



COMMONWEALTH OF MASSACHUSETTS

Office of Consumer Affairs and Business Regulation

DIVISION OF BANKS

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May 10, 2017

Wendy E. Wolf
Vice President Government Affairs
ADP TotalSource
2 Vision Drive
Natick, MA 01760

Dear Ms. Wolf:

This letter is in response to your correspondence dated February 16, 2017 to the Division of Banks ("Division"), in which you request an opinion relative to the applicability of G. L. c. 255F, § 4(b) to the activities of ADP Total Source ("ADP"). More specifically, ADP has asked whether the exclusivity requirement set forth in G. L. c. 255F, § 4(b) and its implementing regulation, 209 CMR 41.00 *et seq*, prohibits Massachusetts licensed mortgage lenders and brokers employing mortgage loan originators from utilizing the outsourcing services of ADP, as described.

As set forth in your most recent letter and previous correspondence dated February 3, 2016, ADP is a professional employer organization ("PEO") operating in Massachusetts. As a PEO, ADP provides human resources services to its small business clients, including health insurance plans as well as retirement plans. ADP enters into client services agreements with its clients, typically small businesses, whereby ADP assumes certain responsibilities with regard to the client's employees. These responsibilities include paying the client's employees, paying and withholding payroll taxes, maintaining workers' compensation coverage, providing employee benefit programs, and administering HR compliance functions. The client maintains exclusive control over the day-to-day activities of its employees and its business. As described by ADP, this "co-employer" relationship relieves small businesses of the burdens of human resources administration, allows small businesses to offer valuable employee services and benefits that they might not otherwise be able to offer, and does so in a cost-effective manner. PEOs such as ADP do not have any involvement in the core business of its clients and do not provide any direct or indirect services to its clients' customers. As explained by ADP, because the PEO is deemed the employer of the client's employee solely for the designated HR functions, the client remains the employer for all other purposes. Namely, the client remains the sole employer for purposes of:

- Management and day-to-day operations, including direction and control over employees
- Determining employee hiring, firing, and employee discipline
- Managing its finances and bookkeeping
- Determining job functions and duties of employees
- Complying with applicable federal and state licensing and industry-specific requirements
- Determining employee wages and frequency of payroll
- Negotiating and entering into contracts on behalf of the business

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As part of its opinion request, ADP has also provided a copy of the services agreement it enters into with clients setting forth the rights and obligations of the parties and outlining the “co-employer” relationship. ADP has also noted the U.S. Department of Housing and Urban Development’s (HUD) recently-issued Mortgage Letter 2016-18, allowing PEOs such as ADP to provide services to Federal Housing Administration (FHA) approved mortgage lenders. Through the letter, HUD has specifically permitted mortgage lenders to use outside contractors for “human resources services (payroll processing, payment of employment taxes and the provision of employee benefits) provided by a professional employer organization or a similar entity.” ADP currently provides its services to non-mortgage clients within the Commonwealth.

Massachusetts General Laws chapter 255F, § 4(b) establishes an exclusivity requirement applicable to mortgage loan originators, providing that a mortgage loan originator may be employed by “no more than 1 entity.” An “entity” is defined in G. L. c. 255F, § 1 as “a person or entity that is licensed under chapter 255E.” Mortgage lenders and brokers are the only entities licensed under Chapter 255E. The Division has previously considered a similar inquiry regarding the exclusivity requirement of G. L. c. 255F, § 4(b) in the context of the provision of PEO-type services. *See* Opinion 10-027. In that Opinion, however, the facts differed from those presented by ADP. More specifically, in Opinion 10-027, the “licensed mortgage lender would be a client of the PEO . . . [and would] pay a fee to the PEO in return for the PEO providing the services of a mortgage loan originator to the lender.” Based on that description, it appeared that the PEO would be employing the mortgage loan originator to provide mortgage industry services to the lender. Accordingly, based upon these facts, the Division explained that “a licensed mortgage loan originator cannot be an employee of any entity other than a licensed mortgage lender or a licensed mortgage broker *relative to his/her employment in the mortgage industry.*” (emphasis added). It is the Division’s position that the exclusivity provision set forth in G. L. c. 255F operates to limit a mortgage loan originator to a single licensed mortgage broker or lender for purposes of the originator’s mortgage industry work. As set forth in ADP’s correspondence and client services agreement, when ADP enters into client services agreements with mortgage lender or broker clients, ADP assumes only limited human resources functions and therefore acts only as a co-employer of a mortgage loan originator with regard to functions that are unrelated to the originator’s mortgage industry work. It is the position of the Division that ADP may provide its services, as described, to Massachusetts licensed mortgage lenders and brokers without violating G. L. c. 255F, § 4(b) or 209 CMR 41.00 *et seq.* The Division reserves the right to require Massachusetts-specific language as part of the addendum to ADP’s client services agreement.

The conclusions reached in this letter are based solely on the facts presented. Fact patterns which vary from that presented may result in a different position statement by the Division.

Sincerely,



Merrily S. Gerrish
Deputy Commissioner of Banks
and General Counsel

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