

BILL ANALYSIS

Senate Research Center

S.B. 1286
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Business & Commerce
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 1286 modernizes the Chapter 91 (Staff Leasing Services), Labor Code, and all defined terms to reflect the current state of the industry. Chapter 91 was enacted more than 15 years ago and the defined terms included in the statute no longer accurately reflect the business models of the industry. The industry seeks to change the name of the chapter to "Professional Employer Organizations" and to update all defined terms so that they accurately reflect the current state of the industry.

Also, S.B. 1286 clarifies a professional employer organization's ability to sponsor a self-funded health benefit plan and clarifies that either a professional employer organization or client may elect to obtain workers' compensation insurance for covered employees, and both the professional employer organization and its client are protected under the exclusive remedy provisions, regardless of which entity holds the policy.

As proposed, S.B. 1286 amends current law relating to the regulation of professional employer services.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Commission of Licensing and Regulation is modified in SECTION 12 (Section 91.019, Labor Code) and SECTION 30 of this bill.

Rulemaking authority previously granted to the comptroller of public accounts of the State of Texas is modified in SECTION 23 (Section 151.057, Tax Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Chapter 91, Labor Code, to read as follows:

CHAPTER 91. PROFESSIONAL EMPLOYER ORGANIZATIONS

SECTION 2. Amends Section 91.001, Labor Code, by amending Subdivisions (1), (2-a), (3), (7), (11), (16), and (17) to redefine "applicant," "assurance organization," "client," "controlling person," "license holder," "temporary help," and "wages;" adding Subdivisions (3-a), (3-b), and (7-a) and to define "co-employer," "co-employment relationship," and "covered employee;" and amending Subdivision (14) to define "professional employer services," rather than "staff leasing services", and Subdivision (15) to define "professional employer organization," rather than "staff leasing company."

SECTION 3. Amends Chapter 91, Labor Code, by adding Sections 91.0015 and 91.0016, as follows:

Sec. 91.0015. CO-EMPLOYMENT RELATIONSHIP. (a) Provides that a co-employment relationship is intended to be an ongoing relationship rather than a temporary or specific one, in which the rights, duties, and obligations of an employer that arise out of an employment relationship are allocated between co-employers under a professional employer services agreement. Provides that co-employment is not a joint employment arrangement.

(b) Provides that in a co-employment relationship:

(1) the professional employer organization is authorized to enforce only those employer rights and is subject to only those obligations specifically allocated to the professional employer organization by the professional employer services agreement or this chapter;

(2) the client is authorized to enforce any right and is obligated to perform those employer obligations allocated to the client by the professional employer services agreement or this chapter; and

(3) the client is authorized to enforce any right and is obligated to perform any obligation of an employer not specifically allocated to the professional employer organization by the professional employer services agreement or this chapter.

Sec. 91.0016. COVERED EMPLOYEE. (a) Requires a covered employee to meet all the following criteria:

(1) the individual is required to receive written notice of the co-employment relationship with the professional employer organization; and

(2) the individual's co-employment relationship is required to be under a professional employer services agreement subject to this chapter.

(b) Provides that an individual who is an officer, director, shareholder, partner, or manager of the client is a covered employee, except to the extent the professional employer organization and the client expressly agree in the professional employer services agreement that the individual is not a covered employee, if the individual meets the criteria of this section and acts as an operational manager or performs day-to-day operational services for the client.

SECTION 4. Amends Sections 91.002(b) and (c), Labor Code, as follows:

(b) Provides that each person who offers professional employer services, rather than staff leasing services, is subject to this chapter and the rules adopted by the Texas Commission of Licensing and Regulation (TCLR).

(c) Makes a conforming change.

SECTION 5. Amends Section 91.003(a), Labor Code, to require each state agency that in performing duties under other law affects the regulation of professional employer services, rather than staff leasing services, to cooperate with the Texas Department of Licensing and Regulation (TDLR) and other state agencies as necessary to implement and enforce this chapter.

SECTION 6. Amends Sections 91.004, 91.005, 91.006, and 91.007, Labor Code, as follows:

Sec. 91.004. EFFECT OF OTHER LAW ON CLIENTS AND EMPLOYEES. (a) Provides that this chapter does not exempt a client of a license holder, or any covered employee, rather than assigned employee, from any other license requirements imposed under local, state, or federal law.

(b) Provides that a covered employee who is licensed, registered, or certified under law, is considered to be an employee of the client, for the purpose of that license, registration, or certification, rather than providing that an employee who is licensed, registered, or certified under law and who is assigned to a client company, is considered to be an employee of the client company for the purpose of that license, registration, or certification.

