

# Legal and Legislative Conference

Workers Compensation  
What if the PEO Client  
Secures It?

# Traditional PEO

- PEO Secures WC Insurance through Master Policy or MCP Arrangement
- PEO is the Insured
- States Have Recognized the Right of the PEO to Secure WC
- CSA Grants to the PEO Rights Regarding Safety and Risk Management
  - Some States Require the PEO to Have a Right of Direction and Control Over Safety

# Traditional PEO

- Other CSA Provisions
  - Right to Audit Class Codes and Payroll
  - Right to Adjust Claims
  - Right to Inspect Premises
  - Right to Require Training
- Exclusive Remedy
  - PEO Industry Fought hard to Assure Exclusive Remedy For the PEO Client
    - See Florida Statute Section 440.11(2)
    - Texas Code Section
  - Client Must Have Exclusive Remedy In Order to Close the Sale
- Alternate Employer Endorsement
  - Has Become Accepted By Carriers
  - Extends WC and Employer Liability Coverage to Client

# *Flexible PEO*

- Client Secures WC Insurance
- Not Part of MCP
- Individual Policy Issued to Client
- Issues Raised
  - Is Such an Arrangement Permitted Under State law?
  - How Does the Arrangement Affect the Client Service Agreement?
  - What Added protections Should the PEO Require From the Client?
  - What Happens if the Client Policy Lapses?
  - Does the PEO Have Exclusive Remedy?
  - Will a Carrier Allow Such an Arrangement?
  - Are There Endorsements Available That Address Such an Arrangement?

# *Flexible PEO*

- *Is Such an Arrangement Permitted by Law?*
  - Probably
    - Clearly, Client is an Employer
    - Client would be required by law to maintain WC Insurance without a PEO
    - Non-PEO Licensing States – No Prohibition
    - PEO Licensing States – Not as Clear
      - Some States (i.e., Florida, Texas) state that the “PEO shall “Provide” Workers Compensation Insurance as Required by Law ....
      - Other States Clearly Anticipate that either party may maintain WC Insurance (i.e., Georgia, \_\_\_\_\_)

# *Flexible PEO*

- *How Does the Arrangement Affect the Client Service Agreement?*
  - Consider a Separate Form of Agreement
    - Many terms in standard PEO Agreement would not apply (i.e., right to audit class codes and payroll; light duty; cooperation with PEO carrier)
    - Need to Add Provisions
      - » Evidence of Insurance (certificate and/or Endorsement) prior to effective date of agreement
      - » Mandatory Requirement to keep Insurance current
      - » Automatic Termination for Lapse
      - » Indemnity
    - Other Changes
      - » Notice to Employees that WC provided by Client (as part of enrollment documents)

# *Flexible PEO*

- *What Added protections should the PEO Require From the Client?*
  - Specific WC Indemnity
  - Representation and Warranty of Coverage
  - Certificate of Insurance that provides notice to the PEO of Cancellation
  - Endorsement
    - Labor Contractor Endorsement
    - NCCI Form WC 00
    - Provide Employer Liability Coverage to the PEO

# *Flexible PEO*

## – *What Happens if the Client Policy Lapses?*

- Need to have the Certificate of Insurance that provides notice to the PEO
- Automatic Termination provision
- Still may not be enough
- PEO likely to be considered an employer under state law and responsible for workplace injuries
- PEO Insurance not likely to cover
- PEO could be forced to pay claims and/or face tort liability
- PEO could receive fines and penalties from State Insurance Regulators as well (failure to secure WC coverage for its employees)
  - State law generally require the *Employer* to maintain WC Coverage

# *Flexible PEO*

- *Does the PEO Have Exclusive Remedy?*
  - It is not clear in many states
- There is a strong argument that the PEO as a co-employer should receive exclusive remedy
- Most state statutes do not address the question
- Most PEO Licensing Statutes provide that the *Client* shall have Exclusive Remedy if the PEO maintains WC Coverage (i.e., Florida)
- Some PEO Licensing/Registration Statutes are Clear (i.e., Georgia, Oklahoma, New York)
- Model Registration Act provides exclusive remedy for both parties
- Cannot require a Work Site Employee to waive right to sue in tort

# *Flexible PEO*

- Will a Carrier Allow Such an Arrangement?
  - Even if State Law permits the Client to maintain WC, a carrier may refuse to issue a policy
  - In this hard insurance market, carriers are reluctant to write a policy involving a PEO at all
  - Many do not understand that the policy is being issued to the client, not the PEO
  - Major carrier in Texas has taken the position that there is no insurable interest because the Staff Leasing Act states that the PEO is the employer for purposes of Workers Compensation
  - May require PEO to meet with underwriters and explain relationship of the parties

# *Flexible PEO*

– *Are There Endorsements Available That Address Such an Arrangement?*

- The NCCI created an Endorsement specifically for this situation
- Labor Contractor Endorsement - NCCI Form WC
- Not the same as the Alternate Employer Endorsement
- Specifically identifies the Client by name and location (thereby confining the risk)
- Provides to the PEO Part II Coverage (Employer Liability)
- Insurance Risk Management Institute (IRMI) also recommends use of this Endorsement if the PEO Client maintains WC Insurance

# Non-Employer Provider

- Provider is not the Employer and does not purport to be the Employer
- Client secures the WC Coverage
- Issues Raised
  - Insurance License
    - Because Provider is not an Employer, Provider cannot discuss, recommend, or place insurance without a license under state law
    - Must work through licensed agent/broker
  - Client Service Agreement
    - Must make clear that there is not employment