TAX SECTION
State Bar of Texas

January 7, 2015

Via Electronic Mail
PEO@tdi.texas.gov.

Ms. Jamie Walker
Associate Commissioner for Licensing Services
Texas Department of Insurance
William P. Hobby Building
333 Guadalupe
P.O. Box 149104
Austin, TX 78714-9104

Re: Comments for Rules Relating to Professional Employer Organizations Sponsoring Self-Funded Employee Health Benefit Plans

Dear Ms. Walker:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to two (2) requests of the Texas Department of Insurance ("TDI") published on TDI's website, for comments relating to an informal working draft of rules to implement Section 16 of Senate Bill 1286, relating to the regulation of professional employer organizations sponsoring self-funded employee health benefit plans (the "Notice"). We understand that the link to the Notice will be removed when the rule proposal is filed.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THESE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO

APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED FOR THESE COMMENTS AND THESE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We commend the TDI for the time and thought that has been put into preparing the Notice, and we appreciate being extended the opportunity to participate in this process.

Respectfully submitted,

Andrius R. Kontrimas
Chair, Tax Section
The State Bar of Texas

COMMENTS ON RULES RELATING TO PROFESSIONAL EMPLOYER ORGANIZATIONS SPONSORING SELF-FUNDED EMPLOYEE HEALTH BENEFIT PLANS

These comments are submitted on behalf of the Tax Section of the State Bar of Texas. Principal responsibility for drafting these comments was exercised by Jim Griffin and Henry Talavera. The Committee on Government Submissions ("COGS") of the Tax Section of the State Bar of Texas has approved these comments. Robert Probasco, the Chair of COGS, reviewed these comments. Riva Johnson also reviewed these comments and made substantive suggestions on behalf of COGS.

Although members of the Tax Section who participated in preparing these comments have clients who would be affected by the principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

Contact Persons: James R. Griffin
Jackson Walker L.L.P.
901 Main Street; Suite 6000
Dallas, Texas 75202
214.953.5827
jgriffin@jw.com

Henry Talavera
Polsinelli PC
2501 N. Harwood, Suite 1900
Dallas, Texas 75201
Direct: (214) 661-5538
htalavera@polsinelli.com

Date: January 7, 2015

These comments are provided in response to the request from the Texas Department of Insurance ("TDI') for comments on an informal working draft of rules ("Informal Working Draft") to implement Section 16 of Senate Bill 1286, relating to the regulation of professional employer organizations ("PEOs") sponsoring partially or fully self-funded/self-insured ("self-funded") employee health benefit plans ("Benefit Plans").

SUMMARY

We respectfully recommend that the TDI reconsider several aspects of the proposed rules contained in the Informal Working Draft. In finalizing the Informal Working Draft, we suggest that the TDI fully consider the impact of the Patient Protection and Affordable Care Act, as amended ("ACA") and ERISA, as well as the probable economic impact on PEOs and other employers who have entered into a co-employment relationship with respect to their workers. Without substantial accommodation from the TDI, such employers may at some point have no reasonable alternative to satisfy the requirements of ACA and the TDI, except for purchasing fully insured insurance products from an insurance company, or in the worst case, perhaps laying-off workers or ceasing operations.

We would, in particular, recommend that TDI consider specific rules for compliance for different types of entities depending upon perhaps, among other things, (A) the size of the entity in terms of numbers of total employees, (B) whether such entity is clearly a PEO, (C) the number of workers employed by such entity in a co-employment relationship or as independent contractors and (D) whether such employers employ long-term, temporary employees for periods longer than a fixed period of time (e.g., at least three (3) months, six (6) months, one (1) year, etc.). We would also like the opportunity to explore whether other criteria might be important and whether TDI might consider providing reasonable methods for various entities and Benefit Plans to become properly regulated by the TDI (or perhaps exempted from any rules by TDI).

Specifically, as outlined further below, we recommend that TDI remove (or at least more narrowly tailor) the dispute resolution provisions in the Informal Working Draft to be more clearly in conformance with ERISA's claims procedures.

