Maryland
INSURANCE ADMINISTRATION

Professional Employer Organizations (PEO) Study

SB 821/Ch. 797 and HB 827/Ch. 796, 2024

Marie Grant

Acting Commissioner

January 3, 2025

For further information concerning this document, please contact:

David Cooney
Associate Commissioner
Life and Health
Maryland Insurance Administration
200 St. Paul Place, Suite 2700
Baltimore, Maryland 21202
410.468.2215

This document is available in alternative format upon
request from a qualified individual with a disability.
TTY 1.800.735.2258

The Administration's website address: insurance.maryland.gov

Table of Contents

Executive Summary

The Maryland Insurance Administration (MIA) is issuing this Professional Employer Organizations (PEOs) Study pursuant to the requirements of SB 821/Ch. 797 and HB 827/Ch. 796, 2024. Chapters 796 and 797 of 2004 require the MIA to:

(1) identify and compare the regulation of PEOs under federal and State law and in other states;

(2) review the history of PEO activities in the State and elsewhere and changes to the PEO industry over time

(3) review PEO health plans and plan benefit designs

(4) review requirements that businesses must meet to participate in PEO arrangements and access PEO health plans

(5) examine the regulatory structures for health insurance and PEOs in other states and under federal law that allow individuals who are co-employed through a PEO arrangement and have a workplace employer that is a small employer to participate in the PEO's large group plan; and

(6) address any potential impacts of proposed statutory changes in the State relating to the offering of health coverage by PEOs on the small group market.

This study provides background information on the organization and activities of PEOs, how they are treated under state and federal law, and to determine what impacts to the small group market, if any, might occur if Maryland law were changed to allow small employers to access large group PEO-sponsored health insurance plans. Additionally, the report provides a broad overview of the development of PEOs over time, their plan and benefit designs, and their requirements for participation among client employers. Under current state law, Maryland small employers (those with 2 to 50 employees) can participate in PEOs; however, the health coverage that they purchase must comply with Maryland's small group market rules, including a prohibition on rating on health status as well as guaranteed issue and renewal.[1] As such, this study concludes with a look at the potential impact that allowing PEOs to offer large group coverage plans to small employers could have on the long-term viability of Maryland's small group market.

Key Findings

The study examines the history of legislative and regulatory changes to the rules governing the small group market in Maryland, and delineates the steps the Maryland General Assembly has taken to preserve the long-term viability of the small group market – illustrating how Maryland has been relatively unique in its treatment of PEOs as compared to other states.

[1] Md. Code Ann., Insurance Article § 31-101(aa) defines a small employer and makes clear under Md. Code Ann., Insurance Article § 31-101(aa)(2)(vi) that "to the extent permitted by federal law, an entity that leases employees from a professional employer organization, coemployer, or other organization engaged in employee leasing and that otherwise meets the description in this section shall be treated as a small employer." See also Testimony of Maryland Insurance Administration before the Senate Finance Committee, April 4, 2017, House Bill 123 - Health Insurance - Required Conformity with Federal, SUPPORT.

PEOs act as "co-employers" of the employees of the firms which participate in PEO arrangements. This "co-employment" relationship is not explicitly recognized in federal law and the question of who is considered the employer of an employee in a participating firm can affect how regulatory agencies assign responsibility for compliance with the law.

Although there are currently an estimated 73 PEOs operating in the State of Maryland, there was a lack of reliable primary source information with regards to the activities of PEOs in the state, due to the fact that PEOs are not required to register or license in Maryland.

Through data gathered from the National Association of Professional Employer Organizations (NAPEO) and their members, the MIA was able to discover information about the growing presence of PEOs in various industries and in different parts of the country. In response to a survey sent out to NAPEO members, various PEOs highlighted what they saw as significant changes to the industry over time.

Data gathered from NAPEO members indicates that most PEOs offer a range of health benefit packages to their respective clients, and that these are often tailored to the needs of both individual clients and the regulatory environments of the areas in which the PEOs operate.

Requirements for participation in PEO arrangements vary according to the PEO and the marketplace in which they operate, but the most standard and frequent tool for enabling clients to participate is the client service agreement (CSA), which is meant to allocate the sharing of employer responsibilities between the PEO and the client. CSAs need to be carefully crafted or else they can lead to compliance and reporting issues with federal agencies.

Regulatory structures affecting PEO-sponsored insurance plans differ by state. And, while 38 states have adopted PEO laws with provisions that comprehensively regulate the PEO industry, these laws and regulations can vary state to state in terms of: a) whether they specifically mention PEOs in their legal and regulatory codes; b) the assigning of responsibility for regulating PEOs to different state agencies; c) how the laws assign employer responsibilities to PEOs and their clients; d) whether the law recognizes the PEO as a single-employer for tax and administrative purposes, and; e) whether the laws impact the ability of small employers to participate in large group insurance plans offered by PEOs.

In assessing the potential impact of allowing PEOs to offer large group coverage to small employers, the MIA conducted a public meeting. This provided a forum in which various stakeholders raised issues concerning whether being allowed to access large group insurance plans would affect the competitiveness of small-business in the state, and whether such a move would negatively impact the long-term viability of the small group market. As part of the discussion, stakeholders discussed whether or not PEOs would "cherry pick" firms with healthy employees, leaving less healthy employees behind in the small group market and raising costs for the regulated small group market. Stakeholders also raised questions of transparency in the pricing of PEO-sponsored health plans, jurisdictional questions over the regulation of PEOs, whether PEOs could circumvent "guaranteed issue" requirements previously legislated by the General Assembly, and questions over whether PEOs could offer adequate coverage which complied with the requirements of the Affordable Care Act.

Little empirical data exists to enable one to draw a conclusive judgement about the impact of PEOs on Maryland's small group market. It is also unclear from the data gathered from other jurisdictions how comparable the experiences of other markets are to the Maryland experience. However, this study serves as a compilation of the information currently available, for consideration of the potential impacts for Maryland, of allowing small employers to access large group health coverage through membership in PEOs.

Introduction and Purpose

Study Origins and Requirements

During the 2024 Legislative Session, the Maryland General Assembly passed House Bill 827, and its cross-file, Senate Bill 821, which required the Maryland Insurance Administration (MIA) to complete a study of Professional Employer Organizations (PEOs), and report the findings by December 31, 2024. At present, Maryland is one of only three states (the others being Maine and Wyoming) which do not allow PEOs to offer large group insurance to small business clients, who would otherwise be compelled to purchase insurance according to the rules governing Maryland's small group and individual markets. This raises questions about what the impacts would be to the small group market if the state of Maryland were to change its laws to enable small employers to participate in large group insurance plans through PEOs.

Definition of a PEO

A PEO is a type of outsourcing firm that enters into a co-employment arrangement with a business under which the PEO entity performs various human resources functions, such as payroll and benefits administration, on behalf of the business. The arrangement is intended to be a way for employers to gain economies of scale and potentially offer additional benefit options to employees that the business may not have otherwise offered.

Among the human resources functions the PEO entity performs is the ability to contract with health insurance carriers in order to enable their clients to access larger and more comprehensive health insurance plans which they would otherwise lack the ability to purchase on their own.[2]

1. Identifying and Comparing Regulation of PEOs under Federal and State Law and in Other States

Maryland Law and Regulation – A Unique Example among States

With regard to the licensing and regulation of PEOs, Maryland has historically had a unique relationship with such collective benefits arrangements as compared to other states. Maryland is currently one of only three states in the country that does not allow for a small employer that has engaged a PEO to participate in the PEO's large group health plan.[3] Furthermore, the legislative history of Maryland reveals a strong preference among policy makers for both protecting the small group market and ensuring that individual consumers would have the ability to purchase health insurance without fear of being denied certain specific benefits or excluded because of pre-existing conditions. Enrollees in Maryland on the

[2] NAPEO email RE: Request for Information to The Office of Commissioner, Maryland Insurance Administration Received June 25, 2024.
[3] Ibid.

small group market have been subject to special protections that did not exist in many other states – long before the Affordable Care Act came into effect.[4]

Regulatory Authority – A Brief Overview

PEOs are neither required to be licensed in, nor to register with, the State of Maryland. However, PEOs doing business in the state of Maryland are still subject to Maryland law relating to health benefits, as well as other employee benefits. Below is a summation of the regulatory authority of state agencies:

The activities of PEOs come under potential regulatory review in Maryland with regard to two specific areas: unemployment insurance and health benefit plans.

Unemployment Insurance (UI) – Rules concerning the operation of PEOs in the state with respect to unemployment insurance are promulgated and enforced by the Maryland Department of Labor. Regulatory authority for this can be found in the Code of Maryland Regulations under COMAR 09.32.01.26 – adopted on May 4, 1998 and updated on March 27, 2006, as well as the Maryland Labor and Employment Article § 8-613 (2023).

If a PEO places all or part of its client company's workers on its payroll, it becomes subject to all rights and obligations of employing units under the unemployment insurance law (also reflecting notification and reporting requirements).[5] In this case, the PEO becomes primarily liable for the unemployment insurance rates associated with the employees it places on payroll, and its rate is determined by its own experience rating, which reflects the overall claims history of the employees across its payroll from multiple companies.[6]

Maryland Labor and Employment Article § 8-613 outlines the rules governing the transfer of unemployment insurance experience ratings, liabilities, and contribution rates when an employer reorganizes, transfers assets, or undergoes a change in ownership or control. Under the rules governing unemployment insurance, the PEO is the one assessed for unemployment, and the employees of small employers become employees of the PEO for UI assessment purposes.[7]

Health Benefit Plans - In Maryland, the small group laws provide that they apply to any health benefit plan offered by an association, PEO, or any other entity, including a plan issued under the laws of another state, if the health benefit plan covers eligible employees of one or more small employers in the State. *See* Md. Code Ann., Insurance Art. §§ 31-101(aa)(2)(vi) and 15-1202(b). In this regard, Maryland is unique in that all PEOs operating in the state are required to offer small-group plans to small businesses.

The MIA periodically issues bulletins clarifying the requirements for participating in the selling of health insurance on the small group market. Two of these bulletins helped define requirements for carriers participating on the small group market:

[4] See HB 1359 (1993); cited on https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000772/html/am772--529.html retrieved 12-23-24.
[5] COMAR 09.32.01.26
[6] COMAR 09.32.01.26
[7] Md. Code Ann., Labor and Employment Article § 8-613.

Bulletin 98-14 (1998)

MIA Bulletin 98-14, issued on November 2, 1998, served to remind "health insurers" of the existing law governing the insuring of leased employees to small employer groups. The Bulletin stated in part:

> *"The law requires a carrier insuring a Professional Employer Organization (PEO) to determine the number of employees the PEO leases to each of its employer clients. Any employer client that is a small employer as defined in Section 15-1203 must be insured in accordance with Maryland laws governing small employer groups."*[8]

Bulletin 09-26 (2009)

MIA Bulletin 09-26 issued on November, 9 2009, and directed to "insurers, non-profit health service plans, and HMOs ("carriers") participating in the Maryland small employer market" clarified the definition of a small employer.

