

CHAPTER 247

LABOR AND INDUSTRY

SENATE BILL 08-114

BY SENATOR(S) Veiga, and Tochtrop;
also REPRESENTATIVE(S) Scanlan, Garza-Hicks, Jahn, and McGihon.

AN ACT

CONCERNING REQUIRED ACTS OF EMPLOYEE LEASING COMPANIES BY THE DEPARTMENT OF LABOR AND EMPLOYMENT, AND MAKING AN APPROPRIATION IN CONNECTION THEREWITH.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 8-70-114 (2) (a), (2) (b) (VII), (2) (b) (VIII), and (2) (e), Colorado Revised Statutes, are amended, and the said 8-70-114 (2) is further amended BY THE ADDITION OF A NEW PARAGRAPH, to read:

8-70-114. Employing unit - definitions - rules - employee leasing company certification fund. (2) (a) For purposes of this section:

(I) "COEMPLOYER" MEANS EITHER AN EMPLOYEE LEASING COMPANY OR A WORK-SITE EMPLOYER.

(II) "COEMPLOYMENT RELATIONSHIP" MEANS A RELATIONSHIP THAT IS INTENDED TO BE AN ONGOING RELATIONSHIP RATHER THAN A TEMPORARY OR PROJECT SPECIFIC ONE, WHEREIN THE RIGHTS, DUTIES, AND OBLIGATIONS OF AN EMPLOYER THAT ARISE OUT OF AN EMPLOYMENT RELATIONSHIP HAVE BEEN ALLOCATED BETWEEN COEMPLOYERS PURSUANT TO AN EMPLOYEE LEASING COMPANY CONTRACT AND THIS SECTION. IN A COEMPLOYMENT RELATIONSHIP:

(A) THE EMPLOYEE LEASING COMPANY IS ENTITLED TO ENFORCE ONLY SUCH EMPLOYER RIGHTS AND IS SUBJECT TO ONLY THOSE OBLIGATIONS SPECIFICALLY ALLOCATED TO THE EMPLOYEE LEASING COMPANY BY THE EMPLOYEE LEASING COMPANY CONTRACT AND THIS SECTION;

(B) THE WORK-SITE EMPLOYER MAY ENFORCE THOSE RIGHTS AND SHALL PROVIDE AND PERFORM THOSE EMPLOYER OBLIGATIONS ALLOCATED TO THE WORK-SITE

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

EMPLOYER BY THE EMPLOYEE LEASING COMPANY CONTRACT AND THIS SECTION;
AND

(C) THE WORK-SITE EMPLOYER MAY ENFORCE ANY RIGHT AND SHALL PERFORM ANY OBLIGATION OF AN EMPLOYER NOT SPECIFICALLY ALLOCATED TO THE EMPLOYEE LEASING COMPANY BY THE EMPLOYEE LEASING COMPANY CONTRACT OR THIS SECTION.

(III) (A) "COVERED EMPLOYEE" OR "WORK-SITE EMPLOYEE" MEANS AN INDIVIDUAL WHO IS IN AN EMPLOYMENT RELATIONSHIP WITH BOTH AN EMPLOYEE LEASING COMPANY AND A WORK-SITE EMPLOYER AND HAS RECEIVED WRITTEN NOTICE OF THE COEMPLOYMENT WITH THE EMPLOYEE LEASING COMPANY.

(B) THE PROVISIONS OF SUB-SUBPARAGRAPH (A) OF THIS SUBPARAGRAPH (III) RELATE SOLELY TO THE EMPLOYEE LEASING CONTRACT AND NOT TO ANY CONTRACT FOR WORKERS' COMPENSATION INSURANCE OR ENTITLEMENT TO WORKERS' COMPENSATION BENEFITS.

(IV) "DEPARTMENT" MEANS THE DEPARTMENT OF LABOR AND EMPLOYMENT.

(H) (V) "Employee leasing company" means any person, business, or other entity that provides services to a work-site employer, as defined in subparagraph (H) (VII) of this paragraph (a), pursuant to an employee leasing company contract, as defined in subparagraph (H) (VI) of this paragraph (a).

