

HOUSE BILL No. 1605

DIGEST OF INTRODUCED BILL

Citations Affected: IC 27-16.

Synopsis: Professional employer organizations. Requires registration and regulation by the department of insurance of a professional employer organization. Specifies certain requirements for conduct with respect to functions of a professional employer organization.

Effective: July 1, 2005.

Walorski, Borrer

January 19, 2005, read first time and referred to Committee on Employment and Labor.

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First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

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HOUSE BILL No. 1605



A BILL FOR AN ACT to amend the Indiana Code concerning insurance.

Be it enacted by the General Assembly of the State of Indiana:

1 SECTION 1. IC 27-16 IS ADDED TO THE INDIANA CODE AS
 2 A **NEW** ARTICLE TO READ AS FOLLOWS [EFFECTIVE JULY 1,
 3 2005]:
 4 **ARTICLE 16. PROFESSIONAL EMPLOYER**
 5 **ORGANIZATIONS**
 6 **Chapter 1. Definitions.**
 7 **Sec. 1. The definitions in this chapter apply throughout this**
 8 **article.**
 9 **Sec. 2. (a) "Administrative fee" means the fee charged to a**
 10 **client by a professional employer organization for professional**
 11 **employer services.**
 12 **(b) The term does not include any amount charged to a client by**
 13 **a professional employer organization for wages and salaries,**
 14 **benefits, worker's compensation, payroll taxes, withholding, or**
 15 **other assessments paid by a professional employer organization to**
 16 **or on behalf of a covered employee.**
 17 **Sec. 3. "Client" means a person that enters into a professional**



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employer agreement:

- (1) with a professional employer organization; and**
- (2) under which all or a majority of the person's employees become covered employees.**

Sec. 4. "Co-employer" means a professional employer organization or a client that has an employment relationship with a covered employee under a professional employer agreement.

Sec. 5. "Co-employment relationship" means a relationship in which the employer rights, duties, and obligations that arise out of an employment relationship are allocated between a client and a professional employer organization under a professional employer agreement and this article.

Sec. 6. "Commissioner" refers to the insurance commissioner appointed under IC 27-1-1-2.

Sec. 7. (a) "Covered employee" means an individual who:

- (1) has a co-employment relationship with a professional employer organization and a client under a professional employer agreement; and**
- (2) has received written notice from the professional employer organization of the individual's co-employment by the professional employer organization.**

(b) The term includes an individual who is an officer, a director, a shareholder, a partner, or a manager of a client to the extent the professional employer organization and the client expressly agree that the individual:

- (1) is described in subsection (a); and**
- (2) acts as an operational manager or performs day to day operational services for the client;**

as reflected in the professional employer agreement.

Sec. 8. "Department" refers to the department of insurance created by IC 27-1-1-1.

Sec. 9. "PEO group" means two (2) or more professional employer organizations that are majority owned or commonly controlled by the same entity, parent, or controlling person.

Sec. 10. "Person" means an individual, a partnership, a corporation, a limited liability company, an association, or another legally recognized entity.

Sec. 11. "Professional employer agreement" means a written contract between a client and a professional employer organization that provides:

- (1) for co-employment of covered employees;**
- (2) for the allocation of employer rights and obligations**

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1 between the client and the professional employer organization
2 with respect to covered employees; and
3 (3) that the professional employer organization and the client
4 assume the responsibilities required under this article.

5 Sec. 12. (a) "Professional employer organization" or "PEO"
6 means a person engaged in the business of providing professional
7 employer services.

8 (b) The term does not include the following:

9 (1) An arrangement through which a person:

10 (A) whose principal business activity is an activity other
11 than entering into professional employer agreements; and

12 (B) that does not hold the person out as a professional
13 employer organization;

14 shares employees with a commonly owned company within
15 the meaning of Section 414(b) and 414(c) of the Internal
16 Revenue Code of 1986, as amended.

17 (2) An independent contractor arrangement through which a
18 person:

19 (A) assumes responsibility for a product produced or a
20 service performed by the person or the person's agent; and

21 (B) retains and exercises primary direction and control
22 over the work performed by an individual whose services
23 are supplied under the independent contractor
24 arrangements.