Specifically the Bulletin declared:

> *"[W]hen insuring Professional Employer Organizations (PEO) or employer leasing companies, carriers are required to count employees at the client employer level. Please refer to Bulletin 98-14, dated November 2, 1998 and §15-1201 of the Insurance Article."*[9]

To summarize, the rules governing how the employees of PEOs are treated for unemployment purposes and for small group insurance law purposes differ. For unemployment insurance, the PEO liability for tax rates for unemployment insurance is determined by the collective aggregate experience, which considers the employer's past unemployment claims history. The PEO becomes primarily liable for the unemployment insurance rates associated with the employees it places on payroll, and its rate is determined by its own experience rating. For the purposes of determining the obligations of health insurance carriers to comply with small group requirements in PEO-sponsored plans, employees are counted at the client-level - not the level of the PEO.

Health Care Reform in 1993

In 1993, the Maryland General Assembly passed and the Governor signed into law HB 1359 – Health Care and Insurance Reform.[10] Noting that three quarters of Maryland's uninsured population either worked in small firms or were dependents of workers in small firms, the legislation was designed to guarantee access to health insurance coverage for small employers on the small group market and to stabilize their rates.

Notably, the legislation required, among other things:

- Guaranteed Issue - a requirement that health plans must permit prospective policy holders to enroll regardless of health status, age, gender, or other factors that might predict the use of health services

[8] https://insurance.maryland.gov/insurer/documents/bulletins/bulletinlh-98-14.pdf
[9] https://insurance.maryland.gov/insurer/documents/bulletins/bulletinlh09-26-smallemployeraffiliatedcos.pdf
[10] HB 1359 (1993) cited on https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000772/html/am772--529.html retrieved 12-23-24.

- Guaranteed Renewal – the requirement that an insurance company renew a policy provided that the policyholder pays their premiums on time
- Consumer Protection – where insurers and health maintenance organizations must notify employees when a policy is cancelled or non-renewed and provide notice of conversion rights
- A Time Limit on Pre-existing Conditions – pre-existing condition limitations could only be imposed once for 6 months, and would be eliminated after January 1, 1995
- Adjusted Community Rating – the requirement that while rates for a health benefit plan may be adjusted by age and geography, for the first year any adjusted rate may not deviate by more than 50 percent from the community rate, decreasing to 16 percent by the fourth year
- Comprehensive Standard Health Benefit Plan - all carriers in the Maryland market would be required to offer a specified minimal benefit plan, and would be permitted to market additional benefits that are priced separately

Defending the Viability of the Small-Group Market Over Time (1997-Present Day)

The passage of small group market reform in 1993 made Maryland relatively unique among states, in that it included a number of protections which pre-dated the Affordable Care Act of 2010 (ACA). Its implementation, however, provoked questions concerning whether PEOs (from whom one could buy large group insurance) were "cherry picking" companies with healthy employee groups through the process of "experience rating," whereby employee groups with healthier populations would receive health insurance at lower premium rates than those with less healthy ones - leaving only groups with a less healthy employee profile behind in the small group market. This process of adverse selection, it was feared, would negatively impact the rates for those companies remaining in the small group market.[11] Debates over legislation for the next three decades would involve efforts both to defend the small group market from adverse selection, and to clarify the state's authority to regulate PEOs and other association health plans.

The Maryland General Assembly consequently amended the law in 1997 to include under the definition of small employers, employers who leased their employees from a PEO.[12] This had the effect of preventing small business owners from purchasing large group insurance through a PEO.

Until 2014, the definition of small employer in the Maryland Insurance Article read:

"'Small employer' means:

(1) An employer described in § 15-1203 of this subtitle; or
(2) An entity that leases employees from a professional employer organization, Co-employer, or other organization engaged in employee leasing and that otherwise meets the description of § 15-1203 of this subtitle."

Then during the 2013 legislative session, as a result of the passage of a bill designed to conform Maryland law to ACA requirements, the express language prohibiting certain PEO activity was deleted from Maryland law when the federal definition of small employer was codified. This change created

[11] Maryland Insurance Administration (2015). Response from the Commissioner to a Citizen Inquiry regarding the ability of her Small Business to purchase Health Insurance through a PEO; For a more in-depth discussion of Health Care Reform at the State level see Kirk, Adele, "Riding the Bull: Experience with Individual Market Reform in Washington, Kentucky, and Massachusetts" Journal of Health Politics, Policy, and Law Vol. 25,, No. 1 February 2000.
[12] HB 213, Chapter 420, Acts of 1997. Maryland General Assembly.

ambiguity with respect to the issue of whether small businesses could purchase large group insurance through PEOs.[13]

In 2017 (HB 123) and 2018 (SB 387), the legislature clarified that the small group laws applied to *any* health benefit plan offered by an association, PEO, or any other entity, including a plan issued under the laws of another state, if the health benefit plan covers eligible employees of one or more Maryland small employers.

In 2017, the law (HB 123, Ch. 720) had previously been revised to amend the definition of "small employer" to specifically indicate that an entity that leases employees from a PEO is generally still considered a small employer.

Finally, the small group laws were modified in 2018 (SB 387, Ch. 38) to clarify that they apply to any health benefit plan offered by an association, PEO, or any other entity, including a plan issued under the laws of another state, if the health benefit plan covers eligible employees of one or more small employers in the State. *See* Md. Code Ann., Insurance Art. §§ 31-101(aa)(2)(vi) and 15-1202(b)). These definitional changes make Maryland unique in that all PEOs operating in the state are required to offer small-group plans to small businesses. According to a request for information from NAPEO, "[w]ith respect to PEO-sponsored health coverage, the most typical model involves the use of a commercial large group insurance policy…PEO-sponsored, fully insured group health plans are generally treated akin to single employer large group health plans at the state and federal level."[14]

Differences Between Large and Small Group Requirements

While a Maryland small employer may not purchase large group insurance through a PEO, it is important to emphasize that PEOs can still legally offer health insurance coverage to small employer clients in Maryland, provided the coverage is underwritten by a Maryland-licensed insurance carrier, and provided the product complies with all of the state requirements applicable to small group health benefit plans. The issue of whether a health benefit plan sold to a small employer through a PEO is treated as small group insurance or large group insurance is important because the regulatory requirements at the state and federal level are different for each market. Both markets share many of the same basic consumer protections under the ACA, including guaranteed availability and renewability of coverage, prohibitions on pre-existing condition limitations, annual limits, lifetime limits, a requirement to cover dependent children to age 26, coverage of preventive care with no cost-sharing, and an annual limitation on enrollee cost-sharing.[15] However, there are key differences in benefits and rating methodologies between the markets.

Small group health benefit plans are required to cover the complete package of essential health benefits under the ACA, while large group health benefit plans are exempt from this requirement. For large group health benefit plans issued in Maryland, the difference in benefits between markets is not as significant as it is in many other states because the General Assembly has mandated a comprehensive set of health insurance benefits for the large group market. On the other hand, the difference in rating methodologies between markets is significant and meaningful. Small group health benefit plans are subject to adjusted community rating, while large group health benefit plans are generally experience rated. With experience rating, an employer's rate is based on the claims experience of the employees of that particular employer. This means that an employer with actual or anticipated high claims costs will

[13] Testimony of the Maryland Insurance Administration submitted to the Maryland Senate Finance Committee RE: HB 123, - Support, April 4, 2017; HB 123 (2017), Acts of 2017 Chapter 720, Maryland General Assembly.
[14] NAPEO email RE: Request for Information to The Office of Commissioner, Maryland Insurance Administration Received June 25, 2024.
[15] See 45 CFR 147.

generally pay higher premiums than an employer with comparatively lower actual or anticipated claim costs will pay. Conversely, with adjusted community rating that is required for the small group market, the rate each employer pays for health insurance depends on the claims experience of the insurer's entire block of business in the small group market in the state, rather than the claims experience of the individual employer's small group. Although there are a limited number of rating factors that are calculated at the employer level with adjusted community rating, an individual small employer is insulated from the rate impact of high claim costs of its own employees under this methodology, because the claims experience is spread out across the entire pool of small employers covered by the insurer. For small employers with fewer than 50 employees, the rate impact of high claim costs for even a single employee would be very significant if an experience rating methodology was used.

Maryland's legislative and regulatory history reflects both General Assembly and Maryland Insurance Administration intent to shield the small group market from the pressure of adverse selection.

Understanding the Evolution of PEOs and their Relationship to Federal Law

Employer Sponsored Insurance (ESI) and Professional Employer Organizations (PEO)

Federal and state laws categorize Employer Sponsored Insurance (ESI) into the small group and large group market based on the number of full-time equivalent employees (FTEs) working for the employer sponsoring the plan.[16] Under the ACA and ensuing regulations, the small group market is defined as serving employers with 50 or fewer employees.[17] The ACA contains additional protections for the small group market - health plans must be guaranteed issue and guaranteed renewal, and cannot change rating based on health status - only age, tobacco use, family size and geography.[18]

The ACA's rules and requirements for small group coverage are similar to longstanding Maryland law relating to the small group market. Maryland was one of the first states to enact protections for small employers in HB 1359 of 1993 - which contained requirements such as guaranteed issue, guaranteed renewal, and pricing based only on age and geography. As such, in previous years, the General Assembly has taken steps to ensure that collectively sponsored employer plans, such as Multiple Employer Welfare Arrangements (MEWAs) or PEOs must also meet the small group market requirements.[19]

Perhaps even more critically, the original statutory and regulatory frameworks for ESIs at both the federal and state levels were based on the idea that each employee could be identified as working for a single-employer to which certain rights and responsibilities could be allocated. The PEO model of "co-employment," therefore, has historically posed unique challenges to the existing regulatory framework by blurring the lines between a PEO as a collective employer of all the employees in the firms they contract

[16] Claxton Gary, Rae, Matthew, and Winger, Aubrey, KFF "Employer Sponsored Health Insurance 101," May 28,2024 as cited from: https://www.kff.org/health-policy-101-employer-sponsored-health-insurance/?entry=table-of-contents-introduction.
[17] See 42 U.S.C. § 18024.
[18] CMS.gov Press release "CMS Health Care Law Protects Consumers Against Worst Insurance Practices," Feb. 22, 2013 as cited on https://www.cms.gov/newsroom/press-releases/health-care-law-protects-consumers-against-worst-insurance-practices#:~:text=No%20one%20can%20be%20denied,have%20or%20had%20an%20illness.&text=Health%20insurance%20companies%20offering%20coverage%20to%20individuals%20and%20small%20employers,%2C%20family%20size%2C%20and%20geography.
[19] See Md. Code Ann., Insurance Article §§ 15-1201(x), 15-1202(b), and 31-101(aa)(2)(vi).

with, and individual client firms themselves– thus enabling PEOs to take advantage of the ambiguity to minimize the number of regulations applicable to them.[20] By creating such pooled arrangements, terming them "co-employment" and making them available to small employers (50 FTEs or less), the question may arise, "Is the employee counted as a member of a small firm with the company that originally hired them, or, do they now count as an employee of a larger one – where the small group market rules no longer apply?"

