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October 20, 2020

Mr. Charles G. Cooper
Banking Commissioner
Texas Department of Banking
2601 North Lamar Boulevard
Austin, Texas 78705

Opinion No. KP-0336

Re: Whether a professional employer organization that conducts money transmission as defined in the Finance Code is subject to licensure under the Finance Code, notwithstanding licensure as a professional employer organization under the Labor Code (RQ-0348-KP)

Dear Commissioner Cooper:

You ask whether a person or entity licensed and performing services as a professional employer organization (“PEO”) under chapter 91 of the Labor Code must also obtain a money transmission license under chapter 151 of the Finance Code.¹ We first review licensure as a PEO under chapter 91 of the Labor Code and then examine licensure as a money transmitter under chapter 151 of the Finance Code.

Under chapter 91, a PEO is an entity that contracts with a client to provide professional employer services, including certain administrative tasks such as payroll, taxes, benefits, human resources, and other functions to assist in the operation of the client’s business. TEX. LAB. CODE §§ 91.001–.062. An entity may not engage in professional employer services without obtaining a PEO license. *Id.* § 91.011. The Department of Licensing and Regulation administers chapter 91, including the licensure of PEOs, the investigation of applicants, and the discipline of PEOs for delinquent payments and other violations of chapter 91.² *Id.* §§ 91.016, .020.

A licensed PEO providing professional employer services under chapter 91 operates under a “coemployment relationship,” whereby employer responsibility with respect to covered

¹See Letter from Charles G. Cooper, Banking Comm’r, Tex. Dep’t of Banking, to Honorable Ken Paxton, Tex. Att’y Gen. at 1–2 (Apr. 21, 2020), <https://www2.texasattorneygeneral.gov/opinions/opinions/51paxton/rq/2020/pdf/RQ0348KP.pdf> (“Request Letter”).

²To obtain a license, a PEO applicant must identify controlling persons and submit their fingerprints for background checks. TEX. LAB. CODE § 91.013(a). The PEO applicant also must submit a financial statement to demonstrate sufficient working capital. *Id.* § 91.014(b).

employees is shared between a PEO and the PEO's client. *Id.* §§ 91.001(3-b), .0011; *see generally Rodriguez v. Lockhart Contracting Servs., Inc.*, 499 S.W.3d 48, 54 (Tex. App.—San Antonio 2016, no pet.) (describing the relationship). The PEO “shall establish the terms of a professional employer services agreement by a written contract between” the PEO and the client. TEX. LAB. CODE § 91.031(a). Under the contract, the PEO and the client share certain employer responsibilities. *Id.* § 91.032(a)(1), (4), (5). The client retains sole responsibility to direct and control covered employees as necessary to conduct the client's business. *Id.* § 91.032(b). But the PEO must assume “responsibility for the payment of wages to the covered employees without regard to payments by the client to the” PEO. *Id.* § 91.032(a)(2). The PEO further assumes responsibility for the payment and collection of payroll taxes, and must manage and make timely payments for insurance premiums, benefit and welfare plans, and other employee withholding. *Id.* §§ 91.032(a)(3), .046. A client and the PEO “are each considered an employer . . . for purposes of sponsoring retirement and welfare benefit plans for covered employees.” *Id.* § 91.041(a). Thus, the PEO and the client, within their respective spheres of authority, both serve as employers of a covered employee. *Id.* § 91.001(7-a).

Chapter 151 of the Finance Code, on the other hand, governs money services businesses, including money transmission businesses.³ TEX. FIN. CODE §§ 151.001–.801. In particular, subchapter D of chapter 151 requires a person or entity engaged in the business of money transmission to obtain a license issued by the Banking Commissioner. *Id.* §§ 151.302, .305. For purposes of chapter 151, “a person engages in the business of money transmission if the person receives compensation or expects to receive compensation, directly or indirectly, for conducting money transmission.” *Id.* § 151.302(b). “Money transmission” is defined as “the receipt of money or monetary value⁴ by any means in exchange for a promise to make the money or monetary value available at a later time or different location.” *Id.* § 151.301(b)(4). The term “includes . . . receiving money or monetary value for transmission[.]” *Id.* § 151.301(b)(4)(A)(ii). Thus, chapter 151 requires a person who receives money under a promise to transmit it to another person or location, for compensation, to have a money transmission license. *See id.* §§ 151.301(b)(4), .302(b). Exceptions exist, and the Commissioner may exempt certain persons from the licensing requirements, but nothing in chapter 151 expressly exempts a PEO from that chapter's reach.⁵ *See, e.g., id.* §§ 151.003, .302(b), (c).