Lastly, we suggest that the proposed rules in the Informal Working Draft appear to be so burdensome as to make the cost prohibitive with respect to any Benefit Plan sponsored by a PEO. We point to a couple of examples, but given the time frame for comments, we have not had a chance to provide all of your comments. We are hopeful that the TDI will consider having an additional comment period on the Informal Working Draft before finalizing such rules. The Tax Section of the State Bar of Texas is willing to consider providing further input to the TDI if requested.

Chapter 91 Self-Funded Employee Health Benefit Plans Are MEWAs

Benefit Plans provided by a professional employer organization ("PEO") for individuals who are co-employed by the PEO and its client employers, as authorized by Chapter 91 of the Texas Labor Code ("Chapter 91"), are known as multiple employer welfare arrangements (singularly "MEWA," and collectively, "MEWAs") for purposes of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

ACA and Benefit Plans

As background, many employers have entered into co-employment relationships with PEOs and other entities, particularly as it relates to temporary employment (singularly "Temp Agency," or collectively "Temp Agencies"). An employee may have more than one employer within the meaning of the Texas Workers' Compensation Act, and each employer who subscribes to workers' compensation insurance may raise the exclusive-remedy provision as a bar to claims about a work injury. *See Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475-76 (Tex. 2005) (stating that client company could assert exclusive-remedy defense to claims by temporary employee if it was covered by workers' compensation insurance); *Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 143 (Tex. 2003) (holding that exclusive-remedy provision applied to both temporary staffing company and client company); *see also Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 242-243 (Tex. 2012).

Temp Agencies are clearly co-employers for purposes of the Texas Workers' Compensation Act, but their status is much less clear under other Texas laws, including but not limited to Chapter 91. A Temp Agency is generally exempt from any licensure requirements as a PEO, because such Temp Agency will qualify in many cases as, among other things, a "temporary common worker employer." Regardless, it is not clear that in all circumstances a Temp Agency will qualify as other than a PEO with respect to its employees. *See* Texas Labor Law § 92.002 (a "temporary common worker employer" includes certain persons who, among other requirements, provide "common workers to a user of common workers").

Under TDI rules, we generally understand workers employed by Temp Agencies and similar entities are arguably the employees of such Temp Agencies and no other entity, including, but not limited to, the customer of any such Temp Agencies. However, this answer is not free from doubt in all circumstances, particularly as it relates to properly classifying such workers as employees. While unrelated to the issue of co-employment, there is much litigation regarding whether individuals should be classified as employees compared to being independent contractors.

There is significant litigation in California and Missouri on these issues and as it relates to ERISA covered Benefit Plans. *See Alexander v. Fedex Ground Package System, Inc.*, 765 F.3d 981 (9th Cir. 2014) (independent contractors are employees under California law); *see also Gray v. Fedex Ground Package System, Inc., at* http://scholar.google.com/scholar_case?case=8497351377564157366&q=reginald+gray+fedex+ERISA&hl=en&as_sdt=6,44 (misclassified employees can possibly receive damages based upon the value of ERISA covered benefit plans). While such litigation is not directly related to PEOs and Temp Agencies, there is risk of litigation in the area of co-employment, particularly in light of the ACA requirements being shifted from the customer to the PEO and Temp Agencies.

Furthermore, under ACA, it is not certain when a temporary staffing firm, including a Temp Agency, might be a co-employer with its customer with respect to temporary workers. In the definition of "temporary" worker, under the final employer shared responsibility regulations under ACA ("Regulations") the Regulations discuss the concept of "short-term employees," meaning employees "who are reasonably expected to average at least 30 hours of service per week and are hired into positions expected to continue for 12 months" (not including seasonal employees, who are expected to have recurring employment on an annual basis). *See* Preamble to Shared Responsibility for

Employers Regarding Health Coverage; Final Rule ("ACA Preamble"), 79 Fed. Reg. 8533, 8562 (Feb. 12, 2104).

