

FLORIDA INSURANCE REPORT

Volume 8, Issue 7

Keeping You Informed About Florida

August, 2010

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Public Adjuster Rules

By: David Yon

The Florida Department of Financial Services, Division of Agent & Agency Services, is proceeding with amendments to rule chapter 69B-220, F.A.C., relating to adjusters. The proposed rule amendments define when an "emergency" exists and provide the procedures to obtain an emergency adjuster license from the Department; revise requirements for public adjusters and apprentices; and add significant new ethical responsibilities and requirements for all adjusters. A public hearing was held on Friday, July 30, 2010 in Tallahassee. The Department kept the record open until August 12, 2010 for additional comments.

One of the most significant concerns raised at the hearing was the new deadline created by section 69B-220.201(3)(f). It provides: "The adjuster shall respond with specific information to a written or electronic request for claims status from a party to the insurance policy or the party's designated representative, in no less than fifteen (15) days from the date of the request and shall document the file accordingly."

Insurers are also raising other concerns about the rule. The Florida Insurance Council (FIC) filed comments and objections to the rules at the July public hearing. FIC testified that: "The proposed rule changes create an entirely new set of standards outside the carefully crafted and balanced current rules and regulations, as well as some of the proposals appear to be in direct conflict with many Florida laws and time requirements. The proposed code of ethics has significant problems and raises many questions and uncertainties as to how the new standards will be applied. These issues will likely lead to additional litigation, and increased regulatory activity, including potential fines, and may interfere with the insurer's employer/employee relationship and its ability to manage adjusters or claims."

The Florida Association of Public Insurance Adjusters filed a formal challenge to the rules. A hearing on that challenge has been set for August 25. The Association challenges the rule's limits on public adjuster conduct as being vague, arbitrary and capricious, and in excess of the statutory authority delegated to the Department.



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Consumer Advocate Schedules Workshop With Title Insurance Companies

By Karen Asher-Cohen

The Office of the Insurance Consumer Advocate has published a notice of a public workshop to be held on Wednesday, August

18, 2010, 9:00 a.m. - 2:30 p.m., in Room 404, of the House Office Building in Tallahassee. The purpose of the meeting is to discuss consumer issues with title insurance companies. An agenda for the meeting is not yet available.

For more about the Insurance Consumer Advocate, Sean Shaw, see Karen's interview with Sean on page 2.



GET TO KNOW...

By Karen Asher-Cohen

SEAN SHAW - Sean joined the Florida Department of Financial Services (DFS) in November of 2008 as the Insurance Consumer Advocate for CFO Alex Sink. A

native of Tallahassee, Sean graduated from Princeton University with a degree in Politics. He earned his J.D. from the University of Florida, Levin College of Law, in 2003. Prior to entering state government, Sean practiced law in Tallahassee with the law firms Akerman Senterfitt and Messer, Caparelllo & Self, P.A.

Recently, I had the opportunity to talk with Sean and asked him the following questions.

How do you view your role as Consumer Advocate?

I view it as making sure that consumers are protected and that they're getting access to insurance products and treated fairly in the process. Also, I try to be as balanced as I can because the best thing for consumers is a strong insurance market. I try to make sure we do things that are fair and balanced on both sides, because the best consumer protection is to have a strong insurance market that is conducive to companies coming here. The property market in Florida is obviously suffering. If we have an insurance market where no one wants to write, that's bad for everyone. We try to strike a balance so we can achieve a strong market, which is best for everyone.

What is the best part of your job?

I represent the consumers of the state of Florida. It doesn't get any better than that. I get to represent everyday people, who need to make decisions about all kinds of insurance - workers' compensation, property insurance, life insurance, health insurance. In that way, and as a lawyer, I have the best clients, so to speak.

You started in private practice. What made you join the public sector?

Well, I really started by getting a call from Alex Sink's office to see if I'd be interested in this job. I researched the position. Then I talked to some people in the insurance sector. I decided it would be a great challenge and a great job. This job is part advocacy and part politics. I am constantly traveling around the state, speaking at conferences, and representing consumers. As a lawyer, it is great to have the Florida consumers as your clients.

What are the biggest challenges facing the insurance market these days?

