

SENATE BILL No. 413

By Committee on Commerce

2-9

1 AN ACT concerning employment; creating the professional employer
2 organization registration act.

3
4 *Be it enacted by the Legislature of the State of Kansas:*

5 Section 1. The provisions of sections 1 through 10, and amendments
6 thereto, shall be known and may be cited as the professional employer
7 organization registration act.

8 Sec. 2. As used in sections 1 through 10, and amendments thereto:

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

11 (b) "Co-employer" means either a professional employer organization
12 or a client.

13 (c) "Co-employment relationship" means a relationship which is
14 intended to be an ongoing relationship rather than a temporary or project-
15 specific relationship, and wherein the rights, duties and obligations of an
16 employer which arise out of an employment relationship have been
17 allocated between the employer and a professional employer organization
18 as co-employers pursuant to a professional employer agreement entered
19 into in accordance with the provisions of sections 1 through 10, and
20 amendments thereto. Under a co-employment relationship:

21 (1) The professional employer organization is entitled to enforce only
22 those employer rights, and is subject to only those employer obligations,
23 that are specifically allocated to the professional employer organization by
24 the professional employer agreement or by the provisions of sections 1
25 through 10, and amendments thereto;

26 (2) the client is entitled to enforce those employer rights, and is
27 obligated to provide and perform those employer obligations, that are
28 allocated to such client by the professional employer agreement or by the
29 provisions of sections 1 through 10, and amendments thereto; and

30 (3) the client also is entitled to enforce any employer right, and is
31 obligated to perform any obligation of an employer, that is not specifically
32 allocated to the professional employer organization by the professional
33 employer agreement or by the provisions of sections 1 through 10, and
34 amendments thereto.

35 (d) (1) "Covered employee" means an individual having a co-
36 employment relationship with a professional employer organization and a

1 client, who has received written notice of the co-employment relationship
2 with the professional employer organization and the client, and such co-
3 employment relationship was entered into pursuant to a professional
4 employer agreement entered into in accordance with the provisions of
5 sections 1 through 10, and amendments thereto.

6 (2) The term "covered employee" shall include individuals who are
7 officers, directors, shareholders, partners or managers of the client, or
8 members of a limited liability company that is a client, if: (A) The
9 professional employer organization and the client have expressly agreed in
10 the professional employer agreement that such individuals are covered
11 employees; (B) such individuals satisfy the provisions of paragraph (1);
12 and (C) such individuals act as operational managers or perform day-to-
13 day operational services for the client.

14 (e) "Department" means the department of labor.

15 (f) "Person" means any individual, partnership, corporation, limited
16 liability company, association or any other form of legally recognized
17 entity.

18 (g) "Professional employer agreement" means a written contract
19 entered into between a client and a professional employer organization that
20 provides:

21 (1) For the co-employment of covered employees;

22 (2) for the allocation of employer rights and obligations between the
23 client and the professional employer organization with respect to covered
24 employees; and

25 (3) for the professional employer organization and the client to
26 assume the responsibilities required by the provisions of sections 1
27 through 10, and amendments thereto.

28 (h) (1) "Professional employer organization" means any person
29 engaged in the business of providing professional employer services. A
30 person engaged in the business of providing professional employer
31 services shall be considered a "professional employer organization"
32 regardless of such person's use of the term staff leasing company,
33 administrative employer, employee leasing company or any name other
34 than professional employer organization in describing such person's
35 business.

36 (2) For purposes of sections 1 through 10, and amendments thereto,
37 the following shall not be considered a "professional employer
38 organization," or as providing "professional employment services":

39 (A) Arrangements wherein a person, whose principal business
40 activity is not entering into professional employer agreements, and which
41 does not hold itself out as a professional employer organization, shares
42 employees with a commonly owned company within the meaning of
43 section 414(b) and (c) of the internal revenue code;

1 (B) independent contractor arrangements by which a person assumes
2 responsibility for the product produced or service performed by such
3 person or such person's agents and retains and exercises primary direction
4 and control over the work performed by the individuals whose services are
5 supplied under such arrangements; and

6 (C) providing temporary help services.

7 (i) "Professional employer group" means two or more professional
8 employer organizations that are majority owned or commonly controlled
9 by the same entity, parent or controlling person.

