEO not specifically allocated to the PEO in the professional employer agreement or this

374 chapter.

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

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

377 employees; and

378 (B) the client may retain the right to exercise the direction and control over covered

379 employees as is necessary to conduct the client's business, to discharge any fiduciary

380 responsibility which it may have, or to comply with any applicable licensure requirements;

381 (ii) the PEO shall have responsibility to:

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

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

384 (C) the extent the PEO has assumed responsibility in the professional employer

385 agreement, to make payments for employee benefits for covered employees;

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

387 covered employees; and

388 (iv) the responsibility to obtain workers' compensation coverage for covered

389 employees, from a carrier licensed to do business in Utah and otherwise in compliance with all

390 applicable requirements, shall be specifically allocated to the client in the professional

391 employer agreement.

392 (d) Except as specifically provided in this chapter or in the professional employer

393 agreement, in each coemployment relationship:

394 (i) the client may exercise all rights and is obligated to perform all duties and

395 responsibilities otherwise applicable to an employer in an employment relationship;

396 (ii) (A) the PEO may exercise only those rights, and is obligated to perform only those

397 duties and responsibilities, specifically required by this chapter or set forth in the professional

398 employer agreement; and

399 (B) the rights, duties, and obligations of the PEO as coemployer with respect to any

400 covered employee is limited to those arising under the professional employer agreement and
401 this chapter during the term of coemployment by the PEO of the covered employee; and
402 (iii) unless otherwise expressly agreed by the PEO and the client in a professional
403 employer agreement, the client retains the exclusive right to direct and control the covered
404 employees as is necessary to conduct the client's business, to discharge any of the client's
405 fiduciary responsibilities, or to comply with any licensure requirements applicable to the client
406 or to the covered employees.

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

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

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

415 (B) a client is solely responsible for directing, supervising, training, and controlling the
416 work of the covered employees with respect to the business activities of the client and solely
417 responsible for the acts, errors, or omissions of the covered employees with regard to those
418 activities; and

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

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

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

431 insurance contract, or bond.

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

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

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

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

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

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

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

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

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

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

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

462 ~~§ [(A) be established pursuant to 29 U.S.C. Sec. 1143 et seq.;~~

463 ~~[(B)] (A) §~~ utilize a third-party administrator licensed by the Utah State Insurance Department;

464 and

465 ~~§ [(C)] (B) §~~ hold all plan assets, including participant contributions, in a trust account.

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

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

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

471a **§ (vii) (A) THE DEPARTMENT OF INSURANCE MAY AUDIT ON A RANDOM BASIS, OR UPON FINDING**
 471b **A REASONABLE NEED, ANY HEALTH BENEFIT PLAN WHICH IS NOT FULLY INSURED BY AN**
 471c **AUTHORIZED INSURER.**

471d **(B) THE COST OF THE AUDIT SHALL BE BORNE BY THE PEO IF THERE IS MATERIAL**
 471e **NONCOMPLIANCE. §**

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

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

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

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

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

488 (iii) On the termination of a contract between a PEO and a client or the failure by a
 489 PEO to submit reports or make tax payments as required by this chapter, the client shall be
 490 treated as a new employer without a previous experience record unless that client is otherwise
 491 eligible for an experience rating.

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

493 **58-59-308. No guarantee.**

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

496 (1) does not guarantee any right, claim, or defense of any professional employer
497 organization, client company, coemployee, or other person;

498 (2) does not guarantee the financial responsibility or solvency of any professional
499 employer organization; and

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

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

503 **Part 5. Penalties**

504 **58-59-501. Unlawful conduct.**

505 Unlawful conduct includes:

506 (1) engaging in practice as a professional employer organization without a [license]
507 registration;

508 (2) offering an employee a self-funded medical program, unless ~~h~~ [:

509 ~~—(a) the program provides its benefits under an employee benefit plan that complies with~~
510 ~~29 U.S.C. Sec. 1143 et seq.; and~~

511 ~~—(b)]~~ ~~h~~ the program is maintained for the sole benefit of participating coemployees;

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

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

518 (5) diversion of funds paid by a client to the professional employer organization,
519 designated as payment for payroll or any related payroll taxes or employee benefits or
520 insurance, to any other purpose or use other than designated. In cases where a client has
521 defaulted on the professional employer agreement or otherwise failed to pay the PEO, the PEO
522 may allocate the deficient payment to the portions of the invoice it determines and not be in
523 violation of this section;

524 [(5)] (6) providing coemployees to any client company under any provision, term, or
 525 condition that is not contained in a clearly written agreement between the professional
 526 employer organization and client company;

527 [(6)] (7) any willful, fraudulent, or deceitful act by a [licensee] PEO, caused by a
 528 [licensee] PEO, or at a [licensee's] PEO's direction, that causes material injury to a client
 529 company or coemployee of a client company;

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

533 (8) **§ UPON COLLECTING CLEARED FUNDS FROM THE CLIENT, §** failing to pay in a timely
 533a manner any federal or state income tax withholding,
 534 FICA, unemployment tax, employee insurance benefit premium, workers' compensation
 535 premium, or other obligation due and payable directly as a result of engaging in business as a
 536 professional employer organization; and

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

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

540 **58-59-503. Penalty for unlawful conduct.**

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

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

545 (3) Any person who has engaged in unlawful conduct may be assessed the costs
 546 associated with the investigations, disciplinary proceedings, court proceedings, or other actions
 547 to enforce the provisions of this [act] chapter.

548 Section 13. **Repealer.**

549 This act repeals:

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

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

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

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

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

- 555 **proceedings.**
- 556 Section **58-59-402, Court intervention.**
- 557 Section **58-59-502, Unprofessional conduct.**

Legislative Review Note
as of 2-11-03 10:40 AM

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

Office of Legislative Research and General Counsel

Fiscal Note
Bill Number SB0155

Professional Employer Organizations

17-Feb-03

10:49 AM

State Impact

This bill will save \$1,300 from the Commerce Service Fund in per diem board costs. Appropriations from the Commerce Service Fund affect the amount available for transfer to the General Fund.

	<u>FY 04 Approp.</u>	<u>FY 05 Approp.</u>	<u>FY 04 Revenue</u>	<u>FY 05 Revenue</u>
Commerce Service Fund	(\$1,300)	(\$1,300)	\$0	\$0
TOTAL	(\$1,300)	(\$1,300)	\$0	\$0

Individual and Business Impact

No fiscal impact.

Office of the Legislative Fiscal Analyst