

LAWS OF NEW YORK, 2002

CHAPTER 565

AN ACT to amend the labor law, in relation to establishing the New York professional employer act

Became a law September 24, 2002, with the approval of the Governor.
Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. It is hereby declared that professional employer organizations provide a valuable service to commerce and the citizens of this state. The rights and responsibilities of professional employer organizations therefore must be clearly defined. Recognition of the employment relationship between a professional employer organization and worksite employees covered by a professional employer agreement shall be based on the statutory law to the extent provided in this act. Professional employer organizations operating in New York shall be registered with the department of labor and shall meet minimum registration requirements.

§ 2. The labor law is amended by adding a new article 31 to read as follows:

ARTICLE 31

NEW YORK PROFESSIONAL EMPLOYER ACT

Section 915. Short title.

916. Definitions.

917. Continuing obligations.

918. Registration required.

919. Registration process.

920. Fees.

921. Minimum net worth, bonding and reporting.

922. General requirements and provisions.

923. Unemployment compensation insurance.

§ 915. Short title. This article shall be known and may be cited as the "New York professional employer act".

§ 916. Definitions. As used in this article:

1. "Client" means a person who enters into a professional employer agreement with a professional employer organization.

2. "Person" means an individual, an association, a company, a firm, a partnership, a corporation, or any other form of legally recognized entity.

3. "Professional employer agreement" means a written contract whereby:

(a) A professional employer organization expressly agrees to co-employ all or a majority of the employees providing services for the client;

(b) The contract is intended to be on-going rather than temporary in nature;

(c) Employer responsibilities for worksite employees, including those of hiring, firing and disciplining, are expressly allocated by and between the professional employer organization and the client in the agreement; and

EXPLANATION--Matter in *italics* is new; matter in brackets [-] is old law to be omitted.

(d) The professional employer organization expressly assumes the rights and responsibilities as required in section nine hundred twenty-two of this article.

4. "Professional employer organization" means any person whose business is entering into professional employer agreements with clients. In determining whether the professional employer organization employs all or a majority of the employees of a client, any person employed pursuant to the terms of the professional employer agreement after the initial placement of client employees on the payroll of the professional employer organization shall be included. Temporary help firms and employment agencies, as defined in article eleven of the general business law, shall not be deemed to be professional employer organizations for purposes of this article.

5. "Temporary help firm" means a business which recruits and hires its own employees, and assigns those employees to perform work at or services for other organizations, to support or supplement the other organization's workforce, 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. A temporary help firm shall not be deemed to be a professional employer organization for the purposes of this article.

6. "Worksite employee" means a person having an employment relationship with both the professional employer organization and the client. Such term may also include the client's officers, directors, shareholders or partners to the extent such persons act as operational managers or perform services for the client.

§ 917. Continuing obligations. 1. Collective bargaining agreements exempted. A professional employer agreement shall have no effect on existing collective bargaining agreements. Notwithstanding any statements to the contrary, nothing in this article shall alter the rights or obligations of any client, professional employer organization or worksite employee under the national labor relations act or any applicable state law.

2. State licensing provisions not exempted. This article shall not exempt a client or a worksite employee from any state, local or federal licensing, registration or certification requirement.

(a) Every individual who is required to be licensed, registered or certified according to law and who is a worksite employee shall be deemed an employee of the client for purposes of any license, registration or certification requirement.

(b) A professional employer organization shall not be deemed to be engaged in an occupation, trade or profession that is subject to licensing, registration or certification requirements, or is otherwise regulated by a governmental entity solely by entering into a professional employer agreement with a client or an employment relationship with worksite employees.

§ 918. Registration required. A professional employer organization shall not engage in business from offices in this state or enter into any arrangement with a person for the purpose of providing professional employer services as described in section nine hundred twenty-two of this article to persons in this state unless the professional employer organization is registered under this article. No professional employer organization or person shall use the name or title "professional employer organization", "PEO", "staff leasing company", "employee leasing company", "registered staff leasing company" or "staff leasing services company", or otherwise represent that it is registered under this arti-

cle unless the entity or person is registered under this article. A professional employer organization that does not comply with the provisions of this article shall not be a registered professional employer organization in this state.

