

BILL ANALYSIS

Senate Research Center

S.B. 1286
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Business & Commerce
7/26/2013
Enrolled

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

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

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

S.B. 1286 amends current law relating to the regulation of professional employer services; authorizing fees.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Texas Commission of Licensing and Regulation is modified in SECTION 4 (Section 91.002, Labor Code), SECTION 11 (Section 91.019, Labor Code), and SECTION 29 of this bill.

Rulemaking authority previously granted to the comptroller of public accounts of the State of Texas is modified in SECTION 22 (Section 151.057, Tax Code) of this bill.

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 16 (Section 91.0411, Labor Code) and SECTION 29 of this bill.

SECTION BY SECTION ANALYSIS

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

CHAPTER 91. PROFESSIONAL EMPLOYER ORGANIZATIONS

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

SECTION 3. Amends Chapter 91, Labor Code, by adding Sections 91.0011 and 91.0012, as follows:

Sec. 91.0011. COEMPLOYMENT RELATIONSHIP. (a) Provides that a coemployment relationship is intended to be an ongoing relationship rather than a temporary or specific

one, in which the rights, duties, and obligations of an employer that arise out of an employment relationship are allocated between coemployers under a professional employer services agreement. Provides that coemployment is not a joint employment arrangement.

(b) Provides that in a coemployment relationship:

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

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

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

Sec. 91.0012. COVERED EMPLOYEE. (a) Requires a covered employee to meet all the following criteria:

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

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

(b) Provides that an individual who is an executive employee, as described by Section 406.097 (Executive Employees of Certain Business Entities), of the client is a covered employee, except to the extent the professional employer organization and the client expressly agree in the professional employer services agreement that the individual is not a covered employee.

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

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

(c) Makes a conforming change.

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

SECTION 6. Amends Sections 91.004, 91.005, 91.006, 91.007, 91.011, and 91.012, Labor Code, as follows:

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

(b) Provides that a covered employee who is licensed, registered, or certified under law, is considered to be an employee of the client for the purpose of that

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

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

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

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

(b) Makes conforming changes.

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

Sec. 91.011. LICENSE REQUIRED. Prohibits a person from engaging in or offering professional employer services, rather than staff leasing services, in this state unless the person holds a license issued under this chapter.

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

SECTION 7. Amends Sections 91.014(a) and (c), Labor Code, as follows:

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

(c) Makes a conforming change.

SECTION 8. Amends Section 91.015(a), Labor Code, to make conforming changes.

SECTION 9. Amends Section 91.017(a) and (c), Labor Code, as follows:

(a) Requires each applicant for an original or renewal professional employer organization license to pay to TDLR before the issuance of the license or license renewal a fee set by TDLR by rule. Makes a conforming change.

(c) Authorizes, rather than requires, fees collected by TDLR under this chapter to be used only to implement this chapter.

SECTION 10. Amends Sections 91.018(e) and (f), Labor Code, as follows:

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

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

SECTION 11. Amends Sections 91.019(a), (b), and (c), Labor Code, as follows:

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

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

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

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

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

Makes conforming changes.

(c) Makes conforming changes.

SECTION 12. Amends Section 91.020, Labor Code, to make conforming changes.

SECTION 13. Amends Section 91.021(b), Labor Code, to make conforming changes.

SECTION 14. Amends Subchapter C, Chapter 91, Labor Code, as follows:

SUBCHAPTER C. PROFESSIONAL EMPLOYER SERVICES AGREEMENT

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

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

(c) Makes conforming changes.

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

(b) Provides that, notwithstanding any other provision of this chapter, a client retains sole responsibility for the direction and control of covered employees as necessary to conduct the client's business, discharge any applicable fiduciary duty, or comply with any licensure, regulatory, or statutory requirement; goods

and services produced by the client; and the acts, errors, and omissions of covered employees committed within the scope of the client's business. Makes conforming changes.

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

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

SECTION 15. Amends Section 91.041, Labor Code, by amending Subsections (a) and (b) and adding Subsections (a-1) and (a-2), as follows:

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

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

(a-2) Requires that a fully insured welfare benefit plan offered to the covered employees of a license holder and provided by an insurance company authorized to provide that insurance in this state or a self-funded health benefit plan sponsored by a license holder as provided by Section 91.0411 be treated for purposes of state law as a single employer welfare benefit plan.

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

SECTION 16. Amends Subchapter D, Chapter 91, Labor Code, by adding Section 91.0411, as follows:

Sec. 91.0411. SELF-FUNDED HEALTH BENEFIT PLAN. (a) Provides that, in this section, "commissioner" means the commissioner of insurance (commissioner).

(b) Authorizes a license holder to sponsor a benefit plan that is not fully insured if the license holder meets the requirements of this section and is approved to sponsor the plan by the commissioner.

