

Clearinghouse Rule 09-008

STATE OF WISCONSIN
DEPARTMENT OF REGULATION AND LICENSING

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : DEPARTMENT OF REGULATION AND
DEPARTMENT OF REGULATION : LICENSING ADOPTING RULES
AND LICENSING : (CLEARINGHOUSE RULE 09-)

PROPOSED ORDER

An order of the Department of Regulation and Licensing to create ch. RL 186, relating to the registration and regulation of professional employer organizations and groups.

Analysis prepared by the Department of Regulation and Licensing.

ANALYSIS

Statutes interpreted:

Ch. 461, Stats., and 2007 Wisconsin Act 189.

Statutory authority:

Sections 227.11 (2), 461.02 (7) and 461.06, Stats.

Explanation of agency authority:

The Department of Regulation and Licensing is required under 2007 Wisconsin Act 189 to promulgate rules to implement the requirements under ch. 461, Stats., relating to the registration of professional employer organizations and groups.

Related statute or rule:

There are no other statutes or rules other than those listed above.

Plain language analysis:

This proposed rule-making order creates new rules relating to the registration of professional employer organizations and groups. The rules contain provisions for the application and renewal of registrations and grounds for discipline of registrants.

SECTION 1 creates the following provisions:

1. Definitions for the terms “applicant,” “client,” “controlling person,” “department,” “electronic record,” “electronic signature,” “professional employer group,” “professional employer organization” and “registrant.”
2. Application requirements for initial and renewal registrations, including requirements for limited and alternative registrations and verification of the financial capability of applicants.
3. Grounds for discipline of professional employer organizations and groups.

Summary of, and comparison with, existing or proposed federal legislation:

There is no existing or proposed federal regulation that relates to the regulation of professional employer organizations or groups.

Comparison with rules in adjacent states:

Iowa:

Iowa has no specific professional employer organization license required.

Illinois:

A license is required from the Division of Insurance to operate a professional employer organization under the Employee Leasing Company Act s215.113 (ILCS). Professional employer organizations are known as employee leasing companies.

Michigan:

Michigan has no specific professional employer organization license required.

Minnesota:

Professional employer organizations must register with the Department of Commerce relating to their ability to sponsor workers’ compensation insurance policies under s79.255 (MN Stats.).

Summary of factual data and analytical methodologies:

Small and medium sized businesses outsource to professional employer organizations everything from administering the payroll and paying employment related taxes, to risk management, recruiting, providing health benefits and securing workers’ compensation coverage according to the National Association of Professional Employer Organizations (NAPEO), the leading trade association for the profession, who also report that about 700 professional employer organizations are operating in 50 states; the average client of

NAPEO members is a small business with an average of 19 employees; and larger businesses are signing up more and more.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact report:

According to statistics provided by NAPEO, between 1980 and 2000, the number of labor laws and regulations grew by almost two-thirds according to the federal Small Business Administration, which also estimated that owners of small and mid-sized businesses spent up to 25% of their time on employment-related paperwork. Professional employer organizations assume much of that responsibility and helps companies comply with all the related regulations. Additional statistics indicate that professional employer organizations provided enhanced access to employee benefits for 2-3 million working Americans because of the savings and benefits they provide to small businesses. Further, because the average client of NAPEO's member professional employer organizations has only 19 worksite employees, without professional employer organization relationships, NAPEO member employees would not have protection under COBRA, ADA or the FMLA. NAPEO also reports that professional employer organizations help tens of thousands of companies provide benefits such as health care plans, 401K tax-free savings accounts and other perks to working Americans. An estimated 95 percent of workers in a professional employer organization arrangement have access to a pension plan, and workers with access to a 401K dropped from 28 percent to 19 percent. Lastly, NAPEO indicates that professional employer organizations help improve the work environment and make it safer in that they focus on workplace risk management, safety programs and good human resources practices. Professional employer organizations arrange coverage for workers' compensation with major insurance carriers and manage the claims as well.

Anticipated costs incurred by private sector:

The department finds that this rule has no significant fiscal effect on the private sector.

Fiscal estimate:

The department estimates that this rule will require staff time in the Office of Legal Counsel, Division of Management Services, Division of Board Services, and the Division of Professional Credentialing. The total one-time salary and fringe costs are estimated at \$45,466. The total on-going salary and fringe costs are estimated at \$29,340 with supplies and services costs of \$12,500.

