

PROFESSIONAL EMPLOYER ORGANIZATIONS

Created as a means of offloading human resource responsibilities to a payroll management company, the PEO was first sanctioned in New Jersey in 2001. Leased-employee arrangements come in many forms, some offering health and pension services, human resources, workers' compensation coverage and processing, and other ancillary programs. In effect, the employee is "leased" to the site where he/she works but paid (and covered) as an employee of the PEO. A company using a PEO may have no employees, while being fully staffed.

No doubt PEO's represent both a cost-saving and efficiency benefit for many employers, particularly mid-size companies. A PEO provider has much greater leverage in negotiating rates and coverages for employee benefits, and an economy of scale for administering them. Unfortunately, the Legislature may not have foreseen the interaction between the Workers' Compensation Act and the PEO enabling statute clearly. There are significant implications in analyzing the true employer in a PEO scenario, given the ABC Test rising in acceptance under New Jersey's various labor laws. Perhaps the analysis of WC vs. Third-Party liability for employment sites must be revisited, given the special employer/dual employer analysis that has evolved in New Jersey since the seminal *Blessing and Kelly* cases. NJSA § 34:8-67 defines the parameters of an employee leasing organization, and imposes an order of duties upon PEO's for the provision of workers' compensation coverage. There was no corresponding amendment to NJSA 34:15-1 et seq. to conform the PEO and the Workers' Compensation Acts. The policy form and coverage quirks of the WCA were no doubt absent from the Legislature's radar-screen when the innovation of a PEO was introduced.

The nuts and bolts of the PEO dilemma is this: In the real world, employers hire and fire employees without much paperwork. They hire day labor. They fill spaces by hiring undocumented workers, seasonal workers and off-the-books workers. Sometimes these workers get injured. If a contract between a factory and a PEO provider, like Paychex or ADP specifies that they will only insure—and cover—employees for whom they have processed paychecks(those on the "census") and they are purchasing a policy under the PEO contract under those terms, then carriers will deny claims filed by employees who do not meet this criteria. The time-honored practice of auditing a policy to conform to the employee census, which has governed WC insurance for generations, is supplanted by a contractual exclusion that is of questionable enforceability.

NJSA 34:15-87 conflicts with this purported limitation on coverage of any business entity in New Jersey:

No policy of insurance against liability arising under this chapter shall contain any limitation of the liability of the insurer to an amount less than that payable by the assured on account of his entire liability under this chapter, and no provision of such policy shall be construed to restrict the liability of the insurer to any stated business, plant, location, or employment carried on by an assured unless the business, plant, location, or employment excluded by such restriction shall be concurrently separately insured or exempted as provided for in this article. [34:15-87]

Section 87 has generally been construed to require that any policy issued in NJ cover all employees, in all locations in which the business operates, regardless of their title, job description, or the nature of their hire. To the extent that a PEO or a carrier engaged by a PEO seeks to exclude an employee from coverage, it would appear that Section 87 would render that attempt at claims avoidance a nullity.

Perhaps even more problematic is the mechanism by which a company moves from a traditional workers' compensation insurance carrier to a PEO. Under the WCA, when coverage is to be voluntarily terminated because of new coverage, notice must be furnished to the N.J.C.R.I.B, confirming the new, superseding coverage. But a PEO is not "coverage." It is an offload entity, a separate company which purchases coverage over the employees who it leases to the previously-insured entity. Since we know that substantial compliance with cancellation requirements is not permissible after *Sroczynski v. Milek*, 396 N.J. Super. 248 (2007), it may be that prior carriers will be bound indefinitely to a risk for which they have not collected a premium, given the atypical transition from insured company to PEO. It would be a good idea for the PEO transition to require notice to CRIB that the company now has no traditional employees and thus requires no coverage. But if the company is an LLC, will the Members be covered by the PEO, or have to purchase Members-only coverage? That remains to be seen, and given the plethora of cases concerning election of coverage under N.J.S.A. 34:15-36, the determination may be difficult.

