

HB 4079

2008 MAR 27 PM 5:00

SECRETARY OF STATE
STATE OF WEST VIRGINIA

WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008



ENROLLED

**COMMITTEE SUBSTITUTE
FOR
House Bill No. 4079**

(By Delegates Morgan, Martin and Hartman)



Passed March 6, 2008

In Effect Ninety Days from Passage

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COMMITTEE SUBSTITUTE

FOR

H. B. 4079

(BY DELEGATES MORGAN, MARTIN AND HARTMAN)

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AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §33-46A-1, §33-46A-2, §33-46A-3, §33-46A-4, §33-46A-5, §33-46A-6, §33-46A-7, §33-46A-8, §33-46A-9, and §33-46A-10, all relating to Professional Employer Organizations; providing declaration of purpose and intent; providing definitions; clarifying rights, duties and obligations unaffected by the article; requiring license from the Insurance Commissioner to engage in the business of a Professional Employer Organization; setting forth licensure requirements; providing for legislative, emergency and legislative exempt rules; authorizing the Insurance Commissioner to establish licensure and other fees; allowing the Insurance Commissioner to examine business records and documents; providing for confidentiality of certain information; setting forth requirements for Professional Employer Agreements; providing requirements for workers' compensation coverage; providing enforcement measures including penalties; requiring study of

health plans, taxation, unemployment and labor laws; and prohibiting self-funded health plans.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §33-46A-1, §33-46A-2, §33-46A-3, §33-46A-4, §33-46A-5, §33-46A-6, §33-46A-7, §33-46A-8, §33-46A-9 and §33-46A-10, all to read as follows:

CHAPTER 33. INSURANCE.

ARTICLE 46A. PROFESSIONAL EMPLOYER ORGANIZATIONS.

§33-46A-1. Purpose and intent.

1 The Legislature hereby finds that:

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

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

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

§33-46A-2. Definitions.

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

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

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

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

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

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

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

36 (1) A person who shares employees with a
37 commonly-owned company within the meaning of section
38 414(b) and (c) of the Internal Revenue Code of 1986, as
39 amended;

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

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

47 (4) A person who provides temporary help services.

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

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

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

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

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

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

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

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

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

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

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

19 (3) Prohibits or amends or any contractual relationship or
20 restrictive covenant that is entered into subsequent to the

21 effective date of a professional employer agreement between
22 a client-employer and a covered employee.

§33-46A-4. Licensing requirements.

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

6 (b) Every PEO operating within this state as of the
7 effective date of this article must obtain a license under this
8 article no later than the thirtieth day of July, two thousand
9 nine.

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

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

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

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

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

22 (5) A statement of ownership, which shall include the
23 name and evidence of the business experience of any person
24 who, individually or acting in concert with one or more other

25 persons, owns or controls, directly or indirectly, twenty-five
26 percent or more of the equity interests of the PEO;

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

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

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

48 (e) A PEO who has not had sufficient operating history
49 to have an audited financial statement based upon at least
50 twelve months of operating history must meet the financial
51 capacity requirements set forth in subsection (h) of this
52 section, and present financial statements reviewed by an
53 independent certified public accountant licensed to practice
54 in the jurisdiction in which the accountant is located.

55 (f) PEOs in a PEO group may satisfy the reporting and
56 financial requirements of this licensing law on a combined or
57 consolidated basis provided that each member of the PEO
58 Group guarantees the obligations under this article of each
59 other member of the PEO Group. In the case of a PEO
60 Group that submits a combined or consolidated audited
61 financial statement including entities that are not PEOs or
62 that are not in the PEO Group, the controlling entity of the
63 PEO Group under the consolidated or combined statement
64 must guarantee the obligations of the PEOs in the PEO
65 Group.

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

73 (h) Except for limited licenses granted in accordance with
74 the provisions of subsection (i) of this section, each PEO
75 shall maintain a minimum of one hundred thousand dollars
76 in working capital, as defined by generally accepted
77 accounting principles and as reflected in the financial
78 statements submitted to the commissioner with the
79 application for an initial or renewal license. As an alternative,
80 each PEO may provide a bond, irrevocable letter of credit, or
81 securities with a minimum market value of one hundred
82 thousand dollars to the commissioner; such bond shall be
83 held by a depository designated by the commissioner,
84 securing payment by the PEO of all taxes, wages, benefits or
85 other entitlement due to or with respect to covered employees
86 if the PEO does not make such payments when due. For any
87 PEO whose annual financial statements do not indicate
88 positive working capital, the amount of the bond shall be one

89 hundred thousand dollars plus an amount sufficient to cover
90 the deficit in working capital.

