WEST VIRGINIA CODE CHAPTER 33 ARTICLE 46A

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§33-46A-1. Purpose and intent.

The Legislature hereby finds that:

(1) Professional Employer Organizations (hereinafter "PEOs") provide a valuable service to commerce and the citizens of this state by increasing the opportunities of employers to develop cost-effective methods of satisfying their personnel requirements and providing employees with access to certain employment benefits which might otherwise not be available to them;

(2) PEOs operating in this state should be properly recognized and regulated by the Insurance Commissioner; and

(3) Any allocation of employer duties and responsibilities between a PEO and a client-employer pursuant to this article should preserve all rights to which covered employees would be entitled under a traditional employment relationship.

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§33-46A-2. Definitions.

(a) "Administrative fee" means the amount charged to a client-employer by a PEO for professional employer services. It does not include amounts paid by a client-employer to the PEO for wages and salaries, benefits, payroll taxes, withholding or assessments paid by the PEO to or on behalf of covered employees under the professional employer agreement.

(b) "Client-employer" means an employer who enters into a professional employer agreement with a PEO.

(c) "Covered employee" means a person employed by a client-employer for whom certain employer responsibilities are shared or allocated pursuant to a PEO agreement. Persons who are officers, directors, shareholders, partners and managers of the client-employer and who perform day-to-day operational services for the client-employer will be covered employees only to the extent expressly set forth in the professional employer agreement.

(d) "PEO group" means two or more PEOs that are majority owned or commonly controlled by the same entity, parent or controlling persons.

(e) "Person" means a natural person or a legal entity, including, without limitation, a sole proprietorship, firm, partnership, limited liability company, association, trust or corporation.

(f) "Professional employer agreement" means a written contract by and between a client-employer and a PEO under which a PEO contracts to provide professional employer services for an administrative fee.

(g) "Professional employer organization" or "PEO" means a person engaged in the business of providing professional employer services, regardless of its use of the term, or conducting business as a "staff leasing company," "registered staff leasing company," "employee leasing company," "administrative employer," or any other name. For purposes of this article, the following is not a PEO:

(1) A person who shares employees with a commonly-owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended;

(2) A person who neither holds itself out as a PEO, nor enters into professional employer agreements as its principal business activity;

(3) An independent contractor who assumes responsibility for the product produced or service performed by a person or his or her agents and who retains and exercises primary direction and control over the work performed; or

(4) A person who provides temporary help services.

(h) "Professional employer services" means functions that are:

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(1) Allocated to a PEO in a PEO agreement;

(2) Customarily exercised by an employer with respect to its employees, including, but not limited to, hiring, firing and disciplining employees, paying wages, withholding and paying payroll taxes, maintaining employee benefit plans, and providing for mandatory workers' compensation coverage;

(3) Exercised with respect to a majority of the employees of a client-employer; and

(4) Intended to be of a continuing rather than a temporary or seasonal nature.

(j) "Worksite employees" means persons employed by a PEO and not by a client-employer.

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§33-46A-3. Rights, duties and obligations unaffected by this article.

(a) Nothing in this article or in any professional employer agreement affects, modifies or amends any collective bargaining agreement, or the rights or obligations of a client-employer, PEO or covered employee under the Federal National Labor Relations Act, the Federal Railway Labor Act or article one-a, chapter twenty-one of this code.

(b) Notwithstanding any other provision of this article, nothing in this article or in any professional employer agreement:

(1) Diminishes, abolishes or removes rights of covered employees as to a client-employer or obligations of a client-employer to covered employees, including but not limited to rights and obligations arising from civil rights laws guaranteeing nondiscrimination in employment practices;

(2) Affects, modifies, or amends any contractual relationship or restrictive covenant between a covered employee and a client-employer in effect at the time a professional employer agreement becomes effective; or

(3) Prohibits or amends or any contractual relationship or restrictive covenant that is entered into subsequent to the effective date of a professional employer agreement between a client-employer and a covered employee.

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§33-46A-4. Licensing requirements.

(a) Except as otherwise provided in this article, no person may provide, advertise or otherwise hold himself herself or itself out as providing professional employer services to client-employers in this state, unless licensed under this article.

(b) Every PEO operating within this state as of the effective date of this article must obtain a license under this article no later than July 30, 2009.

