



Charles G. Cooper
Commissioner

April 21, 2020

TEXAS DEPARTMENT OF BANKING

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Via Electronic Mail at:
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The Honorable Ken Paxton
Office of the Attorney General
Attention Opinion Committee
Austin, Texas 78711-2548

RE: Whether a professional employer organization (PEO) that conducts money transmission as defined in the Finance Code is subject to licensure under the Finance Code, notwithstanding licensure as a PEO under the Labor Code

Dear Attorney General Paxton:

The Texas Department of Banking (“Department”) regulates persons engaged in the business of money transmission in Texas or on behalf of Texas customers under Chapter 151 of the Finance Code (“Money Services Act” or the “Act”).

In accordance with the Act and its predecessor statutes, the Department has licensed and regulated payroll service providers (“PSPs”) that collect payroll funds in advance from their employer-clients, deposit those funds in their own account, and issue their own payment instruments to the employer-client’s employees and to appropriate federal and state taxing authorities. The Department first licensed this type of PSP in approximately 1995, when it learned of this practice, but the licensure requirement has existed since 1963.¹

The Department has recently learned of a category of PSPs that is licensed under a separate statutory scheme applicable to professional employer organizations (“PEOs”), formerly known as staff leasing companies. Now codified as Chapter 91 of the Labor Code, the PEO licensing statute was first created in 1993.²

Pursuant to § 402.042 of the Government Code, I request a formal written opinion regarding whether a licensed PEO that collects payroll funds in advance from an employer-client

¹ See Acts 1963, 58th Leg., ch. 196, eff. Aug. 22, 1963, enacting the former Texas Sale of Checks Act, TEX. REV. CIV. STAT. art. 489d. The Sale of Checks Act was codified as Chapter 152 of the Finance Code by Acts 1997, 75th Leg., ch. 1008, § 1, eff. Sept. 1, 1997. Chapter 152 was later repealed in connection with the enactment of the Money Services Act, see Acts 2005, 79th Leg., ch. 1099, § 3, eff. Sept. 1, 2005.

² See Acts 1993, 73rd Leg., R.S., ch. 994, eff. Sept. 1, 1993, enacting the former Staff Leasing Services Act, TEX. REV. CIV. STAT. art. 9104. The Staff Leasing Services Act was codified as Chapter 91 of the Labor Code by Acts 1995, 74th Leg., ch. 76, § 9.20(a), eff. Sept. 1, 1995.

to be remitted to covered employees at a later time is subject to the licensure requirements of the Money Services Act if that entity holds a PEO license under the Labor Code.

I. Background

A. Money Transmission Under the Money Services Act

The Department licenses and regulates money services businesses, which are governed by the Money Services Act, Chapter 151 of the Finance Code. The Act includes the following three-fold regulatory mandate: 1) to preserve and protect the safety and soundness of money services businesses; 2) to protect the interests of purchasers of money services and the public; and 3) to protect against drug trafficking, terrorist funding, and money laundering or related financial crimes. TEX. FIN. CODE § 151.102(a).

The Act defines money transmission as “the receipt of money or monetary value by any means in exchange for a promise to make the money or monetary value available at a later time or different location.” TEX. FIN. CODE § 151.301(b)(4). Pursuant to § 151.302(a), “[a] person may not engage in the business of money transmission in this state or advertise, solicit, or represent that the person engages in the business of money transmission in this state unless the person” is a license holder or agent of a license holder, or is otherwise excluded or exempted from licensing. TEX. FIN. CODE § 151.302(a). “[A] person engages in “the business of money transmission if the person receives compensation or expects to receive compensation, directly or indirectly, for conducting money transmission.” TEX. FIN. CODE § 151.302(b).

B. Traditional PSPs Engage in the Business of Money Transmission

The Department’s position for many years has been that traditional PSPs directly handling client payroll funds fall squarely within the Act’s money transmission definition. A PSP is conducting money transmission as defined under the Act when it receives funds from an employer-client in exchange for a promise to remit such funds at a later time or different place – namely to employees and/or taxing authorities.³ See TEX. FIN. CODE § 151.301(b)(4). Currently, six PSPs hold money transmission licenses from the Department. Since July 2018, The Department has issued five (5) Consent Orders to PSPs for unlicensed money transmission activities.⁴

In the case of traditional PSPs that receive money for transmission, the application of the Act is clear and based on sound public policy goals. Many Texas businesses contract with PSPs to

³ Not all PSPs are considered to be conducting money transmission under the Act. A PSP may qualify for the “incidental exemption” if it satisfies the requirements of Finance Code § 151.302(c). Most traditional PSPs, however, fail to meet the incidental exemption requirements because the PSP: 1) does not have a separate primary business purpose *unrelated* to money transmission, in that its primary business purpose is the receipt, investment, management and transmission of payroll funds from client-employers to employees and taxing authorities, 2) advertises its money transmission services to the public; and 3) charges a fee for such services.

