

**TITLE 114
EMERGENCY RULE**

**SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS**

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§114-85-1. General

1.1. Scope -- This rule establishes procedures for the licensing and regulation of professional employer organizations (“PEOs”) doing business in the State of West Virginia.

1.2. Authority -- W. Va. Code §§33-2-10, 33-46A-7 and 33-46A-10.

1.3. Filing Date -- June 19, 2008.

1.4. Effective Date -- July 8, 2008.

§114-85-2. Definitions.

In addition to the definitions set forth in W. Va. Code §33-46A-2, the following definitions apply:

2.1. “Controlling Person” means an officer or director of a corporation operating as a professional employer organization, a shareholder holding twenty-five percent (25%) or more of the voting stock or a corporation operating as a professional employer organization, a partner of a partnership operating as a professional employer organization, or a person that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company operating as a professional employer organization through the ownership of voting securities, by contract or otherwise, and who is actively involved in the day-to-day management of the company.

2.2. “PEO” means a professional employer organization as defined in W. Va. Code §33-46A-2(g).

2.3. “Temporary Employee” means a person employed either through another person or directly by an employer to support or supplement the existing work force in special situations such as employee absences and temporary skill shortages, seasonal workloads and special assignments and projects, with the expectation that the person’s position will be terminated upon the completion of the task or function.

§114-85-3. Licensing Requirements.

3.1. After the thirty-first day of July, 2009, no person may provide, advertise or otherwise hold himself, herself, or itself out as providing, professional employer services to employers in this state without first obtaining a license pursuant to W. Va. Code §33-46A-4 and

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this rule.

3.2. Each applicant for a PEO license shall provide the West Virginia Insurance Commissioner (“Commissioner”) with the following information:

- a. Fully completed PEO licensing application;
- b. Application fee of two hundred dollars (\$200);
- c. The name or names under which the PEO conducts business;
- d. The address of the PEO’s principal place of business and the address of each office it maintains in this state. The address of the principal place of business provided will be the address of record and any correspondence from the Commissioner will be directed there unless the applicant requests that another address be used for such purposes; changes to the address of record shall be promptly communicated to the Commissioner;
- e. The PEO’s taxpayer or employer identification number;
- f. 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 successor business entities;
- g. A statement of ownership, which must include the names and business experience of any person who, acting individually or 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.
- h. A statement of management which shall include the names of any person who serves as a president, chief executive officer or otherwise has the authority to act as a senior executive officer of the PEO with evidence of the business experience;
- i. The PEO’s most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen (13) months, performed by a local licensed CPA;
- j. Proof of financial responsibility in the form of \$100,000 in working capital, as defined by generally accepted accounting principles and as reflected in financial statements submitted to the Commissioner. As an alternative, a PEO may provide a bond, irrevocable letter of credit or securities with a minimum market value of \$100,000 to the Commissioner;
- k. A complete and current listing of all client-employers located in West Virginia

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or who have covered employees in West Virginia; and

l. Each applicant for a PEO license must provide the name and address of all officers, directors, partners and shareholders owning ten percent (10%) or more of any stock in the corporation. If the applicant is a corporation, a certified copy of the corporation's Articles of Incorporation filed with the Secretary of State of West Virginia must be submitted to the Commissioner. If the applicant is a partnership, a copy of the Partnership Agreement or an affidavit signed by all parties that no written partnership exists must be submitted to the Commissioner. If the applicant is a limited partnership they must additionally provide and file a certified copy of its Certificate of Limited Partnership to the Commissioner.

3.3. A PEO who has not had sufficient operating history to have an audited financial statement as required by subdivision i, subsection 3.2 of this section must meet the requirements set forth in subdivision j, subsection 3.2 of this section. The amount of the bond for a PEO whose financial statements do not indicate positive working capital must be \$100,000 plus an amount sufficient to cover the deficit in working capital. An applicant may apply to the Commissioner for an extension of time for filing its financial statements so long as the request for an extension is accompanied by a letter from an independent certified public accountant stating the reasons for the delay and the anticipated completion date of the financial statement.

3.4. A PEO must file for renewal of their license annually no later than one hundred eighty (180) days after the close of the PEO's fiscal year. Each application for renewal of a license shall be accompanied by a fee of two hundred dollars (\$200). The applicant for renewal shall submit to the Commissioner its most recent audited financial statements meeting the same requirements for initial licensure, together with any changes in the information required for initial licensure set forth in subsection 3.2 of this section. The applicant shall also submit to the Commissioner an update of the PEO's list of West Virginia clients. A late fee of two hundred dollars (\$200) will be assessed to any PEO that does not timely submit the renewal application and supporting documentation.