(H) (VI) "Employee leasing company contract" means any written staff leasing contract, extended employee staffing or supply contract, or other contract under which an employee leasing company procures or receives from a work-site employer specified coemployer responsibilities for specified employees, designating itself as employer of such employees, and retaining the right of direction and control of such employees with regard to those employer responsibilities, including the rights and responsibilities set forth in paragraph (b) of this subsection (2). An employee leasing company may have other responsibilities pursuant to an employee leasing company contract, including provision of professional guidance with regard to employment matters.

(H) (VII) "Work-site employer" means any person, business, or other entity that procures the services of an employee leasing company under an employee leasing company contract and otherwise retains direction and control of the employees specified in the contract regarding responsibilities not specified in the contract pertaining to the business of the work-site employer.

(b) Notwithstanding the provisions of subsection (1) of this section, an employee leasing company shall be considered an employing unit or the coemployer of a work-site employer's employees if, pursuant to an employee leasing company contract with the work-site employer, it has the following rights and responsibilities:

(VII) EACH EMPLOYEE LEASING COMPANY SHALL PAY WAGES AND COLLECT, REPORT, AND PAY ALL PAYROLL-RELATED TAXES FROM ITS OWN ACCOUNTS FOR ALL COVERED EMPLOYEES. EACH EMPLOYEE LEASING COMPANY SHALL PAY UNEMPLOYMENT COMPENSATION INSURANCE TAXES AND PROVIDE, MAINTAIN, AND

SECURE ALL RECORDS AND DOCUMENTS REQUIRED OF WORK-SITE EMPLOYERS UNDER THE UNEMPLOYMENT INSURANCE LAWS OF THIS STATE FOR COVERED EMPLOYEES. FOR UNEMPLOYMENT REPORTING PURPOSES, EACH EMPLOYEE LEASING COMPANY IS THE ONLY EMPLOYING UNIT FOR COVERED EMPLOYEES AND SHALL HAVE the responsibility for unemployment compensation insurance as required of an employer pursuant to the "Colorado Employment Security Act", articles 70 to 82 of this title.

(VIII) An employee leasing company, as the employing unit or coemployer, may aggregate all employees for the purpose of sponsoring and administering workers' compensation plans pursuant to article 44 of this title and fully insured health coverage plans, as defined in section 10-16-102 (22.5), C.R.S., employee pension benefit plans, and provision of benefits pursuant to such plans. As employing units or coemployers, employee leasing companies shall be entitled to sponsor fully insured employer plans and offer employee benefits to the full extent afforded employers by law. A health plan sponsored by an employee leasing company with an aggregate of more than fifty employees shall comply with all the provisions of Colorado law that apply to large employer health plans, including consumer and provider protections, mandated benefits, nondiscrimination and fair marketing rules, preexisting limitations, and other required health plan policy provisions, and the carrier underwriting the plan shall be responsible for assuring compliance with this requirement pursuant to section 10-16-214 (5), C.R.S. Notwithstanding any provision of this section to the contrary, any workers' compensation insurance carrier may issue an insurance policy that insures either the employee leasing company or the work-site employer as the employer pursuant to the "Workers' Compensation Act of Colorado", articles 40 to 47 of this title. ARTICLE 41 OF THIS TITLE SHALL APPLY TO BOTH THE EMPLOYEE LEASING COMPANY AND THE WORK-SITE EMPLOYER, REGARDLESS OF WHETHER THE POLICY IS ISSUED TO THE EMPLOYEE LEASING COMPANY OR THE WORK-SITE EMPLOYER. Notwithstanding any provision of this section to the contrary, any insurance carrier may issue an insurance policy that insures the employee leasing company as the employer pursuant to article 16 of title 10, C.R.S. An insurance carrier that issues an insurance policy to an employee leasing company shall be entitled to rely upon a copy of the certification filed by the employee leasing company with the department ~~of labor and employment~~ under paragraph (e) of this subsection (2), if such certification is currently valid, for the purpose of determining whether the leasing company is an "employer" under Colorado law.

