MICHIGAN PROFESSIONAL EMPLOYER ORGANIZATION REGULATORY ACT
Act 370 of 2010

AN ACT to license and regulate professional employer organizations; to define certain relationships and allocate certain rights and duties between those relationships; to provide for certain powers and duties for state agencies; to impose certain fees and provide for certain security devices; and to provide for penalties and remedies.

History: 2010, Act 370, Eff. July 1, 2011.

The People of the State of Michigan enact:

338.3721 Short title.

Sec. 1. This act shall be known and may be cited as the "Michigan professional employer organization regulatory act".

History: 2010, Act 370, Eff. July 1, 2011.

338.3723 Definitions.

Sec. 3. As used in this act:

(a) "Client" means any person who enters into a professional employer agreement with a PEO.

(b) "Coemployer" means either a PEO or a client.

(c) "Coemployment relationship" means a relationship that is intended to be an ongoing relationship rather than a temporary or project-specific one, wherein the rights, duties, and obligations of an employer arising out of an employment relationship have been allocated between coemployers pursuant to a professional employer agreement.

(d) "Covered employee" means an individual having a coemployment relationship with a PEO and a client who has received written notice of coemployment with the PEO and the individual has created a coemployment relationship pursuant to a professional employer agreement. Covered employee includes individuals who are officers, directors, shareholders, partners, and managers of the client to the extent the PEO and the client have expressly agreed in the professional employer agreement that those individuals are considered covered employees and those individuals act as operational managers or perform day-to-day operational services for the client.

(e) "Department" means the department of energy, labor, and economic growth.

(f) "Director" means the director of the department.

(g) "Licensee" means a PEO licensed under this act.

(h) "PEO group" means 2 or more PEOs that are majority owned or commonly controlled by the same entity, parent, or controlling person.

(i) "Person" means any individual, partnership, corporation, limited liability company, association, or any other legal entity.

(j) "Professional employer agreement" means a written contract by and between a client and a PEO that provides for the following:

(*i*) Coemployment of covered employees.

(*ii*) The allocation of employer rights and obligations between the client and the PEO with respect to the covered employees.

(*iii*) Assumption of responsibilities by the PEO and the client as required by this act.

(k) "PEO" or "professional employer organization" means any person engaged in the business of providing professional employer services regardless of its use of a descriptive term other than "professional employer organization" or "PEO". PEO does not include any of the following:

(*i*) An arrangement in which a person, whose principal business activity is not entering into professional employer agreements and does not hold itself out as a PEO, shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the internal revenue code of 1986, 26 USC 414.

(*ii*) A provider of temporary help services as defined by section 29 of the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.29.

(*iii*) Independent contractor arrangements by which a person assumes responsibility for the product produced or service performed by that person or his or her agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under such arrangements.

(*l*) "Professional employer service" means the service of entering into a coemployment relationship in which all or a majority of the employees providing services to a client or to a division or work unit of the client are covered employees.

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History: 2010, Act 370, Eff. July 1, 2011.

338.3725 Professional employer agreement; effect.

Sec. 5. (1) Neither this act nor a professional employer agreement shall affect, modify, or amend any collective bargaining agreement, or the rights or obligations of any client, PEO, or covered employee under any state or federal act.

(2) Neither this act nor any professional employer agreement shall do any of the following:

(a) Diminish, abolish, or remove rights of covered employees owed to a client or obligations of that client to a covered employee regarding rights or obligations existing prior to the effective date of the professional employer agreement.

(b) 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 or that is entered into subsequently between a client and a covered employee.

(3) Neither this act nor any professional employer agreement shall affect, modify, or amend any state, local, or federal licensing, registration, certification, or other regulatory requirement applicable to any client or covered employee. A PEO is not considered to be engaged in any occupation, trade, profession, or other activity that is subject to licensing, registration, or certification requirements, or is otherwise regulated by a governmental entity solely by entering into and maintaining a coemployment relationship with a covered employee who is subject to those requirements or regulations.

(4) Unless otherwise provided by law and with respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, a client company's status or certification as a small, minority-owned, disadvantaged, or woman-owned business enterprise or as a historically underutilized business is not affected due to the client company's execution of an agreement with a PEO or to the use of the services of a PEO.

History: 2010, Act 370, Eff. July 1, 2011.

