

109TH CONGRESS
2D SESSION

S. 2913

To amend the Internal Revenue Code of 1986 to clarify the employment tax treatment and reporting of wages paid by professional employer organizations.

IN THE SENATE OF THE UNITED STATES

MAY 19, 2006

Mr. GRASSLEY (for himself and Mr. BAUCUS) 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 organizations.

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 “Small Business Effi-
5 ciency Act of 2006”.

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 and other obligations, 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 remu-
 22 neration 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) SUCCESSOR EMPLOYER STATUS.—For purposes
 5 of sections 3121(a) and 3306(b)(1)—

6 “(1) a certified professional employer organiza-
 7 tion entering into a service contract with a customer
 8 with respect to a work site employee shall be treated
 9 as a successor employer and the customer shall be
 10 treated as a predecessor employer during the term
 11 of such service contract, and

12 “(2) a customer whose service contract with a
 13 certified professional employer organization is termi-
 14 nated with respect to a work site employee shall be
 15 treated as a successor employer and the certified
 16 professional employer organization shall be treated
 17 as a predecessor employer.

18 “(c) LIABILITY WITH RESPECT TO WORK SITE EM-
 19 PLOYEES.—

20 “(1) GENERAL RULES.—Solely for purposes of
 21 its liability for the taxes, and other obligations, im-
 22 posed by this subtitle—

23 “(A) the certified professional employer or-
 24 ganization shall be treated as the employer of
 25 any individual (other than a work site employee

1 or a person described in subsection (e)) who is
 2 performing services covered by a contract meet-
 3 ing the requirements of section 7705(e)(2), but
 4 only with respect to remuneration remitted by
 5 such organization to such individual, and

6 “(B) the exemptions and exclusions which
 7 would (but for subparagraph (A)) apply shall
 8 apply with respect to such taxes imposed on
 9 such remuneration.

10 “(d) SPECIAL RULE FOR RELATED PARTY.—Sub-
 11 section (a) shall not apply in the case of a customer which
 12 bears a relationship to a certified professional employer
 13 organization described in section 267(b) or 707(b). For
 14 purposes of the preceding sentence, such sections shall be
 15 applied by substituting ‘10 percent’ for ‘50 percent’.

16 “(e) SPECIAL RULE FOR CERTAIN INDIVIDUALS.—
 17 For purposes of the taxes imposed under this subtitle, an
 18 individual with net earnings from self-employment derived
 19 from the customer’s trade or business (including a partner
 20 in a partnership that is a customer) is not a work site
 21 employee with respect to remuneration paid by a certified
 22 professional employer organization.

23 “(f) REGULATIONS.—The Secretary shall prescribe
 24 such regulations as may be necessary or appropriate to
 25 carry out the purposes of this section.”.

1 (b) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
 2 ZATION DEFINED.—Chapter 79 of such Code (relating to
 3 definitions) is amended by adding at the end the following
 4 new section:

5 **“SEC. 7705. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-**
 6 **ZATIONS.**

7 “(a) IN GENERAL.—For purposes of this title, the
 8 term ‘certified professional employer organization’ means
 9 a person who applies to be treated as a certified profes-
 10 sional employer organization for purposes of section 3511
 11 and who has been certified by the Secretary as meeting
 12 the requirements of subsection (b).

13 “(b) CERTIFICATION.—A person meets the require-
 14 ments of this subsection if such person—

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

21 “(2) represents that it will satisfy the bond and
 22 independent financial review requirements of sub-
 23 sections (c) on an ongoing basis,

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

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

4 “(5) agrees to verify the continuing accuracy of
 5 representations and information which was pre-
 6 viously provided on such periodic basis as the Sec-
 7 retary may prescribe, and

8 “(6) agrees to notify the Secretary in writing of
 9 any change that materially affects the continuing ac-
 10 curacy of any representation or information which
 11 was previously made or provided.

