

106TH CONGRESS
1ST SESSION

H. R. 3490

To amend the Internal Revenue Code of 1986 to clarify the status of professional employer organizations and to promote and protect the interests of professional employer organizations, their customers, and workers.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 18, 1999

Mr. PORTMAN (for himself and Mr. CARDIN) introduced the following bill;
which was referred to the Committee on Ways and Means

A BILL

To amend the Internal Revenue Code of 1986 to clarify the status of professional employer organizations and to promote and protect the interests of professional employer organizations, their customers, and workers.

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. SHORT TITLE.**

4 This Act may be cited as the “Professional Employer
5 Organization Workers Benefits Act of 1999”.

6 **SEC. 2. NO INFERENCE.**

7 Nothing contained in this Act or the amendments
8 made by this Act shall be construed to create any infer-

1 ence with respect to the determination of who is an em-
2 ployee or employer—

3 (1) for Federal tax purposes (other than the
4 purposes set forth in the amendments made by sec-
5 tion 3), or

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

7 **SEC. 3. CERTIFIED PROFESSIONAL EMPLOYER ORGANIZA-**
8 **TIONS.**

9 (a) **EMPLOYMENT TAXES.**—Chapter 25 of the Inter-
10 nal Revenue Code of 1986 (relating to general provisions
11 relating to employment taxes) is amended by adding at
12 the end the following new section:

13 **“SEC. 3511. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-**
14 **ZATIONS.**

15 “(a) **GENERAL RULES.**—For purposes of the taxes
16 imposed by this subtitle—

17 “(1) a certified professional employer organiza-
18 tion shall be treated as the employer (and no other
19 person shall be treated as the employer) of any work
20 site employee performing services for any customer
21 of such organization, but only with respect to remun-
22 eration remitted by such organization to such work
23 site employee, and

1 “(2) the exemptions and exclusions which would
2 (but for paragraph (1)) apply shall apply with re-
3 spect to such taxes imposed on such remuneration.

4 “(b) SECONDARY CUSTOMER LIABILITY FOR EM-
5 PLOYMENT TAXES.—

6 “(1) IN GENERAL.—Notwithstanding subsection
7 (a), if—

8 “(A) as of the date any payment of taxes
9 imposed by this subtitle is due, the certified
10 professional employer organization does not
11 meet the requirements of paragraph (3),

12 “(B) the customer has not made adequate
13 payments to the certified professional employer
14 organization pursuant to the service contract
15 under this subtitle with respect to work site em-
16 ployees performing services for such customer,
17 or

18 “(C) in accordance with regulations pre-
19 scribed by the Secretary, the Secretary deter-
20 mines that the application of this subsection to
21 a class of customers which includes such cus-
22 tomer is appropriate to prevent an undue and
23 large risk with respect to the ultimate collection
24 of taxes under this subtitle,

1 the customer shall, subject to paragraph (2), also be
2 liable for any payment under this subtitle which the
3 organization is required to make under this section.

4 “(2) SPECIAL RULE.—The Secretary shall not
5 take any action against the customer with respect to
6 liability under paragraph (1) until after 45 days—

7 “(A) after notice and demand by the Sec-
8 retary against the certified professional em-
9 ployer organization for taxes due under this
10 subtitle, or

11 “(B) in the case of a failure to file a re-
12 turn with respect to such taxes, after such re-
13 turn was due.

14 “(3) REQUIREMENTS.—

15 “(A) IN GENERAL.—An organization meets
16 the requirements of this paragraph with respect
17 to a payment if—

18 “(i) the organization meets—

19 “(I) the net worth requirements
20 of subparagraph (B) as of the last
21 day of both the fiscal quarter of the
22 fiscal year of the organization in
23 which the payment is due and the pre-
24 ceding quarter, or

1 “(II) the bond requirements of
2 subparagraph (C) at all times during
3 the fiscal quarter in which the pay-
4 ment is due, and

5 “(ii) the organization provides to the
6 Secretary an examination level attestation
7 from an independent certified public ac-
8 countant not later than the last day of the
9 second month beginning after the end of
10 the calendar quarter in which the payment
11 is due that there is no material reason to
12 question the organization’s assertions with
13 respect to the adequacy of Federal employ-
14 ment tax payments for such calendar quar-
15 ter.

