



National Association
of Professional Employer Organization:

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July 8, 2009

The Honorable Susan Westrom
Chair, NCOIL Workers' Compensation Committee
385 Jordan Road
Troy, NY 12180

Dear Rep. Westrom,

The National Association of Professional Employer Organizations (NAPEO) applauds the NCOIL effort to promote a model act to provide for uniform treatment of the independent contractors and which would assure that employees are appropriately covered under each state's workers' compensation statute. The present proposed model draft, drawn largely from Florida and Wisconsin, is a major step in the right direction.

NAPEO's comment relates to the specific language related to professional employer organizations (PEOs) in Section 2 E.1 that provides:

E. 1. "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. "Employer" also includes employment agencies and Professional Employer Organizations (PEOs) as defined and regulated by *[Insert State Chapter Relating to Employee Leasing Companies]*. If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of this Act.

NAPEO understands the purpose of the proposed model is to establish a clear, bright-line test between employer-employee relationships and client-independent contractor relationships. In a PEO relationship, a worksite employee becomes a W-2 employee of the PEO. In this regard, PEOs have a strong economic incentive for worksite employees to be appropriately classified since the PEO's administrative fee is based upon services related to such employees.

NAPEO is concerned, however, that the use of the language from Chapter 440 in Florida reference PEOs needs clarification. The language in Chapter 440 is based upon the fact that Florida has extensive law and experience with respect to PEOs (defined as employee leasing companies). There are specific provisions for the industry both in the workers' compensation

statute and in the licensing act related to employee leasing companies. The benefit of those provisions is not captured in the proposed NCOIL model.

Moreover, since a majority of states have existing statutory constructs in place regarding licensing or registration of PEOs and almost all states have some form of specific requirements related to workers' compensation in PEO arrangements, there is a serious question as to whether or not a simple enactment that "[e]mployer' also includes ... Professional Employer Organizations" could inadvertently upset those carefully legislative constructs. For example:

- Washington requires that the client (not the PEO [leasing company]) be deemed the employer under its workers' compensation provisions.
- Virginia recognizes that a client of a PEO can fulfill its obligation for workers' compensation through a PEO arrangement, but that the client remains an employer and responsible under the workers' compensation act. (See: Code of Virginia § 65.2-801 A 5 and § 65.2-803.1F)
- North Carolina has very specific statutory requirements for the allocation of responsibilities for workers' compensation between a client and a PEO (See: North Carolina Professional Employer Act § 58-89A-110)
- Ohio specifically provides that the employee is a "shared employee" of both the client and the PEO. (See: Ohio Revised Code §4125.05(E) rather than just an employee of the PEO.

NAPEO would suggest several alternatives to the proposed draft:

Edit Section 2. E. to provide more succinct guidance:

- E. 1. "Employer" means the state and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment, and the legal representative of a deceased person or the receiver or trustees of any person. ~~"Employer" also includes employment agencies and Professional Employer Organizations (PEOs) as defined and regulated by [Insert State Chapter Relating to Employee Leasing Companies].~~ If the employer is a corporation, parties in actual control of the corporation, including, but not limited to, the president, officers who exercise broad corporate powers, directors, and all shareholders who directly or indirectly own a controlling interest in the corporation, are considered the employer for the purposes of this Act.

2. "Employer also includes employment agencies, temporary staffing agencies, labor contractors, employee leasing companies, and professional employer organizations (PEOs) who assign, share, or co-employ workers to or with client companies.."

Drafting Note: States should cross reference existing state statutes related to contingent staffing and PEO relationships to assure that all employees are

appropriately covered by the state workers' compensation provisions. Care should be exercised to assure that existing definitions, allocations of responsibility, or remedy provisions are not inadvertently modified.

2-3. A homeowner shall not be considered the employer of persons hired by the homeowner to carry out construction on the homeowner's own premises if those premises are not intended for immediate lease, sale, or resale.

Such a clarification as suggested above would accomplish two very important goals. First, it would ensure that enactment by a state of the NCOIL model would not unintentionally contradict, confuse or preempt existing statutory provisions. Second, it would appropriately broaden the NCOIL model to include contingent staffing arrangements such as employment agencies, labor contractors, and temporary staffing agencies.

NAPEO appreciates the opportunity to submit comments on the NCOIL effort and once again applauds its efforts to address this difficult issue. We would be happy to work with you on further revisions and to cooperate with its efforts.

Sincerely,

A handwritten signature in black ink that reads "Tim Tucker". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Tim Tucker
Vice President, Government Affairs