12 “(c) REQUIREMENTS.—

13 “(1) IN GENERAL.—An organization meets the
 14 requirements of this paragraph if such organiza-
 15 tion—

16 “(A) meets the bond requirements of para-
 17 graph (2), and

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

20 “(2) BOND.—

21 “(A) IN GENERAL.—A certified profes-
 22 sional employer organization meets the require-
 23 ments of this paragraph if the organization has
 24 posted a bond for the payment of taxes under
 25 subtitle C (in a form acceptable to the Sec-

retary) 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 audit date, caused to be prepared and provided to the Secretary (in such manner as the Secretary may prescribe) an opinion of an independent certified public accountant as to whether the certified professional employer organization’s financial statements are presented fairly in accordance with generally accepted accounting principles, and

“(B) provides, not later than the last day of the second month beginning after the end of each calendar quarter, to the Secretary from an independent certified public accountant an assertion regarding Federal employment tax payments and an examination level attestation on such assertion.

Such assertion shall state that the organization has withheld and made deposits of all taxes imposed by chapters 21, 22, and 24 of the Internal Revenue Code in accordance with regulations imposed by the Secretary for such calendar quarter and such examination level attestation shall state that such assertion is fairly stated, in all material respects.

“(4) CONTROLLED GROUP RULES.—For purposes of the requirements of paragraphs (2) and (3), all professional employer organizations that are members of a controlled group within the meaning of sections 414(b) and (c) shall be treated as a single organization.

“(5) FAILURE TO FILE ASSERTION AND ATTESTATION.—If the certified professional employer organization fails to file the assertion and attestation required by paragraph (3) with respect to any calendar quarter, then the requirements of paragraph

1 (3) with respect to such failure shall be treated as
 2 not satisfied for the period beginning on the due
 3 date for such attestation.

4 “(6) AUDIT DATE.—For purposes of paragraph
 5 (3)(A), the audit date shall be six months after the
 6 completion of the organization’s fiscal year.

7 “(d) SUSPENSION AND REVOCATION AUTHORITY.—
 8 The Secretary may suspend or revoke a certification of
 9 any person under subsection (b) for purposes of section
 10 3511 if the Secretary determines that such person is not
 11 satisfying the representations or requirements of sub-
 12 sections (b) or (c), or fails to satisfy applicable accounting,
 13 reporting, payment, or deposit requirements.

14 “(e) WORK SITE EMPLOYEE.—For purposes of this
 15 title—

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

19 “(A) performs services for a customer pur-
 20 suant to a contract which is between such cus-
 21 tomer and the certified professional employer
 22 organization and which meets the requirements
 23 of paragraph (2), and

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

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

7 “(A) assume responsibility for payment of
8 wages to the individual, without regard to the
9 receipt or adequacy of payment from the cus-
10 tomer for such services,

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

17 “(C) assume responsibility for any em-
18 ployee benefits which the service contract may
19 require the certified professional employer orga-
20 nization to provide, without regard to the re-
21 ceipt or adequacy of payment from the cus-
22 tomer for such services,

23 “(D) assume responsibility for hiring, fir-
24 ing, and recruiting workers in addition to the

1 customer's responsibility for hiring, firing and
2 recruiting workers,

3 “(E) maintain employee records relating to
4 the individual, and

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

8 “(3) WORK SITE COVERAGE REQUIREMENT.—

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

18 “(f) DETERMINATION OF EMPLOYMENT STATUS.—

19 Except to the extent necessary for purposes of section
20 3511, nothing in this section shall be construed to affect
21 the determination of who is an employee or employer for
22 purposes of this title.

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

1 (c) CONFORMING AMENDMENTS.—

2 (1) Section 45B of such Code (relating to credit
3 for portion of employer social security taxes paid
4 with respect to employees with cash tips) is amended
5 by adding at the end the following new subsection:

6 “(e) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
7 ZATIONS.—For purposes of this section, in the case of a
8 certified professional employer organization which is treat-
9 ed under section 3511 as the employer of a work site em-
10 ployee who is a tipped employee—

11 “(1) the credit determined under this section
12 shall not apply to such organization but to the cus-
13 tomer of such organization with respect to which the
14 work site employee performs services, and

15 “(2) the customer shall take into account any
16 remuneration and taxes remitted by the certified
17 professional employer organization.”.