(c) Provides that a license holder is not engaged in the unauthorized practice of an occupation, trade, or profession that is licensed, certified, or otherwise regulated by a governmental entity solely by entering into a professional employer services agreement with a client and covered employees, rather than a staff leasing agreement with a client company and assigned employees.

Sec. 91.005. APPLICATION OF CERTAIN PROCUREMENT LAWS. Makes conforming and nonsubstantive changes.

Sec. 91.006. WORKERS' COMPENSATION COVERAGE. (a) Provides that a certificate of insurance coverage showing that either a license holder or a client maintains a policy of workers' compensation insurance constitutes proof of workers' compensation insurance coverage for the license holder and the client with respect to all covered employees of the license holder and the client, rather than for the license holder and the client company with respect to the license holder assigned to the client company. Requires the state and a political subdivision of the state to accept a certificate of insurance coverage described by this section as proof of workers' compensation coverage under Chapter 406 (Workers' Compensation Insurance Coverage).

(b) Makes conforming changes.

Sec. 91.007. APPLICATION OF LABOR RELATIONS LAWS. Makes a conforming change.

SECTION 7. Amends Sections 91.011 and 91.012, Labor Code, as follows:

Sec. 91.011. LICENSE REQUIRED. Prohibits a person from engaging in or offering professional employer services in this state unless the person is employed, appointed, or authorized by a company that holds a license issued under this chapter. Makes a conforming change.

Sec. 91.012. GENERAL LICENSE REQUIREMENTS. Provides that to be qualified to serve as a controlling person of a license holder under this chapter, that person must be at least 18 years of age and have educational, managerial, or business experience relevant to operation of a business entity offering professional employer services, rather than staff leasing services or service as a controlling person of a professional employer organization. Makes a conforming change.

SECTION 8. Amends Sections 91.014(a) and (c), Labor Code, as follows:

(a) Changes references to covered employees to assigned employees.

(c) Makes a conforming change.

SECTION 9. Amends Section 91.015(a), Labor Code, to make conforming changes.

SECTION 10. Amends Section 91.017(a), Labor Code, to require each applicant for an original or renewal professional employer organization license to pay to the department before the issuance of the license or license renewal a fee set by the commission by rule. Makes a conforming change.

SECTION 11. Amends Sections 91.018(e) and (f), Labor Code, as follows:

(e) Authorizes a license holder offering professional employer services in more than one state to advertise in this state using the name of its parent company or under a trade name, trademark, or service mark. Makes a conforming change.

(f) Requires each written proposal provided to a prospective client and each contract between a license holder and a client or covered employee to clearly identify the name of the license holder. Makes conforming changes.

SECTION 12. Amends Sections 91.019(a), (b), and (c), Labor Code, as follows:

(a) Requires TCLR by rule to provide for the issuance of a limited license to a person who seeks to offer limited professional employer services in this state. Makes a conforming change.

(b) For purposes of this section, a professional employer organization is considered to be offering limited professional employer services if the professional employer organization:

(1) employs fewer than 50 covered employees, rather than assigned employees, in this state at any one time;

(2) does not provide covered employees, rather than assigned employees, to a client, rather than company, based or domiciled in this state; and

(3) does not maintain an office in this state or solicit clients, rather than client companies, located or domiciled in this state.

Makes conforming changes.

(c) Makes conforming changes.

SECTION 13. Amends Section 91.020, Labor Code, to make conforming changes.

SECTION 14. Amends Section 91.021(b), Labor Code, to make conforming changes.

SECTION 15. Amends the heading to Subchapter C, Chapter 91, Labor Code, to read as follows:

SUBCHAPTER C. PROFESSIONAL EMPLOYER SERVICES AGREEMENT

SECTION 16. Amends Sections 91.031 and 91.032, Labor Code, as follows:

Sec. 91.031. AGREEMENT; NOTICE. (a) Requires a license holder to establish the terms of a professional employer services agreement by a written contract between the license holder and the client. Makes conforming changes.

(b) Requires the license holder to give written notice of the agreement as it affects covered employees to each covered employee of the license holder and a client, rather than requires the license holder to give written notice of the agreement as it affects assigned employees to each employee assigned to a client company worksite.

(c) Makes conforming changes.

Sec. 91.032. CONTRACT REQUIREMENTS. (a) Requires that a professional employer services agreement between a license holder and a client provide that the license holder performs certain actions. Makes conforming changes.

(b) Provides that, notwithstanding any other provision of this chapter, a client retains sole responsibility for the direction and control of covered employees as necessary to conduct the client's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirement; goods and services produced by the client; and the acts, errors, and omissions of covered employees committed within the scope of the client's business. Makes conforming changes.