(c) Authorizes the commissioner, on notice and opportunity for all interested persons to be heard, adopt rules and issue orders reasonable necessary to augment and implement the regulation of benefit plans sponsored by a license holder that are not fully insured. Prohibits the commissioner from adopting a rule that requires clients or covered employees to be members of an association or group in the same trade or industry in order to be covered by a license holder-sponsored benefit plan that is not fully insured. Requires that the rules include all requirements that are required to be met by the license holder and the plan, including:

(1) initial and final approval requirements;

- (2) authority to prescribe forms and items to be submitted to the commissioner by the license holder;
- (3) a fidelity bond;
- (4) use of an independent actuary;
- (5) use of a third-party administrator;
- (6) authority for the commissioner to examine an application or a plan;
- (7) the minimum number of clients and covered employees covered by the plan;
- (8) standards for those natural persons managing the plan;
- (9) the minimum amount of gross contributions;
- (10) the minimum amount of written commitment, binder, or policy for stop-loss insurance;
- (11) the minimum amount of reserves; and
- (12) a fee in an amount reasonable and necessary to defray the costs of administering this section to be deposited to the credit of the operating fund of TDI.

(d) Provides that information submitted under this section is confidential and not subject to disclosure under Chapter 552 (Public Information), Government Code.

(e) Requires each license holder under this section to appoint the commissioner as its resident agent for purposes of service of process. Provides that the fee for that service is \$50, payable at the time of appointment.

(f) Authorizes the commissioner to examine the affairs of any plan and is required to have access to the records of the plan. Authorizes the commissioner to examine under oath a manager or employee of the license holder in connection with the plan.

(g) Authorizes the commissioner, in addition to any requirement or remedy under a law, to suspend, revoke, or limit the authorization of a plan if the commissioner determines, after notice and hearing, that the plan does not comply with this section. Authorizes the commissioner to notify the attorney general of a violation of this section, and authorizes the attorney general to apply to a district court in Travis County for leave to file suit in the nature of quo warranto or for injunctive relief or both.

(h) Provides that a plan under this section is subject to Chapters 401 (Audits and Examinations), 404 (Financial Condition), 441 (Supervision and Conservatorship), and 443 (Insurer Receivership Act), Insurance Code.

SECTION 17. Amends Section 91.042, Labor Code, by amending Subsections (a) through (h) and adding Subsections (a-1), (a-2), and (c-1), as follows:

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

(a-1) Requires the client and the professional employer organization to specify in the professional employer services agreement whether the parties have elected to obtain workers' compensation insurance coverage for the covered employees and to specify which party must maintain coverage. Provides that, if the license holder maintains workers' compensation insurance coverage for the client, an individual who is an executive employee, as described by Section 406.097, of the client is eligible to be treated as an executive employee for premium calculation and classification purposes. Requires that a copy of the professional employer services agreement be provided to the Texas Department of Insurance (TDI) on request. Provides that information obtained by TDI under this section is confidential and not subject to disclosure under Chapter 552, Government Code.

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

(b) Requires the license holder, if a license holder maintains workers' compensation insurance coverage for covered employees, to pay workers' compensation insurance premiums for the covered employees based on the experience rating of the client for the first two years the covered employees are covered under the professional employer organization's policy, rather than based on the experience rating of the client company for the first two years the client company has a contract with the license holder, and as further provided by rule by TDI.

(c) Requires a license holder and the license holder's client, for workers' compensation insurance purposes, to be coemployers. Provides that, if either a license holder or a client elects to obtain workers' compensation insurance coverage for covered employees, the client and the license holder are subject to Sections 406.005 (Employer Notice to Employees; Administrative Violation) 406.034 (Employee Election) 408.001 (Exclusive Remedy; Exemplary Damages), and 411.032 (Employer Injury and Occupational Disease Report; Administrative Violation). Makes conforming changes.

(c-1) Provides that, notwithstanding Subsection (c), for purposes of Section 462.308(a)(2) (relating to entitling the Texas Property and Casualty Insurance Guaranty Association to recover the amount of a covered claim for workers' compensation insurance benefits and the costs of administration and defense of the claim paid under this chapter from an insured employer whose net worth on December 31 of the year preceding the date the insurer becomes an impaired insurer exceeds \$50 million), Insurance Code, the client is considered to be the insured employer.

(d) Provides that if a license holder or a client does not elect to obtain workers' compensation insurance coverage for covered employees, both the license holder and the client are subject to Sections 406.004 (Employer Notice to Division), 406.005, 406.033 (Common-Law Defenses; Burden of Proof), and 411.032. Makes a conforming change.

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

Deletes existing text requiring that the premium for the workers' compensation insurance policy of the company after the expiration of the two-year period under Subsection (b), if

the client company obtains a new workers' compensation insurance policy in the company's own name or adds the company's former assigned workers to an existing policy, be based on the lower of the experience modifier of the company before entering into the staff leasing arrangement or the experience modifier of the license holder at the time the staff leasing arrangement terminated.

