

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY
DIVISION OF ALCOHOLIC BEVERAGE CONTROL

AN 2024-08

ADVISORY NOTICE TO THE INDUSTRY REGARDING
EMPLOYEE LEASING AGREEMENTS

The Division of Alcoholic Beverage Control (“Division” or “ABC”) has been asked whether alcoholic beverage licensees may enter into employee leasing agreements to out-source certain non-operational employment related functions (e.g., payroll, tax and benefits administration, etc.) with employee leasing companies without violating the Alcoholic Beverage Control Act, N.J.S.A. 33:1-1 to -5.5, and N.J.A.C. 13:2-1.1 to -44.1 (collectively, “ABC Act”).

The Division will not administratively prosecute alcoholic beverage licensees who enter into employee leasing agreements for non-operational human resource services with Professional Employer Organizations (“PEOs”) that comply with all applicable legal requirements, as discussed below, unless the facts of a particular matter warrant otherwise.¹

I. Employee Leasing Companies²

A. Overview

Generally, employee leasing companies enable clients to cost-effectively out-source the management of human resources, employee benefits, payroll and workers’ compensation. Thus, in some respects, PEOs are similar to temporary staffing agencies, but PEOs generally provide a broader array of administrative and human resource services (unemployment,

¹ The scope of this Advisory Notice is limited to whether employee leasing agreements are generally permissible under the ABC Act. It is not an endorsement of the practice in general or in any particular circumstance or fact situation. This notice should not be relied upon as tax or legal advice beyond the ABC Act. An attorney or tax professional should be consulted for advice on specific legal or tax issues.

² Employee leasing companies are referred to as Professional Employer Organizations under State law and as Certified Professional Employer Organizations (“CPEOs”) by the Internal Revenue Service (“IRS”). For brevity, they will be collectively referred to herein as “PEOs” or generally as employee leasing companies, except when necessary to note a distinction. It should be noted that entities that are neither registered with the New Jersey Department of Labor and Workforce Development nor certified by the Internal Revenue Service performing the same services may be viewed as an undisclosed interest in violation of the ABC Act, depending on the facts and circumstances.

temporary disability insurance and workers' compensation coverage, etc.) with long-term contractual commitments to their clients. Many PEOs also provide workers with access to §401(k) plans, health, dental and life insurance, dependent care, flexible spending accounts and other benefits. National Association of Professional Employer Organizations. What is a PEO?, published at <http://napeo.org/what-is-a-peo/selecting-a-peo/faqs> (last accessed July 1, 2024). The client typically pays the PEO a fixed percentage of total payroll or a flat fee per employee per year, plus certain pass-through costs (discussed below).

The New Jersey Department of Labor and Workforce Development ("NJDOLE") regulates employee leasing companies and employee leasing agreements. See N.J.S.A. 34:8-67 to -8-78, and N.J.A.C. 12:16-24 (discussed below). PEOs must be registered with NJDOLE. N.J.S.A. 34:8-70 to -8-71. An employee leasing company (or an authorized "assurance organization" acting on its behalf) is required to submit initial and annual registration forms, ensure compliance with the financial security requirements set forth in N.J.A.C. 12:16-24.4 and the quarterly payroll tax certification of an independent certified public accountant under N.J.A.C. 12:16-24.10. PEOs are also required to provide a list of their clients that have covered employees in New Jersey with their initial and annual registration forms. N.J.S.A. 34:8-70.

Similarly, the IRS has established a voluntary certification program for PEOs. See IRS Bull. No. 2016-21 (revised May 23, 2016), published at <https://www.irs.gov/pub/irs-irbs/irb16-21.pdf> (last accessed July 1, 2024). Before it certifies a PEO under the federal Program, the IRS conducts "comprehensive background checks, including, but not limited to, checks on tax compliance, criminal background, professional experience (including through the contact of third-party references), credit history, and professional sanctions." Id. at 867. Notably, the IRS requires a criminal background check, but NJDOLE does not.