16 “(B) NET WORTH.—The requirements of
17 this subparagraph are as follows:

“If number of work site em- ployees is:	Its net worth must be at least:
Less than 500	\$50,000.
500 or more but less than 1,500 ...	\$100,000.
1,500 or more but less than 2,500	\$150,000.
2,500 or more but less than 4,000	\$200,000.
4,000 or greater	\$250,000.

18 “(C) BOND.—An organization meets the
19 requirements of this subparagraph if such orga-
20 nization posts a bond for the payment of taxes
21 under this subtitle in a form acceptable to the
22 Secretary and in an amount equal to the

1 amount described in subparagraph (B) with re-
2 spect to such organization.

3 “(D) FAILURE TO FILE.—If the certified
4 professional employer organization fails to file
5 the attestation required by subparagraph (A)(ii)
6 with respect to a particular quarter, then the
7 requirements of this paragraph with respect to
8 such failure shall be treated as not satisfied for
9 the period beginning on the due date for such
10 attestation and ending on the first day of the
11 first calendar quarter following two consecutive
12 calendar quarters (beginning after the failure)
13 for which such attestation requirement is met.

14 “(E) EXCLUSION OF GOODWILL AND
15 OTHER INTANGIBLES.—For purposes of this
16 paragraph, net worth shall be determined with-
17 out regard to goodwill and other intangibles.

18 “(4) SUCCESSOR EMPLOYER STATUS.—For pur-
19 poses of sections 3121(a) and 3306(b)(1)—

20 “(A) a certified professional employer or-
21 ganization entering into a service contract with
22 a customer with respect to a work site employee
23 shall be treated as a successor employer and the
24 customer shall be treated as a predecessor em-
25 ployer, and

1 “(B) a customer whose service contract
2 with a certified professional employer organiza-
3 tion is terminated with respect to a work site
4 employee shall be treated as a successor em-
5 ployer and the certified professional employer
6 organization shall be treated as a predecessor
7 employer.

8 “(c) LIABILITY WITH RESPECT TO INDIVIDUALS
9 PURPORTED TO BE WORK SITE EMPLOYEES.—

10 “(1) GENERAL RULES.—Solely for purposes of
11 its liability for the taxes imposed by this subtitle—

12 “(A) the certified professional employer or-
13 ganization shall be treated as the employer of
14 any individual (other than a work site em-
15 ployee) who is performing services covered by a
16 contract meeting the requirements of section
17 7705(d)(2)(F), but only with respect to remu-
18 neration remitted by such organization to such
19 individual, and

20 “(B) the exemptions and exclusions which
21 would (but for subparagraph (A)) apply shall
22 apply with respect to such taxes imposed on
23 such remuneration.

1 “(2) LIABILITY.—Paragraph (1) shall not be
2 construed to relieve liability of any other individual
3 or entity for such taxes.

4 “(d) SPECIAL RULE FOR RELATED PARTY.—Sub-
5 sections (a) and (b) shall not apply in the case of a cus-
6 tomer which bears a relationship to a certified professional
7 employer organization described in section 267(b) or
8 707(b). For purposes of the preceding sentence, such sec-
9 tions shall be applied by substituting ‘10 percent’ for ‘50
10 percent’.

11 “(e) REGULATIONS.—The Secretary shall prescribe
12 such regulations as may be necessary or appropriate to
13 carry out the purposes of this section, including—

14 “(1) rules for the appropriate allocation (includ-
15 ing on a pro rata basis) of payments of taxes made
16 by professional employee organizations among cus-
17 tomers also liable for such taxes, and

18 “(2) rules for applying this section to profes-
19 sional employee organizations which are not in exist-
20 ence for quarters preceding the quarter in which a
21 service contract under section 7705(d)(2)) is in ef-
22 fect.”.