(e) Each employee leasing company shall maintain and have open for inspection by the department ~~of labor and employment~~ a listing of its work-site employers and their collective employees and shall maintain the records and reports as required by the "Colorado Employment Security Act", as described in articles 70 to 82 of this title. Each employee leasing company shall annually certify with an independent opinion of counsel to the department that it is in compliance with the rights and responsibilities set forth in paragraph (b) of this subsection (2) and that it is offering to all clients in its service agreements those items required in paragraph (b) of this subsection (2). THE EXECUTIVE DIRECTOR OF THE DEPARTMENT SHALL PRESCRIBE FORMS AND PROMULGATE RULES TO PROMOTE THE EFFICIENT ADMINISTRATION OF THIS PARAGRAPH (e). The department ~~of labor and employment~~ may require employee leasing companies to submit documentation to show compliance with the provisions of paragraph (b) of this subsection (2) and may conduct any necessary

review to verify that the employee leasing company is an employing unit or coemployer under this section. EACH EMPLOYEE LEASING COMPANY SHALL FILE AN ANNUAL RENEWAL OF ITS CERTIFICATION ON OR BEFORE JUNE 30 OF EACH YEAR.

(g) (I) EACH EMPLOYEE LEASING COMPANY OPERATING WITHIN THIS STATE AS OF THE EFFECTIVE DATE OF THIS PARAGRAPH (g) SHALL COMPLETE ITS INITIAL CERTIFICATION NOT LATER THAN SIXTY DAYS AFTER THE EFFECTIVE DATE OF THIS PARAGRAPH (g). THE INITIAL CERTIFICATION SHALL BE VALID UNTIL THE END OF THE STATE'S FIRST FISCAL YEAR THAT IS MORE THAN ONE YEAR AFTER THE EFFECTIVE DATE OF THIS PARAGRAPH (g).

(II) AN EMPLOYEE LEASING COMPANY NOT OPERATING WITHIN THIS STATE AS OF THE EFFECTIVE DATE OF THIS PARAGRAPH (g) SHALL COMPLETE ITS INITIAL CERTIFICATION PRIOR TO COMMENCEMENT OF OPERATIONS WITHIN THIS STATE.

(III) EACH EMPLOYEE LEASING COMPANY SHALL ANNUALLY CERTIFY AND PROVIDE EVIDENCE TO THE DEPARTMENT THAT IT MEETS ONE OF THE FOLLOWING CRITERIA TO PROVIDE SECURITIZATION OF UNEMPLOYMENT TAXES:

(A) EXECUTE AND FILE A SURETY BOND OR DEPOSIT WITH THE DIVISION MONEY OR A LETTER OF CREDIT EQUIVALENT TO FIFTY PERCENT OF THE AVERAGE ANNUAL AMOUNT OF UNEMPLOYMENT TAX ASSESSED WITHIN THE PREVIOUS CALENDAR YEAR. FOR A NEW EMPLOYEE LEASING COMPANY, THE INITIAL BOND AMOUNT WILL BE THE STANDARD TAX RATE MULTIPLIED BY FIFTY PERCENT OF THE ESTIMATED PROJECTED TAXABLE PAYROLL FOR THE CURRENT CALENDAR YEAR AS ESTIMATED BY THE EMPLOYEE LEASING COMPANY.

