WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION

Form #3

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NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Insurance Commissioner TITLE NUMBER: 114

CITE AUTHORITY W. Va. Code §§33-2-10, 33-46A-7 and 33-46A-10

AMENDMENT TO AN EXISTING RULE: YES_____ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 85

TITLE OF RULE BEING PROPOSED: Professional Employer Organizations

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Virgil T. Helton
Cabinet Secretary
West Virginia Department of Revenue

Offices of the Insurance Commissioner
Legislative Rule
Title 114, Series 85

PROFESSIONAL EMPLOYER ORGANIZATIONS

TITLE 114, SERIES 85

BRIEF SUMMARY OF RULE

This rule is promulgated in order to implement W. Va. Code §33-46A-1, et seq. to establish procedures for licensing of professional employer organizations (PEOs) or professional employer organizations groups and to establish standards which a professional employer organization or professional employer organization group must meet in conducting business in the State of West Virginia. It also sets forth standards for the approval of master policies for workers' compensation provided through a PEO to several client employers.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period, Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 29, 2008

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: OFFICE OF THE INSURANCE COMMISSIONER
ATTN: Legal Division
1124 Smith Street
Post Office Box 50540
Charleston, West Virginia 25305-0540

LEGISLATIVE RULE TITLE: Professional Employer Organizations, Title 114, Series 85

1. **Authorizing statute(s) citation:**

   WV Code §§33-2-10, 33-46A-7 and 33-46A-10

2. a. **Date filed in State Register with Notice of Hearing or Public Comment Period:**

      June 18, 2008- Comment Period.

   b. **What other notice, including advertising, did you give of the hearing?**

      N/A

   c. **Date of Public Hearing(s) or Public Comment Period ended:**

      July 21, 2008.

   d. **Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.**

      Attached __X__ **No comments received** _____

   e. **Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)**

      August 29, 2008 (following public comment period)

f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Timothy R. Murphy, Associate Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, WV 25305-0540
Phone: (304) 558-6279, Ext. 1210
Fax: (304) 558-1362
E-mail: timothy.murphy@wvinsurance.gov

g. IF DIFFERENT FROM ITEM 'f', please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Same.

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

N/A

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

N/A

Insurance Commissioner
Title 114, Series 85

ATTACHMENT TO QUESTION 2(d):

The National Association of Professional Employer Organizations ("NAPEO") made a number of comments on the proposed rule regarding Professional Employer Organizations ("PEOs"), which was filed with the West Virginia Secretary of State for public comment on June 18, 2008. These comments received by NAPEO were thoroughly reviewed, considered and are addressed herein.

Electronic filing

- NAPEO states that in discussions of the statute (HB 4079) during the 2008 legislative session, the Commissioner indicated that NAPEO's proposal for "electronic filing and compliance" could be omitted because the Commissioner believed there was sufficient regulatory authority to accomplish the same result through rule. NAPEO notes that such language is not present in the proposed rule and recommends the following be added to section 3:

3.7. Electronic Filing and Compliance: The Commissioner shall to the extent practical permit electronic filings in conformance with the West Virginia Uniform Electronic Transmissions Act of 1999, including applications, documents, reports and other filings required by this Act. The Commissioner may provide for the acceptance of electronic filings and other assurance by a bonded, independent and qualified assurance organization approved by the Commissioner that provides satisfactory assurance of compliance acceptable to the Department consistent with §33-46A-4 and other provisions of Article 46A. Nothing in this rule shall limit or change the Commissioner's authority to license or suspend or revoke the license of a professional employer organization or to investigate or enforce any provision of the Act or attendant rules.

The Commissioner agrees that the topic of assurance organizations was discussed and she agrees that specific language authorizing the use of such organizations should be included in the rule. However, she also believes that the topic of electronic filing was not agreed upon and, moreover, is unnecessary. Accordingly, the commissioner changes the rule to add the following subsection:

3.8. Accreditation services: The Commissioner may provide for the acceptance of filings and assurances of a PEO's compliance with this article and other applicable laws by a bonded, independent and qualified assurance organization approved by the Commissioner.

§114-85-2. Definitions

- A comment was received regarding the definition of "Controlling Person" found in subsection 2.1. The definition states that a "Controlling Person" includes a partner of a partnership operating as a PEO. NAPEO states that there is generally no problem with making a general partner a controlling person but that a problem may arise with respect to limited partnerships because the language in the rule is overly broad. NAPEO suggests instead that the words "a partner of a partnership" be deleted and replaced by "or a person or partner that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company or partnership operating as..." The Commissioner recognizes that the current language of the rule may indeed be to broad and agrees to make the following changes to the definition:

2.1. "Controlling Person" means an officer or director of a corporation operating as a professional employer organization, a shareholder holding twenty-five (25%) percent or more of the voting stock or a corporation operating as a professional employer organization, ~~a partner of a partnership~~ or a person or partner that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company or partnership operating as a professional employer organization, or a person that possesses, directly or indirectly, the power to direct or cause the direction of the management of policies of a company operating as a professional employer organization through the ownership of voting securities, by contract or otherwise, and who is actively involved in the day-to-day management of the company.

- Although the rule defines "temporary employee," NAPEO notes that the statute exempts from the definition of PEO a person who performs "temporary help services" and that the rule should, at a minimum, define this term. NAPEO suggests replacing the definition found in §2.3, "Temporary Employee," with the following definition of "Temporary Help Services Employee":

2.3. "Temporary Help Services" means services consisting of a person:

a. Recruiting and hiring its own employees,

b. Finding other organizations that need the services of those employees,

c. Assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

d. Customarily attempting to reassign the employees to other organizations when they finish each assignment.

The Commissioner agrees that a definition of "Temporary Help Services" should be added and changes the subsection as follows:

2.3. ~~"Temporary Employee" means a person employed either through another person or directly by an employer to support or supplement the existing work force in special situations such as employee absences and temporary skill shortages, seasonal workloads and special assignments and projects, with the expectation that the person's position will be terminated upon completion of the task or function.~~ "Temporary Help Services" means services consisting of a Person:

a. Recruiting and hiring its own employees,

b. Finding other organizations that need the services of those employees,

c. Assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

d. Customarily attempting to reassign the employees to other organizations when they finish each assignment.

§114-85-3. Licensing Requirements

- A comment was received pertaining to subdivision (i) of subsection 3.2 of this rule. The subdivision states that a "PEO's most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen months, performed by a local licensed CPA" be submitted in order to obtain a license. NAPEO states that the term "local" contradicts the statute which requires only that the CPA "be licensed to practice in the jurisdiction where the accountant is located." The Commissioner agrees that the requirements set out in the rule in this respect should conform to those in the statute and, accordingly, changes the subdivision as follows:

i. The PEO's most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen months, performed by a ~~local licensed~~ CPA licensed in the jurisdiction in which the CPA is located.

- A comment was received pertaining to subdivision (*l*) of subsection 3.2 of this rule, which provides that "each applicant for a PEO license must provide the name and address of all officers, directors, partners and shareholders owning 10% or more of any stock in the corporation." NAPEO states that the statue is fairly specific as to the requirements for information about 25% owners and that this subdivision exceeds those requirements. The Commissioner agrees that the requirement for the name and address of all officers, directors, partners and shareholders owning 10% or more of any stock in the corporation be submitted exceeds the Commissioners authority and agrees to conform the

requirement to the statute. See W. Va. Code §33-46A-4(c)(5) (see changes following next paragraph).

- NAPEO also commented that subdivision (*l*) of subsection 3.2 of the rule raises a question as to how a foreign entity complies because foreign entities will not have the West Virginia documents required by this section and would instead have a certificate of authority to transact business in West Virginia. The Commissioner agrees that the language stating that a certificate of authority be submitted for non-resident PEO's be added to this subdivision. The Commissioner changes the subdivision as follows:

l. ~~Each applicant for a PEO license must provide the name and address of all officers, directors, partners and shareholders owning 10% or more of any stock in the corporation~~. If the applicant is a corporation, a certificated copy of the corporation's Articles of Incorporation filed with the Secretary of State of West Virginia must be submitted to the Commissioner. If the applicant is a partnership, a copy of the Partnership Agreement or an affidavit signed by all ~~parties~~ partners that no written partnership exists must be submitted to the Commissioner. If the applicant is a limited partnership they must additionally provide and file a certified copy of its Certificate of Limited Partnership to the Commissioner. If the applicant is a non-resident, then a certificate of authority must be submitted to the Commissioner.