The Regulations specifically decline to treat short-term employees any differently from any other employees who are expected to be full time as of their dates of hire. However, the Regulations make clear that there should be no concerns regarding the application of any ACA penalty with respect to certain short-term employees whose employment lasts for less than 90 days, since the general employer shared responsibility rules give employers a pass on the application of ACA penalties for the first several months of full-time employees' employment. *Id.*

The Regulations also discuss the complications of applying certain ACA rules to the employees of temporary staffing firms, including but not limited to, Temp Agencies. As a result, there is not yet any specific guidance under ACA concerning when an employee might or might not be a temporary employee. However, the Regulations provide some preliminary guidance in the ACA Preamble. Specific factors to be used in determining whether an employee of a temporary staffing firm can be treated as other than a full-time employee include, but are not limited to:

> "whether other employees in the same position of employment with the temporary staffing firm, as part of their continuing employment, retain the right to reject temporary placements that the temporary staffing firm offers the employee; typically have periods during which no offer of temporary placement is made; typically are offered temporary placements for differing periods of time; ***and typically are offered temporary placements that do not extend beyond 13 weeks***."

ACA Preamble at 8557 (emphasis added).

Prior to the enactment of ACA, the distinction between a PEO and a Temp Agency was, with limited exception, not necessarily critical. Under ACA, Temp Agencies generally have faced the prospect of prohibitively expensive "fully insured" products, and many insurers in our experience have asked such Temp Agencies to represent that there is no co-employment relationship between the Temp Agencies and any other person. For these and other reasons, many Temp Agencies and similar employers have purchased self-insured medical insurance here in Texas (*i.e.*, the employers pay the first dollar of claims up to certain aggregate and other stop-loss limits, along with stop-loss insurance in favor of the employers). Such arrangements could potentially be classified as MEWAs. However, because the Informal Working Draft only applies to PEOs, such employers are potentially exposed under Texas law to regulation by the TDI without any meaningful method to comply with Texas law.

Because of the uncertainty and evolving nature of the law, including ACA, we respectfully request that the TDI consider issuing rules that would allow such Temp Agencies and others who have entered into either a co-employment and/or independent contractor relationship with workers to reasonably secure TDI approval with respect to Benefit Plans.

The penalties for operating an unregistered MEWA in Texas could be severe. An entity sponsoring a MEWA that is not registered under the state's registration process may be sued by the TDI for violating the prohibition against the unauthorized business of insurance in Texas Insurance Code Annotated Sections 101 and 102. In one case, TDI not only requested that an entity be ordered to cease practicing the business of insurance in Texas, it also requested assessment of a $2 million penalty relating to the prohibited behavior. *LHR Enterprises, Inc. v. Geeslin, Tex. Court of Appeals,* (3rd Dist 2007), *at* *http://scholar.google.com/scholar_case?case=4799541432513528716&q*

=lhr+enterprises+geeslin&hl=en&as_sdt=6,44 (Texas Court of Appeals approved a significant penalty under Texas law).

The PEO and its Client Employers Are Co-Employers

There are significant issues related to Benefit Plans of PEOs. Section 13.510 of the Informal Working Draft provides that a PEO that holds a license in good standing from the Texas Department of Licensing and Regulation may sponsor a self-funded employee health benefit plan in Texas only after it receives its certificate of approval from TDI under Chapter 91.

Chapter 91 provides that the relationship between a PEO and its client employers is a co-employment relationship, which Section 13.512(7) of the Informal Working Draft defines as a contractual relationship between a client employer and a PEO that involves the sharing of employment responsibilities with or allocation of employment responsibilities to covered employees in compliance with the professional employer services agreement and Chapter 91. Thus, any Benefit Plan that is provided by a PEO to its employees (who are also employees of its client employers) is likely established or maintained for the purpose of offering or providing health benefits to the employees of two or more employers, thereby arguably meeting the employee welfare benefit plan definition in Section 3(1) of ERISA and the MEWA definition in Section 3(40) of ERISA.

Chapter 91 and the Informal Working Draft arguably create special MEWA requirements that are applicable only to PEOs and their client employers, while at the same time arguably preventing any other employers in a co-employment relationship from securing TDI approval. This Informal Working Draft has been adopted outside of the existing statutory MEWA provisions in Chapter 846 of the Texas Insurance Code and rules adopted under the Texas Administrative Code.

