

ACT 174

H.B. NO. 144

A Bill for an Act Relating to Professional Employer Organizations.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that Act 225, Session Laws of Hawaii 2007, codified as chapter 373K, Hawaii Revised Statutes, created a new chapter on professional employment organizations that provided a general excise tax exemption to business entities that the department of taxation determined as qualified professional employer organizations.

The legislature further finds that Act 129, Session Laws of Hawaii 2010, codified as chapter 373L, Hawaii Revised Statutes, established a new professional employer organizations chapter that required registration with the department of labor and industrial relations to ensure compliance with federal and state labor laws. The legislature notes that the two separately established statutes, while intended to operate interdependently for the mutual benefit and common public purposes of the department of labor and industrial relations and the department of taxation, could be implemented more effectively by clarifying any existing incompatible and ambiguous language.

The purpose of this Act is to clarify:

- (1) Professional employer organization responsibilities, including meeting the statutory requirements of chapter 373L, Hawaii Revised Statutes; and
- (2) The nexus between the registration of professional employer organizations and qualification for the state general excise tax exemption.

SECTION 2. Chapter 373L, Hawaii Revised Statutes, is amended by adding four new sections to be appropriately designated and to read as follows:

“§373L-A **Registration required.** No person within the purview of this chapter shall use the terms “professional employer organization”, or “PEO”, or other similar name unless the person is registered and in compliance with this chapter and the rules adopted pursuant to this chapter.

§373L-B **Responsibility of professional employer organizations.** During the term of the agreement between a professional employer organization and its client company, the professional employer organization shall be deemed the employer for all covered employees for purposes of complying with all laws relating to unemployment insurance, workers’ compensation, temporary disability insurance, and prepaid health care coverage and the professional employer organization shall provide written notification to each covered employee of this responsibility.

§373L-C **Payroll cost exemption.** At the end of each calendar year, the department shall provide the names, date of registration, and contact information of all professional employer organizations that have successfully complied with the requirements of this chapter to the department of taxation. The exemption provided under section 237-24.75(3) shall only apply to professional employer organizations that fulfill and maintain the registration requirements under this chapter.

§373L-D **Fees.** (a) No applicant shall be allowed to register pursuant to this chapter unless the appropriate fees have been paid.

(b) Effective July 1, 2013, the director shall collect fees in the following amounts:

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|--------------------------|---------|
| (1) Registration fee | \$ 500 |
| (2) Biennial renewal fee | \$ 750 |
| (3) Restoration fee | \$1,500 |

until such time as the director amends the fees by rulemaking pursuant to chapter 91.

(c) The fees collected pursuant to this section shall be deposited into the state general fund.”

SECTION 3. Section 237-24.75, Hawaii Revised Statutes, is amended to read as follows:

“§237-24.75 **Additional exemptions.** In addition to the amounts exempt under section 237-24, this chapter shall not apply to:

- (1) Amounts received as a beverage container deposit collected under chapter 342G, part VIII;
- (2) Amounts received by the operator of the Hawaii convention center for reimbursement of costs or advances made pursuant to a contract with the Hawaii tourism authority under section 201B-7[[]]; and[]
- [](3) Amounts received[[]] by a professional [employment] employer organization that is registered with the department of labor and industrial relations pursuant to chapter 373L, from a client company equal to amounts that are disbursed by the professional [employment] employer organization for employee wages, salaries, payroll taxes, insurance premiums, and benefits, including retirement, vacation, sick leave, health benefits, and similar employment benefits

with respect to ~~[assigned]~~ covered employees at a client company; provided that this exemption shall not apply to amounts received by a professional [employment] employer organization [upon failure of the professional employment organization to collect, account for, and pay over any income tax withholding for assigned employees or any federal or state taxes for which the professional employment organization is responsible.] after:

- (A) Notification from the department of labor and industrial relations that the professional employer organization has not fulfilled or maintained the registration requirements under this chapter; or
- (B) A determination by the department that the professional employer organization has failed to pay any tax withholding for covered employees or any federal or state taxes for which the professional employer organization is responsible.

As used in this paragraph, ~~["professional employment organization";]~~ "professional employer organization", "client company", and ~~["assigned employee"]~~ "covered employee" shall have the meanings provided in section ~~[373K-1.]~~ 373L-1."

