

# SENATE . . . . . No. 127

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## The Commonwealth of Massachusetts

PRESENTED BY:

***Michael J. Rodrigues***

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:*

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the recognition and registration of professional employer organizations operating in the Commonwealth of Massachusetts..

PETITION OF:

NAME:

*Michael J. Rodrigues*

DISTRICT/ADDRESS:

# SENATE . . . . . No. 127

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By Mr. Rodrigues, a petition (accompanied by bill, Senate, No. 127) of Michael J. Rodrigues for legislation to register professional employer organizations operating in Massachusetts. Consumer Protection and Professional Licensure.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Eleven  
\_\_\_\_\_

An Act relative to the recognition and registration of professional employer organizations operating in the Commonwealth of Massachusetts..

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1           SECTION 1. Notwithstanding any general or special law to the contrary, Chapter \_\_\_\_ of  
2 the General Laws is hereby amended by inserting at the end thereof the following new sections: -

3           SECTION 1. Definitions.

4           As used in this Act:

5           (A) “Administrative Fee” means the fee charged to a Client by a Professional Employer  
6 Organization for Professional Employer Services. However, the Administrative Fee shall not be  
7 deemed to include any amount of a fee by the Professional Employer Organization that is for  
8 wages and salaries, benefits, workers’ compensation, payroll taxes, withholding, or other  
9 assessments paid by the Professional Employer Organization to or on behalf of Covered  
10 Employees under the Professional Employer Agreement.

(B) “Client” means any Person who enters into a Professional Employer Agreement with a PEO.

(C) “Co-employer” means either a PEO or a Client.

(D) “Co-employment Relationship” means a relationship which is intended to be an ongoing relationship rather than a temporary or project specific one, wherein the rights, duties, and obligations of an employer which arise out of an employment relationship have been allocated between Co-employers pursuant to a Professional Employer Agreement and this Act. In such a co-employment relationship:

1. The PEO is entitled to enforce only such employer rights, and is subject to only those obligations specifically allocated to the PEO by the Professional Employer Agreement or this Act;

2. The Client is entitled to enforce those rights, and obligated to provide and perform those employer obligations allocated to such Client by the Professional Employer Agreement and this Act; and

3. The Client is entitled to enforce any right and obligated to perform any obligation of an employer not specifically allocated to the PEO by the Professional Employer Agreement or this Act.

(E) “Covered Employee” means an individual having a Co-employment Relationship with a PEO and a Client who meets all of the following criteria: (i) the individual has received written notice of co-employment with the PEO, and (ii) the individual’s Co-employment Relationship is pursuant to a Professional Employer Agreement subject to this Act. Individuals

who are officers, directors, shareholders, partners, and managers of the Client will be Covered Employees to the extent the PEO and the Client have expressly agreed in the Professional Employer Agreement that such individuals would be Covered Employees and provided such individuals meet the criteria of this paragraph and act as operational managers or perform day-to-day operational services for the Client.

(F) "Department" means the Massachusetts Office of Consumer Affairs and Business Regulation (OCABR).

(G) "Governmental entity" means any city, town, village, county or other municipality, any entity created under Title VII, general laws, or any other entity created by the commonwealth, a combination or subunit of any of the foregoing, or an instrumentality of the commonwealth and any of the foregoing.

(H) "PEO Group" means two or more PEO's that are majority owned or commonly controlled by the same entity, parent, or controlling person(s).

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

(J) "Professional Employer Agreement" means a written contract by and between a Client and a PEO that provides:

1. for the Co-employment of Covered Employees;
2. for the allocation of employer rights and obligations between the Client and the PEO with respect to the Covered Employees; and
3. that the PEO and the Client assume the responsibilities required by this Act.

(K) “Professional Employer Organization” or “PEO” means any Person engaged in the business of providing Professional Employer Services. A Person engaged in the business of providing Professional Employer Services shall be subject to registration and regulation under this Act regardless of its use of the term or conducting business as a “professional employer organization,” “PEO,” “staff leasing company,” “registered staff leasing company,” “employee leasing company,” “administrative employer,” or any other name.

The following shall not be deemed to be Professional Employer Organizations or the providing of Professional Employment Services for purposes of this Act.