A large number of legal and regulatory disputes can be traced to two definitional questions, which are essential for determining what set of laws and regulations apply to any specific arrangement where an employee receives health care through their employer. The questions - "What constitutes an employer?" and "What constitutes an employee?"- are critical as far as the laws and regulations governing the provision of health insurance are concerned.

The Origins of PEOs – The 1970's and 1980's

The origins of PEOs can be traced back to the first efforts by a number of companies to outsource or lease employees. These were originally known as employee "leasing companies" or "leasing organizations," and, recent scholarship has noted that, "[e]arlier versions of the PEO model were established to take advantage of loopholes in the pension law, workers' compensation requirements, and unemployment taxes. Following the passage of the Employee Retirement Income Security Act (ERISA) in 1974, employee leasing arrangements provided a work-around on the non-discrimination requirements in ERISA and in the Internal Revenue Code, which limited the extent to which employers would make far more generous pension contributions to company officers than to rank and file employees."[21] The rules, as prescribed by ERISA, however, made no mention of the need for separate organizations under a common owner to be aggregated – leaving employers free to shift some employees into one subsidiary where they could offer more generous benefits, while consigning other employees to a separate entity. In other words, the original ERISA law was crafted with a view that each employee of a company had one employer, but by allowing multiple companies to exist separately under a common owner, the law left ambiguity with regard to employee leasing arrangements.

The question of the employer-employee relationship would define legal and regulatory disputes for years to come – earning special attention from legislators in Maryland.

Although Congress later tried to address the ambiguity surrounding common ownership,[22] the original leasing companies had evolved to offer a more enhanced and extensive array of services, including health benefits. By the mid 1990s, a number of PEOs sought to rebrand their organizational arrangement with a name they felt better reflected changes to their industry over time. Consequently, a number of these organizations came together in 1994, to form the National Association of Professional Employer Organizations (NAPEO).[23]

---

[20] Shnitser, Natalya, "'Professional' Employers and the Transformation of Workplace Benefits" *Yale Journal on Regulation (JREG)*, Vol. 38, No. 99 (December 2021): 104-105.
[21] Ibid., p.108.
[22] See Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (establishing that highly compensated employees of a particular company could not be provided a different pension plan than other employees and clarifying that leased employees had to be treated as employees of the client company unless specific safe harbor provisions were satisfied); Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085 (further limiting the safe harbors for leased employees). As cited in: Schnitzer, 2021.
[23] 29 U.S.C. § 1144(a) (2018).

Federal Statutory and Regulatory Authorities for PEOs

PEOs are governed by a patchwork of federal laws and regulations, as well as a variety of state laws. The following section will outline the sources of federal authority governing PEOs, including laws, agencies, and agency briefings. These laws and enforcement authorities include:

- The Employee Retirement Income Security Act of 1974
- The Patient Protection and Affordable Care Act of 2010
- The Internal Revenue Service and the Tax Increase Prevention Act of 2014
- The United States Department of Labor
- The Centers for Medicare and Medicaid Services

The Patient Protection and Affordable Care Act (ACA) of 2010

In 2010, Congress passed the ACA which outlined a number of protections for health consumers, including protections against discrimination based on a number of socio-demographic factors. It also required that all health plans offered for the individual and small group markets on state health exchanges be required to provide certain specified Essential Health Benefits (EHBs). In response to the ACA, the Internal Revenue Service (IRS) clarified in a guidance document that if a PEO provides health coverage to its employees, it may count as the "employer" under the ACA for the purpose of the employer mandate.[24] Therefore, PEOs offering coverage must comply with ACA reporting requirements and ensure that the health insurance offered meets minimum essential coverage and affordability standards.

The Internal Revenue Service and the Tax Increase Prevention Act of 2014

In 1993, an IRS ruling recognized the ability of PEOs to act as "co-employers" for tax and withholding purposes, clarifying some of the tax responsibilities shared between PEOs and their clients. It provided a baseline understanding of how PEOs should handle payroll taxes.[25]

In 2014, the Tax Increase Prevention Act passed on the federal level, which provided greater clarification of the co-employment arrangement utilized by PEOs under federal law for tax purposes.[26] The Act allowed PEOs to become recognized as Certified PEOs (CPEO), provided they met a series of requirements related to bonding, annual audits, and attestations on employment taxes. Becoming a CPEO would offer PEOs and their constituent employers clarity as far as tax obligations were concerned. Specifically, it would allow for the assigning of liability for employment taxes on the CPEO, while permitting its client-employers to remain recognized as the employer for the purposes of claiming unemployment related tax credits, including a number of tax credits that the client employer would be able to claim had it not entered into a PEO relationship. According to NAPEO and an article in the Berkeley Business Law Journal, this had the effect of encouraging PEOs to meet certain standards for transparency and accountability in exchange for getting greater clarification of the employer-employee relationship in the co-employment model, as well as clarifying its tax obligations under federal law.[27] The

[24] https://www.irs.gov/affordable-care-act/employers/questions-and-answers-on-employer-shared-responsibility-provisions-under-the-affordable-care-act#Employers.
[25] IRS Rev. Proc. 93-47, 1993-2 C.B. 559.
[26] Tax Increase Prevention Act of 2014 (TIPA), Pub. L. No. 113-295, 128 Stat. 4010 as cited in Shnitser (2021).
[27] For a fuller discussion of the clarity provided by the process of PEO Certification at the Federal Level, see Goodner K., and Ramsay, U. (2019) "Certified Professional Employer Organizations and Tax Liability Shifting: Assessing the First Two Years of the IRS Certification Program" *Berkeley Business Law Journal, Vol. 16:2, p. 572-601; see also* . See also NAPEO fact sheet on PEO Certification at https://www.napeo.org/advocacy/what-we-advocate/federal-government-affairs/irscertification retrieved on: 12/1/2024.

tax provisions governing the certification of PEOs are governed by Sections 3511 and 7705 of the Internal Revenue Code.[28]

The United States Department of Labor (DOL)

The DOL asserts regulatory authority over PEOs by determining the rules for which it is considered a single employer. On July 29, 2019, the DOL issued a proposed regulation, finalized later that year, to clarify when a group or association, or PEO, would be acting as an employer under ERISA that may sponsor a Multiple Employer Plan.[29]

The Center for Medicare and Medicaid Services (CMS)

As the agency tasked with creating the enforcement framework for the ACA, CMS has regulatory authority over PEOs through the determination of whether employees in a PEO arrangement are counted as part of the individual businesses that originally hired them, or whether they are instead to be counted along with all employees of all businesses involved in a PEO in the aggregate.

The manner in which employees are counted helps to determine whether or not an employing entity is eligible to buy insurance under small-group or large-group market rules. In guidance issued in 2011, CMS noted the following:

> *"CMS believes that, in most situations involving employment-based association coverage, the group health plan exists at the individual employer level and not at the association-of-employers level. In these situations the size of each individual employer participating in the association determines whether that employer's coverage is subject to the small group market or the large group market rules.*
>
> *"In the rare instances where the association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the "employer" the association coverage is considered a single group health plan. In that case, the number of employees employed by all of the employers participating in the association determines whether the coverage is subject to the small group market or the large group market rules."*[30]

[28] 26 U.S.C. § 3511 (2018) and 26 U.S.C. § 7705 (2018).

[29] 29 CFR Part 2510 (2019) ; see also :https://www.napeo.org/advocacy/what-we-advocate/federal-government-affairs/peos-retirement-regulation/dol-meps-finalrule#:~:text=With%20respect%20to%20PEOs%2C%20the,is%20performing%20essential%20employment%20functions. CR: https://www.groom.com/resources/dol-moves-on-multiple-employer-plans/.

[30] Cohen, Gary, Sept. 1, 2011, "Insurance Standards Bulletin Series – INFORMATION" RE: "Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage is Sold to, or through, Associations," Center for Medicare and Medicaid Services (CMS): https://www.cms.gov/cciio/resources/files/downloads/association_coverage_9_1_2011.pdf as referenced on 12-1-2024.

2. Reviewing PEO Activities in Maryland and Other States - Changes to the PEO Industry over Time

An Overview of PEO Activities in Maryland

It is estimated that there are currently 73 different PEOs operating in the State of Maryland. However, at the time this report was developed, there was a lack of reliable primary sources for data regarding PEO activity in the state.

An Overview of PEO Activities Nationwide and Over Time

According to NAPEO, there are over 500 PEOs in the United States providing services to approximately 200,000 small and mid-sized businesses employing approximately 4.5 million people. These 200,000 clients represent 17 percent of all employers with 10-99 employees.[31] The most recent NAPEO white paper on industry-wide trends notes that the number of work site employees[32] (WSE) in the PEO industry has grown at an average annual compounded growth rate of 7.5% since 2008, and represents a combined workforce greater than Walmart (1.6 million WSE) and Amazon (1.5 million WSE) combined.[33]

---

[31] NAPEO email RE: Request for Information to The Office of Commissioner, Maryland Insurance Administration Received June 25, 2024.

[32] The definition of Worksite employees as they relate to PEOs can be found in 26 U.S.C. § 7705(e)(1): The term "work site employee" means, with respect to a certified professional employer organization, an individual who—
(A)performs services for a customer pursuant to a contract which is between such customer and the certified professional employer organization and which meets the requirements of paragraph (2), and
(B) Performs services at a work site meeting the requirements of paragraph (3).
(2)Service contract requirements
A contract meets the requirements of this paragraph with respect to an individual performing services for a customer if such contract is in writing and provides that the certified professional employer organization shall—
(A)assume responsibility for payment of wages to such individual, without regard to the receipt or adequacy of payment from the customer for such services,
(B)assume responsibility for reporting, withholding, and paying any applicable taxes under subtitle C, with respect to such individual's wages, without regard to the receipt or adequacy of payment from the customer for such services,
(C)assume responsibility for any employee benefits which the service contract may require the certified professional employer organization to provide, without regard to the receipt or adequacy of payment from the customer for such benefits,
(D)assume responsibility for recruiting, hiring, and firing workers in addition to the customer's responsibility for recruiting, hiring, and firing workers,
(E)maintain employee records relating to such individual, and
(F) Agree to be treated as a certified professional employer organization for purposes of section 3511 with respect to such individual.
(3)Work site coverage requirement
The requirements of this paragraph are met with respect to an individual if at least 85 percent of the individuals performing services for the customer at the work site where such individual performs services are subject to 1 or more contracts with the certified professional employer organization which meet the requirements of paragraph (2) (but not taking into account those individuals who are excluded employees within the meaning of section 414(q)(5)).

[33] Baser, Laurie and McMurrer, Dan "PEO Industry Footprint," National Association of Professional Employer Organizations (2023).

