akerman

Brian Nugent

Akerman LLP
1900 16th Street
Suite 950
Denver, CO 80202

T: 303 260 7712
F: 303 260 7714
brian.nugent@akerman.com

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Representative Paul Holvey
Chairman, House Business and Labor Committee
900 Court St NE
Salem, OR H-277, OR 97301

RE: Written Testimony in OPPOSITION of HB 4005 and the proposed amendments, "Relating to an individual's performance of services for an employer."

Dear Chairman Holvey:

I submit this written testimony in opposition to H.B. 4005 and the proposed amendments. I am a partner with the national law firm of Akerman, LLP. I have practiced law since 1984, with a focus on professional employer organizations ("PEO"), temporary staffing and other "non-traditional" employment arrangements for the past twenty-five (25) years. I was the Chief Legal Officer of two national PEOs where I oversaw all legal matters, including the management of unemployment taxes.

I have handled more than a dozen unemployment tax matters in ten different states, including at least four that included allegations of SUTA Dumping. I was also active in the early stages of matters in the State of North Carolina that eventually led to the enactment of the federal Anti-SUTA Dumping Prevention Act in 2004. That legislation required each state to enact anti-SUTA Dumping laws that incorporate the restrictions included in the federal law. Oregon passed its form of anti-SUTA Dumping law in 2005.

The primary purpose of SUTA Dumping laws is to restrict the ability of parties to transfer all or part of their business (a "Transfer") and avoid unfavorable unemployment experience of the transferor[1]. This has the most relevance in states that do not require the transfer of unemployment experience when there is a Transfer. In those states, only if at the time of the Transfer the parties shared common ownership, management, or control, the experience must transfer. However, in states like Oregon, which requires the transfer of unemployment experience for all Transfers, the SUTA Dumping Law had less of an impact. In Oregon, irrespective of the relationship between the parties, the unemployment experience of the transferor must transfer to the transferee when there is a Transfer. Where the Oregon law has had a new effect is in the ability of the state to deny

[1] An additional purpose is to prevent the transfer of favorable unemployment experience into a new employer that previously had no unemployment tax account or unemployment experience.

a transfer of experience after a Transfer if there was a finding that the Transfer was completed solely or primarily for the purpose of securing a lower rate.

I am not aware of any state that considers the start of a PEO, co-employment arrangement to constitute a Transfer for purposes of its SUTA Dumping law, including states such as California, which have no PEO statute. In my opinion, the reason is the recognition that PEO is a valid and quite common form of employment relationship whereby an employer enters into a contract to *co-employ* its employees with the PEO, and as a result, both the PEO and the client employ and manage various aspects of their employment. The client does not transfer part of its trade or business to the PEO, and both parties operate their respective businesses separately after the PEO agreement becomes effective. Moreover, the PEO provides more than just unemployment services to its clients, including payroll processing, tax filing, workers' compensation insurance, benefits, and human resources advice.

In Oregon, like many other states, the PEO, co-employment arrangement is recognized by the state's regulators. The PEO, co-employment arrangement is referred to in Oregon as "Worker Leasing", and the primary statute governing this relationship is found at ORS § 656.855. On the website for the Oregon Workers' Compensation Division, under the sub-topic "Worker Leasing", the following language is used to describe Worker Leasing:

> Under a typical worker leasing arrangement, an employer contracts with a worker leasing company, *commonly called a professional employer organization (PEO)*, to *co-employ* all or most of the employer's regular workforce. The PEO becomes the employer of record for certain employer obligations, typically payroll, employment taxes, workers' compensation insurance, and Workers' Benefit Fund assessments.
>
> PEOs may also offer other services, such as human resources support, retirement plans, and health plan options. This allows the client employer to operate other aspects of the business.
>
> Worker leasing companies must have a license to legally operate in Oregon. The license is issued by the Workers' Compensation Division and is valid for two years. At expiration, the license may be renewed.

Website of the Oregon Workers' Compensation Division, Worker Leasing – Overview (emphasis added).

As is plain from the overview description on the state website, Worker Leasing is considered by the State of Oregon the same as PEO, and Oregon explicitly recognizes that there is a co-employment arrangement between a Worker Leasing company, its client, and the employees. Also notable is the specific acknowledgement by the State of Oregon that the Worker Leasing company becomes the "employer of record" for certain employer functions, *including for unemployment taxes*. This is consistent with the majority of states that have PEO laws.

In conclusion, Worker Leasing is recognized as a co-employment arrangement in Oregon, and Oregon specially acknowledges the authority of the Worker Leasing company to report unemployment taxes as an employer. Based on the clear statements by the State of Oregon, and its express recognition of the PEO, co-employment relationship between a Worker Leasing

company and its client, there is no legal or other basis to conclude that a Worker Leasing arrangement is the product of SUTA Dumping, or that a Worker Leasing company is not authorized to report unemployment taxes of the employees subject to each Worker Leasing agreement.

Brian Nugent

Partner