Because of the importance and impact of the Informal Working Draft on Benefit Plans, we respectfully recommend that the TDI issue further guidance to assist various types of employers with co-employees and/or independent contractors in providing ACA compliant Benefit Plans that do not run afoul of TDI rules and regulations. Furthermore, because proper characterization of an entity is not always certain, we would respectfully request that the TDI establish different, less onerous TDI requirements for certain entities, such as Temp Agencies, that might employ long-term temporary employees or other entities that might employ just a few temporary employees and/or independent contractors.

***MDPhysicians* Does Not Apply**

The issues discussed above differ importantly from the questions involved in the litigation with the Texas State Board of Insurance ("State Board") in the early 1990s in *MDPhysicians & Associates, Inc. v. State Board of Insurance*, 957 F.2d 178 (5th Cir. 1992). In that case, MDPhysicians asserted that ERISA preempted the attempts by the State Board to regulate a health benefits plan that was offered to over 100 unrelated employers. Siding with the State Board, the Fifth Circuit concluded that the promoter of the health benefit plan was not an "employer," and thus, the plan could not be an "employee welfare benefit plan" under ERISA. Accordingly, ERISA's preemption provision did not block regulation of the plan by the State of Texas.

The precedent in *MDPhysicians* is unlikely to apply to ERISA preemption involving Benefit Plans under Chapter 91 and the provisions in the Informal Working Draft. The critical distinction is that Chapter 91 expressly provides that the PEO is an employer of the employees who are assigned to the

client employers. This fact alone is very likely sufficient by itself to cause a PEO's self-funded Benefit Plan to be considered an "employee welfare benefit plan" as defined in and subject to ERISA, including ERISA's MEWA and preemption provisions.

Section 13.557's Dispute Resolution Provisions

Section 13.557 of the Informal Working Draft ("Section 13.557") contains two provisions relating to disputes arising under the Benefit Plan and corresponding trust ("Plan and Trust"). Subsection (1) provides that all disputes arising under the Plan or Trust will be subject to the jurisdiction of Texas state courts. This is referred to below as the "exclusive jurisdiction provision." Subsection (2) provides that the approved PEO and the Plan and Trust waive any right to assert a claim or defense based on Federal statute or common law with respect to all disputes arising under the Plan or Trust. This is referred to below as the "federal claim waiver provision." An approved PEO must include in its Plan and Trust a statement addressing both the exclusive jurisdiction provision and the federal claim waiver provision.

We are aware of no provision in Chapter 91 that requires either the exclusive jurisdiction provision or the federal claim waiver provision for Benefit Plans. As a result, we respectfully recommend that Section 13.557 be revised to be consistent with ERISA claims under the Benefit Plans, as well as other federal laws that might apply such as federal privacy laws.

The Dispute Resolution Provisions Arguably Conflict With ERISA

It appears that the provisions of Section 13.557, if adopted by TDI, may represent a substantial intrusion into the field of federal interest that is occupied by the civil enforcement provisions of ERISA. The civil enforcement mechanism of ERISA Section 502 is one of the cornerstones of ERISA, reflecting Congress' desire to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries by providing for appropriate remedies, sanctions, and ready access to the Federal courts. ERISA § 2(b).

The potential interference that Section 13.557 would have with the specific operation of ERISA exists in the following areas:

1. Section 13.557 provides that all disputes arising under the Plan and Trust would be subject to exclusive jurisdiction of the Texas state courts. ERISA, however, provides that state courts and Federal courts have concurrent jurisdiction in claims that are brought by a participant or beneficiary to recover benefits due under the terms of the plan, to enforce rights under the terms of the plan, or to clarify rights to future benefits under the terms of the plan. ERISA § 502(a)(1)(B). Federal courts have exclusive jurisdiction of all other civil actions under ERISA that are brought by the Department of Labor ("DOL") participants, beneficiaries, or fiduciaries. ERISA § 502(e)(1).

