

- SUBJECT:** Revising regulations for professional employer organizations
- COMMITTEE:** Business and Industry — committee substitute recommended
- VOTE:** 6 ayes — Oliveira, Bohac, Orr, Villalba, Walle, Workman
0 nays
1 absent — E. Rodriguez
- WITNESSES:** For — Garry Bradford, Unique HR; Ashley Slania, Insperity; (*Registered, but did not testify:* Victor Alcorta, Insperity; Sabrina Brown, T & T Staff Management, Inc.; Cathy Dewitt, Texas Association of Business; Galt Graydon and Adam Peer, National Association of Professional Employer Organizations; Megan Peters, ADP; William Yarnell, TriNet)

On — (*Registered, but did not testify:* Doug Danzeiser and Nancy Moore, Texas Department of Insurance; Brian Francis, Texas Department of Licensing and Regulation)
- BACKGROUND:** Labor Code, ch. 91 regulates staff leasing services. The term “staff leasing services company” includes a professional employer organization.

Labor Code, ch. 406 governs workers’ compensation insurance coverage. Sec. 406.097, which addresses executive employees, states that a sole proprietor or partner of a covered business entity or a corporate officer with an equity ownership in a covered business entity of at least 25 percent may be excluded from workers’ compensation coverage.

Insurance Code, sec. 462.308(a)(2) enables the Texas Property and Casualty Insurance Guaranty Association to collect from an insured employer whose net worth exceeds \$50 million the amount of a workers’ compensation claim paid by the guaranty association following the impairment of the normal insurer.
- DIGEST:** CSHB 2763 would make three key changes to statutes regulating professional employment services:
1. changing statutory definitions and terminology in the professional

- employment service industry;
2. allowing professional employment organizations to establish a self-funded health benefit plan for their employees; and
 3. allowing either party in a professional employment services agreement to be responsible for workers' compensation coverage.

Definition changes. CSHB 2763 would add definitions and change key terminology used in statute regarding the professional employment services industry. Among these changes:

- the term “professional employer organization” (PEO) would replace “staff leasing services company” and could be used only by a staff leasing services license holder;
- “client” would mean a person (company) that entered into a professional employer services agreement with a license holder;
- “co-employment relationship” would mean the agreement between a PEO and a client company, both of which would be defined as “co-employers” and;
- “covered employee” would mean an employee working under both a PEO and a client.

A professional employer service agreement would be a contract arising from a co-employment relationship between the PEO and the client. Each party would have rights and obligations under the agreement and under statute. The client would have sole responsibility for the direction and control of covered employees, as well as any of the goods and services they produced and any of their acts, errors, and omissions.

Workers' compensation. The bill would allow the client or the PEO to obtain workers' compensation insurance coverage for covered employees, where before only the PEO could provide such coverage. The professional employer services agreement, which would be provided to the Texas Department of Insurance (TDI) on request, would specify whether the parties had elected to obtain coverage and, if so, which party was responsible.

If the PEO maintained the coverage, then an executive employee of the client would be treated as an executive employee for the purposes of the workers' compensation policy, as described in Labor Code, sec. 406.097. Under the PEO's workers compensation coverage, the premiums would be based on the experience rating of the client for the first two years the

employees were under the policy. Afterwards, if the client decided to take responsibility for coverage from the PEO, the premium would be based on the lower of the experience modifier of the client before the PEO's coverage or the experience modifier of the license holder when client's coverage under the PEO's coverage ended.

If the client maintained the coverage, the client would be responsible for paying the premiums for covered employees based on the client's experience rating.

In addition to following existing workers' compensation coverage requirements for license holders, either co-employer that elected to maintain coverage under CSHB 2763 would have to:

- notify employees that the employer maintained coverage, and provide notification of any changes in that coverage (Labor Code, sec. 406.005); and
- file reports of on-the-job injury or occupational diseases with TDI's Division of Workers' Compensation (Labor Code, sec. 411.032).

These same new requirements would apply if neither co-employer chose to maintain coverage under the bill.

The client, not the PEO, would be considered the insured employer under Insurance Code, sec. 462.308(a)(2), which would require clients with a net worth greater than \$50 million to pay back the amount of a workers' compensation claim to the Texas Property and Casualty Insurance Guaranty Association if the workers' compensation insurer became impaired.

The bill would require the workers' compensation insurer, instead of TDI, to be responsible for providing computations to another prospective workers' compensation insurer of the client.

Self-funded health benefit plan. The bill would extend to PEOs the ability to offer to covered employees either a fully insured welfare benefit plan provided by an authorized insurance company, or a self-funded health benefit plan. For the purposes of sponsoring retirement and benefit plans, CHSB 2763 would consider both the client and the PEO as the employer under state law.

The bill would repeal Labor Code, sec. 91.043, which currently prohibits PEOs from sponsoring a self-funded health benefit plan. A PEO that met other requirements of Labor Code, ch. 91 could offer self-funded plans that were not fully insured, with the approval of the insurance commissioner. In the rule-making process to implement these plans, the commissioner would consider rules adopted for similar benefit plans and could not adopt a rule requiring that the co-employers be members of the same trade or industry.

