

Welcome!

The webinar will begin shortly...

3:00

minutes

until the webinar starts

While you wait, here are some fast facts about HR outsourcing:

Companies that outsource HR to a professional employer organization (PEO) are **50% less likely** to go out of business.



The webinar will begin shortly...

2:00

minutes

until the webinar starts

While you wait, here are some fast facts about HR outsourcing:

Companies that use a professional employer organization (PEO) are **28% more satisfied** with their available selection of employee benefits.



"PEOs: Taking Outsourcing a Step Beyond Pays off for Small & Mid-Sized Companies" Aberdeen Group, 2011

The webinar will begin shortly...

1:00

minute

until the webinar starts

While you wait, here are some fast facts about HR outsourcing:

G&A Partners has an average Net Promoter Score (NPS) that is **35x higher** than that of the HR outsourcing industry.



"NPS Benchmarks for B2B" Inavero, 2014



2021 Employment Law Update: Navigating Familiar Legal Issues in an Unfamiliar Time

Presented by Alexis C. Knapp Shareholder, Littler Houston

aknapp@littler.com (713) 652-4706



Before we begin...

- We are recording this webinar. The on-demand recording will be available on our website by the end of the week.
- This webinar has been pre-certified by the Human Resources Certification Institute (HRCI) and The Society for Human Resource Management (SHRM) for one hour of HR general recertification credit.
- This information provided by Littler is not a substitute for legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related disputes. Although this information attempts to cover some major recent developments, it isn't inclusive, and the current status of any decision or principle of the law should be verified by counsel.

About G&A Partners

G&A Partners delivers world-class HR solutions that help build thriving businesses and make a difference in the lives of the clients and employees we serve.

G&A Partners has a local presence in the following markets:





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**What is Happening,
and May Be About to
Happen, in 2021 and
Beyond**



A New Era in DC



Joseph R. Biden, Jr. - 46th President of the United States

*“I’m going to be the strongest labor
president you have ever had.”*

- President Joe Biden, Sept. 7, 2020.

<https://www.joebiden.com>.



The First 100 Days

The First 100 Days

- The “American Rescue Plan”
 - \$1.9 Trillion Package
 - \$1,400 stimulus payments to individuals
 - Extension of unemployment benefits
 - Extension and expansion of FFCRA
- Over 50 executive orders, proclamations, memoranda, and directives so far
- Agency Personnel / Nominations
- Efforts Toward a Second Trump Impeachment



The 117th Congress

Control of Congress

Senate: 50D – 50R

Vice President Harris to serve as tiebreaker, if applicable

House: 222D – 213R

LA-2, LA-5 and TX-6 open

Control of Congress

First

- COVID-19 Relief

Then

- \$15 Federal Minimum Wage and Tip-Credit
- Multiemployer Pension Issues
- Immigration Reform
- Mandatory Paid Family and Sick Leave
- Gender-based pay discrimination
- Protecting the Right to Organize (PRO) Act
- Anti-arbitration and anti-non-compete

The 117th Congress: The PRO Act – Can It Pass?



The PRO Act – Introduced February 4, 2021

- 50+ changes to the NLRA
- Codifies the Obama-era joint employment, ambush election, and persuader rules
- Codifies California's "ABC" independent contractor test
- Effectively bans state right-to-work laws
- Prohibits arbitration agreements in employment contracts – no class waivers
- Encourages card checks over secret ballot elections
- Takes away employer standing to contest union election petitions
- Eliminates secondary boycott protections to allow return to 1950's union pressure tactics
- Massive new penalties to cripple employer resistance to organizing
- And much more

The 117th Congress: Paid Leave Priorities

Family and Medical Insurance Leave (FAMILY) Act

- Permits workers to take up to 60 days of **paid** time off to care for themselves or a family member
- Establishes the “Federal Family and Medical Leave Insurance Trust Fund”
- Both the employer and employee would be taxed at 0.2% of wages to be paid into this fund

The 117th Congress: Anti-Arbitration Priorities

Forced Arbitration Injustice Repeal (FAIR) Act

- Invalidates pre-dispute agreements to arbitrate employment, consumer, antitrust, and civil rights matters

Restoring Justice for Workers Act

- Prohibits mandatory pre-dispute arbitration in employment matters
- Amends the NLRA and would prescribe relief set forth by the Civil Rights Act in civil actions

Ending Forced Arbitration of Sexual Harassment Act

- Prohibits mandatory pre-dispute arbitration of sex discrimination claims



COVID-19 Vaccines

COVID-19 Vaccine Issues to Consider

Mandating versus encouraging

- Title VII, PDA and ADA exceptions and related employer obligations
- The EUA status of the vaccine
- Availability and practicality
- Employee relations Customer/client/public relations
- What will you do with those who cannot or will not get the vaccine?