SECTION 4. Section 373L-1, Hawaii Revised Statutes, is amended as follows:

1. By adding a new definition to be appropriately inserted and to read: "Department" means the department of labor and industrial relations."

2. By amending the definitions of "client company", "covered employee", "professional employer agreement", and "professional employer organization" to read:

"Client company" means any person [who] that enters into a professional employer agreement with a professional employer organization[-] and has covered employees.

"Covered employee" means an individual [having a co-employment relationship with a professional employer organization and a client company who meets all of the following criteria:

- (1) The individual has received written notice of co-employment with the professional employer organization; and
- (2) The individual's co-employment relationship is pursuant to a professional employer agreement subject to this chapter. Individuals who are officers, directors, shareholders, partners, and managers of the client company shall be covered employees to the extent that the professional employer organization and the client company have expressly agreed in the professional employer agreement that the individuals shall be covered employees; provided that the individuals meet the criteria of this definition and act as operational managers or perform day-to-day operational services for the client company.]

who performs services for a client company pursuant to a professional employer agreement.

"Professional employer agreement" means a written contract by and between a client company and a professional employer organization that [provides for the following]:

- (1) [The co-employment of covered employees; and] Provides for covered employees to the client company;
- (2) [The allocation of employer rights and obligations between] Describes the duties and responsibilities of the client company and the

professional employer organization with respect to the covered employees[-]; and

- (3) Includes a declaration by the professional employer organization of the professional employer organization's responsibilities under section 373L-B.

"Professional employer organization" means any person that is a party to a professional employer agreement with a client company ~~regardless of whether the person uses the term or conducts business expressly as a "professional employer organization", "PEO", "staff leasing company", "registered staff leasing company", "employee leasing company", "administrative employer", or any other similar name.] and whose covered employees perform services on a long-term, rather than temporary or project-specific basis. The term does not include temporary help services, staff leasing, or other similar arrangements."~~

3. By deleting the definition of "co-employment".

~~["Co-employment" means a relationship that is intended to be an ongoing relationship rather than a temporary or project specific one, wherein the rights, duties, and obligations of an employer that arise out of an employment relationship have been allocated between the client company and the professional employer organization pursuant to a professional employer agreement and this chapter."]~~

SECTION 5. Section 373L-2, Hawaii Revised Statutes, is amended to read as follows:

~~["§373L-2"]~~ **Registration required.** (a) Every professional employer organization shall register with the director by providing all of the information required by this section and by rules adopted by the director pursuant to chapter 91 prior to entering into any professional employer agreement with any client company in this State. Registration shall not be approved unless all of the applicable provisions of this chapter have been met to the satisfaction of the department.

- (b) Registration information required by this section shall include:
- (1) The name or names under which the professional employer organization conducts or will conduct business;
 - (2) The address of the principal place of business of the professional employer organization and the address of each office that the professional employer organization maintains in this State;
 - (3) The professional employer organization's general excise tax number;
 - (4) A copy of the certificate of authority to transact business in this State issued by the director of commerce and consumer affairs pursuant to title 23 or title 23A, if applicable;
 - (5) A list, organized by jurisdiction, of each name under which the professional employer organization has operated in the preceding five years, including any alternative names; names of predecessors; and, if known, names of successor business entities;
 - (6) A statement of ownership, which shall include the name of each person who, individually or acting in concert with any other person or persons, owns or controls, directly or indirectly, twenty-five per cent or more of the equity interests of the professional employer organization;
 - (7) A statement of management, which shall include the name of any person who serves as president or chief executive officer or who otherwise has the authority to act as a senior executive officer of the professional employer organization;

- (8) Proof of valid workers' compensation coverage in compliance with all laws of this State;
- (9) Proof of compliance with the Hawaii temporary disability insurance law;
- (10) Proof of compliance with the Hawaii prepaid health care act [~~as regards all employees of the professional employer organization~~];
- (11) Proof of compliance with the Hawaii employment security law, including payment of any applicable employer liability pursuant to chapter 383; [~~and~~]
- (12) [~~A financial statement prepared in accordance with generally accepted accounting principles, audited by an independent certified public accountant licensed to practice in the State, and without qualification as to the going concern status of the professional employer organization.~~] The name, address, and phone number of the financial institution utilized by the professional employer organization for payroll purposes that operates and maintains branches in the State;
- (13) The name of each client company that is party to a professional employer agreement with a professional employer organization which shall be provided to the department on a form approved by the department within twenty-one business days of the initiation of the agreement and within twenty-one business days of the termination of the agreement; and
- (14) A copy of the Internal Revenue Service Form W-3, Transmittal of Wage and Tax Statements, that was most recently filed with the federal government, and which shall be used for obtaining a bond or irrevocable letter of credit pursuant to section 373L-3.