B. Employee Leasing Agreements

The relationship between a PEO and its client company (in this case, a licensee) begins when the parties enter into an employee leasing agreement ("Agreement"). N.J.S.A. 34:8-68 sets forth specific provisions which are required to be in Agreements. The PEO "hires" its initial employee complement from among the client's employees at the time the employee leasing agreement is executed, unless the client is a newly established business. N.J.S.A. 34:8-68a(6) and -73. These and later hired employees are known as "covered employees," and are considered "co-employees" of both the PEO and its client during the term of the Agreement. N.J.S.A. 34:8-67. Upon termination of the Agreement, the employees are considered employees only of the client. N.J.S.A. 34:8-68a(6).

Typically, Agreements designate the PEO as a "co-employer" that is responsible for performing "some or all of the federal employment tax withholding, reporting, and payment functions related to workers," IRS Bull. No. 2016-21 at 863, and similar obligations on the state level. "A PEO also may manage human resources, employee benefits, workers compensation claims, and unemployment insurance claims for the client." Ibid. Employee

wages and benefits expenses are deductible by the client. However, these payments may be reported under the PEO's Employer Identification Number ("EIN") if the PEO elects to use the "Entity Level Reporting Method," instead of the "Client Level Reporting Method." See N.J.S.A. 43:21-7.8b and -7.8c, respectively.³ Reporting in this manner could create practical problems for applicants, licensees and municipal issuing authorities.

Under the ABC Act, alcoholic beverage licenses are issued, renewed and transferred by the municipality in which the license is sited. However, local issuing authorities cannot exercise this authority until an applicant has obtained "an alcoholic beverage retail licensee clearance certificate" (a "Tax Clearance Certificate") from the New Jersey Division of Taxation. N.J.S.A. 33:1-17.1.

When the Division of Taxation reviews a licensee's tax status, it reviews payments made under the licensee's EIN in order to determine whether the licensee is current with its tax obligations. However, when a licensee does not report state tax payments under its EIN, but instead they are reported under a PEO's EIN with no indication that the payment was made on behalf of a specific licensee, the Division of Taxation's task requires additional review. This may delay the issuance of the Tax Clearance Certificate, which in turn also delays the municipality's ability to rule on the client's license application.

Moreover, because the PEO and the client become "co-employers" of those who work on the licensed premises, covered employees owe their employment status, at least in part, to an entity other than the licensee. This and the possibility that tax payments related to the employees may be reported under the PEO's EIN instead of the client-licensee's EIN, give rise to the question as to whether employee leasing agreements violate the ABC Act by creating either an interest in, or delegation of control over, the license by the PEO.

Payments made by a non-licensee on behalf of a licensee suggests the possibility of an undisclosed interest in violation of N.J.S.A. 33:1-25 and -26. Moreover, a licensee must not only have and maintain a continuing possessory interest and control over the licensed premises, N.J.A.C. 13:2-9.3, it must also have exclusive supervision and control of those it employs in furtherance of the licensed business. Fayette Fair Trade, Inc. v. Governing Body of City of Perth Amboy, 395 N.J. Super. 453, 467 (App. Div. 2007). See also N.J.S.A. 33:1-26 (making it a misdemeanor for a non-licensee to exercise the rights and privileges of a licensee). Simply put, a "licensee must be lord and master, the absolute boss, and that is not

³ Under the Entity Level Reporting Method, the state employer account number and contribution rate of the employee leasing company are used to report and pay contributions relating to covered employees. See N.J.S.A. 43:21-7.8b. Under the Client Level Reporting Method, the state employer account number and contribution rate of the client company are used to report and pay contributions relating to covered employees. See N.J.S.A. 43:21-7.8c.

possible unless he has an interest in the premises which gives him exclusive possession and control, for control shared with another, or divided, is no control at all.” Letters Re: Licensed Premises (Letter to Hon. Vincent S. Haneman), A.B.C. Bull. 449, Item 4 at 12 (March 8, 1941).

In Fayette Fair Trade, Inc., supra, the Appellate Division noted that:

The ABC’s decisions prohibiting undisclosed interests in licenses derive from the concept, implicit in N.J.S.A. 33:1–26, that a liquor license in New Jersey must be free “from any device which would subject it to the control of persons other than the licensee.” [Id., 395 N.J. Super. at 466, quoting The Boss Co., Inc. v. Bd. of Comm’rs of Atlantic City, 40 N.J. 379, 388 (1963)].

Thus, whether an employee leasing agreement creates an impermissible interest in, or delegation of control over, the license turns on the relationship between the PEO and the client-licensee.