1. arrangements wherein a Person, whose principal business activity is not entering into Professional Employer Arrangements and which does not hold itself out as a PEO, shares employees with a commonly owned company within the meaning of section 414(b) and (c) of the Internal Revenue Code of 1986, as amended;

2. independent contractor arrangements by which a Person assumes responsibility for the product produced or service performed by such person or his agents and retains and exercises primary direction and control over the work performed by the individuals whose services are supplied under such arrangements, or

3. providing Temporary Help Services.

4. providing contingent labor, a contingent workforce or project specific services.

(L) “Professional Employer Services” shall mean the service of entering into Co-employment Relationships under this Act in which all or a majority of the employees providing services to a Client or to a division or work unit of Client are Covered Employees.

(M) “Registrant” means a PEO registered under this Act.

(N) “Temporary Help Services” means services consisting of a Person:

1. recruiting and hiring its own employees,

2. finding other organizations that need the services of those employees,

3. assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations’ workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

4. customarily attempting to reassign the employees to other organizations when they finish each assignment.

(O) “Working capital” means current assets less current liabilities as determined under generally accepted accounting principles.

(P) “Incentive” means any tax credits, economic incentives, or similar items or benefits provided by the Commonwealth

(Q) (BB) “Business preference program” means a program or process where the state or governmental entity give preferential treatment to certain bidders with respect to bids, contracts, purchase, or other contracts, including the small, minority, women, or disadvantaged-owned business enterprise or as a historically underutilized business.

Section 2. Rights, Duties and Obligations Unaffected by this Act.

(A) Collective Bargaining Agreements. Nothing contained in this Act or in any Professional Employer Agreement shall affect, modify or amend any collective bargaining agreement, or the rights or obligations of any Client, PEO, or Covered Employee under the federal National Labor Relations Act, the federal Railway Labor Act or the State Labor Relations Law.

(B) Employment Arrangements: Nothing in this Act or in any Professional Employer Agreement shall

1. Diminish, abolish or remove rights of Covered Employees to a Client or obligations of such Client to a Covered Employee existing prior to the effective date of the Professional Employer Agreement.

2. Affect, modify, or amend any contractual relationship or restrictive covenant between a Covered Employee and any Client in effect at the time a Professional Employer Agreement becomes effective. This shall include a covenant between a covered employee and a union organization, unless negotiated otherwise. Nor shall it prohibit or amend or any contractual relationship or restrictive covenant that is entered into subsequently between a Client and a Covered Employee. A PEO shall have no responsibility or liability in connection with, or arising out of, any such existing or new contractual relationship or restrictive covenant unless the PEO has specifically agreed otherwise in writing.

3. Create any new or additional enforceable right of a Covered Employee against a PEO that is not specifically provided by the Professional Employer Agreement or this Act.

(C) Licensing: Nothing contained in this Act or any Professional Employer Agreement shall affect, modify or amend any commonwealth, local, federal licensing, or governmental entity, registration, or certification requirement applicable to any Client or Covered Employee.

1. A Covered Employee who must be licensed, registered, or certified according to law or regulation is deemed solely an employee of the Client for purposes of any such license, registration, or certification requirement.

2. A PEO shall not be deemed to engage in any occupation, trade, profession, or other activity that is subject to licensing, registration, or certification requirements, or is otherwise regulated by a governmental entity solely by entering into and maintaining a Co-employment Relationship with a Covered Employee who is subject to such requirements or regulation.

3. A Client shall have the sole right of direction and control of the professional or licensed activities of Covered Employees and of Client's business. Such Covered Employees and Clients shall remain subject to regulation by the regulatory or governmental entity responsible for licensing, registration, or certification of such Covered Employees or Clients.

(D) Tax Credits and Other Incentives. For purposes of determination of tax credits and other economic incentives provided by this Commonwealth or other government entity and based on employment, Covered Employees shall be deemed employees solely of the Client. A Client shall be entitled to the benefit of any tax credit, economic incentive, or other benefit arising as the result of the employment of Covered Employees of such Client. If the grant or amount of any such incentives is based on number of employees, then each Client shall be treated as employing only those Covered Employees co-employed by the Client. Covered Employees working for other clients of the PEO shall not be counted. Each PEO will provide,



upon request by a Client or the Commonwealth or other governmental entity, employment information reasonably required by the Commonwealth or governmental responsible for administration of any such tax credit or economic incentive and necessary to support any request, claim, application, or other action by a Client seeking any such tax credit or economic incentive.

