

112TH CONGRESS
1ST SESSION

S. 1908

To amend the Internal Revenue Code of 1986 to clarify the employment tax treatment and reporting of wages paid by professional employer organization, and for other purposes.

IN THE SENATE OF THE UNITED STATES

NOVEMBER 18, 2011

Mr. GRASSLEY (for himself and Mr. NELSON of Florida) introduced the following bill; which was read twice and referred to the Committee on Finance

A BILL

To amend the Internal Revenue Code of 1986 to clarify the employment tax treatment and reporting of wages paid by professional employer organization, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. CERTIFIED PROFESSIONAL EMPLOYER ORGA-**
4 **NIZATIONS.**

5 (a) EMPLOYMENT TAXES.—Chapter 25 of the Inter-
6 nal Revenue Code of 1986 is amended by adding at the
7 end the following new section:

1 **“SEC. 3511. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-**
 2 **ZATIONS.**

3 “(a) GENERAL RULES.—For purposes of the taxes,
 4 and other obligations, imposed by this subtitle—

5 “(1) a certified professional employer organiza-
 6 tion shall be treated as the employer (and no other
 7 person shall be treated as the employer) of any work
 8 site employee performing services for any customer
 9 of such organization, but only with respect to remuneration
 10 remitted by such organization to such work
 11 site employee, and

12 “(2) exclusions, definitions, and other rules
 13 which are based on the type of employer and which
 14 would (but for paragraph (1)) apply shall apply with
 15 respect to such taxes imposed on such remuneration.

16 “(b) SUCCESSOR EMPLOYER STATUS.—For purposes
 17 of sections 3121(a)(1), 3231(e)(2)(C), and 3306(b)(1)—

18 “(1) a certified professional employer organiza-
 19 tion entering into a service contract with a customer
 20 with respect to a work site employee shall be treated
 21 as a successor employer and the customer shall be
 22 treated as a predecessor employer during the term
 23 of such service contract, and

24 “(2) a customer whose service contract with a
 25 certified professional employer organization is termi-
 26 nated with respect to a work site employee shall be

1 treated as a successor employer and the certified
 2 professional employer organization shall be treated
 3 as a predecessor employer.

4 “(c) LIABILITY OF CERTIFIED PROFESSIONAL EM-
 5 PLOYER ORGANIZATION.—Solely for purposes of its liabil-
 6 ity for the taxes, and other obligations, imposed by this
 7 subtitle—

8 “(1) a certified professional employer organiza-
 9 tion shall be treated as the employer of any indi-
 10 vidual (other than a work site employee or a person
 11 described in subsection (f)) who is performing serv-
 12 ices covered by a contract meeting the requirements
 13 of section 7705(e)(2), but only with respect to remu-
 14 neration remitted by such organization to such indi-
 15 vidual, and

16 “(2) exclusions, definitions, and other rules
 17 which are based on the type of employer and which
 18 would (but for paragraph (1)) apply shall apply with
 19 respect to such taxes imposed on such remuneration.

20 “(d) TREATMENT OF CREDITS.—

21 “(1) IN GENERAL.—For purposes of any credit
 22 specified in paragraph (2)—

23 “(A) such credit with respect to a work
 24 site employee performing services for the cus-

1 tomer applies to the customer, not the certified
2 professional employer organization,

3 “(B) the customer, and not the certified
4 professional employer organization, shall take
5 into account wages and employment taxes—

6 “(i) paid by the certified professional
7 employer organization with respect to the
8 work site employee, and

9 “(ii) for which the certified profes-
10 sional employer organization receives pay-
11 ment from the customer, and

12 “(C) the certified professional employer or-
13 ganization shall furnish the customer with any
14 information necessary for the customer to claim
15 such credit.

16 “(2) CREDITS SPECIFIED.—A credit is specified
17 in this paragraph if such credit is allowed under—

18 “(A) section 41 (credit for increasing re-
19 search activity),

20 “(B) section 45A (Indian employment
21 credit),

22 “(C) section 45B (credit for portion of em-
23 ployer social security taxes paid with respect to
24 employee cash tips),

1 “(D) section 45C (clinical testing expenses
2 for certain drugs for rare diseases or condi-
3 tions),

4 “(E) section 51 (work opportunity credit),

5 “(F) section 51A (temporary incentives for
6 employing long-term family assistance recipi-
7 ents),

8 “(G) section 1396 (empowerment zone em-
9 ployment credit),

10 “(H) 1400(d) (DC Zone employment cred-
11 it),

12 “(I) Section 1400H (renewal community
13 employment credit), and

14 “(J) any other section as provided by the
15 Secretary.