2. It appears that Section 13.557 may also interfere with a fundamental purpose of ERISA, by requiring the approved PEO and the Plan and Trust to waive any right to assert a claim or defense based on federal statute or common law with respect to all disputes arising under the Plan and Trust. The federal claim waiver provision would interfere with ERISA's objective of providing uniformity from state to state in the administration of employee benefit plans. 29 U.S.C. § 1001(b). Federal policy under ERISA is reflected in statutory provisions of ERISA as well as judicial doctrines that have been developed by the Federal courts since ERISA was established in 1974. Examples of the ERISA statutory provisions that could be displaced by the dispute resolution provisions include ERISA provisions dealing with fiduciary duties (ERISA Section 404), liability for breach of fiduciary duty (ERISA Section 409), claims procedures (ERISA Section 503), civil enforcement and limitations on actions (ERISA Section 502) and preemption of state law (ERISA Section 514).

ERISA's Preemption Provision

Although not free from doubt, Section 13.557 also arguably interferes with the preemption provision of ERISA with respect to the vast majority of all Benefit Plans that are offered by non-governmental employers and that are also considered employee welfare benefit plans within the meaning of Section 3(1) of ERISA. The preemption provision of ERISA is designed to promote the national uniformity of benefit plan administration by nullifying the enforcement of "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." ERISA § 514(a). ERISA also contains special rules that apply to State laws that regulate MEWAs, which are discussed below.

Special ERISA Preemption Rules for MEWAs

ERISA, like Texas law, recognizes that MEWAs may provide benefits that are fully insured or that are partially or wholly self-funded or self-insured by such employer. In the case of a MEWA that provides benefits that are fully insured, ERISA provides that any law of any State that regulates insurance may apply to the MEWA to the extent that the law provides:

1. standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due; and

2. provisions to enforce such standards.

ERISA § 514(b)(6)(A)(i).

A different and narrower standard saving State laws from the scope of ERISA preemption applies, however, to Texas laws affecting self-funded MEWAs, like the Plan and Trust authorized to be adopted by PEOs pursuant to Chapter 91. ERISA provides as follows:

in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent ***not inconsistent*** with the preceding sections of this title.

ERISA § 514(b)(6)(A)(ii) (emphasis added).

A State law that applies to self-funded MEWAs must satisfy two requirements to survive a preemption challenge under ERISA. First, the State law must be a law that regulates insurance. Second, the law must not be inconsistent with ERISA. Even assuming that the dispute resolution provisions of the Informal Working Draft could be construed as regulating insurance, it appears that the dispute resolution provisions may not meet the "not inconsistent" requirement.

The "Not Inconsistent" Exception for Self-Funded MEWAs

In 1990, the DOL provided its interpretation of ERISA's preemption exception for self-funded MEWAs. The DOL is the Federal agency charged by Congress with the responsibility for the interpretation and enforcement of ERISA. The DOL explained its position as follows:

> "[A] state law which regulates insurance would be inconsistent with the provisions of title I to the extent that compliance with such law would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under title I of ERISA, or conflict with any provision of title I of ERISA. For example, state insurance law which would require an ERISA-covered MEWA to make imprudent investments would be deemed to be "inconsistent" with the provisions of title I of ERISA because compliance with such a law would "conflict" with the fiduciary responsibility provisions of ERISA section 404, and, as such, would be preempted pursuant to the provisions of ERISA section 514(b)(6)(A)(ii).
>
> However, a state insurance law will, generally, not be deemed "inconsistent" with the provisions of title I of ERISA if it requires ERISA-covered MEWAs to meet more stringent standards of conduct, or to provide more or greater protections to plan participants and beneficiaries, than required by ERISA. For example, state insurance laws which would require more informational disclosure to plan participants of an ERISA-covered MEWA will not be deemed by the Department to be "inconsistent" with the provisions of ERISA. Similarly, a state insurance law prohibiting a fiduciary of an ERISA-covered MEWA from availing himself of an ERISA statutory or administratively-granted exemption permitting certain behavior will not be deemed by the Department to be "inconsistent" with the provisions of ERISA.
>
> Finally, the Department also notes that, in its opinion, any state insurance law which sets standards requiring the maintenance of specified levels of reserves and specified levels of contributions to be met in order for a MEWA to be considered, under such law, able to pay benefits in full when due will generally not be considered to be

"inconsistent" with the provisions of title I of ERISA pursuant to ERISA section 514(b)(6)(A)(ii).