One practical aspect of PEO litigation will be the difficulty of investigating and defending cases where the PEO is really a processing agency, with no relationship to the actual company and its employees. The reporting of accidents and exposures takes on another layer of insulation between the occurrence and the person who determines whether to accept the case as compensable. It may be that the only first-hand information a PEO can supply to the carrier it has bound for coverage is wages and rate. And because the underlying employer has no direct stake in the securing of the policy, negotiating a premium, engaging in loss control and prevention, the complications of investigation and processing of claims may be multiplied. Who does the attorney answering the claim

petition really represent: The boots-on-the-ground employer, the PEO that pays the premium, or the carrier who wrote the risk? Is there an inherent conflict in any of those relationships?

Finally, the entire analysis of special or dual employment vis a vis 3rd party liability that evolved under our case law preceded the concept of a PEO. It remains to be seen whether the offloading of employees will affect the holdings in cases like Chickachop v. Manpower, Blessing, and Kelly. To what extent will the legal fiction of leased employees create or relieve immunities that arise from the Workers' Compensation Act? We do not know.

Statutes Implicated in PEO Creation and Coverage

"Employee leasing company" or "professional employer organization" means a sole proprietorship, partnership, corporation or other business entity, which devotes a substantial portion of its business to providing the services of employees pursuant to one or more employee leasing agreements and provides services of a nature customarily understood to be employer responsibilities including, but not limited to, those responsibilities provided in section 2 [C.34:8-68] of this act.
NJSA 34:8-68

- a. Every employee leasing agreement shall provide that the employee leasing company:
- (1) Reserves a right of direction and control over each covered employee assigned to the client company's location. However, a client company may retain sufficient direction and control over the covered employee as is necessary to conduct the client company's business and without which the client company would be unable to conduct its business, discharge any fiduciary responsibility that it may have, or comply with any applicable licensure, regulatory or statutory requirement of the client company;
 - (2) Assumes responsibility for the payment of wages to each covered employee without regard to payments by the client company to the employee leasing company, except that the provisions of this paragraph shall not affect the client company's obligations with respect to the payment of wages to covered employees;
 - (3) Assumes responsibility for the payment of payroll taxes and collection of taxes from payroll on each covered employee;
 - (4) Retains authority to hire, terminate, discipline, and reassign each covered employee. However, no covered employee shall be reassigned to another client company without that covered employee's consent and the client company may have the right to accept or cancel the assignment of any covered employee;
 - (5) Has given written notice of the relationship between the employee leasing company and the client company to each covered employee it assigns to perform services at the client company's work site;
 - (6) Shall, except for newly established business entities, hire its initial employee complement from among employees of the client company at the time of execution of the employee leasing agreement at comparable terms and conditions of employment as are in existence at the client

company at the time of execution of the employee leasing agreement and as designated by the client company. Throughout the term of the employee leasing agreement the covered employees shall be considered employees of the employee leasing company and the client company and upon the termination of the employee leasing agreement, the covered employees shall be considered employees of the client company;

(7) Continue to honor and abide by existing collective bargaining agreements applicable to covered employees. The client company shall also continue to honor and abide by all collective bargaining agreements applicable to covered employees. Every employee leasing company which enters into a contract with a client company, which has a collective bargaining representative for the covered employees, shall require that client company to enter into an agreement with the employee leasing company containing the following language:

"The client company shall continue to honor and abide by the terms of any applicable collective bargaining agreements, and upon expiration thereof, any obligations of the client company to bargain in good faith in connection with such collective bargaining agreements shall not be affected in any manner by the employee leasing agreement."

(8) Shall provide workers' compensation insurance for their covered employees, unless the client company, in agreement with the employee leasing company elects to assume the responsibility of providing the workers' compensation insurance coverage for those employees in an arrangement with an employee leasing company, and the employee leasing company provides notice of the election and proof of coverage to the department within 30 days of the election or once forms or procedures are decided by the department.