(c) Each applicant for licensure under this article shall provide the commissioner with the following information:

(1) The name or names under which the PEO conducts business;

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

(3) The PEO's taxpayer or employer identification number;

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

(5) A statement of ownership, which shall include the name and evidence of the business experience of any person who, individually or acting in concert with one or more other persons, owns or controls, directly or indirectly, twenty-five percent or more of the equity interests of the PEO;

(6) A statement of management, which shall include the name and evidence of the business experience of any person who serves as president, chief executive officer or otherwise has the authority to act as senior executive officer of the PEO; and

(7) The PEO's most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen months. The financial statement shall be prepared in accordance with generally accepted accounting principles, and audited by an independent certified public accountant licensed to practice in the jurisdiction in which the accountant is located, and shall be without qualification as to the going concern status of the PEO.

(d) An applicant may apply to the commissioner for an extension of time for filing its financial statement. A request for an extension must be accompanied by a letter from an independent certified public accountant licensed to practice in the jurisdiction in which the accountant is located, stating the reasons for the delay and the anticipated completion date of the financial statement.

(e) A PEO who has not had sufficient operating history to have an audited financial

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statement based upon at least twelve months of operating history must meet the financial capacity requirements set forth in subsection (h) of this section, and present financial statements reviewed by an independent certified public accountant licensed to practice in the jurisdiction in which the accountant is located.

(f) PEOs in a PEO group may satisfy the reporting and financial requirements of this licensing law on a combined or consolidated basis provided that each member of the PEO Group guarantees the obligations under this article of each other member of the PEO Group. In the case of a PEO Group that 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.

(g) Within one hundred eighty days after the end of a licensee's fiscal year, the licensee shall apply for renewal of its license by submitting its most recent audited financial statement meeting the same requirements as for initial licensure, together with any changes in the information required for initial licensure, all as set forth by subsection (c) of this section.

(h) Except for limited licenses granted in accordance with the provisions of subsection (i) of this section, each PEO shall maintain a minimum of $100,000 in working capital, as defined by generally accepted accounting principles and as reflected in the financial statements submitted to the commissioner with the application for an initial or renewal license. As an alternative, each PEO may provide a bond, irrevocable letter of credit, or securities with a minimum market value of $100,000 to the commissioner; such bond shall be held by a depository designated by the commissioner, securing payment by the PEO of all taxes, wages, benefits or other entitlement due to or with respect to covered employees if the PEO does not make such payments when due. For any PEO whose annual financial statements do not indicate positive working capital, the amount of the bond shall be $100,000 plus an amount sufficient to cover the deficit in working capital.

(i) Upon such terms and for such periods as he or she deems appropriate, the commissioner may grant a PEO a limited license. Application for such a license must be submitted on forms prescribed by the commissioner and must demonstrate at a minimum that the applicant:

(1) Is licensed or registered as a PEO in another state under terms that are substantially similar to the requirements of this article;

(2) Does not maintain an office in this state or directly solicit client-employers located within this state; and

(3) Does not have more than fifty covered employees employed in this state on any given day.

(j) Except where it is otherwise specially provided, the commissioner shall assess PEOs the following fees: For filing an application pursuant to subsection (b) or (c) of this section and

an application to renew a license pursuant to subsection (g) of this section, $200; and for receiving and filing annual reports, $100.

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§33-46A-4a. Operation of a PEO without a license; enforcement; penalties; fraud unit may investigate.

(a) Any person who operates a PEO without a license issued in accordance with this article is subject to the all of the injunctive, criminal, civil and administrative relief and criminal penalties as provided in article forty-four of this chapter for the unauthorized transaction of insurance.

(b) In addition to the other investigative authority granted to the commissioner in this chapter, the insurance fraud unit created pursuant to the provisions of section eight, article forty-one of this chapter may investigate suspected violations of this article.

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§33-46A-5. Examinations; costs; confidentiality of information.

(a) The commissioner may examine or investigate the business and affairs of any PEO plan he or she considers necessary. The examination or investigation is subject to and shall be performed in accordance with the provisions of section nine, article two of this chapter.

(b) The commissioner shall assess the costs of an examination to the PEO.

(c) All working papers, recorded information, documents and copies thereof produced by, obtained by or disclosed to the commissioner or any other person in the course of an examination made under this section are subject to the confidentiality provisions of subdivision (4), subsection (l), section nine, article two of this chapter.

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§33-46A-6. Requirements for provisions of PEO agreements.