Thus, it is the opinion of the Department that a state law regulating insurance which requires the obtaining of a license or certificate of authority as a condition precedent or otherwise to transacting insurance business or which subjects persons who fail to comply with such requirements to taxation, fines, and other civil penalties, including injunctive relief, would not in and of itself adversely affect the protections and safeguards Congress intended to be available to participants and beneficiaries or conflict with any provision of title I of ERISA, and, therefore, would not, for purposes of section 514(b)(6)(A)(ii), be inconsistent with the provisions of title I. Moreover, given the clear intent of Congress to permit states to apply and enforce their insurance laws with respect to ERISA-covered MEWAs, as evidenced by the enactment of the MEWA provisions, it is the view of the Department that it would be contrary to Congressional intent to conclude that states, while having the authority to apply insurance laws to such plans, do not have the authority to require and enforce registration, licensing, reporting and similar requirements necessary to establish and monitor compliance with those laws."

ERISA Opinion Letter 90-18A (July 2, 1990) (footnotes omitted).

According to the DOL, ERISA will not permit any law that would abolish or abridge an affirmative protection or safeguard otherwise available to plan participants and beneficiaries under Title I of ERISA, or conflict with any provision of title I of ERISA.

In our view, there is a material risk that a Federal court may find that the dispute resolution provisions of the Informal Working Draft would abolish or abridge the protections and safeguards of ERISA and that the dispute resolution provisions of the Informal Working Draft are preempted by ERISA. At a minimum, it is not certain how such dispute resolution provisions can be reconciled with the provisions of ERISA for orderly administration of Benefit Plans. Accordingly, we respectfully recommend that TDI consider modifying the Informal Working Draft to provide that the dispute resolutions do not apply in litigation involving a PEO's self-funded Benefit Plan and its participants and beneficiaries.

Further Comments

We would welcome the opportunity to discuss the Informal Working Draft further with TDI or provide further input regarding the intersection between ERISA and other federal law that might apply. We would also welcome the opportunity to provide additional written comments to the Informal Working Draft, and we respectfully request that the TDI extend the deadline to provide further comments and/or suggested revisions to the Informal Working Draft.

It appears that the Informal Working Draft would be extremely onerous on employers. For example, Section 13.520 of the Informal Working Draft contains a list of eighty nine (89) requirements that apply to an approved PEO, or to a Plan and Trust to the same extent as the provisions apply to any entity that the TDI regulates. That section alone would effectively treat the self-funded Benefit Plan of a PEO as a fully insured plan, thereby eliminating many, if not most, of the advantages of a self-funded plan that were presumably envisioned by the Legislature when it enacted Chapter 91.

Given the limited availability of affordable fully insured plans that will comply with ACA and the important economic role played by staffing and temporary agencies in Texas who will cease offering self-funded Benefit Plans or potentially be put of business for complying (or failing to comply) with the proposed rules set forth in the Informal Working Draft, we respectfully request the TDI to consider an additional comment period on the Informal Working Draft before finalizing such rules.

Finally, the Informal Working Draft contains a rule that requires PEO employers to transmit contributions within two (2) business days of receipt. *See* Section 13.542 of the Informal Working Draft. This seems particularly onerous, as very few employers could meet this requirement, and neither the DOL nor ERISA imposes such requirements even on employee contributions to tax qualified profit-sharing plans, commonly known as "401(k)" plans. At a minimum, we suggest that contributions be permitted when such contributions can reasonably be segregated from an employer's assets, but not more than 90 days after receipt. *See* DOL Technical Release 92-01, *found at,* http://www.dol.gov/ebsa/newsroom/tr92-01.html