

Sixtieth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2036

Introduced by

Legislative Council

(Industry, Business, and Labor Committee)

1 A BILL for an Act to create and enact a new chapter to title 43 of the North Dakota Century
2 Code, relating to the licensing of professional employer organizations; to provide a penalty; and
3 to provide an effective date.

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

5 **SECTION 1.** A new chapter to title 43 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

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

8 6. "Licensee" means a professional employer organization licensed under this
9 chapter.

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

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

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

30 10. "Temporary help services" means services consisting of a person recruiting and
31 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. Neither this chapter nor a professional employer agreement may 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. Neither this chapter nor a professional employer agreement may:
 - 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.
5. Unless otherwise provided by this chapter, a professional employer organization is not deemed to engage in any occupation, trade, profession, or other activity that is subject to licensing, registration, or certification requirements or is otherwise regulated solely by entering and maintaining a coemployment relationship with a covered employee who is subject to the requirement.

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

24 **Licensing requirements.**

- 25 1. After the effective date of this Act, a person may not provide, advertise, or
26 otherwise hold itself out as providing professional employer services, unless the
27 person is licensed under this chapter. A person engaged in the business of
28 providing professional employer services shall obtain a license regardless of its
29 use of the term or conducting business as a "professional employer organization",
30 "staff leasing company", "registered staff leasing company", "employee leasing
31 company", "administrative employer", or any other name.

- 1 2. Each applicant for licensure shall provide the secretary of state with the following
2 information:
- 3 a. The name of the professional employer organization and any name under
4 which the professional employer organization intends to conduct business in
5 this state.
- 6 b. The designation of organization of the applicant whether domestic or foreign;
7 a corporation, limited liability company, general partnership, limited
8 partnership, limited liability partnership, limited liability limited partnership,
9 sole proprietor, or any other person subject to a governing statute; and the
10 jurisdiction of origin of the organization.
- 11 c. The address of the principal place of business of the professional employer
12 organization and the address of each office it maintains in this state.
- 13 d. The professional employer organization's taxpayer or employer identification
14 number.
- 15 e. The date of the end of the applicant's fiscal year.
- 16 f. A list by jurisdiction of each name under which the professional employer
17 organization has operated in the preceding five years, including any
18 alternative names, names of predecessors, and, if known, successor
19 business entities.
- 20 g. A statement of ownership, which must include the name and address of any
21 person that owns or controls twenty-five percent or more of the equity
22 interests of the professional employer organization.
- 23 h. A statement of management, which must include the name and address of
24 any individual who serves as president, chief executive officer, or otherwise
25 has the authority to act as a senior executive officer of the professional
26 employer organization.
- 27 i. A financial statement, audited and verified by an independent certified public
28 accountant licensed to practice in the jurisdiction in which the accountant is
29 located, as of a date not earlier than one hundred eighty days before the date
30 submitted to the secretary of state, which is prepared in accordance with
31 generally accepted accounting principles. The financial statement must set

1 forth the financial condition of the professional employer organization over the
2 most recent twelve-month operating period and must clearly define the
3 working capital of the professional employer organization. A professional
4 employer organization that has not had sufficient operating history to have a
5 financial statement based upon at least twelve months of operating history
6 shall meet the financial capacity requirements under this chapter and present
7 a financial statement as provided under this subdivision for the entire period
8 of its operation.

9 3. A license issued under this section is valid for one year.

10 4. a. Within sixty days before the expiration of a license, the licensee may apply to
11 renew the license by submitting to the secretary of state the information
12 required in subsection 2 along with the required license fee.

13 b. For the purposes of a renewal application, the audited and verified financial
14 statement may be based on the twelve months of operating history before the
15 close of the fiscal year immediately preceding the renewal date of the license.
16 A professional employer organization that is unable to obtain an audited and
17 verified financial statement before the expiration of a license may submit with
18 the application for renewal:

19 (1) A written request for an extension to submit the audited and verified
20 financial statement by a specific date within six months after the license
21 is renewed and a verified statement, signed by an individual authorized
22 by the professional employer organization, affirming that the
23 professional employer organization has continuously maintained
24 sufficient working capital to meet the financial capacity requirements
25 under this chapter; or

26 (2) A bond with a minimum value of one hundred thousand dollars to be
27 held by the secretary of state to secure payment by the professional
28 employer organization of any tax, wage, benefit, or other entitlement
29 due to or with respect to a covered employee if the professional
30 employer organization does not make the payment when due.

