

113TH CONGRESS
1ST SESSION

S. 479

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

IN THE SENATE OF THE UNITED STATES

MARCH 6, 2013

Mr. GRASSLEY (for himself, Mr. NELSON, Mr. PORTMAN, and Mr. PRYOR) 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, 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. SHORT TITLE.**

4 This Act may be cited as the “Small Business Effi-
5 ciency Act”.

1 **SEC. 2. CERTIFIED PROFESSIONAL EMPLOYER ORGANIZA-**
 2 **TIONS.**

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

6 **“SEC. 3511. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-**
 7 **ZATIONS.**

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

10 “(1) a certified professional employer organiza-
 11 tion shall be treated as the employer (and no other
 12 person shall be treated as the employer) of any work
 13 site employee performing services for any customer
 14 of such organization, but only with respect to remun-
 15 eration remitted by such organization to such work
 16 site employee, and

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

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

23 “(1) a certified professional employer organiza-
 24 tion entering into a service contract with a customer
 25 with respect to a work site employee shall be treated
 26 as a successor employer and the customer shall be

1 treated as a predecessor employer during the term
2 of such service contract, and

3 “(2) a customer whose service contract with a
4 certified professional employer organization is termi-
5 nated with respect to a work site employee shall be
6 treated as a successor employer and the certified
7 professional employer organization shall be treated
8 as a predecessor employer.

9 “(c) LIABILITY OF CERTIFIED PROFESSIONAL EM-
10 PLOYER ORGANIZATION.—Solely for purposes of its liabil-
11 ity for the taxes, and other obligations, imposed by this
12 subtitle—

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

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

25 “(d) TREATMENT OF CREDITS.—

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

3 “(A) such credit with respect to a work
4 site employee performing services for the cus-
5 tomer applies to the customer, not the certified
6 professional employer organization,

7 “(B) the customer, and not the certified
8 professional employer organization, shall take
9 into account wages and employment taxes—

10 “(i) paid by the certified professional
11 employer organization with respect to the
12 work site employee, and

13 “(ii) for which the certified profes-
14 sional employer organization receives pay-
15 ment from the customer, and

16 “(C) the certified professional employer or-
17 ganization shall furnish the customer with any
18 information necessary for the customer to claim
19 such credit.

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

22 “(A) section 41 (credit for increasing re-
23 search activity),

24 “(B) section 45A (Indian employment
25 credit),

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

4 “(D) section 45C (clinical testing expenses
5 for certain drugs for rare diseases or condi-
6 tions),

7 “(E) section 45R (employee health insur-
8 ance expenses of small employers),

9 “(F) section 51 (work opportunity credit),

10 “(G) section 51A (temporary incentives for
11 employing long-term family assistance recipi-
12 ents),

13 “(H) section 1396 (empowerment zone em-
14 ployment credit),

15 “(I) 1400(d) (DC Zone employment cred-
16 it),

17 “(J) Section 1400H (renewal community
18 employment credit), and

19 “(K) any other section as provided by the
20 Secretary.

21 “(e) SPECIAL RULE FOR RELATED PARTY.—This
22 section shall not apply in the case of a customer which
23 bears a relationship to a certified professional employer
24 organization described in section 267(b) or 707(b). For

1 purposes of the preceding sentence, such sections shall be
2 applied by substituting ‘10 percent’ for ‘50 percent’.

3 “(f) SPECIAL RULE FOR CERTAIN INDIVIDUALS.—
4 For purposes of the taxes imposed under this subtitle, an
5 individual with net earnings from self-employment derived
6 from the customer’s trade or business is not a work site
7 employee with respect to remuneration paid by a certified
8 professional employer organization.

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

12 (b) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
13 ZATION DEFINED.—Chapter 79 of the Internal Revenue
14 Code of 1986 is amended by adding at the end the fol-
15 lowing new section:

16 **“SEC. 7705. CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
17 ZATIONS DEFINED.**

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

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

1 “(1) demonstrates that such person (and any
2 owner, officer, and such other persons as may be
3 specified in regulations) meets such requirements as
4 the Secretary shall establish with respect to tax sta-
5 tus, background, experience, business location, and
6 annual financial audits,

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

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

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

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

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

22 “(c) BOND AND INDEPENDENT FINANCIAL REVIEW
23 REQUIREMENTS.—

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

4 “(A) meets the bond requirements of para-
5 graph (2), and

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

8 “(2) BOND.—

9 “(A) IN GENERAL.—A certified profes-
10 sional employer organization meets the require-
11 ments of this paragraph if the organization has
12 posted a bond for the payment of taxes under
13 subtitle C (in a form acceptable to the Sec-
14 retary) in an amount at least equal to the
15 amount specified in subparagraph (B).

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

20 “(i) 5 percent of the organization’s li-
21 ability under section 3511 for taxes im-
22 posed by subtitle C during the preceding
23 calendar year (but not to exceed
24 \$1,000,000), or

25 “(ii) \$50,000.

1 “(3) INDEPENDENT FINANCIAL REVIEW RE-
2 QUIREMENTS.—A certified professional employer or-
3 ganization meets the requirements of this paragraph
4 if such organization—

5 “(A) has, as of the most recent review
6 date, caused to be prepared and provided to the
7 Secretary (in such manner as the Secretary
8 may prescribe) an opinion of an independent
9 certified public accountant that the certified
10 professional employer organization’s financial
11 statements are presented fairly in accordance
12 with generally accepted accounting principles,
13 and

14 “(B) provides, not later than the last day
15 of the second month beginning after the end of
16 each calendar quarter, to the Secretary from an
17 independent certified public accountant an as-
18 sertion regarding Federal employment tax pay-
19 ments and an examination level attestation on
20 such assertion.