Asking about vaccination status

Tracking vaccination status

Sharing vaccination status



U.S. Equal Employment Opportunity Commission

Search

What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

Technical Assistance Questions and Answers - Updated on Dec. 16, 2020

K. Vaccinations

The availability of COVID-19 vaccinations may raise questions about the applicability of various equal employment opportunity (EEO) laws, including the ADA and the Rehabilitation Act, GINA, and Title VII, including the Pregnancy Discrimination Act (see [Section J, EEO rights relating to pregnancy](#)). The EEO laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.

ADA and Vaccinations

K.1. For any COVID-19 vaccine that has been approved or authorized by the Food and Drug Administration (FDA), is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a “medical examination” for purposes of the ADA? (12/16/20)

*As of March 23, 2021, the EEOC's December 16, 2020 guidance is the most recent.

Most Employers Unlikely to Mandate COVID-19 Vaccinations, Littler Survey Finds.

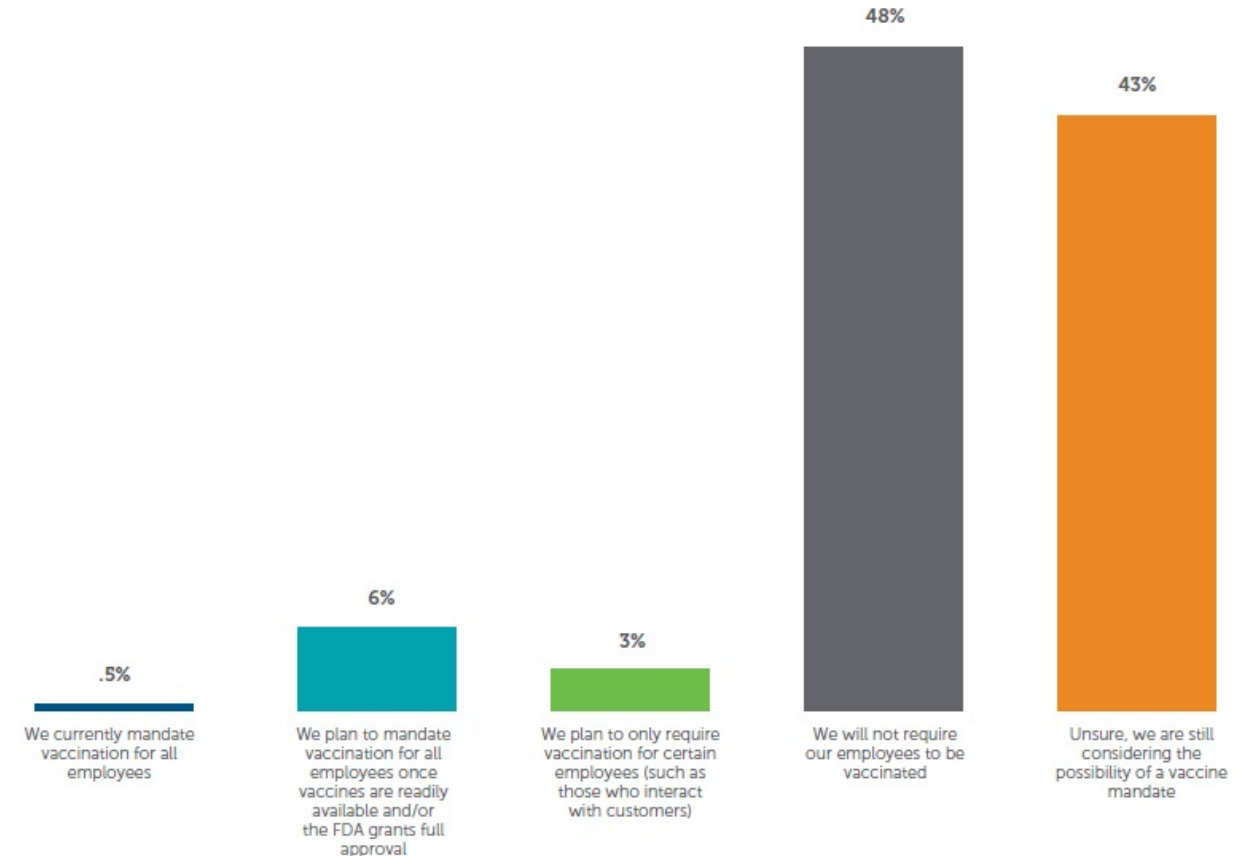
Special Report:

