

SESSION OF 2012

SUPPLEMENTAL NOTE ON SENATE BILL NO. 413

As Amended by Senate Committee on
Commerce

Brief*

SB 413, as amended, would create the Professional Employer Organization (PEO) Act. A person or business that entered into an ongoing co-employment relationship with an employer-client would be defined as being a PEO. Prior to providing employee-related services for client businesses, a PEO would be required to register with the Secretary of the Department of Labor by providing the following information:

- Names by which the PEO conducts business;
- Principal address and the address of any field office in the state;
- Taxpayer or employer identification number;
- A list by jurisdiction of each name under which the PEO has operated in the preceding five years;
- A statement of ownership from owners with 15 percent or more equity in the business;
- A statement of management, including the names and business experience of senior executive officers; and
- A financial statement, which would include the latest annual audit and evidence of:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- Positive working capital; or
- If there is insufficient working capital, the submission of a bond, an irrevocable letter of credit, or securities with a minimum market value which would be equal to positive working capital plus \$100,000. Such a bond would be held by a depository designated by the Secretary.

The Secretary of Labor could promulgate rules and regulations to administer the bill. The Secretary would be required to accept, to the extent practical, the electronic submission of applications and other information. The Secretary could accept electronic filings on the behalf of a PEO by an independent entity that would be approved by the Secretary. The information provided by an independent entity could be consistent with the application requirements. Information obtained from a PEO, except to the extent necessary for the administration of the bill, would be confidential and not open to public inspection.

PEOs already doing business in the state would register within 180 days after the bill's enactment date. PEOs would be required to renew their annual registration within 180 days after the end of their fiscal year. If a PEO discovered a client had covered employees in Kansas, the PEO either could decline to provide services or notify the Secretary of Labor within five business days after the discovery and file for a limited registration or a full registration if there were more 50 covered employees. An annual, limited registration could be applicable to a PEO that is:

- Located outside Kansas and registered as a PEO in another state;
- Does not have a presence in Kansas or directly solicits clients in the state; and

- Does not have more than 50 covered employees in any one day.

Professional employer groups, comprised of two or more PEOs owned or controlled by the same person, could register on the behalf of its members, provided each PEO would be able to guarantee its financial capacity obligations.

The Labor Department would maintain a public list of registered PEOs. The Secretary would be required to promulgate fee rates. An initial application fee would not exceed \$1,000. Fees for renewal or limited registration, either for initial or renewal applications, would not exceed \$500. Moneys collected from fees and penalties would be deposited in a new Professional Employer Organization Fee Fund. The fund would be under the control of the Secretary for administration of the bill.

An employer could not knowingly enter into a co-employment relationship that either covered less than a majority of the employer's in-state employees or in which less than half of the employer's Kansas payroll is attributable to covered employees. A PEO would be required to provide written notice of the professional employer arrangement to each covered employee. Neither the bill nor any professional employer agreement would affect:

- Collective bargaining agreements;
- The rights of covered employees;
- The contractual relationship between a covered employee and any client;
- The creation of new enforceable rights for a covered employee against a PEO;
- Any licensing, registration or certification requirement of the employer-client or the covered employee; and

- An employer-client's designation as woman, minority owned, or small business enterprise.

The PEO and the employer-client would be responsible for sponsoring retirement and employee welfare benefit plans. A professional employer agreement could require the PEO to make payments for covered employees' benefits. A professional employer agreement between a PEO and its employer-client would include:

- The allocation of rights, duties, and obligations;
- The PEO's responsibility to pay the wages of covered employees, along with payroll-related withholding and unemployment taxes;
- The PEO's right to hire, discipline, or terminate a covered employee.

Unless a professional employer agreement specified differently, the relationship between an employer and a PEO could:

- Allocate rights, duties, and obligations between the employer-client and the PEO;
- Assign to the PEO the responsibility to pay wages for covered employees, withholding and remitting funds for taxes, and benefits;
- Assign to the PEO the right to exercise employment decisions over covered personnel;
- Assign to the employer-client the responsibility for the employees' production of goods and services. The employer-client would not be liable for an employee when that person is acting under the direction and control of the PEO;

- Classify a covered employee to not be an employee of the PEO for liability or workers compensation purposes;
- Prohibit a PEO from selling insurance on the behalf of an employer-client, but it would sponsor health and workers' compensation plans for its covered employees from an insurance carrier;
- With regard to any gross receipts tax imposed upon a PEO, exclude gross income derived from professional employer services performed for an employer-client; and
- Assign to the employer-client the responsibility for collecting sales tax and paying any tax imposed on a per-employee basis.

If it is determined, after a civil hearing by the Secretary of Labor, that a person or PEO violated the bill or promulgated rules and regulations, the result could be:

- Denial of application for registration;
- Revoke, restrict, or refuse to renew a registration;
- A civil fine not to exceed \$10,000 per violation;
- Probation; or
- A Cease and Desist Order issued by the Labor Secretary.

The bill would take effect on January 1, 2014.

Background

The National Association of Professional Employer Organizations, the Kansas Association of Insurance Agents,

an in-state PEO firm, and an employer-client spoke in favor of the bill. PEOs provide a spectrum of human resource management services to other employers, typically smaller businesses. Proponents stated the bill would provide small businesses the guidance and legal certainty that a PEO with whom it contracted would be able to perform. The Insurance Agents Association also recommended an amendment to specify that insurance be obtained from an admitted carrier and a licensed person.

The Kansas AFL-CIO and the Association for Justice spoke against the bill. Opponents were concerned that the registration framework implied certain criteria had been met by a PEO. Opponents also noted the bill did not provide employer-clients or covered employees with protection from fraud or a PEO's insolvency.

The Senate Committee on Commerce amended the bill to:

- Specify that in addition to the relationship with covered employees as specified in the introduced bill, the co-employment relationship with an employer-client also would not require a PEO to be regulated by a governmental entity for occupational licensing purposes;
- Change the criterion for filing statements of PEO ownership from 25 percent equity to 15 percent;
- Establish fees and create a new fund;
- Increase the maximum civil penalty from \$1,000 to \$10,000; and
- Change the effective date to January 1, 2014.

According to the fiscal note provided by the Division of the Budget, in consultation with the Department of Labor, initial administrative start-up costs would be estimated to cost

\$29,393 in FY 2013. Since the introduced bill did not specify a funding source, the Department assumed the money would be appropriated from the State General Fund. Annual, ongoing costs are estimated to be \$10,390 annually. The Department would anticipate an increase in litigation over enforcing provisions of the Employment Security Act (Unemployment Insurance or UI), but the agency does not anticipate a change in UI revenues.