(B) PROVIDE THE MOST RECENT INDEPENDENTLY AUDITED FINANCIAL STATEMENT PREPARED BY A CERTIFIED PUBLIC ACCOUNTANT PURSUANT TO GENERALLY ACCEPTED ACCOUNTING PRINCIPLES, WHICH STATEMENT MAY NOT BE OLDER THAN THIRTEEN MONTHS. THE AUDIT SHALL ALSO INCLUDE ITEMS THAT DEMONSTRATE AN ACCOUNTING WORKING CAPITAL OF NOT LESS THAN ONE HUNDRED THOUSAND DOLLARS. FOR THE PURPOSES OF THIS SUB-SUBPARAGRAPH (B), "WORKING CAPITAL" OF AN EMPLOYEE LEASING COMPANY MEANS THE EMPLOYEE LEASING COMPANY'S CURRENT ASSETS MINUS THE EMPLOYEE LEASING COMPANY'S CURRENT LIABILITIES AS DETERMINED BY GENERALLY ACCEPTED ACCOUNTING PRINCIPLES.

(C) PROVIDE SUFFICIENT EVIDENCE ON AN ANNUAL BASIS THAT IT HAS BEEN ACCREDITED BY A BONDED, INDEPENDENT, AND QUALIFIED ASSURANCE ORGANIZATION APPROVED BY THE DIRECTOR OF THE DIVISION THAT PROVIDES SATISFACTORY ASSURANCE OF COMPLIANCE ACCEPTABLE TO THE DEPARTMENT.

(IV) THE DEPARTMENT MAY, AT ITS DISCRETION, REDUCE OR WAIVE THE BONDING, MONEY, OR LETTER OF CREDIT REQUIREMENTS IN SUB-SUBPARAGRAPH (A) OF SUBPARAGRAPH (III) OF THIS PARAGRAPH (g). THIS WAIVER OR REDUCTION MAY BE REVIEWED AT ANY TIME, AND IN THE DEPARTMENT'S DISCRETION, IT MAY REQUIRE THE EMPLOYEE LEASING COMPANY TO RESUME COMPLIANCE WITH SUB-SUBPARAGRAPH (A) OF SUBPARAGRAPH (III) OF THIS PARAGRAPH (g) OR PROVIDE EVIDENCE OF COMPLIANCE WITH SUB-SUBPARAGRAPH (B) OR (C) OF SUBPARAGRAPH (III) OF THIS PARAGRAPH (g) IMMEDIATELY.

(V) AN EMPLOYEE LEASING COMPANY SHALL, WITHIN FIFTEEN DAYS FOLLOWING ANY DEDUCTION FROM A MONEY DEPOSIT OR SALE OF DEPOSITED SECURITIES UNDER THE PROVISIONS OF SUB-SUBPARAGRAPH (A) OF SUBPARAGRAPH (III) OF THIS PARAGRAPH (g), DEPOSIT SUFFICIENT ADDITIONAL MONEYS OR SECURITIES TO MAKE WHOLE THE EMPLOYEE LEASING COMPANY'S DEPOSIT AT THE PRIOR LEVEL. ANY CASH REMAINING FROM THE DEPARTMENT'S SALE OF SUCH SECURITIES SHALL BE A PART OF THE EMPLOYEE LEASING COMPANY'S ESCROW ACCOUNT. THE DEPARTMENT MAY, AT ANY TIME, REVIEW THE ADEQUACY OF THE DEPOSIT MADE BY ANY EMPLOYEE LEASING COMPANY. IF, AS A RESULT OF SUCH REVIEW, THE DEPARTMENT DETERMINES THAT AN ADJUSTMENT IS NECESSARY, IT SHALL REQUIRE THE EMPLOYEE LEASING COMPANY TO MAKE AN ADDITIONAL DEPOSIT WITHIN THIRTY DAYS AFTER RECEIPT OF WRITTEN NOTICE OF THE DEPARTMENT'S DETERMINATION OR SHALL RETURN TO THE EMPLOYEE LEASING COMPANY SUCH PORTION OF THE DEPOSIT AS THE DEPARTMENT NO LONGER CONSIDERS NECESSARY, WHICHEVER ACTION IS APPROPRIATE.

