

CSI - Ohio

The Common Sense Initiative

Business Impact Analysis

Agency Name: Ohio Bureau of Workers' Compensation (BWC)

Regulation/Package Title: Professional Employer Organization (PEO) Rules

Rule Number(s): 4123-17-15(R/N), 4123-17-15.1(N), 4123-17-15.2(N), 4123-15-15.3(N),
4123-17-15.4(N), 4123-17-15.5(N), 4123-17-15.6(N), 4123-17-15.7(N), 4123-14-06(Am)

Date: June 10, 2013

Rule Type:

- ✓ New
- ✓ Amended

- ✓ 5-Year Review
- ✓ Rescinded

The Common Sense Initiative was established by Executive Order 2011-01K and placed within the Office of the Lieutenant Governor. Under the CSI Initiative, agencies should balance the critical objectives of all regulations with the costs of compliance by the regulated parties. Agencies should promote transparency, consistency, predictability, and flexibility in regulatory activities. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

Regulatory Intent

1. Please briefly describe the draft regulation in plain language.

Please include the key provisions of the regulation as well as any proposed amendments.

Proposed rules 4123-17-15 through 4123-17-15.7 govern the registration, recognition, and regulation of professional employer organizations (PEOs) in Ohio. A more detailed description of key provisions of the rules and amendments can be found in the Executive Summary of attached Exhibit A (the rules packet presented to BWC's Board of Directors).

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For simplicity, consistency, and to make the rules more user-friendly, BWC is recommending the rescission of existing rule 4123-17-15 and replacement of the rule with a series of rules as follows:

- 4123-17-15 Professional employer organizations.
- 4123-17-15.1 PEO agreements.
- 4123-17-15.2 Registration and reporting requirements. (Appendix: Registration and renewal fees)
- 4123-17-15.3 Security requirements.
- 4123-17-15.4 Financial requirements.
- 4123-17-15.5 Self-Insuring PEOs.
- 4123-17-15.6 Client employer information.
- 4123-17-15.7 Denial or revocation of PEO registration.

In connection with the five-year rule review of the PEO rule, BWC noted a discrepancy between Revised Code § 4123.291 and rule 4123-14-06, setting forth jurisdiction of the Adjudicating Committee with respect to a PEO's right to appeal the amount of security required by the agency to the Adjudicating Committee. Also included in this rule packet is an amendment to correct this discrepancy. Because this rule does not have an adverse business impact, the remainder of this analysis refers specifically to rules 4123-17-15 through 4123-17-15.7.

2. Please list the Ohio statute authorizing the Agency to adopt this regulation.

4121.12, 4121.121, 4121.30, 4123.05, 4125.02

3. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?

If yes, please briefly explain the source and substance of the federal requirement.

No.

4. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.

Not applicable.

5. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?

R.C. § 4125.02 requires BWC to enact rules to administer and enforce R.C. Chapter 4125.

6. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?

This rule does not lend itself to measurement; success will be determined based on stakeholder feedback.

Development of the Regulation

7. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.

If applicable, please include the date and medium by which the stakeholders were initially contacted.

The Bureau worked with various PEOs, Third Party Administrators (TPAs), employer representatives, and trade associations including the National Association of Professional Employer Organizations (NAPEO) and the Employer Services Assurance Corporation (ESAC) to develop the rule changes relating to the five-year review process. Stakeholder feedback regarding general operation of our PEO rule – including requests for clarity of BWC’s position and transparency by NAPEO – alerted BWC to the need to revisit the language of the rules in the five-year rule review process.

As early as 2011, BWC had stakeholder meetings and forums to develop the requirements for Self-Insuring PEOs (now contained in proposed rule 4123-17-15.5).

8. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

BWC received general support for the proposed rules from the Ohio Chamber of Commerce, the Ohio National Federation of Independent Businesses (NFIB), the Ohio Farm Bureau, and the Ohio Manufacturers’ Association. Prior to the second read with the Board of Directors, BWC distributed the rules for input with BWC registered PEOs, approximately 125 other stakeholders including Third Party Administrators (TPAs), employer representatives, and self-insured employer entities.

Please see the matrix outlining the suggestions, stakeholder rationale, and BWC response to all stakeholders’ feedback, attached as Exhibit B.

9. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

These rules do not lend themselves to scientific data; BWC must rely on stakeholder feedback to determine the success of these rules.

10. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn’t the Agency consider regulatory alternatives?

In addition to those proposed by stakeholders, the agency also examined the statutes and rules of other states that govern PEOs to gather understanding of potential alternative regulations. Other state schemes varied from extremely permissive (no regulation of the PEO industry) to extremely restrictive (prohibiting operation of SI-PEOs). S.B. 139 dictated a majority of the regulation changes in the rule (see the highlighted gray changes in the

Board of Directors packet, attached as Exhibit A). For the remainder of the proposed rule changes, BWC examined its history in regulating PEOs and SI-PEOs to determine the appropriate balance of regulation and registration requirements.

11. Did the Agency specifically consider a performance-based regulation? Please explain.

Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.

BWC's existing rule was a performance-based regulation with respect to the establishment of the co-employment relationship. Feedback from stakeholders and BWC's experience in regulating the industry indicated that the rule as it existed was ambiguous. BWC evaluated the rule and what the appropriate model should be, and proposes changing the rule to specify that the maker of wage for federal tax purposes – the employer that pays and reports wages under its Federal Employer Identification Number (FEIN) – should be the same employer that reports payroll for workers' compensation purposes. This simplifies reporting processes for employers, avoids potential manipulation of payroll between entities, and allows BWC a method to verify proper reporting of payroll if such manipulation is suspected.

12. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

BWC is the sole state agency with authority from the Legislature to adopt rules regulating PEOs, so there is no conflict or duplication with other administrative code rules. BWC also communicated with the Ohio Department of Insurance in the development of this rule.

13. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Prior to the effective date of these rules, BWC will prepare a compliance guide to distribute to all registered PEOs. A summary of changes will be made available electronically.

To the extent PEOs currently registered with BWC will be adversely impacted by the proposed rule changes, the BWC Employer Services division will work with these PEOs to develop a plan that will allow a smooth transition for these companies as they come into compliance with the requirements of the proposed rules.

Adverse Impact to Business

14. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

a. Identify the scope of the impacted business community;

Approximately 200 registered PEOs operating in Ohio will be impacted by these rule changes. To the extent an existing PEO does not comply with proposed rules, clients engaged in a PEO relationship may be impacted by changes required of the PEO.

- b. Identify the nature of the adverse impact (e.g., license fees, fines, employer time for compliance); and**

Please see attached Exhibit C.

- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a “representative business.” Please include the source for your information/estimated impact.

Please see attached Exhibit C.

- 15. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?**

Please see attached Exhibit C.

Regulatory Flexibility

- 16. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.**

Use of a PEO entity is not required of small businesses in Ohio; the use of a PEO to comply with Ohio’s workers’ compensation requirements is a business decision that small businesses undertake. Small businesses can also use an Administrative Service Organization (ASO) or TPA to assist with workers’ compensation compliance.

A PEO subject to the requirements of this rule can use an Assurance Organization to meet securitization requirements of the Revised Code and rules. PEOs that are related entities can use a PEO Reporting Entity to meet the financial reporting requirements of the Revised Code and rules.

- 17. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?**

BWC applies R.C. § 119.14 on a case-by-case basis.

- 18. What resources are available to assist small businesses with compliance of the regulation?**

BWC communicates to all registered PEOs with a periodic PEO Newsletter.

BWC’s Employer Services division will work with PEOs to respond to issues relating to the rules, and to allow a smooth transition for PEOs to comply with the proposed rules.



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Business Impact Analysis:
Exhibit C