Of the estimated 523 PEOs nationwide, the largest 5 encompass over 39% of the WSEs employed by PEOs. The next 25 PEOs comprise 19%, with the remaining 42% of PEO WSEs being spread out over 493 PEOs. According to a September 2022 client-analysis conducted for NAPEO, the industries with the highest penetration rate of PEO participation are: real estate (31%); professional, scientific, and technical services (28%); and manufacturing (20%).[34] The industries with the lowest penetration rate include: utilities, management of companies, and mining (all with less than 0.5% PEO penetration). In the same report on client characteristics, NAPEO finds that two-thirds of its clients have 10-49 employees – fitting the federal and state definitions of a small employer. It is worth noting that none of the three states which preclude PEOs from offering large group health insurance to small employers appear in the states with penetration levels above 3%.

Among the 50 United States, the estimated penetration rate among businesses with 10-99 employees by state were as follows.

Table 2-1

Estimated PEO Penetration Rate by State	
State	**Estimated Penetration Rate %**
Florida	39%
Georgia	20%
New York	16%
Colorado	16%
Texas	15%
Indiana	12%
Missouri	12%
California	11%
Illinois	11%
New Jersey	11%
Connecticut	11%
Massachusetts	10%
Arizona	10%
North Carolina	9%
Tennessee	7%
Oregon	6%
Michigan	5%
Virginia	5%
Ohio	4%
Pennsylvania	4%
All Other States (Including Maryland)	3%

Source: National Association of Professional Employer Organizations (NAPEO)
"PEO Clients: An Analysis" (September 2022)

[34] Baser, Laurie and McMurrer, Dan "PEO Clients: An Analysis," National Association of Professional Employer Organizations (Sept. 2022).

In addition to gathering statistics and studying trends, in October of 2024, the MIA conducted a survey of PEOs affiliated with the National Association of Professional Employer Organizations (NAPEO). The survey was sent out to NAPEO client members and responses were gathered anonymously. Members were given two weeks to respond. In total, 13 organizations responded. The responses encompassed PEOs of varying size and geographic locations. Some had a presence in Maryland, while others did not.

Among the responses received, PEOs made note of the following significant changes to the industry:

- Federal legislation recognizing the PEO industry which has enabled the PEO industry to grow over time, including allowing CPEOs to become certified at the federal level.
- Acceptance of the PEO model and the value proposition PEOs offer to small businesses.
- A greater focus on technology as a larger component of the PEO value proposition.
- Vendor consolidation as more privately held PEOs have been sold to publicly traded PEOs or to private equity firms.
- Shifting to Value Focus: Previously, PEOs could obtain a cheaper cost structure than their clients by buying certain services in volume and then sharing the savings with the client. Today, PEOs bring volume efficiencies less through savings, and more through ability to bring expertise and infrastructure of a large company to bear for small businesses. Examples include being able to have access to larger HR staffing resources – including state of the art HR software – that a small business might not be able to purchase on its own.
- A shift from being focused solely on employment administration to becoming trusted business consultants. Example: During the COVID-19 pandemic, PEOs helped their clients obtain Paycheck Protection Program (PPP) loans and Employee Retention Tax Credits (ERTCs) that allowed many of them to remain in business.

3. Review of PEO Health Plans and Plan Benefit Designs

PEOs do not sell health insurance to their clients, nor do PEOs operate as either health insurers or insurance carriers. Rather, group health insurance policies are issued to a PEO as a plan sponsor, while the PEO itself neither acts as the health insurer nor as an insurance carrier. PEOs will extend insurance to their client co-employees through a) partnering with one or more carriers to offer coverage to worksite employees in the states in which their employees work; or b) using an affiliated entity to act as a benefits broker – allowing clients to buy health insurance from major insurance carriers with the PEO benefits brokerage operating as the broker on the account.

Plans offered to prospective clients are tailored to meet the needs of the individual client, and PEOs often cater to the region-specific requirements of the market they serve. PEOs typically act as the administrator of the health plan. In the MIA survey of the industry, responding PEOs reported partnering with a range of health insurance companies to offer anywhere from 3 to 10 plans, offering a wide variety of packages including HMOs, PPOs, EPOs, POSs, and various dental plans.[35] In addition, some PEOs

[35] The following definitions and explanations are provided courtesy of Health Insurance.org LLC HMO vs PPO vs POS vs EPO: What's the difference? | healthinsurance.org, referenced on 12-23-24.
HMO -"If your coverage is a Health Maintenance Organization plan, you'll generally only have coverage if you use a medical provider who is in-network with the plan, except for emergencies. You'll likely need to choose a primary care physician (PCP) or your insurer will pick one for you. That person will serve as a "gatekeeper," meaning that you'll generally need to see your primary care physician for a referral before you can see a specialist."

offer packages where ancillary benefits are available, including: health care flexible spending accounts, disability coverage, accidental death and dismemberment coverage, adoption assistance, and educational assistance.

Medical options are further tailored according to geographic requirements and the individual legal and regulatory climates of each state. For example, one survey respondent, who reports having clients in Maryland, uses an internal process to determine whether or not a Maryland-based client's employees can participate in their large group plan, given Maryland's relatively unique restrictions on the ability of PEOs to offer large group insurance to small employers in the state. That same respondent will frequently not extend packages that include medical, dental, or vision to employees of Maryland-based clients for the same reason.

4. Review of Requirements for Participation in PEO Arrangements and Accessing PEO Health Plans

The General Framework for Participation

Requirements for participation in PEO arrangements and accessing health plans varies according to the PEO and the respective marketplace which it serves. Individual state laws and regulations can vary in length and scope concerning specific provisions that must be in a written agreement between a PEO and a client company.

The most standard and frequent tool for enabling clients to participate in a PEO arrangement and to access PEO health plans is the client service agreement (CSA). The CSA is a contract which both a) establishes the co-employment relationship between the PEO and the client, and b) allocates the sharing of employer responsibilities between the PEO and the client. As noted by NAPEO, the PEO usually assumes certain administrative responsibilities, including:

- The remission of wages of the worksite employees

PPO - "Under a Preferred Provider Organization plan, policyholders receive discounted prices from in-network healthcare providers partnered with the PPO, which means that the provider will write off a portion of their billed amount, under the terms of the network agreement with the health plan. A referral to a specialist is generally not required, which means policyholders can see a specialist without seeing a primary care doctor first.

PPOs will cover out-of-network care, but the deductible and other out-of-pocket expenses are typically higher (often significantly so) for out-of-network care. So policyholders who use a provider outside of the PPO plan's network typically pay more for the medical care.

EPO - "An Exclusive Provider Organization plan only covers in-network care (except in emergency situations), but policyholders will generally not need to pick a primary care physician, nor will they need to get a referral to see a specialist. So the policyholder can choose to see any specialist in the plan's network without needing to see a primary care doctor first. Since out-of-network care is not covered, the patient will pay full price for out-of-network services that aren't subject to the No Surprises Act."

POS - A Point of Service plan typically (but not always) requires policyholders to choose a primary care physician and get referrals in order to see a specialist. These plans do cover out-of-network care after a referral from the PCP, but out-of-pocket costs can be significantly higher for out-of-network care than for in-network care, and the out-of-network provider can balance bill the policyholder unless it's a situation in which the No Surprises Act protections are applicable. POS plans are not common.

- Reporting, collecting, and depositing employment taxes with local, state, and federal authorities
- Issuing the W-2 Form for the compensation paid by the PEO under the PEO's Employee Identification Number (EIN)[36]

Individual PEOs themselves have varying requirements for participation, often involving setting certain minimum requirements for the level of eligible employees or the number of full-time employees a client must employ along with the percentage of employees enrolled. Among the PEOs who responded to our survey, the minimum requirements for employer participation in a PEO health plan included requiring the employer to have anywhere between two and ten full-time employees, with the enrollment of at least 50% of those employees in a PEO-sponsored plan. In addition, some PEOs have payment requirements which require that the client agree to pay a certain percentage of the employee-only premium of the lowest cost health plan option they choose to offer.

In terms of enrolling the individual employee of a small business, PEOs normally require a CSA to establish the co-employment relationship between the client and their worksite employees. Once the CSA is finalized, an orientation is often organized to educate employees about the details of enrolling in any one of a number of benefit plans. Employees are then given a window of time, similar to open enrollment, in which to select a plan. Similar to other health plans, a worksite employee can only switch plans outside of the open enrollment period if a "qualifying event" occurs.

Federal Issues Related to Participation

While the process of entering into a CSA agreement with a PEO may seem straightforward, the question of "Who is considered the employer?" raises a number of questions with regards to complying with federal regulatory structures, such as ACA and IRS tax reporting requirements.

The ACA assigns responsibility for compliance with its provisions to employers based on their size. Employers with an average of 50 or more employees are classified as Applicable Large Employers (ALEs). Under the ACA, ALEs are required to file reports with the IRS and provide statements to their employees about the health coverage offered or not offered.[37] Furthermore, these employers must meet the ACA's requirements for minimal essential coverage, minimal value requirements where the plans offered cover at least 60% of health care costs covered, and affordability requirements for minimal essential coverage. If the employer in question is not considered an "ALE," then these reporting and shared responsibility requirements do not apply.

However, while the ACA provisions are primarily directed towards large employers, the coverage requirements, common-law employer determination, and reporting obligations imposed on employers can affect small employers participating in a PEO as well.

The ACA assigns compliance responsibilities based on who is deemed the common-law employer, i.e., the entity that controls what work will be done and how it will be done by the employee.[38] From the IRS's point of view, "anyone who performs services for you is your employee if you can control

[36] National Association of Professional Employer Organizations (NAPEO) website. "FAQ's: How does a PEO Arrangement Work," https://www.napeo.org/what-is-a-peo/selecting-a-peo/faqs#:~:text=Once%20a%20client%20company%20contracts,benefit%20package%20for%20worksite%20employees. Accessed Nov. 8, 2024.
[37] 26 U.S.C. § 4980H, § 6055, and. § 6056.
[38] www.irs.gov "Employee (common-law Employee)" cited on the page: https://www.irs.gov/businesses/small-businesses-self-employed/employee-common-law-employee#:~:text=Under%20common%2Dlaw%20rules%2C%20anyone,certain%20assigned%20days%20and%20times.

what will be done and how it will be done," even if the relationship is labelled differently. As the IRS notes, the term "co-employer" is not recognized under federal law.[39] However, PEOs, in their assertion of co-employer status can implicitly assert that they are the employer or co-employer of the individuals performing services to the client, if they agree to:

- Recruit and hire employees for the client or assign employees as permanent or temporary members of the client's work force, or participate with the client in these actions;
- Hire the client's employees as its own and then lease them back to the client to perform services for the client; or
- File employment tax returns using its own EIN that include wages or compensation paid to the individuals performing services for the client.[40]

Therefore, in setting up the contract, both the PEO and the client employer(s) must take care to define the responsibilities of each party in the client service agreement.