3.5. An applicant for a PEO license that is a small start-up PEO may make a request to the Commissioner that any of the above licensing or financial requirements be reduced as determined necessary by the Commissioner.

3.6. An applicant for a PEO license in this state shall respond to any requests for more information regarding an application from the Commissioner within thirty (30) days. Failure to provide the requested information within the time period provided shall be grounds for denial of an application.

3.7. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date initially filed will be considered

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withdrawn and a new application and application fees will be required.

§114-85-4. Combined or Consolidated Licenses.

4.1. PEOs in a PEO group may satisfy the licensing law on a combined or consolidated basis by filing a combined or consolidated application for a license of multiple PEOs majority-owned by the same parent, entity or persons and may do so on forms prescribed and approved by the Commissioner.

a. A subsidiary corporation may submit with its license application the combined or consolidated financial statement of its parent corporation in lieu of its own along with a parental guarantee.

b. Multiple PEOs may only file reports and meet financial requirements on a combined or consolidated basis if each company that is part of the multiple employer organization group provides a guarantee of the obligations of W. Va. Code §33-46A-1 et seq. of each other member of the group.

c. Such a guarantee may be in the form of an indemnification agreement or a resolution of the board of directors of the parent company authorizing the guarantee of workers' compensation, unemployment tax liabilities and other obligations of a subsidiary PEO in the combined or consolidated license.

d. Each PEO involved in a combined or consolidated license must pay a separate application fee.

4.2. PEOs applying for a PEO Group license must submit evidence showing that the professional employer organizations held by the PEO Group is held under common control of the PEO Group. This can be documented by submission of a corporate registration, shareholder report, corporate resolution or interest holder report.

4.3. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date initially filed will be considered withdrawn and new application and application fees will be required.

§114-85-5. Limited Licenses.

5.1. The Commissioner may, under terms he or she determines appropriate, grant a limited license to a PEO. An applicant for a limited license must demonstrate at a minimum that it is licensed or registered as a PEO in another state under terms that are substantially similar to those required by this state, that it does not maintain an office in this state or directly solicit

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employers located in this state, and that it does not have more than fifty (50) covered employees in this state on any given day.

5.2. In addition to the showing required by subsection 5.1 of this section, an applicant for a limited license shall complete an application on forms prescribed and approved by the Commissioner. Proof of financial responsibility shall be in the amount and form determined appropriate by the Commissioner.

5.3. Each application for a limited license shall be accompanied by an application fee of two hundred dollars (\$200).

5.4. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date initially filed will be considered withdrawn and new application and application fees will be required.

§114-85-6. Denial of a License or Renewal Application.

6.1. The Commissioner may deny an application for license:

a. Where the application is not fully completed, improperly executed or otherwise deficient on its face;

b. Where documents required to supplement the application are not included in the application packet;

c. Where any fee required by sections 3, 4 or 5 of this rule and W. Va. Code §33-46A-4 is not submitted;

d. Where the applicant has had a PEO license revoked in this or any other state, unless such revocation has subsequently been rescinded or otherwise suspended and the problems remedied to the reasonable satisfaction of the Commissioner;

e. Where the applicant, or any person named in the application, has made a material misrepresentation in the application; or

f. Upon finding that any person named in the application, any controlling person or any person in a management or policy-making position with any applicant, is not of good moral character, business integrity or financial responsibility, or that there is good and sufficient reason within the meaning and purpose of this rule or of W. Va. Code §33-46A-1 et seq. to deny the application.

6.2. If the Commissioner determines that the applicant does not meet the requirements to

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obtain a license, a written notice of denial shall be furnished to the applicant along with the reasons for the denial of the application. The applicant may request a hearing before the Commissioner within thirty (30) days of receipt of the written notice of denial to protest the decision of the Commissioner.

§114-85-7. Suspension, Revocation or Probation of a License.

7.1. If a PEO fails to comply with any of the requirements for a license or renewal of a license, the Commissioner may suspend or revoke the license or place the PEO on probation until such time the PEO comes into compliance with the licensing requirements.

7.2. The Commissioner may suspend or revoke the license of a PEO or place a PEO on probation for a violation of any provision of W. Va. Code §33-46A-1 et seq. or this rule, for unprofessional conduct or for a violation of any law relating to the conduct of the business of the PEO. Unprofessional conduct includes, but is not limited to:

- a. Failure to maintain financial responsibility and management competence;
- b. Use of advertising that is intended to or tends to deceive the public;
- c. Failure to comply with any state or federal law governing the conduct of PEOs;
- d. Conviction of a crime related to the conduct of the business of a PEO by a controlling person of a licensee; and
- e. Failure to promptly pay all wages, benefits, workers' compensation premiums, unemployment compensation contributions or any other payments for which the PEO has assumed responsibility under the PEO agreement.