The bill would establish the following requirements for rules adopted to govern PEO self-funded health benefit plans:

- the insurance commissioner would have initial and final approval, the authority to require PEOs to provide forms or other items, and the ability to examine applications or plans;
- the plan would need a fidelity bond and would use an independent actuary and third-party administrator;
- the rules would establish the minimum number of client companies and employees covered by a plan, as well as standards for plan managers and minimum amounts of gross contributions, written commitment, binder, policy for stop-loss insurance, and reserves; and
- TDI could assess a reasonable fee to defray the costs of administration.

The PEO would have to appoint the commissioner of insurance as a resident agent and pay a \$50 fee for purposes of service of process.

The commissioner could examine the plan's affairs or access the records, and examine under oath a manager or employee of a PEO regarding the plan.

The Insurer Receivership Act, as well as Insurance Code requirements that govern audits, financial condition, and supervision and conservatorship, would apply to these self-funded health benefit plans. The commissioner could revoke, limit, or suspend authorization of a non-compliant plan.

Other provisions and effective date. CSHB 2763 would repeal statutes that reference an "assigned employee" under a staff leasing services arrangement (Labor Code, sec. 91.001(2) and Tax Code, sec. 171.0001(2)).

Information submitted to TDI under CSHB 2763 regarding a health plan or workers' compensation plan would be confidential and not subject to disclosure.

CSHB 2763 would take effect September 1, 2013, would apply only to professional service agreements entered into on or after that date.

SUPPORTERS
SAY:

CSHB 2763 would update and clarify the rights, responsibilities, and duties of parties to a professional employer service agreement.

Definition changes. The bill would update statutory terminology to reflect commonly used terms in the industry today. Not only would this help by extending the law's protection of designated terms for PEOs, it also would clarify the language to ensure that the professional employment industry and regulators alike had a clear grasp of terminology in the law.

Workers' compensation. The bill would allow either the PEO or the client to provide workers' compensation coverage, again giving the professional employment industry the flexibility to tailor its service packages to its clients' needs.

Clients that had to pay back the Texas Property and Casualty Insurance Guaranty Association if their workers' compensation insurer went insolvent would be responsible for the workplace environment in which the employee sustained the injury in the first place. In addition, the guaranty association would collect only from those employers with a net worth greater than \$50 million, companies that would be well able to sustain the cost. Additionally, client companies are generally a party to workers' compensation policies held by PEOs and therefore should be held to obligations to the guaranty association. The bill would clarify only which of the two employers would be considered the insured employer in Insurance Code, sec. 462.308(a)(2).

Self-funded health benefit plan. CSHB 2763 would give the PEO industry more flexibility in meeting the requirements of its clients. PEOs would be able to offer self-funded health plans, allowing them to tailor plans to the needs of the covered employees and their clients and enabling them to set the price point and compile a benefits package their customers wanted. The bill would safeguard the plans' participants by applying protections in the Insurance Code to the plans, including provisions

dealing with auditing and examination, financial condition, and insolvency.

In addition, these plans would be overseen by the commissioner of insurance, who would adopt rules using similar benefit plan rules as a guideline and could revoke authorization for plans not meeting TDI standards. As federal changes to health care statutes come into effect, smaller employers in particular could benefit from the ability to seek health care coverage from a PEO.

OPPONENTS
SAY:

Workers' compensation. The bill would be unfair to certain clients and to the Texas Property and Casualty Insurance Guaranty Association. The client would bear the responsibility of paying back the guaranty association if its workers' compensation policy insurer became insolvent, even if the client was not the main insured party. Not only that, the guaranty association would be unable to collect from anyone if the PEO was the only party holding the workers' compensation policy.

Self-funded health benefit plan. The state should be careful about extending to a PEO the right to run a self-funded health benefits plan. PEO health benefit plans present a particular risk because they are not subject to all the standards to which a private health insurance company must adhere. Among other provisions, PEO health benefit plans would not have to follow benefit mandates requiring them to cover certain diseases, including serious mental illness, diabetes, and required immunizations, and they would not have to follow prompt-payment requirements. While the bill would direct the commissioner of insurance to adopt rules for these plans comparable to similar benefit plans, the bill leaves ambiguous what would constitute a "similar benefit plan."

NOTES:

In addition to CSHB 2763, the House Business and Industry Committee has recommended an identical committee substitute for the Senate companion, SB 1286 by Williams.

Key provisions that appear in the committee substitute but not in HB 2763 as introduced include:

- requiring certain clients to repay the Texas Property and Casualty Insurance Guaranty Association if the client's workers' compensation insurer was unable to pay a claim due to insolvency;
- directing the commissioner of insurance to consider rules for

similar benefit plans when adopting rules to regulate self-funded health benefit plans offered by PEOs;

- allowing individuals qualifying as executive employees to be designated as such for premium calculation and classification purposes for a workers' compensation policy held by the PEO; and
- changing the definition of executive employee to match the definition in Labor Code, sec. 406.097.