(c) Provides that a client, notwithstanding Subsection (a)(2) (relating to the payment of wages), is solely obligated to pay any wages for which obligation to pay is created by an agreement, contract, plan, or policy between the client and the covered employee; and the professional employer organization has not contracted to pay. Makes conforming changes.

(d) Requires that each professional employer organization disclose the requirements of Subsection (c) in writing to each covered employee. Makes conforming changes.

SECTION 17. Amends Section 91.041, Labor Code, by amending Subsections (a) and (b) and adding Subsections (a-1), (a-2), (a-3), and (a-4), as follows:

(a) Provides that a client and license holder are each considered an employer under the laws of this state for purposes of sponsoring retirement and welfare benefit plans for covered employees. Deletes existing text authorizing a license holder to sponsor and maintain employee benefit plans for the benefit of assigned employees. Deletes existing text authorizing a client company to include assigned employees in any benefit plan sponsored by the client company.

(a-1) Authorizes a license holder to sponsor a single welfare benefit plan under which eligible covered employees of one or more clients is authorized to elect to participate.

(a-2) Requires that a fully insured welfare benefit plan offered to the covered employees of a license holder and provided by an insurance company authorized to provide that insurance in this state be treated for purposes of state law as a single welfare benefit plan.

(a-3) Requires that the plan, if a professional employer organization offers to its covered employees any health benefit plan that is not fully insured by an authorized insurer, to:

(1) use 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 federal Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1103);

(3) provide sound reserves for the plan as determined using generally accepted actuarial standards of practice and consistent with the prudence and loyalty standards of care for fiduciaries under the federal Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.); and

(4) provide written notice to each covered employee participating in the health benefit plan that the plan is self-funded or is not fully insured.

(a-4) Provides that the requirements imposed on license holders in Subsection (a-3) are in addition to any other statutory or regulatory requirement imposed on employers in this state offering self-funded health benefit plans in this state, including those prescribed by the Insurance Code.

(b) Requires a license holder, with respect to any insurance or benefit plan provided by a license holder for the benefit of its assigned employees, to disclose certain information to TDLR, each client, and its covered employees. Makes conforming changes.

SECTION 18. Amends Section 91.042, Labor Code, by amending Subsections (a), (b), (c), (d), and (e) and adding Subsections (a-1) and (a-2), as follows:

(a) Authorizes a license holder or client to elect to obtain workers' compensation insurance coverage for covered employees through an insurance company as defined under Section 401.011(28) (defining "insurance company") or through self-insurance as provided under Chapter 407 (Self-Insurance Regulation). Makes conforming changes.

(a-1) Requires the client and the professional employer organization to specify in the professional employer services agreement whether the parties have elected to obtain workers' compensation insurance coverage for the covered employees and to specify which party must maintain the policy for that coverage.

(a-2) Requires the client, if the client elects to maintain workers' compensation insurance for the covered employees under the client's policy, to pay workers' compensation insurance premiums for the covered employees based on the experience rating of the client.

(b) Requires the license holder, if a license holder maintains workers' compensation insurance for covered employees, to pay workers' compensation insurance premiums for the covered employees based on the experience rating of the client for the first two years the covered employees are covered under the professional employer organization's policy and as further provided by rule by the Texas Department of Insurance (TDI). Makes conforming changes.

(c) Requires a license holder and the license holder's client, for workers' compensation insurance purposes, to be coemployers. Provides that, if either a license holder or a client elects to obtain workers' compensation insurance for covered employees, the client and the license holder are subject to Sections 406.034 (Employee Election) and 408.001 (Exclusive Remedy; Exemplary Damages). Makes conforming changes.

(d) Provides that if a license holder or a client does not elect to obtain workers' compensation insurance for covered employees, both the license holder and the client are subject to Sections 406.004 (Employer Notice to Division) and 406.033 (Common-Law Defenses; Burden of Proof). Makes a conforming change.

(e) Requires that the premium for the workers' compensation insurance coverage for the client, after the expiration of the two-year period under Subsection (b), if the client elects to obtain workers' compensation insurance for covered employees through a policy maintained by the client, or if the professional employer services agreement is terminated and the client elects to maintain workers' compensation coverage for employees previously covered by the former professional employer organization's policy through a policy maintained by the client or a third party, including a policy maintained by a successor professional employer organization, be based on the lower of the experience modifier of the client before being covered under the professional employer organization's policy or the experience modifier of the license holder at the time the client's coverage under the professional employer organization's policy is terminated.

Deletes existing text requiring that the premium for the workers' compensation insurance policy of the company after the expiration of the two-year period under Subsection (b), if the client company obtains a new workers' compensation insurance policy in the company's own name or adds the company's former assigned workers to an existing policy, be based on the lower of the experience modifier of the company before entering into the staff leasing arrangement or the experience modifier of the license holder at the time the staff leasing arrangement terminated.