In River Sys., Inc. v. State, Dep’t of Treasury, Div. of Taxation, 19 N.J. Tax 599 (2001), aff’d, 358 N.J. Super. 287 (App. Div. 2003), the Tax Court described the respective roles of the parties to an employee leasing arrangement as follows:

Under an employee leasing arrangement, ... [t]he employee leasing company assumes responsibility for obligations related to human resources, workers’ compensation, labor law compliance, payroll, and employment taxes. However, the client-company retains responsibility for the day-to-day management of the workers. Furthermore, the contracting company maintains all “hire and fire” authority, handles promotions, and provides workplace supervision as required. ... [Id. at 611, citing StaffMarket, Questions and Answers about PEOs, published at www.staffmarket.com (visited on November 5, 2001)].

Accord, IRS Bull. No. 2016-21 at 863.

In 2011 (effective August 19, 2012), the Legislature amended the New Jersey statute by adding:

[A PEO] shall not be deemed to engage in any occupation, trade, profession, or other activity that is subject to licensing ... 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.

... 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. [N.J.S.A. 34:8-68e(3) and -68e(4)(emphasis added)].

Accord, N.J.S.A. 34:8-68a(1)(the client licensee retains “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 ... or comply with any applicable licensure, regulatory or statutory requirement of the client company.”)(emphasis added).

Hence, covered employees remain under the direction and control of the client-licensee in the performance of the tasks it assigns to them, including exercise of the licensed privilege in furtherance of the licensed business. Therefore, its co-employer status notwithstanding, the PEO may neither exercise nor supervise the exercise of the licensed privilege of selling alcohol.⁴

Furthermore, alcoholic beverage licensees are “strictly and vicariously liable for any transactions on its licensed premises involving its employees ...,” Div. of A.B.C. v. Maynards, Inc., 192 N.J. 158, 181 (2007), regardless of notice and even if the violation is contrary to the licensee’s express instructions. F. & A. Distributing Co. v. Div. of A.B.C., 36 N.J. 34, 37 (1961). See also, N.J.A.C. 13:2-23.28. A “licensee may not avoid responsibility for acts performed by persons ... working in furtherance of the licensed premises.” G. & J.K. Enterprises, Inc. v. Div.

⁴ Parenthetically, Agreements must provide the PEO with authority to hire, terminate, discipline and reassign covered employees. N.J.S.A. 34:8-68a(4). This authority allows the PEO to act in concert with the client. Thus, the PEO, as co-employer, may hire or terminate a covered employee that was hired or terminated by the client. The statute does not suggest that the PEO’s authority supersedes that of the client.

Moreover, pursuant to N.J.S.A. 34:8-68a(6) and -73, the PEO hires the client’s employees at the time the employee leasing agreement is executed. That the licensee has already vetted and approved those who work on its premises is an additional indicia of the licensee’s control over its operations.

of A.B.C., 205 N.J. Super. 77, 83 (App. Div. 1985). Accord, IRS Bull. No. 2016-21 at 863 (“the client is ... legally responsible for federal employment tax compliance.”).

Accordingly, unless the facts of a particular case warrant a different conclusion, it appears that an employee leasing agreement for non-operational administrative and human resource services with a registered PEO that is in good standing with NJDOL (or with a CPEO that is in good standing with the IRS) above does not appear to be inconsistent with alcoholic beverage law.

Additionally, the Division notes that some New Jersey licensed chains hold and operate multiple licenses through their affiliates or subsidiaries. They also own and operate a subsidiary that performs services which are the equivalent of those provided by PEOs. At this time, the Division sees no reason why the foregoing conclusion should not apply to those affiliates or subsidiaries provided they are owned by the same corporate parent as the client-licensee.

C. PEO Compensation

PEOs charge fees to cover the cost of the administrative services they provide to their clients. A PEO’s billing might include statutory costs or “pass-through” costs for FICA, FUTA, Medicare, Workers’ Compensation Insurance costs, State Unemployment Taxes, administrative fees, etc. These fees may also include payroll processing, unemployment claims handling, worker’s compensation claims administration and many other services, etc. StaffMarket, Understanding PEO Pricing: Quote Types, published at <https://www.staffmarket.com/peo-pricing/types> (last accessed July 1, 2024).