- A comment was received pertaining to subsection 3.3 that states that a PEO who has not had sufficient operating history to have an audited financial statement as required in §3.2.i must meet the requirements set forth in §3.2.j of this section. NAPEO states that the phrase "$100,000 working capital or bond" requirements should be added to this sentence for clarification purposes. They note that otherwise it says that a company that does not have a financial statement must have a financial statement. The Commissioner agrees that clarification would be beneficial to this subsection and changes it to read:

3.3. A PEO who has not had sufficient operating history to have an audited financial statement as required by subdivision i, subsection 3.2 of this section must meet the $100,000 working capital or bond requirements set forth in subdivision j of subsection 3.2 of this section. The amount of the bond for a PEO whose financial statements do not indicate positive working capital must be $100,000 plus an amount sufficient to cover the deficit in working capital. An applicant may apply to the Commissioner for an extension of time for filing its financial statements so long as the request for an extension is accompanied by a letter from an independent certified public accountant stating the reasons for the delay and the anticipated completion date of the financial statement.

- A comment was received on subsection 3.7 that states that "any application, as determined by the Commissioner, that remains incomplete for a period of four months from the date initially filed will be considered withdrawn and a new application and application fees will be required." NAPEO suggests adding language that an existing license, not suspended, revoked or otherwise limited by the Commissioner,

should remain in effect during the review of a renewal application by the Commissioner. They suggest further that the phrase "initially filed" be struck and instead read that from the date "of notice from the Commissioner that the application is incomplete." The Commissioner agrees that this language would be better suited with regard to renewal applications and would be beneficial with regard to new applicants as well. This language is also found in subsection 4.3 of section 4 and in subsection 5.4 of section 5. The same change made to this subsection will be made to those subsections as well as to keep language consistent throughout the rule. Therefore, the Commissioner agrees to change this subsection, and those in sections 4 and 5, to read as follows:

3.7. Any incomplete application, as determined by the Commissioner that remains incomplete for a period of four months from the date ~~initially filed~~ of notice from the Commissioner that the application is incomplete will be considered withdrawn and a new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

§114-85-4. Combined or Consolidated Licenses

- A comment was received on subsection 4.1 that states that "PEOs in a PEO group may satisfy the licensing law on a combined or consolidated basis by filing a combined or consolidated application for a license of multiple PEOs majority-owned by the same parent, entity or persons and may do so on forms prescribed by the Commissioner." NAPEO points out that the statute only provides that PEOs can meet the financial and reporting requirements on a consolidated basis and that all other requirements must be met separately. They suggest deleting "licensing law" and replace it with "financial and reporting requirements of W.Va. Code §33-46A." The Commissioner agrees with this suggestion and changes the subsection as follows:

4.1. PEOs in a PEO group may satisfy the ~~licensing law~~ financial and reporting requirements of W.Va. Code §33-46A on a combined or consolidated application for a license of multiple PEOS majority-owned by the same parent, entity or persons and may do so on forms prescribed and approved by the Commissioner.

- A comment was received on subsection 4.2 about PEOs applying for a PEO group license. NAPEO explains that the group does not own the PEO but that there is common ownership of the group. They suggest changing some language that would eliminate the implication that the PEO is owned by the group. The Commissioner feels that this clarification offered by NAPEO would improve the rule and therefore changes the subsection to read as follows:

4.2. PEOs applying for a PEO Group license must submit evidence showing that the professional employer organizations that are commonly held ~~by~~ in the PEO Group is held under common control of a person or entity in the PEO Group. This can be documented by submission of a corporate registration, shareholder report, corporate

resolution or interest holder report.

§114-85-5. Limited Licenses

- A comment was received pertaining to §5.2 that states proof of financial responsibility for limited licenses will be in an amount and form determined by the Commissioner. NAPEO believes that there is no separate financial requirement for this in the limited license provision in the statute and that the impetus under the statute for this provision is that if the PEO is licensed in another jurisdiction under "terms that are substantially similar" (§33-46A-4) then those financial requirements should be accepted. NAPEO further believes that this is in essence a *de minimis* provision for PEOs with only a few workers in West Virginia. The Commissioner disagrees. The statutory criteria in W. Va. Code §33-46A-4(i) are specifically stated to be what the applicant must show "at a minimum." The Commissioner believes that the absence of language permitting a "separate financial requirement" is not a bar to her authority to require a demonstration of such a requirement different from and in addition to that accepted by the other jurisdiction from which the applicant holds a license.

§114-85-6. Denial of a License or Renewal Application

- A comment was received on subsection 6.2 that suggested a provision be added that upon a determination by the Commissioner that the application is not complete, that the Commissioner provide a notice of deficiency and give reasonable opportunity for the applicant to correct such deficiency. The Commissioner feels that this request is fair and beneficial to the rule and agrees to make the following change to the subsection:

6.2. If the Commissioner determines

a. That the application is not complete or not properly executed, the Commissioner shall provide a notice of deficiency and provide a reasonable opportunity for the applicant to correct the deficiency, or

b. That the applicant does not meet the requirements to obtain a license, a written notice of denial shall be furnished to the applicant along with the reasons for the denial of the application. The applicant may request a hearing before the Commissioner within thirty (30) days of receipt of the written notice of denial to protest the decision of the Commissioner.

§114-85-7. Suspension, Revocation or Probation of a License

- A comment was received on this section. NAPEO expressed concern with the entire section. NAPEO believes that the Commissioner is granted all of the enforcement authorities that are specifically contained in §33-46A-8 and that these provisions are very detailed as to both the mandatory obligations of the Commissioner and the discretionary authorities of the Commissioner; that what is created in this section is an additional enforcement section that expands on that which is fairly explicit in the

statute; that it is unclear what additional authority the Commissioner gains under this language that is not already in the statute. NAPEO states that they can envision a scenario in which the Commissioner may desire some sanction short of suspension or revocation, such as probation or a cease and desist order, neither of which is mentioned in the statute. NAPEO also suggests that the rule require that enforcement actions should be progressive, e.g. revocation for any serious or repeated misconduct, suspension for serious be lesser offenses and probation for the smaller violations.

The Commissioner believes that much of the section unnecessarily repeats the corresponding statutory language and can be stricken. However, the provisions relating to what sorts of factors should be considered by the Commissioner in an enforcement proceeding will be retained. Because the Commissioner believes that probation is necessarily included as a possible sanction available to her in any enforcement action, the section will also keep the reference to probation. The Commissioner also believes that the concept of matching the sanction to the violation is implicit in every enforcement and need not be expressed in the rule itself. The Commissioner recognizes the need for the hearings process to be explained further in rule and adds a subsection to do so. The section will be changed as follows:

§114-85-7. Suspension, Revocation or Probation of a License.

7.1. If a PEO fails to comply with any of the requirements for a license or renewal of a license, the Commissioner may suspend or revoke the license or place the PEO on probation until such time the PEO comes into compliance with the licensing requirements.

7.2. The Commissioner may suspend or revoke the license of a PEO or place a PEO on probation for a violation of any provision of this rule, W. Va. Code §33-46A-1 et seq, any order of the Commissioner. ~~or this rule, for unprofessional conduct~~ or ~~for a violation of~~ any law relating to the conduct of the business of the PEO. ~~Unprofessional conduct includes, but is not limited to:~~

~~a. Failure to maintain financial responsibility and management competence;~~

~~b. Use of advertising that is intended to or tends to deceive the public;~~

~~c. Failure to comply with any state or federal law governing the conduct of PEOs;~~

~~d. Conviction of a crime related to the conduct of the business of a PEO by a controlling person of a licensee; and~~

~~e. Failure to promptly pay all wages, benefits, workers' compensation premiums, unemployment compensation contributions or any other payments for which the PEO has assumed responsibility under the PEO agreement.~~

7.3. In determining ~~if probation or license suspension or revocation is~~ an appropriate ~~remedy for a violation~~ sanction, the Commissioner may consider the following ~~facts~~:

a. The record of previous violations by the PEO;

b. The significance or scale of the violation;

c. The existence of outstanding reports or failures to pay;

d. Failure to respond to a request to produce records, documents or proof of payment;

e. Submission of falsified or altered records, forms, documents or proof of payment;

f. Whether the violations were willful or knowing; and

g. Good faith efforts by the PEO to remedy any violations.