21 Such assertion shall state that the organization has
22 withheld and made deposits of all taxes imposed by
23 chapters 21, 22, and 24 of the Internal Revenue
24 Code in accordance with regulations imposed by the
25 Secretary for such calendar quarter and such exam-

1 ination level attestation shall state that such asser-
2 tion is fairly stated, in all material respects.

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

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

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

20 “(d) SUSPENSION AND REVOCATION AUTHORITY.—
21 The Secretary may suspend or revoke a certification of
22 any person under subsection (b) for purposes of section
23 3511 if the Secretary determines that such person is not
24 satisfying the representations or requirements of sub-

1 sections (b) or (c), or fails to satisfy applicable accounting,
2 reporting, payment, or deposit requirements.

3 “(e) WORK SITE EMPLOYEE.—For purposes of this
4 title—

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

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

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

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

21 “(A) assume responsibility for payment of
22 wages to such individual, without regard to the
23 receipt or adequacy of payment from the cus-
24 tomer for such services,

1 “(B) assume responsibility for reporting,
2 withholding, and paying any applicable taxes
3 under subtitle C, with respect to such individ-
4 ual’s wages, without regard to the receipt or
5 adequacy of payment from the customer for
6 such services,

7 “(C) assume responsibility for any em-
8 ployee benefits which the service contract may
9 require the organization to provide, without re-
10 gard to the receipt or adequacy of payment
11 from the customer for such services,

12 “(D) assume responsibility for hiring, fir-
13 ing, and recruiting workers in addition to the
14 customer’s responsibility for hiring, firing and
15 recruiting workers,

16 “(E) maintain employee records relating to
17 such individual, and

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

21 “(3) WORK SITE COVERAGE REQUIREMENT.—

22 The requirements of this paragraph are met with re-
23 spect to an individual if at least 85 percent of the
24 individuals performing services for the customer at
25 the work site where such individual performs serv-

1 ices are subject to 1 or more contracts with the cer-
2 tified professional employer organization which meet
3 the requirements of paragraph (2) (but not taking
4 into account those individuals who are excluded em-
5 ployees within the meaning of section 414(q)(5)).

6 “(f) DETERMINATION OF EMPLOYMENT STATUS.—
7 Except to the extent necessary for purposes of section
8 3511, nothing in this section shall be construed to affect
9 the determination of who is an employee or employer for
10 purposes of this title.

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

14 (c) CONFORMING AMENDMENTS.—

15 (1) Section 3302 of the Internal Revenue Code
16 of 1986 is amended by adding at the end the fol-
17 lowing new subsection:

18 “(h) TREATMENT OF CERTIFIED PROFESSIONAL EM-
19 PLOYER ORGANIZATIONS.—If a certified professional em-
20 ployer organization (as defined in section 7705), or a cus-
21 tomer of such organization, makes a contribution to the
22 State’s unemployment fund with respect to a work site
23 employee, such organization shall be eligible for the credits
24 available under this section with respect to such contribu-
25 tion.”.

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

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

6 “(4) if the taxpayer is a certified professional
7 employer organization (as defined in section 7705)
8 that is treated as the employer under section 3511,
9 such certified professional employer organization is
10 permitted to collect and remit, in accordance with
11 paragraphs (1), (2), and (3), contributions during
12 the taxable year to the State unemployment fund
13 with respect to a 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 (3) Section 6053(c) of such Code is amended by
22 adding at the end the following new paragraph:

23 “(8) CERTIFIED PROFESSIONAL EMPLOYER OR-
24 GANIZATIONS.—For purposes of any report required
25 by this subsection, in the case of a certified profes-

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

10 (d) CLERICAL AMENDMENTS.—

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

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

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

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

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

1 entities that have been so certified. Such rules shall in-
2 clude—

3 (1) notification of the Secretary in the case of
4 the commencement or termination of a service con-
5 tract described in section 7705(e)(2) of the Internal
6 Revenue Code of 1986 between such a person and
7 a customer, and the employer identification number
8 of such customer, and

9 (2) such other information as the Secretary de-
10 termines is essential to promote compliance with re-
11 spect to the credits identified in section 3511(d) of
12 such Code, and

13 shall be designed in a manner which streamlines, to the
14 extent possible, the application of requirements of such
15 amendments, the exchange of information between a cer-
16 tified professional employer organization and its cus-
17 tomers, and the reporting and recordkeeping obligations
18 of the certified professional employer organization.

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

22 “(4) CERTIFIED PROFESSIONAL EMPLOYER OR-
23 GANIZATIONS.—The annual fee charged under the
24 program in connection with the ongoing certification

1 by the Secretary of a professional employer organi-
2 zation under section 7705 shall not exceed \$1,000.”.

3 (g) EFFECTIVE DATES.—

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

9 (2) CERTIFICATION PROGRAM.—The Secretary
10 of the Treasury shall establish the certification pro-
11 gram described in section 7705(b) of the Internal
12 Revenue Code of 1986, as added by subsection (b),
13 not later than 6 months before the effective date de-
14 termined under paragraph (1).

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

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

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

○