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Deanna Halliwell
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10/22/03
Date

2003 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2298

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Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2298

Senate 1BL

conference Committee

Hearing Date 01/27/03

Tape Number	Side A	Side B	Meter #
Tape 1	x		3950 to end
Tape 1		x	0-4380
Committee Clerk Signature <i>Lisa VanBeekom</i>			

Minutes:

Senator Mutch opens SB 2298. All Senators present.

Darcy Fuchs testifies in support of SB 2298 (testimony attached)

Senator Klein : What were attempting to do is to streamline your ability to file your reports and make it easier, You would just have to file one report instead of one for every person. You've been covered under worker's comp, this would just make it a lot easier.

Senator Mutch: But you can't do that now?

Fuchs We must file a separate one for each employee.

Senator Heitkamp: How would they track the worker's if they don't do that?

Fuchs: We could assign the workers a code and put it on their report so worker's comp would know which employees they were.

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Operator's Signature _____ Date 10/22/03

Page 2

Senate ~~_____~~ 1BL

Bill/Resolution Number SB 2298

Hearing Date 01/27/03

Senator Heitkamp: Would that individual worker be able to be tracked if he or she jumped around from place to place?

Fuchs: Yes

Senator Judy Lee introduces bill and explains the reasoning of the bill.

Dan Frisk, tax attorney from Fargo, testifying support of SB 2298.

He is talking about what a PEO is. He states it is not a bookkeeping service and is not a temp agency. It takes the employees from a business and leases them back to the company but they remain an employee of the PEO. The PEO provides health insurance benefits, 401 K benefits, 125 flex spending benefits. It is good for the state because it attracts a higher quality of workers. It keeps them in the state. this is how small business afford and individual and provide them with health insurance benefits and all other benefits. Payroll Express as a PEO, if we are not considered the employer than we are going to run into problems. If we are not considered the employer then it is difficult to offer these services. Payroll Express for example employees 200 people as the employer,. We are competing with other states for people and this is a way for the small business to employee people without the added benefits. We are not here to mod-swap. we are not taking someone who is welding and saying he is a clerical employee. I am the last person who is opposed to business registering but this case we sat down with Worker's Comp and looked at Minnesota and they require us to register as a PEO because then they don't have PEO's mod-swaping.

Senator Heitkamp asks if these workers are full time and what are they fees for registration and who'd paying it?

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Page 3

Senate ~~_____~~ 18L

Bill/Resolution Number SB 2298

Hearing Date 01/27/03

Frisk: Yes, and we are going to register with Worker's Comp. the fees are set out there to off set some of the cost. the registration is intended for workers comp.

Senator Mutch: You are providing this service now with a 401K and everything else, without this proposal what's changes?

Frisk: Worker's comp wants to keep separate accounts for each employee. We would like the committee to recognize that PEO is the employer.

Senator Klein: Doesn't this bill just address the Worker's Comp side correct?

Frisk: Yes, but this will to only address Worker's Comp but we want to clarify that we are the employer.

Senator Nothing: If you are saying that you will register, why do we need line 9 on page 2 that says registration by a professional employer or organization is optional?

Frisk: The bill that we submitted does not have the optional registration. ours was mandatory it came right out of Minnesota. and it did not provide for an optional registration.

Secretary of State, Al Jaeger testifies in opposition to SB 2298. (Testimony attached) This only reflects on section 1 of this bill that addresses my department.

Anne Jorgenson Green, Staff Attorney for Worker's Comp testifying in opposition of bill (Testimony attached)

Senator Nothing: I understand what you want to keep doing business as usual do you have any solutions to help these small businesses?

Green: We feel we had come up with a solution for these problems with these businesses.

Senator Nothing: what is the feeling of these clients about this solution?

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Page 4

Senate ~~_____~~ 18L

Bill/Resolution Number SB 2298

Hearing Date 01/27/03

Green: i can only communicate for myself, feeling that we had a solution with these small businesses.

Senator Heitkamp: Is this something that is arising all over the nation?

Green: Other states are experiencing the same kind of problems other states are.

Senator Heitkamp: Have you found anything that these companies have done throws up a red flag, such as a bad employee.

Green: The experiences with PEO's have been good.

Senator Espegard: Isn't it easy to develop software to keep track of these PEO employees?

Green: we have tried to develop that with companies. We are in opposition because language of bill under subsection 2 on Page 2 Line 26 .

senator Espegard: I don't see this as a large employer, I feel it is a software problem.

Senator Mutch: How cumbersome is it now, where are the advantages for this in the first place.

Senator Krebsbach: I understand this is a replication of Minnesota, how do they do it?

Green: I can not speak directly about Minnesota.

Jim Fettig, Branch Manager of Kelly Services testifies in opposition (testimony attached)

Senator Heitkamp: In order to not conflict with the service that you provide that could be better defined in this bill.

Senator Nething: how do you deal with this in Minnesota?

Fettig: I know the ones who work with those in Minnesota so follow the Minnesota guidelines.

The definition says they are staffing service and that is not what they are.

Anne Green adds additional information that is attached.

Closed SB 2298

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2298

Senate Industry, Business and Labor Committee

Conference Committee

Hearing Date 02-04-03

Tape Number	Side A	Side B	Meter #
2	xxx		5:00-end
2		xxx	Beginning
Committee Clerk Signature <i>Lisa VanBerkom</i>			

Minutes: Chairman Mutch opened the discussion on SB 2298. Senator Heitkamp was absent.

SB 2298 relates to workers' compensation coverage of professional employer organizations.

There was brief discussion among committee members. Amendments prepared for Senator Lee were discussed. See attached.

Senator Nething moved to AMEND. Senator Espegard seconded.

Roll Call Vote: 6 yes. 0 no. 1 absent.

Senator Espegard moved a DO PASS AS AMENDED. Senator Krebsbach seconded.

Roll Call Vote: 6 yes. 0 no. 1 absent.

Carrier: Senator Klein.

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10/22/03
Date

FISCAL NOTE
 Requested by Legislative Council
 02/11/2003

Amendment to: SB 2298

1A. State fiscal effect: Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

1B. County, city, and school district fiscal effect: Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. Narrative: Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

**NORTH DAKOTA WORKERS COMPENSATION
 2003 LEGISLATION
 SUMMARY OF ACTUARIAL INFORMATION**

BILL DESCRIPTION: Workers' Compensation Coverage of Staffing Services

BILL NO: Engrossed SB 2298

SUMMARY OF ACTUARIAL INFORMATION: North Dakota Workers Compensation, together with its actuary, Glenn Evans of Pacific Actuarial Consultants, has reviewed the legislation proposed in this bill in conformance with Section 54-03-25 of the North Dakota Century Code.

The engrossed bill clarifies the definitions and coverage requirements for staffing services and client companies.

FISCAL IMPACT: No significant fiscal impact is anticipated.

DATE: February 12, 2003

3. State fiscal effect detail: For information shown under state fiscal effect in 1A, please:

A. Revenues: Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

see narrative

B. Expenditures: Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

see narrative

C. Appropriations: Explain the appropriation amounts. Provide detail, when appropriate, of the effect on

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10/22/03
 Date

the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	John Halvorson	Agency:	NDWC
Phone Number:	328-3760	Date Prepared:	02/13/2003

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John Halvorson
Operator's Signature

10/22/03

Date

FISCAL NOTE
 Requested by Legislative Council
 01/21/2003

Bill/Resolution No.: SB 2298

1A. **State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$100	\$0	\$0	\$0
Expenditures	\$0	\$0	\$5,000	\$0	\$0	\$0
Appropriations	\$0	\$0	\$5,000	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2. **Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

Section 1 of this bill places a mandate on the Secretary of State to develop a system to register professional employer organizations even though it would at their option whether or not to register. Since the information, which must be disclosed by the registrant under subsection 2, is not required of any other type of registration filed in the Secretary of State's office, it is unknown how many registrations would actually be filed since the registration requirement is optional.

3. **State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

A. **Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

The registration fee proposed in this bill is \$10, which is inconsistent and lower than the other fees already set in law for similar registrations and filings. If ten of these organizations voluntarily register, the revenue generated to the general fund would only be \$100.

B. **Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

It is estimated that it would cost approximately \$5,000 to do the necessary programming to implement this optional registration program.

C. **Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

The agency's budget, as recommended by the Governor, does not include discretionary funds to implement a registration program

Deanna D. Hall
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10/22/03

Date

that is optional as to whether or not the identified organizations even register. Therefore, without an additional appropriation, the Secretary of State cannot justify the expenditure of general fund dollars for an optional registration program. It would take away from the agency's other more critical operational requirements.

Name:	Al Jaeger	Agency:	Secretary of State
Phone Number:	328-2900	Date Prepared:	01/22/2003

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10/22/03
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903
2-5-3
10f3

PROPOSED AMENDMENTS TO SENATE BILL NO. 2298

Page 1, line 1, remove "provide for registration of professional employer organizations; and to"

Page 1, line 3, replace "professional employer organizations" with "staffing services"

Page 1, remove lines 5 through 24

Page 2, remove lines 1 through 10

Page 2, line 24, remove the overstrike over "client company"

Page 2, line 25, remove the overstrike over "or"

Page 2, line 26, replace "be in" with "include" and remove "sole"

Page 3, line 2, overstrike "an employee of" and after "service" insert "or that contracts to lease any or all of that person's employees from a staffing service"

Page 3, line 3, remove "Professional employer organization" means a staffing service that is in the"

Page 3, remove line 4

Page 3, line 5, remove "a."

Page 3, line 7, remove "a"

Page 3, replace line 8 with "organizations' staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional employer organization, staff leasing company, employee leasing organization, or temporary staffing company regardless of the term used.

(1) Within the meaning of staffing service as used in this section, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

- (a) An employee absence;
- (b) A temporary skill shortage;
- (c) A seasonal workload; or
- (d) A special assignment or project with a targeted end date.

2.13

(2) The term does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months.

Page 3, remove line 9

Page 3, line 10, after "4." insert "A staffing service that provides only temporary staffing services is the employee's employer. The temporary staffing service shall maintain a workers' compensation account in the temporary staffing service's name and report the wages for those workers annually to the bureau. All other staffing services shall:

- a. Report annually the payroll detail for each North Dakota client company.
 - b. Maintain complete and separate records of the payroll of the staffing service's client companies. Claims must be separately identified by the staffing service for each client company.
 - c. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between a staffing service and a client company is terminated, the employees become the sole employees of the client company.
 - d. Notify the bureau of the client company's name, workers' compensation account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
 - e. Supply the bureau with a copy of the agreement between the staffing service and client company.
 - f. Notify the bureau upon termination of any agreement with a client company, but no later than fifteen days from the effective date of termination.
 - g. Notify the staffing service's client companies of an "uninsured" status for failure to pay workers' compensation premiums within fifteen days of notice by the bureau.
5. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.
6. a. The bureau shall maintain all employer data for each client company requiring coverage under this title. If a client company enters an agreement with a staffing service, the bureau shall generate a master billing for the staffing service detailing the staffing service's client companies.
- b. Rate classifications for employees provided by a staffing service must be those which would apply as if the work were performed by the employees of the client company. A client company is eligible for bureau safety discount and dividend programs. If a client company enters an agreement with a staffing service, the client company shall retain the client company's experience rate, if applicable.