Two common ways that PEO fees are calculated are: (1) a flat fee per covered employee per year and (2) a percentage applied to the total amount of payroll costs. Statutory costs or “pass-through” costs may also be included. Of course, actual fees or percentages will vary depending on the particular service package selected by the client-licensee. This Advisory Notice need not delve into the complexities of PEO fee calculation other than to note the following: the ultimate fee charged to a client-licensee must reasonably reflect the quantum and nature of services provided; the fee must be commercially reasonable and customary in the employee leasing industry; and the fee may not be based on a licensee’s sales of alcohol or profitability. The aforementioned methodologies appear to meet this standard. Should a question arise regarding the compensation methodology, it shall be the burden of the licensee to prove that the methodology satisfies the standard. A fee based, in part, on a licensee’s sales of alcohol or profitability does not satisfy this standard and is contrary to existing alcoholic beverage law. See Fayette Fair Trade, Inc., 395 N.J. Super. at 464-465 (“[S]omeone who is not a stockholder in a licensee corporation is not entitled to share in the benefits of ownership, which includes ... sharing in the profits from the sale of alcohol.”). Accord, In re: MS & W Distributors, Inc., A.B.C. Bull. 2404, Item 1 (May 29, 1980) and Div. of A.B.C. v. Jayson, Inc., 96 N.J.A.R.2d (ABC) 71, 75 (1996).

II. Conditions

Employee leasing agreements involving alcoholic beverage licensees must comply with the foregoing and following conditions:

1. Licensees may only enter into employee leasing contracts with PEOs that are registered or certified and in good standing with NJDOL or the IRS, as applicable. Corporate affiliates may do likewise provided they are owned by the same corporate parent as the client-licensees.
2. The owners of the PEO may not have any direct or indirect ownership interest in any entity licensed under the ABC Act. However, a corporate affiliate or subsidiary may provide non-operational administrative and human resource services (unemployment, temporary disability insurance and workers' compensation coverage, etc.) if they are owned by the same corporate parent as the client-licensee.
3. Employee leasing agreements must comply with all applicable laws and regulations.
4. Employee leasing agreements must be in writing and contain the following:
 - (a) The PEO (or corporate affiliate) shall fully cooperate with any administrative investigation conducted by ABC or the local issuing authority, in accordance with N.J.S.A. 33:1-35;
 - (b) Failure of the PEO (or corporate affiliate) to comply with the preceding paragraph may subject the client-licensee to disciplinary action against the client's alcoholic beverage license;
 - (c) The client-licensee may terminate the agreement if any act of the PEO (covered employees excluded) subjects the licensee to disciplinary action or if the PEO or CPEO is no longer in good standing; and
 - (d) The role of the PEO (or corporate affiliate) is subordinate to and supportive of the licensee's exclusive control over the licensed entity, its operations and licensed premises. Thus, although the PEO (or corporate affiliate) may provide advice regarding administrative and human resource services (unemployment, temporary disability insurance and workers' compensation coverage, etc.) issues, it may not influence or diminish, in any manner whatsoever, the client-licensee's authority over operational decisions (including hiring, firing and scheduling decisions) related to the exercise of the licensed privilege.

(e) This agreement may be terminated by the alcoholic beverage licensee upon a finding that any owner (in whole or in part) or operator (directly or indirectly) of the PEO has been convicted of a crime involving moral turpitude,⁵ with no further liability on the part of the licensee.

5. Employee leasing agreements may include managerial and non-managerial personnel, but not persons with ownership interests.⁶
6. All covered employees must satisfy the various qualifications applicable to persons employed on licensed premises. For example, they must be fully qualified as to age and free from conviction of crimes involving moral turpitude to the extent required by N.J.S.A. 33:1-26. If not so qualified, they must apply for and obtain the necessary employment permit or disqualification removal from ABC, pursuant to N.J.S.A. 33:1-31.2, before working on the licensed premises.
7. All covered employees must be listed on the employee form (Form E-141A) and provide accurate responses to all information requested on that form.
8. By entering into an employee leasing agreement, the client-licensee and PEO (or corporate affiliate) agree to keep and maintain all documents and records related to the employee leasing arrangement on the licensed premises for five (5) years and to immediately produce them when requested to do so by the Division, the local issuing authority or the Division of Taxation, unless the client-licensee has first obtained a permit pursuant to N.J.A.C. 13:2-29.4. These documents include, but are not limited to, proof of the PEO's current registration or certification (as applicable) and that it is in good standing, the current employee leasing agreement, all invoices from, and records of

⁵ The term "moral turpitude" denotes a serious crime from the viewpoint of society in general and usually contains elements of dishonesty, fraud or depravity. Such crimes are generally but not exclusively contained in the New Jersey Code of Criminal Justice, N.J.S.A. 2C:1-1 to -104.9, and are subject to indictment and punishment by confinement for over one year in State prison.

