



## EMPLOYER SERVICES CLIENT PARTICIPATION CERTIFICATE

1/2009

This certificate (*Certificate*) is issued by the Employer Services Assurance Corporation (*ESAC*) to a client of an employer services firm (*Service Firm*) who participates in ESAC's Client Assurance Program.

### 1. What Is the Purpose of this Certificate?

This Certificate contains the terms of the Client Assurance Program that ESAC administers through the Employer Services Trust (*Trust*) and the conditions under which you may be eligible for reimbursement if your Service Firm does not perform certain employer responsibilities.

### 2. What Technical Terms Are Defined?

Technical terms are defined in section 15 of this Certificate. Additional terms are defined as they first occur in the text. Defined terms are capitalized when they are used below.

### 3. How Long Does This Certificate Last?

This Certificate takes effect automatically when you receive this Certificate from ESAC. The Certificate terminates automatically if you cease to be a client of your Service Firm or if your Service Firm's participation is terminated. In addition, you may terminate by giving written notice to ESAC; and ESAC may terminate the Certificate or the Client Assurance Program by giving written notice to you. Termination does not affect any claims that are incurred before the effective date of termination.

### 4. What Are My Benefits?

According to the terms of this Certificate, the Trust will reimburse you for, or pay, if your Service Firm fails to pay, any of the following:

- Wage Obligations
- Life and Health Insurance Premium Obligations
- Employee Benefit Obligations
- Employment Tax Obligations
- Workers' Compensation Insurance Premium Obligations

The failure to pay any of these obligations is a default (*Default*).

### 5. How Are Benefits Paid?

- a) The benefits are provided solely by surety bond(s) and/or insurance policy(ies) (collectively *Coverage*) held by the Trust. Neither ESAC, the Trust, nor the Trustee is an insurer, fiduciary, or guarantor of the benefits.
- b) In case of a Default, proceeds from the Coverage will be paid to the Trust on behalf of your Service Firm's clients. The Trust will distribute the proceeds for claims that are accepted by the Trust's claims committee (*Claims Committee*).

### 6. What Are the Obligations of ESAC and the Trust?

The obligations of ESAC and the Trust are limited to standards compliance monitoring of your Service Firm, obtaining the Coverage, investigating alleged Defaults, and managing and paying any claims. Neither ESAC nor the Trust guarantees any benefits or any of your Service Firm's Financial Obligations, and this Certificate is not a policy of insurance. The Coverage held by the Trust on behalf of the clients of your Service Firm is the only source of financial assurance under this Certificate. Other Service Firms that participate in the Client Assurance Program do not have any responsibility for the obligations of your Service Firm, ESAC or the Trust.

### 7. What Do I Have to Do to be Eligible for Benefits?

To be eligible for payment of a claim as a covered client (*Covered Client*), you must first satisfy all these requirements:

- a) report any Default and file a claim as required by section 8;
- b) if a Default occurs, terminate your service agreement with your Service Firm before filing a claim (the termination is invalid if it is set aside by a judicial proceeding);
- c) have paid all amounts that you owe to your Service Firm for all pay periods prior to the Default;
- d) assign your claim to the Trust and the Surety or Insurer and execute any other documents that ESAC determines are reasonably necessary under the Client Assurance Program or the Trust; and
- e) for each Wage Obligation or Employee Benefit Obligation that you are claiming, have the Worksite Employee assign his or her claim to the Trust and the Surety or Insurer.

### 8. How Do I Report a Default and File a Claim?

- a) If you know about a possible Default, or if one of your officers or managers knows about a possible Default, then you must immediately notify ESAC by phone and confirm the phone call by sending a fax or e-mail not later than the close of business on the first business day after the phone call.

- b) To file a claim, you must provide completed claims forms to ESAC within 30 days after you receive notice of a Default from ESAC; and supplement your claims filing with any additional information that ESAC requests in order to decide on the claim. ESAC will provide claims forms on request.

### 9. How Are Disputes Over a Claim Resolved?

If you or your Service Firm disputes the validity or amount of a claim or there are conflicting claims, the Claims Committee may resolve the dispute in its discretion or may submit any unsettled dispute to arbitration under section 13. If the Claims Committee chooses to resolve the dispute, either you or your Service Firm can submit the dispute to arbitration under section 13. The Claims Committee may also, at its option, interplead any amounts otherwise payable by depositing these amounts with a court that will resolve the dispute.

### 10. What Are the Limits on Coverage and on Paying Claims?

- a) As of the date of this Certificate, the Trust holds a \$1 million surety bond (*Specific Coverage*) to cover Financial Obligations exclusively for the benefit of your Service Firm's clients who are covered by the Client Assurance Program. The Trust also holds a \$10 million surety bond (*Excess Coverage*) to cover the collective Financial Obligations of all ESAC accredited PEOs. These two bonds together constitute the total amount of Coverage as of the date of this Certificate. The amount of the Coverages may be changed from time to time, but you will receive written notice of any decrease in any component of the Coverage. The Coverage in effect at any time may be verified at [www.ESACorp.org](http://www.ESACorp.org) or by calling or writing ESAC.

