TITLE 114
LEGISLATIVE RULE
INSURANCE COMMISSIONER

SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section.

114-85-1. General.

114-85-2. Definitions.

114-85-3. Licensing and Renewal Requirements.

114-85-4. Combined or Consolidated Licenses.

114-85-5. Limited Licenses.

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

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

114-85-8. Investigations.

114-85-9. Complaints.

114-85-10. Responsibilities of a Professional Employer Organization.

114-85-11. Notification of Change in Identifying Information.

114-85-12. Penalties.

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PROFESSIONAL EMPLOYER ORGANIZATIONS

§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 §§33-46A-7 and 33-46A-10.

1.3. Filing Date. -- May 10, 2011.

1.4. Effective Date. -- May 10, 2011.

§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 of a corporation operating as a professional employer organization, or a person or partner that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company or 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 Help Services" means services consisting of a person:

2.3.a. Recruiting and hiring his, her or its own employees;

2.3.b. Finding other organizations that need the services of those employees;

2.3.c. 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

2.3.d. Customarily attempting to reassign the employees to other organizations when they finish each assignment.

§114-85-3. Licensing and Renewal Requirements.

3.1. After July 31, 2009, no person may provide, advertise or otherwise hold himself, herself, or itself out as providing professional employer organization services to employers in this state without first obtaining a license pursuant to W. Va. Code §33-46A-4 and this rule.

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

3.2.a. Fully completed PEO licensing application;

3.2.b. Application fee of $200, and an annual report fee of $100;

3.2.c. The name or names under which the PEO conducts business;

3.2.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;

3.2.e. The PEO's taxpayer or employer identification number;

3.2.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;

3.2.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.

3.2.h. A statement of management which includes the name and evidence of business experience 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.

3.2.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 CPA licensed in the jurisdiction in which the CPA is located;

3.2.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;

3.2.k. A complete and current listing of all client-employers located in West Virginia or who have covered employees in West Virginia; and

3.2.*l.* 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 partners 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. If the applicant is a non-resident, then a certificate of authority to do business in the state, issued by the Secretary of State, must be submitted 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 $100,000 working capital or bond 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 its' 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 $200 for the application fee and $100 for the annual report. 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 $300 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 of notice from the Commissioner that the application is incomplete will be considered withdrawn and a new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

3.8. Accreditation services: The Commissioner may provide for the acceptance of filings and assurances of a PEO's compliance with this rule and other applicable laws by a bonded, independent and qualified assurance organization approved by the Commissioner.

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

4.1. PEOs in a PEO group may satisfy the financial and reporting requirements of W. Va. Code §33-46A 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.

4.1.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.

4.1.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.

4.1.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.

4.1.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 that are commonly held in the PEO Group is held under common control of a person or entity in 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 of notice from the Commissioner that the application is incomplete will be considered withdrawn and new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the

Commissioner.

§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 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 $200.

5.4. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date of notice from the Commissioner that the application is incomplete will be considered withdrawn and new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

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

6.1. The Commissioner may deny an application for license:

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

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

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

6.1.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;

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

6.1.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

6.2.a. That the application is not complete or not properly executed, the Commissioner shall provide a notice of deficiency and provide a reasonable opportunity for the applicant to correct the deficiency, or

6.2.b. That the applicant does not meet the requirements to 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 this rule, W. Va. Code §33-46A-1 *et seq.*, any order of the Commissioner or any law relating to the conduct of the business of the PEO.

7.3. In determining an appropriate sanction, the Commissioner may consider the following:

7.3.a. The record of previous violations by the PEO;

7.3.b. The significance or scale of the violation;

7.3.c. The existence of outstanding reports or failures to pay;

7.3.d. Failure to respond to a request to produce records, documents or proof of payment;

7.3.e. Submission of falsified or altered records, forms, documents or proof of payment;

7.3.f. Whether the violations were willful or knowing; and

7.3.g. Good faith efforts by the PEO to remedy any violations.

7.4. Hearings. Any hearing regarding actions taken pursuant to this rule or W. Va. Code §33-46A-1 *et. seq.* shall be conducted pursuant to W. Va. Code §33-2-13 and W. Va. Code St. R. §114-13-1 *et. seq.*

§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.

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. 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:

10.1. 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.

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

10.3. 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

10.4. 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.

§114-85-11. Notification of Change in Identifying Information.

11.1. Each PEO has a continuing duty to timely notify the Commissioner, in a format and manner prescribed by the Commissioner, of changes in its identifying information provided pursuant to subdivisions c through h, inclusive, of subsection 3.2 of this rule.

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

§114-85-12. Enforcement and penalties.

12.1. If the Commissioner finds that any licensed PEO has violated any provisions of this rule or any provisions in W. Va. Code §33-46A-1 et seq., the Commissioner may, in lieu of a suspension or revocation, order the PEO to pay a penalty in a sum not to exceed $10,000. If the PEO fails to pay the penalty within thirty days after notice of the penalty, the Commissioner may revoke or suspend the license of the PEO.

12.2. With respect to any person operating as a PEO without a license, the Commissioner may, pursuant to W. Va. Code §33-46A-4a(a), do one or more of the following:

12.2.a. File a complaint in the Circuit Court of Kanawha County or in any county in which illegal PEO activities are alleged to have occurred to enjoin the person from engaging in any act that constitutes a PEO service; and

12.2.b. After notice and hearing in accordance with W. Va. Code §33-2-13, assess restitution in an amount sufficient to reimburse any person adversely affected by the operation of the unlicensed PEO and, in addition to or in lieu of restitution, impose a fine in a sum not to exceed $20,000 for each unauthorized act.