Furthermore, employers with less than 50 full-time employees can find themselves re-classified as ALEs and subject to ACA reporting and shared responsibility provisions under two circumstances:

1) The first is if they are re-classified as an ALE predicated on whether or not the IRS determines that they exceed 50 employees based on the number of full-time equivalents they employ.

2) The second circumstance arises in cases where the IRS determines that the small business is part of an arrangement with other small businesses that involves a common ownership structure. Companies with a common owner or that are otherwise related under rules of section 414 of the Internal Revenue Code are generally combined and treated as a single employer for determining ALE status.[41] It is because of this that some industry experts recommend small employers perform an aggregation analysis to determine if their small business can be considered an ALE.[42]

The above mentioned requirements, therefore, require a very exacting diligence on the part of small employers who enroll in PEO arrangements to ensure that the number of full-time or full-time equivalent employees are counted correctly; and that the CSA specifies the obligations of each party clearly enough to avoid confusion over which party in the as-now federally unrecognized co-employment relationship is the common-law employer who will be held accountable for meeting ACA reporting requirements. Furthermore, the PEO should take care to file IRS forms 1094 and 1095-C under the client's Employer Identification Number (EIN) – not that of the PEO.[43]

---

[39] www.irs.gov "Third Party Payer Arrangements - Professional Employer Organizations" on the page: https://www.irs.gov/government-entities/third-party-payer-arrangements-professional-employer-organizations referenced on 12-2 -2024.

[40] Ibid. "Third Party Payer Arrangements – Professional Employer Organizations"- referenced on 12-2. Note: Look on the same page for further discussion of "issue indicators" and "audit tips" which IRS examiners use in reviewing the tax filings of a PEO. Among them are: contracts, meeting minutes, interviews, personnel and payroll records, employee benefit plan sponsors, or state unemployment records."

[41] "Determining if an Employer is an Applicable Large Employer" as cited on https://www.irs.gov/affordable-care-act/employers/determining-if-an-employer-is-an-applicable-large-employer: Retrieved on 12-8-24.

[42] Sheen, Robert, "Owners of Small Businesses may need to comply with the ACA." December, 1, 2022 as cited on https://acatimes.com/owners-of-multiple-small-businesses-may-need-to-comply-with-the-aca/#:~:text=What%20is%20an%20aggregated%20employer,and%20full%2Dtime%20equivalent%20employees. Retrieved on 11-17-2024.

[43] Brown and Brown Insurance Risk management "Health and Welfare Benefit Plan Compliance Considerations for Employers Using Professional Employer Organizations (PEOs)" as cited on https://www.bbrown.com/wp-content/uploads/2024/01/PEOs-and-Benefit-Plan-Compliance-Brown-Brown_WEB.pdf: Retrieved on 11-7-24.

Small employers must exercise care, both in assessing how employees will be counted and in ensuring a clear delineation and demarcation of responsibilities within the terms of any client service agreement, in order to avoid triggering any federal regulatory or tax penalties.

5. Examination of Regulatory Structures in Other States

This section of the report provides an overview of the legal and regulatory structures that exist in the 47 states where PEOs are not required to comply with small group market regulation.

As noted by NAPEO, 48 states have some form of PEO recognition in law[44] - enacting statutes related to registration, licensing, unemployment, insurance taxes and workers' compensation. Of these, 38 states have enacted laws based on NAPEO's Model Act.[45] State laws, in turn, can vary in length and complexity- addressing various topics including:

- Specific provisions that must be in a written agreement between a PEO and a client company
- Whether written notice of the PEO arrangement must be given to employees affected by the PEO relations
- Financial capability that must be demonstrated by the PEO
- Whether the PEO is deemed an employer in specific instances
- Licensing and registration requirements[46]

A Brief Overview of the NAPEO Model Act

At present, 38 states have adopted what NAPEO considers to be "comprehensive" PEO laws, with provisions that extensively regulate the PEO Industry. The majority of these statutes are either based on, or derive from, the Model Act in some way. A full copy of the Model Act is attached to this report in Appendix A.

The Act was crafted by NAPEO with the aim of resolving the most common legal problems which can arise in a co-employment context. By crafting language to address common legal issues and accompanying it with common terminology, NAPEO aimed to make PEO operations from state to state as seamless as possible while simultaneously creating a level competitive playing field within the industry.[47]

Among the common legal issues to which NAPEO seeks to provide clarity are:

- Clarifying that both the client and the PEO are the employer for retirement and welfare benefit plans.
- A welfare benefit plan offered to the employees of a single, fully insured PEO, is not a Multiple Employer Welfare Arrangements (MEWA), and is exempt from state MEWA licensing requirements.

[44] Response to Information Request from the Office of the Commissioner, Maryland Insurance Administration from National Association of Professional Employer Organizations (NAPEO), June 25, 2024.
[45] See Appendix A.
[46] State PEO Laws Chart: Overview, Practical Law Practice Note Overview 4-616-7435.
[47] Response to Information Request from the Office of the Commissioner, Maryland Insurance Administration from National Association of Professional Employer Organizations (NAPEO), December 6, 2024.

- Ensuring a statutory basis for a PEO to be considered the employer of all its covered employees of one or more companies.

Below is an overview of the regulatory structures that exist in some other states, which vary according to the way state laws and regulations treat PEOs. Some jurisdictions make no reference to PEOs in their insurance statutes or insurance codes whatsoever (although they are mentioned in other sections of state law). Other jurisdictions formally recognize PEOs in either state statute or the state regulatory code, but make no direct references to health insurance in their provisions – focusing instead on licensing, registration, solvency requirements, and workers compensation. Other jurisdictions recognize the "co-employment" model and spell out requirements for contractual relationships between PEOs and their client employers.

Maryland – In Maryland, PEOs are not required to be licensed or registered with the state. Maryland law does not allow small employers to purchase large group health insurance through a PEO. SB 387 (2018) clarified that the small group laws apply to any health benefit plan offered by an association, PEO, or any other entity. This includes any plan issued under the laws of another state if the health benefit plan covers eligible employees of one or more Maryland small employers. SB 387 also clarified the authority of the Maryland Insurance Administration to regulate PEO and other health plans.

District of Columbia - In D.C., PEO arrangements are not explicitly addressed in statute or regulation. There is no registration required, apart from a basic business license. All small-employer group health insurance is sold through DC Health Link, the ACA marketplace for the District of Columbia, but there is no express prohibition on allowing PEOs to offer large group health insurance to their small group clients.

Virginia – In Virginia**,** PEOs are required to register with the Workers' Compensation Commission. Health plans provided by PEOs that meet the definition of a MEWA are required either to register, if fully insured, or to be licensed, if self-funded. If acting as a MEWA, PEOs are regulated by the State Corporation Commission and Bureau of Insurance. A small employer can not participate as part of a large group health plan under a fully-insured policy per federal rules and per definitions of "group health plan," "group health insurance coverage," "large employer," "employer," and "employee," provided in Virginia law at Section 38.2-3431 of the Code of Virginia that point to ERISA defined terms. Source: *Code of Virginia § 38.2-3431. Application of article; definitions.*

West Virginia - In West Virginia, PEOs are required to apply for a license with the West Virginia Offices of the Insurance Commissioner. The PEO co-employment relationship is recognized in statute and PEO plans are treated as a single employer welfare benefit plan. *Source: W. Va. Code. Ann. 33-46A-1 et seq.*

Massachusetts – In Massachusetts, the co-employment relationship is codified law with specific duties assigned to both the PEO and the client. Registration and solvency requirements are enforced by the Massachusetts Department of Labor Standards. There is no mention of requirements concerning health insurance. In an e-mail reply to an inquiry from the MIA, the Massachusetts Division of Insurance confirms that "Massachusetts currently has no insurance laws enabling oversight of PEOs. The Division has not opined regarding the status of small employer groups that may or may not be part of co-employment groups." *Source: Massachusetts General Laws, c. 149. 192-203.*

Texas – In Texas, both the PEO and co-employment relationship are recognized in statute. PEOs are required to license with the Texas Department of Labor and Regulation (TDLR). Certain PEO health plans must obtain approval from the Texas Department of Insurance (TDI). PEO plans are treated as single-employer plans, regardless of the number of client employers offering coverage. The TDI has specific rules for PEO sponsored self-funded plans. *Source. Tex. (Labor) Code Ann. 91.0012 et seq.*

The differences in state regulatory structures above show that state regulatory institutions handle the regulation of PEOs in different ways and that laws and regulations need not always specifically mention PEOs by name, nor make specific requirements with regards to PEO-sponsored health insurance, in order for PEOs to do business in the state.

6. Potential Impacts of PEOs Offering Large Group Health Coverage on the Small Group Market in Maryland

After consulting a wide variety of sources, the MIA found limited data to demonstrate a direct causation between allowing small businesses to purchase large group health insurance through PEOs and a deleterious effect on the small group market. In gauging the potential impact of changing Maryland law to enable employers to purchase through PEOs, the MIA consulted widely with a number of stakeholders and held a virtual public meeting on Wednesday, July 20, 2024. At this meeting, stakeholders were invited to raise issues of interest and concern regarding the PEO study mandated by SB 821/HB 827 of the 2024 legislative session. Attendance at the public meeting was not a requirement for submitting written comments, which were accepted through August 9, 2024. Below is a summary of the issues and concerns raised by stakeholders during and following the virtual public meeting.

The public feedback summary is succeeded by an overview of current data trends in Maryland's small group market, followed by a brief examination of studies undertaken in Massachusetts and the District of Columbia on the potential impact to the small group market of allowing employers to access large group coverage.

Summary of Public Comments Received by the Maryland Insurance Administration in the Summer of 2024

During the public meeting, several parties expressed their concerns verbally, many of which were later summarized in written comments submitted to the MIA. A summary of these comments lies below. Interested parties can also access both the written comments and a recording of the verbal comments made during the public meeting on the MIA's website.[48]

Six parties submitted written comments. One group representing an association of professional employer organizations and one group representing a variety of Maryland businesses wrote in support of allowing small employers to be able to participate in large group coverage sponsored by PEOs. The other four parties - a managed care organization, an association representing professionals in the insurance and business community, an association representing professionals working in insurance and finance, and a Maryland-based insurance broker - submitted written comments expressing concerns about such a proposal. Each submission of written comments is summarized below:

[48] Maryland Insurance Administration - Notice of Virtual Public Meeting: Professional Employer Organization Study: https://insurance.maryland.gov/Consumer/Pages/Hearing-Professional-Employer-Organization-Study.aspx: as retrieved on 12-28-24.

Maryland Chamber of Commerce

The Maryland Chamber of Commerce expressed concerns that Maryland is one of only three states to prohibit PEOs from offering aggregated health plans to their clients, and that consequently, Maryland businesses are placed at a competitive disadvantage compared to those in the other 47 states and the District of Columbia where such plans are allowed. They further assert that PEOs operating in other states have shown that they can exist alongside robust markets without adversely impacting the broader market.[49]

Kaiser Permanente

Kaiser Permanente wrote in opposition to proposed changes relating to PEOs, asserting that "[w]hile many PEOs provide important services, there is a history of fraud and abuse in this industry where PEOs have exploited loopholes or acted fraudulently."[50] Kaiser also noted that national advocates for PEOs have been pursuing similarly focused legislation with the aim of exempting themselves from the consumer protections of the ACA.