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Operator's Signature

10/22/03
Date

3 of 3

a. Both a staffing service and client company under this section are considered employers for purposes of section 65-04-26.1. A staffing service that provides employees to a client company that has been determined to be uninsured or ineligible for coverage under sections 65-04-27.1 and 65-04-33 may not secure workers' compensation coverage for those employees.

7. a. The bureau shall determine whether an entity is a staffing service. If the bureau determines an entity is a staffing service, the bureau may further determine if the entity is a temporary staffing service. In rendering either determination, the bureau may issue a decision under section 65-04-32. If the bureau determines an entity is not a staffing service, the client company shall maintain a workers' compensation account and pay the premium for coverage of the employees.

b. The factors the bureau may consider in determining whether an entity is a staffing service include the number of client companies handled by the staffing service, the length of time the staffing service has been in existence, the extent to which the staffing service extends services to the general public, the degree to which the client company and staffing service are separate and unrelated business entities, the repitition of officers or managers between the client company and staffing service, and the extent to which a client company has an ownership or other interest in the staffing service. The bureau also may consider the scope of the services provided by the staffing service, the relationship between the staffing service and the client company's workers, the written agreement between the staffing service and the client company, and any other factor deemed relevant by the bureau.

c. The bureau may require information from any staffing service, including a list of current client company accounts, staffing assignments, payroll information, and rate classification information. A client company shall provide any information requested by the bureau regarding any staffing service.

8."

Page 3, line 12, remove "Rules adopted by the"

Page 3, remove lines 13 and 14

Renumber accordingly

Deanna Stalder
Operator's Signature

10/22/03
Date

REPORT OF STANDING COMMITTEE (410)
February 5, 2003 1:08 p.m.

Module No: SR-22-1715
Carrier: Klein
Insert LC: 30601.0102 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2298: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2298 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "provide for registration of professional employer organizations; and to"

Page 1, line 3, replace "professional employer organizations" with "staffing services"

Page 1, remove lines 5 through 24

Page 2, remove lines 1 through 10

Page 2, line 24, remove the overstrike over "~~client company~~"

Page 2, line 25, remove the overstrike over "er"

Page 2, line 26, replace "be in" with "include" and remove "sole"

Page 3, line 2, overstrike "an employee of" and after "service" insert "or that contracts to lease any or all of that person's employees from a staffing service"

Page 3, line 3, remove "Professional employer organization means a staffing service that is in the"

Page 3, remove line 4

Page 3, line 5, remove "c."

Page 3, line 7, remove "a"

Page 3, replace line 8 with "organizations' staff leasing companies, employee leasing organizations, and temporary staffing companies. The term "staffing service" must be broadly construed to encompass entities that offer services provided by a professional employer organization, staff leasing company, employee leasing organization, or temporary staffing company regardless of the term used."

(1) Within the meaning of staffing service as used in this section, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns the employees to a client company to support or supplement the client company's workforce in a special work situation including:

- (a) An employee absence;
- (b) A temporary skill shortage;
- (c) A seasonal workload; or
- (d) A special assignment or project with a targeted end date.

(2) The term does not include arrangements in which the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than twelve consecutive months."

Page 3, remove line 9

Page 3, line 10, after "4." insert "A staffing service that provides only temporary staffing services is the employee's employer. The temporary staffing service shall maintain a workers' compensation account in the temporary staffing service's name and report the wages for those workers annually to the bureau. All other staffing services shall:

- a. Report annually the payroll detail for each North Dakota client company.
 - b. Maintain complete and separate records of the payroll of the staffing service's client companies. Claims must be separately identified by the staffing service for each client company.
 - c. Share employer responsibilities with the client company, including retention of the authority to hire, terminate, discipline, and reassign employees. If the contractual agreement between a staffing service and a client company is terminated, the employees become the sole employees of the client company.
 - d. Notify the bureau of the client company's name, workers' compensation account number, and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering an agreement with a client company, but no later than fifteen days from the effective date of the written agreement.
 - e. Supply the bureau with a copy of the agreement between the staffing service and client company.
 - f. Notify the bureau upon termination of any agreement with a client company, but no later than fifteen days from the effective date of termination.
 - g. Notify the staffing service's client companies of an "uninsured" status for failure to pay workers' compensation premiums within fifteen days of notice by the bureau.
5. A staffing service that provides both temporary and long-term employees is subject to the reporting requirements associated with the type of employee provided to the client company.
6. a. The bureau shall maintain all employer data for each client company requiring coverage under this title. If a client company enters an agreement with a staffing service, the bureau shall generate a master billing for the staffing service detailing the staffing service's client companies.
- b. Rate classifications for employees provided by a staffing service must be those which would apply as if the work were performed by the employees of the client company. A client company is eligible for bureau safety discount and dividend programs. If a client company enters an agreement with a staffing service, the client company shall retain the client company's experience rate, if applicable.

- c. Both a staffing service and client company under this section are considered employers for purposes of section 65-04-26.1. A staffing service that provides employees to a client company that has been determined to be uninsured or ineligible for coverage under sections 65-04-27.1 and 65-04-33 may not secure workers' compensation coverage for those employees.
7. a. The bureau shall determine whether an entity is a staffing service. If the bureau determines an entity is a staffing service, the bureau may further determine if the entity is a temporary staffing service. In rendering either determination, the bureau may issue a decision under section 65-04-32. If the bureau determines an entity is not a staffing service, the client company shall maintain a workers' compensation account and pay the premium for coverage of the employees.
- b. The factors the bureau may consider in determining whether an entity is a staffing service include the number of client companies handled by the staffing service, the length of time the staffing service has been in existence, the extent to which the staffing service extends services to the general public, the degree to which the client company and staffing service are separate and unrelated business entities, the repetition of officers or managers between the client company and staffing service, and the extent to which a client company has an ownership or other interest in the staffing service. The bureau also may consider the scope of the services provided by the staffing service, the relationship between the staffing service and the client company's workers, the written agreement between the staffing service and the client company, and any other factor deemed relevant by the bureau.
- c. The bureau may require information from any staffing service, including a list of current client company accounts, staffing assignments, payroll information, and rate classification information. A client company shall provide any information requested by the bureau regarding any staffing service.

8."

Page 3, line 12, remove "Rules adopted by the"

Page 3, remove lines 13 and 14

Renumber accordingly

1962 HOUSE INDUSTRY, BUSINESS AND LABOR

SS 2298

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10/22/03
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2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2298

House Industry, Business and Labor Committee

Conference Committee

Hearing Date March 12, 2003

Tape Number	Side A	Side B	Meter #
2		x	12.0-end
3	x		0.0-8.0
Committee Clerk Signature <i>Judith Hammer</i>			

Minutes: Chairman Keiser called for committee work on SB 2298.

Senator Judy Lee, District 13, introduced the bill, the genesis of which came from two of her constituents who have a professional employer organization in West Fargo. Workers Compensation was instrumental in assisting with the drafting of the legislation. PEO's are not temporary hiring services, they are payroll services. Therefore it is important that procedures for this new type of business are clarified with Workers Compensation Bureau and other state agencies.

Rep. Koppelman, District 13, testified in support of SB 2298.

Rep. Kasper: From your perspective, will there be amendments forthcoming for this bill or have all the wrinkles been ironed out?

Rep. Koppelman: Questions were raised but those have been discussed at length and they are procedural things that can be worked out WCB. Much of the language in the bill came from the administrative rule which took effect March 1, 2003. I suspect the Administrative Rules

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Page 2
House Industry, Business and Labor Committee
Bill/Resolution Number SB 2298
Hearing Date March 12, 2003

Committee will be asked to void that rule when it comes before them because it would be duplicated in statute if SB 2298 passes.

Darcy Fuchs, President of Payroll Express, Inc., West Fargo, testified in support of SB 2298.

(See attached testimony #1)

Rep. Johnson: Do I understand this correctly, WCB will be assessed against both the PEO and the location where your employees are working? And that would be a combined contribution?

Fuchs: Yes. Both the client company and the PEO would have Workers Comp coverage.

Anne Jorgenson Green, Staff Attorney for Policy Holder Services Department of ND Workers Compensation, testified in support of SB 2298. (See attached testimony #2)

Rep. Johnson: Are the rates separate, how are they paid?

Chairman Keiser: Let's set up a concrete example so the committee can grasp this. I have a small company and I go to a PEO and they do my accounting, payroll etc.

Green: PEO's run the gamut in terms of services they provide. They do accounting, write checks, track and pay quarterly withholding and Workers Comp, providing potentially a group rate on insurance plans. Services can run to the opposite end of the spectrum---large scale operations that provide safety services, risk management, human resources, input and information on a variety of issues. They assist the small business owners in the business of doing business. Quarterly and annual payroll reports, FICA, FUTA, etc. PEO's are actually derivative of what the original business structure of these entities was. There was the notion that leasing companies would come in, the employer would fire all his employees, the leasing company would hire them and lease them back to their former employer. There were big problems with that. PEO's evolved into a notion of co-employment relationships. So the PEO and the client

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company are maintaining a co-employment relationship. They each retain and keep part of the employment relationship for purposes of immunity and civil liability under WCB code and IRS and Job Service requirements.

Chairman Keiser: So I contract with a PEO to do all my accounting because my business is to build cabinets, now WCB comes to me and says you have to pay a premium on the basis of your payroll and number of employees etc. They are not my employees. But I am using their services. Do I pay the premium for my employees who are actually building the cabinets, the accounting is being done by the PEO, does the PEO pay the premiums for the employees who are doing my accounting?

Green: The beauty of the relationship with the PEO is that one of the services they provide is that they collect all your employee data. IF the PEO had folks in the office crunching numbers and writing checks etc., those would be sole employees of the PEO and the PEO would pay those premiums. And you would be charged a fee for your employees, all the services they provide to you.

Rep. Froseth: If the PEO in fact, hires all the employees and leases them to the company, the PEO is responsible for the Workers Comp, then, because they're actually employees of the PEO, are they not? So then, why the dual Workers Comp payments?

