

HOUSE No. 1775

The Commonwealth of Massachusetts

PRESENTED BY:

Joseph F. Wagner

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:	DATE ADDED:
<i>Joseph F. Wagner</i>	<i>8th Hampden</i>	<i>1/16/2015</i>

HOUSE No. 1775

By Mr. Wagner of Chicopee, a petition (accompanied by bill, House, No. 1775) of Joseph F. Wagner for legislation to further regulate professional employer organizations operating in the Commonwealth. Labor and Workforce Development.

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

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. The Legislature hereby finds:

2 (a) That professional employer organizations operating in this state should be
3 properly recognized and regulated by the Department of Labor Standards of the Commonwealth
4 of Massachusetts, as provided in this act.

5 SECTION 2. Chapter 149 of the General Laws is hereby amended by adding the
6 following section:-

7 Section 192. (a). As used in this section, the following words shall, unless the context
8 clearly requires otherwise, have the following meanings:-

9 “Client” means any person who enters into a professional employer agreement with a
10 professional employer organization.

11 “Co-employer” means either a professional employer organization or a client.

12 “Co-employment Relationship” means a relationship which is intended to be an ongoing
13 relationship rather than a temporary or project specific one, wherein the rights, duties, and
14 obligations of an employer which arise out of an employment relationship have been
15 allocated between co-employers pursuant to a professional employer agreement and this act. In a
16 co-employment relationship:

17 (1) the professional employer organization is entitled to enforce only such employer
18 rights, and is subject to only those obligations specifically allocated to the professional employer
19 organization by the professional employer agreement or this act;

20 (2) the client is entitled to enforce those rights, and obligated to provide and perform
21 those employer obligations allocated to the client by the professional employer agreement and
22 this act; and

23 (3) an employer not specifically allocated to the professional employer organization
24 by the professional employer agreement or this act.

25 “Covered Employee” means an individual having a co-employment relationship with a
26 professional employment organization and a client who meets all of the following criteria: (i) the
27 individual has received written notice of co-employment with the professional employment
28 organization, and (ii) the individual’s co-employment relationship is pursuant to a professional
29 employer agreement subject to this act. Individuals who are officers, directors, shareholders,
30 partners, and managers of the client will be covered employees, except to the extent the
31 professional employer organization and the client have expressly agreed in the professional
32 employer agreement that such individuals would not be covered employees, provided such

individuals meet the criteria of this paragraph and act as operational managers or perform day-to-day operational services for the client.

“Department” means the Department of Labor Standards of the Commonwealth of Massachusetts.

“Director” means the Director of the Department of Labor Standards.

“PEO Group” means two or more professional employer organizations that are majority owned or commonly controlled by the same entity, parent, or controlling person(s).

“Person” means any individual, partnership, corporation, limited liability company, association, or any other form of legally recognized entity.

“Professional Employer Agreement” means a written contract by and between a client and a professional employer organization that provides:

(1) for the co-employment of covered employees;

(2) for the allocation of employer rights and obligations between the client and the Professional employer organization with respect to the covered employees; and

(3) The professional employer organization and the client assume the responsibilities required by this act.

“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.

(1) The following shall not be deemed to be professional employer organizations or
the providing of professional employment services for purposes of this act:

(A) 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;

(B) 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

(C) Services provided by employment agency or temporary staffing agency

“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 the client are covered employees.

“Registrant” means a PEO registered under this act.

“Employment Agency” or “Temporary staffing agency” as defined by section 46A
chapter 140 of the General Laws means any person who conducts in whole or in part an agency
for the purpose of procuring or attempting to procure permanent or temporary help or
employment or engagements, or for the registration of persons seeking such help, employment or

engagement, or for giving information as to where and of whom such help, employment or engagement may be procured, where a fee is exacted or attempted to be collected for such service; provided, however, that except with respect to the inspection authority of the commissioner under section forty-six Q, the term “employment agency” shall not include a firm none of whose fees or charges are paid either directly or indirectly by any applicant for employment, unless such firm is engaged in providing domestic employees, nor shall such definition apply to any person conducting a business which consists of employing individuals directly for the purpose of furnishing part time or temporary help to others or to any person conducting a business which consists solely of providing employers or prospective employers, by electronic means, biographical information, background and experience of applicants for temporary employment, help or engagement.

(b) 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 chapter 150A of the General Laws.

(1) Nothing in this act or in any professional employer agreement shall:

(i) 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.

(ii) 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. Nor shall it prohibit or amend 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.

(iii) 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.

(2) Nothing contained in this act or any professional employer agreement shall affect, modify or amend any state, local, or federal licensing, registration, or certification requirement applicable to any client or covered employee.

(i) 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.

(ii) 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.

(iii) A client shall have the sole right of direction and control of the professional or licensed activities of covered employees and of the client's business. 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.