18 (2) Section 3302 of such Code is amended by
19 adding at the end the following new subsection:

20 “(h) TREATMENT OF CERTIFIED PROFESSIONAL EM-
21 PLOYER ORGANIZATIONS.—If a certified professional em-
22 ployer organization (as defined in section 7705), or a cli-
23 ent of such organization, makes a payment to the State’s
24 unemployment fund with respect to a work site employee,

1 such organization shall be eligible for the credits available
 2 under this section with respect to such payment.”.

3 (3) Section 3303(a) of such Code is amended—

4 (A) by striking the period at the end of
 5 paragraph (3) and inserting “; and” and by in-
 6 serting after paragraph (3) the following new
 7 paragraph:

8 “(4) a certified professional employer organiza-
 9 tion (as defined in section 7705) is permitted to col-
 10 lect and remit, in accordance with paragraphs (1),
 11 (2), and (3), contributions during the taxable year
 12 to the State unemployment fund with respect to a
 13 work site employee.”, and

14 (B) in the last sentence—

15 (i) by striking “paragraphs (1), (2),
 16 and (3)” and inserting “paragraphs (1),
 17 (2), (3), and (4)”, and

18 (ii) by striking “paragraph (1), (2), or
 19 (3)” and inserting “paragraph (1), (2),
 20 (3), or (4)”.

21 (4) Section 6053(c) of such Code (relating to
 22 reporting of tips) is amended by adding at the end
 23 the following new paragraph:

24 “(8) CERTIFIED PROFESSIONAL EMPLOYER OR-
 25 GANIZATIONS.—For purposes of any report required

1 by this section, in the case of a certified professional
 2 employer organization that is treated under section
 3 3511 as the employer of a work site employee, the
 4 customer with respect to whom a work site employee
 5 performs services shall be the employer for purposes
 6 of reporting under this section and the certified pro-
 7 fessional employer organization shall furnish to the
 8 customer any information necessary to complete
 9 such reporting no later than such time as the Sec-
 10 retary shall prescribe.”.

11 (d) CLERICAL AMENDMENTS.—

12 (1) The table of sections for chapter 25 of such
 13 Code is amended by adding at the end the following
 14 new item:

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

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

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

18 (e) REPORTING REQUIREMENTS AND OBLIGA-
 19 TIONS.—The Secretary of the Treasury shall develop such
 20 reporting and recordkeeping rules, regulations, and proce-
 21 dures as the Secretary determines necessary or appro-
 22 priate to ensure compliance with the amendments made
 23 by this Act with respect to entities applying for certifi-
 24 cation as certified professional employer organizations or

1 entities that have been so certified. Such rules shall be
 2 designed in a manner which streamlines, to the extent pos-
 3 sible, the application of requirements of such amendments,
 4 the exchange of information between a certified profes-
 5 sional employer organization and its customers, and the
 6 reporting and recordkeeping obligations of the certified
 7 professional employer organization.

8 (f) USER FEES.—Subsection (b) of section 7528 of
 9 such Code (relating to Internal Revenue Service user fees)
 10 is amended by adding at the end the following new para-
 11 graph:

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

17 (g) EFFECTIVE DATES.—

18 (1) IN GENERAL.—The amendments made by
 19 this Act shall take effect on the January 1st of the
 20 first calendar year beginning more than 12 months
 21 after the date of the enactment of this Act.

22 (2) CERTIFICATION PROGRAM.—The Secretary
 23 of the Treasury shall establish the certification pro-
 24 gram described in section 7705(b) of the Internal
 25 Revenue Code of 1986 not later than 6 months be-

- 1 fore the effective date determined under paragraph
- 2 (1).

○