



HOUSE COMMITTEE ON APPROPRIATIONS

FISCAL NOTE

HOUSE BILL NO. 1055

PRINTERS NO. 3577

PRIME SPONSOR: Mustio

COST / (SAVINGS)

FUND	FY 2011/12	FY 2012/13
Administration Fund	\$0	\$0
General Fund	\$0	\$0
Workmen's Compensation Administration Fund	\$0	\$0

SUMMARY: Creates a freestanding act to regulate the professional employer organization (PEO) industry which will be known as the "Professional Employer Organization Act". This legislation would take effect in 180 days.

ANALYSIS: This legislation would create a freestanding act known as the "Professional Employer Organization Act."

Scope of Legislation: A person engaged in the business of providing PEO services will be subject to this legislation, regardless of its use of the term or conducting business as a professional employer organization, staff leasing company, registered staff leasing company, employee leasing company, administrative employer or any other name. The following will not be deemed to be professional employer organizations or the providing of professional employment services for purposes of this act: 1) arrangements where a person, whose principal business activity is not entering into professional employer arrangements and which does not hold itself out as a PEO, shares employees with a commonly-owned company; 2) independent contractor arrangements; and 3) temporary help services.

Preservation of Collective Bargaining Agreements: Nothing contained in professional employer agreements can affect, modify or amend any existing collective bargaining agreement, or amend any rights or obligations of any client, PEO or covered employee under the National Labor Relations Act.

Existing Contracts/Rights: Nothing in the legislation or in any professional employer agreement shall: 1) diminish, abolish or remove rights of covered employees of a client or obligations of such client to a covered employee existing prior to the effective date of the professional employer agreement; 2) affect, modify or amend any contractual relationship or restrictive covenant between a covered employee and any client in effect at the time a professional employer agreement becomes effective, nor shall it prohibit or amend any contractual relationship or restrictive covenant that is entered into subsequently between a client and a covered employee; 3) eliminate any right otherwise existing in law, except as provided in this act; and 4) create any right or cause of action not otherwise existing in law except as specifically set forth in the professional employer agreement or this act.

Professional Employer Arrangement Effect on Licenses: Nothing in the legislation or a professional employer agreement will affect any Federal, State or local licensing, registration or certification requirement applicable to any client or covered employee. The following will apply: 1) a covered employee who must be licensed, registered or certified according to law or regulation is deemed solely an employee of the client for purposes of the license, registration or certification requirement; 2) a PEO will not be deemed to engage in any occupation, trade, profession or other activity that is subject to licensing, registration or certification requirements, or is otherwise regulated by a governmental entity, solely by entering into and maintaining a coemployment relationship with a covered employee; and 3) a client will have the sole right of direction and control of the professional or licensed activities of covered employees and of the client's business. Covered employees and clients will remain subject to regulation by the regulatory or governmental entity responsible for licensing, registration or certification of the covered employees or clients.

Tax Credits/Disadvantaged Business Status: For purposes of determination of tax credits and other economic incentives provided by the Commonwealth or other government entity based on employment, covered employees will be deemed employees solely of the client. In addition, a company's status as a minority-owned, disadvantaged, or woman-owned business will not be affected by being involved in a professional employer arrangement.

PEO Duties and Responsibilities: The legislation specifically states that a client is entitled to exercise all rights, and is obligated to perform all duties and responsibilities, otherwise applicable to an employer. The PEO is entitled to exercise only those rights, and is obligated to perform only those duties/responsibilities, specifically required by this act or set forth in the professional employer agreement. The rights, duties, and obligations of the PEO as coemployer with respect to any covered employee are limited to those arising pursuant to the professional employer agreement and this act.

Unless otherwise expressly agreed by the PEO and the client, the client retains the exclusive right to direction and control of the covered employees as is necessary to conduct the client's business. Except as provided by law, the coemployment relationship between the client and the PEO, and between each coemployer and each covered employee, shall be governed by the professional employer agreement. Each professional employer agreement must be in writing and signed by both the client and the PEO and shall provide: 1) the rights, duties and obligations; 2) that the PEO shall have responsibility to pay wages to covered employees, and to withhold/collect/report/remittance payroll-related taxes; 3) that the PEO may remit unemployment taxes; 4) that, to the extent the PEO has assumed responsibility in the agreement, the PEO make payments for employee benefits for covered employees; 5) that nothing in a professional employer agreement shall relieve a client from compliance with the Commonwealth's wage and labor laws; 6) that the PEO shall have a right to hire, discipline and terminate a covered employee as may be necessary to fulfill the PEO's responsibilities under this act and the professional employer agreement; 7) that the client shall have a right to hire, discipline and terminate a covered employee; and 8) that the PEO or the client has the responsibility to provide workers' compensation coverage for covered employees, and responsibility shall be specifically allocated in the professional employer agreement to either the client or the PEO.

Required Notices by PEO: The PEO must provide the procedures by which the client or PEO may terminate the professional employer agreement. In addition, the PEO must provide written notice to each covered employee affected by the agreement of the general nature of the coemployment relationship between and among the PEO, the client and the covered employee.