(3) For purposes of determination of tax credits and other economic incentives provided by this state 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. Notwithstanding that the PEO is the W-2 reporting employer, the client shall continue to qualify for the benefit, incentive or credit. If the grant or amount of any benefit, incentive, or credit 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 an agency or department of this state, employment information reasonably required by any agency or department of this state responsible for administration of any tax credit or economic incentive and necessary to support any request, claim, application, or other action by a client seeking any tax credit or economic incentive.

(4) With respect to a bid, contract, purchase order, or agreement entered into with the state or a political subdivision of the state, 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.

(c)(1) Except as otherwise provided in this act, no person shall provide, advertise, or otherwise hold itself out as providing Professional Employer Services in this state, unless such person is registered under this act.

(2) Each applicant for registration under this act, shall provide the department the following information:

(i) The name or names under which the PEO conducts business;

(ii) The address of the principal place of business of the PEO and the address of each office it maintains in this state;

(iii) The PEO's taxpayer or employer identification number;

(iv) A list by jurisdiction of each name under which the PEO has operated in the preceding 5 years, including any alternative names, names of predecessors and, if known, successor business entities;

(v) A statement of ownership, which shall include the name and evidence of the business experience of any person that, individually or acting in concert with one or more other persons, owns or controls, directly or indirectly, twenty-five percent or more of the equity interests of the PEO;

(vi) A statement of management, which shall include the name and evidence of the business experience of any person who serves as president, chief executive officer, or otherwise has the authority to act as senior executive officer of the PEO; and

(vii) A financial statement setting forth the financial condition of the PEO or PEO Group. At the time of application for a new license, the applicant shall submit the most recent audit of the applicant, which may not be older than 13 months. Thereafter, a PEO or PEO Group shall file on an annual basis, within 180 days after the end of the PEO's or PEO Group's fiscal year, a succeeding audit. An applicant may apply for an extension with the department but any

such request must be accompanied by a letter from the auditors stating the reasons for the delay and the anticipated audit completion date. The financial statement shall be prepared in accordance with generally accepted accounting principles, and audited by an independent certified public accountant licensed to practice in the jurisdiction in which such accountant is located, and shall be without qualification as to the going concern status of the PEO. A PEO Group may submit combined or consolidated audited financial statements to meet the requirements of this section. A PEO that has not had sufficient operating history to have audited financials based upon at least 12 months of operating history must meet the financial capacity requirements below and present financial statements reviewed by a certified public accountant.

(3) Initial Registration:

(i) Each PEO operating within this state 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. Initial registration shall be valid until 180 days from the end of the PEO's first fiscal year end that is more than one year after the effective date of this act.

(ii) Each PEO not operating within this state as of the effective date of this act shall complete its initial registration prior to initiating operations within this state. In the event, a PEO not registered in this state becomes aware that an existing client not based in this state has employees and operations in this state, the PEO must either decline to provide PEO services for those employees or notify the department within five business days of its knowledge of this fact and file a limited registration application under paragraph (6) below or a full business registration if there are more than 50 covered employees. The department may issue an interim operating permit for the period the registration applications are pending if (a) the PEO is

currently registered or licensed by another state and (b) the department determines it to be in the best interests of the potential covered employees.

(4) Within 180 days after the end of a registrant's fiscal year, the registrant shall renew its registration by notifying the department of any changes in the information provided in the registrant's most recent registration or renewal. A registrant's existing registration shall remain in effect during the pendency of a renewal application.

(5) PEOs in a PEO Group may satisfy the reporting and financial requirements of this registration law on a combined or consolidated basis provided that each member of the PEO Group guarantees the financial capacity 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.

(6) Limited Registration:

(i) A PEO is eligible for a limited registration under this act if the PEO:

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

(B) Is domiciled outside this state and is licensed or registered as a PEO in another state;

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

202 (D) Does not have more than 50 covered employees employed or domiciled in this
203 state on any given day.

204 (ii) A limited registration is valid for one year, and may be renewed.

205 (iii) A PEO seeking limited registration under this section shall provide the
206 department with information and documentation necessary to show that the PEO qualifies for a
207 limited registration.

208 (iv) Subsection (e) shall not apply to applicants for limited registration.

209 (7) The department shall maintain a list of PEOs registered under this act that is
210 readily available to the public by electronic or other means.

211 (8) The department may prescribe forms necessary to promote the efficient
212 administration of this section.