Green: It's that notion of the co-employment relationship, the fact that they share employment responsibilities. They are on the books, both the employers of the employees. The PEO handles Human Resources and Risk Management. The reality is, if you are building cabinets, the owner is directing the activity of the employees. There is not a dual premium being paid. The premium is calculated based on the risk of the client company. The paperwork, the report filing and the

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physical paying of the premium is filtered and done through the PEO. That's the heart of the service that they provide.

Rep. Thorpe: Who pays Workers' Comp?

Green: The client company pays a fee to the PEO who in turn remits the premium to WCB.

Rep. Thorpe: The PEO has staff involved. Who pays the Workers Comp for them?

Green: Depending on the individual PEO, they may or may not have their own employees. If they don't have their own employees, then simply the owners and officers of the company, there's no mandatory obligation for Workers Comp coverage required. If the PEO had employees, they would be obligated to establish an account for payroll taxes, etc.

Rep. Thorpe: If it isn't a mom-and-pop operation, but just a couple employees, does that get picked up by the people they are leasing with or the PEO?

Green: The responsibility of the premiums for its own employees is the PEO.

Chairman Keiser: So the money is laundered, in a sense, through the PEO. The PEO is responsible for making timely payments, etc.

Rep. Ruby: So the main issue with this is not who is paying it but the experience rating, right?

Green: That's correct. The issue from the perspective of WCB is the loss of existence of North Dakota business, the loss of claims history and established experience rating that for all intents and purposes disappears if a North Dakota business engages the services of a PEO where ND Workers Comp has not maintained data internally to continue to track that business. Ultimately, you could end up with the potential of an unscrupulous employer at a 40% surcharge not paying the surcharge and then the surcharge is ultimately distributed among the honest premium paying business owners.

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Rep. Ruby: Don't you believe that there is a high amount of risk for the PEO to assume the liability of an experience rating from an employer that doesn't really control the safety provisions or programs? I understand that the PEO can provide the services for risk management and so forth, but if they're not, the employees could be placed in situations that could hurt the PEO's experience rating too, correct?

Green: Hypothetically, yes, that could happen.

Rep. Kasper: I don't think that's correct. Let's say the PEO has five employer clients. One business is a very dangerous employment circumstance and the fifth one is very safe. The other three range in between. Each company will maintain their own Workers Comp rate and their own Workers Comp history based upon the history of what happens with their employee base. A company with terrible claims experience and terrible Workers Comp history, all their costs will be paid by that company, not the PEO. All the PEO does is funnel the money and do the paperwork but the company takes care of their own problems. By separating the accounting factors, you are saying, we want to keep it separate so that the bad claims don't impact the other companies using the services of the PEO. Isn't that what will happen?

Green: Yes. From our perspective, the risk that we perceive the PEO could potentially have would be taking on a company with a poor claims history which is suggestive of future poor claims history. Down the road, there could be a shortfall in premium based on a reconfigured experience rating.

Rep. Kasper: That's if we don't pass this bill. SB 2298 solves that problem, correct?

Rep. Nottestad: Does the company head quartered in West Fargo have clients in Minnesota, too? How does it work, crossing state lines?

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Green: North Dakota workers compensation coverage is mandatory for North Dakota based businesses who hire North Dakota employees. If a PEO secures a client in Minnesota, it is likely that the PEO would be required to secure coverage in Minnesota for Minnesota based businesses.

Rep. Nottestad: So the residence of the employee in this case wouldn't matter if it was Moorhead or Fargo, they could go back and forth and the base for the Workers Comp would be strictly with the business that it is contracting with?

Green: Residency is a factor that is used in the analysis of where coverage should be secured. The advice from Workers Comp is to check with requirements of any and all jurisdictions that govern border cities.

Rep. Froseth: How many PEO's are in North Dakota and are they licensed?

Green: At this point there is a working list of 15 and 20 that we believe are doing business using the PEO model. Currently there is not a licensing requirement in North Dakota for PEO's.

Rep. Zaiser: Isn't a PEO essentially a patchwork organization of business management for all these different clients? Do they establish the risk for their individual clients based on their history? Would they have to assume those clients are providing them with accurate and reliable work history information and data? And that is where the PEO would determine the risk?

Green: That's a fair assessment, the PEO's provide many more services than that.

Rep. Koppelman: Currently there is no law on the books to govern this type of business that PEO's provide. State agencies didn't have guidelines or administrative rules to govern them. In the past, the PEO would be the employer of all the employees of its clients. Technically, under law, if the PEO had fifteen clients and they had ten employees each, the PEO employed 150

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people and those fifteen companies employed zero employees on their books. Even though, those ten people came into their job sites everyday doing the same work they had always done. What this law will change in that regard from a Workers Comp perspective is that the dual employer relationship will ascertain separate experience ratings for the clients who have different risks in the nature of their business. This keeps bad operators out of the business, or allows Workers Comp better supervision of them. As far as the payment, the billing for the clients from the PEO is based upon that client's obligation. Social Security won't differ. But Workers Comp premiums and contributions will differ based on safety and experience ratings.

Rep. Keiser: The complete leaseback is easy to understand. What is complicated is where it is a partial. Where a client is buying one service and the original company is maintaining its integrity in the manufacturing side but in terms of office staffing and accounting etc. they use a PEO.

That's complicated. Who is responsible for what? Where is the liability for mistakes, fraud, those types of issues? What if the PEO reports inaccurately? If it gets down to an investigation, did the client provide correct data to the PEO? Did the PEO mismanage the data? What went wrong and where? Isn't there potential here for finger pointing? What will happen in those situations?

Green: Ultimate liability for payment of premiums rests with the client company.

Rep. Keiser: So if the PEO is in error, or there is some kind of fraud, will the president of the client company be prosecuted?

Green: There's a contractual agreement between the PEO and the client company, presumably there is a cause of action in the contract for any of the kinds of issues you are referencing.

Rep. Dosch: What happens if I go to the PEO and I want you to provide fully trained employees for my business. What happens during the training process if that employee is injured? The time

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between the hiring and training and reporting to the job? Am I vulnerable, is there a gray area of concern here? When does my Workers Comp liability begin and where does the PEO's end if this is a co-employee situation?

Green: We're talking about two business models. The PEO is not a staffing agency. A staffing agency is the employer of personnel that they train and place in their client's business.

Rep. Kasper: Is unemployment insurance covered in SB 2298?

Green: This bill addresses only the issue of Workers Compensation.

Rep. Froseth: I have an additional question. How will Job Service unemployment issues be handled for and by PEO's?

Fuchs: Other than Workers Comp, our payroll is recorded under the employer identification number of Payroll Express. Our 941 form (employer's quarterly tax return) lists all employees of those employers who retain our services. That's the same for Job Service and up until December 31, the same for Workers Comp. They have been considered sole employees of the PEO. This bill and the administrative rule that went into effect March 1 for Workers Comp has separated that. That's where we get into separate Workers' Comp accounts for our different clients.

Rep. Froseth: Let's say you provide employees for a seasonal construction business. You also apply the experience rating of that construction business to the services the PEO provides. What about the unemployment benefits for seasonal companies?

Fuchs: For unemployment they are all listed under one account so if we make a bad business choice and take on a construction company client that lays off all their employees over the winter, that affects the unemployment rate for the PEO and all our clients. That's why we screen our client base very well.

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Rep. Froese: This is a growing profession, I'm sure. Would this same type of policy serve your profession in regard to unemployment insurance also?

Fuchs: We don't feel so. We are content with the unemployment provisions that we have now.

Rep. Kasper: Would it be beneficial for the professional image of your profession to have some type of registration? Are you registered with the Secretary of State now so that the Secretary of State's office knows how many PEO's are in business in North Dakota?

Fuchs: The registration process was originally addressed when SB 2298 was introduced in the Senate. They removed it.

Rep. Ruby: Rather than have all the uncertainty of assigning experience ratings, wouldn't it just be easier to pay the premium under the employer's account, even if the PEO was handling the accounting? Wouldn't that retain the experience rating?

Fuchs: If the account was solely in the name of the client company, since we are the employer of record for other purposes with payroll, we write the paychecks out of our account, we pay the social security taxes, we technically are the employer of those people. But if that Workers Comp account is solely in the name of the client company, then we pay a check for it, we have no liability. So if an employee is injured on the job, they cannot sue the client company whose name is on the account but they can sue us. And that is our contention, we need that liability.

Rep. Thorpe: What type of businesses do you perform services for?

Fuchs: I believe some PEO's will do business with any type of business. Our firm does set some parameters. We shy away from the construction and food industries because of seasonal unemployment and the high turnover issues inherent with them.

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Rep. Thorpe: You just stated one of the reasons for my question. Wouldn't the construction and restaurant businesses be likely candidates for the types of services you can provide?

Fuchs: I don't know of a PEO that handles those industries.

Rep. Zaiser: You've talked about the businesses you don't do business with, so who are your clients?

Fuchs: A lot of offices, retail stores, small businesses who can't get insurance plans. We put them under the umbrella of Payroll Express and now they are eligible for group health insurance benefits. That's the main focus of our business.

Rep. Froseth: Don't you think this might be the beginning of regulation for this profession? Two years from now they'll be here looking to establish a state board.

Rep. Kaiser: I compliment WCB for their work on this bill. Here's an agency who solved a problem. Take that message back to the WCB that we appreciate their diligence here.

As there was no one else present who wished to testify either in support of or in opposition to SB 2298, the hearing was closed.

Rep. Ruby moved a Do Pass.

Rep. Kasper seconded the motion.

Results of the roll call vote were: 14-0-0.

Representative Johnson will carry SB 2298 on the floor.

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Date: 3/12/03
Roll Call Vote #: |

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2298

House INDUSTRY BUSINESS & LABOR Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DO PASS

Motion Made By Ruby Seconded By KASPER

Representatives	Yes	No	Representatives	Yes	No
Chairman Kaiser	✓		Boe	✓	
Vice-Chair Severson	✓		Ekstrom	✓	
Doach	✓		Thorpe	✓	
Froseth	✓		Zaiser	✓	
Johnson	✓				
Kasper	✓				
Klein	✓				
Nottestad	✓				
Ruby	✓				
Tieman	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Johnson

If the vote is on an amendment, briefly indicate intent:

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REPORT OF STANDING COMMITTEE (410)
March 12, 2003 4:46 p.m.

Module No: HR-44-4820
Carrier: N. Johnson
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE
SB 2298, as engrossed: Industry, Business and Labor Committee (Rep. Kaiser, Chairman) recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2298 was placed on the Fourteenth order on the calendar.