25 (3) The provision of temporary help services.

26 Sec. 13. "Professional employer services" means the services
27 that are provided to a client by a professional employer
28 organization as a result the co-employment relationship entered
29 into between the client and the professional employer organization
30 under a professional employer agreement.

31 Sec. 14. "Temporary help service" means a service consisting of
32 a person that:

33 (1) recruits and hires the person's own employees, not
34 including an officer, a manager, or a controlling person of the
35 client to which the person's own employee is assigned by the
36 person;

37 (2) identifies organizations that need the services of employees
38 described in subdivision (1);

39 (3) assigns employees described in subdivision (1) to:

40 (A) perform work or services for organizations described
41 in subdivision (2);

42 (B) support or supplement the workforces of organizations

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- 1 described in subdivision (2); or
- 2 (C) provide assistance in special work situations, including
- 3 employee absences, skill shortages, seasonal workloads,
- 4 and special assignments or projects; and
- 5 (4) customarily attempts to reassign the employees described
- 6 in subdivision (1) to other organizations when an assignment
- 7 described in subdivision (3) is completed.

8 **Chapter 2. Effect on Rights, Duties, and Obligations**

9 **Sec. 1. This article and a professional employer agreement do**
10 **not affect, modify, or amend:**

- 11 (1) a collective bargaining agreement; or
- 12 (2) rights or obligations of a client, PEO, or covered employee
- 13 under:
- 14 (A) the federal National Labor Relations Act (29 U.S.C.
- 15 151 et seq.);
- 16 (B) the federal Railway Labor Act (45 U.S.C. 151 et seq.);
- 17 or
- 18 (C) IC 22-7.

19 **Sec. 2. This article and a professional employer agreement do**
20 **not do the following:**

- 21 (1) Diminish, abolish, or remove the obligations of a client to
- 22 a covered employee that exist before the effective date of the
- 23 professional employer agreement.
- 24 (2) Affect, modify, or amend a contractual relationship or
- 25 restrictive covenant:
- 26 (A) between a covered employee and a client that is in
- 27 effect on the effective date of the professional employer
- 28 agreement; or
- 29 (B) that is entered into between a client and a covered
- 30 employee after the effective date of the professional
- 31 employer agreement.

32 **A PEO is not responsible or liable in connection with or**
33 **arising out of a contractual relationship or restrictive**
34 **covenant described in this subdivision unless the PEO has**
35 **otherwise specifically agreed in writing.**

- 36 (3) Create a new or additional enforceable right of a covered
- 37 employee against a PEO that is not specifically provided by
- 38 the professional employer agreement or this article.

39 **Sec. 3. (a) This article and a professional employer agreement**
40 **do not affect, modify, or amend a federal, state, or local:**

- 41 (1) license;
- 42 (2) registration; or

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(3) certification;
requirement that applies to a client or covered employee.

(b) The following apply to a federal, state, or local requirement described in subsection (a):

(1) A covered employee who is required to be licensed, registered, or certified is considered solely an employee of the client for purposes of a license, registration, or certification requirement.

(2) A PEO is not considered to engage in an occupation, a trade, a profession, or another activity that is:

(A) subject to a license, registration, or certification requirement; or

(B) otherwise regulated by a governmental entity; solely because the PEO has entered into and maintained a co-employment relationship with a covered employee who is subject to a requirement or regulation described in clause (A) or (B).

(3) A client has the sole right of direction and control of the professional or licensed activities of a covered employee and of the client's business.

(4) Only a:

(A) covered employee; or

(B) client;

that is subject to a requirement or regulation described in subdivision (2)(A) or (2)(B) is subject to the regulation by a regulatory or governmental entity responsible for licensing, registration, certification, or other regulation of the covered employee or client.

Sec. 4. (a) For purposes of determination of tax credits and other economic incentives:

(1) provided by the state or another governmental entity; and

(2) based on employment;

a covered employee is considered an employee solely of the client.

(b) A client is entitled to the benefit of any tax credit, economic incentive, or other benefit arising as the result of the employment of a covered employee of the client.