10 (j) "Professional employer services" means the service of entering
11 into co-employment relationships.

12 (k) "Registrant" means a professional employer organization
13 registered under the provisions of sections 1 through 10, and amendments
14 thereto.

15 (l) "Secretary" means the secretary of the department of labor.

16 (m) "Temporary help services" means services consisting of a person:

17 (1) Recruiting and hiring such person's own employees;

18 (2) locating other organizations that need the services of such
19 employees;

20 (3) assigning such employees: (A) To perform work at or services for
21 such other organizations to support or supplement such other
22 organizations' workforces; (B) to provide assistance in special work
23 situations, including employee absences, skill shortages or seasonal
24 workloads; or (C) to perform special assignments or projects; and

25 (4) customarily attempting to reassign such employees to other
26 organizations when such employees finish an assignment.

27 (n) "Working capital" means current assets less current liabilities, as
28 such terms are used by generally accepted accounting principles.

29 Sec. 3. (a) Nothing in the provisions of sections 1 through 10, and
30 amendments thereto, or in any professional employer agreement shall:

31 (1) Affect, modify or amend any collective bargaining agreement, or
32 the rights or obligations of any client, professional employer organization
33 or covered employee under the national labor relations act, 29 U.S.C. §
34 151 *et seq.*, or the railway labor act, 45 U.S.C. § 151 *et seq.*;

35 (2) diminish, abolish or remove the rights of covered employees as to
36 a client, or the obligations of such client to a covered employee, whether
37 existing prior to or after the effective date of the professional employer
38 agreement, including, but not limited to, rights and obligations arising
39 from civil rights laws guaranteeing nondiscrimination in employment
40 practices;

41 (3) affect, modify or amend any contractual relationship or restrictive
42 covenant between a covered employee and any client in effect at the time a
43 professional employer agreement becomes effective, nor prohibit or amend

1 any contractual relationship or restrictive covenant that is entered into
2 subsequently between a client and a covered employee. A professional
3 employer organization shall have no responsibility or liability in
4 connection with, or arising out of, any such existing or new contractual
5 relationship or restrictive covenant unless the professional employer
6 organization has specifically agreed otherwise in writing; or

7 (4) create any new or additional enforceable right of a covered
8 employee against a professional employer organization that is not
9 specifically provided by the professional employer agreement or by the
10 provisions of sections 1 through 10, and amendments thereto.

11 (b) (1) Nothing in the provisions of sections 1 through 10, and
12 amendments thereto, or in any professional employer agreement shall
13 affect, modify or amend any local, state or federal licensing, registration or
14 certification requirement applicable to any client or covered employee.

15 (2) A covered employee who is required to be licensed, registered or
16 certified pursuant to local, state or federal law or rules and regulations
17 shall be deemed to be an employee solely of the client for purposes of any
18 such license, registration or certification requirement.

19 (3) A professional employer organization shall not be deemed to
20 engage in any occupation, trade, profession or other activity that is subject
21 to licensing, registration or certification requirements, or is otherwise
22 regulated by a governmental entity solely by entering into and maintaining
23 a co-employment relationship with a covered employee who is subject to
24 such requirements or regulations.

25 (4) A client shall have the sole right to direct and control the
26 professional or licensed activities of covered employees and of the client's
27 business. Such covered employees and clients shall remain subject to
28 regulation by the regulatory or governmental entity responsible for
29 licensing, registration or certification of such covered employees or
30 clients.

31 (c) With respect to a bid, contract, purchase order or agreement
32 entered into with the state or a political subdivision of the state, a client's
33 status or certification as a small, minority-owned, disadvantaged or
34 woman-owned business enterprise, or as a historically underutilized
35 business, shall not be affected because the client has entered into a
36 professional employer agreement with a professional employer
37 organization, or uses the services of a professional employer organization.

38 Sec. 4. (a) A person engaged in the business of providing
39 professional employer services pursuant to co-employment relationships in
40 which all or a majority of the employees of a client are covered employees
41 shall be registered pursuant to this section.

42 (b) A person who is not registered pursuant to this section shall not
43 offer or provide professional employer services in this state, and shall not

1 use the names PEO, professional employer organization, staff leasing
2 company, employee leasing company, administrative employer or any
3 other name or title representing professional employer services.