16 “(e) SPECIAL RULE FOR RELATED PARTY.—This
17 section shall not apply in the case of a customer which
18 bears a relationship to a certified professional employer
19 organization described in section 267(b) or 707(b). For
20 purposes of the preceding sentence, such sections shall be
21 applied by substituting ‘10 percent’ for ‘50 percent’.

22 “(f) SPECIAL RULE FOR CERTAIN INDIVIDUALS.—
23 For purposes of the taxes imposed under this subtitle, an
24 individual with net earnings from self-employment derived
25 from the customer’s trade or business is not a work site

1 employee with respect to remuneration paid by a certified
 2 professional employer organization.

3 “(g) REGULATIONS.—The Secretary shall prescribe
 4 such regulations as may be necessary or appropriate to
 5 carry out the purposes of this section.”.

6 (b) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
 7 ZATION DEFINED.—Chapter 79 of the Internal Revenue
 8 Code of 1986 is amended by adding at the end the fol-
 9 lowing new section:

10 **“SEC. 7705. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-**
 11 **ZATIONS DEFINED.**

12 “(a) IN GENERAL.—For purposes of this title, the
 13 term ‘certified professional employer organization’ means
 14 a person who has been certified by the Secretary for pur-
 15 poses of section 3511 as meeting the requirements of sub-
 16 section (b).

17 “(b) GENERAL REQUIREMENTS.—A person meets the
 18 requirements of this subsection if such person—

19 “(1) demonstrates that such person (and any
 20 owner, officer, and such other persons as may be
 21 specified in regulations) meets such requirements as
 22 the Secretary shall establish with respect to tax sta-
 23 tus, background, experience, business location, and
 24 annual financial audits,

1 “(2) computes its taxable income using an ac-
 2 crual method of accounting unless the Secretary ap-
 3 proves another method,

4 “(3) agrees that it will satisfy the bond and
 5 independent financial review requirements of sub-
 6 section (c) on an ongoing basis,

7 “(4) agrees that it will satisfy such reporting
 8 obligations as may be imposed by the Secretary,

9 “(5) agrees to verify on such periodic basis as
 10 the Secretary may prescribe that it continues to
 11 meet the requirements of this subsection, and

12 “(6) agrees to notify the Secretary in writing
 13 within such time as the Secretary may prescribe of
 14 any change that materially affects whether it con-
 15 tinues to meet the requirements of this subsection.

16 “(c) BOND AND INDEPENDENT FINANCIAL REVIEW
 17 REQUIREMENTS.—

18 “(1) IN GENERAL.—An organization meets the
 19 requirements of this paragraph if such organiza-
 20 tion—

21 “(A) meets the bond requirements of para-
 22 graph (2), and

23 “(B) meets the independent financial re-
 24 view requirements of paragraph (3).

25 “(2) BOND.—

“(A) IN GENERAL.—A certified professional employer organization meets the requirements of this paragraph if the organization has posted a bond for the payment of taxes under subtitle C (in a form acceptable to the Secretary) in an amount at least equal to the amount specified in subparagraph (B).

“(B) AMOUNT OF BOND.—For the period April 1 of any calendar year through March 31 of the following calendar year, the amount of the bond required is equal to the greater of—

“(i) 5 percent of the organization’s liability under section 3511 for taxes imposed by subtitle C during the preceding calendar year (but not to exceed \$1,000,000), or

“(ii) \$50,000.

“(3) INDEPENDENT FINANCIAL REVIEW REQUIREMENTS.—A certified professional employer organization meets the requirements of this paragraph if such organization—

“(A) has, as of the most recent review date, caused to be prepared and provided to the Secretary (in such manner as the Secretary may prescribe) an opinion of an independent

1 certified public accountant that the certified
2 professional employer organization's financial
3 statements are presented fairly in accordance
4 with generally accepted accounting principles,
5 and

6 “(B) provides, not later than the last day
7 of the second month beginning after the end of
8 each calendar quarter, to the Secretary from an
9 independent certified public accountant an as-
10 ssertion regarding Federal employment tax pay-
11 ments and an examination level attestation on
12 such assertion.