Littler COVID-19 Vaccine Employer Survey Report

February 2021

Mandatory Vaccination

Which of the following best describes your organization's plans to require employees to receive a COVID-19 vaccination?



For More Information...

An Employer's guide to EEOC Compliance and Covid-19

https://www.littler.com/files/littler_report_on_covid-19_and_vaccines.pdf

A State-by-State guide to phased vaccinations

<https://www.littler.com/publication-press/publication/giving-it-our-best-shot-statewide-vaccination-plans>

Littler's Employer Vaccination Survey

https://www.littler.com/files/littler_vaccine_employer_survey_report.pdf



Leave and Accommodation Issues Associated with the Pandemic



But Wait, I Thought We Were Done with FFCRA???

On March 11, 2021—President Biden signed H.R. 1319, the American Rescue Plan Act of 2021

- This is not a leave mandate!
- It simply extends tax credits for employers with 499 or fewer U.S. employees that *voluntarily* decide to provide emergency paid sick and/or family leave according to the otherwise-expired FFCRA
- Tax credits apply to qualifying leave taken from April 1, 2021 through September 30, 2021
- All six of the original EPSL reasons still apply, plus the following:
 - Employee is seeking or awaiting results of a diagnostic test for, or a medical diagnosis of, COVID-19 and was either exposed to COVID-19 or the employer requested such test or diagnosis; or
 - Employee is obtaining COVID-19 immunization or recovering from any injury, disability, illness, or condition related to such immunization.

Some other minor modifications, but unless stated otherwise, all other rules remain the same. Be sure to consult with G&A or your counsel

A Few Novel Issues During the Pandemic

Employees or their family members who get sick enough to trigger FMLA—serious health condition or family care leave under classic FMLA

Employees with chronic medical conditions *who aren't sick*, but whose health care providers advise them to quarantine / not go to work who are protected under classic FMLA (29 CFR § 825.115 (c), (f))

Employees whose health care providers provide them with documentation that they are unable to wear masks or other facial coverings at work due to a health condition—but masks are now required per state / local law or Company policy—if the interactive process gets exhausted, are they now unable to perform one or more essential job functions due to a serious health condition—and do they get leave?

So Am I Supposed to Single Out My “COVID-Vulnerable Populations?”

I know everyone is telling you they are high risk—but tread very lightly (ADA and ADEA concerns abound)

From the EEOC on age in particular: “May an employer exclude from the workplace an employee who is 65 years old or older and who does not have COVID-19, or symptoms associated with this disease, solely because the CDC has identified this age group as being at a higher risk of severe illness if they contract COVID-19? The answer is no. The Age Discrimination in Employment Act prohibits employment discrimination against workers aged 40 and over. If the reason for an action is older age, over age 40, the law would not permit employers to bar older workers from the workplace, to require them to telework, or to place them on involuntary leave. One way to show that an action was based on age would be if the employer did not take similar actions against comparable workers who are under the age of 40.”

Make the offer for employees to approach about vulnerabilities—case-by-case

Poll Question

Does your business currently have employees returning to the office?

- We never left or we are an essential business
- We're working on it right now
- We don't yet have a plan to return
- People are already transitioning back



The “I Don’t Feel Safe...” Employee

As the pandemic ebbs and flows, some concerns may resurface. Then what?

Carefully vet refusals to work onsite / return to work for individualized, **protected considerations** (eligible for leave or accommodations under FMLA, ADA, state / local law; refusal of unsafe work under OSHA; etc.)