4 (c) Each applicant for registration shall submit an application to the
5 secretary in such form and manner as prescribed by the secretary. The
6 application shall contain the following information:

7 (1) The name or names under which the professional employer
8 organization conducts business;

9 (2) the address of the principal place of business of the professional
10 employer organization, and the address of each office the professional
11 employer organization maintains in this state;

12 (3) the professional employer organization's taxpayer or employer
13 identification number;

14 (4) a list, by jurisdiction, of each name under which the professional
15 employer organization has operated in the preceding five years, including
16 any alternative names, names of predecessors and, if known, successor
17 business entities;

18 (5) a statement of ownership, which shall include the name and
19 evidence of the business experience of any person that, individually, or
20 acting in concert with one or more other persons, owns or controls,
21 directly or indirectly, 25% or more of the equity interest of the professional
22 employer organization;

23 (6) a statement of management, which shall include the name and
24 evidence of the business experience of any individual who serves as
25 president, chief executive officer or otherwise has the authority to act as
26 senior executive officer of the professional employer organization; and

27 (7) a financial statement setting forth the financial condition of the
28 professional employer organization or professional employer group, which
29 shall comply with the provisions of subsection (h).

30 (d) (1) Each professional employer organization operating within this
31 state as of the effective date of this act shall complete its initial registration
32 not later than 180 days after the effective date of this act. Such initial
33 registration shall be valid until 180 days from the end of the professional
34 employer organization's first fiscal year that is more than one year after the
35 effective date of this act.

36 (2) Each professional employer organization not operating within this
37 state as of the effective date of this act shall complete its initial registration
38 prior to initiating operations within this state. If a professional employer
39 organization not registered in this state becomes aware that an existing
40 client, not based in this state, has employees and operations in this state,
41 the professional employer organization shall either decline to provide
42 professional employer services for those employees, or notify the secretary
43 within five business days of the professional employer organization's

1 knowledge of this fact and file a limited registration application pursuant
2 to subsection (g), or a full registration if there are more than 50 covered
3 employees employed by such client. The secretary may issue an interim
4 operating permit for the period of time the application is pending if the
5 professional employer organization is currently registered or licensed by
6 another state, and the secretary determines it is in the best interests of the
7 potential covered employees.

8 (e) Within 180 days after the end of a registrant's fiscal year, such
9 registrant shall renew its registration by notifying the secretary of any
10 changes in the information provided in such registrant's most recent
11 registration or renewal. A registrant's existing registration shall remain in
12 effect for the period of time the renewal application is pending.

13 (f) Professional employer organizations in a professional employer
14 group may satisfy any reporting and financial requirements of this section
15 on a combined or consolidated basis, provided that each member of the
16 professional employer group guarantees the financial capacity obligations
17 required by section 5, and amendments thereto, of each other member of
18 the professional employer group. In the case of a professional employer
19 group that submits a combined or consolidated audited financial statement,
20 including entities that are not professional employer organizations or that
21 are not in the professional employer group, the controlling entity of the
22 professional employer group under the consolidated or combined
23 statement must guarantee the obligations of the professional employer
24 organizations in the professional employer group.

25 (g) (1) A professional employer organization is eligible for a limited
26 registration if such professional employer organization:

27 (A) Submits a written request for limited registration in such form
28 and manner as prescribed by the secretary;

29 (B) is domiciled outside this state, and is licensed or registered as a
30 professional employer organization in another state;

31 (C) does not maintain an office in this state, or directly solicit clients
32 located or domiciled within this state; and

33 (D) does not have more than 50 covered employees employed or
34 domiciled in this state on any given day.

35 (2) A limited registration is valid for one year, and may be renewed.

36 (3) A professional employer organization requesting limited
37 registration under this subsection shall provide the secretary with such
38 information and documentation as required by the secretary to show that
39 the professional employer organization qualifies for a limited registration.

40 (4) The provisions of section 5, and amendments thereto, shall not
41 apply to applicants for limited registration.