~~*7.4. The following procedure shall apply to a revocation or suspension of a license:*~~

~~*a. The Commissioner shall send written notice to the PEO describing the noncompliance;*~~

~~*b. The PEO shall have thirty (30) days to correct the noncompliance and to provide the Commissioner with written verification of the correction;*~~

~~*c. If the Commissioner determines that the PEO has failed to remedy the noncompliance, he or she shall initiate a hearing pursuant to W. Va. Code §33-2-13 and shall provide appropriate notice to the PEO and other proper parties. A decision issued in connection with a hearing shall specify the effective date of the revocation or suspension. Where a suspension is imposed, the decision shall specify the duration of the period of suspension. During a period of suspension or revocation, the PEO shall be determined to have not applied for a license with the Commissioner; and*~~

~~*7.5. Upon receipt of a written request from a PEO that its license be voluntarily terminated, the Commissioner shall determine whether such proposed termination will adversely affect any of the legal responsibilities assumed by the PEO under its professional services agreements and may permit such termination under such terms as he or she determines are necessary.*~~

7.4. Hearings. Any hearing regarding actions taken pursuant to this rule or W.Va. Code §33-46A-1 et. seq. shall be conducted pursuant to W.Va. Code §33-2-13 and W.Va. Code St. R. §114-13-1 et. seq.

§114-85-10. Actions Against Bond or Securities

- NAPEO commented that the entire section should be stricken because there is nothing in the statute creating a private right of action. NAPEO states that enforcement is specifically the responsibility of the Commissioner and that there is

already an independent right of action by a contracting party for contractual violations and by any employee for non-payment of wages or other violations. The Commissioner agrees that the rule may not create a private right of action that is not provided for in statute and, accordingly, she strikes the entire section (the remaining sections are renumbered).

~~***§114-85-10. Actions Against Bond or Securities.***~~

~~*10.1. If any person is aggrieved by the misconduct of any PEO licensee, that person may maintain an action in his or her own name upon the bond of the PEO if there be one, in any court of competent jurisdiction. Such an action shall not be exclusive of any other remedy available to the aggrieved person. Alternatively, the Commissioner may maintain such an action in the name of the State for the benefit of the aggrieved person. The aggrieved person may assign the claim, and the assignee shall be entitled to any remedies available to the aggrieved person, and an assigned claim may be enforced in the name of the assignee.*~~

~~*10.2. If any person obtains a judgment in its favor against a licensee maintaining a deposit of securities, cash or cash equivalent, and the licensee does not promptly pay the judgment, the Commissioner shall upon receipt of a certified copy of the final judgment:*~~

~~*a. Notify the licensee by certified mail to pay the judgment within thirty (30) days of receipt of the notice; and*~~

~~*b. Pay from the cash deposit or draw upon a letter of credit or sell at public or private sale an amount of securities sufficient to pay the judgment, if the judgment is not paid by the licensee within the thirty (30) day period.*~~

~~*10.3. A licensee shall have thirty (30) days after receiving notice of cancellation of its bond or notice that the cash, letter of credit or securities have been drawn upon, to replace or supplement its bond, cash, letter of credit or sold securities. Failure of the licensee to so replace shall result in suspension of its license, which suspension shall continue until replacement of the bond or sold securities. A licensee so suspended shall not solicit new client employers while suspended and shall comply with any other conditions set forth in the order of suspension.*~~

§114-85-12. Notification of Change in Identifying Information

- The comment received is in regard to the duty to notify the Commissioner of changes in a PEO's "identifying information." NAPEO suggests that it would be clearer to say "...changes in information required by §114-85-3.2c-h." The Commissioner agrees that clarification is needed and changes the section to add a cross-reference to the types of "identifying information" covered by the rule. The

Commissioner notes that the numbering of this section is changed from section 12 to section 11 due to the recommended deletion of section 10, "Actions Against Bonds," which renumbers the remaining sections of the rule. The section is changed to read as follows:

~~12~~1.1. Each PEO has a continuing duty to timely notify the Commissioner, in a format and manner prescribed by the Commissioner, of changes in any of the identifying information ~~in a format and manner prescribed by the Commissioner~~ provided pursuant to subdivisions c through h, inclusive, of subsection 3.2 of this rule.

~~12~~1.2. Failure by a PEO to timely notify the Commissioner of a change in ~~its identifying~~ this information shall subject the PEO to the penalties provided in W.Va. Code §33-46A-8.

§114-85-14. Professional Employer Organization Workers' Compensation Policies

- A comment was received pertaining to subdivision d of subsection 14.2 and the definition of "Residual Market." NAPEO points out that the code reference found in the definition may be wrong; as it reads now, the code section reference is §23-2C-2(u) and they think it should be §23-2C-2(s). The Commissioner responds that the term "residual market" is not defined in the Workers' Compensation Code (chapter 23 of the W. Va. Code) and the use of the term is unnecessary in the rule. Instead, current reference to "residual market" will be replaced throughout this section to reflect amendments to W. Va. Code §23-2-10 establishing the assigned risk plan.

- A comment was received on §14.3.b, which states that workers' compensation policies to be used for PEOs and their clients must be filed by the carrier no less than sixty days in advance of such policy being used. The subsection also states that approval of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty day period. NAPEO wants to know that upon such approval and waiver does that mean that policy is immediately effective. The Commissioner responds that an affirmative notice of approval will contain the effective date and that any change to the subsection is unnecessary: However, the Commissioner does change the subsection to require that the affirmative approval be in writing. The Commissioner notes that the numbering of this section is changed from section 14 to section 13 due to the recommended deletion of section 10, "Actions Against Bonds," which renumbers the remaining sections of the rule.

§114-85-~~14~~3. Professional Employer Organization Workers' Compensation Policies.

~~14~~3.1. The purpose of this section is to implement W. Va. Code §33-46A-7 relating to workers' compensation policies for PEOs and their client-employers.

~~14~~3.2. In addition to the definitions found in W. Va. Code §33-46A-2 and section 2 of this rule, the following definitions shall apply to this section:

a. "Master Policy Basis" means an arrangement under which a single policy issued to a PEO covers more than one client-employer.

b. "Multiple Coordinated Policy Basis" means an arrangement under which a separate policy is issued to or on behalf of each client-employer but certain payment obligations and policy communications are coordinated through the PEO.

c. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

d. ~~"Residual Market" is the market of workers' compensation insurance written pursuant to the assigned risk plan~~ "Assigned risk plan" is the plan developed pursuant to W. Va. Code §23-2C-10 to provide workers' compensation coverage to employers who are unable to obtain coverage in the voluntary market.

e. "Voluntary Market" has the same meaning ascribed to it in W. Va. Code §23-2C-2(u).

143.3. PEO Workers' Compensation Policies.

a. In the voluntary market, workers' compensation policies for PEOs and their client employers may be issued on a master policy basis, multiple coordinated policy basis or such other form as approved by the Commissioner.

b. Every policy form of workers' compensation insurance to be used for PEOs and their client-employers must be filed by the private carrier using the policy or the Commissioner's designated rating organization no less than sixty (60) days in advance of such policy being used by the private carrier. At the expiration of the sixty (60) day period, unless the period was extended by the Commissioner to obtain additional information from the private carrier, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved in writing by the Commissioner. Approval in writing of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty (60) day period.

c. Policies of worker's compensation insurance for PEOs and their client employers in the ~~residual market~~ assigned risk plan shall not be issued on a master policy basis. Such policies shall only be issued on forms submitted by servicing carriers and approved by the Commissioner pursuant to subdivision b of this subsection.

National Association
of Professional Employer Organizations

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July 21, 2008

Mr. Timothy Murphy
Associate Counsel
West Virginia Insurance Commission
Legal Division
P.O. Box 50540
Charleston, West Virginia 25305-0540

RE: 2008 Legislative Rule Title 114, Series 85- Professional Employer Organizations

Dear Tim:

Please find attached comments on behalf of the National Association of Professional Employer Organizations (NAPEO) to Insurance Commission Legislative Rule Title 114, Series 85 relative to Professional Employer Organizations.

I wanted to take the opportunity to thank you, Commissioner Cline and members of your staff for working with our industry throughout the legislative session on HB 4079. I, along with members of our industry, certainly appreciate the time and attention the department has placed into ensuring that the citizens of West Virginia are adequately protected through oversight under the purview of the Commissioner of Insurance.

NAPEO and our membership appreciate the opportunity to comment on these proposed rules and look forward to working with you during the rules process to ensure the final regulations represent a fair, accurate and adequate regulation the PEO industry.

As always, if I can provide any additional information or be a resource for any questions, please do not hesitate to contact me. Once again, thank you for you time and attention to this important matter.

