

Introduced by

1 A BILL for an Act to create and enact a new chapter to title 65 of the North Dakota Century
2 Code, relating to the registration of professional employer organizations; and to provide a
3 penalty.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1.** A new chapter to title 65 of the North Dakota Century Code is created and
6 enacted as follows:

7 **Definitions.** As used in this chapter:

- 8 1. "Administrative fee" means the fee charged to a client by a professional employer
9 organization for professional employer services. The term does not include any
10 amount of a fee which is for wages and salaries, benefits, workers' compensation
11 coverage, payroll taxes, withholding, or other assessment paid by the professional
12 employer organization to or on behalf of a covered employee under a professional
13 employer agreement.
- 14 2. "Client" means any person that enters a professional employer agreement with a
15 professional employer organization.
- 16 3. "Coemployer" means either a professional employer organization or a client.
- 17 4. "Coemployment relationship" means a relationship that is intended to be an
18 ongoing relationship rather than a temporary or project-specific relationship,
19 wherein the rights, duties, and obligations of an employer which arise out of an
20 employment relationship have been allocated between coemployers under a
21 professional employer agreement and this chapter.
- 22 5. "Covered employee" means an individual having a coemployment relationship with
23 a professional employer organization and a client, who has received written notice
24 of coemployment with the professional employer organization, and whose

coemployment relationship is under a professional employer agreement subject to this chapter. An individual who is an officer, director, shareholder, partner, or manager of the client is a "covered employee" to the extent the professional employer organization and the client have expressly agreed in the professional employer agreement that the individual is a covered employee and if the individual meets the criteria of this subsection and acts as an operational manager or performs day-to-day operational services for the client.

6. "Professional employer agreement" means a written contract between a client and a professional employer organization which provides for the coemployment of a covered employee, for the allocation of employer rights and obligations between the client and the professional employer organization with respect to a covered employee, and the assumption of the responsibilities required by this chapter.

7. "Professional employer organization" means a person engaged in the business of providing professional employer services. The term does not include an arrangement through which a person that does not have as its principal business activity the practice of entering a professional employer arrangement and does not hold itself out as a professional employer organization and that shares an employee with a commonly owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986; an independent contractor arrangement through which a person assumes responsibility for a product produced or a service performed by the person or the person's agents and retains and exercises primary direction and control over the work performed by an individual whose services are supplied under the arrangement; or the provision of temporary help services.

8. "Professional employer organization group" means two or more professional employer organizations that are majority-owned or commonly controlled by the same person.

9. "Professional employer services" means the entering of a coemployment relationship under this chapter under which at least a majority of the employees providing services to a client are covered employees.

10. "Registrant" means a professional employer organization registered under this chapter.

11. "Temporary help services" means services consisting of a person recruiting and hiring its own employees; finding another organization that needs the services of those employees; assigning those employees to perform work at or services for the other organization to support or supplement the other organization's workforce, to provide assistance in special work situations, such as an employee absence, skill shortage, or seasonal workload or to perform a special assignment or project; and customarily attempting to reassign the employees to another organization when the employers finish each assignment.

Rights, duties, and obligations unaffected.

1. This chapter does not or a professional employer agreement may not affect, modify, or amend a collective bargaining agreement or any right or obligation of a client, professional employer organization, or covered employee under federal law.

2. This chapter does not or a professional employer agreement may not:

a. Diminish, abolish, or remove any right of a covered employee to a client or obligation of the client to a covered employee existing before the effective date of the professional employer agreement.

b. Affect, modify, or amend any contractual relationship or restrictive covenant between a covered employee and a client in effect at the time a professional employer agreement becomes effective or prohibit or amend a contractual relationship or restrictive covenant that is entered subsequently between a client and a covered employee.

3. A professional employer organization is not responsible and may not incur any liability in connection with or arising out of any contractual relationship or restrictive covenant unless the professional employer organization has specifically agreed otherwise in writing.

4. A covered employee who is required under law to be licensed, registered, or certified is deemed solely an employee of the client for purposes of the license, registration, or certification requirement.

