

111<sup>TH</sup> CONGRESS  
1<sup>ST</sup> SESSION

# H. R. 2447

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

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## IN THE HOUSE OF REPRESENTATIVES

MAY 14, 2009

Mr. POMEROY (for himself and Mr. BRADY of Texas) introduced the following bill; which was referred to the Committee on Ways and Means

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## 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 2009”.

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).

○