

**336.242 Rights, duties, and responsibilities of client and professional employer organization in a co-employment relationship -- Professional employer agreement -- Notice -- Imposition of taxes.**

- (1) Except as specifically provided in KRS 336.230 to 336.250, or in a professional employer agreement, in each co-employment relationship:
  - (a) The client shall be entitled to exercise all rights, and shall be obligated to perform all duties and responsibilities, otherwise applicable to an employer in an employment relationship;
  - (b) The professional employer organization shall be entitled to exercise only those rights, and shall be obligated to perform only those duties and responsibilities, specifically required by KRS 336.230 to 336.250 or set forth in the professional employer agreement. The rights, duties, and obligations of the professional employer organization as co-employer with respect to any covered employee shall be limited to those arising out of the professional employer agreement and KRS 336.230 to 336.250 during the term of co-employment by the professional employer organization of the covered employee; and
  - (c) Unless otherwise expressly agreed by the professional employer organization and the client in a professional employer agreement, the client retains the exclusive right to direct and control the covered employees as necessary to conduct the client's business, to discharge any of the client's fiduciary responsibilities, or to comply with any licensure requirements applicable to the client of the covered employees.
- (2) Except as otherwise provided in KRS 336.230 to 336.250, the co-employment relationship between the client and the professional employer organization, and between each co-employer and each covered employee, shall be governed by the professional employer agreement. Each professional employer agreement shall:
  - (a) Include the allocation of rights, duties, and obligations as set forth in subsection (1) of this section;
  - (b) Provide that the professional employer organization shall have responsibility to pay wages to covered employees; to withhold, collect, report and remit payroll and unemployment taxes; and, to the extent the professional employer organization has assumed responsibility in the professional employer agreement, to make payments for employee benefits for covered employees as a result of the outsourcing of payroll duty to the professional employer organization by the client. As used in this paragraph, "wages" does not include any obligation between a client and a covered employee for payments beyond or in addition to the covered employee's salary, draw, or regular rate of pay such as bonuses, commissions, severance pay, deferred compensation, profit sharing, or vacation, sick, or other paid time off, unless the professional employer organization has expressly agreed to assume liability for payments in the professional employer agreement;
  - (c) Provide that the professional employer organization shall have a right to hire,

discipline, and terminate a covered employee as may be necessary to fulfill the professional employer organization's responsibilities under KRS 336.230 to 336.250 and the professional employer agreement. The client shall have a right to hire, discipline, and terminate a covered employee; and

- (d) Provide that the responsibility to obtain and maintain workers' compensation coverage for covered employees from an insurer licensed to do business in this Commonwealth and otherwise in compliance with all applicable requirements shall be specifically allocated to either the client or the professional employer organization in the professional employment agreement.
- (3) A professional employer organization shall provide written notice to each covered employee affected by a professional employer agreement entered into by a professional employer organization. The notice shall set forth the general nature of the co-employment relationship between and among the professional employer organization, the client, and the covered employees. Nothing in this subsection shall create a presumption of liability against a professional employer organization for the acts, errors, or omissions of the covered employees. Notwithstanding any provision to the contrary, the statute of limitations for a claim of a covered employee against a professional employer organization shall not begin to run until the covered employee knew or should have known about the professional employer organization agreement and the identity of the professional employer organization, but in no event shall the statute of limitations be more than one (1) year from the date the original lawsuit was timely filed by the covered employee. Nothing in this subsection shall limit the existing statute of limitations for any causes of action contained in the original lawsuit for the covered employee.
- (4) Except to the extent otherwise expressly provided by the applicable professional employer agreement:
- (a) A client shall be solely responsible for workplace safety and for the quality and adequacy of the goods and services produced or sold in the client's business. Nothing in KRS 336.230 to 336.250 shall limit an injured workers' ability to recover increased compensation under KRS 342.165 from the co-employer;
  - (b) A client shall be solely responsible for directing, supervising, training, retaining, and controlling the work of the covered employees with respect to the business activities of the client and solely responsible for the acts, errors, or omissions of the covered employees with regard to these activities. Nothing in this subsection shall create a presumption of liability against a professional employer organization for the acts, errors, or omissions of the covered employees. Notwithstanding any provision to the contrary, the statute of limitations for a claim of an injured party who is not a covered employee against a professional organization shall not begin to run until the injured party who is not a covered employee knew or should have known about the professional employer organization agreement and the identity of the professional employer organization, but in no event shall the statute of

limitations be more than one (1) year from the date the original lawsuit was timely filed by the injured party who is not a covered employee. Nothing in this paragraph shall limit the existing statute of limitations for any causes of action contained in the original lawsuit for the injured party who is not a covered employee;

- (c) A client shall not be liable for the acts, errors, or omissions of a professional employer organization, or of any covered employee of the client and a professional employer organization when the covered employee is acting under the express direction and control of the professional employer organization;
  - (d) A professional employer organization shall not be liable for the acts, errors, or omissions of a client or of any covered employee of the client when the covered employee is acting under the express direction and control of the client;
  - (e) Nothing in this subsection shall serve to limit any contractual liability or obligation specifically provided in the written professional employer agreement; and
  - (f) A covered employee is not, solely as a result of being a covered employee of a professional employer organization, an employee of the professional employer organization for the purposes of general liability insurance, fidelity bonds, surety bonds, employer's liability which is not covered by workers' compensation, or liquor liability insurance carried by the professional employer organization unless the covered employees are included by specific reference in the professional employer agreement and applicable prearranged employment contract, insurance contract, or bond.
- (5) A professional employer organization under KRS 336.230 to 336.250 is not engaged in the sale of insurance or in acting as a third-party administrator by providing professional employer services which include services and employee benefit plans for covered employees.
- (6) For purposes of the Commonwealth or any city, county, or other political subdivision thereof:
- (a) Covered employees whose services are subject to sales tax shall be deemed the employees of the client for purposes of collecting and levying sales tax on the services performed by the covered employee. Nothing contained in KRS 336.230 to 336.250 shall relieve a client of any sales tax liability with respect to its goods or services;
  - (b) Any tax or assessment imposed upon professional employer services or any business license or other fee which is based upon gross receipts shall allow a deduction for the gross income or receipts of the business derived from performing professional employer services that is equal to that portion of the fee charged to a client that represents the actual cost of wages and salaries, benefits, workers' compensation, payroll taxes, withholding, or other assessments paid to or on behalf of a covered employee by the professional employer organization under a professional employer agreement;

- (c) Any tax or assessment or mandated expenditure on a per capita or per employee basis shall be assessed against the client for covered employees and against the professional employer organization for its employees who are not covered employees co-employed with a client. Benefits or monetary consideration that meet the requirements of mandates imposed on a client and that are received by covered employees through the professional employer organization either through payroll or through benefit plans sponsored by the professional employer organization shall be credited against the client's obligation to fulfill the mandates; and
- (d) In the case of a tax or assessment imposed or calculated upon the basis of total payroll, the professional employer organization shall be eligible to apply any small business allowance or exemption available to the client for the covered employees for purpose of commuting the tax.

**Effective:** July 14, 2022

**History:** Created 2022 Ky. Acts ch. 50, sec. 7, effective July 14, 2022.