(c) Registration under this section shall expire on [~~December 31~~] June 30 of each [~~odd-numbered~~] even-numbered year. Before [~~December 31~~] June 30 of each [~~odd-numbered~~] even-numbered year, the director or the director's authorized delegate shall mail a renewal application for registration to the address on record of the registrant. In connection with renewal of registration, a professional employer organization shall provide all of the information required by subsection (b). Failure to renew a registration shall result in termination of that registration. A professional employer organization whose registration has been terminated pursuant to this section shall be required to pay the restoration fee.

(d) Notwithstanding that a registration under this section has not expired, a professional employer organization shall submit annually, no later than June 30 of each year, to the department a copy of the Internal Revenue Service Form W-3, Transmittal of Wage and Tax Statements, that was most recently filed with the federal government. If the amount of the total payroll has changed to an amount that requires a different bond or irrevocable letter of credit amount than posted with the department, the professional employer organization shall obtain a new bond or irrevocable letter of credit to satisfy the requirements of section 373L-3.

~~[(d) The director shall establish fees and requirements for registration, maintenance of registration, renewal, and restoration of registration for professional employer organizations by rule pursuant to chapter 91.]~~

SECTION 6. Section 373L-3, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

“(a) No professional employer organization shall enter into a professional employment agreement with a client company in the State unless the professional employer organization posts a surety bond [~~in the amount of \$250,000,~~

which is a performance or financial guaranty type bond naming the], or an irrevocable letter of credit equivalent to the required bond amount, that is based on the previous year's total payroll of the professional employer organization. The total payroll of the professional employer organization shall be the amount reported on the Internal Revenue Service Form W-3, Transmittal of Wage and Tax Statements, that was most recently filed with the federal government in the year in which the bond or irrevocable letter of credit is to become effective. The bond or its irrevocable letter of credit equivalent required under this section shall be on a sliding scale as follows:

- (1) For professional employer organizations with a total payroll up to and including \$25,000,000, a bond or its irrevocable letter of credit equivalent of \$25,000;
- (2) For professional employer organizations with a total payroll of \$25,000,001 to \$150,000,000, a bond or its irrevocable letter of credit equivalent of \$75,000; and
- (3) For professional employer organizations with a total payroll of \$150,000,001 and higher, a bond or its irrevocable letter of credit equivalent of \$250,000.

If the professional employer organization posts a bond, the director shall be named as the obligee and [which] the bond may be canceled only if the professional employer organization gives sixty days prior written notice to the surety and the director or if the surety gives thirty days prior written notice to the director of cancellation of the bond. If the professional employer organization furnishes an irrevocable letter of credit approved by the director, the director shall be named as the beneficiary, and the irrevocable letter of credit shall be issued by a bank, savings bank, or other depository financial institution insured by a federal depository insurance agency and authorized to do business in the State. The requirements of this section shall be satisfied by a single bond[-] or its irrevocable letter of credit equivalent. If a professional employer organization has more than one branch location, the bond or its irrevocable letter of credit equivalent shall cover all locations."

SECTION 7. Chapter 373K, Hawaii Revised Statutes, is repealed.

SECTION 8. There is appropriated out of the general revenues of the State of Hawaii the sum of \$13,000 or so much thereof as may be necessary for fiscal year 2013-2014 and the same sum or so much thereof as may be necessary for fiscal year 2014-2015 to be expended by the department of labor and industrial relations to carry out the purposes of this Act.

SECTION 9. This Act does not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun before its effective date.

SECTION 10. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 11. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.²

SECTION 12. This Act shall take effect on July 1, 2013.

(Approved June 25, 2013.)

Notes

1. So in original.
2. Edited pursuant to HRS §23G-16.5.