(2) DESK, (3) COMM

Page No. 1

HR-44-4820

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2003 TESTIMONY
SB 2298

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TESTIMONY ON SB 2298
Senate Industry, Business and Labor Committee
Senator Duane Mutch, Chairman
Monday, January 27, 2003

Good Morning Mr. Chairman and members of the Committee, my name is Darcy Fuchs from West Fargo and I am in favor of this bill because currently Section 65-01-08 of the North Dakota Century Code does not recognize a PEO as an employer of the workers who are employed by the PEO.

I was born and raised in North Dakota, graduated from college in North Dakota and decided to locate our business here in my home state. I am President of Payroll Express, Inc., a PEO that has been in West Fargo since 1995. We serve small businesses across the entire state, as far west as Bowman and Williston. As a PEO I would like to tell you about the services our company provides for our clients.

DEFINITION OF A PEO:

I have placed in your packet a rather lengthy definition of the term "professional employer organization" or PEO. This definition is from the National Association of Professional Employer Organizations (NAPEO).

A definition that is more easily understood is; by the terms of a service agreement, the PEO employs workers and assigns them to its client locations, and thereby the PEO assumes responsibility as an employer. We pay wages and employment taxes of the employee out of our own accounts. We report, collect and deposit employment taxes with state and federal authorities. We establish and maintain the employment relationship with the employee by retaining the right to hire, reassign and fire the employees.

Other terms that are sometimes used interchangeably when referring to a PEO arrangement are "employee leasing", "staff leasing", "hire and lease back".

THE PEO ARRANGEMENT:

The PEO arrangement involves all or a significant number of the workplace employees. Although similar to a temp agency, the PEO

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Operator's Signature

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relationship differs because it is a long-term. Client companies make a continuing investment in their workers, because the PEO provides insurance benefits, retirement plans and other important employee benefits for their employees.

By the PEO arrangement, the PEO is able to offer many benefits to the employees that may not have been available to them by being a sole employee of the client company. Benefits available through a PEO include health insurance, dental and vision care insurance, accident, cancer and disability insurance, life insurance, retirement plan and Section 125 Flexible Benefits plan. Without recognizing the PEO as the employer, it would not be possible to make such a wide variety of benefits available to employees of small business.

PEOs BENEFIT NORTH DAKOTA EMPLOYEES:

PEOs provide workers with coverage under the entire spectrum of employment laws and regulations. In some cases, these laws would not apply to workers at small businesses without the PEO relationship, since many laws have exemptions based on the number of workers. Once included in the PEO's workforce, the workers are protected by these laws. The employee truly profits from the PEO arrangement.

PEOs BENEFIT NORTH DAKOTA SMALL BUSINESS:

Small businesses also profit from the PEO arrangement. Personnel management today is becoming increasingly complex. The small business owner is expected to administer health benefits, workers' compensation, unemployment insurance, payroll and payroll tax compliance. The PEO assumes these responsibilities, which then allows the client to concentrate on the revenue-producing side of its business.

PEOs BENEFIT GOVERNMENT:

PEOs benefit government agencies as well. The Internal Revenue Service acknowledges a PEO the employer for federal income and unemployment taxes. The PEO consolidates several small companies' tax filings into one, making for accelerated collection of taxes. PEOs also allow government agencies to reach business through a single-employer entity. Reporting to the agencies is more professional and accurate.

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PEOs BENEFIT NORTH DAKOTA:

North Dakota is concerned about losing our young people to other states. That out-migration is due, in part, to job opportunities, higher wages, and benefits offered by larger out-of-state employers. PEOs allow North Dakota small business to be competitive with these out-of-state employers by giving them the opportunity to offer affordable benefits. PEOs may be considered another tool in economic development for North Dakota.

REGISTRATION:

Many states require some form of licensing or registration for PEOs. The Registration for Professional Employer Organizations that SB 2298 proposes is based on Minnesota Statutes. Registration assists in fraud prevention and is required for most other professionals in our state.

PROPOSED CHANGES TO NDCC 65-01-08:

The proposed changes to NDCC 65-01-08 define a professional employer organization as an employer of the workers at the client location. Currently the code does not do that and the workers compensation administrative rule specifically excludes PEOs (leasing companies) in their definition of a "staffing service" under subsection 1 of section 92-01-02-21. Being excluded in the staffing service definition eliminates PEOs as a contributing employer and eliminates the PEOs relief from liability for injury to an employee. As a wage-paying employer, PEOs need to be defined as such.

As of now, the North Dakota Workers Compensation Bureau is requiring our client companies to each hold their own account with the Bureau. A PEO with 200 clients now has 200 separate reports to prepare and submit to workers compensation. This reporting requirement is extremely time-consuming, costly and burdensome on the PEO. A consolidated report submitted by the PEO could contain all of the required information, including client location, and would be far more efficient for both the PEO and the Bureau.

The changes that are proposed would define a PEO as a staffing service and name us as a contributing employer relieved from liability for injury to an employee. The changes would also require that the workers compensation account be held in the sole name of the PEO streamlining

the reporting requirements. By defining a PEO as a staffing service and having one account, both the client company and the PEO would be considered contributing employers.

Passing this bill would help guarantee that our employees do not lose their current benefits such as health insurance and retirement plans; it would attract new business to North Dakota and ensure that our client companies remain competitive employers in the job market to help keep our young people in the state.

Also in your packet, I have provided letters from some of our clients and employees along with a letter from our insurance broker describing their views of working with a Professional Employer Organization.

Thank you for your time, are there any questions?

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FROM :

FAX NO. :

Jan. 25 2003 07:18PM P1



1308 2nd Ave. W. • Williston • (701) 872-9448
Car audio/security sales and installation

Senate Industry, Business and Labor Committee
Senator Duane Mutch, Chairman
Re: Senate Bill No. 2298

Dear Senator Mutch and Committee Members:

My name is Greg Fuchs. I own and operate Car Tunz, a car audio and security sales and installation company in Williston, North Dakota. I appreciate your time in reading this letter in support of Senate Bill Number 2298.

I first contracted with a PEO to manage our human resources in 1998. Prior to that time I processed my own payroll and prepared my own reports. Let me say this, I am much better at installing car audio systems and remote starters than I was at pushing paper. I have no desire to go back to the hassle of quarterly reports, unemployment reports and workers compensation reports. Nor do I have time to shop for the best deal in health insurance and other benefits.

The PEO that my company uses takes the responsibility for paying my employees, depositing my payroll taxes and filing all of the reports that are required by the various agencies. The PEO also provides benefits for my workers that I could not afford to offer without using their services.

In addition, the PEO I work with participates in the Workers Compensation Risk Management Program. They provide safety training at my business annually for the workers at my company. Without the services of the PEO, I would not participate in the Risk Management Program (because I don't have time to deal with the paperwork).

It is my understanding that without passage of this bill, the workers comp responsibilities would be returned to me and I would be responsible for payment and filing reports. This is not a good thing. I run a business, not an office. I contract with a PEO to make sure the reports are correct and filed on-time. Defeating this bill would be detrimental to small business owners like me, and the people who work for us.

Please support passage of Senate Bill 2298.

Sincerely,


Greg Fuchs

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I G N U S

855 1 45th St. SW, Suite 1 PO Box 9202 Fargo, ND 58106-9202 701.280.9040 888.449.9040 701.282.3232 FAX

January 22, 2003

Senate Industry, Business and Labor Committee
Senator Duane Mutch, Chairman
Re: Senate Bill No. 2298

Dear Senator Mutch,

I am writing this letter to express my concerns about Bill #2298. I have had much experience with PEO's and feel obligated to let you know my feelings. Please take this in consideration before voting on the upcoming bill.

I have been directly involved in both sides of PEO's. I was the President of a company with 44 employees who used the services of PEO's to outsource our HR responsibilities from 1997 to 2001. As of July 2002, I have been the employee of a company in Fargo that uses the services of another PEO to outsource their HR as well. Both of these situations have provided me with the insight of what a PEO provides from both the owner down to the employee.

As an owner looking to attract the brightest employees, most small business would be hard pressed to compete with large companies without the assistance of PEO's. Just the sheer cost of offering a good medical plan is hard enough not to mention other costs such as workers compensation. Contracting with a PEO allows the business owner to completely forget about the legal issues associated with having employees and allows the owner to focus on the profitability of the company. Any bill that would disrupt this process is a disservice to every small company in North Dakota and the state as a whole.

On the other side, I can tell you that everyone at my current company is dependant on our PEO to take care of the issues that don't make us money. We are in the competitive technology field where margins are tight and good employees scarce. We don't have the time to shop for the best rates with benefits, keep current on taxes or the changing laws. What we do know is that we need the best benefit packages available to us to attract the best employees and once again, our PEO allows us to do that. We love not having to worry about workers compensation, taxes, benefits or any other HR issue. Please don't disrupt this for us or any other small business in North Dakota.

I would love to be able to testify directly and go into my experiences in greater detail but my job requires my full attention here in Fargo. If I can be of any help in the future, please feel free to contact me at 701-280-9040.

Sincerely,

Corey D. Nesemeier
Business Development Manager

info@ignus.com

www.ignus.com

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FARGO ND 58102-4699

ROKERAGE GENERAL AGENCY

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January 24, 2003

Senator Duane Mutch
Chairman Industry Business and Labor Committee
North Dakota State Senate
Bismarck, ND 58501

RE: Senate Bill 2298

My business is health insurance brokerage. Our organization markets individual and group health insurance products to individuals and small and large businesses. As I am sure you are aware, it has become increasingly difficult for our clients to deal with these products in the past few years.

A small business has a number of challenges that are of little difficulty to a larger business. A business is required to file reports with several government agencies for various details concerning State and Federal payroll withholding, unemployment, and workers compensation. These reports are required of a small business in the same manner and form as a large business. The difference is the small business nearly always has fewer resources than a large business to compile and file them.

This problem is magnified by employee benefits. A small business must compete with a large business for the employees to operate profitably. Employee benefits, in today's world, means much more than a Group Health Insurance policy. Group Health Insurance itself brings with it several management and accounting tasks, but the additional items that a small business must offer range from Pension Plans, Dental and Vision Insurance to cafeteria plans. Cafeteria plans provide an employee the option of paying their portion of the premiums with pre-taxing dollars and flexible spending accounts to pay for out of pocket medical expenses and day care. These plans have become an accepted and expected benefit by most of today's work force and for a small employer are unaffordable.

I cannot understand why there should be any question that a Professional Employee Organization should be an acceptable business entity in the state of North Dakota. Changing the regulations of the North Dakota Worker Compensation is the only reasonable option. I am confident passing this legislation will be a boon to North Dakota's small business but their employees will benefit from it as well.

This legislation will help North Dakota grow and prosper.