Clearly, the property insurance market in Florida is very troubled. We have got to figure out whether as a state, we want the state to shoulder the majority of the risk, or the private market, and depending on what decision we make, we need to move forward. There is a see-saw battle going on right now in the state - do we want low rates with the state, and state-

backed institutions such as Citizens and the CAT Fund, having the entire burden, or do we want private capital to be here in Florida? If we want to see all the companies, such as Allstate, State Farm, and Nationwide, come back, we have to accept that they won't come back without rate increases. Now, every session, we go in one direction, and then the next session, we retreat, and then we go off in another direction. We need a consistent approach to the property market. Right now, we don't have a consistent theme or path for the state to follow, and the market is suffering for it.

What advice would you give to the consumers of Florida?

I would tell consumers to make sure they're aware of all resources that are publicly available to help them. There are lots of resources - my office, the DFS Division of Consumer Services, their agents, the Office of Insurance Regulation's website to shop and compare homeowner's rates, and many other websites out there. Insurance is a very complicated area. It's even complicated for me, when I sit down to look at different policies. So for consumers, it's hard to know what they need and what they're eligible for. I would encourage them to research everything.

How has your life changed since coming to work at DFS?

I am out of town a lot more. I go to a lot of conferences and speak to industry and consumer groups about my views on these issues. But it's fun and I really like that part of it.

What is your advice for a young lawyer considering state government service?

This is a great way to hone your skills. In government, you get to do a little bit of everything. When I was in private practice, you get stuck in one area, maybe always doing appellate work or administrative law. But in state government, you are hit with lots of different issues and different areas of the law. You also have to learn to deal with the Legislature. Even though that is not strictly legal work, politics are very important. You have to learn how to navigate that process, and how ideas turn into laws. But there are a lot of great jobs for a lawyer with the state. Being a prosecutor or a public defender is also a great way, right out of law school, to hone your skills and get great experience, which then can translate to the private sector later, if you want to.

Where do you see yourself in five years?

Great question. I serve at the pleasure of the CFO. No matter what happens, we'll have a new CFO in January. I'll have to answer that question after November. I can see myself still in state government in some capacity or maybe running for office in the future.

How do you get away from it all?

I go visit my Dad every weekend. He still lives in the house I grew up in, on Lake Iamonia. Or we go to his beach house in Jacksonville. Also, I work out as much as I can. I take a book and work out at the gym, and it cleanses the mind a little bit.



Regular FIGA Assessments Subject to Premium Tax

By: *Travis Miller*

The Florida Department of Revenue has published Tax Information Publication #10B8-02R relating to premium taxes on FIGA assessments. The publication specifies that for insolvencies occurring after July 1, 2010, for which FIGA subsequently levies regular assessments, amounts recouped by insurers are subject to the premium tax. However, any recoupments of emergency assess-

ments levied by FIGA are not subject to the premium tax.

This Tax Information Publication follows a law change in 2010. The new law specifies that FIGA recoupment filings are submitted to OIR for informational purposes only. In adopting this new recoupment language, the legislature stated that recoupments of regular assessments are subject to the premium tax but are not subject to fees or commissions. Existing law previously specified that emergency assessments are not subject to premium taxes, fees or commissions, and that provision of the law remains unchanged.

Service Contract Quarterly Reports Not Required

By: *Travis Miller*

The Office of Insurance Regulation has notified service agreement companies they are no longer required to submit quarterly financial reports. As described in a previous edition of the Florida Insurance Report, the Florida legislature passed a bill earlier this year reducing regulatory obligations for motor vehicle service agreement companies, home warranty companies, and consumer product service contract companies. The next financial report for service agreement companies will be the 2010 annual report

submitted in 2011, absent a specific request from the OIR.

The new law eliminates existing requirements for service agreement companies to file their forms for approval. Of course, the contents of the forms remain subject to applicable provisions of the Insurance Code. Although the legislature reduced certain routine regulatory requirements for service agreement companies, the legislature increased penalties for engaging in unlicensed activity and also expanded a statutory list of activities considered to be deceptive. Overall, the new law reduces ongoing regulatory requirements on service agreement companies while placing increased compliance responsibility on them.

