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COMMITTEE REPORT

January 23, 2020

**S. 909**

Introduced by Senators Gambrell and Alexander

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Read the first time January 14, 2020.

**THE COMMITTEE ON LABOR, COMMERCE AND INDUSTRY**

To whom was referred a Bill (S. 909) to amend the Code of Laws of South Carolina, 1976, by adding Section 12‑10‑108 so as to provide circumstances in which professional employer organizations may be eligible, etc., respectfully

**REPORT:**

That they have duly and carefully considered the same and recommend that the same do pass:

THOMAS C. ALEXANDER for Committee.

**A** **BILL**

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 12‑10‑108 SO AS TO PROVIDE CIRCUMSTANCES IN WHICH PROFESSIONAL EMPLOYER ORGANIZATIONS MAY BE ELIGIBLE FOR CERTAIN TAX CREDITS AND ECONOMIC INCENTIVES UNDER THE ENTERPRISE ZONE ACT OF 1995; BY ADDING SECTION 40‑68‑145 SO AS TO PROVIDE FOR THE DETERMINATION OF TAX CREDITS AND ECONOMIC INCENTIVES BASED ON EMPLOYMENT WITH RESPECT TO CLIENT COMPANIES OF PROFESSIONAL EMPLOYER ORGANIZATIONS; TO AMEND SECTION 40‑68‑55, RELATING TO THE ABILITY OF THE DEPARTMENT OF INSURANCE TO REGULATE THE ACCEPTANCE OF AFFIDAVIT OR CERTIFICATION OF APPROVAL OF QUALIFIED ASSURANCE ORGANIZATIONS, SO AS TO DELETE THE REQUIREMENT THAT THESE FUNCTIONS BE PROVIDED BY REGULATION; TO AMEND SECTION 40‑68‑60, RELATING TO THE REQUIREMENTS OF PROFESSIONAL EMPLOYMENT ORGANIZATION SERVICES AGREEMENTS BETWEEN PROFESSIONAL EMPLOYER ORGANIZATIONS AND ASSIGNED EMPLOYEES, SO AS TO PROVIDE ORGANIZATIONS SHALL PROVIDE ASSIGNED EMPLOYEES WITH CERTAIN WRITTEN NOTICE OF HOW THE AGREEMENT AFFECTS THEM; TO AMEND SECTION 40‑68‑70, RELATING TO THE REQUIREMENTS OF PROFESSIONAL EMPLOYMENT ORGANIZATION SERVICES AGREEMENTS BETWEEN PROFESSIONAL EMPLOYER ORGANIZATIONS AND CLIENT COMPANIES, SO AS TO PROVIDE THAT THE TERMS OF THE AGREEMENT MUST BE ESTABLISHED BY WRITTEN CONTRACT; AND TO AMEND SECTION 40‑68‑150, RELATING TO CERTAIN PROHIBITED ACTS, SO AS TO PROVIDE PROFESSIONAL EMPLOYER ORGANIZATIONS SHALL NOT ENGAGE IN THE SALE OF INSURANCE OR ACT AS THIRD PARTY ADMINISTRATORS, AND TO PROVIDE THAT THE SPONSORING AND MAINTAINING OF EMPLOYEE BENEFIT PLANS FOR THE BENEFIT OF ASSIGNED EMPLOYEES DOES NOT CONSTITUTE THE SALE OF INSURANCE.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Chapter 10, Title 12 of the 1976 Code is amended by adding:

“Section 12‑10‑108. (A) As used in this section:

(1) ‘Assigned employee’ means an employee providing services for a client company as affected by a contract between a licensee and a client company in which employment responsibilities are shared.

(2) ‘Client company’ means a person that contracts with a licensee and that is assigned employees under that contract.

(3) ‘Licensee’ means a person under Chapter 68, Title 40 as a professional employer organization to provide professional employer services as that term is defined in Section 40‑68‑10. The term includes a professional employer services group licensed under Section 40‑68‑80.

(B) A client company that is a qualifying business and otherwise meets the requirements of this chapter except that it uses a single licensee to provide assigned employees which perform services at the project, is eligible for an overpayment of withholding resulting from a job development credit for new jobs filled by assigned employees provided the provisions of this section are met, including the following:

(1) the benefits package, including health care, for employees described in Section 12‑10‑50(A)(2) and (B)(2) is sponsored by either the licensee or the client company;

(2) a revitalization agreement is executed between the qualifying business that is a client company and the council, and an addendum to the revitalization agreement is executed among the qualifying business that is a client company, the council, and the licensee that sets forth the applicable responsibilities of each party and is in a form acceptable to the council;

(3) the licensee makes all books and records concerning a client company available to the department and the council concerning withholding and the claiming of a job development credit in the manner provided by this title and applicable regulations; and

(4) the licensee submits the required income tax withholding payments and returns for all assigned employees working at the project and claims any applicable job development credit attributable to the assigned employees.