Effect on small business:

These proposed rules will have no significant economic impact on a substantial number of small businesses, as defined in s. 227.114 (1), Stats. The Department's Regulatory Review Coordinator may be contacted by email at larry.martin@wisconsin.gov, or by calling 608-266-8608.

Agency contact person:

Pamela Haack, Paralegal, Department of Regulation and Licensing, Office of Legal Counsel, 1400 East Washington Avenue, Room 152, P.O. Box 8935, Madison, Wisconsin 53708; telephone 608-266-0495; email at pamela.haack@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Pamela Haack, Paralegal, Department of Regulation and Licensing, Office of Legal Counsel, 1400 East Washington Avenue, Room 152, P.O. Box 8935, Madison, Wisconsin 53708-8935, or by email to pamela.haack@wisconsin.gov. Comments must be received on or before March 20, 2009, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. Chapter RL 186 is created to read:

CHAPTER RL 186

REGISTRATION AND REGULATION OF PROFESSIONAL
EMPLOYER ORGANIZATIONS AND GROUPS

SUBCHAPTER I – AUTHORITY AND DEFINITIONS

RL 186.01 Authority. The rules in ch. RL 186 are adopted under the authority of s. 227.11 (2) and ch. 461, Stats.

RL 186.02 Definitions. As used in ch. RL 186 and ch. 461, Stats.:

(1) “Applicant” means a professional employer organization or a professional employer group that applies for registration under this chapter.

(2) “Client” means any person that enters into a written contract with a professional employer organization or a professional employer group for the provision of the nontemporary, ongoing workforce of the person.

(3) “Controlling person” means any of the following:

(a) A person who, individually or acting in concert with one or more other persons, owns or controls, directly or indirectly, 25 percent or more of the ownership interest of an applicant or registrant.

(b) A person who serves as president or chief executive officer of an applicant or registrant or who otherwise has the authority to act as the senior executive officer of an applicant or registrant.

(4) “Department” means the department of regulation and licensing.

(5) “Electronic record” means a record that is created, generated, sent, communicated, received, or stored by electronic means.

(6) “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(7) “Professional employer group” means 2 or more professional employer organizations that are controlled by the same person.

(8) “Professional employer organization” means a person that is engaged in the business of entering into written contracts for the provision of the nontemporary, ongoing employee workforce of a client and providing services under those contracts and that under those contracts has the obligation to pay the employees providing services for those clients from its own accounts, regardless of whether the person uses the term “professional employer organization,” “PEO,” “staff leasing company,” “registered staff leasing company,” “employee leasing company,” or “administrative employer,” or uses any other name, as part of the person’s business name or to describe the person’s business.

(9) “Registrant” means a professional employer organization or a professional employer group that is registered under this chapter.

SUBCHAPTER II – APPLICATION FOR REGISTRATION AND RENEWAL OF REGISTRATION

RL 186.03 Initial registrations. (1) Each professional employer organization or professional employer group that is operating in this state on July 1, 2009, shall register with the department by no later than 180 days after that date. An initial registration is valid until 180 days after the end of the first fiscal year of the registrant that ends more than one year after July 1, 2009.

(2) Any person that is not engaged in the business of providing professional employer services in this state on July 1, 2009, shall register with the department before engaging in that business in this state. An initial registration is valid until 180 days after the end of the first fiscal year of the registrant that ends after the date of initial registration.

RL 186.04 Applications. A person applying for registration shall apply on a form provided by the department. An applicant who fails to comply with a request for information related to the application, or fails to meet all requirements for the registration within 180 days from the date of filing shall file a new application and fee if registration is sought at a later date. The application shall include all of the following:

(1) The fee determined by the department under s. 440.03 (9) (a), Stats.

(2) A registration form prescribed by the department that contains all of the following information:

(a) The name or names under which the applicant conducts business.

(b) The address of the principal place of business of the applicant and of each office that the applicant maintains in this state.

(c) A list by jurisdiction of each name under which the applicant has operated in the 5 years preceding the date of the application, including any alternate names of the applicant, the names of any predecessor business entities of the applicant, and, if known, the names of any successor business entities of the applicant.