Edwin E Dorsett President
EE Dorsett & Associates Inc

CC: file

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NAPEO – National Association of Professional Employer Organizations

Definition of a Professional Employer Organization

A Professional Employer Organization (PEO) is defined as an organization that provides an integrated and cost effective approach to the management and administration of the human resources and employer risk of its clients, by contractually assuming substantial employer rights, responsibilities, and risk and, through the establishment and maintenance of an employer relationship with the workers assigned to its clients.

More specifically, a PEO establishes a contractual relationship with its clients whereby the PEO:

- assigns workers to client locations, and thereby assumes responsibility as an employer for specified purposes of the workers assigned to the client locations;
- reserves a right of direction and control of the employees and may share such responsibility with the client, consistent with the client's responsibility for its product or service;
- pays wages and employment taxes of the employee out of its own accounts;
- reports, collects, and deposits employment taxes with state and federal authorities;
- establishes and maintains an employment relationship with its employees which is intended to be long term and not temporary; and
- retains a right to hire, reassign, and fire the employees.

Businesses today need help managing increasingly complex employee related matters such as personnel management, health benefits, workers' compensation claims, payroll, payroll tax compliance, and unemployment insurance claims. Businesses contract with a PEO to assume these responsibilities, which then allows the client to concentrate on the revenue-producing side of its operations.

A PEO provides integrated services which more cost effectively manage critical human resource responsibilities and employer risks for clients. PEOs deliver these services by establishing and maintaining an employer relationship with the workers assigned to its client and by contractually assuming substantial employer rights, responsibilities, and risk.

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FAQs

1. **What is NAPEO?**
As the national trade association for the PEO industry, NAPEO is the recognized voice of the industry, providing education, training, government relations, and a Code of Ethics to its member companies.
2. **What is a PEO?**
A professional employer organization (PEO) is a company which contractually assumes and manages critical human resource and personnel responsibilities and employer risks for its small to mid-sized businesses by establishing and maintaining an employer relationship with worksite employees.
3. **Are PEOs recognized as employers?**
The Internal Revenue Service acknowledges that a PEO may be the employer for federal income and unemployment taxes. Seventeen states provide some form of licensing, registration, or regulation for PEOs. Moreover, many states statutorily recognize PEOs as the employer or co-employer of worksite employees for purposes of workers' compensation and state unemployment insurance taxes.
4. **What is the difference between employee leasing and a PEO arrangement?**
Although many still view these two staffing arrangements as the same, they are, in fact, quite different. The term "employee leasing" means different things to different people and has been, and continues to be, used in many diverse contexts. The confusion surrounding this terminology is one reason NAPEO has been active in defining and distinguishing the PEO concept; however, many commentators, regulators, and statutes use the terms interchangeably.

The genesis of employee leasing envisioned a transfer of certain responsibilities from a client to the employee leasing company and spawned the concept of "fire, hire, and lease back," which does not occur in a PEO arrangement. Some would define employee leasing as a supplemental, temporary employment arrangement where one or more workers are assigned to a customer for a fixed period of time, often for a specific project. This concept creates little long-term equity or investment between the worker and customer (much like leasing a car for two years and knowing that you are using it for a specific need but not building any long-term equity).

A PEO arrangement however, involves all or a significant number of the client workplace employees in a long-term, non-project related, employment relationship. The PEO assumes the employer responsibility for employment tax, benefit plans, and other human resource purposes. Through the use of a PEO relationship, client companies make a long-term investment in their workers, because the PEO provides health insurance, retirement savings plans, and other critical employee benefits for their worksite employees.

5. **What is the difference between temporary staffing services and a PEO arrangement?**
A temporary staffing service recruits employees and assigns them to clients to support or supplement the client's workforce in special work situations, such as employee absences, temporary skill shortages, or seasonal workloads. A PEO contractually assumes and manages employer responsibilities for all or a majority of a client's workforce. Industry ratios identify the PEO arrangement as a long-term relationship with nearly 90% of our clients and worksite employees remaining with the PEO for a year or longer. Worksite employees participate in the PEO's full range of employee benefits including, health, dental, and life insurance, vision care, and retirement savings plans.
6. **Who uses a PEO?**
The average client customer of a PEO is a small business with 16 worksite employees, though larger businesses also find value in a PEO arrangement. These small business customers include every single type of business from accountants to zoo keepers and every profession in between including doctors, retailers, mechanics and more.
7. **How many Americans are employed in a co-employment PEO arrangement?**

<http://www.napeo.org/what/questions.htm>

1/24/2003

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It is estimated that 2-3 million Americans are currently co-employed in a PEO arrangement. PEOs are operating in every state and the industry continues to grow more than 20% each year. Today, it is estimated there are around 600 PEO companies who are responsible for generating more than \$43 billion in gross revenues. NAPEO member companies are estimated to account for more than 70% of the industry's gross revenues.

8. **How does a PEO arrangement work?**
In the relationship among a PEO, a worksite employee, and a client company, there exists a co-employment relationship in which both the PEO and client company have an employment relationship with the worker. The PEO and client company contractually allocate some and share other traditional employer responsibilities and liabilities. The PEO assumes responsibility and liability for the "business of employment" such as risk management, personnel management, human resource compliance, and payroll & employee tax compliance. The client company manages product development and production, marketing, sales, and service. The PEO assumes and establishes an employment relationship with the worksite employee and provides a complete human resource and employee benefit package.
9. **Why would a small business use a PEO?**
Small business owners want to focus their time and energy on the "business of their business" and not on the "business of employment." As businesses grow, most small business owners don't have the necessary human resource training; payroll and accounting skills; knowledge of regulatory compliance; or backgrounds in risk management, insurance and employee benefit programs to meet the demands of being an employer.
10. **Does the small business owner lose control of his or her business?**
As co-employers, the PEO and small business owner become partners in the employment of their workers. The client retains ownership of the company. As co-employers, the PEO and client contractually share or assume employer responsibilities and liabilities. The PEO assumes most responsibilities and liabilities associated with a "general" employer. The client usually retains those rights and responsibilities associated with "special" employers. The PEO assumes a real and factual employer role. PEOs are responsible for payroll and employment taxes, maintaining employee records, reserve the ultimate right to hire and fire, and have the authority to resolve employee disputes. By shifting these responsibilities to the PEO, the client gains more command of the "core" revenue generating aspects of their business.
11. **Why would a worker of a small business want a PEO as an employer?**
Workers seek financial security, quality health insurance, a safe working environment, and opportunities for retirement savings. PEOs may provide Fortune 500 quality employee benefits including health insurance and 401(k) savings plans, and aggressive workplace risk management. Job security is improved as the PEO's economy of scale permits a business to lower employment costs. Job satisfaction and productivity increases when workers are provided quality human resource services like employee manuals, grievance procedures, and improved communications.
12. **Is this just a "fired and rehired" scheme?**
Workers are never fired by the client business and rehired by the PEO. Instead, a worker becomes an employee of two employers in a contractual co-employment relationship. The PEO assumes employer responsibilities and liabilities for the human resource and personnel obligations of the worksite employees. This responsibility includes the employees wages and employment taxes, workers' compensation and unemployment insurance, and employee benefits. The small business retains employer responsibilities and supervision for the production of the products or the delivery of services.
13. **Is this a scheme to avoid providing health or retirement saving benefits to rank and file workers?**
No. In fact, a PEO arrangement is often the only opportunity for a worker of many small businesses to receive Fortune 500 quality employee benefits like health insurance, dental and vision care, life insurance, retirement saving plans, job counseling, adoption assistance, and educational benefits.

- 14. Who is responsible for the employee's wages and employment taxes?**
PEOs assume responsibility and liability for payment of wages and compliance with all rules and regulations governing the reporting and payment of federal and state taxes on wages paid to its employees. The Internal Revenue Service recognizes the PEO as the employer for federal income and unemployment taxes, and case law affirms the principle that the PEO is responsible for payroll taxes.
- 15. Who is responsible for state unemployment taxes?**
As the employer for employment tax and employee benefits, PEOs assume responsibility and liability for payment of state unemployment taxes, and most states recognize the PEO as the responsible entity. A few states require the PEO to report unemployment tax liability under its clients' account number, and four states have laws that hold the client and PEO jointly liable for unemployment taxes.
- 16. Who is responsible for employment laws and regulations?**
PEOs provide worksite employees with coverage under the entire spectrum of employment laws and regulations, including federal, state, and local discrimination laws, Title VII of the 1964 Civil Rights Act, Age Discrimination in Employment Act, ADA, FMLA, HIPAA, Equal Pay Act, and COBRA. In some cases, these laws would not apply to workers at small businesses without the PEO relationship, since many statutes have exemptions based upon the number of workers in a work force. Once included in the PEO's workforce, the workers are protected by these laws.
- 17. Who is responsible for workers' compensation?**
Many states recognize the PEO as the employer of worksite employees for purposes of providing workers' compensation coverage.
- 18. Does a PEO arrangement impact a collective bargaining agreement?**
PEOs work equally well in union and non-union workplaces. The National Labor Relations Board (NLRB) recognizes that, in co-employment relationships, worksite employees may be included in the client employer's collective bargaining unit. Where a collective bargaining agreement exists, PEOs fully abide by the agreement's terms. PEOs endorse the rights of employees to organize, or not organize, according to standards of the NLRB.
- 19. Do PEOs need to be licensed to provide insurance benefits to their workers?**
A PEO may sponsor employee benefit plans for its worksite employees. Such benefits are either mandated by law, such as workers' compensation and unemployment benefits, or voluntary, but desirable in attracting and retaining quality employees, such as health, life, dental and disability insurance. PEOs are consumers of insurance and procure these benefits from licensed insurance agents and authorized insurers.
- 20. What is the future of the PEO industry?**
American business is undergoing a fundamental change in human resource management, and the PEO industry is one response to market demands for change. The expertise required to manage the human resource elements of a small to mid-sized business has outgrown the experience and training of many entrepreneurs who started these small businesses. The PEO industry is demand driven as business owners seek solutions to the increasingly complex "business of employment." PEOs are one of the growth industries of the 1990s and of the next century.