If you offer work in accordance with appropriate state and local guidelines, and they refuse, and there are no protections for the refusal: you typically do not have to pay them, and it may disqualify them for unemployment (but consider employee relations issues)

Will the WFH requests for jobs that can be performed off-site long outlive the pandemic?

- Considering issues on a case-by-case basis
- Recognizing the potential impact on future defenses to failure to accommodate claims
- Documenting temporary work-from-home agreements for employees who cannot perform all essential functions remotely—and time-limit it, reserve the right to re-evaluate, and memorialize that all essential functions aren't being performed

What About Employees with High-Risk Family Members?


This could be classic FMLA if the employee is caring for the family member, and the family member has a serious health condition

This is not ADA—which only applies to the accommodation of an employee’s own disability (but watch association discrimination claims / risks)

So if there is no care being provided, and the request is just because the employee’s family member is high risk—what do we do?

- Consider whether the request is even doable (and watch out for over-use of the word “accommodation”)
- Consider documentation issues—but watch for GINA issues—careful on the questioning
- Memorialize that it’s something your organization is voluntarily doing for X period of time

Masks, Masks, and More About Masks

- It got super political, and super polarizing, super fast
- CDC guidance, and state/local orders requiring face coverings in various settings
- You can require masks, if you choose to do so. And these are fake: 
- But ADA principles do still apply (whether because a state or local order says so, or because federal law still applies during the pandemic)
- Remember what you know about ADA—interactive process, no blanket rules, flexibility in policies, exploring options
- Practical solutions—breaks from wearing the coverings when not around others, methods of isolating work, remote work, reassignment, leave from work





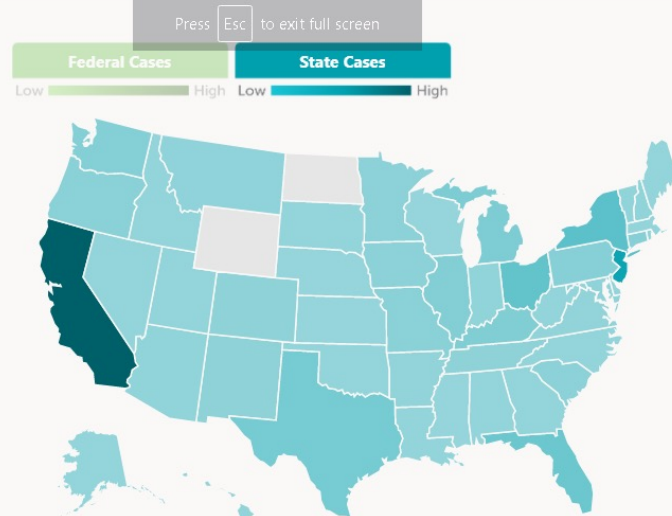
**The COVID
Lawsuits are here**

COVID-Related Litigation Trends (as of March 18, 2021)

- Between March 12, 2020 and March 18, 2021, there have been **2,038 lawsuits** (including 159 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus
- States with the most filings include: California (491); New Jersey (239); Florida (167); New York (158); and Ohio (116)
- Industries with the most filings are: healthcare (495 cases); manufacturing (225 cases); retail (183 cases); public administration (178 cases); and hospitality (154 cases).