(a) Each professional employer agreement shall, at a minimum, allocate the responsibility to:

(1) Arrange for the payment of wages to covered employees;

(2) Withhold, collect, report and remit payroll-related and unemployment taxes;

(3) Make payments for employee benefits on behalf of covered employees; and

(4) Provide for mandatory workers' compensation coverage.

(b) Each professional employer agreement shall provide that the client-employer shall retain the right to hire, discipline, and terminate a covered employee: Provided, That every professional employment agreement may provide that the PEO has the right to terminate the professional employment agreement if a client-employer refuses without good cause a request from the PEO that the client-employer discipline or terminate a covered employee as may be necessary to fulfill the PEO's responsibilities under this article and the professional employer agreement.

(c) Except as otherwise provided by law:

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

(2) A client-employer is solely responsible for directing, supervising, training and controlling the work of a covered employee, and is solely responsible for the acts, errors or omissions of a covered employee, when the covered employee is engaged in the business activities of the client-employer;

(3) A PEO is not liable for the acts, errors or omissions of a client-employer or of a covered employee of the client-employer when the covered employee is acting under the express direction and control of the client-employer.

(d) Within twenty days of its execution, every professional services agreement shall be filed with the commissioner. Such agreements are confidential by law and privileged, are not subject to the provisions of chapter twenty-nine-b of this code, and are not open to public inspection.

(e) A covered employee is not, solely as the result of being a covered employee, an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety bonds, wage bonds 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.

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§33-46A-7. Workers' compensation.

(a) The responsibility to obtain workers' compensation coverage for covered employees in compliance with all applicable law shall be specifically allocated in the professional employer agreement to either the client-employer or the PEO.

(b) If the responsibility is allocated to the PEO under the agreement:

(1) The agreement shall require that the PEO maintain and provide workers' compensation coverage for the covered employees from a carrier authorized to do business in this state: Provided, That the provisions of section seven, article two, chapter twenty-three of this chapter may not be abrogated by a PEO agreement and the client-employer shall at all times remain ultimately liable under chapter twenty-three of this code to provide workers' compensation coverage for its covered employees;

(2) The insurer shall report:

(A) Payroll and claims data for each client-employer to the commissioner or his or her designated advisory organization in a manner that identifies both the client-employer and PEO; and

(B) Coverage status with respect to each client-employer in accordance with the proof of coverage requirements provided for in statute and rules.

(c) Workers' compensation coverage may be provided:

(1) On a master policy basis, under which a single policy issued to the PEO provides coverage for more than one client-employer, and may also provide coverage to the PEO with respect to its worksite employees: Provided, That on or before July 1, 2008, the commissioner shall promulgate an emergency legislative rule in accordance with the provisions of section fifteen, article three, chapter twenty-nine of this code, and shall also propose an exempt legislative rule for adoption by the industrial council in accordance with the provisions of subdivision (2), subsection (j), section one-a, article one, chapter twenty-three of this code, establishing standards for the reporting of client-employer experience in sufficient detail to enable the assignment of an experience modifier upon termination of the professional employer agreement: Provided, however, That no mandatory workers' compensation coverage may be provided through a PEO arrangement to any client-employers on a master policy basis other than through coverage in the voluntary market, as that term is defined in subsection (u), section two, article two-c, chapter twenty-three of this code.

(2) On a multiple coordinated policy basis, under which a separate policy is issued to or on behalf of each client-employer or group of affiliated client-employers with certain payment obligations and policy communications coordinated through the PEO; or

(3) On any other basis approved by the commissioner.

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(d) This article does not prohibit grouping together the client-employers of a PEO for the purposes of offering dividend eligibility, applying a discount to the premium charged, applying a retrospective rating option arrangement or the use of any other loss sensitive rating options or large deductible policies as allowed under state law.

(e) The protection of the exclusive remedy provision of section six, article two, chapter twenty-three of this code, shall apply to the PEO, the client-employer, and to all covered employees and other employees of the client-employer irrespective of whether the PEO or the client-employer obtains the workers' compensation coverage.

(f) The commissioner shall propose rules in accordance with the provisions of subsection (c), section five, article two-c, chapter twenty-three of this code, for adoption by the Industrial Council, to effectuate the purposes of this section, including the manner in which notice of default of a master policy must be given to client-employers.

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§33-46A-8. Enforcement; penalties.

(a) No person may offer or provide professional employer services or use the names PEO, Professional Employer Organization, staff leasing, employee leasing, administrative employer or other title representing professional employer services without holding a license issued under the provisions of this article.