(E) Disadvantaged Business. With respect to a bid, contract, purchase order, or agreement entered into with the commonwealth or governmental entity, a Client company's status or certification as a small, minority-owned, disadvantaged, or woman-owned business enterprise or as a historically underutilized business is not affected because the Client company has entered into an agreement with a PEO or uses the services of a PEO.

### Section 3. Registration Requirements.

(A) Registration Required: Except as otherwise provided in this Act, no Person shall provide, advertise, or otherwise hold itself out as providing Professional Employer Services in this Commonwealth, unless such Person is registered under this Act.

(B) Registration Information: Each applicant for registration under this Act, shall provide the Department with the following information:

1. The name or names under which the PEO conducts business;
2. The address of the principal place of business of the PEO and the address of each office it maintains in this Commonwealth;
3. The PEO's taxpayer or employer identification number;

154 4. A list by state of each name under which the PEO has operated in the preceding 5  
155 years, including any alternative names, names of predecessors and, if known, successor business  
156 entities;

157 5. A statement of ownership, which shall include the name and evidence of the  
158 business experience of any Person that, individually or acting in concert with one or more other  
159 Persons, owns or controls, directly or indirectly, twenty-five percent or more of the equity  
160 interests of the PEO;

161 6. A statement of management, which shall include the name and evidence of the  
162 business experience of any Person who serves as president, chief executive officer, or otherwise  
163 has the authority to act as senior executive officer of the PEO; and

164 7. At the time of initial registration, the applicant shall file the most recent financial  
165 statements of the professional employer organization or professional employer organization  
166 group. The report of the auditor of financial statements filed with initial registration may not be  
167 older than thirteen months from the date of registration. A registrant renewing a license shall file  
168 the most recent financial statements of the professional employer organization or professional  
169 employer group. The department may grant a registrant for a renewal license an extension to file  
170 financial statements of the professional employer organization or professional employer  
171 organization group if the applicant files such a request with a letter from the auditor explaining  
172 the reason for the delay and the anticipated completion date.

173 8. Financial statements under paragraph (7) shall be:

174 a. prepared in accordance with generally accepted accounting standards,

b. audited by an independent certified public accountant licensed to practice in the jurisdiction in which the certified public accountant is located, and

c. without qualification as to the status of the applicant or licensee as a going concern as reflected in the auditor's report.

9. Notwithstanding paragraphs (7) and (8), a PEO that has not had sufficient operating history to have financial statements based on twelve months of operations must comply with the financial requirement under Section 6 and submit financial statements reviewed by a certified public accountant licensed in the jurisdiction in which the certified public accountant is located.

10. Paragraphs (7) to (9) shall not apply PEOs registered pursuant to subsections (F) and (G).

(C) Initial Registration:

1. Each PEO operating in the Commonwealth as of the effective date of this Act shall complete its initial registration not later than 180 days after the effective date of this Act. Such initial registration shall be valid until the end of the PEO's first fiscal year end that is more than one year after the effective date of this Act.

2. Each PEO not operating within this Commonwealth as of the effective date of this Act shall complete its initial registration prior to commencement of operations within this Commonwealth.

(D) Renewal: Within 180 days after the end of a Registrant's fiscal year, such Registrant shall renew its registration by notifying the department of any changes in the information provided in such Registrant's most recent registration or renewal.

(E) PEO Group Registration: PEOs in a PEO Group may satisfy the reporting and financial requirements of this act on a combined or consolidated basis provided that each member of the PEO Group guarantees the obligations under this act of each other member of the PEO Group. In the case of a PEO Group that submits a combined or consolidated audited financial statement including entities that are not PEOs or that are not in the PEO Group, the controlling entity of the PEO Group under the consolidated or combined statement must guarantee the obligations of the PEOs in the PEO Group.

(F) Limited Registration:

1. A PEO is eligible for a limited registration under this Act if such PEO:

a. Submits a properly executed request for limited registration on a form prescribed by the Department;

b. Is domiciled outside the Commonwealth and is licensed or registered as a Professional Employer Organization in another state;

c. Does not maintain an office in this Commonwealth or directly solicit Clients located or domiciled within this Commonwealth; and

d. Does not have more than 50 Covered Employees employed or domiciled in this Commonwealth on any given day.

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

3. A PEO seeking limited registration under this Section shall provide the Department with information and documentation necessary to show that the PEO qualifies for a limited registration.

217 4. Paragraphs (7), (8), and (9) and Section (6) shall not apply to applicants under this  
218 subsection.

