



AMERICAN ACADEMY *of* ACTUARIES

March 30, 2007

Sen. Carroll Leavell (NM)
Chair, PEO Working Group
National Conference of Insurance Legislators
c/o Mike Humphreys
385 Jordan Road
Troy, New York 12180

**Re: Proposed Model Act Regarding Professional Employer Organizations' (PEOs)
Relationship to Workers' Compensation Laws**

Dear Sen. Leavell:

The Workers' Compensation Subcommittee of the American Academy of Actuaries¹ (hereinafter "WC Subcommittee") respectfully offers the following comments with respect to the draft Model Act regarding Professional Employer Organizations' relationship to workers' compensation laws, currently being considered by the Workers' Compensation Insurance Committee.

As requested, attached is a copy of the draft Model Act with most of the Academy WC Subcommittee's tracked comments provided in markup. The WC Subcommittee intends for the comments that follow to be read in conjunction with the comments that are tracked in the attached draft Model Act.

Coverage Mechanism

The proposed language in the model act is silent as to whether coverage for Client businesses can or must be provided under separate policies issued to each Client, via multiple-coordinated policies, and/or under Master policies issued to the PEOs. There is an implication, however, that Master policies may be at least allowed. Under Section 6 Experience Ratings - Paragraph C, the PEO is required, upon the termination of a PEO agreement, to provide the Client with records regarding the loss experience related to workers' compensation insurance provided to Covered Employees, and is further required to provide records regarding that same loss experience to the appropriate rating/statistical organization within 90 days of termination of the PEO agreement.

¹ The American Academy of Actuaries is the public policy organization for actuaries practicing in all specialties within the United States. A major purpose of the Academy is to act as the public information organization for the profession. The Academy is non-partisan and assists the public policy process through the presentation of clear and objective actuarial analysis. The Academy regularly prepares testimony for Congress, provides information to federal elected officials, comments on proposed federal regulations, and works closely with state officials on issues related to insurance. The Academy also develops and upholds actuarial standards of conduct, qualification, and practice, and the Code of Professional Conduct for all actuaries practicing in the United States.

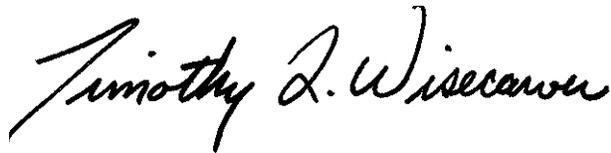
Such notices would presumably not be necessary if separate Client policies were issued in all circumstances.

In order to maintain an orderly, timely, and verifiable flow of experience data, it is strongly recommended that each Client's Covered Employees be insured under a policy limited to that Client. Such separate Client policies should be allowed, and in some jurisdictions may be required, to include Direct Hire Employees of the Client. Extricating Client data from the aggregate records underlying a Master Policy after the fact could cause delays and unnecessary costs at best, and, at worst, will create circumstances in which the desired records will be either unavailable or of questionable reliability.

Further in this regard, we note the existence of a requirement in Section 6 Experience Ratings – Paragraph A, in which each Client is required to have its own experience rating. Under current industry systems, multiple different experience ratings (i.e., one per Client covered under a Master Policy) cannot be issued under the same policy.

We appreciate NCOIL's efforts to address this topic and the opportunity to comment here.

Sincerely,

A handwritten signature in black ink that reads "Timothy L. Wisecarver". The signature is written in a cursive, flowing style.

Timothy L. Wisecarver, Chair
Workers' Compensation Subcommittee
American Academy of Actuaries

Enclosure

NATIONAL CONFERENCE OF INSURANCE LEGISLATORS

Proposed Model Act Regarding Professional Employer Organizations' (PEOs) ~~in~~ Relationship to Workers' Compensation Insurance

To be considered by the NCOIL Workers' Compensation Insurance Committee on July 19, 2007.

Sponsored by Sen. Carroll Leavell (NM)

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Section 1. Short Title

This Act may be called the *Model Act Regarding Professional Employer Organizations' (PEOs) ~~in~~ relationship to Workers' Compensation Insurance*.

Section 2. Purpose

The purpose of this Act is to require the registration of professional employer organizations (PEOs) and to regulate the use of experience ratings in PEO relationships.

[Drafting Note: This model is specifically designed to address the registration and use of experience ratings by PEOs in workers' compensation insurance. Some states may wish to address additional PEO rights and responsibilities, or require PEOs to be licensed.]

Section 3. Definitions

- A. "Applicant" means a party applying to register a PEO.
- B. "Client" means any party that enters into a Professional Employer Agreement with a PEO.
- C. "Covered Employee" means an employee of the Client whose responsibilities are shared between the Client and a PEO. ~~The party providing workers'~~

compensation coverage for a Covered Employee shall be explicitly stated in a PEO agreement. The Client shall be responsible for demonstrating compliance with its State workers' compensation statute.

[Drafting Note: Workers' compensation law governs whether or not the PEO is the employer of an individual for workers' compensation purposes. States must determine if a PEO agreement is consistent with the law.]