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<http://www.napeo.org/what/questions.htm>

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1/22/03
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SECRETARY OF STATE

STATE OF NORTH DAKOTA
600 EAST BOULEVARD AVENUE DEPT 108
BISMARCK ND 58505-0500

January 27, 2003

TO: Senator Mutch, Chairman, and Members of the Industry, Business, and Labor Committee

FR: Al Jaeger, Secretary of State

RE: SB 2298 – Registration of Professional Employer Organizations

I oppose Section 1 of this bill for the following reasons:

1. It mandates the Secretary of State to expend several thousand dollars of the agency's general fund appropriation to establish a registration process, which is optional according to page 2, line 9. Then, it mandates that the registration fee for this optional registration cannot exceed \$10, which is \$15 less than other similar registrations and filings in the Secretary of State's office that are mandatory.
2. On page 1, lines 20 through 24, there is a requirement that the registrant reveal the names of those individuals owning more than 4% of the organization over the preceding five years. This type of information is not required of the approximately 40,000 other business registrations filed with the Secretary of State's office.
3. Throughout Section 1 of the bill, there are other requirements for the registrant to supply information from the preceding five years. Again, it is information that is not required of any other type of business entity that has a filing requirement with the Secretary of State's office.
4. Virtually all entities that conduct business in North Dakota already have some type of filing requirement with the Secretary of State's office. Therefore, the optional registration proposed in this bill is a redundant requirement.
5. I cannot justify the expenditure of the agency's general funds for an optional registration program that may be relevant to fewer than ten potential organizations without an additional appropriation to the agency's 2003-2005 budget. As it is, the requirements in section 1 make it unlikely that any business would choose to register under the provisions of this bill and voluntarily reveal the type of information that is being requested. Even if the registration was mandatory, I still could not justify it.

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10/22/03
Date

2003 SENATE BILL 2298

**Fifty-Eighth Legislative Assembly
Before the Senate Industry Business and Labor Committee
Anne Jorgenson Green, Attorney
North Dakota Workers Compensation
January 27, 2003**

Mr. Chairman, Members of the Committee:

My name is Anne Jorgenson Green. I am the staff attorney for the Policyholder Services Department of North Dakota Workers Compensation. I am here today to testify in opposition to SB 2298.

The ability of an insurance company to track the loss history of its individual insureds is critical to protecting its ability to pay claims. Workers Compensation insures all North Dakota employers. Our knowledge of where an employers' place of business is, the kind of work that he does, the risk that he incurs and the frequency of his claims losses are issues necessary to assessing the risk that we are tasked with underwriting.

Professional Employer Organizations, or PEO's, are a type of business entity which provide a variety of accounting, payroll and reporting services. These entities are also known as employee leasing organizations, employee staffing companies and staffing services. The Century Code contemplates this kind of business and uses the term staffing service to encompass all these entity types. Staffing Services manage the "business of having employees" for a fee and provide the business owner the ability to concentrate on the "business of doing business." These entities provide a valuable service, particularly to small North Dakota businesses.

The National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions (IAIABC) issued a joint report in February of 2002 centering on the issues of staffing services. I have attached a summary article of that report to this testimony. Most staffing services prefer a "master policy" approach to coverage where all payroll is reported under the name of the PEO. SB 2298 at line 26 attempts to codify this approach. The drafters of the report, however, concluded that separate policies, or the "multiple coordinated policy," for client companies is the preferred approach in the residual market. North Dakota workers compensation has adopted that policy and has proposed an administrative rule echoing the recommendations in the NAIC/IAIABC report.

The difficulty of the master policy approach is best explained by example:

Company A has a significant claims loss history. That poor claims experience has resulted in a surcharge to Company A's premium. Company A enters into an agreement with a PEO and cancels their account with workers compensation. The PEO adds Company A to their client list and combines their payroll with their existing client companies. Since the payroll is reported under the PEO, Company A's loss history is subsumed under the umbrella of the PEO. Indeed, since Company A is now part of the PEO, their surcharge will not be applied towards the premiums paid on their behalf by the PEO. If Company A remains with that PEO for a period of time, they could ultimately come out from under the PEO and establish a new account with workers comp free of the surcharge. The claims experience during Company A's relationship with the PEO is lost within the PEO. Company A has essentially "laundered" their poor claims experience through their relationship with the PEO.

Separate workers compensation accounts maintained by NDWC and cross-referenced to the PEO allows workers comp to track loss history by business, maintain surcharges or discounts where appropriate and preserve the experience rates of individual employers even while they enjoy the services of a PEO.

Other issues associated with a master policy approach have been confirmed by our experience. A North Dakota employer, uninsured for purposes of workers compensation for failure to pay premium enrolled the services of a PEO. The result was an uninsured North Dakota employer achieving insured status by establishing coverage under the auspices of a PEO. Fortunately, this employer's success was short-lived, but separate accounts preserve NDWC's ability to track unscrupulous employers. Further, separate accounts and open communication with NDWC protect the PEO itself from doing business which might have serious financial repercussions.

Finally, the master policy approach puts the PEO in the position of intermediary between workers compensation and the client company directly affecting our ability to assess each and every individual underwriting risk. If information on safety programs, location and nature of the work is filtered and diluted through the PEO, our in-house underwriting process may be skewed in terms of the exact nature of the client companies' operations. That impedes our ability to assess risk and ultimately, protect the fund.

Not only are separate accounts the best way for NDWC to accurately set rates, assess risk and maintain loss history for North Dakota employers, it is the standard in the industry. I would be happy to answer any questions that you may have at this time.

Analysis and Perspective

Employee Leasing Arrangements Present WC Challenges

Employee leasing arrangements are becoming a major factor in the American workplace. But their growth has raised concerns throughout the workers' compensation system. A three-year study by the International Association of Industrial Accidents Boards and Commissions and the National Association of Insurance Commissioners found many past abuses in these arrangements have disappeared, but new issues have arisen. Here, we review the study's findings.

WC Liability, Reporting Unclear

Employee leasing companies — now often called professional employer organizations — relieve an employer of many administrative duties, such as payroll, and unemployment compensation and workers' compensation oversight. They are different from temporary employment companies, which generally provide workers for short durations. Employees provided by PEOs can remain on the job for an unspecified period of time.

The report identified several key facts about today's PEOs, including:

- The number of PEOs has grown from about 200 in 1984 to 2,000 today.
- PEO and similar arrangements exist in nearly every state and have an estimated growth rate of 20 to 30 percent per year.
- PEOs employ between 2 million and 3 million work-nationwide.
- The states with the most PEOs in 2000 were Florida, with 243 and Oregon, with 154.
- The average number of employees per employer in a PEO is 15.
- The annual estimate of the number of employers that move between different PEOs is 17 percent

In a leasing arrangement, an employer typically outsources many or all of his employees from the PEO. The contract between the employer and PEO stipulates a co-employer agreement. Workers have an employer-employee relationship with both the employer and the PEO. But that arrangement can cause unnecessary expense and delay when a worker is injured.

Outsourcing of employment services can create hurdles to the regulatory process. For example, it may complicate and in some cases weaken regulatory surveillance of coverage mandates.

Another problem relates to charging or crediting employers for their own loss experience, which is thought to motivate and strengthen safety performance. Typically, these charges/credits are done through experience rating, but experience rating is jeopardized by some outsourcing relationships.

In addition, access to responsible parties for claims handling is sometimes confused and complicated. Also, statistical data vital to rate-making and system performance measurements can be lost or distorted.

These concerns stem from the way the workers' compensation coverage, employment, and loss experience are reported to statistical agents, insurers, and state agencies.

The prevailing view about workers' comp in outsourcing arrangements is that the employer is responsible. But if the state statute in question does not adequately address the situation, there can be confusion as to who is primarily liable.

Where there are questions and confusion, workers' claims might be delayed. The whole intention of the workers' comp system — to provide timely benefits and return the worker to gainful employment at the earliest opportunity — may be frustrated. Workers could be forced to hire attorneys and litigate claims that would otherwise have been resolved informally.

The report identified four key concerns regulators and state legislators should address:

- Benefit and coverage issues.
- Notice and reporting requirements.
- Experience rating.
- Financial issues.

Employee Leasing History. The use of employee leasing arrangements began in the 1970s. Laid-off employees were hired by the leasing company, which then leased them back to the employer. Small employers liked this because it relieved them of many administrative functions.

Because of abuses that sprang up in the mid-1980s, the NAIC developed a model law that was implemented by many states. The abuses surrounded employers' experience ratings.

Insurers use the loss experience data of employers to help determine appropriate rates. Employers with better safety records and fewer losses have lower experience ratings, which cuts their workers' comp premiums. But some employers with higher experience ratings found they could lower them by associating with an employer leasing organization.

Many of the current workers' comp problems associated with leasing arrangements stem from the types of policies that are issued.

WC Coverage. Where possible, PEOs try to get master policies for their workers' comp. A master policy is a single contract of insurance that covers all the workers for all the employers associated with the PEO, as well as the leasing companies' internal employees.

Under a master policy, the rating experience of all the employers in the PEO is lumped together. The incentive for an employer to provide a safe workplace is lost. Also, obtaining accurate and reliable experience ratings for individual employers becomes difficult if not impossible.

Most states allow master policies in employee leasing arrangements for the voluntary market but not the residual market. In the market of last resort, PEOs must have sepa-

rate policies for each employer. That was one of the changes enacted to address the issue of employers mitigating their bad safety records by associating with employer leasing organizations.

Some PEOs have multiple coordinated policies, which cover all employers through the same insurer. This system requires the leasing company to name and record information on each employer as gathered from separate client policies. The explicit reporting places new demands on the leasing firm.

MCPs allow for individual employer experience rating and enhance the accuracy of statistical data. They avoid benefit gaps and interruption to injured workers, and reduce the potential for litigation over who is responsible for coverage. But, MCPs are more expensive and may expose leasing firms to fines and enforcement actions by state agencies.

MCP policies can avoid opportunities for manipulation that exist with master policies. In some states, the policies can be blended into hybrids.

Providing workers' comp coverage to a leasing company, whether through a master policy or an MCP puts that company in charge of underwriting for the employers. If there's a master policy, the leasing company also is in charge of setting rates for each employer. That can ultimately affect the insurer's vulnerability if the leasing company sets rates badly.

Problems arise when the leasing company becomes the intermediary between the insurer and employer. There are questions about what rates the leasing company should pass to the employer. Also, is the employer's premium payment to the leasing company considered payment to the insurer? Can the leasing company offer discounts or charge mark-ups? If so, do they have to be uniform for all clients? Do insurance charges have to be itemized separately?

Other questions arise if the leasing company has a high deductible. For example, is the cost built into the charges to the employer? What happens if the leasing company becomes insolvent? Is the employer or insurer responsible for the losses?

Additional Problems. Several other employee leasing problems need to be addressed in the workers' comp industry, such as:

- Risk splitting occurs when an employer outsources only some of his workers. That can create confusion and cause delays in processing claims, or the denial of benefits when the wrong party is named in a dispute.

- Employers who use subcontractors can wind up in hot water if they don't realize they are responsible for their workers' comp coverage.

- Piggybacking occurs when a workers' comp policy covers multiple PEOs. Regulators in Virginia, Arizona and South Carolina have recently voiced their concerns over that issue.