338.3727 Provider of professional employer services; license; fee; application; prohibitions relating to person convicted of certain felony; filing by PEO operating on effective date of act; renewal application; combined or consolidated audited financial statement; electronic filings.

Sec. 7. (1) Except as otherwise provided in this act, beginning September 1, 2012, a person shall not provide, advertise, or otherwise hold itself out as providing professional employer services in this state, unless licensed or exempt from licensure under this act.

(2) An applicant for licensure shall submit to the department the application fee imposed in section 13 and a completed application that provides the following information:

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

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

(c) The PEO's taxpayer or employer identification number.

(d) A list by jurisdiction of each name under which the PEO has operated in the preceding 5 years, including any alternative names, names of predecessors, and, if known, successor business entities.

(e) A statement of ownership that includes the name and evidence of the business experience of any person, individually or acting in concert with 1 or more other persons, that directly or indirectly owns or controls 10% or more of the equity interests of the PEO.

(f) A statement of management that includes the name and evidence of the business experience of any individual who serves as president or chief executive officer or otherwise has the authority to act as senior executive officer of the PEO.

(g) A financial statement describing the financial condition of the PEO or PEO group, prepared in accordance with generally accepted accounting principles and audited by an independent certified public accountant licensed to practice in the jurisdiction in which that accountant is located and is without qualification as to the going concern status of the PEO. A PEO group may submit combined or consolidated audited financial statements to meet the requirements of this subsection. A PEO that has not had sufficient operating history to have audited financials based on at least 12 months of operating history must meet the financial capacity requirements described in section 15 and present financial statements reviewed by a licensed certified public accountant.

(h) A financial audit of the applicant. At the time of application for an initial license, the applicant shall submit its most recent audit, which may not be older than 13 months. Thereafter, a PEO or PEO group shall file on an annual basis, within 270 days after the end of the PEO or PEO group's fiscal year, a succeeding

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audit. An applicant may apply to the department for an extension, except that any request must include a letter from the auditors stating the reasons for the delay and the anticipated audit completion date.

(i) A certification that the PEO has made an election under section 13m of the Michigan employment security act, 1936 (Ex Sess) PA 1, MCL 421.13m.

(3) Beginning September 1, 2012, a person that has been convicted of a felony related to the operation of a PEO shall not own or control, directly or indirectly, a PEO doing business in this state.

(4) Each PEO operating in this state on the effective date of this act shall file its completed application and submit the license fee by July 1, 2012.

(5) Before a license expires, the licensee may renew its license by submitting a renewal application to the department that includes any changes in the information provided in the licensee's prior application.

(6) PEOs in a PEO group may satisfy the reporting and financial requirements of this section on a combined or consolidated basis if each member of the PEO group guarantees the obligations under this act of each other member of the PEO group. If a PEO group submits a combined or consolidated audited financial statement, including entities that are not PEOs or that are not in the PEO group, the controlling entity of the PEO group under the consolidated or combined statement must guarantee the obligations of the PEOs in the PEO group. The department shall determine whether the requirements of this subsection are satisfied.

(7) The department shall, to the extent practical, accept electronic filing of applications, documents, reports, and other filings required under this act. The department may accept electronic filings and other assurance by an independent and qualified assurance organization that provides satisfactory assurance of compliance acceptable to the department consistent with, or in lieu of, the requirements of this section, sections 9 and 15, and other requirements of this act. The department shall allow a PEO to authorize an assurance organization, approved by the director, to act on the PEO's behalf in complying with the licensure requirements of this act including, but not limited to, electronic filings of information and payment of license fees. Use of an approved assurance organization by a PEO is optional. This subsection does not limit or change the department's authority to license, to rescind, revoke, or deny a license, or to investigate or enforce any provision of this act.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

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338.3729 Limited license.

Sec. 9. (1) Beginning September 1, 2012, the department may issue a limited PEO license. A PEO seeking limited licensure under this section shall submit to the department a properly executed and completed application on a form provided by the department and include with the application the license fee for limited licensure established by the department.

(2) A PEO is eligible for a limited license if it meets all of the following conditions:

(a) Is domiciled outside this state and is licensed or otherwise regulated as a PEO in another state.

(b) Does not maintain an office in this state or does not directly solicit clients located or domiciled in this state.

(c) Does not have more than 50 covered employees employed or domiciled in this state on any given day.