Commissioner McCarty Opposes Reinsurance Tax Change

By: *Travis Miller*

Commissioner Kevin McCarty recently wrote to U.S. Representative Gus Bilirakis expressing concern with H.R. 3424. Commissioner McCarty believes the bill will adversely affect property insurance capacity in Florida by changing current law relating to the taxation of affiliated reinsurance for foreign insur-

ance companies. According to the Commissioner's letter, certain European parent companies have indicated they will reduce their subsidiaries' writings if the bill becomes law because the tax will reduce the profitability of current transactions.

Commissioner McCarty further states that a disproportionate share of the taxes arising from the bill would be borne by Floridians due to this state's substantial reliance on international reinsurance markets.

Report Card Rule Re-Proposed

By: *Travis Miller*

The Financial Services Commission has republished a notice of proposed rulemaking relating to an insurer report card rule. The current version of the rule was scheduled to be presented to the Financial Services Commission at its August 26, 2010 meeting. However, due to procedural requirements, the rule will not be presented to the FSC at that time and instead will be the subject of another rule hearing on September 8, 2010. The rule thereafter is expected to be presented to the Financial Services Commission for final adoption, subject to any changes made as a result of input at the public hearing.

The Florida Insurance Code specifies that the Insurance Consumer Advocate will publish a report card grading insurers in the areas of consumer complaints and timeliness of claims handling. The Insurance Consumer Advocate has developed an administrative rule setting forth the methodology by which the grades will be assigned. Insurers have expressed concerns with prior and current drafts of the rule because, among other reasons, the rule does not distinguish between valid and invalid consumer complaints and the rule does not account for legislative changes in claims-handling timelines. A legislative proposal to revise the report card grading criteria met its demise with the Governor's veto of SB 2044 earlier this year. The Financial Services Commission has since continued to move forward with rulemaking, leading to the upcoming September hearing.

OIR Issues Informational Memorandum OIR-10-5M Regarding the Uniform Mitigation Verification Inspection Form

By Karen Asher-Cohen

On August 4, 2010, the OIR issued Informational Memorandum OIR-10-5M, to notify all residential property insurers in the state that, effective July 1, 2010, the “Uniform Mitigation Verification Inspection Form,” adopted by the Financial Services Commission in April 2010, had been significantly changed. Section 45 of House Bill 663, passed in the last legislative session, amends Section 627.711, Florida Statutes, regarding mitigation verifications. The Informational Memorandum outlines some of the new provisions of the law:

Insurers are no longer required to accept mitigation verification forms from hurricane mitigation inspectors certified by My Safe Florida Home. Instead, insurers must accept a mitigation verification form if it is signed by a home inspector licensed under Section 468.8314, Florida Statutes, who has completed at least three hours of hurricane mitigation training and completed a proficiency exam. Thereafter, such licensed home inspectors must complete at least two hours of continuing education on this subject as part of their license renewal requirements each year.

Citizens Reinspects Personal and Commercial Residential Properties

By: Travis Miller

A Citizens Property Insurance Corporation committee recently discussed results of its reinspection program for wind mitigation features. The reinspection of 1500 personal residential risks has identified changes in data for 90% of the policies and changes in premiums for 75% of the policies. The average premium change per policy is \$528. In the aggregate, the reinspection program shows a net premium increase of \$793,000, and after reinspection expenses of \$185,000 should result in increased revenue to Citizens of about \$608,000.

Citizens has processed 86 commercial residential multiperil inspections. These reinspections showed 69 policies resulting in data changes and 17 without data changes. The reinspections

A person who is authorized to sign a mitigation verification form must inspect the structures personally and not through employees or other persons, and must certify and attest to this on the form. The bill provides certain specified exemptions to this requirement for employees of professional engineers and licensed contractors who have the requisite skill, knowledge and experience to conduct a mitigation verification inspection.

The Bill defines misconduct on the part of an inspector and provides for disciplinary action by licensing boards and investigations by the Department of Financial Services Division of Insurance Fraud.

Before accepting any uniform mitigation verification form provided by an authorized mitigation inspector, an insurer at its own expense, may require verification by an independent inspector, inspection company, or a third-party quality assurance provider, before accepting a form as valid.

The OIR has also noticed a public workshop, to be held September 22, 2010 at 9:30 a.m., regarding changes to form OIR-B1-1802, the Uniform Mitigation Verification Inspection Form, due to this new legislation.