- The cancellation of workers' comp policies can be a problem for employers who are not notified. If a PEO is notified but fails to inform the employer, the employer may unknowingly end up with no coverage.

Recommended Actions. There is no clear, one-size-fits-all solution to the workers' comp problems in employee leasing arrangements, the report said. It suggested that each state's insurance and workers' comp administrators tailor their responses to the their particular laws.

There are, however, a number of areas in which legislative or regulatory clarification is desirable, and it is worth exploring

the extent to which a public policy consensus may be developed. The report advises state authorities to seriously consider moving toward requiring separate coverage for individual employers who use outsourcing firms. It recommends the NAIC evaluate whether its current model laws, which are geared primarily toward residual market issues and the regulation of master policies, should be repealed or substantially revised.

Other public policy questions the report says should be addressed include:

- Does the law specify a contractual provision that deems an outsourcing firm and its client to be co-employers? If so, under what circumstances and subject to what terms? If not, which party is deemed to be the sole employer?

- Does the law give effect to a contractual provision that deems an employee leasing company or other outsourcing firm to be the sole employer? If not, is there dual employment by operation of law or is the client the sole employer?

- In a dual employment relationship, which rights and responsibilities can be contractually allocated between co-employers, and which ones are fixed by operation of law?

- Who must secure compensation and file proof of coverage for which employees? Who must respond to claims? Who has the benefit of the exclusive remedy? If one co-employer is out of compliance, what are the consequences for the other co-employer?

- Can an outsourcing firm obtain a master policy? If so, under what conditions and subject to what reporting requirements? What can it charge its clients for coverage? How and when can a client's coverage be terminated? What defenses and remedies does an insurer have?

- What notice rights does a client have before being terminated by an outsourcing firm? Should there be any restrictions on how or when a client can be terminated without cause? Should there be a right to convert to a separate policy if terminated by the outsourcing firm?

- What record keeping and reporting requirements should apply to outsourcing firms and their current and former clients?

- What special provisions are necessary for outsourcing firms with clients in multiple states or clients with interstate operations?

- Can an outsourcing firm self-insure? If so, under what conditions?

- Do any special regulatory requirements apply if there are separate policies for each client employer? Can the outsourcing firm collect and remit premiums, and if so, must it be licensed as a producer?

- How is the scope of the law defined? Will it also apply to group insurance arrangements that are not based on employment services outsourcing contracts?

- What effect would the insolvency of an outsourcing firm have upon the responsibilities of its clients, and what effect would the insolvency of a client have upon the responsibilities of an outsourcing firm?

- To the extent that the law allows insurers several different ways of providing coverage for outsourcing firms and their clients, should all of these options be available when such coverage is written in the state's assigned risk plan?

BY NANCY GROVER

For more information on the report, contact the IAIABC at (608) 663-6355 or visit its Web site at www.laiabc.org.

Testimony

Before the Senate Industry, Business and Labor Committee
January 27, 2003

Members of the committee, my name is Jim Fettig and I am the Branch Manager of Kelly Services here in Bismarck and a member of the North Dakota Staffing Association. Thank you for giving me the opportunity to speak today.

I am here representing staffing firms doing business in North Dakota. In 2002 our industry employed over 2,000 people per day and contributed over \$34 million in annual payroll. We are concerned that Senate Bill 2298 the Professional Employer Organization registration bill is too broad and will affect how we do our business.

We are concerned that the legislation would unnecessarily subject traditional staffing firms to regulations that were designed to address potential workers compensation experience ratings issues in the "employee leasing" or professional employer organization (PEO) industry. The PEO industry is distinctly different from temporary help and staffing services.

We support the PEO industry's legislative efforts to register their businesses with the state. It is our understanding that these efforts are made to correct alleged abuses, sometimes referred to as "mod-swapping," whereby an employer with high workers compensation costs seeks to reduce those costs by transferring its existing workforce, or a significant part thereof, to the payroll of another entity with a more favorable experience rating, and then "leasing" the same employees back. Hence, the abuse occurs, if it is going to occur at all, at the time that the leaseback arrangement begins, and then, only if the arrangement shifts all or substantially all of the employer's existing workforce to another entity's payroll.

Staffing arrangements that recruit, hire and assign their own employees to clients do not present these issues and, therefore, should not be regulated. Unfortunately, the definition of "professional employer organization" is so broad that it could include any staffing service.

Unlike PEO "leaseback" arrangements covering all or most of an employer's workforce, staffing firms recruit, hire and assign their own employees to supplement their clients' existing workforce. Whether temporary or long-term, such services should not be treated as PEO services. The bill as written would cover any arrangement in which a firm employs individuals on a "long-term, ongoing" basis. Many traditional staffing arrangements potentially could be swept in depending the law is ultimately interpreted.

The two key distinctions between staffing and PEO are (1) PEO arrangements cover an

employer's existing workforce and (2) they generally cover all or substantially all of that workforce. Recognition of these two critical differences between PEO and non-PEO services will ensure that only PEO companies are subject to the legislation.

We would encourage the committee to modifying the definition of professional employer organization to an organization that provides arrangements involving "all or substantially all" of an employer's existing workforce and excluding arrangements, in which the firm recruits, screens and hires its own employees. The modification should also include the explicit exclusion for assignments involving employees who have never worked for the client because this business relationship is that of a traditional staffing arrangement where the issues suspected of abuse are not present. These changes would get at the heart of the abuse issue and provide enough specificity to ensure that the regulation covers those entities engaged in employee leasing.

Thank you again for giving me an opportunity to speak with you today.

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92-01-02-21. Employee service staffing arrangements.

1. As used in this section, "client company" means an employer under subsection 3 of North Dakota Century Code section 65-01-08 who, under written contract, enters into a relationship with a staffing service or leases any or all of its employees from a staffing service.

2. ~~4.~~ As used in this section, "staffing service" means an employer under subsection 3 of section 65-01-08 which offers its services, under written contract, to the public, provides employees' services to more than one client company. The term includes professional employer organizations, staff leasing companies, employee leasing organizations and temporary staffing companies, and was not created for the purpose of hiring and leasing back the employees of specific client companies. The term "staffing service" shall be broadly construed to encompass entities which offer services provided by professional employer organizations, staff leasing companies, employee leasing organization and temporary staffing companies regardless of the term used.

Within the meaning of staffing service as used in this section, "temporary staffing," or "temporary staffing service" means an arrangement by which an employer hires its own employees and assigns them to a client company to support or supplement the client company's work force in a special work situation including:

- a. an employee absence;
- b. a temporary skill shortage;
- c. a seasonal workload; or
- d. a special assignment or project with a targeted end date.

The term does not include arrangements where the majority of the client company's workforce has been assigned by a temporary staffing service for a period of more than 12 consecutive months.

A staffing service which provides only temporary staffing services shall be the employee's employer. The temporary staffing service shall maintain a workers compensation account in the temporary staffing services' name and report the wages for those workers annually to the bureau.

All other staffing service organizations shall:

- a. Maintain individual North Dakota workers compensation accounts for each of its North Dakota client companies.
- b. On separate payroll reports supplied by the bureau, report annually the payroll detail for each North Dakota client company.
- c. Maintain complete and separate records of the payroll of its client companies. Claims shall be separately identified by the staffing service for each client company.
- d. Share employer responsibilities with the client company including retention of the authority to hire, terminate, discipline, and reassign employees.
- e. Notify the bureau of the client company's name, workers compensation account number and the date the staffing service began providing services to the client company. The staffing service shall provide this information upon entering into an agreement with a client company, but no later than fifteen (15) calendar days from the effective date of the written agreement.
- f. Supply the bureau with a copy of the agreement between the staffing service and client company.

g. Notify the bureau upon termination of any agreement with a client company, but no later than fifteen (15) calendar days from the effective date of termination.

h. If the contractual agreement between a staffing service and a client company is terminated, employees shall become the sole employees of the client company.

i. Notify its client companies of an "uninsured" status for failure to pay workers compensation premiums within fifteen (15) days of notice by NDWC.

2. ~~As used in this section, "client company" means an employer under subsection 3 of North Dakota Century Code section 65-01-08 who hires a staffing service for the purpose of providing employees to work for the client company.~~

A staffing service which provides both temporary and long term employees is subject to the reporting requirements associated with the type of employee provided to the client company.

3. ~~Responsibility for payment of premium.~~ Experience Rating and Risk Assessment

a. Rate classifications for employees provided by a staffing service must be those which would apply as if the work were performed by the employees of the client company.

b. If a client company enters into an agreement with a staffing service, the bureau client company shall apply retain its the experience modifier rate, if applicable, of the staffing service to the premiums attributed to an employee service arrangement unless the bureau determines the entity is not a staffing service as defined by this rule.

c. ~~For purposes of the payment of premium, a staffing company is considered a subcontractor and a client company is considered a general contractor pursuant to subdivision e of subsection 17 of North Dakota Century Code section 65-01-02.~~

Both a staffing service and client company under this section are considered employers for purposes of North Dakota Century Code Section 65-04-26.1. The client company has the ultimate responsibility for the filing of payroll reports and payment of premium.

d. A staffing service that provides employees to a client company that has been determined to be uninsured or ineligible for coverage under North Dakota Century Code sections 65-04-27.1 and 65-04-33 may not secure workers' compensation coverage for those employees.

4. Determination of staffing service.

a. The bureau shall determine whether an entity is a staffing service under this rule and North Dakota Century Code section 65-01-08. If the bureau determines an entity is a staffing service, the bureau may further determine if it is a temporary staffing service. In rendering either determination, the bureau may issue a decision pursuant to North Dakota Century Code section 65-04-32. If the bureau determines an entity is not a staffing service, the client company is responsible for maintaining a workers compensation account and paying the premium for coverage of the employees.

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b. The factors the bureau may consider when determining whether an entity is a staffing service under this rule include the number of client companies handled by the staffing service, the length of time the staffing service has been in existence, the extent to which the staffing service extends its services to the general public, the degree to which the client company and staffing service are separate and unrelated business entities, the repetition of officers or managers between the client company and staffing service, and the extent to which a client company has an ownership or other interest in the staffing service. The bureau may also consider the scope of the services provided by the staffing service, the relationship between the staffing service and the client company's workers, the written agreement between the staffing service and the client company and any other factors deemed relevant by the bureau.

c. The bureau may require information from any staffing service including a list of current client company accounts, staffing assignments, payroll information, and rate classification information.

d. A client company shall provide any information requested by the bureau regarding the identity of any staffing service with which it has contracted.