42 (h) At the time of initial registration, the applicant shall submit the
43 most recent audit of the applicant or such applicant's parent holding

1 company, which audit shall not be older than 13 months. Thereafter, a
2 professional employer organization or professional employer group shall
3 file on an annual basis, within 180 days after the end of the professional
4 employer organization's or parent holding company's fiscal year, a
5 succeeding audit. An applicant may apply to the secretary for an extension
6 of time to submit such audit, but any such request shall be accompanied by
7 a letter from the auditor stating the reasons for the delay and the
8 anticipated audit completion date. For the initial application, if the closing
9 date of the audited financial statements required by this section is older
10 than three months from the date of the application, the application also
11 shall include updated, though unaudited, financial statements for the most
12 recent quarter. The financial statement shall be prepared in accordance
13 with generally accepted accounting principles and audited by an
14 independent certified public accountant licensed to practice in the
15 jurisdiction in which such accountant is located, and shall be without
16 qualification as to the going concern status of the professional employer
17 organization. A professional employer group may submit combined or
18 consolidated audited financial statements to meet the requirements of this
19 section. A professional employer organization that has not had sufficient
20 operating history to have audited financials based upon at least 12 months
21 of operating history shall meet the financial capacity requirements of
22 subsection (f) and present financial statements reviewed by a certified
23 public accountant.

24 (i) The department shall maintain a list of professional employer
25 organizations registered under this section, and such list shall be readily
26 available to the public by electronic or other means.

27 (j) The secretary, to the extent practical, shall permit the acceptance
28 of electronic filings, including applications, documents, reports and other
29 filings required by the secretary under this section. The secretary may
30 provide for the acceptance of electronic filings and other assurance
31 documents by an independent and qualified entity approved by the
32 secretary that provides satisfactory assurance of compliance acceptable to
33 the secretary consistent with, or in lieu of, the requirements of this section
34 and section 5, and amendments thereto. The secretary shall permit a
35 professional employer organization to authorize such entity approved by
36 the secretary to act on the professional employer organization's behalf in
37 complying with the registration requirements of this section, including
38 electronic filings of information and payment of registration fees. Use of
39 such an approved entity shall be optional and not mandatory for a
40 registrant. Nothing in this subsection shall limit or change the secretary's
41 authority to register or terminate registration of a professional employer
42 organization, or to investigate or enforce any provision of sections 1
43 through 10, and amendments thereto.

1 (k) All records, reports and other information obtained from a
2 professional employer organization under this section, except to the extent
3 necessary for the proper administration of the provisions of sections 1
4 through 10, and amendments thereto, by the secretary, shall be confidential
5 and shall not be published or open to public inspection other than to
6 employees of the department in the performance of such employee's
7 official duties.

8 Sec. 5. Except as provided by subsections (g) and (j) of section 4, and
9 amendments thereto, each professional employer organization, or
10 collectively each professional employer group shall either:

11 (a) Maintain positive working capital upon registration as reflected in
12 the financial statements submitted to the secretary with the initial
13 registration application and each renewal application; or

14 (b) for a professional employer organization or professional employer
15 group that does not have sufficient positive working capital as required in
16 subsection (a), submit a bond, irrevocable letter of credit or securities with
17 a minimum market value in an amount equal to the sum of the amount that
18 would be necessary for such professional employer organization or
19 professional employer group to comply with subsection (a) plus \$100,000
20 to the secretary at such time as the professional employer organization or
21 professional employer group does not have sufficient working capital.
22 Such bond shall be held by a depository designated by the secretary
23 securing payment by the professional employer organization of all taxes,
24 wages, benefits or other entitlement due to or with respect to covered
25 employees, if the professional employer organization does not make such
26 payments when due.

27 Sec. 6. (a) No person shall knowingly enter into a co-employment
28 relationship in which less than a majority of the employees of the client in
29 this state are covered employees, or in which less than half of the payroll
30 of the client in this state is attributable to covered employees.