SECTION 19. Amends Sections 91.044, 91.046, 91.048, 91.050, and 91.061, Labor Code, as follows:

Sec. 91.044. UNEMPLOYMENT TAXES; PAYROLL. (a) Makes conforming changes

(b) Makes conforming changes.

Sec. 91.046. CONTRACTUAL DUTIES. Provides that each license holder is responsible for the license holder's contractual duties and responsibilities to manage, maintain, collect, and make timely payments for certain obligations, including for any

other expressed responsibility within the scope of the professional employer services agreement for fulfilling the duties imposed under this section and Sections 91.032, 91.047 (Compliance with Other Laws), and 91.048. Makes conforming changes.

Sec. 91.048. **REQUIRED INFORMATION.** Requires each license holder to maintain and provide certain information, including each professional employer services agreement with a client. Makes conforming changes.

Sec. 91.050. **TAX CREDITS AND OTHER INCENTIVES.** (a)-(c) Makes conforming changes.

Sec. 91.061. **PROHIBITED ACTS.** Prohibits a person from:

(1) engaging in or offering professional employer services without holding a license under this chapter as a professional employer organization;

(2) using the name or title "professional employer organization," "employee leasing company," "licensed professional employer organization," "professional employer organization services company," "professional employer organization company," or "administrative employer" or otherwise represent that the entity is licensed under this chapter unless the entity holds a license issued under this chapter; or

(3)-(5) Makes no changes to these subdivisions.

Deletes existing text prohibiting a person from using the name or title "staff leasing company," "licensed staff leasing company," "staff leasing services company," or "professional employer organization." Makes conforming changes.

SECTION 20. Amends Section 92.012, Labor Code, to provide that this chapter does not apply to certain groups, including a professional employer organization, and to make a conforming change.

SECTION 21. Amends Section 201.030, Labor Code, as follows:

Sec. 201.030. New heading: **PROFESSIONAL EMPLOYER ORGANIZATION.** Defines, for the purposes of this subtitle, "professional employer organization," rather than "staff leasing services company."

SECTION 22. Amends Section 207.045(i), Labor Code, to make conforming changes.

SECTION 23. Amends Section 151.057, Tax Code, as follows:

Sec. 151.057. **SERVICES BY EMPLOYEES.** Provides that certain services are not taxable under this chapter, including a service performed by covered employees of a professional employer organization, either licensed under Chapter 91, Labor Code, or exempt from the licensing requirements of that chapter, for a client under a written contract that provides for shared employment responsibilities between the professional employer organization and the client for the covered employees, most of whom must have been previously employed by the client. Requires the comptroller of public accounts of the State of Texas (comptroller) to prescribe by rule the minimum percentage of covered employees that must have been previously employed by the client, the minimum time period the covered employees are required to have been employed by the client prior to the commencement of its contract, and such other criteria as the comptroller is authorized to deem necessary to properly implement this section. Makes conforming changes.

SECTION 24. Section 171.0001(15), Tax Code, to define "professional employer organization," rather than "staff leasing services company."

SECTION 25. Amends Section 171.101(b), Tax Code, to make conforming changes.

SECTION 26. Amends Section 171.1011(k), Tax Code, to require a taxable entity that is a professional employer organization to exclude from its total revenue payments received from a client for wages, payroll taxes on those wages, employee benefits for the covered employees of the client. Makes conforming changes.

SECTION 27. Amends Sections 171.1013(d) and (e), Tax Code, as follows:

(d) Prohibits a taxable entity that is a professional employer organization from including as wages or cash compensation payments described by Section 171.1011(k), and requires the entity to determine compensation as provided by this section only for the taxable entity's own employees that are not covered employees.

(e) Makes conforming changes.

SECTION 28. Amends Section 171.2125, Tax Code, as follows:

Sec.171.2125. New heading: CALCULATING COST OF GOODS OR COMPENSATION IN PROFESSIONAL EMPLOYER SERVICES ARRANGEMENTS. Requires a taxable entity that is a client of a professional employer organization, in calculating cost of goods sold or compensation, to rely on information provided by the professional employer organization on a form promulgated by the comptroller or an invoice. Makes conforming changes.

SECTION 29. Repealer: Section 91.001(2) (defining "assigned employee"), Labor Code.

Repealer: Section 91.043 (Health Benefit Plans), Labor Code.

SECTION 30. (a) Requires TCLR, not later than January 1, 2014, to adopt any rules necessary to administer Chapter 91, Labor Code, as amended by this Act.

(b) Makes application of this Act prospective.

SECTION 31. Effective date: September 1, 2013.