Littler

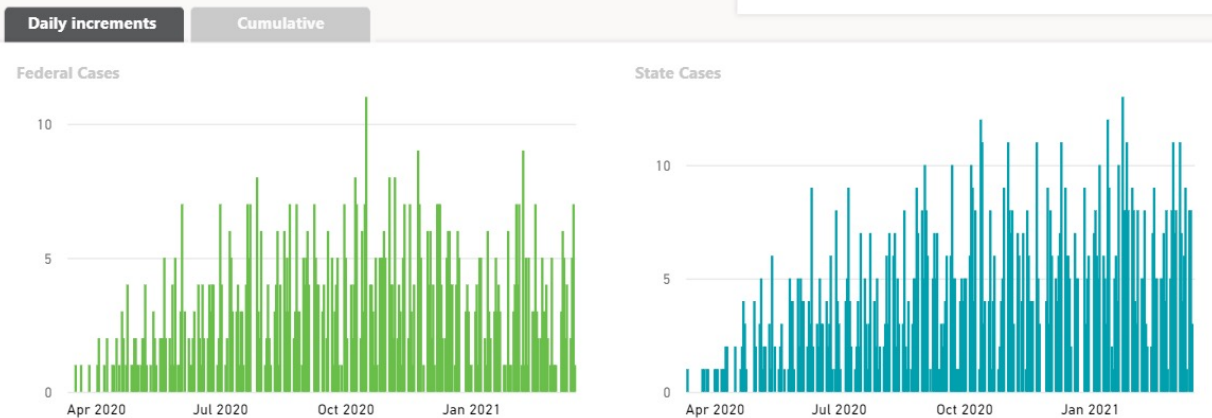
	Federal Cases	State Cases	Total Cases
USA	859	1175	2034
Wisconsin	10	0	10
West Virginia	1	1	2
Washington	5	23	28
Virginia	7	4	11
Vermont	0	5	5
Utah	0	1	1
Texas	61	42	103
Tennessee	18	9	27
South Dakota	0	1	1
South Carolina	9	11	20
Rhode Island	9	2	11
Puerto Rico	6	0	6
Pennsylvania	74	19	93
Oregon	6	16	22
Oklahoma	4	1	5
Ohio	46	70	116
North Carolina	9	1	10
New York	79	79	158
New Mexico	4	9	13
New Jersey	45	194	239
New Hampshire	4	6	10
Nevada	5	2	7
Nebraska	5	0	5
Montana	1	7	8



3/12/2020 3/18/2021

Nature of Case **Claim** **Industry**

Claims*	Federal	State
(Unspecified)	44	67
Arbitration	11	2
Background Checks	0	1
Benefits - Non-ERISA	2	2
Bonuses	11	16
CA Labor Code	26	196
CARES Act	6	3
CFRA - California Family Rights Act	2	17
Collective Bargaining Agreement	17	11
Commissions	8	9
Constitutional Claims	42	19
Conversion	1	2
Deductions	10	7
Discrimination - Age	49	127
Total	2,619	4,332



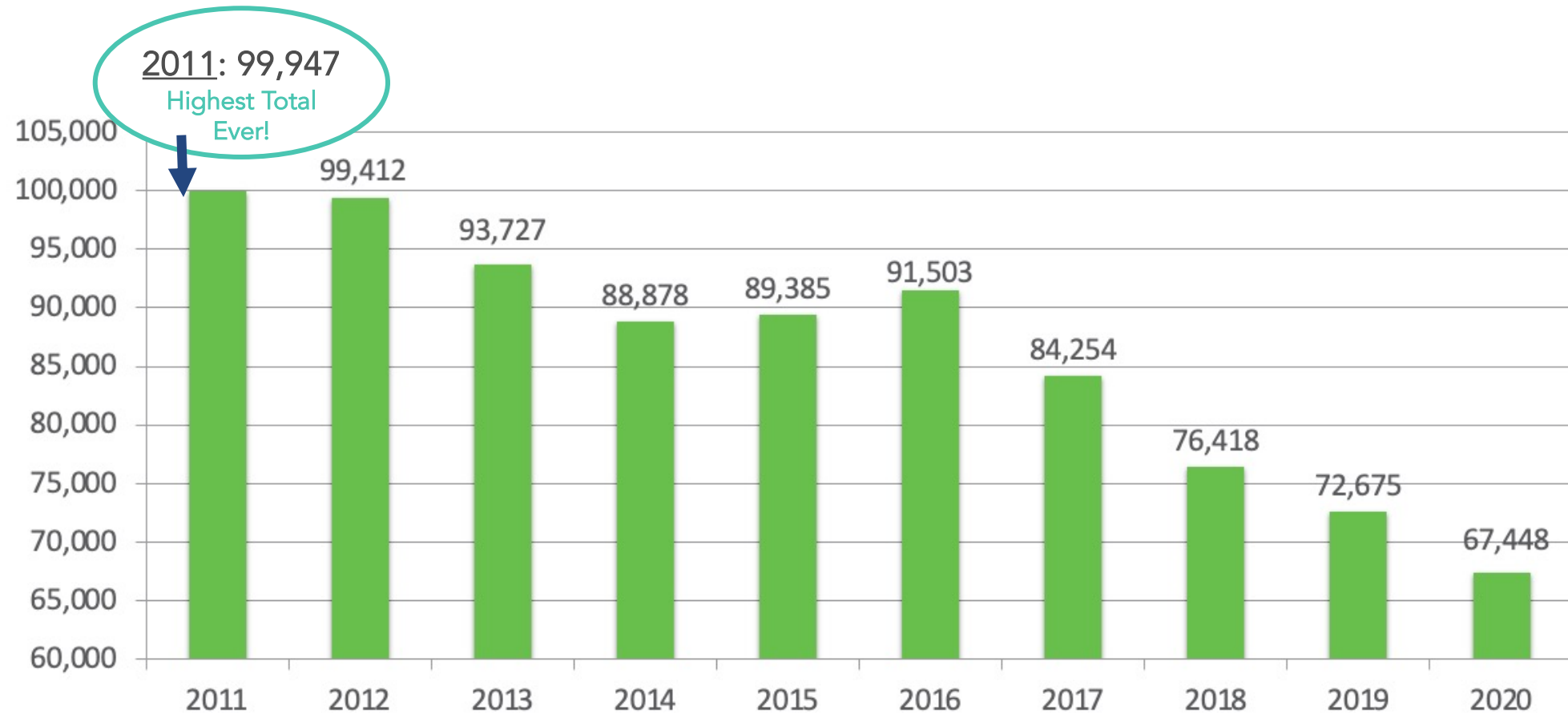
*The data reported here is collected, reviewed, and categorized from state and federal litigation filings generally. This interactive report highlights the multiple claims alleged and industries affected within each case filed. For further inquiries please contact your Littler attorney.