A client company that assumes the responsibility to provide workers compensation insurance required by an employee leasing agreement, shall provide a copy of the agreement to the insurance carrier licensed in the State of New Jersey that issues the policy for the covered employees prior to the issuance of the policy or upon entering an employee leasing agreement as appropriate. The agreement shall contain a legal mailing address for the employee leasing company and the client company shall be obligated to update that address should it change over the policy period.

In the event that a policy issued to a client company is cancelled pursuant to R.S.34:15-81, the insurance carrier licensed in the State of New Jersey that issues the policy shall provide the employee leasing company copies of all notices required to be issued to the client company pursuant to R.S.34:15-81 with at least 10 days' notice by regular mail at the address set forth in the employee leasing agreement, as updated.

Notwithstanding the provisions of this paragraph (8), if the client company, having elected to assume the responsibility of providing the workers' compensation insurance coverage for covered employees in an arrangement with an employee leasing company, fails to provide workers' compensation insurance coverage as required by law during the period of the agreement, then the employee leasing company shall provide workers' compensation insurance for the covered employees under the employee leasing agreement.

b. Every employee leasing agreement shall allocate responsibility between the employee leasing company and the client company regarding the right of direction and control over management of safety, risk and hazard control at the work site or sites affecting each covered employee including:

- (1) Responsibility for performing safety inspections of client company equipment and premises;
 - (2) Responsibility for the promulgation and administration of employment and safety policies;
- and

(3) Responsibility for the management of workers' compensation claims, the filings thereof, and procedures related thereto.

c. Nothing in this section or any other section of P.L.2001, c.260 (C.34:8-67 et seq.) shall alter the rights or obligations of client companies, employee leasing companies or covered employees under the National Labor Relations Act, 29 U.S.C. § 151 et seq.

d.

(1) Nothing in P.L.2001, c.260 (C.34:8-67 et seq.) or in any employee leasing agreement shall diminish, abolish or remove any obligations of covered employees to a client company or any obligations of any client company to a covered employee existing prior to the effective date of an employee leasing agreement, or create any new or additional enforceable right of a covered employee against an employee leasing company that is not specifically provided by the appropriate employee leasing agreement or P.L.2001, c.260 (C.34:8-67 et seq.).

(2) Nothing in P.L.2001, c.260 (C.34:8-67 et seq.) or in any employee leasing agreement shall affect, modify, or amend any contractual relationship or restrictive covenant between a covered employee and any client company in effect at the time an employee leasing agreement becomes effective; nor shall it prohibit or amend any contractual relationship or restrictive covenant that is entered into subsequently between a client company and a covered employee. An employee leasing company 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 employee leasing company has specifically agreed otherwise in writing.

e.

(1) Nothing in P.L.2001, c.260 (C.34:8-67 et seq.) or in any employee leasing agreement shall affect, modify or amend any state or local registration or certification requirement applicable to any client company or covered employee.

(2) A covered employee who is required to be licensed, registered, or certified pursuant to any State law or regulation shall be considered solely an employee of the client company for purposes of that license, registration, or certification requirement.

(3) An employee leasing company 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 an employee leasing agreement with a client company who is subject to those requirements or regulations.

(4) A client company shall have the sole right of direction and control of the professional or licensed activities of covered employees and the client company's business. Those covered employees and client companies shall remain subject to regulation by the regulatory or governmental entity responsible for licensing, registration, or certification of those covered employees or client companies.

f. A client company's certification as a small, minority-owned, disadvantaged, woman-owned business enterprise or an historically underutilized business for the purposes of any bid, contract, purchase order, or agreement entered into with the State or a political subdivision of the State, shall not be affected because the client company has entered into an employee leasing agreement with an employee leasing company.

g. Any benefit that a client company is required to provide to covered employees that is provided to covered employees by an employee leasing company through an employee leasing agreement shall be credited against the client company's obligation to fulfill the requirement.

History

N.J. Stat. § 34:8-68