

EMPLOYMENT

NEW LAW AFFECTS EMPLOYEE LEASING ORGANIZATIONS ("PEOS")

by Christina K. McDonald
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A new law dramatically affecting employee leasing took effect on January 1, 2012. An employee leasing company, formally known as a professional employer organization ("PEO"), is a business that provides human resources and staffing services to its clients. Both PEOs and businesses utilizing PEOs should be familiar with the Professional Employer Organization Regulatory Act because it affects new and existing PEO-client relationships.

Under the new legislation, all PEOs must be licensed by Michigan's Department of Licensing and Regulatory Affairs ("LARA") by September 1, 2012. Several exemptions to the licensing requirements are available:

- A person whose principal business activity is not entering into professional employer agreements and does not hold itself out as a PEO does not need to obtain a PEO license.
- A provider of temporary help services does not need to obtain a PEO license.
- Certain independent contractor arrangements are also exempt from the licensure requirements.

To become licensed, a PEO must submit a completed license application to LARA, along with the required application fee, by July 1, 2012. The license application requires the following information:

- The PEO's name.
- The address of the principal place of business of the PEO and the address of each office it maintains in Michigan.
- The PEO's taxpayer identification number.
- A list by jurisdiction of each name under which the PEO has operated in the preceding 5 years.
- A statement of ownership.
- A statement of management.
- An audited financial statement describing the financial condition of the PEO.
- A certification that the PEO has made an election under section 13m of the Michigan employment security act.

PEO licenses must be renewed annually. Under the Act, LARA is required to maintain a publicly available list of all licensed PEOs. Limited PEO licenses are available for PEOs domiciled outside of the State of Michigan.

The legislation also requires PEOs to maintain a minimum of \$100,000 in working capital, as reflected in the annual financial statements that must be submitted to LARA with the license

applications. Alternatively, a PEO may present LARA with evidence of a bond, irrevocable letter of credit, or securities with a minimum market value of \$100,000 to secure payment of PEO taxes, wages, and benefit payments.

Businesses utilizing PEOs should be aware of the new legislation because it affects existing and subsequently executed contracts between PEOs and their clients. For example, the following terms must be included in any PEO-client agreement executed after September 1, 2012:

- The responsibility of the PEO and the client to pay wages, to withhold taxes, including unemployment taxes, and to make employee benefit payments for covered employees.
- The responsibility of the PEO and the client to hire, discipline, and terminate employees.
- The responsibility of the PEO and the client to comply with Michigan's Worker's Disability Compensation Act.

In addition to the above-listed terms, which must be included in all new PEO-client agreements, the law implies certain terms and obligations into all PEO-client relationships, including those governed by existing agreements. Unless a PEO-client agreement expressly provides to the contrary, the following terms will be implied into all PEO-client agreements:

- The client is solely responsible for the quality, adequacy, or safety of the goods or services produced or sold in the client's business.
- The client is solely responsible for the acts, errors, and omissions of its employees, including the directing, supervising, training, and controlling their work, unless acting under the express direction and control of the PEO.
- All employees will be considered the client's employees for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability not covered by worker's compensation, and/or liquor liability insurance.
- A client and a PEO are each considered an employer for purposes of sponsoring retirement and welfare benefit plans for its covered employees.
- Employees whose services are subject to sales tax are considered the client's employees for purposes of collecting and levying sales tax on the services performed by the employee.
- Taxes assessed on a per capita or per employee basis are to be assessed against the client.



Like many statutes, the Act imposes penalties for each violation. Violations of the Act include fraud or deceit in obtaining or renewing a license, aiding or abetting another person in an unlicensed PEO practice, engaging in regulated activities without a license, or being convicted of a crime relating to the operation of

a PEO. Sanctions for violating the Act include license limitations, license suspensions, license denials, license revocations, or the imposition of a \$5,000 fine, censure, probation, and/or restitution. In addition, any person who knowingly and willfully violates the Act, or who aids and abets another in directly or indirectly violating the Act, is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than \$10,000, or both.

LARA is charged with promulgating “consistent and necessary rules” to implement the Act under Michigan’s administrative procedures act. Unfortunately, no administrative rules have yet been promulgated to assist LARA, or a PEO or client entity, in interpreting the new legislation, and several issues remain open under the Act. Dickinson Wright will keep you informed about the rules if and when adopted.

Employers utilizing PEOs, as well as entities that serve as single-client or multi-client PEOs, should take immediate steps to comply with the Act.

FOR MORE INFORMATION CONTACT:



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