(VI) UPON FILING AN ANNUAL CERTIFICATION UNDER THIS SECTION, AN EMPLOYEE LEASING COMPANY SHALL PAY A FEE, AS DETERMINED BY RULE OF THE DEPARTMENT, NOT TO EXCEED FIVE HUNDRED DOLLARS. FEES COLLECTED PURSUANT TO THIS SECTION SHALL BE TRANSMITTED TO THE STATE TREASURER, WHO SHALL CREDIT THE SAME TO THE EMPLOYEE LEASING COMPANY CERTIFICATION FUND, REFERRED TO IN THIS SECTION AS THE "FUND", WHICH IS HEREBY CREATED IN THE STATE TREASURY. MONEYS IN THE FUND SHALL BE SUBJECT TO ANNUAL APPROPRIATION BY THE GENERAL ASSEMBLY FOR IMPLEMENTATION OF THIS SECTION. THE MONEYS IN THE FUND AND INTEREST EARNED ON THE MONEYS IN THE FUND SHALL NOT REVERT TO THE GENERAL FUND OR BE TRANSFERRED TO ANY OTHER FUND AND SHALL BE EXEMPT FROM SECTION 24-75-402, C.R.S. NO FEE CHARGED PURSUANT TO THIS SECTION SHALL EXCEED THE AMOUNT REASONABLY NECESSARY FOR THE ADMINISTRATION OF THIS SECTION.

(VII) THE DEPARTMENT SHALL MAINTAIN A LIST OF EMPLOYEE LEASING COMPANIES THAT SUBMIT CERTIFICATIONS REQUIRED UNDER PARAGRAPH (e) OF THIS SUBSECTION (2) THAT IS READILY AVAILABLE TO THE PUBLIC BY ELECTRONIC OR OTHER MEANS.

(VIII) ALL RECORDS, REPORTS, AND OTHER INFORMATION OBTAINED FROM AN EMPLOYEE LEASING COMPANY UNDER THIS SECTION, EXCEPT TO THE EXTENT NECESSARY FOR THE PROPER ADMINISTRATION OF THIS SECTION BY THE DEPARTMENT, SHALL BE HELD CONFIDENTIAL AND SHALL NOT BE PUBLISHED OR OPEN TO PUBLIC INSPECTION OTHER THAN TO PUBLIC EMPLOYEES IN THE PERFORMANCE OF THEIR PUBLIC DUTIES, PURSUANT TO PROVISIONS GOVERNING RECORDS AND REPORTS IN THIS TITLE.

SECTION 2. 80-70-114, Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS to read:

8-70-114. Employing unit - definitions - rules - employee leasing company certification fund. (7) Employment arrangements. NOTHING IN THIS SECTION OR IN ANY EMPLOYEE LEASING COMPANY CONTRACT SHALL:

(a) DIMINISH, ABOLISH, OR REMOVE RIGHTS OF COVERED EMPLOYEES OF A

WORK-SITE EMPLOYER OR OBLIGATIONS OF SUCH WORK-SITE EMPLOYER TO A COVERED EMPLOYEE EXISTING PRIOR TO THE EFFECTIVE DATE OF THE EMPLOYEE LEASING COMPANY CONTRACT;

(b) AFFECT, MODIFY, OR AMEND ANY CONTRACTUAL RELATIONSHIP OR RESTRICTIVE COVENANT BETWEEN A COVERED EMPLOYEE AND ANY WORK-SITE EMPLOYER IN EFFECT AT THE TIME AN EMPLOYEE LEASING COMPANY CONTRACT BECOMES EFFECTIVE. NOR SHALL IT PROHIBIT OR AMEND ANY CONTRACTUAL RELATIONSHIP OR RESTRICTIVE COVENANT THAT IS ENTERED INTO SUBSEQUENTLY BETWEEN A WORK-SITE EMPLOYER AND A COVERED EMPLOYEE. AN EMPLOYEE LEASING COMPANY SHALL HAVE NO RESPONSIBILITY OR LIABILITY IN CONNECTION WITH, OR ARISING OUT OF, ANY SUCH EXISTING OR NEW CONTRACTUAL RELATIONSHIP OR RESTRICTIVE COVENANT UNLESS THE EMPLOYEE LEASING COMPANY HAS SPECIFICALLY AGREED OTHERWISE IN WRITING.