Among the concerns expressed by Kaiser are that having a PEO exemption would open the door to market destabilization – allowing PEOs to, in effect, "cherry pick" the healthiest businesses and people to cover, while leaving older and sicker people and small businesses in certain industries to rely on the ACA-regulated markets. They assert that this phenomenon of "cherry picking," also known as "adverse selection," will, in turn, destabilize the state-regulated small group (small business) and individual private health insurance markets.

Kaiser further argued that a PEO exemption would open the door to inadequate coverage and discrimination – enabling PEOs to avoid complying with the ACA protections for consumers, including: coverage requirements for Essential Health Benefits, rate reforms, guaranteed issue, single-risk pool requirements, maternity coverage, and other essential benefits. They further allege that the door would be open for PEOs to discriminate in terms of rates – potentially charging women higher rates than men, charging smaller businesses higher rates than large ones, charging some industries higher rates than others, and charging older enrollees higher rates without limit.

With regard to fraud and abuse, Kaiser asserts that in the past, PEOs established a history of collecting insurance premiums, and not paying claims; collecting workers' compensation premiums, and not buying insurance; and collecting payroll taxes, and not paying the IRS.

They make note of a number of instances of fraud in the past, including:

> A scam whereby operators of a PEO used health insurance premiums to buy boats instead of paying claims – leaving workers and their families with over $3.6 million in unpaid medical claims.[51]

---

[49] Written comments submitted to the Maryland Insurance Administration Regarding the Study of Professional Employer Organizations mandated by SB821/HB827 (2024) on behalf of the Maryland Chamber of Commerce, Mary D. Kane, President & CEO, August 9, 2024.

[50] Written comments submitted to the Maryland Insurance Administration Regarding the Study on Professional Employer Organizations mandated by SB821/HB827 (2024) on behalf of Kaiser Permanente, Allison Taylor, Director of Government Relations, August 9, 2024.

[51] US Labor Department Sues Florida Outsourcing Company, Fiduciaries, Service Providers To Restore $1.5 Million to Health, Welfare Arrangement, Aug. 11, 2016, available at https://www.dol.gov/newsroom/releases/ebsa/ebsa20160825-0. Federal Agents Seize HB Resident's Boat, Car, The

A workers' compensation scam whereby operators of a nationwide PEO scam collected $5.8 million in premiums but did not pay for the promised workers' compensation insurance for 33,000 people.[52]

National Association of Business and Insurance Professionals of Maryland (NABIP-MD)

Similar concerns about cherry picking were echoed by the National Association of Business and Insurance Professionals of Maryland (NABIP-MD), who noted that the number of participants in the Maryland small group market has declined to approximately 250,000 lives – down from over double that more than 30 years ago.[53] Writing in a similar vein to Kaiser Permanente, they asserted that "...creating exemptions in the small group rules for health benefit plans marketed by PEOs could result in the erosion of the small group pool because only healthy employee populations would migrate to the large group model utilized by PEOs. This market movement would, in turn, leave remaining small groups with a relatively less healthy, and therefore higher cost, rating structure."[54]

Opening the Door to Previously Prohibited forms of Insurance

As part of its written testimony, NABIP-MD noted that some employers are banding together to create other mechanisms whereby employers can pool together to purchase insurance products collectively and receive benefits similar to those offered by PEOs. NABIP-MD fears that altering current Maryland statute to accommodate the offering of health benefit plans by PEOs to small businesses may open the door to legalizing mechanisms, such as stop-loss insurance captives and consortiums, which are currently prohibited by Maryland Law. This could, in turn, result in greater pressure to depopulate the small group market through the removal of healthier lives from the small group pool.[55]

Jurisdictional Questions

NABIP-MD further notes that PEOs are not currently licensed by the MIA – a situation, which could, in their view, lead to complaints not being resolved as efficiently as had they been lodged against a licensed insurance producer of record. For that reason, NABIP-MD requests that should PEOs be permitted to enter the small group market, the MIA should make it a requirement that a licensed Maryland health insurance producer should serve as both the producer of record and the contact for the MIA.

As a matter of statutory wording, NABIP-MD further notes that permitting PEOs to enter the small group market could have implications for Title 27 – The Unfair Trade Practices title. They advise the MIA to examine the statutory definitions of the terms "insurance producer," "sell," "solicit," and

---

Islander, available at https://www.islander.org/2012/12/federal-agents-seize-hb-residents-boat-cars as cited in written comments submitted to MIA RE: Study on Professional Employer Organizations, August 9, 2024.

[52] Fla. Workers' Comp Fraud Results in 14 Year Prison Sentence, Insurance Journal, May 21, 2007, available at https://www.insurancejournal.com/news/southeast/2007/05/21/79853.htm. As cited in Written comments submitted to MIA RE: Study on Professional Employer Organizations, August 9, 2024.

[53] Written comments submitted to the Maryland Insurance Administration by Bryson Popham on behalf of the National Association of Business and Insurance Professionals in Maryland (NABIP-MD) regarding the Professional Employer Organization Study mandated by SB821/HB827 (2024) on Friday, August 2, 2024.

[54] Ibid., NBAPID-MD Letter to MIA.

[55] Written comments submitted to the Maryland Insurance Administration by Bryson Popham on behalf of the National Association of Business and Insurance Professionals in Maryland (NABIP-MD) regarding the Professional Employer Organization Study mandated by SB821/HB827 (2024) on Friday, August 2, 2024.

"negotiate," and to consider whether the statutory language as written, would provide the necessary authority to the MIA to handle a complaint from a small employer or an employee that participates in a PEO plan.

Potential Circumventing of the Guaranteed Issue Requirement

In their written comments, NABIP-MD noted with concern, questions raised by some of its members during the July 24 meeting, that a small employer could be involuntarily separated from a PEO large group. Additionally, they note concerns from their members that a small business might find itself subject to the practice of "lasering," whereby a single employee is removed from a small employer group that is seeking coverage through a PEO plan. NAPIB-MD asserts that enabling PEOs to enter the small group market would effectively circumvent the requirements for "guaranteed issue," in situations where the reasons for such a removal of a business or an individual from a PEO pool include either the loss-experience of a group or individual, or a single individual's health condition.

National Association of Insurance and Financial Advisors - Maryland Chapter (NAIFA-MD)

The National Association of Insurance and Financial Advisors – Maryland Chapter ("NAIFA-MD") raised concerns over the transparency of PEOs in the pricing of their contracts. Writing in a follow-up letter dated October 2, 2024, NAIFA's concerns were threefold:[56]

> *1) Price Transparency* – According to their membership, PEOs often do not itemize the cost for each of the services they offer, as they are bundled into one bottom-line number.
>
> *2) Contract Transparency* – NAIFA-MD expressed the further concern of their membership that businesses are presented with one contract to sign for all of the services included in their offering – thus making the initial offer deceptively appealing in terms of bottomline cost, but creating unwelcome complications down the road when the small business realizes they are not receiving the same level of service as that provided by their health insurance producer.
>
> *3) Benefit Transparency* – NAIFA-MD also expressed concern over the dangers of PEOs offering self-funded plans – thus allowing some PEOs to get around the protections afforded to consumers by the ACA and Maryland small group protections for businesses under 50 employees.

Group Benefit Strategies, LLC

Group Benefit Strategies, LLC – a Maryland-based insurance broker – also submitted written comments to the MIA expressing concerns that carriers in the small group market would have a challenging time sustaining competitive premiums. While noting that there are currently only ~250,000 lives insured in the Maryland small group market (down from 500,000 some years ago), the broker expressed concerns that PEOs would pull healthy groups from the pool, pushing small group insurance premiums to an unsustainable level.

[56] Written comments submitted to the Maryland Insurance Administration by the National Association of Insurance and Financial Advisors - Maryland Chapter (NAIFA-MD) regarding the Professional Employer Organization Study mandated by SB821/HB827 (2024) on Thursday, August 8, 2024.

In addition to echoing the concerns of other participants over transparency, the broker asserted that, "[i]n order to unbundle it is exceedingly difficult to pull out pieces of the benefits and even know how much the premiums are compared to if you pull them out of a product individually."

Finally, Group Benefit Strategies also raised concerns regarding quality of service, and noted that once an agent refers a small group client to a PEO, that the agent is not the broker of record with insurance products, and that they must rely on the PEO partner to which they referred them to service the client correctly.[57]

National Association of Professional Employer Organizations (NAPEO)

NAPEO offered written comments in response to those who testified in order to address some of the concerns raised in the public meeting.

NAPEO asserted that most PEOs do not sponsor self-funded group plans, instead, typically sponsoring "fully insured group health plans using ACA and state law compliant insurance policies where the benefits and coverage are underwritten and guaranteed by licensed and regulated health carriers."[58]

In response to concerns about a lack of transparency in pricing, NAPEO asserted the practice of quoting "all-in-one" or "bundled" prices to prospective clients is far less prevalent today than in the early years of the industry, and that the industry has shifted to a pricing methodology that "breaks out for the client employer the respective costs of the of the health care coverage available."[59] They noted, in addition, that PEOs are "providing clear and transparent information to the client employer at annual renewal/enrollment of any change in their health care costs, regardless of whether the client seeks to maintain or change their health offerings for the upcoming year."[60]

In response to concerns that plans sponsored by PEOs offer low-quality coverage that could leave employees inadequately protected, NAPEO asserted that market dynamics drive PEOs to offer fully-insured plans that are ACA-compliant. They further asserted that providing "skinny" alternatives with minimal benefits would go against the self-interest of most PEOs since they would encourage younger, healthier employees to adopt the cheaper alternative – which consequently would "weaken the risk pool covered under the PEO's comprehensive insured arrangement and drive up the costs of that arrangement and affect the marketability of the PEO services more generally."[61]

In response to claims that PEOs would "cherry pick" good risk from small group or individual health markets, NAPEO asserted that "PEO-sponsored plans generally cover any worksite employee of a client employer…so long as the worksite employee otherwise meets the plan's standard eligibility rules,"[62] – just like any employer would. They further asserted that PEOs would not exclude an employee,

[57] Written comments submitted to the Maryland Insurance Administration by Group Benefit Strategies, LLC regarding the Professional Employer Organization Study mandated by SB821/HB827 (2024) on 8-7-24.
[58] Written comments submitted to the Maryland Insurance Administration by the National Association of Employer Organizations (NAPEO) regarding the Professional Employer Organization Study mandated by SB821/HB827 (2024) on Friday, August 9, 2024.
[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.

or subject them to an increased premium, based on their individual claims experience or pre-existing conditions, and that to do so would be a violation of certain federal and state laws.