(c) If the grant or amount of an incentive is based on the number of employees a client employs:

(1) each client must be treated as employing only the covered employees actually working in the client's business operations; and

(2) covered employees working for other clients of the PEO

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1 **must not be counted.**
2 **(d) A PEO shall provide, upon request by a client or an agency**
3 **or a department of the state or of another governmental entity,**
4 **employment information:**
5 **(1) reasonably required by an agency or a department of the**
6 **state or of another governmental entity that is responsible for**
7 **administration of a tax credit or economic incentive described**
8 **in this section; and**
9 **(2) necessary;**
10 **to support a request, a claim, an application, or another action by**
11 **a client seeking a tax credit or an economic incentive.**
12 **Sec. 5. With respect to a bid, a contract, a purchase order, or an**
13 **agreement entered into with the state or a political subdivision of**
14 **the state, a client's status or certification as a:**
15 **(1) small, minority owned, disadvantaged, or woman owned**
16 **business enterprise; or**
17 **(2) historically underutilized business;**
18 **is not affected because the client has entered into the professional**
19 **employment agreement.**
20 **Chapter 3. Registration**
21 **Sec. 1. (a) A person shall not:**
22 **(1) provide professional employer services;**
23 **(2) advertise that the person:**
24 **(A) is a professional employer organization; or**
25 **(B) provides professional employer services; or**
26 **(3) otherwise hold the person out as a professional employer**
27 **organization;**
28 **in Indiana unless the person is registered under this article.**
29 **(b) The registration requirement specified in subsection (a)**
30 **applies to a person that performs any of the activities specified in**
31 **subsection (a) regardless of the person's use of any of the following**
32 **terms:**
33 **(1) Professional employer organization.**
34 **(2) PEO.**
35 **(3) Staff leasing company.**
36 **(4) Registered staff leasing company.**
37 **(5) Employee leasing company.**
38 **(6) Administrative employer.**
39 **(7) Any other name.**
40 **Sec. 2. An applicant for registration under this article shall file**
41 **with the department the following information:**
42 **(1) The name or names under which the applicant conducts**

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business.

(2) The address of the principal place of business of the applicant and the address of each office the applicant maintains in Indiana.

(3) The applicant's taxpayer or employer identification number.

(4) A list by jurisdiction of each name under which the applicant has operated in the preceding five (5) years, including any alternative names, names of predecessors, and, if known, successor business entities.

(5) A statement of ownership that includes the name and evidence of the business experience of any person that, individually or acting in concert with one (1) or more other persons, owns or controls, directly or indirectly, twenty-five percent (25%) or more of the equity interests of the applicant.

(6) A statement of management that includes the name and evidence of the business experience of any individual who serves as president, chief executive officer, or otherwise has the authority to act as senior executive officer of the applicant.

(7) A financial statement:

- (A) setting forth the financial condition of the applicant as of a date not earlier than one hundred eighty (180) days before the date the financial statement is submitted to the department;**
- (B) prepared in accordance with generally accepted accounting principles; and**
- (C) audited by an independent certified public accountant licensed to practice in the jurisdiction in which the accountant is located.**

However, a PEO that does not have sufficient operating history to have an audited financial statement based upon at least twelve (12) months of operating history must meet the financial requirements specified in IC 27-16-5 and present a pro forma financial statement reviewed by a certified public accountant licensed to practice in the jurisdiction in which the accountant is located.

Sec. 3. (a) A PEO that is operating in Indiana on July 1, 2005, shall complete the PEO's initial registration not later than January 1, 2005.

(b) An initial registration under subsection (a) is valid until the end of the PEO's first fiscal year end that occurs after June 30,

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(c) A PEO that is not operating in Indiana on July 1, 2005, shall complete the PEO's initial registration before commencement of operations in Indiana.

Sec. 4. A PEO shall, not more than one hundred eighty (180) days after the end of the PEO's fiscal year, renew the PEO's registration by filing a statement notifying the department of any changes in the information provided in the PEO's most recent registration or renewal.

Sec. 5. A PEO group may satisfy the reporting and financial requirements of this chapter on a combined or consolidated basis if each member of the PEO group guarantees the obligations under this article of each other member of the PEO group.