(C)(1) On a quarterly basis, the client company shall file with the department and the council information concerning:

(a) the number of assigned employees at the project attributable to the licensee;

(b) the amount of South Carolina income tax withholding for assigned employees for the licensee;

(c) the total amount of job development credits associated with the assigned employees attributable to the licensee; and

(d) such other information the department or council may require.

(2) If the client company also has employees subject to South Carolina withholding taxes payable by the client company, the client company is eligible to claim a job development credit for any such employee. The client company also shall provide the information set forth in this subsection concerning such employees.

(D)(1) In lieu of refunding any applicable overpayment of withholding attributable to a job development credit to a licensee, the department shall pay to the client company any applicable overpayment of withholding attributable to the job development credit for assigned employees. Once payment is made to the client company, the licensee has no further claim to any overpayment of withholding attributable to the job development credit and paid to the client company and shall hold the department and the council harmless for any overpayment of withholding paid to the client company pursuant to this item.

(2) To the extent that any overpayment of withholding results from an improper claiming of a job development credit, it must be treated as misappropriated withholding with the client company being liable for the amount and the licensee only liable if the licensee commits fraud attributable to the claiming of a job development credit.

(3) Qualifications and calculations of job development credits pursuant to this chapter must be made on a client company basis and not on a licensee basis.

(4) The department and the council may specify the form and manner of any information to be submitted under this section.

(5) All notices pertaining to the claiming of the job development credit must be sent to both the licensee and the client company.

(E) If a contract entered into pursuant to Section 40‑68‑60 between a client company and a licensee is terminated, the client company shall send notice of termination to the department and the council within thirty business days of the date of termination. If and until a new licensee becomes a party to the addendum, the client company shall be responsible for all of the licensee’s responsibilities under the addendum to the revitalization agreement.

(F) The client company is responsible for submitting any reports or fees to the council or the department required by this chapter including itemized sources and uses of funds and paying any penalty imposed for failure to submit a report or fee without an extension.

(G) Notwithstanding Section 12‑10‑80(A)(1) and (2), a client company must be considered current with respect to withholding tax if the licensee is current with respect to withholding taxes. If the client company has its own employees that are subject to a job development credit, in addition to assigned employees, the client company also must be current with respect to all withholding taxes.

(H) The licensee and the client company agree to waive the taxpayer confidentiality provisions of Section 12‑54‑240 and allow the exchange of information concerning withholding tax and the claiming of job development credit among the licensee, client company, department, and the council.

(I) A claim for a retraining credit pursuant to Section 12‑10‑95 must be treated the same as a job development credit under this section.

(J) The client company must pay an additional three hundred dollar administrative fee to be split equally between the department and the council to cover the cost of administering the provisions of this section.

(K) The department and the council may establish such rules and regulations as are necessary to administer this section.

(L) All the provisions of this chapter remain applicable to a client company and the claiming of the job development credit.”

SECTION 2. Chapter 68, Title 40 of the 1976 Code is amended by adding:

“Section 40‑68‑145. (A) Except as otherwise provided by law, for purposes of determining an incentive or business preference program based on employment, an assigned employee is considered an employee solely of the client company, not the licensee. Notwithstanding that the licensee is the W‑2 reporting employer, the client company is entitled to the benefit of or to continue to qualify for an incentive, business preference program, or other benefit arising from the employment of assigned employees.

(B) Except as otherwise provided by law, for the purposes of an incentive or business preference program based on the number of employees, assigned employees, and direct employees of the client company are considered employees solely of the client company, but not the licensee.

(C) On request by the client company, the State, or any governmental entity, a licensee shall provide employment information and applicable books and records required by the State or governmental entity responsible for the administration of the incentive or business preference program and necessary to support a request, claim, application, or other action by a client company seeking an incentive or participation in a business preference program, or an audit of the client company’s claiming of the incentive or business preference if based in whole, or in part, on the assigned employees.

(D) In providing information required pursuant to subsection (C), a licensee may not be required to:

(1) complete forms on behalf of a client;

(2) attest, certify, and verify the accuracy of information originally provided by or based on information provided by the client company to the licensee; however, any information submitted to the licensee by the client company must be signed by a person authorized to sign a return under Section 12‑2‑75 and shall be treated as though such information were submitted in connection with a return submitted to the Department of Revenue;

(3) create new information or records; or

(4) provide employment information beyond the applicable statute of limitation for assessing taxes provided in Section 12‑54‑85.

(E) The licensee and the client company agree to waive the taxpayer confidentiality provisions of Section 12‑54‑240 and allow the exchange of information concerning the applicable incentive or business preference program among the client company, the licensee and any public entity administering the applicable incentive or business preference program.”