23 (b) EMPLOYEE BENEFITS.—Section 414 of such
24 Code (relating to definitions and special rules) is amended
25 by adding at the end the following new subsection:

1 “(v) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
2 ZATIONS.—

3 “(1) PLANS MAINTAINED BY CERTIFIED PRO-
4 FESSIONAL EMPLOYER ORGANIZATIONS.—

5 “(A) IN GENERAL.—Except as otherwise
6 provided in this subsection, if a certified profes-
7 sional employer organization establishes or
8 maintains a plan to provide employee benefits
9 to work site employees, then, for purposes of
10 applying the provisions of this title applicable to
11 such benefits—

12 “(i) such plan shall be treated as a
13 single employer plan established and main-
14 tained by the organization,

15 “(ii) the organization shall be treated
16 as the employer of the work site employees
17 eligible to participate in the plan, and

18 “(iii) the portion of such plan covering
19 work site employees shall not be taken into
20 account in applying such provisions to the
21 remaining portion of such plan or to any
22 other plan providing employee benefits
23 (other than to work site employees).

24 “(B) SPECIAL EXCEPTIONS IN APPLYING
25 RULES TO BENEFITS.—

1 “(i) IN GENERAL.—In applying any
2 requirement listed in clause (iii)—

3 “(I) the portion of the plan es-
4 tablished by the certified professional
5 employer organization which covers
6 work site employees performing serv-
7 ices for a customer shall be treated as
8 a separate plan of the customer (in-
9 cluding for purposes of any disquali-
10 fication or correction),

11 “(II) the customer shall be treat-
12 ed as establishing and maintaining
13 the plan, as the employer of such em-
14 ployees, and as having paid any com-
15 pensation remitted by the certified
16 professional employer organization to
17 such employees under the service con-
18 tract entered into under section
19 7705(d), and

20 “(III) a controlled group that in-
21 cludes a certified professional em-
22 ployer organization shall not include
23 in the controlled group any work site
24 employees performing services for a
25 customer.

1 For purposes of subclause (III), all persons
2 treated as a single employer under sub-
3 sections (b), (c), (m), and (o) shall be
4 treated as members of the same controlled
5 group.

6 “(ii) SELF-EMPLOYED INDIVID-
7 UALS.—A work site employee who would
8 be treated as a self-employed individual (as
9 defined in section 401(c)(1)), a disqualified
10 person (as defined in section 4975(e)(2)),
11 or a shareholder-employee (as defined in
12 section 4975(f)(6)(C)), but for the rela-
13 tionship with the certified professional em-
14 ployer organization, shall be treated as a
15 self-employed individual for purposes of de-
16 termining eligibility for employee benefit
17 plans maintained by such certified profes-
18 sional employer organization.

19 “(iii) LISTED REQUIREMENTS.—The
20 requirements listed in this clause are—

21 “(I) NONDISCRIMINATION.—Sec-
22 tions 79(d), 105(h), 125(b), 127(b),
23 129(d), 132(j)(1), 274(j)(3)(B),
24 401(a)(4), 401(a)(17), 401(a)(26),

1 401(k)(3), 401(m)(2), 410(b), 414(q),
2 415, 416, 422, 423(b), and 505(b).

3 “(II) SIZE.—Sections 220,
4 401(k)(11), 401(m)(10), 408(k), and
5 408(p).

6 “(III) ELIGIBILITY.—Section
7 401(k)(4)(B).

8 “(2) PLANS MAINTAINED BY CUSTOMERS OF
9 CERTIFIED PROFESSIONAL EMPLOYER ORGANIZA-
10 TIONS.—If a customer of a certified professional em-
11 ployer organization provides (other than through
12 such organization) any employee benefits, then with
13 respect to such benefits—

14 “(A) work site employees of the organiza-
15 tion who perform services for the customer shall
16 be treated as leased employees of such cus-
17 tomer,

18 “(B) such customer shall be treated as a
19 recipient for purposes of subsection (n), and
20 paragraphs (4) and (5) of subsection (n) shall
21 not apply for such purposes, and

22 “(C) with respect to such work site em-
23 ployees, sections 105(h), 403(b)(12), 422, and
24 423 shall be treated as a benefit listed in sub-
25 section (n)(3)(C).