- 1 5. A professional employer organization is not deemed to engage in any occupation,
2 trade, profession, or other activity that is subject to licensing, registration, or
3 certification requirements or is otherwise regulated solely by entering and
4 maintaining a coemployment relationship with a covered employee who is subject
5 to the requirement.
- 6 6. A client has the sole right of direction and control of the professional or licensed
7 activities of a covered employee and of the client's business. The covered
8 employee and client remain subject to regulation by the entity responsible for
9 licensing, registration, or certification of the covered employee or client.
- 10 7. For purposes of determination of a tax credit or other economic incentive based on
11 employment, a covered employee is deemed an employee solely of the client. A
12 client is entitled to the benefit of any tax credit, economic incentive, or other benefit
13 arising as the result of the employment of a covered employee of the client. If the
14 grant or amount of the incentive is based on the number of employees, each client
15 must be treated as employing only those covered employees coemployed by the
16 client. A covered employee working for another client of the professional employer
17 organization may not be counted. Each professional employer organization shall
18 provide, upon request by a client or an agency or department of the state,
19 employment information reasonably required for administration of the tax credit or
20 economic incentive and which is necessary to support any request, claim,
21 application, or other action by a client seeking the tax credit or economic incentive.
- 22 8. With respect to a bid, contract, purchase order, or agreement entered with the
23 state or a political subdivision, a client company's status or certification as a small,
24 minority-owned, disadvantaged, or woman-owned business enterprise or as a
25 historically underutilized business is not affected because the client company has
26 entered an agreement with a professional employer organization or uses the
27 services of a professional employer organization.

28 **Registration requirements.**

- 29 1. Except as otherwise provided in this chapter, a person may not provide, advertise,
30 or otherwise hold itself out as providing professional employer services, unless the
31 person is registered under this chapter. A person engaged in the business of

1 providing professional employer services is subject to registration regardless of its
2 use of the term or conducting business as a "professional employer organization",
3 "staff leasing company", "registered staff leasing company", "employee leasing
4 company", "administrative employer", or any other name.

5 2. Each applicant for registration shall provide the organization with the following
6 information:

- 7 a. Any name under which the professional employer organization conducts
8 business.
- 9 b. The address of the principal place of business of the professional employer
10 organization and the address of each office it maintains in this state.
- 11 c. The professional employer organization's taxpayer or employer identification
12 number.
- 13 d. A list by jurisdiction of each name under which the professional employer
14 organization has operated in the preceding five years, including any
15 alternative names, names of predecessors, and, if known, successor business
16 entities.
- 17 e. A statement of ownership, which must include the name and evidence of the
18 business experience of any person that owns or controls twenty-five percent
19 or more of the equity interests of the professional employer organization.
- 20 f. A statement of management, which must include the name and evidence of
21 the business experience of any person who serves as president, chief
22 executive officer, or otherwise has the authority to act as a senior executive
23 officer of the professional employer organization.
- 24 g. A financial statement setting forth the financial condition of the professional
25 employer organization, as of a date not earlier than one hundred eighty days
26 before the date submitted to the organization, which is prepared in
27 accordance with generally accepted accounting principles and audited by an
28 independent certified public accountant licensed to practice in the jurisdiction
29 in which the accountant is located. A professional employer organization
30 group may submit a combined or consolidated audited financial statement to
31 meet the requirements of this subdivision. A professional employer

organization that has not had sufficient operating history to have an audited financial statement based upon at least twelve months of operating history shall meet the financial capacity requirements under this chapter and present a pro forma financial statement reviewed by a certified public accountant.

3. A professional employer organization operating within this state as of the effective date of this chapter shall complete an initial registration no later than one hundred eighty days after the effective date of this chapter. The initial registration is valid until the end of the professional employer organization's first fiscal yearend that is more than one year after the effective date of this chapter.

4. Within one hundred eighty days after the end of a registrant's fiscal year, the registrant shall renew its registration by notifying the organization of any change in the information provided in the registrant's most recent registration or renewal.

5. A professional employer organization group may satisfy any reporting and financial requirements of this chapter on a combined or consolidated basis if each member of the professional employer organization group guarantees the obligations under this chapter of each other member of the professional employer organization group.

