



New York State Department of Labor
Eliot Spitzer, Governor
M. Patricia Smith, Commissioner

OPINION
FILE

MEMORANDUM

May 11, 2007

TO: Carmine Ruberto

FROM: Maria Colavito *[Signature]*
By: Jeffrey Shapiro

SUBJECT: PEO Security, Letters of Credit, RO-07-0040

To your e-mail of May 1, 2007 you attach an April 24, 2007 letter from Victor Fama, Esq, to the Commissioner in which he asks whether a "guaranteed, irrevocable Letter of Credit in the amount of \$75,000 issued by a major banking institution" is sufficient to meet the requirements of Labor Law §921(2). You state that although this has not previously been done, you have no objections. You ask if Counsel's Office can see any reason not to do so. It is this Office's opinion that such a letter of credit may satisfy the requirements of Labor Law §921(2).

Labor Law §921(1) requires that upon initial registration and each subsequent annual reporting, a PEO must submit an audited financial statement showing a minimum net worth of \$75,000.00. Labor Law §921(2) provides that as a substitute for such statement, a PEO may be required to "deposit in a depository designated by the department a bond or securities with a minimum market value of seventy-five thousand dollars." Such securities must include authorization to the Department to sell such securities in "an amount sufficient to pay any taxes, wages, benefits or other entitlement due a worksite employee, if the professional employer organization does not make those payments when due." Therefore, the issue here is whether a letter of credit is capable of meeting the requirements of such a security.

Letters of credit are governed by Article 5 of the Uniform Commercial Code (UCC §5-101 *et. seq.*). UCC §5-102(a)(10) defines a "letter of credit," in essence, as a "definite undertaking" by which the issuing bank or other guarantor agrees to honor the presentment of the letter for payment. UCC §5-106(a) states that a letter of credit "is issued and becomes enforceable according to its terms" when it is given to the beneficiary (in this case, the Department). UCC §5-108 provides that the issuer may only honor presentations for payment that strictly comply with the terms of the letter and must dishonor any presentation that does not so comply. Of special note for the Department's purposes are the provisions of UCC §5-106 stating that a letter of credit is revocable only if it so provides (UCC §5-106(a)), that if no

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expiration date is stated a letter of credit expires one year after issuance (UCC §5-106(c)) and that a letter of credit that states that it is "perpetual" expires five years after issuance (UCC §5-106(d)).

As Labor Law §921(2) states that the Department may accept a security of a minimum value of \$75,000.00 if such security contains authorization to the Department to sell such security to pay taxes, wages and benefits to employees that the PEO fails to pay, and as a letter of credit must be honored upon strict compliance with its stated terms, a letter of credit in a minimum amount of \$75,000.00 whose terms provide for presentment by the Department upon the circumstances set forth in Labor Law §921(2) would be a "security" sufficient to meet the requirements of Labor Law §921(2).

Please take note that as Labor Law §921(2) appears to make discretionary the acceptance of a security by the Department, and as a letter of credit is only honored if presented on strict compliance with its terms, the Department has the right to insist that the terms of the letter of credit are in exact accord with Labor Law §921(2), and has the right to reject any letter of credit that does not so comply. Also, since letters of credit without stated expiration dates expire after one year, and as Labor Law §921 requires submission of a financial statement or security upon initial registration and with each annual reporting, Counsel's Office recommends that the term of each letter of credit be unstated and that the PEO be required to submit a new letter of credit with each annual reporting. In this way, we may be certain that the letter of credit has been issued by a solvent financial institution, and not one that has become insolvent during the five year period of a "perpetual" letter of credit.

If you have any further questions on this issue, please feel free to contact me.

bcc: Opinion File
J. Shapiro
CO Dayfile (RO-07-0040)