

110TH CONGRESS
2^D SESSION

H. R. 7103

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 HOUSE OF REPRESENTATIVES

SEPTEMBER 25, 2008

Mr. POMEROY (for himself and Mr. BRADY of Texas) 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 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 2008”.

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) 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 imposed by this subtitle—

22 “(A) the certified professional employer or-
23 ganization shall be treated as the employer of
24 any individual (other than a work site employee
25 or a person described in subsection (e)) who is

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

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

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

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

22 “(f) REGULATIONS.—The Secretary shall prescribe
23 such regulations as may be necessary or appropriate to
24 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 sub-
17 paragraph (2), and

18 “(B) meets the independent financial re-
19 view requirements of subparagraph (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-

1 retary) that is in an amount at least equal to
2 the amount specified in subparagraph (B).

3 “(B) AMOUNT OF BOND.—

4 “(i) IN GENERAL.—For the period
5 April 1 of any calendar year through
6 March 31 of the following calendar year,
7 the amount of the bond required is equal
8 to the greater of—

9 “(I) 5 percent of the organiza-
10 tion’s liability under section 3511 for
11 taxes imposed by subtitle C during the
12 preceding calendar year (but not to
13 exceed \$1,000,000), or

14 “(II) \$50,000.

15 “(ii) SPECIAL RULE FOR NEWLY CRE-
16 ATED PROFESSIONAL EMPLOYER ORGANI-
17 ZATIONS.—During the first three full cal-
18 endar years that an organization is in ex-
19 istence, subclause (I) of clause (i) shall not
20 apply. For this purpose—

21 “(I) under rules provided by the
22 Secretary, an organization is treated
23 as in existence as of the date that
24 such organization began providing
25 services to any client which were com-

1 parable to the services being provided
2 with respect to work site employees,
3 regardless of whether such date oc-
4 curred before or after the organization
5 is certified under subsection (b), and

6 “(II) an organization with liabil-
7 ity under section 3511 for taxes im-
8 posed by subtitle C during the pre-
9 ceding calendar year in excess of
10 \$5,000,000 shall no longer be de-
11 scribed in this clause (ii) as of April
12 1 of the year following such calendar
13 year.

14 “(3) INDEPENDENT FINANCIAL REVIEW RE-
15 QUIREMENTS.—A certified professional employer or-
16 ganization meets the requirements of this subpara-
17 graph if such organization—

18 “(A) has, as of the most recent audit date,
19 caused to be prepared and provided to the Sec-
20 retary (in such manner as the Secretary may
21 prescribe) an opinion of an independent cer-
22 tified public accountant as to whether the cer-
23 tified professional employer organization’s fi-
24 nancial statements are presented fairly in ac-

1 cordance with generally accepted accounting
2 principles, and

3 “(B) provides to the Secretary an assertion
4 regarding Federal employment tax payments
5 and an examination level attestation on such
6 assertion from an independent certified public
7 accountant not later than the last day of the
8 second month beginning after the end of each
9 calendar quarter. Such assertion shall state
10 that the organization has withheld and made
11 deposits of all taxes imposed by chapters 21,
12 22, and 24 of the Internal Revenue Code in ac-
13 cordance with regulations imposed by the Sec-
14 retary for such calendar quarter and such ex-
15 amination level attestation shall state that such
16 assertion is fairly stated, in all material re-
17 spects.

18 “(4) SPECIAL RULE FOR SMALL CERTIFIED
19 PROFESSIONAL EMPLOYER ORGANIZATIONS.—The
20 requirements of paragraph (3)(A) shall not apply
21 with respect to a fiscal year of an organization if
22 such organization’s liability under section 3511 for
23 taxes imposed by subtitle C during the calendar year
24 ending on (or concurrent with) the end of the fiscal
25 year were \$5,000,000 or less.