6. a. A professional employer organization is eligible for a limited registration under this chapter if the professional employer organization:

(1) Submits a properly executed request for limited registration on a form provided by the organization;

(2) Is domiciled outside this state and is licensed or registered as a professional employer organization in another state;

(3) Does not maintain an office in this state or directly solicit clients located or domiciled within this state; and

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

b. A limited registration is valid for one year and may be renewed.

c. A professional employer organization seeking limited registration shall provide the organization with any information or documentation necessary to show that the professional employer organization qualifies for a limited registration.

7. The organization may provide, by rule, for the acceptance of an affidavit or certification of a bonded, independent, and qualified assurance organization certifying qualifications of a professional employer organization in lieu of the registration and financial capacity requirements of this chapter.

8. The organization shall maintain a list of professional employer organizations registered under this chapter.

Fees.

1. Upon filing an initial registration, a professional employer organization shall pay an initial registration fee of five hundred dollars.

2. A professional employer organization shall pay a renewal fee not to exceed two hundred fifty dollars for an annual renewal of a registration.

3. The organization shall determine, by rule, any fee to be charged for a group registration.

4. A professional employer organization seeking limited registration shall pay a fee in the amount of two hundred fifty dollars upon initial application for limited registration and upon each renewal of the limited registration.

5. A professional employer organization seeking alternative registration shall pay an initial and annual fee not to exceed two hundred fifty dollars.

Financial capability.

1. Except as otherwise provided, a professional employer organization shall maintain either:

a. A minimum net worth of one hundred thousand dollars as reflected in the financial statement submitted to the organization with the initial registration and each annual renewal; or

b. A bond or irrevocable letter of credit or securities with a minimum market value of one hundred thousand dollars as reflected in the financial statement submitted to the organization. The bond must be held by a depository designated by the organization and secure payment by the professional employer organization of any tax, wage, benefit, or other entitlement due to or with respect to a covered employee if the professional employer organization does not make the payment when due. A bond, irrevocable letter of credit, or

1 security deposited under this subsection may not be included for the purpose
2 of calculation of the minimum net worth required by this subsection.

- 3 2. The requirements of this section do not apply to a limited registration professional
4 employer organization.

5 **General requirements.**

- 6 1. Except as specifically provided in this chapter or in a professional employer
7 agreement, in each coemployment relationship:

8 a. The client is entitled to exercise all rights and is obligated to perform all duties
9 and responsibilities otherwise applicable to an employer in an employment
10 relationship.

11 b. The professional employer organization is entitled to exercise only those
12 rights and obligated to perform only those duties and responsibilities
13 specifically required by this chapter or set forth in the professional employer
14 agreement. The rights, duties, and obligations of the professional employer
15 organization as coemployer with respect to any covered employee are limited
16 to those arising under the professional employer agreement and this chapter
17 during the term of coemployment by the professional employer organization of
18 the covered employee.

19 c. Unless otherwise expressly agreed by the professional employer organization
20 and the client in a professional employer agreement, the client retains the
21 exclusive right to direct and control any covered employee as is necessary to
22 conduct the client's business, to discharge any of the client's fiduciary
23 responsibilities, or to comply with any licensure requirements applicable to the
24 client or to a covered employee.

- 25 2. Except as specifically provided in this chapter, a coemployment relationship
26 between the client and the professional employer organization, and between each
27 coemployer and each covered employee, must be governed by the professional
28 employer agreement. Each professional employer agreement must include:

29 a. The allocation of rights, duties, and obligations.

30 b. A statement providing that the professional employer organization shall pay
31 wages to any covered employee; to withhold, collect, report, and remit

1 payroll-related and unemployment taxes; and, to the extent the professional
2 employer organization has assumed responsibility in the professional
3 employer agreement, to make payments for employee benefits for covered
4 employees. As used in this subdivision, the term "wages" does not include
5 any obligation between a client and a covered employee for payments beyond
6 or in addition to the covered employee's salary, draw, or regular rate of pay,
7 such as a bonus, commission, severance pay, deferred compensation, profit
8 sharing, or vacation, sick, or other paid time off, unless the professional
9 employer organization has expressly agreed to assume liability for the
10 payments in the professional employer agreement.