SECTION 3. Section 40‑68‑55 of the 1976 Code is amended to read:

“Section 40‑68‑55. The department may ~~by regulation~~ provide for the acceptance of an affidavit or certification of a bonded, independent, and qualified assurance organization that has been approved by the department for certifying qualifications of a professional employer organization or professional employer organization group in lieu of those requirements of Sections 40‑68‑30 and 40‑68‑40 or any other requirements of a licensee under this chapter as determined by the department. ~~In the regulation~~ The department may establish a fee structure for the acceptance not to exceed the fees in Section 40‑68‑50. Professional employer organizations or professional employer organization groups are subject to any assessment under Section 40‑68‑50(B). This section does not relieve a professional employer organization or professional employer organization group of any notice or disclosure obligations under this chapter to an insurer, client, or employee, or of any other requirement of this chapter not expressly waived by regulation of the department.”

SECTION 4. Section 40‑68‑60(A) and (B) of the 1976 Code is amended to read:

“(A) A licensee shall ~~establish the terms of a professional employer organization services agreement by a written contract between the licensee and the client company. The licensee shall~~ give written notice of the professional employer services agreement as it affects assigned employees to each employee assigned to a client company in the manner provided in this section.

(B) A written explanation of the ~~agreement~~ general nature of the employee relationship among the professional employer organization, client company, and assigned employees must be provided to each assigned employee by delivering it to the employee ~~personally~~ within ten days ~~after executing the agreement~~ of the effective date of the contract between the licensee and the client company. If not otherwise provided in a separate document, the explanation also must ~~state, substantially, the terms of the agreement between the licensee and client company and~~ include the same notice that is required ~~to be posted in the client company’s place of business~~ by subsection (C).”

SECTION 5. Section 40‑68‑70(A) of the 1976 Code is amended to read:

“(A) A licensee shall establish the terms of a professional employer organization services agreement by a written contract between the licensee and the client company. A contract between a licensee and a client company must provide that the licensee:

(1) reserves the right of direction and control over employees assigned to a client company;

(2) assumes responsibility for the payment of wages to the assigned employees without regard to payments by the client to the licensee;

(3) assumes responsibility for the payment of payroll taxes and collection of taxes from payroll on assigned employees;

(4) retains the right to hire, fire, discipline, and reassign the assigned employees;

(5) retains the right of direction and control over the adoption of employment and safety policies and the management of workers’ compensation claims, claim filings, and related procedures on joint agreement by the client company and the licensee; and

(6) agrees that:

(a) notice to or acknowledgment of the occurrence of an injury on the part of the client company is notice to or knowledge on the part of the licensee and its workers’ compensation insurer;

(b) for the purposes of Title 42, the jurisdiction of the client company is the jurisdiction of the licensee and its workers’ compensation insurer;

(c) the licensee and its workers’ compensation insurer is bound by and subject to the awards, judgments, or decrees rendered against them under the provisions of Title 42; ~~and~~

(d) insolvency, bankruptcy, or discharge in bankruptcy of the licensee or client company does not relieve the licensee, client company, their respective workers’ compensation insurers from payment of compensation for disability or death sustained by an employee during the life of a workers’ compensation insurance policy; and

(7) with a client company, in the contract, shall specify whether the licensee, the client company, or both, are securing workers’ compensation liability.”

SECTION 6. Section 40‑68‑150 of the 1976 Code is amended to read:

“Section 40‑68‑150. (A) A person may not:

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

(2) use the name or title ‘staff leasing services company’, ‘licensed staff leasing services company’, ‘licensed staff leasing services group’, or ‘professional employer organization’, ‘licensed professional employer organization’, ‘licensed professional employer organization group’, ‘professional employer organization group’, ‘staff leasing services group’, or otherwise represent that it is licensed under this chapter, unless the entity holds a license issued under this chapter;

(3) represent as the person’s own the license of another person or represent that a person is licensed if the person does not hold a license;

(4) give false or forged evidence to the department in connection with obtaining or renewing a license or in connection with disciplinary proceeding under this chapter;

(5) use or attempt to use a license that has expired or been revoked;

(6) offer an employee a self‑funded, self‑insured, or other employee benefit plan not licensed under Title 38, unless the program is maintained by the client company individually for the sole benefit of participating co‑employees of the client company; or

(7) misrepresent that any self‑funded, self‑insured, or unlicensed benefit plans are licensed under Title 38 or otherwise in compliance with ERISA.

(B) A professional employer organization shall not engage in the sale of insurance or act as a third party administrator. The sponsoring and maintaining of employee benefit plans for the benefit of assigned employees does not constitute the sale of insurance.

(C) A person who voluntarily violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than one year or fined not more than fifty thousand dollars, or both.”

SECTION 7. This act takes effect upon approval by the Governor.

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