(f) Requires an insurer, rather than TDI, on request, to provide the necessary computations to the prospective workers' compensation insurer of the client, rather than company, to comply with Subsection (e).

(g) Requires a license holder that elects to provide workers' compensation insurance for covered employees, on the written request of a client, to provide to the client a list of claims associated with that client made against the license holder's workers' compensation policy, rather than requiring a license holder that elects to provide workers' compensation insurance for assigned employees, on the written request of a client company, to provide to the client company a list of claims associated with that client company made against the license holder's workers' compensation policy.

(h) Requires the license holder to provide the information described by Subsection (g) in writing from the license holder's own records, if the license holder is a qualified self-insurer, or from information the license holder received from the license holder's workers' compensation insurance provider following the license holder's request under Section 2051.151 (Notice of Claims Information to Policyholder Required; Administrative Penalty), Insurance Code, not later than the 60th day after the date the license holder receives the client's, rather than the client company's, written request. Provides that, for purposes of this subsection, information is considered to be provided to the client, rather than the client company, on the date the information is personally delivered to the client, rather than the client company.

SECTION 18. Amends Sections 91.044, 91.046, 91.048, 91.050, 91.061, 92.012, and 201.030, Labor Code, as follows:

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

Sec. 91.046. CONTRACTUAL DUTIES. Provides that each license holder is responsible for the license holder's contractual duties and responsibilities to manage, maintain, collect, and make timely payments for certain obligations, including for any other expressed responsibility within the scope of the professional employer services agreement for fulfilling the duties imposed under this section and Sections 91.032, 91.047 (Compliance with Other Laws), and 91.048. Makes conforming changes.

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

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

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

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

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

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

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

Sec. 92.012. EXEMPTIONS FROM LICENSING REQUIREMENT. Provides that this chapter does not apply to certain groups, including a professional employer organization, and to make a conforming change.

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

SECTION 19. Amends Section 207.045(i), Labor Code, to make conforming changes.

SECTION 20. Amends the heading to Section 415.011, Labor Code, to read as follows:

Sec. 415.011. NOTICE OF PROFESSIONAL EMPLOYER ORGANIZATION WORKERS' COMPENSATION CLAIM AND PAYMENT INFORMATION; ADMINISTRATIVE VIOLATION.

SECTION 21. Amends Section 415.011, Labor Code, by amending Subsections (a) and (c) and adding Subsection (a-1), as follows:

(a) Defines "license holder" in this section.

(a-1) Provides that, except as provided by Subsection (c), a license holder, rather than a staff leasing services company license holder, commits a violation if the license holder fails to provide the information required by Sections 91.042(g) and (h).

(c) Provides that a license holder, rather than a staff leasing services company license holder, does not commit an administrative violation under this section if the license holder requested the information required by Sections 91.042(g) and (h) from the license holder's workers' compensation insurance provider and the provider does not provide the information to the license holder within the required time. Requires the license holder to notify TDI of a provider's failure to comply with the requirements of Section 2051.151, Insurance Code.

SECTION 22. Amends Section 151.057, Tax Code, as follows:

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

SECTION 23. Amends Section 171.0001, Tax Code, by amending Subdivisions (6) and (15) to redefine "client" and "professional employer organization," rather than "staff leasing services company," and adding Subdivision (8-a) to define "covered employee" for this section.

SECTION 24. Amends Section 171.101(b), Tax Code, to make conforming changes.

SECTION 25. Amends Section 171.1011(k), Tax Code, to require a taxable entity that is a professional employer organization to exclude from its total revenue payments received from a client for wages, payroll taxes on those wages, employee benefits and workers' compensation benefits for the covered employees of the client. Makes conforming changes.

SECTION 26. Amends Sections 171.1013(d) and (e), Tax Code, as follows:

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

(e) Makes conforming changes.

SECTION 27. Amends Section 171.2125, Tax Code, as follows:

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

SECTION 28. Repealer: Section 91.001(2) (defining "assigned employee"), Labor Code;

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

Repealer: Section 171.0001(2) (defining "assigned employee"), Tax Code.

SECTION 29. (a) Requires TCLR, not later than January 1, 2014, to adopt any rules necessary to administer Chapter 91, Labor Code, as amended by this Act.

(b) Makes application of this Act prospective.

(c) Provides that Section 91.042(c-1), Labor Code, as added by this Act, is not intended to change the interpretation of Section 462.308 (Recovery from Certain Persons), Insurance Code, but is intended to clarify the application of that section.

(d) Requires the commissioner, in adopting rules to implement Section 91.0411, Labor Code, as added by this Act, to consider rules adopted with respect to similar benefit plans.

SECTION 30. Effective date: September 1, 2013.