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Fred Bruyns,
Policy analyst/rules coordinator
Oregon Department of Consumer and Business Services
Workers' Compensation Division
350 Winter Street NE
Salem, OR 97309-0405

RE: Oregon Definition of "Worker Leasing"

Dear Mr. Bruyns,

These comments are submitted on behalf of the American Staffing Association for inclusion in the record of the September 22, meeting of the Rulemaking Advisory Committee to consider proposed changes to Chapter 436, division 050 of the Oregon Workers' Compensation Division Rules pertaining to working leasing. ASA represents the U.S. temporary and contract staffing industry, which employs and assigns to clients more than three million employees each week—almost over 15 million annually—in virtually every work category.

Summary of Comments and Recommendations

- *Definitions of working leasing company and temporary service provider:* The Oregon working leasing statute was first adopted in 1993 and the definitions of the persons and services affected by the law are out of date. We propose that "worker leasing company" be redefined as "professional employer organization" (PEO) and that the definition include the salient elements discussed below that characterize PEO services in today's economy. Similarly, we propose that the definition of "temporary service provider" be updated to reflect the key differences between those providers and PEOs. If the Division considers such changes as beyond its rulemaking authority, we respectfully request that the Division work with ASA and the National Association of Professional Employer Organizations (NAPEO) to craft appropriate legislation.

- *Proposed changes in the current rules:* ASA's comments regarding the Division's proposed changes in the current worker leasing rules focus solely on the requirement that temporary service providers maintain "contemporaneous documentation" of their employees' temporary status. The Division proposes requiring such documentation only in the case of assignments of 30 days or more. As discussed herein, we have fundamental questions regarding both the legal basis and the policy rationale for requiring documentation of individual workers' job status and believe that our proposed definitional changes would obviate the need for such a requirement. Until such changes can be made, however, we support the proposal to limit the requirement to longer-term assignments—but urge that the threshold period be at least 90 days.

The Definitions of Worker Leasing and Temporary Service Provider Should Be Updated

Section 656.850(1)(a) of the Oregon Statutes currently defines "worker leasing company" as "a person who provides workers, by contract and for a fee, to work for a client but does not include a person who provides workers to a client on a temporary basis." The worker leasing definition is so broad—without any reference to the unique operating characteristics of leasing—that it literally could apply to any service business in the economy despite having nothing to do with the business at which the law originally was aimed. Similarly, the current definition of exempt "temporary service provider" omits key operating factors that distinguish those providers from leasing companies. This lack of specificity and clarity as to the services being regulated and those

that are exempt has resulted in complexity and confusion that has created an unnecessary administrative burden not only for the businesses affected by the rules but also the regulators seeking to enforce them.

"Worker Leasing Company" Should be Renamed "Professional Employer Organization" and Key PEO Operating Characteristics Should be included in the Definition

It is undisputed that the business the Oregon legislature had in mind when it enacted the worker leasing law in 1993 was the business known in its earliest form as "employee (or staff) leasing." Today, the companies engaged in that business are universally called, at least by the companies themselves, "Professional Employer Organizations" (PEOs) and the services they provide are called professional employer services. Most states today have laws and rules specifically addressing that business, although many of the earlier adopted laws still use the term employee leasing ("worker leasing" appears to be unique to Oregon). All such laws, including guidelines issued by the National Association of Insurance Commissioners and the National Council on Compensation Insurance, exclude temporary help services either expressly or in practice.

To update the 1993 law, we propose that Oregon adopt "professional employer organization" to refer to what is currently called "worker leasing." The definition of PEO should include the key operational elements unique to those services which distinguish them from temporary services. Any definition of PEO should incorporate two key concepts:

Source of the workers: Unlike temporary services firms, PEOs do not supply labor to their clients. Rather, they provide services and benefits to the clients' *existing* workforce. The Department of Consumer and Business Services notes this on its website stating that, in leasing arrangements, the client "takes its chosen employees to the leasing company, which hires them and then leases them back to the employer." NAPEO in published FAQs uses similar language to distinguish between PEOs and temporary services, stating that PEOs "co-employ existing permanent workforces" at their clients' worksites. The workers' origination with the client is an essential component of any PEO definition reflecting, as it does, regulators' early concern with the use of leasing arrangements by businesses seeking to avoid the cost of unfavorable workers' compensation experience by shifting their payroll to leasing firms. See, e.g., the model PEO definition set forth in the NAIC's Guidelines for Regulations and Legislation on Workers' Compensation Coverage for Professional Employer Organization Arrangements (2010).

Proportion of client employees covered under the arrangement: At the Sept. 22 Advisory Committee meeting, PEOs noted that to maximize their benefit offerings they typically assume employer responsibility for *all or most* of the client's employees (including owners and management). Such a "percentage of workforce" test is reflected in NAPEO's model licensing law and in most state PEO laws. Utah, for example, defines a PEO service as one in which "all or a majority of the employees who provide a service to a client, or a division or work unit of a client, are covered employees" Utah Code §31A-40-102(18). Along with the "source of worker" concept, the NAIC's PEO definition provides that the workers comprise "all or a significant number" of the client's workforce, again reflecting historical concerns with payroll shifting.

Defining PEO services in terms of these two characteristics would address a major compliance issue for temporary service providers under the current rules, which have been construed in such a way as to render the exclusion for those providers virtually meaningless. The rules require that, to avoid classification as a worker leasing company, temporary service providers must provide "contemporary documentation" that every one of its employees is working on a "temporary basis." If even one worker is deemed non-temporary, the firm's entire business is subject to licensure as a worker leasing company.