Sincerely,

Todd J. Cohn
Assistant Director, State Government Affairs

Cc: Chad Robinson, Compensation Strategies
Jeff Mullins, EIN, LLC

114CSR85
TITLE 114
SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section.
114-85-1. General
114-85-2. Definitions
114-85-3. Licensing and Renewal Requirements
114-85-4. Combined or Consolidated Licenses
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114-85-13. Penalties
114-85-14. Professional Employer Organization Workers Compensation Policies

SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS

§114-85-1. General

1.1. Scope -- This rule establishes procedures for the licensing and regulation of professional employer organizations ("PEOs") doing business in the State of West Virginia.

1.2. Authority -- W. Va. Code §§33-2-10, 33-46A-7 & 33-46A-10

1.3. Filing Date --

1.4. Effective Date --

§114-85-2. Definitions

In addition to the definitions set forth in W. Va. Code §33-46A-2, the following definitions apply:

2.1. "Controlling Person" means an officer or director of a corporation operating as a professional employer organization, a shareholder holding twenty-five (25%) percent or more of the voting stock or a corporation operating as a professional employer organization, a partner of a partnership operating as a professional employer organization, or a person that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company operating as a professional employer organization through the ownership of voting securities, by contract or otherwise, and who is actively involved in the day-to-day management of the company.

Comment: the problem is limited partnerships (see 3.2. 1 below). Generally, NAPEO is not concerned in making a general partner a controlling person, but this language may be too broad. NAPEO suggests deleting the highlighted section and instead making the following clause read "or a person or partner that possesses, directly or indirectly, the

power to direct or cause the direction of the management or policies of a company or partnership operating as ..."

2.2. "PEO" means a professional employer organization as defined in W. Va. Code §33-46A-2(g).
2.3. "Temporary Employee" means a person employed either through another person or directly by an employer to support or supplement the existing work force in special situations such as employee absences and temporary skill shortages, seasonal workloads and special assignments and projects, with the expectation that the person's position will be terminated upon the completion of the task or function.

The Act speaks of "temporary help services" so at a minimum, the regulation should define a "temporary help services employee." NAPEO suggests a more accurate definition may be:

(A) "Temporary Help Services" means services consisting of a Person:

1. recruiting and hiring its own employees,

2. finding other organizations that need the services of those employees,

3. assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

4. customarily attempting to reassign the employees to other organizations when they finish each assignment.

§114-85-3. Licensing Requirements
3.1. After the thirty-first day of July, 2009, no person may provide, advertise or otherwise hold himself, herself, or itself out as providing, professional employer services to employers in this state without first obtaining a license pursuant to W.Va. Code §33-46A-4 and this rule.
3.2. Each applicant for a PEO license shall provide the West Virginia Insurance Commissioner ("Commissioner") with the following information:
a. Fully completed PEO licensing application;
b. Application fee of two-hundred dollars ($200);
c. The name or names under which the PEO conducts business;
d. The address of the PEO's principal place of business and the address of each office it maintains in this state. The address of the principal place of business provided
will be the address of record and any correspondence from the Commissioner will be

directed there unless the applicant requests that another address be used for such purposes; changes to the address of record shall be promptly communicated to the Commissioner;
e. The PEO's taxpayer or employer identification number;
f. A list by jurisdiction of each name under which the PEO has operated in the preceding five years, including any alternative names, names of predecessors and successor business entities;
g. A statement of ownership, which must include the names and business experience of any person who, acting individually or in concert with one or more other persons, owns or controls, directly or indirectly, twenty-five (25%) percent or more of the equity interests of the PEO.
h. A statement of management which shall include the names of any person who serves as a president, chief executive officer or otherwise has the authority to act as a senior executive officer of the PEO with evidence of the business experience;
i. The PEO's most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen months, performed by a ~~local~~ licensed CPA;
"Local" contradicts the statute which requires that the CPA "be licensed to practice in the jurisdiction where the accountant is located" 33-46A-4(c)(7). This is of paramount concern to NAPEO and its membership.

j. Proof of financial responsibility in the form of $100,000 in working capital, as defined by generally accepted accounting principles and as reflected in financial statements submitted to the Commissioner. As an alternative, a PEO may provide a bond, irrevocable letter of credit or securities with a minimum market value of $100,000 to the Commissioner;
k. A complete and current listing of all client-employers located in West Virginia or who have covered employees in West Virginia; and
l. ~~Each applicant for a PEO license must provide the name and address of all officers, directors, partners and shareholders owning 10% or more of any stock in the corporation.~~
The statute is fairly specific as to the requirements for information about individual (25% owners) and this exceeds those requirements. While 33-46A-10 does offer rulemaking authority, that presupposes legislative approval absent an emergency. Since the Commissioner is obtaining controlling party information, NAPEO is unclear what the rationale for this lower 10% threshold.

If the applicant is a corporation, a certified copy of the corporation's Articles of Incorporation filed with the Secretary of State of West Virginia must be submitted to the Commissioner. If the applicant is a partnership, a copy of the Partnership Agreement or an affidavit signed by all ~~parties~~ partners that no written partnership exists must be submitted to
the Commissioner. If the applicant is a limited partnership they must additionally provide and file a certified copy of its Certificate of Limited Partnership to the Commissioner.
With regard to this entire section, the question arises as to how a foreign entity complies. So, for example, a Florida corporation or a NY State Partnership will not have West

Virginia documents required by this section. What they will have to have to do business in WV is a certificate of authority to transact business. NAPEO is aware that WV has a foreign corporations act. NAPEO suggests that additional language may be added to convey for a foreign entity, the certificate of authority to operate should have to be filed.

3.3. A PEO who has not had sufficient operating history to have an audited financial statement as required by subdivision 3.2.i must meet the $100,000 working capital or bond requirements set forth
(this merely clarifies the requirement, otherwise it says that a company that does not have a financial statement must have a financial statement)
in subdivision 3.2.j. The amount of the bond for a PEO whose financial statements do not indicate positive working capital must be $100,000 plus an amount sufficient to cover the deficit in working capital. An applicant may apply to the Commissioner for an extension of time for filing its financial statements so long as the request for an extension is accompanied by a letter from an independent certified public accountant stating the reasons for the delay and the anticipated completion date of the financial statement.
3.4. A PEO must file for renewal of their license annually no later than one hundred eighty (180) days after the close of the PEO's fiscal year. Each application for renewal of a license shall be accompanied by a fee of two-hundred dollars ($200). The applicant for renewal shall submit to the Commissioner its most recent audited financial statements meeting the same requirements for initial licensure, together with any changes in the information required for initial licensure set forth in subsection 3.2 of this section. The applicant shall also submit to the Commissioner an update of the PEO's list of West Virginia clients. A late fee of two hundred ($200) dollars will be assessed to any PEO that does not timely submit the renewal application and supporting documentation.
3.5. An applicant for a PEO license in this state shall respond to any requests for more information regarding an application from the Commissioner within thirty (30) days. Failure to provide the requested information within the time period provided shall be grounds for denial of an application.
3.6. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four months from the date ~~initially filed~~ of notice from the Commissioner that the application is incomplete will be considered withdrawn and a new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

§114-85-4. Combined or Consolidated Licenses
4.1. PEOs in a PEO group may satisfy the ~~licensing law~~ financial and reporting requirements of W.Va. Code §33-46A on a combined or consolidated basis by filing a combined or consolidated application for a license of multiple PEOs majority-owned by the same parent, entity or persons may do so on forms prescribed and approved by the Commissioner.
The above change is consistent with the statutory language. The only requirements that the PEOs can meet on a consolidated basis are the financial and reporting requirements. As to all other requirement each PEO must separately comply.
a. A subsidiary corporation may submit with its license application the

combined or consolidated financial statement of its parent corporation in lieu of its own along with a parental guarantee.
b. Multiple PEOs may only file reports and meet financial requirements on a combined or consolidated basis if each company that is part of the multiple employer organization group provides a guarantee of the obligations of W. Va. Code §33-46A-1 et seq. of each other member of the group.
c. Such a guarantee may be in the form of an indemnification agreement or a resolution of the board of directors of the parent company authorizing the guarantee of workers' compensation, unemployment tax liabilities and other obligations of a subsidiary PEO in the combined or consolidated license.
d. Each PEO involved in a combined or consolidated license must pay a separate application fee.
4.2. PEOs applying for a PEO Group license must submit evidence showing that the professional employer organizations that is commonly held ~~by~~ in the PEO Group is held under common
control ~~of~~ a person or entity in the PEO Group. This can be documented by submission of a corporate
registration, shareholder report, corporate resolution or interest holder report.

It is not that the group owns but that there is common ownership of the group.