7.3. In determining if probation or license suspension or revocation is an appropriate remedy, the Commissioner may consider the following facts:

- a. The record of previous violations by the PEO;
- b. The significance or scale of the violation;
- c. The existence of outstanding reports or failures to pay;
- d. Failure to respond to a request to produce records, documents or proof of payment;
- e. Submission of falsified or altered records, forms, documents or proof of

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payment;

- f. Whether the violations were willful or knowing; and
- g. Good faith efforts by the PEO to remedy any violations.

7.4. The following procedure shall apply to a revocation or suspension of a license:

- a. The Commissioner shall send written notice to the PEO describing the noncompliance;
- b. The PEO shall have thirty (30) days to correct the noncompliance and to provide the Commissioner with written verification of the correction;
- c. If the Commissioner determines that the PEO has failed to remedy the noncompliance, he or she shall initiate a hearing pursuant to W. Va. Code §33-2-13 and shall provide appropriate notice to the PEO and other proper parties. A decision issued in connection with a hearing shall specify the effective date of the revocation or suspension. Where a suspension is imposed, the decision shall specify the duration of the period of suspension. During a period of suspension or revocation, the PEO shall be determined to have not applied for a license with the Commissioner; and

7.5. Upon receipt of a written request from a PEO that its license be voluntarily terminated, the Commissioner shall determine whether such proposed termination will adversely affect any of the legal responsibilities assumed by the PEO under its professional services agreements and may permit such termination under such terms as he or she determines are necessary.

§114-85-8. Investigations.

8.1. The Commissioner may request information, perform an investigation and audit and review documents necessary to determine whether a PEO has violated any provision of W. Va. Code §33-46A-1 et seq. or this rule. In conducting an investigation of a PEO, the Commissioner or his or her representatives may enter the business premises during reasonable business hours and may examine and copy records pertinent to the investigation in accordance with the provisions of W. Va. Code §33-2-9.

8.2. An applicant or licensed PEO shall respond to any requests for information and comply with any investigations that are initiated by the Commissioner. Information gathered pursuant to an investigation is confidential and not open to public inspection pursuant to W. Va. Code §33-46A-5.

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8.3. The Commissioner may charge the licensee the actual cost of any investigation undertaken at the direction of the Commissioner.

§114-85-9. Complaints.

9.1. Any person may file a written complaint with the Commissioner regarding a PEO. The Commissioner shall receive any complaints and shall investigate and determine whether action is necessary involving allegations of any misconduct as provided in W. Va. Code §33-46A-8 and this rule. The complainant, the PEO and the nature of the alleged misconduct and the circumstances surrounding it shall be clearly identified, and supporting documentation shall be attached.

9.2. The Commissioner shall mail a copy of the complaint to the PEO in question and request a written response.

9.3. If a PEO fails to respond within thirty (30) days to a request made pursuant to subsection 9.2 of this section or to a request for information during an investigation, the Commissioner may take action pursuant to W. Va. Code §33-46A-8.

§114-85-10. Actions Against Bond or Securities.

10.1. If any person is aggrieved by the misconduct of any PEO licensee, that person may maintain an action in his or her own name upon the bond of the PEO if there be one, in any court of competent jurisdiction. Such an action shall not be exclusive of any other remedy available to the aggrieved person. Alternatively, the Commissioner may maintain such an action in the name of the State for the benefit of the aggrieved person. The aggrieved person may assign the claim, and the assignee shall be entitled to any remedies available to the aggrieved person, and an assigned claim may be enforced in the name of the assignee.

10.2. If any person obtains a judgment in its favor against a licensee maintaining a deposit of securities, cash or cash equivalent, and the licensee does not promptly pay the judgment, the Commissioner shall upon receipt of a certified copy of the final judgment:

a. Notify the licensee by certified mail to pay the judgment within thirty (30) days of receipt of the notice; and

b. Pay from the cash deposit or draw upon a letter of credit or sell at public or private sale an amount of securities sufficient to pay the judgment, if the judgment is not paid by the licensee within the thirty (30) day period.