13 Such assertion shall state that the organization has
14 withheld and made deposits of all taxes imposed by
15 chapters 21, 22, and 24 of the Internal Revenue
16 Code in accordance with regulations imposed by the
17 Secretary for such calendar quarter and such exam-
18 ination level attestation shall state that such asser-
19 tion is fairly stated, in all material respects.

20 “(4) CONTROLLED GROUP RULES.—For pur-
21 poses of the requirements of paragraphs (2) and (3),
22 all professional employer organizations that are
23 members of a controlled group within the meaning
24 of sections 414(b) and (c) shall be treated as a sin-
25 gle organization.

1 “(5) FAILURE TO FILE ASSERTION AND ATTES-
 2 TATION.—If the certified professional employer orga-
 3 nization fails to file the assertion and attestation re-
 4 quired by paragraph (3) with respect to any cal-
 5 endar quarter, then the requirements of paragraph
 6 (3) with respect to such failure shall be treated as
 7 not satisfied for the period beginning on the due
 8 date for such attestation.

9 “(6) REVIEW DATE.—For purposes of para-
 10 graph (3)(A), the review date shall be 6 months
 11 after the completion of the organization’s fiscal year.

12 “(d) SUSPENSION AND REVOCATION AUTHORITY.—
 13 The Secretary may suspend or revoke a certification of
 14 any person under subsection (b) for purposes of section
 15 3511 if the Secretary determines that such person is not
 16 satisfying the representations or requirements of sub-
 17 sections (b) or (c), or fails to satisfy applicable accounting,
 18 reporting, payment, or deposit requirements.

19 “(e) WORK SITE EMPLOYEE.—For purposes of this
 20 title—

21 “(1) IN GENERAL.—The term ‘work site em-
 22 ployee’ means, with respect to a certified profes-
 23 sional employer organization, an individual who—

24 “(A) performs services for a customer pur-
 25 suant to a contract which is between such cus-

1 tomer and the certified professional employer
2 organization and which meets the requirements
3 of paragraph (2), and

4 “(B) performs services at a work site
5 meeting the requirements of paragraph (3).

6 “(2) SERVICE CONTRACT REQUIREMENTS.—A
7 contract meets the requirements of this paragraph
8 with respect to an individual performing services for
9 a customer if such contract is in writing and pro-
10 vides that the certified professional employer organi-
11 zation shall—

12 “(A) assume responsibility for payment of
13 wages to such individual, without regard to the
14 receipt or adequacy of payment from the cus-
15 tomer for such services,

16 “(B) assume responsibility for reporting,
17 withholding, and paying any applicable taxes
18 under subtitle C, with respect to such individ-
19 ual’s wages, without regard to the receipt or
20 adequacy of payment from the customer for
21 such services,

22 “(C) assume responsibility for any em-
23 ployee benefits which the service contract may
24 require the organization to provide, without re-

1 gard to the receipt or adequacy of payment
2 from the customer for such services,

3 “(D) assume responsibility for hiring, fir-
4 ing, and recruiting workers in addition to the
5 customer’s responsibility for hiring, firing and
6 recruiting workers,

7 “(E) maintain employee records relating to
8 such individual, and

9 “(F) agree to be treated as a certified pro-
10 fessional employer organization for purposes of
11 section 3511 with respect to such individual.

12 “(3) WORK SITE COVERAGE REQUIREMENT.—

13 The requirements of this paragraph are met with re-
14 spect to an individual if at least 85 percent of the
15 individuals performing services for the customer at
16 the work site where such individual performs serv-
17 ices are subject to 1 or more contracts with the cer-
18 tified professional employer organization which meet
19 the requirements of paragraph (2) (but not taking
20 into account those individuals who are excluded em-
21 ployees within the meaning of section 414(q)(5)).

22 “(f) DETERMINATION OF EMPLOYMENT STATUS.—

23 Except to the extent necessary for purposes of section
24 3511, nothing in this section shall be construed to affect

1 the determination of who is an employee or employer for
 2 purposes of this title.

3 “(g) REGULATIONS.—The Secretary shall prescribe
 4 such regulations as may be necessary or appropriate to
 5 carry out the purposes of this section.”.

6 (c) CONFORMING AMENDMENTS.—

7 (1) Section 3302 of the Internal Revenue Code
 8 of 1986 is amended by adding at the end the fol-
 9 lowing new subsection:

10 “(h) TREATMENT OF CERTIFIED PROFESSIONAL EM-
 11 PLOYER ORGANIZATIONS.—If a certified professional em-
 12 ployer organization (as defined in section 7705), or a cus-
 13 tomer of such organization, makes a contribution to the
 14 State’s unemployment fund with respect to a work site
 15 employee, such organization shall be eligible for the credits
 16 available under this section with respect to such contribu-
 17 tion.”.