1 “(3) RULES APPLICABLE TO PLANS MAIN-
2 TAINED BY CERTIFIED PROFESSIONAL EMPLOYER
3 ORGANIZATIONS AND PLANS MAINTAINED BY THEIR
4 CUSTOMERS.—

5 “(A) SERVICE CREDITING FOR PARTICIPA-
6 TION AND VESTING PURPOSES.—In the case of
7 a plan maintained by a certified professional
8 employer organization or a customer, for pur-
9 poses of determining a work site employee’s
10 service for eligibility to participate and vesting
11 under sections 410(a) and section 411, rules
12 similar to the rules of paragraphs (1) and (3)
13 of section 413(c) shall apply to service for the
14 certified professional employer organization and
15 customer.

16 “(B) COMPENSATION.—

17 “(i) IN GENERAL.—Except as pro-
18 vided in clause (ii), for purposes of sub-
19 section (s) and section 415(c)(3), or other
20 comparable provisions of this title based on
21 compensation which affects employee ben-
22 efit plans, compensation received from the
23 customer with respect to which the work
24 site employee performs services shall be
25 taken into account together with com-

1 pensation received from the certified pro-
2 fessional employer organization.

3 “(ii) EXCEPTION.—For purposes of
4 applying sections 404 and 412 to a plan
5 maintained by a certified professional em-
6 ployer organization, only compensation re-
7 ceived from the certified professional em-
8 ployer organization shall be taken into ac-
9 count.

10 “(4) SPECIAL RULES WHERE MULTIPLE
11 PLANS.—

12 “(A) IN GENERAL.—For purposes of ap-
13 plying section 415 with respect to a plan main-
14 tained by a certified professional employer orga-
15 nization, the organization and customers of
16 such organization shall be treated as a single
17 employer, except that if plans are maintained
18 by a certified professional employer organiza-
19 tion and a customer with respect to a work site
20 employee, any action required to be taken by
21 such plans shall be taken first with respect to
22 the plan maintained by the customer.

23 “(B) MINIMUM BENEFIT.—If a minimum
24 benefit is required to be provided under section
25 416, such benefit shall, to the extent possible,

1 be provided through the plan maintained by the
2 certified professional employer organization.

3 “(5) TERMINATION OF SERVICE CONTRACT BE-
4 TWEEN CERTIFIED PROFESSIONAL EMPLOYER ORGA-
5 NIZATION AND CUSTOMER.—

6 “(A) IN GENERAL.—

7 “(i) TREATMENT OF SUCCESSOR
8 PLAN.—If a service contract between a
9 customer and a certified professional em-
10 ployer organization is terminated and work
11 site employees of the customer were cov-
12 ered by a plan maintained by the organiza-
13 tion, then, except as provided in regula-
14 tions, any plan of a certified professional
15 employer organization or the customer
16 which covers such work site employees
17 shall be treated as a successor plan.

18 “(ii) TREATMENT AS SEVERANCE
19 FROM EMPLOYMENT AND SEPARATION
20 FROM SERVICE.—If a service contract be-
21 tween a customer and a certified profes-
22 sional employer organization is terminated,
23 and there is no plan treated as a successor
24 plan under clause (i), then such termi-
25 nation shall be treated as a severance from

1 employment and a separation from service
2 of each work site employee of such cus-
3 tomer.

4 “(B) DISTRIBUTION RULES APPLICABLE
5 TO SUBPARAGRAPH (A)(ii).—In any case to
6 which subparagraph (A)(ii) applies, the certified
7 professional employer organization plan may
8 distribute—

9 “(i) during the 2-year period begin-
10 ning on the date of such termination (in
11 accordance with plan terms) only—

12 “(I) elective deferrals,

13 “(II) qualified nonelective con-
14 tributions (within the meaning of sec-
15 tion 401(m)(4)(C)), and

16 “(III) matching contributions de-
17 scribed in section 401(k)(3)(D)(ii)(I),
18 of former work site employees associated
19 with the terminated customer only in a di-
20 rect rollover described in section
21 401(a)(31), and

22 “(ii) after such 2-year period,
23 amounts in such plan in accordance with
24 plan terms.”.