Finally, NAPEO cited a report from the Massachusetts Merged Market Advisory Council, which concluded that "to date, there is no evidence that off-market product offering (specifically including PEO-sponsored plans) have materially affected the merged market's composition or stability..." and that NAPEO is unaware of "any evidence demonstrating that PEO health coverage has destabilized or materially affected the ACA Health Exchanges, including in Maryland's neighboring states of Virginia and the District of Columbia, where PEO-sponsored plans have co-existed alongside robust small group markets for many decades."[63]

Summary of Issues Raised by Stakeholders

In response to a request for input from stakeholders at the public meeting, a number of stakeholders submitted written comments offering their opinions with regards to the effect that allowing PEOs to offer large group health insurance to small employers could have on Maryland's small group market. A number of issues and concerns were raised by the participants including:

- Whether PEO plans would be fully ACA compliant
- Whether PEO-offered plans were transparent in terms of pricing and contract language
- Whether allowing PEOs to offer large group coverage could potentially open the door to previously prohibited forms of insurance
- Whether current statutory language gives the MIA adequate authority to handle a complaint from a small employer or an employee that participates in a PEO plan
- Whether allowing PEOs to offer large group coverage to small employers would potentially circumvent the "guaranteed issue" requirements laid out in the health care reforms of 1993
- Whether PEOs would put employees at risk of being enrolled in low quality coverage
- Whether PEOs would "cherry pick" healthier risks - causing a potentially harmful increase in premiums which could have a deleterious effect on viability of the small group market

Writing in response to concerns raised during the meeting, NAPEO asserted that PEOs offered ACA-compliant plans that were costed in a transparent manner, offering coverage through high-quality plans. NAPEO further asserted that PEOs do not cherry pick good risk from the small group market - offering that "all indications are that PEO-plans have not materially affected the small group market. As evidence they cited a study commissioned by the Massachusetts Merged Market Advisory Council, which asserted that "[t]o date, there is no evidence that off-market product offering [specifically including PEO-sponsored plans] have materially affected the merged market's composition or stability, but such trends bear monitoring."

The Current State of the Small Group Market in Maryland

Data gathered by the MIA (as illustrated below) indicates that Maryland's small group market has experienced enrollment losses since 2018. Because current Maryland law prevents PEOs from offering these groups large group insurance, none of this decline can be attributed to PEOs. The question, to which MIA currently does not have the necessary data to provide an informed answer, is how much additional

[63] Ibid.

enrollment loss would occur if small employers could get large group insurance through their PEOs, i.e., how many small employers would leave the small group market?

At the moment, there is no baseline number of how many groups are in PEOs, let alone an estimate of how many would want to switch their insurance if the law were changed.

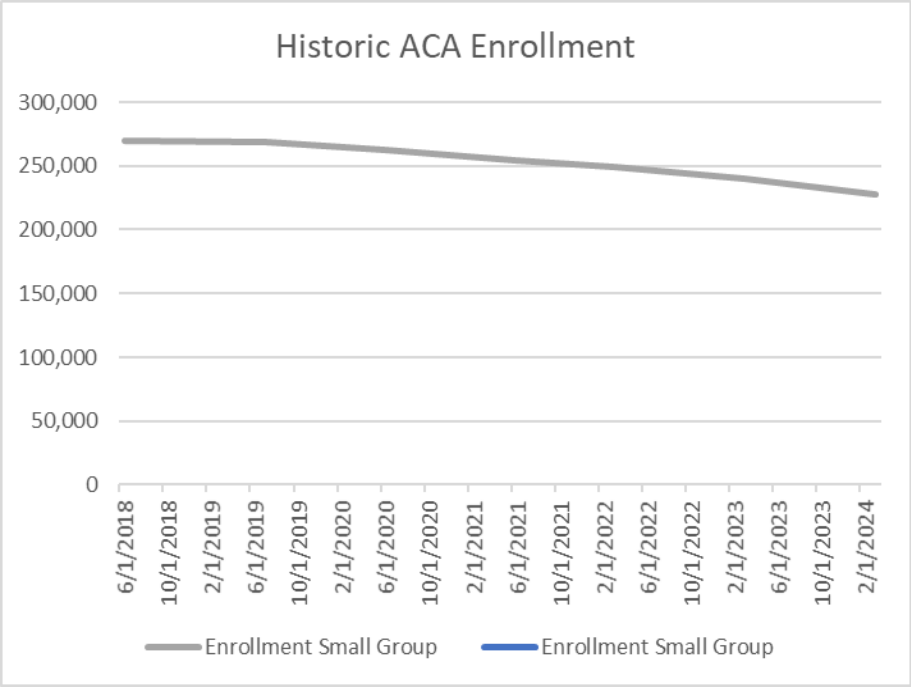
Additionally, on August 1, 2024, one of the largest national health insurance carriers, Aetna, notified the MIA that the company would be withdrawing from the small group market in Maryland beginning on April 1, 2025. Aetna's share of the small group market in Maryland in 2024 was slightly under 5% of the total market, and the withdrawal is expected to impact 1,649 small employer groups and 11,639 enrollees in total.[64]

Table 6-1 - Enrollment in the Maryland Small Group Market Over Time

Date	# Enrolled	% Change Since Previous Report Date
6/30/2018	**270,267**	
7/31/2019	**268,816**	**-0.5%**
6/30/2020	**263,023**	**-2.2%**
6/30/2021	**254,654**	**-3.2%**
3/31/2022	**249,549**	**-2.0%**
3/31/2023	**239,575**	**-4.0%**
3/31/2024	**227,256**	**-5.1%**

[64] Based on data from rate filings submitted to the MIA.

Graph 6-1 - Enrollment in Small Group Market Over Time



PEOs and the District of Columbia – A Glimpse at the Interaction of PEOs with a Single Market

In June of 2021, proponents of PEOs brought before the City Council of the District of Columbia Bill 24-0305, "The Professional Employer Organization Registration Act of 2021." According to the bill summary, the purpose of the Act was to "require professional employer organizations that offer health insurance in the District to register with the Department of Insurance, Securities, and Banking; and to authorize the Mayor to collect registration fees, impose fines, and suspend and revoke certificates of registration."[65]

At a subsequent public hearing on the legislation held on March 7, 2022, the Executive Director of the DC Health Benefit Exchange Authority (HBX), the governing body for the DC Health Benefit Exchange, gave testimony which noted with concern a provision of the bill which would have required that "a plan offered to covered employees of a PEO shall be considered a 'single employer health benefit plan.'"[66]

In her testimony, the Director of the HBX noted that by prescribing that the employees of a PEO should all be considered part of a single benefit plan, the proposed legislation would, in effect, exempt PEOs from the District's requirements for small group coverage – including the provision of essential

[65] Bill Summary for Bill 24-0305, "The Professional Employer Organization Registration Act of 2021" as cited on https://lims.dccouncil.gov/Legislation/B24-0305.

[66] "The Professional Employer Act Organization Registration Act of 2021: Hearings on Bill 24-0305 Before the Committee on Health, March 7, 2022, Testimony of Mila Kofman, J.D., Executive Director, Health Benefit Exchange Authority. CR with text of Bill 24-0305 - The Professional Employer Act Organization Registration Act of 2021 as cited on https://lims.dccouncil.gov/Legislation/B24-0305.

health benefits (EHB), non-discrimination requirements, and prohibitions against red-lining.[67] The director also offered up evidence suggesting that three firms which left the DC health exchange to purchase coverage through a PEO had a significantly higher percentage (74%) of enrollees under the age of 35 and no workers over the age of 55.

Bill 24-0305 ultimately failed to pass.

Massachusetts – 2019 Report

While many insurers and professional associations have expressed concern that the presence of PEOs selling large group insurance can have a negative influence on premiums offered in the small group marketplace, NAPEO cites a 2019 Massachusetts study commissioned by Governor Charlie Baker as part of the state's "Merged Market Advisory Council."

The Executive Summary of the "Report of the Merged Market Council"[68] states in its notes:

> "To date, there is no evidence that off-market product offerings have materially affected the merged market's composition or stability, but such trends bear monitoring. State rules governing marketing and disclosures could be revisited to ensure consumers are informed of how such products differ from merged market coverage, and state actions could be taken to collect more robust information regarding the enrollment in such products. The growth in recent years in adoption of such arrangements as alternatives to coverage offered through the merged market bear monitoring, as it could lead to more small employers and individuals exiting the merged market."[69]

However, the MIA notes that the historical disparities in small group reform and the differing prevailing regulatory frameworks in Maryland and Massachusetts render this study an inadequate basis for drawing parallels regarding similar impacts in our state.

The Current State of the Small Group-Market in Massachusetts

An examination of data on small group enrollment in Massachusetts shows a picture of continuous decline since 2006.

As an editorial in the Boston Globe notes:

> *"According to the State Division of Insurance, the number of people covered by the Massachusetts small group insurance plans (covering two to 50 employees) dropped from more than 800,000 in 2006, to 517,000 in 2014, the year the Affordable Care Act was implemented, to 335,000 in 2022. In 2021 alone, according to the Center for Health Information and Analysis, the number of people insured in the small group market dropped by 4.3 percent, compared to a 1.3% decrease in the number of people with employer-sponsored insurance overall…*

[67] Ibid, Kofman Testimony, March 7, 2022.
[68] Merged Market Advisory Council (MMAC), "Report of the Merged Market Advisory Council – Pursuant to Executive Order Number 589," Gary D. Anderson, Commissioner of Insurance Council Chair as referenced on: https://www.mass.gov/doc/final-report-of-the-merged-market-advisory-council/download.
[69] MMAC, Ibid. p.7.

…The reason, employers say, is costs keep going up, and the plans small businesses can offer are worse than those offered by larger employers."[70]

The article then goes on to note an increase in the number of small businesses joining professional employment organizations.[71]

Furthermore, a report by the Center for Health Information and Analysis, an independent state agency in Massachusetts, notes that enrollment in high deductible health plans (HDHPs), defined in the report as a plan having a deductible of at least $1400, has grown fastest in the small group sector, with year-to-year increases of 2.9% from 2021 to 2022. Jumbo group plans (defined as firms with 500 or more employers), by contrast, declined by 1.0% during the same time span.[72]

The report goes on to note:

"Although the majority of HDHP members in 2022 received coverage through larger employers, the proportion of members enrolled in HDHPs tended to decrease as group size increased, with 90.1% of unsubsidized individual purchasers and over two-thirds of members covered through small and mid-size employers enrolled in an HDHP."[73]

Conclusion

In order to gather information for the study required by HB 827 and SB 821, Maryland Insurance Administration staff conducted extensive outreach to, and gathered data from, a number stakeholders, professional associations, and sources of academic literature. This work included a federal and state legal review; a public meeting; and a survey fielded to NAPEO members. Data received on other states' experiences was inconclusive on the impact of PEOs on state small group markets - however, given the unique nature of Maryland's long-time history of consumer protections in the small group market for small employers, it is also unclear how comparable other state experiences are to the Maryland experience.