To see a copy of the Informational Memorandum, please visit our website at www.radeylaw.com.

showed 48 policies for which premium increases are needed and 7 for which decreases are needed. The estimated premium impact is an increase of \$750,000, which after expenses will result in a net increase to Citizens of \$683,000.

The commercial residential wind business showed similar results, with 51 out of 55 policies reflecting data errors. More than 72% of the policies showed a need for premium adjustments. The sum of the positive and negative premium changes was an overall increase of \$287,000, which less expenses should result in \$256,000 in additional premiums to be collected by Citizens.

For more information about the reinspections and Citizens’ findings, please see the [Blog](#) section of our website at www.radeylaw.com.



Appellate Updates

By: Tom Crabb

Auto Insurer's Deposit Of Past Due Premium Not Enough To Reinstate Policy

A week after an insured's auto policy was cancelled for nonpayment of premium, she mailed a check for the delinquent premium. Three days later, she was involved in an accident and two days after that the insurance company's lock box service received the payment and automatically deposited it. The insured sought coverage and the company refused, having refunded the premium as soon as the now-ex insured's check cleared. In the inevitable coverage lawsuit that followed, the plaintiff argued that because the company deposited her premium, it could not deny her coverage. The insurer maintained that it cancelled her policy before the accident and that its later deposit of the insured's check – followed by its immediate return by insurance company check – did not reinstate the coverage. The trial court concluded that the insurer had to provide coverage for the accident. On July 28, 2010, the Fourth District Court of Appeal reversed, holding that there was no coverage. Critical to the court's decision was the fact that the accident occurred before the insurance company deposited the premium check. Thus the insured could not reasonably rely on the insurer's deposit of her check as reinstating her policy. At the time of the accident, she had mailed the check but could not reasonably rely on the fact that her check would be accepted or that the insurance company would reinstate her policy. The court also noted that the company did not waive its right to cancel her policy by "temporarily accepting" her payment through its lock box. *Bristol West Insurance Company v. Albertson*, Case No. 4D09-574 (Fla. 4th DCA 2010).

In Med Mal Case, Hospital Cannot Act As "Final Arbiter" Of What Constitutes An "Adverse Medical Incident" Under Amendment 7's Right To Know

The Florida Constitution's "Amendment 7" (Art. X, s. 25(a)) gives patients a right to access any records made or received in the course of business by a health care provider relating to any "adverse medical incident." On July 20, 2010, the First District Court of Appeal held that a hospital cannot be the final arbiter of what constitutes an "adverse medical incident" for which it must provide such records. A patient at Shands Hospital awoke from an appendectomy with severe damage to his larynx and throat. The patient sued for medical negligence, alleging that he was injured as a result of a faulty intubation as part of the anesthesia given him. Pursuant to his rights under Amendment 7, the patient demanded that Shands produce its risk management incident report, peer review record, and any other records of "adverse medical incidents" involving the patient. Shands' inter-

nal investigation of the incident concluded that there was no negligence and thus Shands argued to the trial court that no "adverse medical incident" had occurred for which it had to provide the information required by Amendment 7. The trial court agreed, and refused to order Shands to produce the records. The First District reversed, concluding that the hospital cited no authority that would allow it to "act as the final arbiter" in determining whether a medical incident was sufficiently "adverse" to trigger the disclosure requirements of Amendment 7. Such a decision must ultimately be made by a court. Moreover, the First District noted that because the document request arose as part of a medical malpractice suit in which the plaintiff had obtained an opinion from a verified medical expert that the claim was viable (as required by law), that was one method of establishing an "adverse medical incident" under Amendment 7. In other words, the opinion rendered by the expert that the suit was viable was sufficient to show that there had been an "adverse medical incident" for purposes of Amendment 7's disclosure requirements. *Baldwin v. Shands Hospital and Teaching Clinics, Inc.*, Case No. 1D10-127 (Fla. 1st DCA 2010).