Specific Responsibilities: Except to the extent otherwise expressly provided by the professional employer agreement: 1) a client shall be solely responsible for the quality, adequacy or safety of the goods or services produced or sold in client's business; 2) a client shall be solely responsible for directing, supervising, training and controlling the work of the covered employees with respect to the business activities of the client and solely responsible for the acts, errors or omissions of the covered employees with regard to these activities; 3) a client shall not be liable for the acts, errors or omissions of a PEO or of any covered employee of the client and a PEO when the covered employee is acting under the express direction and control of the PEO; and 4) a PEO shall not be liable for the acts, errors or omissions of a client or of any covered employee of the client when the covered employee is acting under the express direction and control of the client.

The legislation states that a covered employee is not an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation or liquor liability insurance carried by the PEO unless the covered employee is included by specific reference in the professional employer agreement and applicable prearranged employment contract, insurance contract, or bond.

Insurance/Tax Clarification: The legislation states that a PEO under this act is not engaged in the sale of insurance or in acting as a third party administrator by offering, marketing, selling, administering or providing professional employer services which include services and employee benefit plans for covered employees.

With respect to taxation, the legislation clarifies that: 1) covered employees whose services are subject to sales tax shall be deemed the employees of the client for purposes of collecting and levying sales tax on the services performed by the covered employee; 2) any tax upon professional employer services or any business license or other fee which is based upon gross receipts shall be limited to the administrative fee of the PEO; 3) any tax assessed on a per capita or per employee basis shall be assessed against the client for covered employees and against the PEO for its employees who are not covered employees coemployed with a client; and 4) in the case of tax imposed or calculated upon the basis of total payroll, the PEO shall be eligible to apply any small business allowance or exemption available to the client for the covered employees for purpose of computing the tax.

Benefit Plans: The legislation states that a client and a PEO shall each be deemed an employer for purposes of sponsoring retirement and welfare benefit plans. A fully insured welfare benefit plan offered to the covered employees of a single PEO shall be considered, for purposes of Commonwealth law and regulation, to be a single employer welfare benefit plan and shall not be considered a multiple employer welfare arrangement. For purposes of the Insurance Company Law of 1921, a PEO shall be considered the employer of all of its covered employees, and all covered employees of one or more clients participating in a health benefit plan sponsored by a single PEO shall be considered employees of the PEO.

Unemployment Compensation: The legislation makes clear that the current provisions of the Unemployment Compensation Law with respect to PEOs apply (client being the employer). A client may authorize a PEO to file employer reports pursuant to Section 304 of the Unemployment Compensation Law and pay unemployment compensation contributions, interest and penalties on the client's behalf.

Workers' Compensation: The legislation designates both the PEO and the client as employers of covered employees assigned to the client for purposes of workers' compensation. The responsibility to provide workers' compensation coverage for the covered employees must be specifically allocated in the professional employer agreement to either the client or the PEO. When the responsibility to provide workers' compensation coverage is specifically allocated in the professional employer agreement to the PEO, the PEO must elect to provide coverage for all covered employees. A client and a registered PEO that have entered into a professional employer agreement may meet their statutory obligation under the Workers' Compensation Act for coverage as employers for the covered employees by any of the following:

- The client obtaining a standard workers' compensation policy from an insurer authorized to provide workers' compensation coverage covering the client's covered employees.
- The client being approved by the department to self-insure or group self-insure its workers' compensation obligations for the client's covered employees.
- The PEO purchasing workers' compensation insurance on a multiple coordinated policy basis from an insurer authorized to provide workers' compensation coverage to the PEO and to the client with respect to the covered employees. Separate experience data must be reported to the licensed rating organization for workers' compensation insurance for each multiple coordinated policy in a format complying with requirements of the approved statistical plan for workers' compensation coverage.
- The PEO being approved by the department to self-insure its workers' compensation obligations, including direct employees and covered employees.
- The PEO purchasing workers' compensation insurance on a master policy basis from an insurer authorized to provide workers' compensation coverage.

The legislation permits insurers to issue standard workers' compensation policies, multiple coordinated policies or master policies covering fewer than all of a client's employees. Both the PEO and the client shall be entitled to the exclusiveness of remedy under section 303 of the Workers' Compensation Act regardless of which provided such coverage.

Upon request, a PEO or PEO group must make available all personal identifying information, employer identification numbers, a federal employment identification number, provisions of the professional employer agreements, and client lists to a licensed workers' compensation rating organization to comply with the rating organization's statutory obligations.

FISCAL IMPACT: This legislation would have no adverse fiscal impact on Commonwealth funds. The legislation, as amended in the Senate, does not require any agency of the Commonwealth to regulate or enforce the provisions of this act.

PREPARED BY: Tim Rodrigo
House Appropriations Committee (R)

DATE: June 28, 2012

Estimates are calculated using the best information available. Actual costs and revenue impact incurred may vary from estimates.