4.3. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four months from the date initially filed will be considered withdrawn and new application and application fees will be required.
§114-85-5. Limited licenses.
5.1. The Commissioner may, under terms he or she determines appropriate, grant a limited license to a PEO. An applicant for a limited license must demonstrate at a minimum that it is licensed or registered as a PEO in another state under terms that are substantially similar to those required by this state, that it does not maintain an office in this state or directly solicit employers located in this state, and that it does not have more than fifty (50) covered employees in this state on any given day.
5.2. In addition to the showing required by subsection 5.1, an applicant for a limited license shall complete those portions of the application required under section 4 of this rule that the Commissioner may require. ~~Proof of financial responsibility shall be in the amount and form determined appropriate by the Commissioner.~~
NAPEO believes that there is no separate financial responsibility requirement for this in the limited license provision in the statute. NAPEO believes that the impetus under the statute for this provision is that if the PEO is licensed in another jurisdiction under "terms that are substantially similar" 33-46A-4 then those financial requirements should be accepted. NAPEO believes that this is in essence a de minimis provision for PEOs with only a few workers in WV.
5.3. Each application for a limited license shall be accompanied by an application fee of two hundred ($200) dollars.
5.4. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four months from the date ~~initially filed~~ of notice from the Commissioner that the application is incomplete will be

considered withdrawn and new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

§114-85-6. Denial of a License or Renewal Application

6.1. The Commissioner may deny an application for license:
a. Where the application is not fully completed, improperly executed or otherwise deficient on its face;
b. Where documents required to supplement the application are not included in the application packet;
c. Where any fee required by sections 3, 4 or 5 of this rule and W. Va. Code §33-46A-4 is not submitted;
d. Where the applicant has had a PEO license revoked in this or any other state, unless such revocation has subsequently been rescinded or otherwise suspended and the problems remedied to the reasonable satisfaction of the Commissioner;
e. Where the application, or any person named in the application, has made a material misrepresentation in the application; or
d. Upon finding that any person named in the application, any controlling person or any person in a management or policy-making position with any applicant, is not of good moral character, business integrity or financial responsibility, or that there is good and sufficient reason within the meaning and purpose of this rule or of W.Va. Code §33-46A to deny the application.

6.2. If the Commissioner determines
a. That he application is not complete or not properly executed, the Commissioner shall provide notice of the deficiency and provide a reasonable opportunity for the applicant to correct the deficiency, or
b That the applicant does not meet the requirements to obtain a license, a written notice of denial shall be furnished to the applicant along with the reasons for the denial of the application. The applicant may request a hearing before the Commissioner within thirty (30) days of receipt of the written notice of denial to protest the decision of the Commissioner.

{{§114-85-7. Suspension, Revocation or Probation of a License

NAPEO is concerned by this whole section. NAPEO believes the Commissioner is granted all of the enforcement authorities that are specifically contained in Section 33-46A-8 and these are very detailed as to both the mandatory obligations of the Commissioner and the discretionary authorities of the Commissioner. NAPEO believes what is created below is an additional enforcement section which expands on that which is fairly explicit in the statute.

NAPEO is unclear what additional authorities the Commissioner gains under this language that is not already in the statute. The statute requires the Commissioner to take certain actions under defined circumstances, the statute gives the Commissioner discretionary enforcement authority in certain defined situations, and the statute grants the licensee an opportunity for notice and hearing absent an emergency.

NAPEO can envision a scenario in which the Commissioner may desire some authorities short of suspension or revocation (which are defined). For example, probation is not mentioned in the statute and the Commissioner may want Cease and Desist authority short of suspension or revocation. If that is the case, NAPEO would suggest that these authorities be defined and addressed. It also seems that the steps should be more progressive – ie revocation for any serious or repeated misconduct, suspension for serious be lesser offenses, and probation for the smaller violations if deemed necessary.

7.1. If a PEO fails to comply with any of the requirements for a license or renewal of a license, the Commissioner may suspend or revoke the license or place the PEO on probation until such time the PEO comes into compliance with the licensing requirements.
7.2. The Commissioner may suspend or revoke the license of a PEO or place a PEO on probation for a violation of any provision of W. Va. Code §33-46A-1 et seq. this rule, for unprofessional conduct or for a violation of any law relating to the conduct of the business of the PEO. Unprofessional conduct includes, but is not limited to:
a. Failure to maintain financial responsibility and management competence;
b. Use of advertising that is intended to or tends to deceive the public;
c. Failure to comply with any state or federal law governing the conduct of PEOs;
d. Conviction of a crime related to the conduct of the business of a PEO by a controlling person of a licensee; and
e. Failure to promptly pay all wages, benefits, workers' compensation premiums, unemployment compensation contributions or any other payments for which the PEO has assumed responsibility under the PEO agreement.
7.3. In determining if probation or license suspension or revocation is an appropriate remedy, the Commissioner may consider the following facts:
a. The record of previous violations by the PEO;
b. The significance or scale of the violation;
c. The existence of outstanding reports or failures to pay;
d. Failure to respond to a request to produce records, document or proof of payment;
e. Submission of falsified or altered records, forms, documents or proof of payment;
f. Whether the violations were willful or knowing; and
g. Good faith efforts by the PEO to remedy any violations.
7.5. The following procedure shall apply to a revocation or suspension of a license:
a. The Commissioner shall send written notice to the PEO describing the noncompliance;
b. The PEO shall have thirty (30) days to correct the noncompliance and to provide the Commissioner with written verification of the correction;

c. If the Commissioner determines that the PEO has failed to remedy the noncompliance, he or she shall initiate a hearing pursuant to W. Va. Code §33-2-13 and

shall provide appropriate notice to the PEO and other proper parties. A decision issued in connection with a hearing shall specify the effective date of the revocation or suspension. Where a suspension is imposed, the decision shall specify the duration of the period of suspension. During a period of suspension or revocation, the PEO shall be determined to have not applied for a license with the Commissioner; and

7.4. Upon receipt of a written request from a PEO that its license be voluntarily terminated, the Commissioner shall determine whether such proposed termination will adversely affect any of the legal responsibilities assumed by the PEO under its professional services agreements and may permit such termination under such terms as he or she determines are necessary.}}

§114-85-8. Investigations

8.1. The Commissioner may request information, perform an investigation and audit and review documents necessary to determine whether a PEO has violated any provision of W.Va. Code §33-46A-1 et seq. or this rules. In conducting an investigation of a PEO, the Commissioner or his or her representatives may enter the business premises during reasonable business hours and may examine and copy records pertinent to the investigation in accordance with the provisions of W. Va. Code §33-2-9.

8.2. An applicant or licensed PEO shall respond to any requests for information and comply with any investigations that are initiated by the Commissioner. Information gathered pursuant to an investigation is confidential and not open to public inspection pursuant to W.Va. Code §33-46A-5.

8.4. The Commissioner may charge the licensee the actual cost of any investigation undertaken at the direction of the Commissioner.

§114-85-9. Complaints.

9.1. Any person may file a written complaint with the Commissioner regarding a PEO. The Commissioner shall receive any complaints and shall investigate and determine whether action is necessary involving allegations of any misconduct as provided in W.Va. Code §33-46A-8 and these rules. The complainant, the PEO and the nature of the alleged misconduct and the circumstances surrounding it shall be clearly identified, and supporting documentation shall be attached.

9.2. The Commissioner shall mail a copy of the complaint to the PEO in question and request a written response.

9.3. If a PEO fails to respond within thirty (30) days to a request made pursuant to section 9.2 or to a reqeust for information during an investigation, the Commissioner may take action pursuant to W.Va. Code §33-46A-8.

~~**§114-85-10. Actions Against Bond or Securities**~~

~~10.1. If any person is aggrieved by the misconduct of any PEO licensee, that person may maintain an action in his or her own name upon the bond of the PEO if there be one, in any court of competent jurisdiction. Such an action shall not be exclusive of any other remedy available to the aggrieved person. Alternatively, the Commissioner may maintain such an action in the name of the State for the benefit of the aggrieved person. The aggrieved person may assign the claim, and the assignee shall be entitled to any remedies available to the aggrieved person, and an assigned claim may be enforced in the name of the assignee.~~

~~10.2. If any person obtains an judgment in its favor against a licensee maintaining a deposit of securities, cash or cash equivalent, and the licensee does not promptly pay~~

~~the judgment, the Commissioner shall upon receipt of a certified copy of the final judgment:~~
~~a. Notify the licensee by certified mail to pay the judgment within thirty (30) days of receipt of the notice; and~~
~~b. Pay from the cash deposit or draw upon a letter of credit or sell at public or private sale an amount of securities sufficient to pay the judgment, if the judgment is not paid by the licensee within the thirty (30) day period.~~
~~10.3. A licensee shall have thirty (30) days after receiving notice of cancellation of its bond or notice that the cash, letter of credit or securities have been drawn upon, to replace or supplement its bond, cash, letter of credit or sold securities. Failure of the licensee to so replace shall result in suspension of its license, which suspension shall continue until replacement of the bond or sold securities. A licensee so suspended shall not solicit new client employers while suspended and shall comply with any other conditions set forth in the order of suspension.~~

NAPEO believes that there is nothing in the statute creating a private right of action. Enforcement is specifically the responsibility of the Commissioner. There is already an independent right of action by a contracting party for contractual violations and by any employee for non-payment of wages or other violation. This entire section is of paramount concern to NAPEO's membership.