Business Impact Grid: PEO Rules

<u>Question 14b:</u> <u>Nature of Adverse Impact</u>	<u>Question 14c:</u> <u>Expected Cost of Compliance</u>	<u>Question 15:</u> <u>Reason Regulatory Intent Justifies Adverse Impact</u>
PEOs must report individual client employer payroll, claims, and classification data under a separate and unique subaccount to BWC.	Minimal (PEOs currently maintain this information and report it to BWC on a quarterly basis; reporting will be in electronic format.)	This change in rule is required by Substitute Senate Bill 139 of the 129 th General Assembly (S.B. 139).
PEOs and PEO reporting entities are required to register annually with the bureau, and must provide information such as: <ul style="list-style-type: none"> List of current client employers List of related corporate entities List of corporate officers Financial statements prepared in accordance with Generally Accepted Accounting Principles (GAAP) Attestation of accuracy of data by the CEO of the organization 	Cost to prepare GAAP financial statements will be incurred by PEOs will vary by PEO's size and current business practices. Costs to comply with the other registration requirements are minimal (PEOs currently maintain this information and report it to BWC on an annual basis; reporting will be in electronic format.)	Registration is required by R.C. 4125.05(A), which enumerates the elements required for registration. S.B. 139 amended this statute to require GAAP financial statements. Limited registration is available to PEOs with minimal contacts in the state. PEOs that are related entities may use a PEO reporting entity to submit a consolidated financial statement on behalf of all commonly-controlled PEOs.
PEOs are required to provide security prior to being registered.	Amount of security required will depend on the PEO's financial strength.	The posting of security is required by R.C. 4125.05. As an alternative to providing security, a PEO may use an assurance organization to certify its financial strength.
PEOs, PEO Reporting Entities, and Assurance Organizations must pay an initial registration fee and an annual renewal fee.	Registration fees: <ul style="list-style-type: none"> PEO: \$1,000 PEO Reporting Entity: \$1,000 per PEO within the reporting entity Assurance Organization: \$500 Limited PEO Registration: \$100 Renewal fees: <ul style="list-style-type: none"> PEO: \$250 PEO Reporting Entity: \$250 per PEO within the reporting entity Assurance Organization: \$500 	R.C. 4125.05 indicates that registrants shall pay a fee "as determined by the administrator." BWC examined the costs of processing applications and the costs of registration in the other states that require registration (see Appendix A), and determined the fees proposed in rule were appropriate.

Business Impact Grid: PEO Rules

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PEOs must make reports regarding transfer of employees between PEO entities or reporting entities.	Minimal (PEOs are currently required to report any change in PEO arrangements to BWC.)	This change in rule is required by S.B. 139.
<p>PEOs desiring the privilege of self-insuring status must meet additional requirements:</p> <ul style="list-style-type: none"> • Furnish 100% security • Submit actuarial estimate of loss and loss adjustment expense liabilities • Make contribution to the Self-Insuring Employers' Guaranty Fund 	<p>Security will be no less than the total of the outstanding claim liabilities associated with the policy.</p> <p>Costs of the actuarial estimate will vary depending on the PEO and its record-keeping practices.</p> <p>Contributions to the SIFGF are determined by OAC 4123-19-15.</p>	<p>SPEOs have a unique set of concerns associated with them, and BWC's experience with SPEOs indicates that the opportunity to game the system through an SPEO entity is immense. The risks associated with SPEOs have been observed by other states; California, for example, has passed legislation simply prohibiting their existence.</p> <p>BWC worked with SPEOs over the course of 2 years collaboratively to develop a rule that allows BWC proper oversight of these entities without prohibiting their existence. These requirements are necessary components to a proper regulatory environment, and BWC believes they are necessary to protect the workers' compensation system.</p>
PEOs with negative working capital (defined as current liabilities in excess of current assets) must post additional security and provide quarterly financial reports to BWC.	<p>Additional security required is equal to the amount of negative working capital reflected on the financial statements of the PEO.</p> <p>The cost of preparing financial reports will vary by PEO's size and its current business practices.</p>	This change in rule is required by S.B. 139.
PEOs failing to provide a client employer's information as required by law must repay BWC's costs of investigating the complaint and providing such information to the client employer.	Costs in investigating the complaint and providing such information to the client employer will vary by situation.	R.C. 4125.02 requires BWC to make a rule to enforce the legal requirement that a PEO provide certain information to its client employers.
Assurance Organizations (AOs) wishing to certify the financial strength of PEOs must submit written request to BWC to be approved to provide such certification, and apply for renewal of approval.	Minimal costs should be incurred in submitting the written request (BWC will allow the AO to determine how to submit such application based on its own records and materials).	R.C. 4125.02 as amended by S.B. 139 indicates that an AO "shall abide by all standards and procedures established by the administrator for that approval." BWC has determined that a flexible registration process allowing for a case-by-case determination is appropriate.