219 (G) Electronic Filing and Compliance: The department shall to the extent practical permit  
220 by regulation the acceptance of electronic filings in conformance with the Uniform Electronic  
221 Transactions Act MGL CH 110G, including applications, documents, reports, and other filings  
222 required by this Act. The department may approve the acceptance of electronic filings and other  
223 assurance by an independent and qualified assurance organization approved by the department  
224 that provides satisfactory assurance of compliance acceptable to the department consistent with  
225 or in lieu of the requirements of Sections (4), (6), and other requirements of this act or the  
226 regulations promulgated pursuant to it. The department may permit a PEO to authorize an  
227 assurance organization approved by the department to act on the PEO's behalf in complying with  
228 the registration requirements of this act, including electronic filings of information and payment  
229 of registration fees. Use of such an approved assurance organization shall be optional and not  
230 mandatory for a registrant. Nothing in this subsection shall limit or change the department's  
231 authority to register or terminate registration of a professional employer organization or to  
232 investigate or enforce any provision of this act.

233 (H) List: The Department shall maintain a list of Professional Employer Organizations  
234 registered under this act that available to the public by electronic or other means.

235 (I) Forms: The Department may prescribe forms necessary to promote the efficient  
236 administration of this section.

237 (J) Record Confidentiality: All records, reports, and other information obtained from a  
238 PEO under this act, except to the extent necessary for the proper administration of this act by the

department, shall be confidential and shall not be published or open to public inspection other than to public employees in the performance of their public duties.

#### Section 4. Fees.

(A) Initial Registration: Upon filing an initial registration statement under this Act, a PEO shall pay an initial registration fee not to exceed \$1000.

(B) Renewal: Upon each annual renewal of a registration statement filed under this Act, a PEO shall pay a renewal fee not to exceed \$500.

(C) Group Registration: The Department shall determine by regulation any fee to be charged for a Group Registration.

(D) Limited Registration: Each PEO seeking limited registration under the terms of this subsection shall pay a fee in the amount not to exceed \$500 upon initial application for limited registration and upon each annual renewal of such limited registration.

(E) Alternative Registration: A PEO seeking registration under Section (4)(G) shall pay an annual fee not to exceed \$500.

(F) No fee charged pursuant to this Act shall exceed the amount reasonably necessary for the administration of this Act.

Section 5. Financial Capability. Each PEO or collectively each PEO Group shall maintain either:

(A) Positive working capital at registration as reflected in the financial statements submitted to the department with the initial registration and each annual renewal, or

(B) A PEO or PEO Group that does not have positive working capital may provide a bond, irrevocable letter of credit, securities, or a combination thereof with a minimum market value equaling the deficiency plus \$100,000 to the department.

(C) An instrument or combination thereof under subsection (B) shall be held by a depository designated by the department, securing payment by the PEO of all taxes, wages, benefits or other entitlement due to or with respect to Covered Employees, if the PEO does not make such payments when due.

#### Section 6. General Requirements and Provisions.

(A) Contractual Relationship. Except as specifically provided in this Act, the Co-employment Relationship between the Client and the PEO, and between each Co-employer and each Covered Employee, shall be governed by the Professional Employer Agreement. Each Professional Employer Agreement shall include the following:

1. The allocation of rights, duties and obligations of the PEO and client.
2. That the PEO shall have responsibility to pay wages to Covered Employees; to withhold, collect, report and remit payroll-related and unemployment taxes; and, to the extent the PEO has assumed responsibility in the Professional Employer Agreement, to make payments for employee benefits for Covered Employees. As used in this section, 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 bonuses, commissions, severance pay, deferred compensation, profit sharing or vacation, sick or other paid time off pay, unless the PEO has expressly agreed to assume liability for such payments in the Professional Employer Agreement;

281               3. That the PEO shall have a right to hire, discipline, and terminate a Covered  
282 Employee, as may be necessary to fulfill the PEO's responsibilities under this Act and the  
283 Professional Employer Agreement. The Client shall have a right to hire, discipline, and  
284 terminate a Covered Employee.

285               (C) Notice to Covered Employees. With respect to each Professional Employer  
286 Agreement entered into by a PEO, such PEO shall provide written notice to each Covered  
287 Employee affected by such agreement of the general nature of the Co-employment Relationship  
288 between and among the PEO, the Client, and such Covered Employee.