(b) The commissioner shall deny, suspend or revoke the license of a PEO if he or she finds that the PEO:

(1) Is in an unsound financial condition;

(2) Is using methods or practices in the conduct of its business that render its transaction of business in this state hazardous or injurious to its client-employers or the public; or

(3) Has failed to pay a judgment rendered against it in this state within sixty days after the judgment has become final.

(c) The commissioner may, after notice and opportunity for a hearing in accordance with the provisions of article two, chapter thirty-three of this code, deny, suspend or revoke the license of a PEO if the commissioner finds that the PEO:

(1) Has violated any lawful rule or order of the commissioner or any provision of the laws of this state;

(2) Has refused to be examined or to produce its accounts, records and files for examination, or if any person responsible for the conduct of affairs of the PEO has refused to give information with respect to its affairs, or has refused to perform any other legal obligation as to an examination, when required by the commissioner. For purposes of this section, persons responsible for the conduct of affairs of the PEO include, but are not limited to, members of the board of directors, board of trustees, executive committee or other governing board or committee; the principal officers in the case of a corporation or the partners or members in the case of a partnership, association or limited liability company; any shareholder or member holding directly or indirectly ten percent or more of the voting stock, voting securities or voting interest of the administrator; and any other person who exercises control or influence over the affairs of the PEO;

(3) Has, without just cause, refused to pay proper claims or perform services arising under its contracts or has, without just cause, caused covered employees to accept less than the amount due them or caused covered employees to employ attorneys or bring suit against the PEO to secure full payment or settlement of their claims;

(4) At any time fails to meet any qualification for which issuance of the license could have been refused;

(5) Has been convicted of, or has entered a plea of guilty or no contest to, a felony without

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regard to whether the adjudication was withheld; or

(6) Is under suspension or revocation in another state.

(d) Every PEO licensed under this article is under a continuing duty to notify the commissioner within ten days of any of the events set forth in subdivisions (5) and (6) of subsection (c) or subdivision (3) of subsection (b) of this section.

(e) The commissioner may, in his or her discretion and without advance notice or hearing, immediately suspend the license of a PEO if the commissioner finds that one or more of the following circumstances exist:

(1) The PEO is insolvent or impaired;

(2) A proceeding for receivership, conservatorship, rehabilitation or other delinquency proceeding regarding the PEO has been commenced in any state; or

(3) The financial condition or business practices of the PEO otherwise pose an imminent threat to the public health, safety or welfare of the residents of this state.

(f) If the commissioner finds that one or more grounds exist for the suspension or revocation of a license issued under this article, the commissioner may, in lieu of suspension or revocation, order the PEO to pay to the State of West Virginia a penalty in a sum not exceeding $10,000; upon the failure of the PEO to pay the penalty within thirty days after notice of the penalty, the commissioner may revoke or suspend the license of the PEO.

(g) When a license has been revoked or suspended or renewal of the license refused, the commissioner may reissue, terminate the suspension or renew the license when he or she is satisfied that the conditions causing the revocation, suspension or refusal to renew have ceased to exist and are unlikely to recur.

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§33-46A-9. Health benefit plans; self-funded plans permitted under certain circumstances.

(a) A professional employer organization that sponsors a health benefit plan shall be considered the employer of all of its covered employees, and all covered employees of one or more client employers participating in a health benefit plan sponsored by a single professional employer organization shall be considered employees of that professional employer organization. For purposes of state law, such health benefit plans shall be treated as a single employer welfare benefit plan.

(b) If a professional employer organization offers to its covered employees any health benefit plan which is not fully insured by an authorized insurer, the professional employer organization must comply with the provisions of article thirty-one of this chapter. The Insurance Commissioner of West Virginia is authorized to promulgate and adopt rules with respect to professional employer organizations sponsoring health benefit plans in accordance with this section.

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§33-46A-10. Rule-making authority; fees.

(a) In addition to the authority to propose rules as provided in section seven of this article, the commissioner may propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code, to implement the provisions of this article, including but not limited to:

(1) Requirements for the issuance and renewal of licenses;

(2) Requirements for denying, suspending, revoking, reinstating or limiting the practice of a licensee;

(3) Requirements for activating inactive or revoked licenses;

(4) Special financial and other licensing requirements for small, start-up PEOs; and

(5) A schedule of fees.

(b) The commissioner may promulgate emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code, for any purposes set forth for legislative rules in subsection (a) of this section.

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