1 tified professional employer organization’s financial
2 statements are presented fairly in accordance with
3 generally accepted accounting principles,

4 “(3) represents that it will satisfy such report-
5 ing obligations as may be imposed by the Secretary,

6 “(4) represents that it will maintain a qualified
7 plan (as defined in section 408(p)(2)(D)(ii)) or an
8 arrangement to provide simple retirement accounts
9 (within the meaning of section 408(p)) which benefit
10 at least 95 percent of all its work site employees,
11 and

12 “(5) agrees to notify the Secretary in writing of
13 any change that affects the continuing accuracy of
14 any representation or information which was pre-
15 viously made or provided.

16 “(c) SUSPENSION AND REVOCATION AUTHORITY.—
17 The Secretary may suspend or revoke a certification of
18 any person under subsection (b) for purposes of section
19 414(v) or 3511, or both, if Secretary determines that such
20 person is not satisfying the requirements or representa-
21 tions of subsection (b) or fails to satisfy applicable report-
22 ing, payment, or deposit requirements.

23 “(d) WORK SITE EMPLOYEE.—For purposes of this
24 title—

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

4 “(A) performs services for a customer pur-
5 suant to a contract which is between such cus-
6 tomer and the certified professional employer
7 organization and which meets the requirements
8 of paragraph (2), and

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

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

17 “(A) assume responsibility for payment of
18 wages to the individual, without regard to the
19 receipt or adequacy of payment from the cus-
20 tomer for such services,

21 “(B) assume responsibility for reporting,
22 withholding, and paying any applicable taxes
23 under subtitle C, with respect to the individ-
24 ual’s wages, without regard to the receipt or

1 adequacy of payment from the customer for
2 such services,

3 “(C) assume responsibility for any em-
4 ployee benefits which the service contract may
5 require the certified professional employer orga-
6 nization to provide, without regard to the re-
7 ceipt or adequacy of payment from the cus-
8 tomer for such services,

9 “(D) assume shared responsibility with the
10 customer for firing the individual and for re-
11 cruiting and hiring any new worker,

12 “(E) maintain employee records relating to
13 the individual, and

14 “(F) agree to be treated as a certified pro-
15 fessional employer organization for purposes of
16 sections 414(v) and 3511 with respect to such
17 individual.

18 “(3) WORK SITE COVERAGE REQUIREMENT.—

19 “(A) IN GENERAL.—The requirements of
20 this paragraph are met with respect to an indi-
21 vidual if at least 85 percent of the individuals
22 performing services for the customer at the
23 work site where such individual performs serv-
24 ices are subject to one or more contracts with

1 the certified professional employer organization
2 which meet the requirements of paragraph (2).

3 “(B) SPECIAL RULES.—For purposes of
4 subparagraph (A)—

5 “(i) WORK SITE.—The term ‘work
6 site’ means a physical location at which an
7 individual generally performs service for
8 the customer or, if there is no such loca-
9 tion, the location from which the individual
10 receives job assignments from the cus-
11 tomer.

12 “(ii) CONTIGUOUS LOCATIONS.—For
13 purposes of clause (i), work sites which are
14 contiguous locations shall be treated as a
15 single physical location.

16 “(iii) NONCONTIGUOUS LOCATIONS.—
17 For purposes of clause (i), noncontiguous
18 locations shall be treated as separate work
19 sites, except that each work site within a
20 reasonably proximate area must satisfy the
21 85 percent test under subparagraph (A)
22 for the individuals performing services for
23 the customer at such work site. In deter-
24 mining whether noncontiguous locations

1 are reasonably proximate, all facts and cir-
2 cumstances shall be taken into account.

3 “(iv) WORK SITES 35 MILES OR MORE
4 APART.—Any work site which is separated
5 from all other customer work sites by at
6 least 35 miles shall not be treated as rea-
7 sonably proximate under clause (iii).

8 “(v) DIFFERENT INDUSTRY.—A work
9 site shall not be treated as reasonably
10 proximate to another work site under
11 clause (iii) if the work site operates in a
12 different industry or industries or for a
13 different business purpose from such other
14 work site as determined by the Secretary.