⁶ ABC is advised that it is not uncommon for covered employees to include business owners. However, licensed entities must remain independent and may not be subject to the control of persons other than their disclosed owners. Thus, owners of licensed entities may not be co-employees of a PEO vis-a-vis the licensed entity. This relationship may be considered a violation of the ABC Act. Notwithstanding, PEOs may perform limited ministerial payroll services related to the licensee's owners such as paying salary, withholding employee taxes, filing quarterly payroll tax reports and paying tax withholdings to the proper state and federal agencies and issuing employee W-2 and 1099 forms at the end of the year, etc.

payments to, the PEO (or corporate affiliate) and payroll records. If any of these records are kept and maintained by the PEO (or corporate affiliate) at its location pursuant to a permit pursuant to N.J.A.C. 13:2-29.4, the client-licensee shall produce those records in accordance with that regulation. Any failure to comply with the foregoing, or any other provision of the ABC Act, may subject the alcoholic beverage license to the penalties applicable to violations of N.J.A.C. 13:2-23.32. See N.J.A.C. 13:2-19.11(i). (All other records of receipts, disbursements and investment in the licensed entity continue to be governed by N.J.A.C. 13:2-23.32.)⁷

9. The PEO's compensation must reasonably reflect the quantum and nature of services provided and be commercially reasonable and customary in the employee leasing industry. Also, the PEO's (or corporate affiliate's) compensation must be completely unrelated to the licensee's sales of alcoholic beverages or the profitability of the client licensee.
10. The PEO (or corporate affiliate) is prohibited from obtaining any type of pledge or interest in the client's alcoholic beverage license in violation of N.J.S.A. 33:1-26.
11. In accordance with N.J.A.C. 13:2-23.28, the licensee shall be strictly and vicariously liable for any violations of the ABC Act or the regulations promulgated pursuant thereto engaged in, or allowed, permitted or suffered, by covered employees.
12. The client licensee shall remain solely liable and shall not be reimbursed by the PEO (or corporate affiliate) in any manner whatsoever for any penalty imposed for any violation of the ABC Act.
13. PEOs and corporate affiliates that perform services which are the equivalent of those provided by PEOs, may obtain guidance regarding the tax clearance requirements for license holders at: abcclearance.public@treas.nj.gov.

⁷ See also N.J.S.A. 34:1A-1.12 (providing that a written determination by the NJDOL commissioner to suspend a licensee's license may also lead to the rescission of the PEO's registration "unless the failure or continued failure was caused by incomplete, inaccurate, misleading, or false information provided to the employee leasing company by the client [licensee].")

III. Conclusion

For these reasons and subject to the foregoing, the Division will not administratively prosecute alcoholic beverage licensees that enter into employee leasing agreements with PEOs which are registered or certified and in good standing with NJDOL or the IRS, as applicable, provided the agreement complies with all applicable legal requirements and the limitations and conditions contained herein. Similarly, a corporate affiliate owned by the same corporate parent as the client-licensee may do likewise.

The Division reserves the right to revisit or modify the foregoing conclusions should circumstances require. This Advisory Notice shall remain in effect unless and until it is superseded by regulation or subsequent advisory notice.

This Advisory Notice does not provide legal advice beyond the ABC Act and should not be treated as providing legal advice beyond the ABC Act. This Advisory Notice does not establish any rights or obligations for any person. Licensees should speak to a qualified attorney for legal advice related to this Advisory Notice.

A handwritten signature in black ink, appearing to read "Kirstin L. Krueger", is positioned above a horizontal line.

KIRSTIN L. KRUEGER
INTERIM DIRECTOR

Date: August 20, 2024