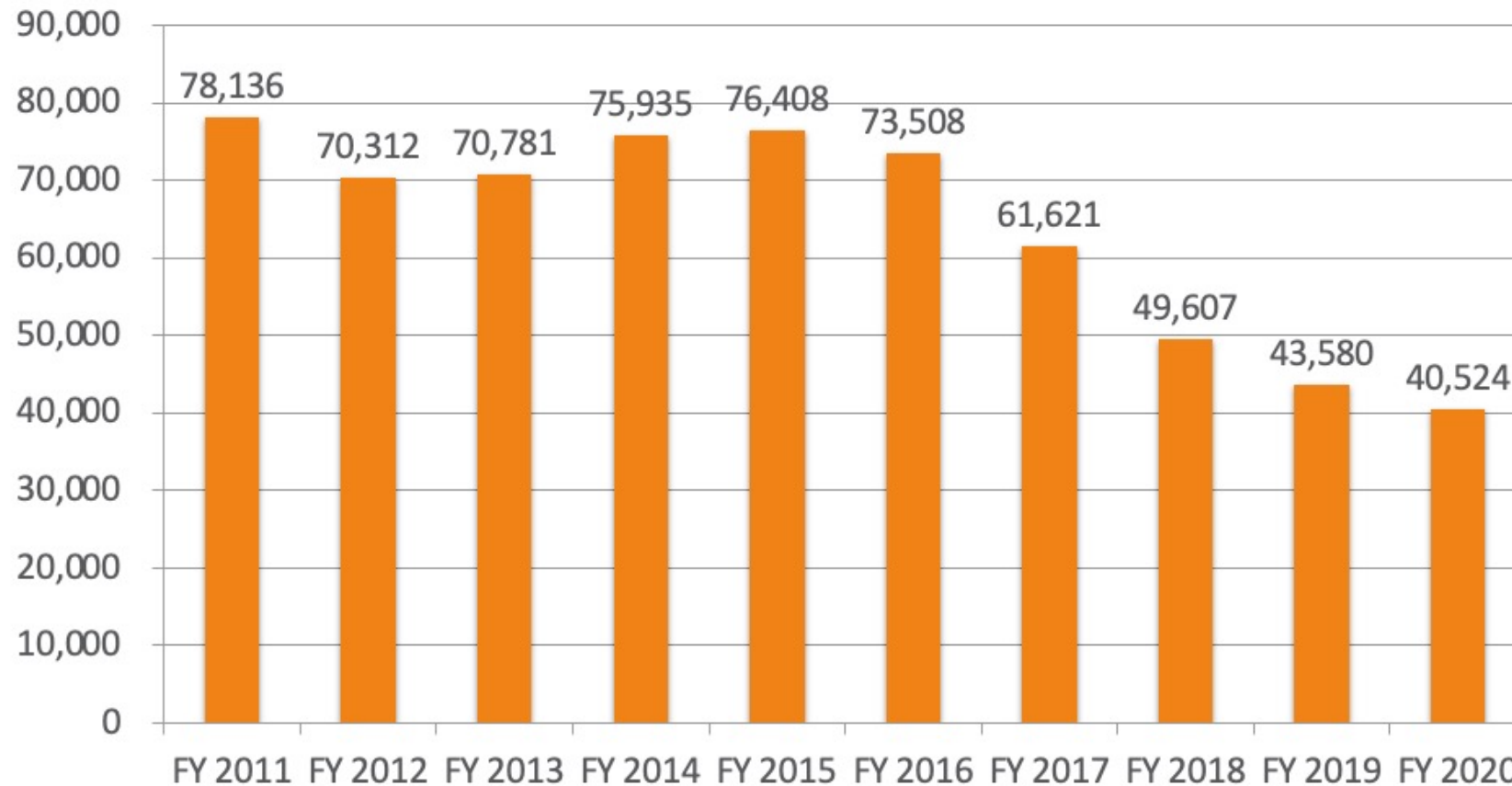
Equal Employment Opportunity Commission



Charge Filings FY 2011 through FY 202



Backlog of EEOC Charges- FY 2011 Through FY 2020



Statistics on EEOC Litigation – Volume of Litigation

Year	Individual	"Multiple Victim" (Including Systemic Lawsuits)	Percentage/ Multiple Victim Lawsuits	Total Number of "Merits" Lawsuits
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	69	25	27%	93

Breakdown of EEOC Lawsuits Filed FY 2019-2020

CAUSES OF ACTION	NUMBER OF LAWSUITS	
	2019	2020
ADA Claims	53	29
Sex Discrimination	61	37
Retaliation	48	26
Race	16	13
Religion	7	5
Age	6	7
National Origin	4	4

My Observations of Recent EEOC Activity

- Increased emphasis on mediation, conciliation / resolution of charges
- Paying attention to specific types of claims (sexual orientation discrimination, religious discrimination, COVID)
 - Battle of religious freedom versus EEO is likely to continue to be waged before the U.S. Supreme Court
- More cause findings
- Dismissals of insufficient charges?



**U.S. Department
of Labor**



U.S. Department of Labor: Wage & Hour

- Focus on joint employer
- Focus on independent contractors
- Revisit Overtime Regulations?
- Increased wage and hour enforcement

The Wandering Workforce

- Working from where? Which laws apply?
- Leaves of Absence
- State Income Tax
- Unemployment Compensation
- Workers' Compensation
- Employment Discrimination
- Training
- Notice posting

U.S. Department of Labor: OFCCP

- OFCCP responsible for enforcing anti-discrimination laws and affirmative action obligations for 25% of American workforce