§114-85-11. Responsibilities of a Professional Employer Organization

11.1. An applicant or licensed PEO shall notify the Commissioner in writing within ten (10) days of any:

a. Conviction, judgment, guilty plea or no contest plea of the applicant or any of the applicant's controlling persons for any violation listed in W.Va. Code 33-46A-8 or sections 6 or 14 of this rule;

b. Final action by a state or federal regulatory agency for violations related to the operation of a PEO; or

c. Determination of any court of competent jurisdiction, including federal courts, located in any state, that the applicant or any of the applicants controlling persons were found, or pled guilty to fraud related to the operation of a PEO; or

d. PEO's failure to stay current with obligations that relate to payroll, payroll related taxes, workers' compensation insurance premiums for covered employees and employee benefits.

§114-85-12. Notification of change in identifying information.

12.1. Each PEO has a continuing duty to timely notify the Commissioner of changes in its identifying information in a format and manner prescribed by the Commissioner.

Formatted: Highlight

What is identifying information? Would it be clearer to say "...changes in information required by §114-85-3.2 c-h"

12.2. Failure by a PEO to timely notify the Commissioner of a change in ~~its identifying~~ this nformation shall subject the PEO to the penalties provided in §33-46A-8 and

section 6 of this rule.
NAPEO is not concerned about notifying the Commissioner as to changes. However, since penalties can attach, there should be some specificity as to what is "identifying information."

§114-85-13. Penalties

13.1. Any person violating any provisions of this rule or any provisions in W.Va. Code §33-46A shall, after notice and hearing, be liable for a penalty of not less than two hundred fifty ($250) dollars nor more than five thousand ($5,000) dollars for each violation, with each day of non-compliance constituting a separate violation.

13.2. In addition to imposing monetary penalties, the Commissioner may bring an action in Circuit Court to enjoin or restrain any person from engaging in the business of or acting as a PEO.

§114-85-14. Professional Employer Organization Workers' Compensation Policies

14.1. The purpose of this section is to implement W.Va. Code §33-46A-7 relating to workers' compensation policies for PEOs and their client-employers.

14.2. In addition to the definitions found in §33-46A-2 and section 2 of this rule, the following definitions shall apply to this section:

a. "Master Policy Basis" means an arrangement under which a single policy issued to the lessor covers more than one lessee. Two or more lessees that are insured under the same policy solely because they are under common ownership are considered a single lessee for purposes of this definition.

b. "Multiple Coordinated Policy Basis" means an arrangement under which a separate policy is issued to or on behalf of each client employer but certain payment obligations and policy communications are coordinated through the employee leasing firm.

c. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirtythree
of the West Virginia Code.

d. "Residual Market" is the market of workers' compensation insurance written pursuant to the pooling mechanism as described in W.Va. Code §23-2C-2(u).
Isn't this 23-2C-2(s) under the new act?

e. "Voluntary Market" is the term as defined in W.Va. Code §23-2C-2(u).

14.3. PEO Workers' Compensation Policies.

a. In the voluntary market, workers' compensation policies for PEO's and their client employers may be issued on a mater policy basis, multiple coordinated policy basis or such other form as approved by the Commissioner.

b. Every policy form of workers' compensation insurance to be used for PEO's and their client employers must be filed by the private carrier using the policy no less than sixty (60) days in advance of such policy being used by the private carrier. At the expiration of the sixty (60) day period, unless the period was extended by the Commissioner to obtain additional information from the private carrier, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved by the Commissioner. Approval of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty day period.
Does this mean that the policy is immediately effective?

c. Policies of worker's compensation insurance for PEOs and their client employers in the residual market shall not be issued on a master policy basis. Such policies shall only be issued on forms submitted by servicing carriers and approved by the Commissioner pursuant to subsection 3.2 of this section.

14.4. Data Collection and Proof of Coverage Reporting.

a. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier shall collect and maintain payroll and claims data for each client employer in a manner which will always permit an experience modification factor to be calculated separately for each client employer who is eligible to be experience rated. Experience modification factors for client employers shall be based solely upon the client employer's own experience.

b. Carriers providing workers' compensation insurance to PEOs shall comply with all data reporting requirements pursuant to the appropriate rating manual and rules submitted by the Commissioner's designated rating organization for workers' compensation.

c. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier is required to timely and accurately report information regarding policy issuance, renewal and cancellation as required by the provisions of W.Va. Code §23-2C-15(f) and W.Va. Code St. R. §85-8-9. The carrier must be able to report such information separately regarding both the PEO and each client employer.

14.5. The Commissioner shall propose a legislative exempt rule for PEO Workers' Compensation Policies, to be approved by the Industrial Council, to be added to Title 85 of the W.Va. Code St. R. Upon approval and final filing by the Industrial Council, this section will terminate and be of no further effect.

During discussions of the statute, the Commissioner indicated a request that NAPEO's proposal for Electronic Filing and Compliance be deleted (in earlier versions it was called alternative registration or licensing) on the basis that the Commissioner believed that there was sufficient regulatory authority to do that without a statutory section. It was indicated to NAPEO that it would considered as part of the regulations but it is not in the above draft. We would recommend the inclusion of the following:

§114-85-3.7 Electronic Filing and Compliance: The Commissioner shall to the extent practical permit electronic filings in conformance with the West Virginia Uniform Electronic Transactions Act of 1999, including applications, documents, reports, and other filings required by this Act. The Commissioner may provide for the acceptance of electronic filings and other assurance by a bonded, independent, and qualified assurance organization approved by the Commissioner that provides satisfactory assurance of compliance acceptable to the Department consistent with §§33-46A-4 and other provisions of Article 46A. Nothing in this rule shall limit or change the Commissioner's authority to license or suspend or revoke the license of a professional employer organization or to investigate or enforce any provision of the Act or attendant rules.

Offices of the Insurance Commissioner
Legislative Rule
Title 114, Series 85

PROFESSIONAL EMPLOYER ORGANIZATIONS

TITLE 114, SERIES 85

STATEMENT OF CIRCUMSTANCES

The recent statutory recognition of Professional Employer Organizations (PEOs) also requires implementing rules for the licensing of these entities by the Offices of the West Virginia Insurance Commissioner (OIC). The proposed rule also includes standards of conduct for PEOs and a section on how they can provide workers' compensation coverage to their client employers. Although licensing is not required until June 2009, OIC is proposing a rule at this time to allow PEOs to prepare well in advance.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Professional Employer Organizations (Title 114, Series 85)

Type of Rule: X Legislative ____Interpretive ___Procedural

Agency: Offices of the Insurance Commissioner

Address: Post Office Box 50540

1124 Smith Street, Greenbrooke Building

Charleston, West Virginia 25305-0540

Phone Number: (304) 558-0401 Email: Timothy.Murphy@wvinsurance.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

The rule will have no additional fiscal impact upon state government.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	N/A	N/A	N/A
Personal Services	N/A	N/A	N/A
Current Expenses	N/A	N/A	N/A
Repairs & Alterations	N/A	N/A	N/A
Assets	N/A	N/A	N/A
Equipment	N/A	N/A	N/A
Other	N/A	N/A	N/A
2. Estimated Total Revenues	N/A	N/A	N/A

Rule Title: Professional Employer Organizations (Title 114, Series 85)

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

N/A

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: _____

Signature of Agency Head or Authorized Representative

_____

Timothy Murphy, Associate Counsel

TITLE 114
LEGISLATIVE RULE

SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS

Section

114-85-1. General.

114-85-2. Definitions.

114-85-3. Licensing Requirements.

114-85-4. Combined or Consolidated Licenses.

114-85-5. Limited Licenses.

114-85-6. Denial of a License or Renewal Application.

114-85-7. Suspension, Revocation or Probation of a License.

114-85-8. Investigations.

114-85-9. Complaints.