213 (9) The department shall to the extent practical permit the acceptance of electronic
214 filings in conformance with the Uniform Electronic Transactions Act, including applications,
215 documents, reports, and other filings required by this act. The department may provide for the
216 acceptance of electronic filings and other assurance by an independent and qualified assurance
217 organization approved by the director that provides satisfactory assurance of compliance
218 acceptable to the department consistent with or in lieu of the requirements of subsections (c) and
219 subsection (e), and other requirements of this act or the rules promulgated pursuant to it. The
220 director shall permit a PEO to authorize such an approved assurance organization to act on the
221 PEO's behalf in complying with the registration requirements of this act, including electronic
222 filings of information and payment of registration fees. Use of such an approved assurance

organization shall be optional and not mandatory for a registrant. Nothing in this subsection shall limit or change the department's authority to register or terminate registration of a professional employer organization or to investigate or enforce any provision of this act.

(10) All records, reports and other information obtained from a 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.

(d)(1) Upon filing an initial registration statement under this act, a PEO shall pay an initial registration fee not to exceed \$500.

(2) Upon each annual renewal of a registration statement filed under this act, a PEO shall pay a renewal fee not to exceed \$250.

(3) The department shall determine by rule any fee to be charged for a group registration.

(4) Each PEO seeking limited registration under the terms of this subsection shall pay a fee in the amount not to exceed \$250 upon initial application for limited registration and upon each annual renewal of such limited registration.

(5) A PEO seeking registration pursuant to subsection (c)(9) shall pay an initial and annual fee not to exceed \$250.

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

(e)(1) Except as provided by subsection (c) (6) and (9), each PEO or collectively each PEO Group shall maintain either:

(i) Positive working capital, as defined by generally accepted accounting principles, at registration as reflected in the financial statements submitted to the department with the initial registration and each annual renewal; or

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

(f)(1) Except as specifically provided in this act or in the professional employer agreement, in each co-employment relationship:

(i) The client shall be entitled to exercise all rights, and shall be obligated to perform all duties and responsibilities, otherwise applicable to an employer in an employment relationship; and

(ii) The PEO shall be entitled to exercise only those rights, and obligated to perform only those duties and responsibilities, specifically required by this act or set forth in the professional employer agreement. The rights, duties, and obligations of the PEO as co-employer with respect to any covered employee shall be limited to those arising pursuant to the professional employer agreement and this act during the term of co-employment by the PEO of such covered employee.

(iii) Unless otherwise expressly agreed by the PEO and the client in a professional employer agreement, the client retains the exclusive right to direct and control the covered employees 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 the covered employees.

(2) 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:

(i) The allocation of rights, duties and obligations as described in paragraph (1)

(ii) 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;

(iii) That the PEO shall have a right to hire, discipline, and terminate a covered employee, as may be necessary to fulfill the PEO's responsibilities under this act and the

285 Professional Employer Agreement. The client shall have a right to hire, discipline, and terminate
286 a covered employee.

287 (iv) The responsibility to obtain workers' compensation coverage for covered
288 employees, from a carrier licensed to do business in this State and otherwise in compliance with
289 all applicable requirements, shall be specifically allocated to either the client or the PEO in the
290 professional employer agreement.

291 (3) With respect to each professional employer agreement entered into by a PEO,
292 such PEO shall provide written notice to each covered employee affected by such agreement of
293 the general nature of the co-employment relationship between and among the PEO, the client,
294 and such covered employee.

295 (4) Except to the extent otherwise expressly provided by the applicable professional
296 employer agreement:

297 (i) A client shall be solely responsible for the quality, adequacy or safety of the
298 goods or services produced or sold in client's business.

299 (ii) A client shall be solely responsible for directing, supervising, training and
300 controlling the work of the covered employees with respect to the business activities of the client
301 and solely responsible for the acts, errors or omissions of the covered employees with
302 regard to such activities.

303 (iii) A client shall not be liable for the acts, errors or omissions of a PEO, or of any
304 covered employee of the client and a PEO when such covered employee is acting under the
305 express direction and control of the PEO.

306 (iv) A PEO shall not be liable for the acts, errors, or omissions of a client or of any
307 covered employee of the client when such covered employee is acting under the express
308 direction and control of the client.

309 (v) Nothing in this subsection shall serve to limit any contractual liability or
310 obligation specifically provided in the written Professional Employer Agreement.

311 (vi) A covered employee is not, solely as the result of being a covered employee of a
312 PEO, an employee of the PEO for purposes of general liability insurance, fidelity bonds, surety
313 bonds, employer's liability which is not covered by workers' compensation, or liquor liability
314 insurance carried by the PEO unless the covered employees are included by specific reference in
315 the professional employer agreement and applicable prearranged employment contract, insurance
316 contract or bond.

317 (5) A PEO under this act is not engaged in the sale of insurance or in acting as a third
318 party administrator by offering, marketing, selling, administering or providing professional
319 employer services which include services and employee benefit plans for covered employees.