- b) If a Default occurs, the Trust will pay the Financial Obligations for all of your Service Firm's Covered Clients based on all claims received within the filing period specified in section 8. After the claims period ends and disputed amounts are decided, if the total amount of approved claims for a Default exceeds the amount of Coverage available, the Trust will pay the claims in the following order:

- i. Wage Obligations;
- ii. Life and Health Insurance Premium Obligations;
- iii. Employee Benefit Obligations;
- iv. Employment Tax Obligations;
- v. Workers' Compensation Insurance Premium Obligations

If there is not enough Coverage available to pay all of a class of obligations, the Trust will pay each approved claim within a class on a prorated basis. In the event of a Default by more than one ESAC accredited Entity, the Excess Coverage will be used to pay claims in excess of the Specific Coverage according to the dates of occurrence, with claims related to the earliest Default being paid first.

- c) The Claims Committee has the sole discretion to decide which claims are properly documented and which obligations the Client Assurance Program covers.
- d) The Client Assurance Program does not cover indirect or special or consequential damages, penalties, interest, the cost of legal representation, lost profits, goodwill, exemplary damages, or other forms of claims or damage other than the Financial Obligations listed in section 4 and defined in section 15.
- e) The Trust may pay certain claims as follows:
  - i. for Employment Tax Obligations, payment may be made directly to the taxing authority.
  - ii. for Life and Health Insurance Premium Obligations and Workers' Compensation Insurance Premium Obligations, payment may be made directly to the insurance carrier;
  - iii. for Wage Obligations and Employee Benefit Obligations, payment may be made directly to the applicable Worksite Employee, unless the employee has validly assigned to you the right to those payments.
- f) Any Life and Health Insurance Premium Obligation or Workers' Compensation Insurance Premium Obligation is limited to premium payable not more than 60 days before the applicable Default.

### 11. Who Can Act for Me, and What Assignments Am I Making?

By accepting this Certificate and participating in the Client Assurance Program:

- a) you appoint the Trustee of the Trust and ESAC as your attorneys-in-fact, and you authorize either the Trustee or ESAC to take any action concerning the Coverage or the Surety or Insurer that you could take, including the power to:
  - i. receive proceeds on your behalf from the Coverage held by the Trust, and to hold and pay out any proceeds for your benefit;
  - ii. compromise or settle any claim or conduct any other dealings with the Surety or Insurer on your behalf;
  - iii. sign a document of subrogation concerning any claim or benefit under the Client Assurance Program; and
  - iv. hold, as your agent, any interest in any Coverage held by the Trust.
- b) you assign to the Trust and the Trustee all the interest you may have or acquire in any Coverage held by the Trust, and in the proceeds from this Coverage and in any other trust assets. The Trust will use the proceeds to pay your claims and the claims of other Covered Clients of your Service Firm.
- c) you will sign any other document that ESAC requests to reaffirm or acknowledge the appointments and assignments in this section 11.
- d) nothing in this Certificate limits any actions you may take to recover any amounts due to you from your Service Firm, except for your assignment of claims made under the terms of this Certificate as a condition of being eligible for reimbursement by the Trust. Your rights and benefits under the Client Assurance Program are in addition to, and not in place of, any rights you may have under the service agreement with your Service Firm.

#### 12. How Does ESAC Notify Me?

To notify you, ESAC will use the address and contact information provided by your Service Firm as part of its ongoing accreditation requirements. ESAC has no liability for using the latest address of record for you. The Trust, Trustee, Surety and Insurer are entitled to rely solely on ESAC for all notices to you that this Certificate requires.

#### 13. How Are Disputes Resolved?

- a) If there is a dispute among you, ESAC, the Claims Committee, Trust, Trustee or your Service Firm about any matter related to this Certificate, the Trust, Coverage held by the Trust, or the Client Assurance Program, the parties must make a good-faith effort to resolve the dispute by direct discussion on the telephone or in person. Any unresolved dispute must be resolved exclusively through final and binding arbitration under the Federal Arbitration Act. This requirement to arbitrate only applies to matters related to this Certificate and the Client Assurance Program. By accepting this Certificate and participating in the Client Assurance Program, you agree to arbitration.
- b) If you want to seek arbitration, you must file a demand with the American Arbitration Association within the applicable statute of limitations. A copy of the demand must be simultaneously served on all other parties.
- c) The American Arbitration Association will administer the arbitration under its Commercial Arbitration Rules, using a single arbitrator. The arbitration proceedings will take place at a location that the parties mutually agree on. If they cannot agree, the proceedings will take place in Little Rock, Arkansas. The substantive law of Arkansas and of the United States will bind the arbitrator.
- d) The arbitrator may award any relief available under law. The cost of arbitration—including attorneys' fees, the American Arbitration Association's fees, the arbitrator's fees, and the cost of a hearing room—are subject to the arbitrator's award. Any judgment on the award may be entered and enforced in any court with jurisdiction.
- e) As the sole exception to arbitration, any party may seek injunction to preserve the status quo before and during arbitration.
- f) This requirement to arbitrate survives the breach or termination of this Certificate by any party for any reason.
- g) You do not have standing to dispute any claims or obligations to other Covered Clients of your Service Firm.