Four Policyholders Who Received Improper Policy Cancellation Premium Refunds Do Not Justify A Class Action

Insurance companies are required to pay interest on unearned premiums returned more than thirty days after the effective date of the cancellation. (s. 627.7283, Fla. Stat.) Three premium finance companies sued an insurer, claiming that the insurer failed to pay such interest when due. Following deposition testimony by the insurer that it never paid interest on late-returned premiums ("we do not pay interest on unearned premiums..."), the suit was amended to allege a class action for the recovery of unpaid interest. However, the plaintiff could identify only four policy cancellations for which the insurer allegedly failed to include interest for which the statute of limitations had not yet run. On July 28, 2010, the Fourth District Court of Appeal concluded this was insufficient to meet the "numerosity" requirement for a class action. While the plaintiffs argued that the putative class could include more than 100 members by showing the number of premium finance companies doing business in Florida according to the OIR, there was no proof that any of those other companies did business with the defendant. Accordingly, as there were only four potential plaintiffs identified, the Fourth District concluded that no class action could be brought. *Canal Insurance Company v. Gibraltar Budget Plan, Inc.*, Case No. 4D09-70 (Fla. 4th DCA 2010).

Electronic Licenses Now Available for Agents, Adjusters, and Other DFS Licensees

By: Tom Crabb

Licenses for insurance agents, adjusters, and other licensees of the DFS Division of Agent and Agency Services can now be printed from the internet on demand by the licensee. The Division issues about 5,000 such licenses per month. According

to a July 15 press release by the Division, new license IDs will be encrypted and available for printing online through the DFS MyProfile program. This online license ID initiative is expected to save taxpayers \$420,000 a year. In the release, Florida CFO Alex Sink said “I continue to look for new and innovative ways to run government more like a business and save taxpayers money . . . By allowing agents and adjusters to print their own licenses on demand, we eliminate hundreds of thousands of dollars in unnecessary costs.”

OIR’s QUASRng Public Reports Function Provides Easy Access to Industry Data; First Quarter 2010 Data Just Released

By: Tom Crabb

Commercial and personal residential property insurers are well aware of their requirement to submit policy data to the OIR quarterly through its QUASRng (Quarterly and Supplemental Reporting System - Next Generation) portal. Less well known, however, is the fact that anyone can access a “public reports” function of the QUASRng system and create customized reports based on the data for a desired reporting quarter. The reports can be customized in numerous ways. For example, a market share report could be generated ranking the top 25 (or 50 or however many wanted) companies by policies in force, direct premium written, number of new policies written, number of policies nonrenewed due to hurricane risk and a dozen other criteria. Customized reports can also be generated that are broken down by company, type of insurance, and even county. While this public reports function was down for some time, it is now up and running smoothly at <https://apps.fldfs.com/QRNG/Reports/ReportCriteriaWizard.aspx>. On July 21st, the OIR added first quarter 2010 data to the function, and quarterly data for 2009 remains available as well. For both companies looking to obtain data about their competitors’ businesses and anyone else interested in the Florida property insurance market, this online function provides easy access to many types of relevant industry data.

FSU Researchers Develop New Statistical Model to Estimate the Frequency of Extreme Hurricane Winds

By: Tom Crabb

While there are numerous existing methods for estimating hurricane risk to Florida cities, many of those methods focus on estimating category 2 or lower hurricanes. Researchers at Florida State University here in Tallahassee have recently developed the Hurricane Risk Calculator, a statistical model used to estimate extreme hurricane winds (category 3 or higher) at particular loca-

tions around Florida. According to a news release on FSU’s website, the model is based on “extreme value theory,” which estimates the occurrence of events along the lines of Andrew and Katrina. Using the calculator, the researchers estimate that Miami will face category 3 hurricane winds or greater (112 mph) every 12 years, Pensacola every 24, and Tallahassee can expect such winds only once every 500 years. The researchers also concluded that while the frequency of hurricanes is constant over time, “there is an upward trend in the intensity of the strongest hurricanes in Florida,” which is the hourly increase in wind speed during a hurricane. The complete findings will be published in the November issue of the *Journal of Applied Meteorology and Climatology*.



Special Session and Interim Reports

By: David Yon

After one special session where lawmakers were barely in Tallahassee long enough to tell Governor Crist he was premature asking them to meet, there is talk of a possible special session in September. Senate President-designate Mike Haridopolos, R-Merritt Island, has been quoted as saying a special legislative session to deal with the economic impacts of the Gulf of Mexico oil spill is likely.

In the meantime, the Senate Banking and Insurance Committee has issued its list of interim projects. A list of the issues and a brief description of each follows.