31 (b) Except as otherwise provided in sections 1 through 10, and
32 amendments thereto, or in the professional employer agreement, in each
33 co-employment relationship:

34 (1) The client shall be entitled to exercise all rights and shall be
35 obligated to perform all duties and responsibilities otherwise applicable to
36 an employer in an employment relationship;

37 (2) the professional employer organization shall be entitled to
38 exercise only those rights and obligated to perform only those duties and
39 responsibilities specifically required by the provisions of sections 1
40 through 10, and amendments thereto, or in the professional employer
41 agreement. The rights, duties and obligations of the professional employer
42 organization as co-employer with respect to any covered employee shall be
43 limited to those arising pursuant to the professional employer agreement or

1 as required by the provisions of sections 1 through 10, and amendments
2 thereto, during the term of co-employment by the professional employer
3 organization of such covered employee; and

4 (3) the client retains the exclusive right to direct and control the
5 covered employees as is necessary to conduct the client's business, to
6 discharge any of the client's fiduciary responsibilities or to comply with
7 any licensure requirements applicable to the client or to the covered
8 employees.

9 (c) Except as otherwise provided in sections 1 through 10, and
10 amendments thereto, the co-employment relationship between the client
11 and the professional employer organization, and between each co-
12 employer and each covered employee, shall be governed by the
13 professional employer agreement. Each professional employer agreement
14 shall include the following:

15 (1) The allocation of rights, duties and obligations as described in this
16 section;

17 (2) that the professional employer organization shall have the
18 responsibility to pay wages to covered employees, to withhold, collect,
19 report and remit payroll-related and unemployment taxes and, to the extent
20 the professional employer organization has assumed such responsibility in
21 the professional employer agreement, to make payments for employee
22 benefits for covered employees;

23 (3) that, in addition to the client's right to hire, discipline and
24 terminate a covered employee, the professional employer organization
25 shall have a right to hire, discipline and terminate a covered employee as
26 may be necessary to fulfill the professional employer organization's
27 responsibilities under the provisions of sections 1 through 10, and
28 amendments thereto, or the professional employer agreement.

29 (d) For purposes of this section, wages do not include any obligation
30 between a client and a covered employee for payments beyond, or in
31 addition to, the covered employee's salary, draw or regular rate of pay,
32 such as bonuses, commissions, severance pay, deferred compensation,
33 profit sharing or vacation, sick or other paid time off pay, unless the
34 professional employer organization has expressly agreed to assume
35 liability for such payments in the professional employer agreement.

36 (e) With respect to each professional employer agreement entered
37 into by a professional employer organization, such professional employer
38 organization shall provide written notice to each covered employee
39 affected by such agreement. The professional employer organization shall
40 provide and the client is required to post the following notices in a
41 conspicuous place at the client's worksite:

42 (1) Notice of the general nature of the co-employment relationship
43 between and among the professional employer organization, the client and

1 such covered employees; and

2 (2) any notices required by the state relating to unemployment
3 compensation and minimum wages.

4 (f) Except as otherwise provided in the professional employer
5 agreement:

6 (1) A client shall be solely responsible for the quality, adequacy or
7 safety of the goods or services produced or sold in the client's business;

8 (2) a client shall be solely responsible for directing, supervising,
9 training and controlling the work of the covered employees with respect to
10 the business activities of the client and solely responsible for the acts,
11 errors or omissions of the covered employees with regard to such
12 activities;

13 (3) a client shall not be liable for the acts, errors or omissions of a
14 professional employer organization, or of any covered employee of the
15 client and a professional employer organization when such covered
16 employee is acting under the express direction and control of the
17 professional employer organization;

18 (4) nothing in this subsection shall limit any contractual liability or
19 obligation specifically provided in a professional employer agreement;

20 (5) a covered employee is not, solely as the result of being a covered
21 employee of a professional employer organization, an employee of the
22 professional employer organization for purposes of general liability
23 insurance, fidelity bonds, surety bonds, employer's liability which is not
24 covered by workers' compensation or any other liability insurance carried
25 by the professional employer organization unless the covered employee is
26 included for such purposes by specific reference in the professional
27 employer agreement and in any applicable prearranged employment
28 contract, insurance contract or bond;

29 (6) in its capacity as sponsoring employer of a benefit program, a
30 professional employer organization shall not sell, solicit or negotiate
31 insurance on behalf of a client, covered employee or other employee of a
32 client except through a person or entity licensed to do so pursuant state
33 law;

34 (7) a professional employer organization shall sponsor health and
35 workers' compensation plans for its covered employees only on a fully
36 insured basis from an insurance carrier admitted to do business in this
37 state;