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

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

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

18 “(d) SUSPENSION AND REVOCATION AUTHORITY.—
19 The Secretary may suspend or revoke a certification of
20 any person under subsection (b) for purposes of section
21 3511 if the Secretary determines that such person is not
22 satisfying the representations or requirements of sub-
23 sections (b) or (c), or fails to satisfy applicable accounting,
24 reporting, payment, or deposit requirements.

1 “(e) WORK SITE EMPLOYEE.—For purposes of this
2 title—

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

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

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

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

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

23 “(B) assume responsibility for reporting,
24 withholding, and paying any applicable taxes
25 under subtitle C, with respect to the individ-

1 ual’s wages, without regard to the receipt or
2 adequacy of payment from the customer for
3 such services,

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

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

14 “(E) maintain employee records relating to
15 the individual, and

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

19 “(3) WORK SITE COVERAGE REQUIREMENT.—
20 The requirements of this paragraph are met with re-
21 spect to an individual if at least 85 percent of the
22 individuals performing services for the customer at
23 the work site where such individual performs serv-
24 ices are subject to 1 or more contracts with the cer-
25 tified professional employer organization which meet

1 the requirements of paragraph (2) (but not taking
2 into account those individuals who are excluded em-
3 ployees within the meaning of section 414(q)(5)).

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

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 (c) CONFORMING AMENDMENTS.—

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

17 “(e) CERTIFIED PROFESSIONAL EMPLOYER ORGANI-
18 ZATIONS.—For purposes of this section, in the case of a
19 certified professional employer organization that is treat-
20 ed, under section 3511, as the employer of a work site
21 employee who is a tipped employee, the credit determined
22 under this section does not apply to such organization, but
23 does apply to the customer of such organization with re-
24 spect to which the work site employee performs services.
25 For this purpose the customer shall take into account any

1 remuneration and taxes remitted by the certified profes-
2 sional employer organization.”.

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

5 “(h) TREATMENT OF CERTIFIED PROFESSIONAL EM-
6 PLOYER ORGANIZATIONS.—If a certified professional em-
7 ployer organization (as defined in section 7705) (or a cli-
8 ent of such organization) makes a payment to the State’s
9 unemployment fund with respect to a work site employee,
10 such organization shall be eligible for the credits available
11 under this section with respect to such payment.”.

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

13 (A) by striking the period at the end of
14 paragraph (3) and inserting “; and” and by in-
15 serting after paragraph (3) the following new
16 paragraph:

17 “(4) a certified professional employer organiza-
18 tion (as defined in section 7705) is permitted to col-
19 lect and remit, in accordance with paragraphs (1),
20 (2), and (3), contributions during the taxable year
21 to the State unemployment fund with respect to a
22 work site employee.”, and

23 (B) in the last sentence—

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

4 (ii) by striking “paragraph (1), (2), or
5 (3)” and inserting “paragraph (1), (2), (3), or
6 (4)”.

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

10 “(8) CERTIFIED PROFESSIONAL EMPLOYER OR-
11 GANIZATIONS.—For purposes of any report required
12 by this section, in the case of a certified professional
13 employer organization that is treated, under section
14 3511, as the employer of a work site employee, the
15 customer with respect to whom a work site employee
16 performs services shall be the employer for purposes
17 of reporting under this section and the certified pro-
18 fessional employer organization shall furnish to the
19 customer any information necessary to complete
20 such reporting no later than such time as the Sec-
21 retary shall prescribe.”.

22 (d) CLERICAL AMENDMENTS.—

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

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

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

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

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

18 (f) USER FEES.—Subsection (b) of section 7528 of
19 such Code (relating to Internal Revenue Service user fees)
20 is amended by adding at the end thereof the following new
21 paragraph:

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

1 of a professional employer organization under sec-
2 tion 7705 shall not exceed \$500.”.

3 (g) EFFECTIVE DATES.—

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

8 (2) CERTIFICATION PROGRAM.—The Secretary
9 of the Treasury shall establish the certification pro-
10 gram described in section 7705(b) of the Internal
11 Revenue Code of 1986 not later than 6 months be-
12 fore the effective date determined under paragraph
13 (1).

○