Requiring temporary staffing firms to provide documentation on hundreds or even thousands of individual workers to prove that they are temporary is unnecessary as a policy matter and places an enormous burden on temporary service providers and on the Division's compliance resources. It also is unsupported by the statute in

our view. ORS §656.850(1)(a) states that a "worker leasing company" does not include a person who provides temporary workers. It does not say that *every one* of the workers must be temporary, it simply says "provides workers." Thus, on its face, a firm that provides even a few workers on a temporary basis arguably is not a worker leasing company. Since the law does not mandate that every worker be temporary, requiring that staffing firms document the temporary status of every worker to avoid leasing status rests on questionable legal ground.

These issues can be addressed, as proposed above, by defining PEOs based on the source of the workers and the percentage the workers make up of the client's workforce. A firm meeting the source and percentage tests would be a PEO. Whether it also had temporary workers would be irrelevant. Likewise, as explained below, a temporary staffing provider that sources its own workers, and whose workers make up a relatively small percentage of the client's workforce, should not be considered a PEO even if it has longer term employees or employees whose positions do not fit the examples of "special situations" set forth in the rules.

The Most Important Distinction Between PEOs and Temporary Service Providers Is How the Workers Are Sourced

Just as clarifying the definition of leasing would assist in identifying the firms that are subject to the law, so would it help to more clearly define the temporary service providers that are exempt. ORS §656.850(1)(c) defines a temporary service provider as a "person who provides workers, by contract and for a fee, to a client on a temporary basis." ORS §656.850(1)(b) defines "temporary basis" as:

> …providing workers to a client for special situations *such as* to cover employee absences, employee leaves, professional skill shortages, seasonal workloads and special assignments and projects with the expectation that the position or positions will be terminated upon completion of the special situation. Workers also are provided on a temporary basis if they are provided as probationary new hires with a reasonable expectation of transitioning to permanent employment with the client and the client uses a preestablished probationary period in its overall employment selection program (emphasis added).

Two things are essential to note in the definition of temporary basis: first, the words "such as" precede the examples of the "special situations" deemed to be temporary. Hence, the list is nonexclusive and the examples given are only illustrative. Second, there is no temporal limit on the duration of the work to be performed or the tenure of the individuals who perform the services; the only limitation (if it can be called that) is the "expectation" that the position will be terminated upon completion of the special situation—a subjective and open-ended concept that could include multi-year assignments.

Such factors are useful in generally distinguishing the *business* of PEOs and temporary service providers, but the tenure of individual workers or the nature or duration of their positions have no real relevance to the purposes of the special workers' compensation rules applicable to employee leasing/PEO services—i.e., to ensure that employees are covered and that the workplace risks associated with the work performed are properly reflected in the premiums paid by the employer(s) providing the coverage. Moreover, the fact that PEOs may have some temporary workers—or that temporary service providers may have workers who are longer-term, or whose job descriptions don't conform to the examples in the rules—is, or should be, irrelevant. As explained below, the PEO and temporary service businesses can more appropriately (and more easily) be distinguished by looking at more relevant and objective operating characteristics, without examining individual jobs and positions.

For both PEOs and temporary service providers, the most salient operational differences relate to (1) the source of the employees involved in the arrangement, and (2) the percentage those employees comprise of the client's work force. In those two respects, PEOs and temporary service providers are the converse of each other. Regarding the source of employees, staffing firms recruit, screen, their own employees from the general labor market and then assign them to clients, whereas PEO's assume responsibility for their client's *existing* workforce. Regarding the percentage the employees comprise of the workforce, PEOs generally assume responsibility for all or a majority of the client's workforce, whereas the employees supplied by temporary service providers usually

make up a relatively small portion of the workforce. Both factors are missing from the current definitions of PEO and temporary service provider and should be included.

Of the two factors, the source of the workers is, from a compliance standpoint, the most relevant in distinguishing between PEOs and temporary service providers in view of the historical concerns of regulators with workforce shifting under employee leasing/PEO arrangements. The NAIC guidelines previously cited address the "sourcing" factor in the case of PEOs by specifying that they assume employer responsibilities for the worksite employees of another business. In contrast, NAIC excludes from the PEO definition any temporary service provider that "recruits and hires its own employees…". Accordingly, it is especially important to include the "source of employees" factor in any new definitions of PEO and temporary service provider.

Proposed changes in the current worker leasing rules

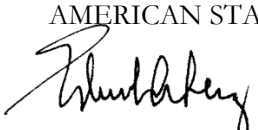
The Division proposes to change the requirement in OAR §436-050-0420 that temporary service providers maintain "contemporaneous documentation" indicating the "duration of the work to be performed and that the worker is provided for a special situation under ORS §656.850(1)(b)." The Division proposes to require such documentation only for assignments of 30 days or more. As explained above, we believe that documenting the tenure and job characteristics of individual workers is unnecessary, and that changing the definitions as proposed would address the key distinctions between PEOs and temporary service providers without the need for such documentation. Until such changes can be made, we support limiting the requirement to longer-term assignments, but strongly urge that the threshold period be longer than 30 days. Ninety (90) days would be more compatible with historical notions of short-term temporary work and would significantly reduce the regulatory burden on both staffing firms and the Division until more fundamental changes can be made.

Conclusion

Oregon should redefine worker leasing companies as professional employer organizations and clarify the definition of temporary service provider—in each case to include language addressing two key operating factors that distinguish those businesses: (1) the source of the workers, and (2) the percentage those employees comprise of the client's work force. Narrowing the definitions based on those factors would more clearly and objectively distinguish between what is intended to be regulated and what is not, making it easier for the affected businesses to understand and comply with the law and for the state to enforce it. Until such changes can be made, the American Staffing Association supports the current proposal to change the rules to require documentation of the tenure and nature of a workers' job only for longer-term assignments, which we urge should be at least 90 days.

Respectfully submitted,

AMERICAN STAFFING ASSOCIATION



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