Sec. 6. (a) A PEO that is not domiciled in Indiana is eligible for a limited registration under this article if the PEO:

- (1) submits a properly executed request for limited registration on a form prescribed by the department;**
- (2) is licensed or registered as a professional employer organization in another state that has licensure or registration requirements that are:**
 - (A) substantially the same as; or**
 - (B) more restrictive than;****the requirements of this article;**
- (3) does not:**
 - (A) maintain an office; or**
 - (B) directly solicit clients located or domiciled; in Indiana; and**
- (4) does not have more than fifty (50) covered employees who are employed or domiciled in Indiana on any day.**

(b) A limited registration is valid for one (1) year and may be renewed.

(c) A PEO that seeks limited registration under this section shall provide to the department information and documentation necessary to show that the PEO qualifies for a limited registration.

(d) IC 27-16-5-1(1) does not apply to a PEO that applies for limited registration under this section.

Sec. 7. The department shall adopt rules under IC 4-22-2 to provide for registration of a PEO without compliance with this chapter and IC 27-16-5 by the commissioner's acceptance of an affidavit or a certification:

- (1) provided by a bonded, independent, and qualified assurance organization that has been approved by the**

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commissioner; and
(2) that certifies the qualifications of a professional employer organization.

Sec. 8. The department shall maintain a list of PEOs that are registered under this article.

Sec. 9. The department may prescribe forms necessary to promote the efficient administration of this chapter.

Sec. 10. All records, reports, and other information obtained from a PEO under this chapter, except to the extent necessary for the proper administration of this chapter by the department, are confidential.

Chapter 4. Fees

Sec. 1. Upon filing an initial registration application under IC 27-16-3-2, a PEO shall pay an initial registration fee not to exceed five hundred dollars (\$500).

Sec. 2. Upon the filing of an annual renewal of a registration under IC 27-16-3-4, a PEO shall pay a renewal fee not to exceed two hundred fifty dollars (\$250).

Sec. 3. Upon initial application for limited registration under IC 27-16-3-6 and upon each annual renewal of the limited registration, a PEO shall pay a fee not to exceed two hundred fifty dollars (\$250).

Sec. 4. The department shall adopt rules under IC 4-22-2 to specify any fee to be charged for a PEO group registration.

Sec. 5. A PEO seeking registration under IC 27-16-3-7 shall pay an initial and annual fee not to exceed two hundred fifty dollars (\$250).

Sec. 6. (a) The department shall adopt rules under IC 4-22-2 to specify any other fee to be charged under this article.

(b) A fee:

- (1) for which the amount is not specified in; and
- (2) that is charged under;

this article must not exceed the amount reasonably necessary for the administration of this article.

Sec. 7. Fees collected under this chapter shall be deposited in the department of insurance fund established by IC 27-1-3-28.

Chapter 5. Financial Requirements

Sec. 1. (a) A PEO shall maintain either:

- (1) subject to section 2 of this chapter, a minimum net worth of one hundred thousand dollars (\$100,000); or
- (2) subject to subsection (b), a bond, an irrevocable letter of credit, or securities with a minimum market value of one

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hundred thousand dollars (\$100,000).
(b) A bond described in subsection (a)(2) must be held by a depository designated by the department, securing payment by the PEO of all taxes, wages, benefits, or other entitlement due to or with respect to covered employees in the event that the PEO does not make the payments when due.

Sec. 2. A bond, an irrevocable letter of credit, or securities described in section 1(a)(2) of this chapter must not be included in the calculation of the minimum net worth described in section 1(a)(1) of this chapter.