289               (D) Specific Responsibilities. Except to the extent otherwise expressly provided by the  
290 applicable Professional Employer Agreement:

291               1. A Client shall be solely responsible for the quality, adequacy or safety of the goods  
292 or services produced or sold in Client's business.

293               2. A Client shall be solely responsible for directing, supervising, training and  
294 controlling the work of the Covered Employees with respect to the business activities of the  
295 Client and solely responsible for the acts, errors or omissions of the Covered Employees with  
296 regard to such activities.

297               3. A Client shall not be liable for the acts, errors or omissions of a PEO, or of any  
298 Covered Employee of the Client and a PEO when such Covered Employee is acting under the  
299 express direction and control of the PEO.



4. A PEO shall not be liable for the acts, errors, or omissions of a Client or of any Covered Employee of the Client when such Covered Employee is acting under the express direction and control of the Client.

5. Nothing in this subsection shall serve to limit any contractual liability or obligation specifically provided in the written Professional Employer Agreement.

6. A Covered Employee is not, solely as the result of being a Covered Employee of a PEO, an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation, or liquor liability insurance carried by the PEO unless the Covered Employees are included by specific reference in the Professional Employer Agreement and applicable prearranged employment contract, insurance contract or bond.

(E) Professional Employer Services Not Insurance. A PEO under this Act is not engaged in the sale of insurance or in acting as a third party administrator (TPA) by offering, marketing, selling, administering or providing professional employer services which include services and employee benefit plans for Covered Employees.

(F) Taxation:

1. Covered Employees whose services are subject to sales tax shall be deemed the employees of the Client for purposes of collecting and levying sales tax on the services performed by the Covered Employee. Nothing contained in this Act shall relieve a Client of any sales tax liability with respect to its goods or services.

320               2. Any tax upon Professional Employer Services or any business license or other fee  
321 which is based upon “gross receipts” shall be limited to the Administrative Fee of the PEO.

322               3. Any tax assessed on a per capita or per employee basis shall be assessed against the  
323 Client for Covered Employees and against the Professional Employer Organization for its  
324 employees who are not Covered Employees co-employed with a client.

325               4. In the case of tax imposed or calculated upon the basis of total payroll, the  
326 Professional Employer Organization shall be eligible to apply any small business allowance or  
327 exemption available to the Client for the Covered Employees for purpose of computing the tax.

328               Section 8. Workers’ Compensation.

329               Chapter 152 s. 15, 2004 Edition, is hereby amended by replacing the next to last sentence  
330 with the following:- "Nothing in this section, or in section 18 or 24 shall be construed to bar an  
331 action at law for damages for personal injuries or wrongful death by an employee against any  
332 person other than (1) the insured person employing such employee and liable for the payment of  
333 the compensation provided by this chapter for the employee's personal injury or wrongful death  
334 and said persons employees, and (2) an insured employee leasing company and its client  
335 company, as defined in Section 14A of this chapter, if each are in compliance with the  
336 requirements of this chapter, and the leasing arrangement is not involved, directly or indirectly in  
337 a labor dispute as that term is defined in Section 20C of Chapter 149 of the General Laws.

338               Section 9. Enforcement.

339               (A) Prohibited acts:

340               1. PEO Services – A person:

a. may not offer or provide Professional Employer Services or use the names PEO, Professional Employer Organization, staff leasing, employee leasing, administrative employer or other title representing Professional Employer Services without first becoming registered under this Act.

b. may not knowingly provide false or fraudulent information to the Department in conjunction with any registration, renewal, or in any report required under this Act.

(B) Disciplinary Action:

1. Disciplinary action may be taken by the Department for violation of (A)(1) a. or b above or for:

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

b. knowingly making a material misrepresentation to the department, or other governmental agency; or

c. a willful violation this Act or any order or regulation issued by the Department under this Act.

(A) Disciplinary Authorities: Upon finding, after notice and opportunity for hearing, that a PEO or a controlling person of a PEO has violated one or more provisions of this section, the Director may:

1. deny an application for a registration;

2. revoke, restrict, or refuse to renew a registration;

3. impose an administrative penalty in an amount not to exceed one thousand dollars for each material violation;

4. place the registration on probation for the period and subject to conditions that the department specifies; or

5. issue a cease and desist.

#### Section 11. Severability.

(A) The provisions of this Act are severable. If any provision of this Act or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provision or application.

#### Section 12. Effective Date

(A) This act shall be effective 180 days after enactment.