(d) A statement of ownership, which shall include the name and business experience of every controlling person, as defined in s. RL 186.02 (3) (a), of the applicant.

(e) A statement of management, which shall include the name and business experience of every controlling person, as defined in s. RL 186.02 (3) (b), of the applicant.

(f) A financial statement that sets forth the financial condition of the applicant as of a date that is not more than 13 months preceding the date of the application, that is prepared in accordance with generally accepted accounting principles, and that has been audited by an independent certified public accountant. The financial statement shall be without qualification as to the going concern status of the applicant. A professional employer group may meet these requirements by submitting a combined or consolidated audited financial statement. An applicant that does not have sufficient operating history to have an audited financial statement that is based on at least 12 months of operating history may meet these requirements by submitting financial statements that have been reviewed by an independent certified public accountant.

(g) Documentary evidence satisfactory to the department that the applicant maintains financial capability, as required under s. RL 186.07.

(h) A statement that the applicant has not been convicted of any crime in connection with the operation of a professional employer organization or professional employer group, any crime that involves fraud or deceit, or any crime that otherwise affects the ability of the applicant, registrant, or controlling person to operate a professional employer organization or professional employer group.

Note: Applications for registration are available from the Department of Regulation and Licensing, 1400 East Washington Avenue, P.O. Box 8935, Madison, Wisconsin 53708, or from the department's website at: <http://drl.wi.gov>.

RL 186.05 Limited registrations. (1) A professional employer organization or professional employer group that is domiciled outside this state, that is registered or licensed as a professional employer organization or professional employer group in another state, that does not maintain an office in this state or directly solicit clients that are located or domiciled in this state, and that has no more than 50 employees performing services for clients in this state on any given day, may apply for limited registration by filing with the department a limited registration form prescribed by the department and paying the initial credential fee determined by the department under s. 440.03 (9) (a), Stats. An applicant that is seeking limited registration shall, in addition to the information provided under s. RL 186.04, provide the department with information and documentation showing that the applicant meets the qualifications specified in this subsection for limited registration.

(2) A professional employer organization or professional employer group seeking limited registration that has employees performing services for clients in this state on July 1, 2009, shall register with the department no later than 180 days after that date. The limited registration shall be valid until 180 days after the end of the first fiscal year of the registrant that ends more than one year after July 1, 2009.

(3) A professional employer organization or professional employer group seeking limited registration that does not have employees performing services for clients in this state on July 1, 2009, shall register with the department before contracting with a client in this state. The initial limited registration shall be valid until 180 days after the end of the first fiscal year of the registrant that ends after the date of initial registration.

(4) A registrant that wishes to renew its limited registration shall, in addition to complying with the renewal requirements under s. RL 186.09, provide the department with information and documentation showing that the registrant continues to meet the qualifications specified in sub. (1) for limited registration. The limited registration shall be valid for one year after the date of renewal.

(5) A limited registrant is not required to comply with the financial capability requirement under s. RL 186.07.

RL 186.06 Professional employer group registrations. Two or more professional employer organizations that are part of a professional employer group may register under this section or renew a registration by providing the information required under s. RL 186.04, 186.05 or 186.09, on a combined or consolidated basis, paying the initial credential or renewal fee determined by the department under s. 440.03 (9) (a), Stats., and guaranteeing each other's obligations. If a professional employer group provides a combined or consolidated financial statement under s. RL 186.04 (2) (f), that includes the financial condition of entities that are not part of the professional employer

group, the person controlling the professional employer group shall guarantee the obligations of the professional employer organizations in the professional employer group.

RL 186.07 Financial capability. Except as provided in s. RL 186.05 (5) or 186.08, a professional employer organization or professional employer group shall maintain one of the following:

(1) **WORKING CAPITAL REQUIREMENT.** (a) Working capital, as defined by generally accepted accounting principles, of not less than \$100,000, as shown in the financial statement submitted to the department under s. RL 186.04 (2) (f), 186.06 or 186.09. If a professional employer organization or professional employer group has less than \$100,000 in working capital, the department may issue a registration or renewal registration contingent on the registrant meeting the working capital requirement no later than 180 days after the issuance of the registration or renewal registration.