You suggest that “[a] PEO that pays wages to its covered employees and is later reimbursed by its employer-client is *not* engaged in the business of money transmission; it is only the *advance*

³The Department of Banking administers chapter 151. TEX. FIN. CODE § 151.101; *see also id.* § 151.002(b)(9). The Finance Commission promulgates regulatory rules to implement the chapter. *Id.* § 151.102. And the Banking Commissioner possesses general regulatory authority. *Id.* § 151.103(c) (authorizing the commissioner to impose “any condition the commissioner considers reasonably necessary or appropriate to carry out and achieve the purposes of this chapter”).

⁴“Money” or “monetary value” is defined as “currency or a claim that can be converted into currency through a financial institution, electronic payments network, or other formal or informal payment system.” *Id.* § 151.301(b)(3).

⁵A person may be exempted from licensing requirements by commission rule or by the “commissioner's order on a finding that the licensing of the person is not necessary to achieve the purposes of this chapter.” *Id.* § 151.003(10).

receipt of payroll funds from an employer-client that implicates [chapter 151].”⁶ We disagree with that distinction. A court’s main objective in construing the law is to discern the Legislature’s intent. *Brazos Elec. Power Coop., Inc. v. Tex. Comm’n on Env’tl Quality*, 576 S.W.3d 374, 383–84 (Tex. 2019). And the best indicator of intent is the plain language of the law itself. *Id.* at 384. Furthermore, courts do not construe statutes in isolation but rather within the context of “the surrounding statutory landscape.” *LTTS Charter Sch., Inc. v. C2 Constr., Inc.*, 342 S.W.3d 73, 75 (Tex. 2011).

Chapter 91 expressly designates a PEO as “*the employer* of a covered employee for purposes of” the payment of wages. TEX. LAB. CODE § 91.044(a) (emphasis added); *see id.* §§ 61.001–.095 (regarding payment of wages); *cf. id.* § 91.0011(a) (recognizing the “coemployment relationship” between a PEO and client). Thus, a PEO’s payment of wages under chapter 91 and a professional employer services agreement satisfies the PEO’s duty as an *employer* of a covered employee. And a PEO’s duty to pay wages under chapter 91 exists irrespective of receiving any payment from a client. *Id.* § 91.032(a)(2). That is, the absence of compensation from a client does not absolve a PEO from its duty to pay wages to covered employees. By definition, then, a PEO that pays wages to *its* employees under chapter 91 acts in its capacity as an employer, not as a money transmitter. Therefore, we see no reason to distinguish between a PEO that receives an advance payment from a client and one that receives a reimbursement from a client for the same services.

Accordingly, we do not believe a court would conclude that a PEO engages in the business of money transmission for purposes of chapter 151 of the Finance Code by merely paying wages to its employees under chapter 91 of the Labor Code. To conclude otherwise would extend chapter 151’s reach far beyond what the Legislature intended. That said, on particular facts, a PEO could promise to make a payment not governed by the professional employer services agreement under circumstances that may constitute money transmission under chapter 151 of the Finance Code. *Cf. id.* § 91.032(c) (concerning client-employer’s obligation to pay wages not governed by the agreement.). Whether a person or entity engages in money transmission for purposes of chapter 151 is a fact question that cannot be resolved through an Attorney General opinion. *See* Tex. Att’y Gen. Op. No. KP-0178 (2018) at 3. We also note that chapter 151 expressly authorizes the Banking Commissioner to “cooperate, coordinate, and share information with another state” agency that regulates a person engaged in money transmission services. *See* TEX. FIN. CODE § 151.105(a)(1). Consistent with that provision, the Banking Commissioner may exchange information and work with such an agency “[t]o efficiently and effectively administer and enforce [chapter 151.]” *Id.* § 151.105(a)–(b).

⁶Request at 4 (emphasis added). You also explain that “a PEO is not engaged in money transmission with respect to the portion of payroll funds received in advance for payment of state unemployment taxes.” *Id.* at 3, n.5. We therefore limit our opinion solely to whether a PEO’s activities relating to the payment of wages to covered employees constitute money transmission services.

S U M M A R Y

A person or entity must obtain a money transmission license from the Commissioner of Banking to engage in the money transmission business under chapter 151 of the Texas Finance Code. A person or entity must obtain a license from the Department of Licensing and Regulation to engage in professional employer services involving the compensation of covered employees under chapter 91 of the Labor Code. A professional employer organization's performance of its statutory duties under chapter 91 of the Labor Code pursuant to a professional employer services agreement does not constitute money transmission for which a separate license is required under chapter 151 of the Finance Code.

Very truly yours,

A handwritten signature in black ink that reads "Ken Paxton". The signature is written in a cursive, flowing style.

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