38 (8) for purposes of this state or any county, municipality or other
39 political subdivision thereof:

40 (A) Covered employees whose services are subject to sales tax shall
41 be deemed the employees of the client for purposes of collecting and
42 levying sales tax on the services performed by the covered employee, and
43 nothing in the provisions of sections 1 through 10, and amendments

1 thereto, shall be construed to relieve a client of any sales tax liability with
2 respect to such client's goods or services;

3 (B) any tax or assessment imposed upon professional employer
4 services or any business license or other fee which is based upon gross
5 receipts shall allow a deduction from the gross income or receipts of the
6 business derived from performing professional employer services that is
7 equal to that portion of the fee charged to a client that represents the actual
8 cost of wages and salaries, benefits, workers' compensation, payroll taxes,
9 withholding or other assessments paid to or on behalf of a covered
10 employee by the professional employer organization under a professional
11 employer agreement;

12 (C) any tax assessed or assessment or mandated expenditure on a per
13 capita or per employee basis shall be assessed against the client for
14 covered employees and against the professional employer organization for
15 its employees who are not covered employees co-employed with a client,
16 and any benefits or monetary consideration that meets the requirements of
17 mandates imposed on a client and that are received by covered employees
18 through the professional employer organization either through payroll or
19 through benefit plans sponsored by the professional employer organization
20 shall be credited against the client's obligation to fulfill such mandates;
21 and

22 (D) in the case of a tax or an assessment imposed or calculated upon
23 the basis of total payroll, the professional employer organization shall be
24 eligible to apply any small business allowance or exemption available to
25 the client for the covered employees for the purpose of computing the tax.

26 Sec. 7. A client and a professional employer organization shall each
27 be deemed an employer under the laws of this state for purposes of
28 sponsoring retirement and employee welfare benefit plans for its covered
29 employees.

30 Sec. 8. (a) It shall be a violation of the provisions of sections 1
31 through 10, and amendments thereto:

32 (1) For a person to knowingly offer or provide professional employer
33 services or use the names PEO, professional employer organization, staff
34 leasing, employee leasing, administrative employer or other title
35 representing professional employer services without registering in
36 accordance with section 4, and amendments thereto;

37 (2) for a person to knowingly provide false or fraudulent information
38 to the secretary in conjunction with any registration application, renewal or
39 in any report required under the provisions of sections 4 or 5, and
40 amendments thereto;

41 (3) for a person to knowingly make a material misrepresentation to
42 the secretary, or other governmental agency to which such person is
43 required to submit a report or information;

1 (4) for a professional employer organization or a controlling person
2 of a professional employer organization to be convicted of a crime that
3 relates to the operation of a professional employer organization, or relates
4 to the ability of the professional employer organization or a controlling
5 person of a professional employer organization to operate a professional
6 employer organization; or

7 (5) for a person to willfully violate any provision of sections 1
8 through 10, and amendments thereto, or any rule or regulation adopted by
9 the secretary pursuant thereto.

10 (b) Upon a finding, and after notice and an opportunity for a hearing,
11 that a professional employer organization, or a controlling person of a
12 professional employer organization, or a person offering professional
13 employer services has committed a violation under this section, the
14 secretary may:

15 (1) Deny the application for registration;

16 (2) revoke, restrict or refuse to renew a registration;

17 (3) impose a civil fine in an amount not to exceed \$1,000 for each
18 material violation of the provisions of sections 1 through 10, and
19 amendments thereto;

20 (4) place the registrant on probation for such period of time and
21 subject to such conditions as the secretary shall specify; or

22 (5) issue an order to cease and desist those professional employer
23 organization activities and services specified in such order.

24 (c) The provisions of this section shall be subject to the Kansas
25 judicial review act.

26 Sec. 9. The secretary shall adopt such rules and regulations as the
27 secretary deems necessary to implement and enforce the provisions of
28 sections 1 through 10, and amendments thereto.

29 Sec. 10. If any provision of sections 1 through 10, and amendments
30 thereto, or any portion thereof, is declared invalid or unconstitutional, such
31 invalidity shall not affect the validity or constitutionality of the remaining
32 provisions of sections 1 through 10, and amendments thereto.

33 Sec. 11. This act shall take effect and be in force from and after its
34 publication in the statute book.