1 c. The secretary of state shall suspend the license of a professional employer
2 organization if the professional employer organization fails to submit the
3 audited and verified financial statement by the extended date provided under
4 subdivision b.

5 5. A person applying for licensure or a renewal of licensure shall maintain
6 continuously its organization's applicable records current and in good standing as
7 otherwise required by law.

8 6. The secretary of state shall maintain a list of professional employer organizations
9 licensed under this chapter.

10 **Fees.**

11 1. Upon filing of an application for a license, a professional employer organization
12 shall pay a fee of one thousand dollars.

13 2. Upon filing of an application for renewal of a license, a professional employer
14 organization shall pay a fee of five hundred dollars.

15 3. Any fees collected under this chapter must be deposited in the secretary of state's
16 operating fund.

17 **Financial capability.** A professional employer organization shall maintain either:

18 1. A minimum working capital of one hundred thousand dollars as reflected in the
19 financial statement submitted to the secretary of state with the license application
20 and each annual renewal; or

21 2. A bond with a minimum value of one hundred thousand dollars as reflected in the
22 financial statement submitted to the secretary of state. The bond must be held by
23 the secretary of state and secure payment by the professional employer
24 organization of any tax, wage, benefit, or other entitlement due to or with respect to
25 a covered employee if the professional employer organization does not make the
26 payment when due. A bond provided under this section may not be included for
27 the purpose of calculation of the minimum net worth required by this section.

28 **General requirements.**

29 1. Except as specifically provided in this chapter or in a professional employer
30 agreement, in each coemployment relationship:

- a. The client is entitled to exercise all rights and is obligated to perform all duties and responsibilities otherwise applicable to an employer in an employment relationship.
 - b. The professional employer organization is entitled to exercise only those rights and obligated to perform only those duties and responsibilities specifically required by this chapter or set forth in the professional employer agreement. The rights, duties, and obligations of the professional employer organization as coemployer with respect to any covered employee are limited to those arising under the professional employer agreement and this chapter during the term of coemployment by the professional employer organization of the covered employee.
 - c. The client retains the exclusive right to direct and control any covered employee as is necessary to conduct the client's business, to discharge any of the client's fiduciary responsibilities, or to comply with any licensure requirements applicable to the client or to a covered employee.
2. Except as specifically provided in this chapter, a coemployment relationship between the client and the professional employer organization, and between each coemployer and each covered employee, must be governed by the professional employer agreement. Each professional employer agreement must include:
 - a. The allocation of rights, duties, and obligations.
 - b. A statement providing that the professional employer organization shall pay wages to any covered employee; to withhold, collect, report, and remit payroll-related and unemployment taxes; and, to the extent the professional employer organization has assumed responsibility in the professional employer agreement, to make payments for employee benefits for covered employees. As used in this subdivision, the term "wages" does not include any obligation between a client and a covered employee for payments beyond or in addition to the covered employee's salary, draw, or regular rate of pay, such as a bonus, commission, severance pay, deferred compensation, profit sharing, or vacation, sick, or other paid time off, unless

1 the professional employer organization has expressly agreed to assume
2 liability for the payments in the professional employer agreement.

3 c. A statement providing that the professional employer organization has the
4 right to hire, discipline, and terminate a covered employee as may be
5 necessary to fulfill the professional employer organization's responsibilities
6 under this chapter and the professional employer agreement and that the
7 client has the right to hire, discipline, and terminate a covered employee.

8 d. A statement addressing the responsibility to obtain workers' compensation
9 coverage.