#### 14. General Provisions:

- a) **Binding Effect.** This Certificate is binding on and inures to the benefit of the respective successors and assigns of you, ESAC, the Claims Committee, Trust, Trustee or your Service Firm.
- b) **Governing Law.** The laws of Arkansas govern this Certificate and the terms of the Client Assurance Program.
- d) **Integration.** This Certificate constitutes the entire terms of the Client Assurance Program. No other agreement, statement, promise,

or practice concerning the subject matter is binding on you, ESAC, the Claims Committee, Trust, Trustee or your Service Firm.

- e) **Amendment.** ESAC may amend this Certificate at any time, by giving you 90 days' prior written notice. But if the Surety or an Insurer providing Coverage under the Client Assurance Program or any regulatory agency requires an amendment, ESAC may amend the Certificate on the date that it gives you written notice.
- f) **Notices to ESAC.** Except as provided in section 8(a) and (b), you must give notice to ESAC by one of the following means: (i) certified mail, return receipt requested; (ii) overnight courier service; (iii) hand delivery with receipt; or (iv) facsimile, e-mail or telephone, followed by one of the above. You must send the notice to ESAC's address provided on the Certificate of Coverage, unless this information is updated by written notice to you.
- g) **Third Party Beneficiaries.** Only you, ESAC, the Claims Committee, Trust, Trustee or your Service Firm have an interest in the Client Assurance Program. More specifically, there is no intended third-party beneficiary, and only you, ESAC, the Claims Committee, Trust, Trustee or your Service Firm are entitled to rely upon this Certificate.

#### 15. Definition of Technical Terms:

- a) *Employee Benefit Obligation* means the obligation of your Service Firm to collect and remit any elective or voluntary contributions by Worksites Employees with respect to any employee benefit plan as defined in Section 3(3) of the Employee Retirement Income Security Act of 1974, as amended (ERISA), if the plan is sponsored or co-sponsored by your Service Firm or your Service Firm is otherwise contractually obligated pursuant to an express provision of a written contract to pay such contributions on behalf of the Worksites Employee and clients. Employee Benefit Obligations are covered by this Certificate to the extent the contributions are collected by your Service Firm but not paid over to the policy, plan, or other funding vehicle for the employee benefit plan. The obligations of the Trust are not "plan assets," and ESAC, the Trust, and their agents are not "fiduciaries" within the meaning of ERISA.
- b) *Employment Tax Obligation* means your Service Firm's obligation with respect to Worksites Employees to report and pay in a timely and accurate manner the amount of its liability under applicable law for payment and withholding of federal, state, and local income taxes and employment taxes, and FICA and Medicare taxes, but not including any gross receipt taxes, sales taxes or use taxes.
- c) *Life and Health Insurance Premium Obligation* means the obligation of your Service Firm to pay when due premiums, not subject to a good faith reasonable dispute, for life or health insurance coverage under a Fully Insured group life insurance plan, as defined in Section 79 of the Internal Revenue Code, or a Fully Insured group health plan, as defined in Section 5000 of the Internal Revenue Code, sponsored by your Service Firm for the benefit of its Worksites Employees.
- d) *Wage Obligation* means the obligation of your Service Firm to pay wages to its Worksites Employees according to applicable law. Wages are limited to cash compensation payable to Worksites Employees in the ordinary course of business for which you have paid your Service Firm its service fees.
- e) *Workers' Compensation Insurance Premium Obligation* means the obligation of your Service Firm to pay when due workers' compensation premiums, not subject to a good-faith reasonable dispute, with respect to a Fully Insured workers' compensation policy issued to your Service Firm for the benefit of its Worksites Employees.
- f) *Financial Obligation(s)* means any or all of the obligations of your Service Firm described in a) through e) above.
- g) *Worksites Employee* means any person whose employment status with your Service Firm has been recognized by completing Internal Revenue Service Form W-4, who is treated as an employee of your Service Firm on its payroll records, and who provides services to you.
- h) *Fully Insured* insurance plan means any plan of insurance that is fully insured by a duly licensed carrier. If a portion of the premium cost is determined retrospectively, the financial obligation is limited to that portion of the premium due to be paid in advance or within a policy period without regard to the amount of claims.