(b) During the period of contingent registration, the registrant shall submit quarterly financial statements to the department accompanied by an attestation by the chief executive officer of the registrant that all wages, salaries, employee benefits, worker's compensation insurance premiums, payroll taxes, unemployment insurance contributions, and other amounts that are payable to or with respect to an employee of the registrant performing services for a client were paid by the registrant when due.

(2) **ALTERNATIVE COMMITMENT.** (a) A bond, certificate of deposit, escrow account, or irrevocable letter of credit in an amount that is not less than \$100,000 or, if the financial statement submitted to the department under s. RL 186.04 (2) (f), 186.06 or 186.09 indicates a deficit in working capital, a bond, certificate of deposit, escrow account, or irrevocable letter of credit in an amount that is not less than \$100,000 plus an amount that is sufficient to cover that deficit.

(b) The commitment shall be in a form approved by the department, shall be held in a depository designated by the department, and shall secure the payment by the professional employer organization or professional employer group of any wages, salaries, employee benefits, worker's compensation insurance premiums, payroll taxes, unemployment insurance contributions, or other amounts that are payable to or with respect to an employee performing services for a client if the professional employer organization or professional employer group does not make those payments when due.

(c) The commitment shall be established in favor of or be made payable to the department, for the benefit of the state and any employee to whom or with respect to whom the professional employer organization or professional group does not make a payment when due.

(d) The professional employer organization or professional employer group shall file with the department any agreement, instrument, or other document that is necessary to enforce the commitment against the professional employer organization or professional employer group, or against any relevant 3rd party, or both.

RL 186.08 Alternative registrations. The department may accept a registration of a professional employer organization or professional employer group without compliance with s. RL 186.04, 186.05, 186.06, 186.07 or 186.09, or the rules promulgated under s. 461.06, Stats., on acceptance by the department of assurance provided by a bonded, independent, and qualified assurance organization that has been approved by the department that provides assurance satisfactory to the department that the professional employer organization or professional employer group is qualified to engage in the business of providing professional employer services in this state.

RL 186.09 Renewal of registrations. (1) APPLICATION. A registrant that wishes to renew its registration shall, by no later than 180 days after the end of the registrant's fiscal year, renew that registration by doing all of the following:

(a) Notifying the department, on a form provided by the department, of any changes in the information specified in s. RL 186.04 (2) (a) to (e) and (g).

(b) Filing an updated financial statement as described in s. RL 186.04 (2) (f).

(c) Submitting documentary evidence satisfactory to the department that the registrant maintains financial capability, as required under s. RL 186.07.

(d) Paying the renewal credential fee determined by the department under s. 440.03 (9) (a), Stats.

(2) EXTENSION OF TIME. A registrant may apply to the department for an extension of the time within which to renew a registration by providing with the application a letter from the certified public accountant who is auditing the registrant's financial statement stating the reasons for the delay and the anticipated completion date of the audit.

(3) DURATION. A renewal registration is valid for one year after the date of renewal.

RL 186.10 Submission of electronic records. Any form, application or document required to be filed with the department under this chapter may be submitted in the form of an electronic record that may include an electronic signature.

SUBCHAPTER III - DISCIPLINE

RL 186.11 Grounds. Subject to the rules promulgated under s. 440.03 (1), Stats., the department may reprimand a professional employer organization or professional employer group or deny, limit, suspend, revoke, restrict, refuse to renew, or otherwise withhold a registration if the department finds that an applicant, registrant, or controlling person has done any of the following:

- (1) Conducted any of the activities specified in s. 461.02 (1), Stats., without first registering with the department as provided in s. 461.02, Stats.
- (2) Knowingly made a material misrepresentation or false statement in an application for registration or for renewal of a registration under s. RL 186.04 or 186.09, or in a report under s. 108.067, Stats.
- (3) Been convicted of any crime in connection with the operation of a professional employer organization or professional employer group, any crime that involves fraud or deceit, or any crime that otherwise affects the ability of the applicant, registrant, or controlling person to operate a professional employer organization or professional employer group.
- (4) Willfully committed a violation of ch. 461, Stats., or of a rule promulgated under s. 461.06, Stats.

(END OF TEXT OF RULE)

The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register, pursuant to s. 227.22 (2) (intro.), Stats.

Dated _____

Agency _____

Celia M. Jackson, Secretary
Department of Regulation and Licensing

Ch. RL 186 CR09- (Professional employer organizations) Draft to CH 1-21-09