[Section 3. Definitions – Paragraph C. For purposes of consistency with other portions of the proposed language, insert “employment” between “whose” and “responsibilities.”](#)

- D. “Direct hire employee” means an individual who is an employee of the Client and who is not a Covered Employee.
- E. “Professional Employer Organization” or “PEO” means a ~~party that offers professional employer services and includes staff leasing services companies, employee leasing companies, staff leasing companies, and administrative employers, who offer or propose to offer professional employer services in this State. PEO does not include temporary help services or independent contractor arrangements.~~ **business entity that enters into agreements with other businesses, whether under a formal contract or otherwise and regardless of the terminology used by the parties to describe the relationship, under which the PEO assumes or shares employment responsibilities for all or a significant number of the worksite employees of the other business. However, “PEO” does not include a business entity that recruits and hires its own employees; assigns them to clients on a temporary basis to support or supplement the Client’s work force in special work situations such as employee absences, temporary skill shortages, and seasonal workloads; and customarily attempts to reassign the employees to other clients when they finish each assignment.**
- F. “Professional employer agreement” or “PEO agreement” means an agreement between a PEO and a Client under which the PEO agrees to assume specified employment responsibilities for all or part of the Client’s work force.
- G. “Insurer” means an insurance company authorized to do business in this State.

Section 4. Registration Requirements

- A. A PEO shall be registered as a Professional Employer Organization with the *[insert appropriate state agency]*. An insurer may not enter into a policy agreement with a PEO that is not registered.

- B. An applicant shall file an application for registration with the *[insert appropriate state agency]* on a form approved by the *[insert appropriate state agency]* accompanied by a *[insert application and fee amounts]*.

Drafting Note: Requirements regarding PEO registration information, the timeframe of the initial registration, and renewal procedures should be defined according to state law.

Section 5. General Rules

- A. The responsibility to obtain workers' compensation coverage for Covered Employees in compliance with all applicable law shall be specifically allocated in the Professional Employer Agreement to either the Client or the PEO. If such responsibility is allocated to the PEO under any such agreement, such agreement shall require that the PEO maintain and provide workers' compensation coverage for the Covered Employee from an insurer authorized to do business in this State. **The Client shall be responsible for demonstrating compliance with its State workers' compensation statute.**

[Coverage Responsibility](#)

[The proposed language \(Section 5 General Rules – Paragraph A\) envisions that the responsibility to obtain workers' compensation coverage for Covered Employees shall be allocated to either the PEO or the client in each PEO agreement. For regulatory entities charged with enforcing the coverage requirements of their state's workers' compensation laws, this provision could require considerable research into the details of individual contracts for the regulator to determine where this responsibility lies. Further, this allocation process seems at odds with the proposed language of Section 6, reproduced below:](#)

[“Section 6. Experience Ratings – Paragraph D, wherein ‘The Client is responsible for providing workers' compensation insurance for the Client company's direct hire and Covered employees.’”](#)

[While we do not object to PEOs assisting Clients in obtaining workers' compensation coverage, including, with support of the underwriting carrier, a consolidation of Client policies for purposes of applying such pricing programs as premium discount, schedule rating, and/or retrospective rating, we would contend that the ultimate responsibility for compliance with workers' compensation law with respect to both direct hire and covered employees, rests clearly and unambiguously with each Client.](#)

- ~~B. The PEO shall provide any information requested by the [insert appropriate state official] relating to its contractual provisions for inception and termination of PEO agreements with Clients, the methods by which the fees~~**

~~charged to Clients are calculated, and any other information relevant to the PEO's workers' compensation coverage arrangements.~~

- C. A PEO may only provide ~~life, health, or~~ workers' compensation benefits through a policy written by a licensed insurer. A PEO that pays benefits to Covered Employees from its own funds and receives fees paid by clients or employees is acting as an insurer.

[Section 5. General Rules. The proposed language would eliminate a prior draft's entire Paragraph B. With the benefit of that change, it would appear that the existing Paragraph C should become Paragraph B.](#)

Section 6. Experience Ratings

- A. Workers' compensation insurance premiums shall be determined based on the experience rating of the Client company for which the PEO performs services, provided the Client company has sufficient workers' compensation premium volume to be experience rated. Otherwise the premiums shall be at the rate approved by *[insert appropriate state agency]* for an employer that cannot be experience rated.

[Experience Ratings](#)

~~Finally,~~ [Section 6 Experience Ratings – Paragraph A provides that, subject to eligibility requirements, workers' compensation experience ratings shall be determined based on the experience rating of the Client company for which the PEO performs services. We suggest that it be made clear that the Client's experience rating shall be promulgated using all exposure and loss experience for the Client, regardless of whether such experience was developed for Covered Employees under one or more PEO agreements or for Direct Hire Employees.](#)

- B. The PEO shall maintain separate payroll records and separate records of work-related injuries and illnesses for each Client company.
- C. At the termination of a PEO agreement, the PEO shall provide the Client with records regarding the loss experience related to workers' compensation insurance provided to Covered Employees. **The PEO shall provide records regarding loss experience to the *[insert appropriate rating/statistical organization]* within 90 days of termination of the PEO agreement.**
- D. The Client is responsible for providing workers' compensation insurance for the Client company's direct hire **and Covered** employees.

Section 7. Severability

If any section, paragraph, sentence, clause, phrase, or any part of this Act passed is declared invalid, the remaining sections, paragraphs, sentences, clauses, phrases, or parts thereof shall be in no manner affected and shall remain in full force and effect.

Drafting Note: States should consider whether to include rulemaking authority for the [insert appropriate state agency] as part of this act.

Section 8. Effective Date

This Act shall take effect on *[insert date]*.

*Proposed Working Group additions to the draft Model Act indicated by **boldface underline**.*
*Proposed Working Group deletions from the draft Model Act indicated by **boldface strikethrough**.*