320 (6) For purposes of this state or any county, municipality or other political
321 subdivision thereof:

322 (i) Covered employees whose services are subject to sales tax shall be deemed the
323 employees of the client for purposes of collecting and levying sales tax on the services
324 performed by the covered employee. Nothing contained in this act shall relieve a client of any
325 sales tax liability with respect to its goods or services.

(ii) Any tax or assessment imposed upon professional employer services or any business license or other fee which is based upon “gross receipts” shall allow a deduction from the gross income or receipts of the business derived from performing professional employer services that is equal to that portion of the fee charged to a client that represents the actual cost of wages and salaries, benefits, worker’s compensation, payroll taxes, withholding, or other assessments paid to or on behalf of a covered employee by the professional employer organization under a professional employer agreement.

(iii) Any tax assessed or assessment or mandated expenditure on a per capita or per employee basis shall be assessed against the client for covered employees and against the PEO for its employees who are not covered employees co-employed with a client. Benefits or monetary consideration that meet the requirements of mandates imposed on a client and that are received by covered employees through the PEO either through payroll or through benefit plans sponsored by the PEO shall be credited against the client’s obligation to fulfill such mandates

(iv) In the case of a tax or an assessment imposed or calculated upon the basis of total payroll, the PEO shall be eligible to apply any small business allowance or exemption available to the client for the covered employees for purpose of computing the tax.

(g)(1) A client and a registered PEO shall each be deemed an employer under the laws of this state for purposes of sponsoring retirement and welfare benefit plans for its covered employees.

(2) A fully-insured welfare benefit plan offered to the covered employees of a single PEO shall be treated for purposes of state law as a single employer welfare benefit plan.

(3) For purposes chapter 176J of the General Laws, as most recently amended by Chapter 35 of the Acts of 2013, a PEO shall be considered the employer of all of its covered employees and all covered employees of one or more clients participating in a health benefit plan sponsored by a single PEO shall be considered employees of that PEO.

(4) If a PEO offers to its covered employees any health benefit plan which is not fully-insured by an authorized insurer, the plan shall:

- (i) Utilize a third-party administrator licensed to do business in this state;
- (ii) Hold all plan assets, including participant contributions, in a trust account consistent with the requirements of section 403 of the Employee Retirement Income Security Act of 1974 ("ERISA");
- (iii) Provide sound reserves for such plan as determined using generally accepted actuarial standards of practice and consistent with the prudence and loyalty standards of care for ERISA fiduciaries; and
- (iv) Provide written notice to each covered employee participating in the benefit plan that the plan is self-funded or is not fully-insured.

(h) (1) The responsibility to obtain workers' compensation coverage for covered employees shall be specifically allocated in the professional employer agreement to either the client or the PEO. Workers' compensation coverage shall be provided pursuant to section 14A of chapter 152 of the General Laws and 211 CMR 111.

(2) Both client and the PEO shall be considered the employer for purpose of coverage under the Workers' Compensation Act. The protection of the exclusive remedy provision of the

Workers' Compensation Act shall apply to the PEO, the client, and to all covered employees and other employees of the client irrespective of which co-employer obtains workers' compensation coverage.

(i) (1) For purposes of chapter 151A of the General Laws, covered employees of a registered PEO are considered the employees of the PEO, which shall be responsible for the payment of contributions, penalties, and interest on wages paid by the PEO to its covered employees during the term of the applicable professional employer agreement.

(2) The PEO shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the experience rate of the client company pursuant to 30 CMR 5.07 - 5.13, inclusive.

(j) (1) A person may not knowingly:

(i) 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.

(ii) Provide false or fraudulent information to the department in conjunction with any registration, renewal, or in any report required under this act.

(2) Disciplinary action may be taken by the department for violation of paragraph(1)(i) or (ii) or for:

387 (i) The conviction of a PEO or a controlling person of a PEO of a crime that relates
388 to the operation of a PEO or the ability of the licensee or a controlling person of a licensee to
389 operate a PEO;

390 (ii) Knowingly making a material misrepresentation to the department, or other
391 governmental agency; or

392 (iii) A willful violation this act or any order or regulation issued by the department
393 under this act.

394 (3) Upon finding, after notice and opportunity for hearing, that a PEO, or a
395 controlling person of a PEO, or a person offering PEO services has violated one or more
396 provisions of this section and subject to any appeal, the director may:

397 (i) Deny an application for a license;

398 (ii) Revoke, restrict, or refuse to renew a license;

399 (iii) Impose an administrative penalty in an amount not to exceed \$1,000 for each
400 material violation;

401 (iv) Place the licensee on probation for the period and subject to conditions that the
402 department specifies; or

403 (v) Issue a cease and desist.

404 (k) The provisions of this act are severable. If any provision of this act or application
405 thereof to any person or circumstance is held invalid, the invalidity shall not affect other

406 provisions or applications of this act which can be given effect without the invalid provision or
407 application.