(c) CREATE ANY NEW OR ADDITIONAL ENFORCEABLE RIGHT OF A COVERED EMPLOYEE AGAINST AN EMPLOYEE LEASING COMPANY THAT IS NOT SPECIFICALLY PROVIDED BY THE EMPLOYEE LEASING COMPANY CONTRACT OR THIS SECTION.

(8) Prohibited acts and enforcement. (a) A PERSON SHALL NOT OFFER OR PROVIDE EMPLOYEE LEASING COMPANY SERVICES OR USE THE NAMES EMPLOYEE LEASING COMPANY, PROFESSIONAL EMPLOYER ORGANIZATION, PEO, STAFF LEASING, EMPLOYEE LEASING, ADMINISTRATIVE EMPLOYER, OR OTHER TITLE REPRESENTING EMPLOYEE LEASING SERVICES WITHOUT FIRST OBTAINING CERTIFICATION FROM THE DEPARTMENT UNDER THIS SECTION.

(b) A PERSON SHALL NOT KNOWINGLY PROVIDE FALSE OR FRAUDULENT INFORMATION TO THE DEPARTMENT IN CONJUNCTION WITH ANY CERTIFICATIONS OR IN ANY REPORT REQUIRED UNDER THIS SECTION.

(c) THE EXECUTIVE DIRECTOR OF THE DEPARTMENT MAY TAKE DISCIPLINARY ACTION AGAINST AN EMPLOYEE LEASING COMPANY FOR A VIOLATION OF PARAGRAPH (a) OR (b) OF THIS SUBSECTION (8), FOR THE CONVICTION IN A COURT OF LAW FOR A CRIME ARISING FROM THE OPERATION OF AN EMPLOYEE LEASING COMPANY RELATING TO FRAUD OR DECEIT OR THE ABILITY OF THE EMPLOYEE LEASING COMPANY TO OPERATE AS SUCH, FOR KNOWINGLY MAKING A MATERIAL MISREPRESENTATION TO THE DEPARTMENT OR OTHER GOVERNMENTAL AGENCY, OR FOR A WILLFUL VIOLATION OF THIS SECTION OR ANY ORDER OR RULE ISSUED BY THE DEPARTMENT UNDER THIS SECTION.

(d) UPON FINDING, AFTER NOTICE AND OPPORTUNITY FOR HEARING, THAT AN EMPLOYEE LEASING COMPANY HAS VIOLATED ONE OR MORE PROVISIONS OF THIS SECTION, THE DIRECTOR OF THE DIVISION MAY:

(I) PLACE THE CERTIFIED EMPLOYEE LEASING COMPANY ON PROBATION FOR A PERIOD AND SUBJECT TO CONDITIONS THAT THE DIRECTOR OF THE DIVISION SPECIFIES;

(II) IMPOSE AN ADMINISTRATIVE PENALTY IN AN AMOUNT NOT TO EXCEED ONE THOUSAND DOLLARS FOR EACH MATERIAL VIOLATION; AND

(III) REFUSE TO ACCEPT THE CERTIFICATION AND RESCIND THE EMPLOYEE LEASING COMPANY'S ABILITY TO MAKE UNEMPLOYMENT INSURANCE CONTRIBUTIONS FOR WORK-SITE EMPLOYEES UNDER ITS UNEMPLOYMENT INSURANCE ACCOUNT.

SECTION 3. Appropriation. In addition to any other appropriation, there is hereby appropriated, out of any moneys in the employee leasing company certification fund created in section 8-70-114 (2) (g) (VI), Colorado Revised Statutes, not otherwise appropriated, to the department of labor and employment, for allocation to the division of employment and training, for the fiscal year beginning July 1, 2008, the sum of forty-four thousand six hundred fifty-nine dollars (\$44,659) cash funds and 0.9 FTE, or so much thereof as may be necessary, for the implementation of this act.

SECTION 4. Effective date. This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008); except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

Approved: May 20, 2008