114-85-10. Actions Against Bonds or Securities.

114-85-11. Responsibilities of Professional Employer Organizations.

114-85-12. Notification of Change in Identifying Information.

114-85-13. Penalties.

114-85-14. Professional Employer Organization Workers' Compensation Policies.

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STATE OF WEST VIRGINIA

TITLE 114
LEGISLATIVE RULE

SERIES 85
PROFESSIONAL EMPLOYER ORGANIZATIONS

§114-85-1. General

1.1. Scope -- This rule establishes procedures for the licensing and regulation of professional employer organizations ("PEOs") doing business in the State of West Virginia.

1.2. Authority -- W. Va. Code §§33-2-10, 33-46A-7 and 33-46A-10.

1.3. Filing Date --

1.4. Effective Date --

§114-85-2. Definitions.

In addition to the definitions set forth in W. Va. Code §33-46A-2, the following definitions apply:

2.1. "Controlling Person" means an officer or director of a corporation operating as a professional employer organization, a shareholder holding twenty-five percent (25%) or more of the voting stock or a corporation operating as a professional employer organization, or a person or partner that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company or partnership operating as a professional employer organization, or a person that possesses, directly or indirectly, the power to direct or cause the direction of the management or policies of a company operating as a professional employer organization through the ownership of voting securities, by contract or otherwise, and who is actively involved in the day-to-day management of the company.

2.2. "PEO" means a professional employer organization as defined in W. Va. Code §33-46A-2(g).

2.3. "Temporary Help Services" means services consisting of a person:

a. Recruiting and hiring its own employees;

b. Finding other organizations that need the services of those employees;

c. Assigning those employees to perform work at or services for the other organizations to support or supplement the other organizations' workforces, or to provide assistance in special work situations such as, but not limited to, employee absences, skill shortages, seasonal workloads, or to perform special assignments or projects, and

d. Customarily attempting to reassign the employees to other organizations when the finish each assignment.

§114-85-3. Licensing Requirements.

3.1. After the thirty-first day of July, 2009, no person may provide, advertise or otherwise hold himself, herself, or itself out as providing, professional employer services to employers in this state without first obtaining a license pursuant to W. Va. Code §33-46A-4 and this rule.

3.2. Each applicant for a PEO license shall provide the West Virginia Insurance Commissioner ("Commissioner") with the following information:

a. Fully completed PEO licensing application;

b. Application fee of two hundred dollars ($200);

c. The name or names under which the PEO conducts business;

d. The address of the PEO's principal place of business and the address of each office it maintains in this state. The address of the principal place of business provided will be the address of record and any correspondence from the Commissioner will be directed there unless the applicant requests that another address be used for such purposes; changes to the address of record shall be promptly communicated to the Commissioner;

e. The PEO's taxpayer or employer identification number;

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

g. A statement of ownership, which must include the names and business experience of any person who, acting individually or in concert with one or more other persons, owns or controls, directly or indirectly, twenty-five percent (25%) or more of the equity interests of the PEO.

h. A statement of management which shall include the names of any person who serves as a president, chief executive officer or otherwise has the authority to act as a senior executive officer of the PEO with evidence of the business experience;

i. The PEO's most recent audited financial statement setting forth the financial condition of the PEO or PEO Group, which may not be older than thirteen (13) months, performed by a CPA licensed in the jurisdiction in which the CPA is located;

j. Proof of financial responsibility in the form of $100,000 in working capital, as defined by generally accepted accounting principles and as reflected in financial statements submitted to the Commissioner. As an alternative, a PEO may provide a bond, irrevocable letter of credit or securities with a minimum market value of $100,000 to the Commissioner;

k. A complete and current listing of all client-employers located in West Virginia or who have covered employees in West Virginia; and

l. If the applicant is a corporation, a certified copy of the corporation's Articles of Incorporation filed with the Secretary of State of West Virginia must be submitted to the Commissioner. If the applicant is a partnership, a copy of the Partnership Agreement or an affidavit signed by all partners that no written partnership exists must be submitted to the Commissioner. If the applicant is a limited partnership they must additionally provide and file a certified copy of its Certificate of Limited Partnership to the Commissioner. If the applicant is a non-resident, then a certificate of authority must be submitted to the Commissioner.

3.3. A PEO who has not had sufficient operating history to have an audited financial statement as required by subdivision i, subsection 3.2 of this section must meet the $100,000 working capital or bond requirements set forth in subdivision j, subsection 3.2 of this section. The amount of the bond for a PEO whose financial statements do not indicate positive working capital must be $100,000 plus an amount sufficient to cover the deficit in working capital. An applicant may apply to the Commissioner for an extension of time for filing its financial statements so long as the request for an extension is accompanied by a letter from an independent certified public accountant stating the reasons for the delay and the anticipated completion date of the financial statement.

3.4. A PEO must file for renewal of their license annually no later than one hundred eighty (180) days after the close of the PEO's fiscal year. Each application for renewal of a license shall be accompanied by a fee of two hundred dollars ($200). The applicant for renewal shall submit to the Commissioner its most recent audited financial statements meeting the same requirements for initial licensure, together with any changes in the information required for initial licensure set forth in subsection 3.2 of this section. The applicant shall also submit to the Commissioner an update of the PEO's list of West Virginia clients. A late fee of two hundred dollars ($200) will be assessed to any PEO that does not timely submit the renewal application and supporting documentation.

3.5. An applicant for a PEO license that is a small start-up PEO may make a request to

the Commissioner that any of the above licensing or financial requirements be reduced as determined necessary by the Commissioner.

3.6. An applicant for a PEO license in this state shall respond to any requests for more information regarding an application from the Commissioner within thirty (30) days. Failure to provide the requested information within the time period provided shall be grounds for denial of an application.

3.7. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date of notice from the Commissioner that the application is incomplete will be considered withdrawn and a new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

3.8. Accreditation services: The Commissioner may provide for the acceptance of filings and assurances of a PEO's compliance with this article and other applicable laws by a bonded, independent and qualified assurance organization approved by the Commissioner.

§114-85-4. Combined or Consolidated Licenses.

4.1. PEOs in a PEO group may satisfy the financial and reporting requirements of W.Va. Code §33-46A on a combined or consolidated basis by filing a combined or consolidated application for a license of multiple PEOs majority-owned by the same parent, entity or persons and may do so on forms prescribed and approved by the Commissioner.

a. A subsidiary corporation may submit with its license application the combined or consolidated financial statement of its parent corporation in lieu of its own along with a parental guarantee.

b. Multiple PEOs may only file reports and meet financial requirements on a combined or consolidated basis if each company that is part of the multiple employer organization group provides a guarantee of the obligations of W. Va. Code §33-46A-1 et seq. of each other member of the group.

c. Such a guarantee may be in the form of an indemnification agreement or a resolution of the board of directors of the parent company authorizing the guarantee of workers' compensation, unemployment tax liabilities and other obligations of a subsidiary PEO in the combined or consolidated license.

d. Each PEO involved in a combined or consolidated license must pay a separate

application fee.

4.2. PEOs applying for a PEO Group license must submit evidence showing that the professional employer organizations that are commonly held in the PEO Group is held under common control of a person or entity in the PEO Group. This can be documented by submission of a corporate registration, shareholder report, corporate resolution or interest holder report.

4.3. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date of notice from the Commissioner that the application is incomplete will be considered withdrawn and new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

§114-85-5. Limited Licenses.

5.1. The Commissioner may, under terms he or she determines appropriate, grant a limited license to a PEO. An applicant for a limited license must demonstrate at a minimum that it is licensed or registered as a PEO in another state under terms that are substantially similar to those required by this state, that it does not maintain an office in this state or directly solicit employers located in this state, and that it does not have more than fifty (50) covered employees in this state on any given day.

5.2. In addition to the showing required by subsection 5.1 of this section, an applicant for a limited license shall complete an application on forms prescribed and approved by the Commissioner. Proof of financial responsibility shall be in the amount and form determined appropriate by the Commissioner.

5.3. Each application for a limited license shall be accompanied by an application fee of two hundred dollars ($200).

5.4. Any incomplete application, as determined by the Commissioner, that remains incomplete for a period of four (4) months from the date of notice from the Commissioner that the application is incomplete will be considered withdrawn and new application and application fees will be required. An existing license, not suspended, revoked or otherwise limited by the Commissioner, shall remain in effect during the review of a renewal application by the Commissioner.

§114-85-6. Denial of a License or Renewal Application.