18 (2) Section 3303(a) of such Code is amended—

19 (A) by striking the period at the end of
 20 paragraph (3) and inserting “; and” and by in-
 21 serting after paragraph (3) the following new
 22 paragraph:

23 “(4) if the taxpayer is a certified professional
 24 employer organization (as defined in section 7705)
 25 that is treated as the employer under section 3511,

1 such certified professional employer organization is
 2 permitted to collect and remit, in accordance with
 3 paragraphs (1), (2), and (3), contributions during
 4 the taxable year to the State unemployment fund
 5 with respect to a work site employee.”, and

6 (B) in the last sentence—

7 (i) by striking “paragraphs (1), (2),
 8 and (3)” and inserting “paragraphs (1),
 9 (2), (3), and (4)”, and

10 (ii) by striking “paragraph (1), (2), or
 11 (3)” and inserting “paragraph (1), (2),
 12 (3), or (4)”.

13 (3) Section 6053(c) of such Code is amended by
 14 adding at the end the following new paragraph:

15 “(8) CERTIFIED PROFESSIONAL EMPLOYER OR-
 16 GANIZATIONS.—For purposes of any report required
 17 by this subsection, in the case of a certified profes-
 18 sional employer organization that is treated under
 19 section 3511 as the employer of a work site em-
 20 ployee, the customer with respect to whom a work
 21 site employee performs services shall be the employer
 22 for purposes of reporting under this section and the
 23 certified professional employer organization shall
 24 furnish to the customer any information necessary

1 to complete such reporting no later than such time
 2 as the Secretary shall prescribe.”.

3 (d) CLERICAL AMENDMENTS.—

4 (1) The table of sections for chapter 25 of the
 5 Internal Revenue Code of 1986 is amended by add-
 6 ing at the end the following new item:

“Sec. 3511. Certified professional employer organizations.”.

7 (2) The table of sections for chapter 79 of such
 8 Code is amended by inserting after the item relating
 9 to section 7704 the following new item:

“Sec. 7705. Certified professional employer organizations defined.”.

10 (e) REPORTING REQUIREMENTS AND OBLIGA-
 11 TIONS.—The Secretary of the Treasury shall develop such
 12 reporting and recordkeeping rules, regulations, and proce-
 13 dures as the Secretary determines necessary or appro-
 14 priate to ensure compliance with the amendments made
 15 by this section with respect to entities applying for certifi-
 16 cation as certified professional employer organizations or
 17 entities that have been so certified. Such rules shall be
 18 designed in a manner which streamlines, to the extent pos-
 19 sible, the application of requirements of such amendments,
 20 the exchange of information between a certified profes-
 21 sional employer organization and its customers, and the
 22 reporting and recordkeeping obligations of the certified
 23 professional employer organization.

1 (f) USER FEES.—Subsection (b) of section 7528 of
 2 the Internal Revenue Code of 1986 is amended by adding
 3 at the end the following new paragraph:

4 “(4) CERTIFIED PROFESSIONAL EMPLOYER OR-
 5 GANIZATIONS.—The fee charged under the program
 6 in connection with the certification by the Secretary
 7 of a professional employer organization under sec-
 8 tion 7705 shall not exceed \$500.”.

9 (g) EFFECTIVE DATES.—

10 (1) IN GENERAL.—The amendments made by
 11 this section shall apply with respect to wages for
 12 services performed on or after January 1 of the first
 13 calendar year beginning more than 12 months after
 14 the date of the enactment of this Act.

15 (2) CERTIFICATION PROGRAM.—The Secretary
 16 of the Treasury shall establish the certification pro-
 17 gram described in section 7705(b) of the Internal
 18 Revenue Code of 1986, as added by subsection (b),
 19 not later than 6 months before the effective date de-
 20 termined under paragraph (1).

21 (h) NO INFERENCE.—Nothing contained in this sec-
 22 tion or the amendments made by this section shall be con-
 23 strued to create any inference with respect to the deter-
 24 mination of who is an employee or employer—

1 (1) for Federal tax purposes (other than the
2 purposes set forth in the amendments made by this
3 section), or

4 (2) for purposes of any other provision of law.

○