Chapter 6. General Requirements and Provisions

Sec. 1. Except as provided in a professional employer agreement, the following apply to a co-employment relationship:

- (1) The client:
 - (A) may exercise and enforce all rights; and
 - (B) is obligated to perform all duties and responsibilities; that otherwise apply to an employer in an employment relationship, that are allocated to the client by the professional employer agreement and this article, and that are not specifically allocated to the PEO by the professional employer agreement and this article.
- (2) The PEO:
 - (A) may exercise and enforce only the rights; and
 - (B) is obligated to perform only the duties and responsibilities; that are required of the PEO or specifically allocated to the PEO by this article and the professional employer agreement.
- (3) Unless otherwise expressly agreed by the PEO and the client in the professional employer agreement, the client retains the exclusive right to direct and control the covered employees as necessary to:
 - (A) conduct the client's business;
 - (B) discharge the client's fiduciary responsibilities; or
 - (C) comply with licensure requirements that apply to the client or the covered employees.

Sec. 2. (a) Except as provided in this article, the co-employment relationship between a client and a PEO, and between a co-employer and a covered employee, is governed by the professional employer agreement.

(b) A professional employer agreement must specify the following:

- (1) The allocation of rights, duties, and responsibilities

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described in section 1 of this chapter.

(2) Except as provided in subsection (c), that the PEO is responsible for:

- (A) payment of wages to covered employees;
- (B) withholding, collection, reporting, and remittance of payroll related and unemployment taxes; and
- (C) to the extent the PEO has assumed responsibility in the professional employer agreement, making payments for employee benefits for covered employees.

(3) The allocation, to either the client or the PEO, of the responsibility to obtain worker's compensation coverage for covered employees from a worker's compensation insurer that is authorized under this title to conduct the business of insurance in Indiana.

(4) If the professional employer agreement allocates the responsibility under subdivision (3) to the PEO, a requirement that the PEO maintain and provide to the client, at the client's request at the termination of the professional employer agreement, records regarding loss experience related to the worker's compensation insurance coverage.

(c) A PEO is not responsible for an obligation between a client and a covered employee for payments in addition to the covered employee's salary, draw, or regular rate of pay, including bonuses, commissions, severance pay, deferred compensation, profit sharing, or vacation, sick, or other paid time off, unless the PEO has expressly agreed to assume liability for the payments in the professional employer agreement.

Sec. 3. A PEO shall provide written notice to each covered employee who is affected by a professional employer agreement entered into by the PEO concerning the general nature of the co-employment relationship between and among the PEO, the client, and the covered employee.

Sec. 4. (a) Except as expressly provided by the professional employer agreement:

- (1) a client:
 - (A) is solely responsible for:
 - (i) the quality, adequacy, or safety of goods or services produced or sold in the client's business;
 - (ii) directing, supervising, training, and controlling the work of a covered employee with respect to the business activities of the client; and
 - (iii) the acts, errors, or omissions of a covered employee

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with respect to activities described in item (ii); and
(B) is not liable for the acts, errors, or omissions of:
 (i) the PEO; or
 (ii) a covered employee of the client and a PEO when the covered employee is acting under the express direction and control of the PEO.

(2) A PEO is not liable for the acts, errors, or omissions of a client or a covered employee of the client when the covered employee is acting under the express direction and control of the client.

(3) A covered employee is not, solely as the result of being a covered employee of a PEO, an employee of the PEO for purposes of:
 (A) general liability insurance;
 (B) fidelity bonds;
 (C) surety bonds;
 (D) employer's liability that is not covered by worker's compensation; or
 (E) liquor liability insurance;
 carried by the PEO unless the covered employee is specified as an employee of the PEO by specific reference in the professional employer agreement and any applicable prearranged employment contract, insurance contract, or bond.

(b) This section does not limit:
 (1) a contractual liability or obligation specified in a professional employer agreement; or
 (2) the liabilities and obligations of a PEO or client as specified in this article.

Sec. 5. A PEO that offers, markets, sells, administers, or provides professional employer services under a professional employer agreement as provided in this article is not:
 (1) engaged in the business of insurance; or
 (2) acting as an administrator (as defined in IC 27-1-25-1) .

Sec. 6. (a) A business license fee or other fee that is based upon gross receipts must, in the case of a PEO, be based upon the administrative fee of the PEO.
(b) A tax assessed on a per capita or per employee basis must be assessed against a:
 (1) client for covered employees; and
 (2) PEO for the PEO's employees who are not covered employees.