(3) A limited license is valid for 1 year and may be renewed.

(4) Section 15 does not apply to an applicant for a limited license.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3731 List of licensed PEOs; availability to public.

Sec. 11. The department shall maintain a list of PEOs licensed under this act. The list shall be readily available to the public by electronic or other means.

History: 2010, Act 370, Eff. July 1, 2011.

338.3733 License fees; adjustment; "Detroit consumer price index" defined.

Sec. 13. (1) The department may charge an application fee for an initial license under this act. The amount of the fee shall be determined by the department and shall not exceed $1,500.00 for an individual license or $1,500.00 for a PEO group license.

(2) Except for an initial license, the term of a license issued under this act is 1 year, beginning on September 1 and expiring on August 31 of the next calendar year.

(3) The department shall issue an initial license under this act for a term from the effective date of that initial license, as determined by the department, to the next August 31 after that effective date or, at the option of the department, to the second August 31 after the effective date. If the effective date of the license is not September 1, the department shall adjust the amount of the annual license fee under subsection (4) for that initial term on a pro rata basis to reflect the length of the initial term, as determined by the department.

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(4) Subject to subsection (3), the annual license fee is $1,500.00 for an individual license and $1,500.00 for a PEO group license.

(5) The department may adjust the license fees under this section every 2 years by an amount determined by the state treasurer to reflect the cumulative annual percentage change in the Detroit consumer price index in the preceding 2-year period and rounded to the nearest dollar. As used in this subsection, "Detroit consumer price index" means the most comprehensive index of consumer prices available for the Detroit area by the bureau of labor statistics of the United States department of labor.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3735 Working capital; requirements.

Sec. 15. Unless otherwise exempt under this act, beginning September 1, 2012, each PEO or collectively each PEO group shall submit to the department evidence of and maintain either of the following:

(a) A minimum of $100,000.00 in working capital, as defined by generally accepted accounting principles, as reflected in the financial statements submitted to the department with the initial license application and each annual renewal application. A PEO or PEO group with less than $100,000.00 in working capital at renewal has 180 days to eliminate the deficiency in a manner acceptable to the department. During that 180-day period, the PEO or PEO group shall submit quarterly financial statements to the department accompanied by an attestation of the chief executive officer that all wages, taxes, worker's compensation premiums, and employee benefits have been paid by the PEO or members of the PEO group.

(b) A bond, irrevocable letter of credit, or securities with a minimum market value of $100,000.00, acceptable to the department. The bond shall be held by a depository designated by the department to secure payment by the PEO of all taxes, wages, benefits, or other entitlements due to, or regarding, covered employees, if the PEO or PEO group does not make those payments when due. For any PEO or PEO group whose annual financial statements do not indicate positive working capital, the PEO shall provide a bond in the amount of $100,000.00 plus an amount sufficient to cover the deficit in working capital.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3737 Professional employer agreement; provisions; written notice to covered employee affected by agreement.

Sec. 17. (1) Each professional employer agreement executed on or after September 1, 2012 shall include the following provisions:

(a) The responsibility of the PEO to pay wages to covered employees; to withhold, collect, report and remit payroll-related and unemployment taxes; and, to the extent the PEO has assumed responsibility in the professional employer agreement, to make payments for employee benefits for covered employees. For purposes of this subdivision, wages do not include any obligation between a client and a covered employee for payments beyond, or in addition to, the covered employee's salary, draw, or regular rate of pay, including bonuses, commissions, severance pay, deferred compensation, profit sharing, or vacation, sick, or other paid time off pay, unless the PEO has expressly agreed to assume liability for those payments in the professional employer agreement.

(b) The hiring, disciplining, and termination by the PEO of a covered employee, as necessary to fulfill the PEO's responsibilities under this act and the professional employer agreement. The client may also hire, discipline, and terminate a covered employee.

(c) The responsibility of the client and the PEO to comply with the worker's disability compensation act of 1969, 1969 PA 317, MCL 418.101 to 418.941.

(2) Each professional employer agreement executed on or after September 1, 2012 shall require that the PEO provide written notice to each covered employee affected by the agreement regarding the general nature of the coemployment relationship between and among the PEO, the client, and that covered employee.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3739 Professional employer agreement; liabilities or obligations; tax or assessment.