10 3. Under each professional employer agreement entered by a professional employer
11 organization, the professional employer organization shall provide written notice to
12 each covered employee affected by the agreement of the general nature of the
13 coemployment relationship.

14 4. Except to the extent otherwise expressly provided by a professional employer
15 agreement:

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

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

22 c. A client is not liable for any act, error, or omission of a professional employer
23 organization or of any covered employee of the client and a professional
24 employer organization if the covered employee is acting under the express
25 direction and control of the professional employer organization.

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

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

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

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

6. Nothing in this chapter or in a professional employer agreement may be construed to affect the provisions of section 52-04-24 or 65-01-08.

Benefit plans.

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

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

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

4. If a professional employer organization offers to its covered employees any health benefit plan that is not fully insured by an authorized insurer, the plan must:

a. Utilize an authorized third-party administrator;

b. Hold all plan assets, including participant contributions, in a trust account;

c. Provide sound reserves for the plan as determined using generally accepted actuarial standards; and

d. Provide written notice to each covered employee participating in the benefit plan that the plan is self-insured or is not fully insured.

Disciplinary actions - Complaints - Adjudicative proceedings - Penalties -

Appeals.

1. The secretary of state may:

a. Deny an application for a professional employer organization license;

b. Suspend a professional employer organization license for a period of not more than sixty months;

c. Request the attorney general to bring an action in district court to recover restitution or penalties imposed under this chapter; or

d. Not renew or issue a new professional employer organization license until a professional employer organization has paid any civil penalty or restitution imposed under this chapter.

2. Any person acting in the capacity of a professional employer organization without a license is guilty of a class A misdemeanor. In addition to the license fee due if the person subsequently applies for a license, the person may be assessed a civil penalty by the secretary of state, following written notice to the person of an intent to assess the penalty, in an amount not to exceed three times the amount of the license fee.

3. An individual may file a duly verified complaint with the secretary of state charging that the professional employer organization is guilty of any of the following:

a. The conviction of the professional employer organization or a controlling person of the professional employer organization of a crime that relates to the operation of the professional employer organization or which relates to fraud or deceit or the ability of the professional employer organization or the controlling person of the professional employer organization to operate the professional employer organization;

b. An individual knowingly making a material misrepresentation or providing false or fraudulent information to the secretary of state or other governmental agency; or

c. A willful violation of this chapter.

4. A complaint must be on a form approved by the secretary of state and must set forth sufficient facts upon which a reasonable individual could conclude that any of the acts or omissions in subsection 3 has been committed.

5. The secretary of state shall review a complaint filed under this section. If the secretary of state determines a complaint provides sufficient facts upon which a reasonable individual could conclude that one or more of the acts or omissions set forth in subsection 3 has been committed, the secretary of state may initiate an adjudicative proceeding under chapter 28-32. If, after an adjudicative proceeding or as part of an informal disposition under chapter 28-32, the secretary of state determines that the professional employer organization is guilty of an act or omission charged or if the licensee admits guilt to an act or omission charged, the secretary of state may:

a. Suspend or revoke the professional employer organization license;

b. Order an administrative penalty of not more than one thousand dollars for each material violation;

c. Order restitution in an amount not exceeding five thousand dollars;

d. Issue a cease and desist order; or

e. Impose a lesser sanction or remedy.

6. Any act or omission under subsection 3 may also constitute grounds for the attorney general to bring an action under chapter 51-15 and may subject the professional employer organization to all provisions, procedures, remedies, and penalties provided for in chapter 51-15.

7. A professional employer organization aggrieved by a decision of the secretary of state in denying, revoking, or suspending the professional employer organization license or ordering restitution or penalties may appeal the decision to the district court of Burleigh County.

1 8. A professional employer organization may not obtain a license under any name
2 after the denial of an application for a license or during the period of a revocation
3 or suspension. For the purposes of this subsection, a professional employer
4 organization that has had an application for a license denied or which has had a
5 license revoked or suspended includes any officer, director, agent, member, or
6 employee of the professional employer organization.

7 **SECTION 2. EFFECTIVE DATE.** This Act becomes effective on October 1, 2007.