§ 919. Registration process. 1. Except as otherwise provided in this section, each professional employer organization required to be registered under this article shall provide the department with information required by the department on forms that the department specifies. At a minimum, professional employer organizations shall provide the following information:

(a) The name or names under which it conducts business;

(b) The address of the principal place of business of the professional employer organization and the address of each office it maintains in this state;

(c) The professional employer organization's taxpayer or employer identification number;

(d) A list by jurisdiction of each name under which the professional employer organization has operated in the preceding five years, including any alternative names, names of predecessors and, if known, successor business entities; and

(e) In the event the professional employer organization or the ultimate parent of a professional employer organization group is a privately or closely held company, the professional employer organization or professional employer organization group shall file a list of all persons or entities that own a five percent or greater interest in the professional employer organization at the time of application and a list of persons who formerly owned a five percent or greater interest in the professional employer organization or its predecessors in the preceding five years. In the event the professional employer organization or the ultimate parent of a professional employer organization group is a publicly traded company, the professional employer organization or professional employer organization group shall file a list of all persons or entities that own a fifty percent or greater interest in the professional employer organization or the ultimate parent of the professional employer organization group at the time of application.

2. Each professional employer organization operating within this state shall complete its initial registration within one hundred eighty days after the end of the professional employer organization's fiscal year ending after the effective date of this article.

3. Within one hundred eighty days after the end of the professional employer organization's fiscal year, each registrant shall renew its registration by notifying the department of any changes in the information previously provided pursuant to this section.

4. Two or more professional employer organizations that are majority owned by the same ultimate parent, entity or persons may be registered as a professional employer organization group. A professional employer organization group may satisfy any reporting and financial requirements of this article on a consolidated basis. As a condition of registration as a professional employer organization group, each company that is a member of the group shall guarantee payment of all financial obligations of each other member.

5. A professional employer organization shall be exempt from the registration requirements specified in this section and from the fees specified in section nine hundred twenty of this article if such professional employer organization:

(a) submits a properly executed request for registration and exemption on a form provided by the department;

(b) is domiciled outside this state and is licensed or registered as a professional employer organization in another state that has the same or greater requirements as this article;

(c) does not maintain an office in this state or solicit in any manner clients located or domiciled within this state; and

(d) does not have more than twenty-five worksite employees in this state.

6. The registration and exemption of a professional employer organization under subdivision five of this section shall be valid for one year. Each de minimis registrant shall pay to the department upon initial registration, and upon each annual renewal thereafter, a registration fee in the amount of two hundred fifty dollars.

7. The department shall maintain a list of professional employer organizations registered under this article.

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

§ 920. Fees. 1. The following shall be the registration fees under this article.

(a) Upon filing a registration statement pursuant to subdivisions one and two of section nine hundred nineteen of this article, each professional employer organization shall pay an initial registration fee of one thousand dollars.

(b) Upon renewing its registration statement pursuant to subdivision three of section nine hundred nineteen of this article, each professional employer organization shall pay an annual renewal fee of five hundred dollars.

2. All fees shall be paid to the state comptroller and credited to a fund deemed appropriate by the comptroller.

§ 921. Minimum net worth, bonding and reporting. 1. Every initial registration and subsequent annual reporting shall be accompanied by a reviewed or an audited financial statement of the professional employer organization's most recent fiscal year end and prepared within one hundred eighty days prior to the date of application or renewal by an independent certified public accountant in accordance with generally accepted accounting principles, which statement shall show a minimum net worth of seventy-five thousand dollars, and shall be accompanied by a cover letter from the independent certified public accountant that the professional employer organization has satisfied the requirements of this section. A professional employer organization group may submit combined or consolidated audited or reviewed financial statements to meet the requirements of this section. Where the group or the group's parent submits a combined or consolidated statement, the statement shall include supplemental consolidating or combining schedules covering each professional employer organization registered under the group.

2. As a substitute for the requirement set forth in subdivision one of this section, the department may require that the professional employer organization deposit in a depository designated by the department a bond or securities with a minimum market value of seventy-five thousand dollars. The securities so deposited shall include authorizations to the department to sell those securities in an amount sufficient to pay any taxes, wages, benefits or other entitlement due a worksite employee, if the professional employer organization does not make those payments when due. Any bond or securities deposited under this subdivision shall

not be included for the purpose of calculation of net worth required by subdivision one of this section.

3. Every professional employer organization shall submit to the department, within sixty days after the end of each calendar quarter, a statement by an independent certified public accountant that all applicable federal and state payroll taxes have been paid on a timely basis for that quarter.