The Maryland Insurance Administration remains committed to ensuring a strong small group market, and comprehensive, affordable health care options for Maryland small businesses, and looks forward to continuing to work with the General Assembly on these important issues.

---

[70] Editorial Board, "Small-business health insurance market facing 'death spiral'" *The Boston Globe,* May 7, 2023. pulled from the website of the Retailers Association of Massachusetts at https://www.retailersma.org/assets/docs/Globe%20editorial%20on%20health%20insurance.pdf: retrieved on 12-23-24.

[71] Ibid. *The Boston Globe,* May 7, 2023.

[72] "Annual Report on the Performance of the Massachusetts Health Care System" Center for Health Information and Analysis, March 2024. p.57. /https://www.chiamass.gov/assets/2024-annual-report/2024-Annual-Report.pdf: Retrieved on 12-23-24.

[73] "Annual Report on the Performance of the Massachusetts Health Care System" Center for Health Information and Analysis, March 2024. p.57. from:https://www.chiamass.gov/assets/2024-annual-report/2024-Annual-Report.pdf: Retrieved on 12-23-24.

APPENDIX

NAPEO MODEL PROFESSIONAL EMPLOYER ORGANIZATION ACT
(Italicized language indicates insertions or instructions and are not final text of the bill)

(STATE) PROFESSIONAL EMPLOYER ORGANIZATION
RECOGNITION AND REGISTRATION ACT

AN ACT relating to the recognition and registration of Professional Employer Organizations operating in the State of (*state*).

Be it enacted by the Legislature of the State of (*state*): *[Note: this language, as well as other language in the Act will need to conform to the legislative language and practice of the state. For example, this may need to read "General Assembly" rather than Legislature]*

Section 1. Purpose and Intent.

The Legislature hereby finds:

(A) That Professional Employer Organizations provide a valuable service to commerce and the citizens of this State by increasing the opportunities of employers to develop cost-effective methods of satisfying their personnel requirements and providing employees with access to certain employment benefits which might otherwise not be available to them; and

(B) That Professional Employer Organizations operating in this State should be properly recognized and regulated by the (*State*) Department of (*insert name of* Department) of this State, as provided in this Act.

Section 2. Definitions.

As used in this Act:

(A) "Client" means any Person who enters into a Professional Employer Agreement with a PEO.

(B) "Co-employer" means either a PEO or a Client.

(C) "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.

(D) "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, except to the extent the PEO and the Client have expressly agreed in the Professional 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.

(E) "Department" means the Department of [*insert name of Department*] of the State of (*State*). *[Note: this language may need to be changed and relocated depending upon the agency that will be named as the principal agency. It could, for example, be the Commissioner of Insurance, and in that instance, "Commissioner" and "Insurance Commission" may need to be the defined terms]*

(F) "Director" means the Director of the Department of [*insert Department*]. *[Note: If Commissioner of Insurance, the Director definition should be deleted and "Commissioner" defined in alphabetical order above]*

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

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

(I) "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.

(J) "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.

(K) "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.

(L) "Registrant" means a PEO registered under this Act.

(M) "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.

Section 3. 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 (*insert reference to State Labor Relations Law - if any*).

(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. 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.

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 state, local, or federal licensing, 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 the 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 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 such benefit, incentive or credit. If the grant or amount of any such incentive 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 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 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.

Section 4. 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 State, unless such Person is registered under this Act.

(B) Registration Information: Each applicant for registration under this Act, shall provide the [*insert State Agency*] 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 State;

3. The PEO's taxpayer or employer identification number;

4. 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;

5. 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;

6. 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

7. 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 {*insert State Agency*} 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 (GAAP), 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 twelve (12) months of operating history must meet the financial capacity requirements below and present financial statements reviewed by a certified public accountant.

(C) Initial Registration:

1. 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. Such 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.

2. 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 (F) 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.

(D) Renewal: Within 180 days after the end of a Registrant's fiscal year, such Registrant shall renew its registration by notifying the [*insert State Agency*] of any changes in the information provided in such Registrant's most recent registration or renewal. A Registrant's existing registration shall remain in effect during the pendency of a renewal application.

(E) PEO Group Registration: 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.

(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 provided by the [*insert State Agency*];

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

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

    d. Does not have more than 50 Covered Employees employed or domiciled in this State 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 [*insert State Agency*] with information and documentation necessary to show that the PEO qualifies for a limited registration.

4. Section 6 shall not apply to applicants for limited registration.

(G) List: The [*insert State Agency*] shall maintain a list of Professional Employer Organizations registered under this Act that is readily available to the public by electronic or other means.

(H) Forms: The [*insert State Agency*] may prescribe forms necessary to promote the efficient administration of this section.

(I) Electronic Filing and Compliance: The [*insert State Agency*] shall to the extent practical permit the acceptance of electronic filings in conformance with [*the Uniform Electronic Transactions Act or insert relevant state provision*], including applications, documents, reports, and other filings required by this Act. The [*insert State Agency*] may provide for the acceptance of electronic filings and other assurance by an independent and qualified assurance organization approved by the Director that provides satisfactory assurance of compliance acceptable to the Department consistent with or in lieu of the requirements of Sections 4, 6, and other requirements of this Act or the rules promulgated pursuant to it. The Director shall permit a PEO to authorize such an approved assurance organization to act on the PEO's behalf in complying with the registration requirements of this Act, including electronic 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.

(J) Record Confidentiality: 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 [*insert State Agency*], 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 5. Fees.

(A) Initial Registration: Upon filing an initial registration statement under this Act, a PEO shall pay an initial registration fee not to exceed $500.

(B) Renewal: Upon each annual renewal of a registration statement filed under this Act, a PEO shall pay a renewal fee not to exceed $250.

(C) Group Registration: The [insert state agency] shall determine by rule 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 $250 upon initial application for limited registration and upon each annual renewal of such limited registration.

(E) Electronic Filing and Compliance: A PEO seeking registration pursuant to Section 4(I) shall pay an initial and annual fee not to exceed $250.

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

Section 6. Financial Capability. Working Capital and Bonding. Except as provided by Section 4 (F) and (I) above, each PEO or collectively each PEO Group shall maintain either:

(A) Positive working capital (current assets minus current liabilities) as defined by Generally Accepted Accounting Principles at registration as reflected in the financial statements submitted to the [*insert State Agency*] 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, or securities with a minimum market value equaling the deficiency plus $100,000 to *[insert State Agency]*. Such bond to be held by a depository designated by the [*insert State Agency],* 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 7. General Requirements and Provisions.

(A) Allocation of Rights, Duties, and Obligations. Except as specifically provided in this Act or in the Professional Employer Agreement, in each Co-employment Relationship:

1. 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

2. 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.

3. 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 Client's fiduciary responsibilities, or to comply with any licensure requirements applicable to Client or to the Covered Employees.

(B) 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 as described in paragraph (A) above.

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; *[Note: this last clause should be altered as required to be consistent with state law definitions regarding wages and wage requirements]*

3. 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 Professional Employer Agreement. The Client shall have a right to hire, discipline, and terminate a Covered Employee.

4. The responsibility to obtain workers' compensation coverage for Covered Employees, from a carrier licensed to do business in this State and otherwise in compliance with all applicable

requirements, shall be specifically allocated to either the Client or the PEO in the Professional Employer Agreement.

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

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

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

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

3. A Client shall not be liable for the acts, errors or omissions of a PEO, or of any Covered Employee of the Client and a PEO when such Covered Employee is acting under the 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 and Assessments: For purposes of this State or any county, municipality or other political subdivision thereof:

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.

2. 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.

3. 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 Professional Employer Organization 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.

4. In the case of a tax or an assessment imposed or calculated upon the basis of total payroll, the Professional Employer Organization 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.

Section 8. Benefit Plans.

(A) 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.

(B) 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. [[*(optional language where there is a MEWA statute)* for purposes of [*insert state MEWA law*] shall be exempt from the licensing requirements contained at (*insert State Statute*).

(C) For purposes of the (*insert State Small Employer Health Reform Act*), as amended (*insert State Statute*), 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.

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

1. Utilize a third-party administrator licensed to do business in this State;

2. 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");

3. 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

4. Provide written notice to each Covered Employee participating in the benefit plan that the plan is self-funded or is not fully-insured.

Section 9. Workers' Compensation.

(A) Coverage: The responsibility to obtain workers' compensation coverage for Covered Employees in compliance with all applicable laws [*or specifically cite Workers' Compensation Act*] shall be specifically allocated in the Professional Employer Agreement to either the Client or the PEO.

(B) Voluntary and Residual Market Coverage: Coverage for both the directly employed workers of a Client and the Covered Employees of that Client must be all in the residual or all in the voluntary market. In addition,

1. Workers' compensation coverage for Covered Employees in the voluntary market may be obtained by either (i) the Client through a standard workers' compensation policy or through duly authorized self-insurance or (ii) by the PEO through a duly authorized self-insurance program, through a master policy issued to the PEO by a carrier authorized to do business in this State, or through a multiple coordinated policy issued by a carrier authorized to do business in this State in the name of the PEO or the Client. A carrier providing coverage through the PEO or a PEO authorized to self-insure must report to the appropriate state and rating authorities such Client-based information as is necessary to maintain the Client's experience rating.

2. Workers' compensation for Covered Employees in the residual market may be obtained (i) by the Client through a residual market policy or (ii) by the PEO through a multiple coordinated policy in either the name of the PEO or the Client that provides to the appropriate state and rating authorities the Client-based information satisfactory to maintain the Client's experience rating.

(C) Exclusive Remedy: 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 such workers' compensation coverage.

Section 10. Unemployment Compensation Insurance.

(A) For purposes of the (*insert State Unemployment Compensation Act*), 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.

(B) The PEO shall report and pay all required contributions to the unemployment compensation fund using the state employer account number and the contribution rate of the PEO.

(C) On the termination of a contract between a PEO and a Client or the failure by a PEO to submit reports or make tax payments as required by this Chapter, the Client shall be treated as a new employer without a previous experience record unless that Client is otherwise eligible for an experience rating.

Section 11. Enforcement.

(A) Prohibited acts:

1. PEO Services – A person may not knowingly:

   a. 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 [insert state agency] in conjunction with any registration, renewal, or in any report required under this Act.

(B) Disciplinary Action: Subject to [*insert reference to due process requirements*]

1. Disciplinary action may be taken by the [insert state agency] 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 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.

(C) Disciplinary Authorities: Upon finding, after notice and opportunity for hearing, that a PEO, or a controlling person of a PEO, or a person offering PEO services has violated one or more provisions of this section and subject to any appeal required by [*insert reference to due process requirements*], the Director may:

1. deny an application for a license;

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

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

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

5. issue a cease and desist.

Drafting Note: In some states, existing state laws may address how state agencies are to consider evaluating or invoking criminal sanctions in the process of administering licenses. Before proposing the model act, users should take into account any such state law and possibly integrate section 11 with existing state law.

Section 12. 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 13. Effective Date

(A) This act shall be effective (*State specific effective date language*).

As amended 11-21-08