- Agency expected to return to aggressive hiring and pay discrimination enforcement
- Trump Executive Order on Diversity / Inclusion Training rescinded on Day 1
- Trump religious exemption rule challenged and rescission rulemaking announced
- Possible EO on \$15 Minimum Wage and Required Emergency Sick Leave for Federal Contractors



National Labor Relations Board



NLRB: Where Things May Be Headed

- On February 1, 2021, NLRB issued GC-21-02, rescinding 10 Trump era NLRB policy directives
- What does it mean for this administration's NLRB?
 - Will there be another “war” on employee handbooks? (Boeing)
 - Will “micro” units and “quickie” election rules be revisited? (PCC Structurals)
 - Will unions gain access to employer email systems? (Caesar's/Rio)
 - Will employer rights to terminate abusive employees be protected? (GM)
 - Will confidentiality of workplace investigations be preserved? (Apogee)
 - Will union organizing and ULP charges return to pre-Trump levels?

Now What?

- Don't panic—focus on what you know now, and what you can actually do something about
- Union organizing is likely to increase – prepare your HR and management teams for what that might look like and how to respond
- Federal government contractors are special targets-keep an eye out
- Make sure your COVID protocols are defensible, doable and working—and that your HR/management teams are trained to deal with the COVID issues that will continue to come
- Revisit policies and processes for things you know need work
- Keep in close contact with G&A and your counsel!

**For additional resources,
including our on-demand
webinars, visit:**
gnapartners.com/resources