☞ **Sinkhole Insurance and related issues.** The report notes claims for sinkhole damage have increased dramatically in both number and costs. The objective of the project is to “seek to provide information to aid policymakers and other interested parties in assessing these issues.” The methodology includes “researching statutes, rules, reports, studies, and case law.” In addition, staff looks to interview regula-

tors, insurers and other interested stakeholders.

- ☞ **Non-judicial foreclosures.** The committee staff intends to produce a brief that explores the viability of non-judicial foreclosure options to facilitate foreclosures without overburdening Florida courts.
- ☞ **Examine Financial Products that serve as alternatives to reinsurance.** Staff intends to review financial products that might serve as an alternative to reinsurance and interview regulators, insurers and financial counselors to learn about their feasibility.
- ☞ **Public Adjusters.** Staff intends to interview insurers, public adjusters, the insurance consumer advocate and regulators to get a better understanding of the issues giving rise to the legislative changes regarding the regulation of public adjusters which were passed, but vetoed last year.
- ☞ **Impact of federal health care reforms on the Florida private insurance market.** Committee staff intends to evaluate the federal legislation to determine how the provisions of the act may necessitate changes in state laws regulating private health insurance and analyze the potential fiscal impact of the health insurance reforms on the private and public sector in Florida.

Model Audit Rule Changes Again

By: David Yon

The Office has noticed additional changes to the model audit rule, section 69O-137.002, F.A.C. The initial proposed changes were focused on updating the Florida rule to make it more consistent with the NAIC model rule. However, numerous changes have resulted from comments by the Joint Administrative Procedures Committee and others. A notice of change was published in the July 16, 2010, Florida Administrative Weekly, incorporating many of these changes. The Office advised that it

inadvertently omitted some proposed changes in that notice.

The omitted language provides that the Office has authority to require an insurer’s board to enact improvements to the independence of the insurer’s audit committee membership if the “insurer is in a Risk Based Capital action level event, meets one or more of the standards of an insurer deemed to be in hazardous financial condition, or *otherwise exhibits qualities of a troubled insurer.*” The revised rule was presented to the Financial Services Commission on August 10, 2010 and approved for final adoption. For a complete copy of the new rule please contact any of our insurance team members.

Elizabeth McArthur Selected as Administrative Law Judge

By: Travis Miller

Elizabeth McArthur, a founding shareholder of Radey Thomas Yon & Clark, has accepted an appointment as an Administrative Law Judge with Florida’s Division of Administrative Hearings. She is board certified in State & Federal Government and Administrative Practice and has long been active in the Administrative Law section of The Florida Bar.

“We are excited for Elizabeth as she begins this new phase of her career,” said firm president Travis Miller. “We are grateful for her contributions to the firm over the last seven years, and we will miss her as she pursues this new position. At the same time, this appointment presents a unique opportunity for Elizabeth to advance her interest in administrative law. We wish her all the best.”

Elizabeth joined the Division of Administrative Hearings on July 30, 2010.

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Donna Blanton Attains Board Certification

Donna Blanton has become board certified by The Florida Bar in State & Federal Government and Administrative Practice. Certification is The Florida Bar's highest level of evaluation of an attorney's competency and experience in Florida Supreme Court-approved areas of law. The certification process includes evaluation of a lawyer's professional experience, as well as a rigorous examination. In addition, certification includes peer review in an attorney's professional field and in the areas of ethics and professionalism.

"We congratulate Donna on this achievement," said firm president Travis Miller, who also is board certified in State & Federal Government and Administrative Practice. "Donna's board certification shows not only her dedication to her field of practice, but also the firm's commitment to professional development."

The State & Federal Government and Administrative Practice area of certification encompasses rulemaking and adjudications associated with state and federal agencies' actions.



Bert Combs Invited to Participate in Panel Discussion at NAPEO Conference

Bert Combs has been invited to participate in a panel discussion at an upcoming NAPEO conference in September in San Antonio, Texas. The panel entitled *Opportunities and Pitfalls in Affiliated Industries & Insurance Relationships* will focus on:

- Hearing the best opportunities for expanding a PEO's market share.
- Discovering how affiliated entities can lead to increased services and profits.
- Learning where the minefields are, how to avoid them, and where to reap the benefits.
- Discovering the do's and don'ts for PEOs in these unique relationships.