10.3. A licensee shall have thirty (30) days after receiving notice of cancellation of its

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bond or notice that the cash, letter of credit or securities have been drawn upon, to replace or supplement its bond, cash, letter of credit or sold securities. Failure of the licensee to so replace shall result in suspension of its license, which suspension shall continue until replacement of the bond or sold securities. A licensee so suspended shall not solicit new client employers while suspended and shall comply with any other conditions set forth in the order of suspension.

§114-85-11. Responsibilities of a Professional Employer Organization.

An applicant or licensed PEO shall notify the Commissioner in writing within ten (10) days of any of the following:

11.1. Conviction, judgment, guilty plea or no contest plea of the applicant or any of the applicant's controlling persons for any violation listed in W. Va. Code 33-46A-8 or section 7 of this rule;

11.2. Final action by a state or federal regulatory agency for violations related to the operation of a PEO;

11.3. Determination of any court of competent jurisdiction, including federal courts, located in any state, that the applicant or any of the applicant's controlling persons were found, or pled guilty to fraud related to the operation of a PEO; or

11.4. PEO's failure to stay current with obligations that relate to payroll, payroll-related taxes, workers' compensation insurance premiums for covered employees and employee benefits.

§114-85-12. Notification of Change in Identifying Information.

12.1. Each PEO has a continuing duty to timely notify the Commissioner of changes in its identifying information in a format and manner prescribed by the Commissioner.

12.2. Failure by a PEO to timely notify the Commissioner of a change in its identifying information shall subject the PEO to the penalties provided in W. Va. Code §33-46A-8 and section 7 of this rule.

§114-85-13. Penalties.

13.1. Any person violating any provisions of this rule or any provisions in W. Va. Code §33-46A-1 et seq. shall, after notice and hearing, be liable for a penalty of not less than two hundred fifty dollars (\$250) nor more than five thousand dollars (\$5,000) for each violation, with each day of non-compliance constituting a separate violation.

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13.2. In addition to imposing monetary penalties, the Commissioner may bring an action in Circuit Court to enjoin or restrain any person from engaging in the business of or acting as a PEO.

§114-85-14. Professional Employer Organization Workers' Compensation Policies.

14.1. The purpose of this section is to implement W. Va. Code §33-46A-7 relating to workers' compensation policies for PEOs and their client-employers.

14.2. In addition to the definitions found in W. Va. Code §33-46A-2 and section 2 of this rule, the following definitions shall apply to this section:

a. "Master Policy Basis" means an arrangement under which a single policy issued to a PEO covers more than one client-employer.

b. "Multiple Coordinated Policy Basis" means an arrangement under which a separate policy is issued to or on behalf of each client-employer but certain payment obligations and policy communications are coordinated through the PEO.

c. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

d. "Residual Market" is the market of workers' compensation insurance written pursuant to the assigned risk plan developed pursuant to W. Va. Code §23-2C-10.

e. "Voluntary Market" has the same meaning ascribed to it in W. Va. Code §23-2C-2(u).

14.3. PEO Workers' Compensation Policies.

a. In the voluntary market, workers' compensation policies for PEOs and their client employers may be issued on a master policy basis, multiple coordinated policy basis or such other form as approved by the Commissioner.

b. Every policy form of workers' compensation insurance to be used for PEOs and their client-employers must be filed by the private carrier using the policy or the Commissioner's designated rating organization no less than sixty (60) days in advance of such policy being used by the private carrier. At the expiration of the sixty (60) day period, unless the period was extended by the Commissioner to obtain additional information from the private

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carrier, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved by the Commissioner. Approval of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty (60) day period.

c. Policies of worker's compensation insurance for PEOs and their client employers in the residual market shall not be issued on a master policy basis. Such policies shall only be issued on forms submitted by servicing carriers and approved by the Commissioner pursuant to subdivision b of this subsection.

14.4. Data Collection and Proof of Coverage Reporting.

a. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier shall collect and maintain payroll and claims data for each client employer in a manner that will permit an experience modification factor to be calculated separately for each client-employer who is eligible to be experience rated. Experience modification factors for client employers shall be based solely upon the client-employer's own experience.

b. Carriers providing workers' compensation insurance to PEOs shall comply with all data reporting requirements pursuant to the appropriate rating manual and rules submitted by the Commissioner's designated rating organization for workers' compensation.

c. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier is required to timely and accurately report information regarding policy issuance, renewal and cancellation as required by the provisions of W. Va. Code §23-2C-15(e)-(f) and W. Va. Code St. R. §85-8-9. The carrier must be able to report such information separately regarding both the PEO and each client employer.

14.5. This section shall be of no further force and effect on the effective date of any new legislative exempt rule or amendment to an existing rule adopted by the Industrial Council addressing the same matters as this section.