6.1. The Commissioner may deny an application for license:

a. Where the application is not fully completed, improperly executed or otherwise deficient on its face;

b. Where documents required to supplement the application are not included in the application packet;

c. Where any fee required by sections 3, 4 or 5 of this rule and W. Va. Code §33-46A-4 is not submitted;

d. Where the applicant has had a PEO license revoked in this or any other state, unless such revocation has subsequently been rescinded or otherwise suspended and the problems remedied to the reasonable satisfaction of the Commissioner;

e. Where the applicant, or any person named in the application, has made a material misrepresentation in the application; or

f. Upon finding that any person named in the application, any controlling person or any person in a management or policy-making position with any applicant, is not of good moral character, business integrity or financial responsibility, or that there is good and sufficient reason within the meaning and purpose of this rule or of W. Va. Code §33-46A-1 et seq. to deny the application.

6.2. If the Commissioner determines

a. That the application is not complete or not properly executed, the Commissioner shall provide a notice of deficiency and provide a reasonable opportunity for the applicant to correct the deficiency, or

b. That the applicant does not meet the requirements to obtain a license, a written notice of denial shall be furnished to the applicant along with the reasons for the denial of the application. The applicant may request a hearing before the Commissioner within thirty (30) days of receipt of the written notice of denial to protest the decision of the Commissioner.

§114-85-7. Suspension, Revocation or Probation of a License.

7.1. If a PEO fails to comply with any of the requirements for a license or renewal of a license, the Commissioner may suspend or revoke the license or place the PEO on probation until such time the PEO comes into compliance with the licensing requirements.

7.2. The Commissioner may suspend or revoke the license of a PEO or place a PEO on probation for a violation of any provision of this rule, W. Va. Code §33-46A-1 *et seq.*, any order

of the Commissioner or any law relating to the conduct of the business of the PEO.

7.3. In determining an appropriate sanction, the Commissioner may consider the following:

a. The record of previous violations by the PEO;

b. The significance or scale of the violation;

c. The existence of outstanding reports or failures to pay;

d. Failure to respond to a request to produce records, documents or proof of payment;

e. Submission of falsified or altered records, forms, documents or proof of payment;

f. Whether the violations were willful or knowing; and

g. Good faith efforts by the PEO to remedy any violations.

7.4. Hearings. Any hearing regarding actions taken pursuant to this rule or W.Va. Code §33-46A-1 *et. seq.* shall be conducted pursuant to W.Va. Code §33-2-13 and W.Va. Code St. R. §114-13-1 *et. seq.*

§114-85-8. Investigations.

8.1. The Commissioner may request information, perform an investigation and audit and review documents necessary to determine whether a PEO has violated any provision of W. Va. Code §33-46A-1 et seq. or this rule. In conducting an investigation of a PEO, the Commissioner or his or her representatives may enter the business premises during reasonable business hours and may examine and copy records pertinent to the investigation in accordance with the provisions of W. Va. Code §33-2-9.

8.2. An applicant or licensed PEO shall respond to any requests for information and comply with any investigations that are initiated by the Commissioner. Information gathered pursuant to an investigation is confidential and not open to public inspection pursuant to W. Va. Code §33-46A-5.

8.3. The Commissioner may charge the licensee the actual cost of any investigation undertaken at the direction of the Commissioner.

§114-85-9. Complaints.

9.1. Any person may file a written complaint with the Commissioner regarding a PEO. The Commissioner shall receive any complaints and shall investigate and determine whether action is necessary involving allegations of any misconduct as provided in W. Va. Code §33-46A-8 and this rule. The complainant, the PEO and the nature of the alleged misconduct and the circumstances surrounding it shall be clearly identified, and supporting documentation shall be attached.

9.2. The Commissioner shall mail a copy of the complaint to the PEO in question and request a written response.

9.3. If a PEO fails to respond within thirty (30) days to a request made pursuant to subsection 9.2 of this section or to a request for information during an investigation, the Commissioner may take action pursuant to W. Va. Code §33-46A-8.

§114-85-10. Responsibilities of a Professional Employer Organization.

An applicant or licensed PEO shall notify the Commissioner in writing within ten (10) days of any of the following:

10.1. Conviction, judgment, guilty plea or no contest plea of the applicant or any of the applicant's controlling persons for any violation listed in W. Va. Code §33-46A-8 or section 7 of this rule;

10.2. Final action by a state or federal regulatory agency for violations related to the operation of a PEO;

10.3. Determination of any court of competent jurisdiction, including federal courts, located in any state, that the applicant or any of the applicant's controlling persons were found, or pled guilty to fraud related to the operation of a PEO; or

10.4. PEO's failure to stay current with obligations that relate to payroll, payroll related taxes, workers' compensation insurance premiums for covered employees and employee benefits.

§114-85-11. Notification of Change in Identifying Information.

11.1. Each PEO has a continuing duty to timely notify the Commissioner, in a format and manner prescribed by the commissioner, of changes in its identifying information provided

pursuant to subdivisions c through h, inclusive, of subsection 3.2 of this rule.

11.2. Failure by a PEO to timely notify the Commissioner of a change in this information shall subject the PEO to the penalties provided in W. Va. Code §33-46A-8 and section 7 of this rule.

§114-85-12. Penalties.

12.1. Any person violating any provisions of this rule or any provisions in W. Va. Code §33-46A-1 et seq. shall, after notice and hearing, be liable for a penalty of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000) for each violation, with each day of non-compliance constituting a separate violation.

12.2. In addition to imposing monetary penalties, the Commissioner may bring an action in Circuit Court to enjoin or restrain any person from engaging in the business of or acting as a PEO.

§114-85-13. Professional Employer Organization Workers' Compensation Policies.

13.1. The purpose of this section is to implement W. Va. Code §33-46A-7 relating to workers' compensation policies for PEOs and their client-employers.

13.2. In addition to the definitions found in W. Va. Code §33-46A-2 and section 2 of this rule, the following definitions shall apply to this section:

a. "Master Policy Basis" means an arrangement under which a single policy issued to a PEO covers more than one client-employer.

b. "Multiple Coordinated Policy Basis" means an arrangement under which a separate policy is issued to or on behalf of each client-employer but certain payment obligations and policy communications are coordinated through the PEO.

c. "Private Carrier" means any insurer authorized by the Commissioner to provide workers' compensation insurance pursuant to chapters twenty-three and thirty-three of the West Virginia Code.

d. "Assigned risk plan " is the plan developed pursuant to W. Va. Code §23-2C-10 to provide workers' compensation coverage to employers who are unable to obtain coverage in the voluntary market.

e. "Voluntary Market" has the same meaning ascribed to it in W. Va. Code §23-2C-2(u).

13.3. PEO Workers' Compensation Policies.

a. In the voluntary market, workers' compensation policies for PEOs and their client employers may be issued on a master policy basis, multiple coordinated policy basis or such other form as approved by the Commissioner.

b. Every policy form of workers' compensation insurance to be used for PEOs and their client-employers must be filed by the private carrier using the policy or the Commissioner's designated rating organization no less than sixty (60) days in advance of such policy being used by the private carrier. At the expiration of the sixty (60) day period, unless the period was extended by the Commissioner to obtain additional information from the private carrier, the form is deemed to be approved unless prior thereto it was affirmatively approved or disapproved in writing by the Commissioner. Approval in writing of any form under this subsection by the Commissioner constitutes a waiver of any unexpired portion of the sixty (60) day period.

c. Policies of worker's compensation insurance for PEOs and their client employers in the assigned risk plan shall not be issued on a master policy basis. Such policies shall only be issued on forms submitted by servicing carriers and approved by the Commissioner pursuant to subdivision b of this subsection.

13.4. Data Collection and Proof of Coverage Reporting.

a. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier shall collect and maintain payroll and claims data for each client employer in a manner that will permit an experience modification factor to be calculated separately for each client-employer who is eligible to be experience rated. Experience modification factors for client employers shall be based solely upon the client-employer's own experience.

b. Carriers providing workers' compensation insurance to PEOs shall comply with all data reporting requirements pursuant to the appropriate rating manual and rules submitted by the Commissioner's designated rating organization for workers' compensation.

c. Regardless of the basis on which coverage is provided for PEOs and their client employers, the private carrier is required to timely and accurately report information regarding policy issuance, renewal and cancellation as required by the provisions of W. Va. Code §23-2C-15(e)-(f) and W. Va. Code St. R. §85-8-9. The carrier must be able to report such

information separately regarding both the PEO and each client employer.

13.5. This section shall be of no further force and effect on the effective date of any new legislative exempt rule or amendment to an existing rule adopted by the Industrial Council addressing the same matters as this section.