SENATE DOCKET, NO. 560 FILED ON: 1/19/2011

SENATE . . . . . No. 127

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:	DISTRICT/ADDRESS:
Michael J. Rodrigues	

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SENATE . . . . . No. 127

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.

The Commonwealth of Massachusetts

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:

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

SECTION 1. Definitions.

As used in this Act:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

49 1. for the Co-employment of Covered Employees;

50 2. for the allocation of employer rights and obligations between the Client and the PEO
51 with respect to the Covered Employees; and

52 3. that the PEO and the Client assume the responsibilities required by this Act.

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

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

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

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

69 3. providing Temporary Help Services.

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

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

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

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

76 1. recruiting and hiring its own employees,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

144 Section 3. Registration Requirements.

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

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

150 1. The name or names under which the PEO conducts business;

151 2. The address of the principal place of business of the PEO and the address of each
152 office it maintains in this Commonwealth;

153 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,

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

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

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

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

185 (C) Initial Registration:

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

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

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

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

203 (F) Limited Registration:

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

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

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

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

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

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

214 3. A PEO seeking limited registration under this Section shall provide the Department
215 with information and documentation necessary to show that the PEO qualifies for a limited
216 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

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

241 Section 4. Fees.

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

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

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

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

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

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

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

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

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

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

266 Section 6. General Requirements and Provisions.

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

271 1. The allocation of rights, duties and obligations of the PEO and client.

272 2. That the PEO shall have responsibility to pay wages to Covered Employees; to
273 withhold, collect, report and remit payroll-related and unemployment taxes; and, to the extent the
274 PEO has assumed responsibility in the Professional Employer Agreement, to make payments for
275 employee benefits for Covered Employees. As used in this section, the term "wages" does not
276 include any obligation between a Client and a Covered Employee for payments beyond or in
277 addition to the Covered Employee's salary, draw or regular rate of pay, such as bonuses,
278 commissions, severance pay, deferred compensation, profit sharing or vacation, sick or other
279 paid time off pay, unless the PEO has expressly agreed to assume liability for such payments in
280 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.

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

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

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

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

315 (F) Taxation:

316 1. Covered Employees whose services are subject to sales tax shall be deemed the
317 employees of the Client for purposes of collecting and levying sales tax on the services
318 performed by the Covered Employee. Nothing contained in this Act shall relieve a Client of any
319 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:

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

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

347 (B) Disciplinary Action:

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

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

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

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

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

360 1. deny an application for a registration;

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

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

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

366 5. issue a cease and desist.

367 Section 11. Severability.

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

372 Section 12. Effective Date

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