By: Representative Ford (54th)

To: Insurance

COMMITTEE SUBSTITUTE
FOR
HOUSE BILL NO. 331

AN ACT TO PROVIDE FOR THE RECOGNITION AND REGISTRATION OF PROFESSIONAL EMPLOYER ORGANIZATIONS OPERATING IN THE STATE OF MISSISSIPPI; TO PROVIDE DEFINITIONS FOR THE ACT; TO CLARIFY WHAT THE ACT DOES NOT DO; TO PROVIDE THE PROCEDURES FOR REGISTRATION WITH THE MISSISSIPPI INSURANCE DEPARTMENT UNDER THIS ACT; TO PROVIDE REGISTRATION FEES; TO PROVIDE FOR CERTAIN VIOLATIONS UNDER THIS ACT AND PENALTIES THAT MAY BE IMPOSED BY THE COMMISSIONER OF INSURANCE FOR SUCH VIOLATIONS; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. 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 Mississippi Insurance Department, as provided in this act.

SECTION 2. As used in this act the following terms shall have the following meanings, unless the context clearly indicates otherwise:

(a) "Client" means any person who enters into a professional employer agreement with a professional employer organization.

(b) "Co-employer" means either a professional employer organization 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:

(i) The professional employer organization is entitled to enforce only such employer rights, and is subject to only those obligations specifically allocated to the professional employer organization by the professional employer agreement or this act;

(ii) 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

(iii) The client is entitled to enforce any right and obligated to perform any obligation of an employer not specifically allocated to the professional employer organization by the professional employer agreement or this act.

(d) "Commissioner" means the Commissioner of the Mississippi Insurance Department.

(e) "Covered employee" means an individual having a co-employment relationship with a professional employer organization and a client who meets all of the following criteria: (i) the individual has received written notice of co-employment with the professional employer organization, 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 professional employer organization 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.

(f) "Department" means the Mississippi Insurance Department.

(g) "PEO group" means two (2) or more professional employer organizations 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 professional employer organization that provides:

(i) For the co-employment of covered employees;

(ii) For the allocation of employer rights and obligations between the client and the professional employer organization with respect to the covered employees; and

(iii) That the professional employer organization 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:

(i) 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;

(ii) 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

(iii) 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:

(i) Recruiting and hiring its own employees,

(ii) Finding other organizations that need the services of those employees,

(iii) 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

(iv) Customarily attempting to reassign the employees to other organizations when they finish each assignment.

SECTION 3. (1) 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 Section 71-1-47, Mississippi Code of 1972.

(2) Nothing in this act or in any professional employer agreement shall:

(a) 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.

(b) 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.

(c) 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.

(3) 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.

(a) 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.

(b) 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.

(c) 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.

(4) 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 the 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.

(5) 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. (1) 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.

(2) Each applicant for registration under this act, shall provide the Insurance Department with the following information:

(a) The name or names under which the PEO conducts business;

(b) The address of the principal place of business of the PEO and the address of each office it maintains in this state;

(c) The PEO's taxpayer or employer identification number;

(d) A list by jurisdiction of each name under which the PEO has operated in the preceding five (5) years, including any alternative names, names of predecessors and, if known, successor business entities;

(e) 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 (25%) or more of the equity interests of the PEO;

(f) 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

(g) 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 thirteen (13) months. Thereafter, a PEO or PEO group shall file on an annual basis, within one hundred eighty (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 the Insurance Department, 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.

(3) (a) Each PEO operating within this state as of the effective date of this act shall complete its initial registration not later than one hundred eighty (180) days after the effective date of this act. Such initial registration shall be valid until one hundred eighty (180) days from the end of the PEO's first fiscal year end that is more than one (1) year after the effective date of this act.

(b) 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 (5) business days of its knowledge of this fact and file a limited registration application under subsection (6) below or a full business registration if there are more than fifty (50) covered employees. The department may issue an interim operating permit for the period the registration applications are pending if (i) the PEO is currently registered or licensed by another state and

(ii) the department determines it to be in the best interests of the potential covered employees.

(4) Within one hundred eighty (180) days after the end of a registrant's fiscal year, such registrant shall renew its registration by notifying the Insurance Department 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.

(5) 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.