⁴ The Department has issued Consent Orders to: JetPay HR & Payroll Services, Inc., Paychex Holdings, LLC, Paycom Software, Inc., Pay USA, and ZenPayroll, Inc. These Orders can be accessed here: <https://www.dob.texas.gov/laws-regulations/enforcement-orders>.

manage their payrolls and pay their employees. Consequently, many Texas consumers depend on PSPs to receive their wages. Without regulation under the Act, traditional PSPs would receive vast sums of money based on unsecured promises to make the money available at a later time or different location, exponentially increasing the risk of harm to Texas employees as well as their employers, in that delivery of payroll funds to the PSP does not discharge an employer's liability to employees (and to taxing authorities with respect to employment taxes) until the funds are actually delivered to the intended recipients.

II. The Business of Professional Employer Organizations

Previously referred to as staff leasing or employee leasing companies, PEOs are licensed by the Texas Department of Licensing and Regulation ("TDLR") under Chapter 91 of the Labor Code. A person may not engage in or offer "professional employer services" in the State of Texas unless the person holds a PEO license. TEX. LAB. CODE § 91.011.

As defined in § 91.001(14) of the Labor Code, the term "professional employer services" means "the services provided through coemployment relationships in which all or a majority of the employees providing services to a client or to a division or work unit of a client are covered employees..." subject to certain exclusions. A "coemployment relationship" means a contractual relationship between a client and a professional employer organization that involves the sharing of employment responsibilities with or allocation of employment responsibilities to covered employees in accordance with the professional employer services agreement and applicable statutes. TEX. LAB. CODE §§ 91.001(3-b) and 91.0011.

A PEO establishes a statutorily mandated "co-employment" contractual relationship with its employer-clients. TEX. LAB. CODE § 91.031. Under this agreement, the PEO must, among other duties and responsibilities: 1) assume responsibility for the payment of wages to covered employees without regard to payments by the client to the license holder; and 2) assume responsibility for the payment of payroll taxes and collection of taxes from payroll on covered employees. TEX. LAB. CODE § 91.032(a).

However, this contractual allocation of responsibility does not itself discharge the employer-client's liability for wages and certain related taxes; only the actual delivery of funds to the intended recipients will discharge this liability, with limited exceptions for, e.g., employer-funded portions of premiums for or contributions to any insurance or benefit plan sponsored or provided by the PEO for the benefit of covered employees, state unemployment taxes⁵ and, in some cases, federal employment taxes.⁶

⁵ A PEO license holder is statutorily designated as the sole employer of covered employees for purposes of the Texas Unemployment Compensation Act. TEX. LAB. CODE §§ 91.044(a) and 204.002(a). Accordingly, a PEO is not engaged in money transmission with respect to the portion of payroll funds received in advance for payment of state unemployment taxes.

⁶ Pursuant to 26 U.S.C. §§ 3511(a)(1) and 3511(c)(1), for purposes of federal employment taxes and other obligations under the federal employment tax rules, a "certified professional employer organization" (CPEO) is generally treated as the sole employer of any individual performing services for a customer (the employer-client) of the CPEO that is covered by a contract meeting the requirements of § 7705(e)(2) between the CPEO and the

While a licensed PEO is statutorily authorized to provide professional employer services to employer-clients by § 91.011 of the Labor Code, nothing in the definition of “professional employer services”⁷ or elsewhere in Chapter 91 explicitly authorizes a PEO to engage in the business of money transmission. A PEO that pays wages to its covered employees and is later reimbursed by its employer-client is not engaged in the business of money transmission; it is only the advance receipt of payroll funds from an employer-client that implicates the Money Services Act. As Chapter 91 explicitly acknowledges, “nothing in this chapter preempts the existing statutory or rulemaking authority of any other state agency or entity to regulate professional employer services in a manner consistent with the statutory authority of that state agency or entity.” TEX. LAB. CODE § 91.002(c).

III. Request for Opinion

As discussed above, the Department has previously determined that a traditional PSP receiving compensation from Texas employer-clients in exchange for the receipt and subsequent transmission of payroll wages and taxes to employees and others is engaged in the business of money transmission and requires a money transmission license. We now request your opinion regarding whether PSPs operating in this manner who also hold PEO licenses issued by the TDLR are subject to the licensure requirements of the Money Services Act.

We appreciate your assistance in clarifying the law relevant to the question above. If you have any questions or if the Department can be of any assistance regarding this matter, please contact General Counsel Catherine Reyer, at (512)475-1327 or Catherine.reyer@dob.texas.gov.

Sincerely,



Charles G. Cooper
Banking Commissioner
Texas Department of Banking

cc: TDLR - Derek Burkhalter via email at: Derek.Burkhalter@tdlr.texas.gov
TDLR – Alex Phipps via email at: Alex.Phipps@tdlr.texas.gov

customer, but only with respect to remuneration remitted to the covered employee by the CPEO. *See* 26 U.S.C. § 3511 and 7705; *also see* 26 C.F.R. §§ 31.3511-1, 301.7705-1 and 301.7705-2, Rev. Proc. 2016-33, 2016-25 I.R.B. 1034, and Rev. Proc. 2017-14, 2017-3 I.R.B. 426.

⁷ TEX. LAB. CODE § 91.001(14).