11 c. A statement providing that the professional employer organization has the
12 right to hire, discipline, and terminate a covered employee as may be
13 necessary to fulfill the professional employer organization's responsibilities
14 under this chapter and the professional employer agreement and that the
15 client has the right to hire, discipline, and terminate a covered employee.

16 d. A statement addressing the responsibility to obtain workers' compensation
17 coverage.

18 3. Under each professional employer agreement entered by a professional employer
19 organization, the professional employer organization shall provide written notice to
20 each covered employee affected by the agreement of the general nature of the
21 coemployment relationship.

22 4. Except to the extent otherwise expressly provided by a professional employer
23 agreement:

24 a. A client is solely responsible for the quality, adequacy, or safety of the goods
25 or services produced or sold in the client's business.

26 b. A client is solely responsible for directing, supervising, training, and controlling
27 the work of a covered employee with respect to the business activities of the
28 client and solely responsible for any act, error, or omission of a covered
29 employee relating to those activities.

30 c. A client is not liable for any act, error, or omission of a professional employer
31 organization or of any covered employee of the client and a professional

1 employer organization if the covered employee is acting under the express
2 direction and control of the professional employer organization.

3 d. A professional employer organization is not liable for any act, error, or
4 omission of a client or of any covered employee of the client if the covered
5 employee is acting under the express direction and control of the client.

6 e. This subsection does not limit any contractual liability or obligation specifically
7 provided in the written professional employer agreement.

8 f. A covered employee is not, solely as the result of being a covered employee
9 of a professional employer organization, an employee of the professional
10 employer organization for purposes of general liability insurance, fidelity bond,
11 surety bond, employer's liability not covered by workers' compensation, or
12 liquor liability insurance carried by the professional employer organization
13 unless the covered employee is included by specific reference in the
14 professional employer agreement and applicable prearranged employment
15 contract, insurance contract, or bond.

16 5. A professional employer organization is not engaged in the sale of insurance or in
17 acting as a third-party administrator by offering, marketing, selling, administering,
18 or providing professional employer services which include services and employee
19 benefit plans for a covered employee.

20 **Benefit plans.**

21 1. Both a client and a professional employer organization are deemed to be an
22 employer for purposes of sponsoring retirement and welfare benefit plans for a
23 covered employee.

24 2. A fully insured welfare benefit plan offered to the covered employees of a
25 professional employer organization is considered a single employer welfare benefit
26 plan and may not be considered a multiple employer welfare arrangement.

27 3. For purposes of chapter 26.1-36.3, a professional employer organization is
28 considered the employer of all of its covered employees, and all covered
29 employees of any client participating in a health benefit plan sponsored by a single
30 professional employer organization are considered employees of the professional
31 employer organization.

- 1 4. If a professional employer organization offers to its covered employees any health
2 benefit plan that is not fully insured by an authorized insurer, the plan must:
3 a. Utilize an authorized third-party administrator;
4 b. Hold all plan assets, including participant contributions, in a trust account;
5 c. Provide sound reserves for the plan as determined using generally accepted
6 actuarial standards; and
7 d. Provide written notice to each covered employee participating in the benefit
8 plan that the plan is self-insured or is not fully insured.

9 **Disciplinary actions - Penalty.**

- 10 1. The organization may take any appropriate disciplinary action provided under this
11 section upon the finding of:
12 a. The conviction of a professional employer organization or a controlling person
13 of a professional employer organization of a crime that relates to the operation
14 of a professional employer organization and which relates to fraud or deceit or
15 the ability of the professional employer organization or a controlling person of
16 the professional employer organization to operate the professional employer
17 organization;
18 b. A person knowingly making a material misrepresentation or providing false or
19 fraudulent information to the organization or other governmental agency; or
20 c. A willful violation of this chapter.
21 2. Upon a finding that a professional employer organization or a controlling person of
22 a professional employer organization has violated this chapter and after notice and
23 opportunity for hearing, the director may:
24 a. Deny an application for registration;
25 b. Revoke, restrict, or refuse to renew registration;
26 c. Impose an administrative penalty in an amount not to exceed one thousand
27 dollars for each material violation;
28 d. Place the registrant on probation for a period and subject to conditions that
29 the director specifies; or
30 e. Issue a cease and desist order.