(6) (a) A PEO is eligible for a limited registration under this act if such PEO:

(i) Submits a properly executed request for limited registration on a form provided by the Insurance Department;

(ii) Is domiciled outside this state and is licensed or registered as a professional employer organization in another state;

(iii) Does not maintain an office in this state or directly solicit clients located or domiciled within this state; and

(iv) Does not have more than fifty (50) covered employees employed or domiciled in this state on any given day.

(b) A limited registration is valid for one (1) year, and may be renewed.

(c) A PEO seeking limited registration under this section shall provide the Insurance Department with information and documentation necessary to show that the PEO qualifies for a limited registration.

(d) Section 6 of this act shall not apply to applicants for limited registration.

(7) The Insurance Department shall maintain a list of professional employer organizations registered under this act that is readily available to the public by electronic or other means.

(8) The Insurance Department may prescribe forms necessary to promote the efficient administration of this section.

(9) The Insurance Department shall to the extent practical permit the acceptance of electronic filings in conformance with Chapter 12, Title 75, Mississippi Code of 1972, including applications, documents, reports, and other filings required by

this act. The Insurance Department may provide for the acceptance of electronic filings and other assurance by an independent and qualified assurance organization approved by the Commissioner 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 commissioner 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.

(10) 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 Insurance Department, 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. (1) Upon filing an initial registration statement under this act, a PEO shall pay an initial registration fee not to exceed Five Hundred Dollars ($500.00).

(2) Upon each annual renewal of a registration statement filed under this act, a PEO shall pay a renewal fee not to exceed Two Hundred Fifty Dollars ($250.00).

(3) The Insurance Department shall determine by rule any fee to be charged for a group registration.

(4) Each PEO seeking limited registration under the terms of this subsection shall pay a fee in the amount not to exceed Two Hundred Fifty Dollars ($250.00) upon initial application for limited registration and upon each annual renewal of such limited registration.

(5) A PEO seeking registration pursuant to Section 4(9) of this act shall pay an initial and annual fee not to exceed Two Hundred Fifty Dollars ($250.00).

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

SECTION 6. Except as provided by Section 4(6) and (9) of this act, 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 Insurance Department 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 One Hundred Thousand Dollars ($100,000.00) to the Insurance Department. Such bond to be held by a depository designated by the Insurance Department, 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. (1) Except as specifically provided in this act or in the professional employer agreement, in each co-employment relationship:

(a) 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

(b) 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.

(c) 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 the client's fiduciary responsibilities, or to comply with any licensure requirements applicable to the client or to the covered employees.

(2) 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:

(a) The allocation of rights, duties and obligations as described in subsection (1) of this section.

(b) 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;

(c) 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.

(3) 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.

(4) Except to the extent otherwise expressly provided by the applicable professional employer agreement:

(a) A client shall be solely responsible for the quality, adequacy or safety of the goods or services produced or sold in the client's business.

(b) 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.

(c) 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.

(d) 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.

(e) Nothing in this subsection shall serve to limit any contractual liability or obligation specifically provided in the written professional employer agreement.

(f) 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.

(5) 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.

(6) For purposes of this state or any county, municipality or other political subdivision thereof:

(a) 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.

(b) 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.

(c) 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.

(d) 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. (1) 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.

(2) A fully-insured welfare benefit plan offered to the covered employees of a PEO shall be treated for purposes of state law as a single employer welfare benefit plan.

(3) 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 PEO shall be considered employees of that PEO.

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

(a) Utilize a third-party administrator licensed to do business in this state;

(b) 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");

(c) 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

(d) 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. (1) 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 Department of Insurance in conjunction with any registration, renewal, or in any report required under this act.

(2) Subject to Section 25-43-1.101, et seq., Mississippi Code of 1972, in accordance with the Mississippi Administrative Procedures Law, disciplinary action may be taken by the Insurance Department for violation of subsection (1)(a) or (b) 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 of this act or any order or regulation issued by the department under this act.

(3) 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, the commissioner may:

(a) Deny an application for a license;

(b) Revoke, restrict or refuse to renew a license;

(c) Impose an administrative penalty in an amount not to exceed One Thousand Dollars ($1,000.00) for each material violation;

(d) Place the licensee on probation for the period that the department specified, and subject to conditions that the department specifies; or

(e) Issue a cease and desist.

SECTION 10. This act shall take effect and be in force from and after July 1, 2021, and shall stand repealed from and after June 30, 2021.