4. All records, reports and other information obtained from a professional employer organization under this article, except to the extent necessary for the proper administration by the department of this article and all applicable labor laws, 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.

5. The department may rescind, suspend or revoke a registration for failure to comply with this article. Should a registrant wish to contest an action of the department, the department may require such additional financial assurances or bond required to protect the interests of the state and its citizens during the course of the appeal.

§ 922. General requirements and provisions. 1. A professional employer organization shall meet the following standards:

(a) Have a written professional employer agreement between the client and the professional employer organization setting forth the responsibilities and duties of each party. The professional employer agreement shall contain a description of the type of services to be rendered by the professional employer organization and the respective rights and obligations of the parties and the professional employer agreement shall also provide that the professional employer organization:

(i) reserves a right of direction and control over the worksite employees. However, the client shall maintain such direction and control over the worksite employees as is necessary to conduct the client's business and without which the client would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure;

(ii) assumes responsibility for the withholding and remittance of payroll-related taxes and employee benefits for worksite employees and for which the professional employer organization has contractually assumed responsibility from its own accounts, as long as the professional employer agreement between the client and professional employer organization remains in force; and

(iii) retains authority to hire, terminate and discipline the worksite employees.

(b) Provide written notice of the general nature of the relationship between the professional employer organization and the client to the worksite employees located at the client worksite.

2. A professional employer organization shall be considered an employer for the purposes of withholding state income tax of the worksite employees pursuant to section six hundred seventy-one of the tax law.

3. As long as the professional employer organization's professional employer agreement with a client remains in force, the professional employer organization shall have a right to and shall assume the following responsibilities:

(a) pay wages and collect, report and remit employment taxes of its worksite employees from its own accounts;

(b) pay unemployment insurance as required by the unemployment insurance law;

(c) secure and provide required workers' compensation coverage for its worksite employees either in its own name or in its client's name.

4. Both the client and the professional employer organization shall be considered the employer for the purpose of coverage under the workers' compensation law and both the professional employer organization and its client shall be entitled to protection of the exclusive remedy provision of the workers' compensation law irrespective of which entity secures and provides such workers' compensation coverage.

5. A registered professional employer organization shall be deemed for purposes of state law an employer for purposes of sponsoring welfare benefit plans for its worksite employees. Worksite employees participating in that professional employer organization's fully insured welfare benefit plan or plans shall be considered employees participating in a single employer welfare benefit plan or plans. A fully insured welfare benefit plan or plans offered by a registered professional employer organization to its employees and/or worksite employees shall not be considered for purposes of state law a multiple employer welfare arrangement.

6. Subject to any contrary provisions contained in the written professional employer agreement between the client and the professional employer organization, the professional employer arrangement that exists between a professional employer organization and its client or clients shall be interpreted for the purposes of insurance and bonding as follows:

(a) Nothing in this section shall serve to limit any contractual liability, as may be expressly agreed upon, between the professional employer organization and the client, nor shall this section in any way limit the liabilities of any professional employer organization or client as defined elsewhere in this article; and

(b) Worksite employees are not automatically deemed pursuant to this section to be employees of the professional employer organization for purposes of general liability, insurance, automobile insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation, or liquor liability insurance carried by the professional employer organization unless the worksite employees are included by specific reference in the professional employer agreement and applicable prearranged employment contract, insurance contract or bond.

7. The sale of professional employer services in conformance with the provisions of this article shall not constitute the sale of insurance for purposes of the insurance law. However, no professional employer organization shall function or hold itself out as an insurer, insurance broker or insurance agent unless appropriately licensed by this state.

8. Worksite 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 worksite employee.

§ 923. Unemployment compensation insurance. 1. During the term of a professional employer agreement, a professional employer organization shall be liable in accordance with the provisions of article eighteen of this chapter for the payment of contributions, penalties and interest on wages paid by the professional employer organization to worksite employees.

2. The professional employer organization shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the professional employer organization.

§ 3. Severability. If any provisions 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, and to that end the provisions of this act are severable.

§ 4. This act shall take effect on the one hundred eightieth day after it shall have become a law.

The Legislature of the STATE OF NEW YORK **ss:**

Pursuant to the authority vested in us by section 70-b of the Public Officers Law, we hereby jointly certify that this slip copy of this session law was printed under our direction and, in accordance with such section, is entitled to be read into evidence.

JOSEPH L. BRUNO
Temporary President of the Senate

SHELDON SILVER
Speaker of the Assembly