History: Effective July 1, 1991; amended effective January 1, 1992; April 1, 1997; August 1, 1998; May 1, 2000; May 1, 2002. _____, 2003
General Authority: NDCC 65-02-08, ~~65-04-17~~, ~~65-01-08~~, ~~65-04-13~~
Law Implemented: NDCC 65-01-08, ~~65-04-17~~

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TESTIMONY ON SB 2298
House of Representatives Industry, Business and Labor
Committee
Representative George Keiser, Chairman
Wednesday, March 12, 2003

Good Morning Mr. Chairman and members of the Committee, my name is Darcy Fuchs from West Fargo and I am in favor of this bill because currently Section 65-01-08 of the North Dakota Century Code does not recognize a PEO (*Professional Employer Organization*) as an employer of the workers who are employed by the PEO.

I was born and raised in North Dakota, graduated from college in North Dakota and decided to locate our business here in my home state. I am President of Payroll Express, Inc., a PEO that has been in West Fargo since 1995. We serve small to mid-sized businesses across the entire state, from Fargo to as far west as Bowman and Williston. As a PEO I would like to tell you about the services our company provides for our Clients.

DEFINITION OF A PEO:

I have placed in your packet a rather lengthy definition of the term "professional employer organization" or PEO. This definition is from the National Association of Professional Employer Organizations (NAPEO).

A definition that is more easily understood is; by the terms of a service agreement, the PEO employs workers and assigns them to its client locations, and thereby the PEO assumes responsibility as an employer. We pay wages and employment taxes of the employee out of our own accounts. We collect, report and deposit employment taxes with state and federal authorities. We establish and maintain the employment relationship with the employee by retaining the right to hire, reassign and fire the employees.

Other terms that are sometimes used interchangeably when referring to a PEO arrangement are "employee leasing", "staff leasing", "hire and lease back".

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THE PEO ARRANGEMENT:

Although similar to a "temp agency", the PEO relationship differs because it is a long-term arrangement and involves all or a significant number of the workplace employees. By using the services of a PEO, the Client Companies make a continuing investment in their workers, because the PEO provides insurance benefits, retirement plans and other important benefits for their employees.

PEOs BENEFIT NORTH DAKOTA EMPLOYEES:

By the PEO arrangement, the PEO is able to offer many benefits to the employees that may not have been available to them by being a sole employee of the Client Company. Benefits available through a PEO include health insurance, dental and vision care insurance, accident, cancer and disability insurance, life insurance, retirement plan and Section 125 Flexible Benefits plan. By not recognizing the PEO as the employer, many employees could lose their insurance benefits and retirement plans.

PEOs provide workers with coverage under the entire spectrum of employment laws and regulations. In some cases, these laws would not apply to workers at small businesses without the PEO relationship, since many laws have exemptions based on the number of workers. Once included in the PEO's workforce, the workers are protected by these laws. The employee truly profits from the PEO arrangement.

PEOs BENEFIT NORTH DAKOTA SMALL BUSINESS:

Small businesses also profit from the PEO arrangement. Personnel management today is becoming increasingly complex. The small business owner is expected to administer health benefits, workers' compensation, unemployment insurance, payroll and payroll tax compliance. The PEO assumes these responsibilities, which then allows the Client to concentrate on the revenue-producing side of its business.

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PEOs BENEFIT GOVERNMENT:

PEOs benefit government agencies as well. The Internal Revenue Service acknowledges a PEO the employer for federal income and unemployment taxes. The PEO consolidates several small companies' tax filings into one, making for accelerated collection of taxes.

PEOs also allow government agencies to reach business through a single-employer entity. Reporting to the agencies is more professional and accurate.

PEOs BENEFIT NORTH DAKOTA:

North Dakota is concerned about losing our young people to other states. That out-migration is due, in part, to job opportunities, higher wages, and benefits offered by larger out-of-state employers. PEOs allow North Dakota small business to be competitive with these out-of-state employers by giving them the opportunity to offer affordable benefits. PEOs may be considered another tool in economic development for North Dakota.

PROPOSED CHANGES TO NDCC 65-01-08:

The proposed changes to NDCC 65-01-08 define a professional employer organization as an employer of the workers at the client location. Currently the code does not do that and the workers compensation administrative rule specifically excludes PEOs (leasing companies) in their definition of a "staffing service" under subsection 1 of section 92-01-02-21. Being excluded in the staffing service definition eliminates PEOs as a contributing employer and eliminates the PEOs relief from liability for injury to an employee. As a wage-paying employer, PEOs need to be defined as such.

These changes define a PEO as a type of staffing service and name the PEO as a contributing employer relieved from liability for injury to an employee. The changes would also require that the workers compensation account be held in the name of the PEO, streamlining the reporting requirements. By defining a PEO as a staffing service and having one account, both the Client Company and the PEO would be considered contributing employers.

As of now, the North Dakota Workers Compensation Bureau is requiring our Client Companies to each hold their own account with the Bureau. No other government entity has that requirement of a PEO – we submit one 941 Employer's Quarterly Federal Tax Return, one Unemployment Quarterly Tax Return for each state, one 940 Employer's Annual Unemployment Report and hold one workers compensation account with one report for each state other than North Dakota.

A PEO with 200 Clients now has 200 separate reports to prepare and submit to North Dakota Workers Compensation Bureau along with 200 separate bills to reconcile and pay. This reporting requirement is extremely time-consuming, costly and burdensome on the PEO. One account and a consolidated report submitted by the PEO could contain all of the required information, including the client location, and would be far more efficient for both the PEO and the Bureau itself.

I have here a copy of our bill from the North Dakota Workers' Compensation Bureau dated February 2002 – it consolidated all of our Clients and the employees into one report - it was 3 pages long. The employees were all listed under their correct classification on the PEO's report, and the premiums were calculated on that information. The billing and reporting was very manageable as well as accurate – one report, one bill and one payment each month.

I also have a copy of our bill dated February 2003 – it is 60 pages long! I did not give each of you a copy of it because that amount of paperwork would be extremely burdensome to you. Each Client Company has now been assigned their own separate account, with separate reporting and separate bills for each account. In addition, each Client Company is now charged a minimum fee to have an account with the Bureau. In some cases, the Client Company has no employees that are required to have workers compensation coverage – but we are still charged a minimum fee to have that account. As I said before, the PEO is responsible for the payment of wages, benefits, payroll taxes and workers compensation. We, the PEO have been charged additional fees in excess of \$1000 for these separate accounts.

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Passing this bill would help guarantee that our employees do not lose their current benefits such as health insurance and retirement plans; it would attract new business to North Dakota and ensure that our Client Companies remain competitive employers in the job market to help keep our young people in the state.

Passing this bill would also relieve the PEO of this burdensome and undue reporting requirement, as well as eliminate inflated minimum fees to the PEO and their Client Companies, North Dakota small businesses.

Also in your packet, I have provided letters from some of our Clients and employees describing their views of working with a Professional Employer Organization.

Thank you for your time, are there any questions?

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2003 ENGROSSED SENATE BILL 2298

**Fifty-Eighth Legislative Assembly
Before the House Industry Business and Labor Committee
Anne Jorgenson Green, Attorney
North Dakota Workers Compensation
March 12th, 2003**

Mr. Chairman, Members of the Committee:

My name is Anne Jorgenson Green. I am the staff attorney for the Policyholder Services Department of North Dakota Workers Compensation. The North Dakota workers compensation Board of Directors unanimously supports engrossed Senate Bill 2298.

The ability of an insurance company to track the loss history of its individual insureds is critical to protecting its ability to pay claims. Workers Compensation insures all North Dakota employers. Our knowledge of where an employer's place of business is, the kind of work that he does, the risk that he incurs and the frequency of his claims losses are issues necessary to assessing the risk that we are tasked with underwriting.

Professional Employer Organizations, or PEO's, are a type of business entity which provide a variety of accounting, payroll and reporting services. These entities are also known as employee leasing organizations, employee staffing companies and staffing services. The Century Code contemplates this kind of business and uses the term staffing service to encompass all these entity types. Staffing Services manage the "business of having employees" for a fee and provide the business owner the ability to concentrate on the "business of doing business." These entities provide a valuable service, particularly to small North Dakota businesses.

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The National Association of Insurance Commissioners (NAIC) and the International Association of Industrial Accident Boards and Commissions (IAIABC) issued a joint report in February of 2002 centering on the issues of staffing services. I have attached a summary article of that report to this testimony. Most staffing services prefer a "master policy" approach to coverage where all payroll is reported under the name of the PEO. The drafters of the report, however, concluded that separate policies, or the "multiple coordinated policy" for client companies is the preferred approach in the residual market. North Dakota workers compensation has adopted that policy and has proposed an administrative rule echoing the recommendations in the NAIC/IAIABC report.

The difficulty of the master policy approach is best explained by example:

Company A has a significant claims loss history. That poor claims experience has resulted in a surcharge to Company A's premium. Company A enters into an agreement with a PEO and cancels their account with workers compensation. The PEO adds Company A to their client list and combines their payroll with their existing client companies. Since the payroll is reported under the PEO, Company A's loss history is subsumed under the umbrella of the PEO. Indeed, since Company A is now part of the PEO, their surcharge will not be applied towards the premiums paid on their behalf by the PEO. If Company A remains with that PEO for a period of time, they could ultimately come out from under the PEO and establish a new account with workers comp free of the surcharge. The claims experience during Company A's relationship with the PEO is lost within the PEO. Company A has essentially "laundered" their poor claims experience through their relationship with the PEO.

Separate workers compensation accounts maintained by NDWC and cross-referenced to the PEO allows workers comp to track loss history by business, maintain surcharges or discounts where appropriate and preserve the experience rates of individual employers even while they enjoy the services of a PEO.

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Other issues associated with a Master Policy approach have been confirmed by our experience. A North Dakota employer, uninsured for purposes of workers compensation for failure to pay premium enrolled the services of a PEO. The result was an uninsured North Dakota employer achieving insured status by establishing coverage under the auspices of a PEO. Fortunately, this employer's success was short-lived, but separate accounts preserve NDWC's ability to track unscrupulous employers. Further, separate accounts and open communication with NDWC protect the PEO itself from doing business which might have serious financial repercussions.

Finally, the Master Policy approach puts the PEO in the position of intermediary between workers compensation and the client company directly affecting our ability to assess each and every individual underwriting risk. If information on safety programs, location and nature of the work is filtered and diluted through the PEO, our in-house underwriting process may be skewed in terms of the exact nature of the client companies' operations. That impedes our ability to assess risk and ultimately, protect the fund.

Not only are separate accounts the best way for NDWC to accurately set rates, assess risk and maintain loss history for North Dakota employers, it is the standard in the industry. I would be happy to answer any questions that you may have at this time.

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