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1 (c) In the case of tax imposed or calculated upon the basis of
2 total payroll, a PEO is eligible to apply a small business allowance
3 or exemption available to the client for covered employees for the
4 purpose of computing the tax.

5 Chapter 7. Benefit Plans

6 Sec. 1. A client and a PEO are each considered to be an
7 employer for purposes of sponsoring retirement and welfare
8 benefit plans for covered employees.

9 Sec. 2. A fully insured welfare benefit plan offered to covered
10 employees of a single PEO is:

- 11 (1) considered to be a single employer welfare benefit plan;
- 12 and
- 13 (2) not a multiple employer welfare arrangement (as defined
- 14 in IC 27-1-34-1(b)) and is not required to comply with
- 15 IC 27-1-34.

16 Sec. 3. For purposes of IC 27-8-15, all covered employees of a
17 PEO participating in a group health benefit plan sponsored by the
18 PEO are considered to be:

- 19 (1) employees of the PEO; and
- 20 (2) participating in a single employer plan.

21 Sec. 4. If a PEO offers to the PEO's covered employees a health
22 benefit plan that is not fully insured by an insurer authorized
23 under this title to conduct the business of insurance in Indiana, the
24 health benefit plan must:

- 25 (1) be administered by an administrator licensed under
- 26 IC 27-1-25;
- 27 (2) hold all plan assets, including participant contributions, in
- 28 a trust account;
- 29 (3) provide sound reserves for the health benefit plan as
- 30 determined using generally accepted actuarial standards as
- 31 set forth in an actuarial opinion filed with the commissioner
- 32 and prepared and signed by a qualified actuary who:
 - 33 (A) is a member in good standing of the American
 - 34 Academy of Actuaries; and
 - 35 (B) meets the requirements established by the
 - 36 commissioner in rules adopted under IC 4-22-2;
- 37 (4) annually submit current audited financial statements to
- 38 the commissioner;
- 39 (5) at the discretion of the commissioner, possess a written
- 40 commitment, binder, or policy for stop-loss insurance:
 - 41 (A) issued by an insurer authorized to conduct the business
 - 42 of insurance in Indiana; and

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- 1 **(B) that meets any specific and total coverage**
- 2 **requirements established by the commissioner in rules**
- 3 **adopted under IC 4-22-2;**
- 4 **(6) be subject to audit for compliance with the requirements**
- 5 **of this section by the department on a random basis or upon**
- 6 **a finding of reasonable need; and**
- 7 **(7) provide written notice to each covered employee**
- 8 **participating in the health benefit plan that the health benefit**
- 9 **plan is:**
- 10 **(A) self-insured or not fully insured; and**
- 11 **(B) subject to the federal Employee Retirement Income**
- 12 **Security Act of 1974 (29 U.S.C. 1001 et seq.).**

Chapter 8. Worker's Compensation

Sec. 1. Subject to the specification required under IC 27-16-6-2(b)(3), a client and a PEO are both considered the employer of a covered employee for purposes of coverage under IC 22-3-2 through IC 22-3-7.

Sec. 2. The protection of the exclusive remedy provisions of IC 22-3-2-6 and IC 22-3-7-6 apply to the PEO, the client, and each covered employee and other employee of the client regardless of whether the PEO or the client is responsible to obtain the worker's compensation coverage for the covered employees under the professional employer agreement.

Chapter 9. Unemployment Compensation Insurance

Sec. 1. (a) For purposes of IC 22-4, a covered employee of a PEO is an employee of the PEO.

(b) A PEO is responsible for the payment of contributions, penalties, and interest on wages paid by the PEO to the PEO's covered employees during the term of the professional employer agreement.

Sec. 2. A PEO shall report and pay all required contributions to the unemployment compensation fund as required by IC 22-4-10 using the state employer account number and the contribution rate of the PEO.

Sec. 3. Upon the:

- 36 **(1) termination of a professional employer agreement; or**
- 37 **(2) failure by a PEO to submit reports or make tax payments**
- 38 **as required under this article;**
- 39 **the client must be treated by the department of workforce**
- 40 **development as a new employer without a previous experience**
- 41 **record unless the client is otherwise eligible for an experience**
- 42 **rating.**

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