15 “(e) EMPLOYER AGGREGATION RULES.—

16 “(1) IN GENERAL.—For purposes of sub-
17 sections (b)(4) and (d), all persons treated as a sin-
18 gle employer under subsections (b), (c), (m), or (o)
19 of section 414 shall be treated as one person.

20 “(2) QUALIFIED PLANS.—For purposes of sub-
21 section (b)(4)—

22 “(A) a qualified plan (as defined in section
23 408(p)(2)(D)(ii)) which is maintained by, or an
24 arrangement to provide a simple retirement ac-
25 count (within the meaning of section 408(p))

1 to, a customer with respect to a work site em-
2 ployee performing services for such customer
3 shall be treated as if it were maintained by the
4 applicant, and

5 “(B) work site employees who do not meet
6 the minimum age and service requirements of
7 section 410(a)(1)(A) (or who are excludable
8 from consideration under section 410(b)(3))
9 shall not be taken into account.

10 “(f) DETERMINATION OF EMPLOYMENT STATUS.—
11 Except to the extent necessary for purposes of sections
12 414(v) or 3511, nothing in this section shall be construed
13 to affect the determination of who is an employee or em-
14 ployer for purposes of this title.

15 “(g) REGULATIONS.—The Secretary shall prescribe
16 such regulations as may be necessary or appropriate to
17 carry out the purposes of this section and sections 414(v)
18 and 6503(k).”.

19 (d) CONFORMING AMENDMENT.—Section 6503 of
20 such Code is amended by redesignating subsection (k) as
21 subsection (l) and by inserting after subsection (j) the fol-
22 lowing new subsection:

23 “(k) EXTENSION IN CASE OF CUSTOMERS WITH LI-
24 ABILITY.—With respect to any liability of a customer
25 under section 3511(b), the period of limitation for the as-

1 assessment of any tax imposed under subtitle C shall not
2 expire before the date which is one year after the date
3 it would otherwise expire.”.

4 (e) CLERICAL AMENDMENTS.—

5 (1) The table of sections for chapter 25 of such
6 Code is amended by adding at the end the following
7 new item:

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

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

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

11 (f) REPORTING REQUIREMENTS AND OBLIGA-
12 TIONS.—The Secretary of the Treasury shall develop such
13 reporting and recordkeeping rules, regulations, and proce-
14 dures as the Secretary determines necessary or appro-
15 priate to ensure compliance with the amendments made
16 by this Act with respect to entities applying for certifi-
17 cation as certified professional employer organizations or
18 entities that have been so certified. Such rules shall re-
19 quire the certified professional employer organizations to
20 report to customers whether they have filed the attesta-
21 tions required by section 3511(b)(3) of the Internal Rev-
22 enue Code of 1986 (as added by this section). Such rules
23 shall, however, be designed in a manner which streamlines,
24 to the extent possible, the application of requirements of

1 such amendments, the exchange of information between
2 a certified professional employer organization and its cus-
3 tomers, and the reporting and record keeping obligations
4 of the certified professional employer organization.

5 (g) EFFECTIVE DATES.—

6 (1) IN GENERAL.—The amendments made by
7 this Act shall take effect on the later of—

8 (A) January 1, 2002, or

9 (B) the January 1st of the first calendar
10 year beginning more than 12 months after the
11 date of the enactment of this Act.

12 (2) CERTIFICATION PROGRAM.—The Secretary
13 of the Treasury shall establish the certification pro-
14 gram described in section 7705(b) of the Internal
15 Revenue Code of 1986 not later than 3 months be-
16 fore the effective date determined under paragraph
17 (1).

18 (3) TRANSITION ISSUES.—Subject to such con-
19 ditions as the Secretary of the Treasury may pre-
20 scribe, employee benefit plans in existence on the
21 date of the enactment of this Act shall not be treat-
22 ed as failing to meet the requirements of the Inter-
23 nal Revenue Code of 1986 merely because such
24 plans were maintained by an organization prior to
25 such organization becoming a certified professional

1 employer organization (as defined by section 7705 of
2 such Code (as added by section 3 of this Act)).

○