Sec. 19. (1) Except to the extent otherwise expressly provided for by the professional employer agreement, the following apply:

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

(b) A client is solely responsible for directing, supervising, training, and controlling the work of the covered employees with respect to the business activities of the client and is solely responsible for the acts, errors, or omissions of the covered employees regarding those activities.

(c) A client is not liable for the acts, errors, or omissions of a PEO or of any covered employee of the client

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and a PEO when the covered employee is acting under the express direction and control of the PEO.

(d) A PEO is not 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.

(2) This section does not limit any contractual liability or obligation specifically provided in the written professional employer agreement.

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

(4) A PEO is not considered engaged in the sale of insurance or in acting as a third party administrator by offering, marketing, selling, administering, or providing professional employer services that include services and employee benefit plans for covered employees.

(5) A client and a PEO are each considered an employer for purposes of sponsoring retirement and welfare benefit plans for its covered employees. A fully insured welfare benefit plan offered to the covered employees of a single PEO shall be treated, for purposes of state law, as a single employer welfare benefit plan.

(6) For purposes of this state or any political subdivision of this state and except as otherwise specifically provided for PEO arrangement by law, covered employees whose services are subject to sales tax are considered the employees of the client for purposes of collecting and levying sales tax on the services performed by the covered employee. This act does not relieve a client of any sales tax liability with respect to its goods or services.

(7) Except as otherwise specifically provided for PEO arrangement by law, a tax or assessment imposed upon professional employer services or any business license or other fee that is based upon gross receipts shall allow a deduction from the gross income or receipts of the business derived from performing professional employer services that is equal to that portion of the fee charged to a client that represents the actual cost of wages and salaries, benefits, worker's compensation insurance, payroll taxes, withholding, or other assessments paid to, or on behalf of, a covered employee by the professional employer organization under a professional employer agreement.

(8) Except as otherwise specifically provided for PEO arrangement by law, a tax assessed, assessment, or mandated expenditure on a per capita or per employee basis shall be assessed against the client for covered employees and against the professional employer organization for its employees who are not covered employees co-employed with a client. Benefits or monetary consideration that meet the requirements of mandates imposed on a client and that are received by covered employees through the PEO, either through payroll or through benefit plans sponsored by the PEO, shall be credited against the client's obligation to fulfill those mandates.

(9) Except as otherwise specifically provided for PEO arrangement by law and in the case of a tax or an assessment imposed or calculated upon the basis of total payroll, the professional employer organization is eligible to apply any small business allowance or exemption available to the client for the covered employees for the purpose of computing the tax.

History: 2010, Act 370, Eff. July 1, 2011.

338.3741 Prohibited conduct; opportunity for hearing; penalties.

Sec. 21. (1) Beginning September 1, 2012, a person that commits 1 or more of the following is subject to the penalties described in subsection (2):

(a) Practices fraud or deceit in obtaining or renewing a license.

(b) Aids or abets another person in the unlicensed practice of an occupation.

(c) Engages in activities regulated under this section without obtaining a license under this act or demonstrating that the person is exempt from licensure under this act.

(d) If the person is a licensee or an officer of a licensee, is convicted of a crime relating to the operation of a PEO.

(e) Engages in false advertising.

(2) After notice and opportunity for hearing under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, the department shall do 1 or more of the following if it determines that a person violated this act, a rule adopted under this act, or an order issued under this act:

(a) Place a limitation on a license.

(b) Suspend a license.

(c) Deny a license or renewal of a license.

(d) Revoke a license.

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(e) Impose an administrative fine to be paid to the department, not to exceed $5,000.00.

(f) Censure the person or license.

(g) Place the licensee on probation.

(h) Require restitution to be made, based on proofs submitted to and findings made by the hearing examiner after a contested case.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3743 Violation of act as misdemeanor; penalty.

Sec. 23. Beginning September 1, 2012, a person that knowingly and willfully violates this act, or that aids and abets, directly or indirectly, a violation of this act, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $10,000.00, or both.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

338.3745 Rules.

Sec. 25. The department shall promulgate consistent and necessary rules under the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328, as considered necessary to implement this act.

History: 2010, Act 370, Eff. July 1, 2011.

338.3747 Effective date.

Sec. 27. This act takes effect January 1, 2012.

History: 2010, Act 370, Eff. July 1, 2011;—Am. 2011, Act 125, Eff. Jan. 1, 2012.

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