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

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

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

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

103 (j) Except where it is otherwise specially provided, the
104 commissioner shall assess PEOs the following fees: For
105 filing an application pursuant to subsection (b) or (c) of this
106 section and an application to renew a license pursuant to
107 subsection (g) of this section, two hundred dollars; and for
108 receiving and filing annual reports, one hundred dollars.

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

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

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

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

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

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

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

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

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

9 (4) Provide for mandatory workers' compensation
10 coverage.

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

21 (c) Except as otherwise provided by law:

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

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

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

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

41 (e) A covered employee is not, solely as the result of
42 being a covered employee, an employee of the PEO for
43 purposes of general liability insurance, fidelity bonds, surety
44 bonds, wage bonds or liquor liability insurance carried by the
45 PEO, unless the covered employee is included by specific
46 reference in the professional employer agreement and
47 applicable prearranged employment contract, insurance
48 contract or bond.

§33-46A-7. Workers' compensation.

1 (a) The responsibility to obtain workers' compensation
2 coverage for covered employees in compliance with all

3 applicable law shall be specifically allocated in the
4 professional employer agreement to either the
5 client-employer or the PEO.

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

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

17 (2) The insurer shall report:

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

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

25 (c) Workers' compensation coverage may be provided:

26 (1) On a master policy basis, under which a single policy
27 issued to the PEO provides coverage for more than one
28 client-employer, and may also provide coverage to the PEO
29 with respect to its worksite employees: *Provided*, That on or
30 before the first day of July, two-thousand eight, the
31 commissioner shall promulgate an emergency legislative rule

32 in accordance with the provisions of section fifteen, article
33 three, chapter twenty-nine of this code, and shall also propose
34 an exempt legislative rule for adoption by the industrial
35 council in accordance with the provisions of subdivision (2),
36 subsection (j), section one-a, article one, chapter twenty-three
37 of this code, establishing standards for the reporting of client-
38 employer experience in sufficient detail to enable the
39 assignment of an experience modifier upon termination of the
40 professional employer agreement: *Provided, however,* That
41 no mandatory workers' compensation coverage may be
42 provided through a PEO arrangement to any client-employers
43 on a master policy basis other than through coverage in the
44 voluntary market, as that term is defined in subsection (u),
45 section two, article two-c, chapter twenty-three of this code.

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

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

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

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

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

§33-46A-8. Enforcement; penalties.

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

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

9 (1) Is in an unsound financial condition;

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

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

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

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

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

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

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

47 (5) Has been convicted of, or has entered a plea of guilty
48 or no contest to, a felony without regard to whether the
49 adjudication was withheld; or

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

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

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

60 (1) The PEO is insolvent or impaired;

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

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

67 (f) If the commissioner finds that one or more grounds
68 exist for the suspension or revocation of a license issued
69 under this article, the commissioner may, in lieu of
70 suspension or revocation, order the PEO to pay to the State
71 of West Virginia a penalty in a sum not exceeding ten
72 thousand dollars; upon the failure of the PEO to pay the
73 penalty within thirty days after notice of the penalty, the
74 commissioner may revoke or suspend the license of the PEO.

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

§33-46A-9. Study of health plans, taxation, unemployment and labor laws; self-funded plans prohibited.

1 (a) The Joint Committee on Government and Finance
2 shall, in consultation with the Insurance Commissioner, the
3 Secretary of the Department of Revenue and the Secretary of
4 the Department of Commerce, study the issue of PEO
5 sponsorship of and involvement in employee health plans,
6 including their role in insuring the uninsured and
7 underinsured and their impact on the small group market, as
8 well issues related to how the operation of PEOs affects other
9 areas such as taxation and unemployment insurance. The
10 Joint Committee shall report back to the Legislature on or
11 before the thirty-first day of December, two-thousand eight
12 on its findings, conclusions and recommendations, together
13 with drafts of any legislation necessary to effectuate its
14 recommendations.

15 (b) PEOs are expressly prohibited from self-funding
16 health plans for covered employees.

§33-46A-10. Rulemaking authority; fees.

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

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

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

11 (3) Requirements for activating inactive or revoked
12 licenses;

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

15 (5) A schedule of fees.

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

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.



Chairman Senate Committee



Chairman House Committee

Originating in the House.

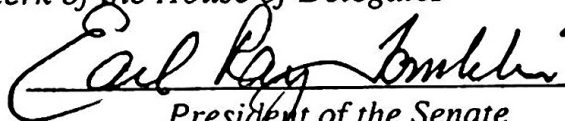
In effect ninety days from passage.



Clerk of the Senate



Clerk of the House of Delegates



President of the Senate



Speaker of the House of Delegates

The within is approved this the 27th
day of March, 2008.



Governor

PRESENTED TO THE
GOVERNOR

MAR 17 2008

Time 9:30 pm