
Welcome!

The webinar will begin shortly...

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

3:00

minutes

until the webinar starts

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



"Professional Employer Organizations: Keeping Turnover Low & Survival High" McBassi & Company, 2014

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...

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

1:00

minute

until the webinar starts

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



⊕ Employment Law Forecast: 2020 & Beyond

Alexis C. Knapp, Littler Mendelson

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 HRCI and SHRM for 1 hour of HR general recertification credit.
- + If at any time during the presentation you have a question you'd like us to answer, send it to us using the "Questions" tab in the GoToWebinar menu bar.

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:



Agenda

- + 2020 overview
- + A little thing called COVID-19
- + Reopening the workplace
- + Non-COVID-19 developments
- + What employers should do right now



Alexis C. Knapp
SPHR, SHRM-SCP, MS-HRM, JD
Shareholder, Littler Mendelson

2020 Overview

- + Most new laws that were scheduled to take effect in 2020 are at the state and local levels, presenting compliance challenges for employers with operations in multiple jurisdictions
- + It's a Leap Year – and a 27-pay day year (for some)
 - + Organizations that pay biweekly on Fridays starting January 3 will have an extra payday to plan and account for...once every 11 or 12 year event
- + It's an Election year – political discussion in the workplace may ramp up! Be prepared for potential arguments, conflicts and complaints. Remind managers to enforce policies consistently
- + And wait...something else happened in 2020...what was it...???

COVID-19

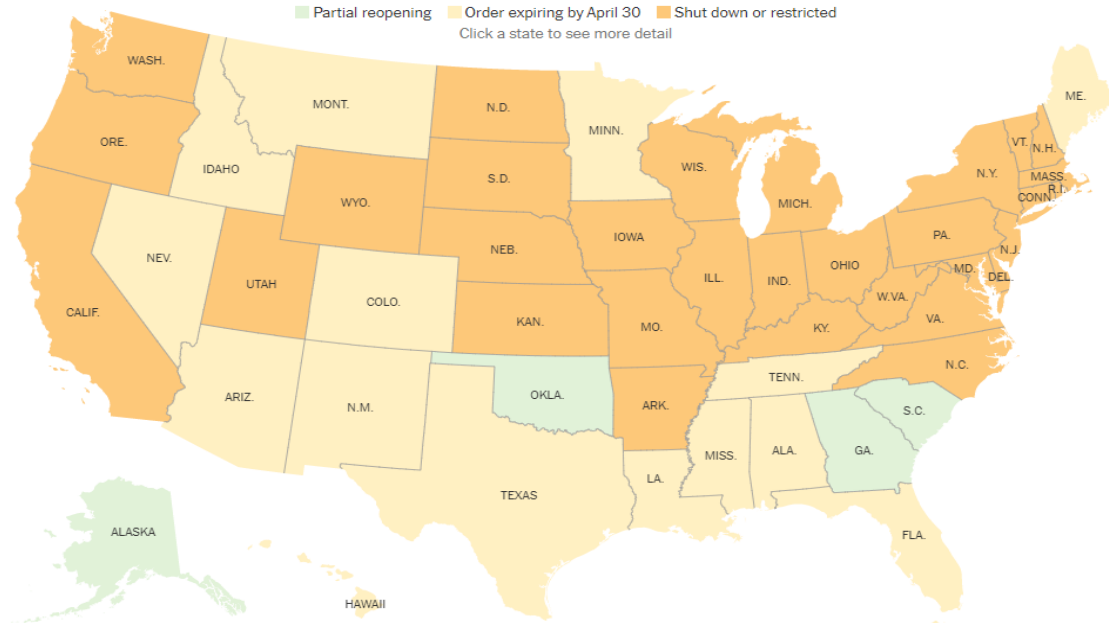
I mean, really, is there anything else to talk about?

The COVID-19 Timeline

- + February—there's a virus; should we be taking temperatures??
- + March—I need leave, wait there are new laws, and more new laws, and the laws are changing—and everything must close and all employees work from home if they can (March was over in about five minutes)
- + April—getting into a routine of homeschooling, working, cooking, answering all-day-every-day questions you've never answered before (April is about 43,215 days long)

Shelter-in-Place Orders

Partial reopening Order expiring by April 30 Shut down or restricted



"See Which States are Reopening Soon and Which are Still Shut Down"
.....The New York Times, April 2020.

FFCRA Rocks the World of Employers with Fewer than 500 Employees

- + Took effect April 1 (not retroactive)
- + Regulations at <https://www.federalregister.gov/documents/2020/04/06/2020-07237/paid-leave-under-the-families-first-coronavirus-response-act>
- + DOL Q&A <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>
- + FFCRA Poster https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Overview of FFCRA Paid Leave Provisions

- + Emergency Paid Sick Leave (“EPSL”)
 - + Up to 80 hours (~ first 10 days)
 - + 6 different reasons
 - + Full pay or 2/3 pay (depending on reason)—subject to monetary caps

- + Emergency Paid FMLA (“FMLA+”)
 - + Up to 12 weeks (~ days 11-60)
 - + 1 reason only—schools/childcare
 - + Weeks 1 -2 unpaid by this provision
 - + Weeks 3 – 12: 2/3 pay—subject to monetary caps

FFCRA: What's Going on Now

- + Covered employers are struggling navigating documentation requirements
- + Some of the reasons are still causing confusion, and don't precisely fit the requests from employees
- + DOL is pursuing employers who are claiming FFCRA exemptions (health care providers, emergency responders) and otherwise not fully complying with FFCRA (it's still April!)

Some Thoughts on FFCRA Compliance Based on a Whopping 30 Days of Experience

- + Carefully consider the position you are taking on integrated employer—and how that may affect future disputes, litigation
- + Those of you who are close—watch that headcount
- + Really listen to what your employees are asking and what their reasons are for leave
- + Don't over-reach on documentation requirements like this is “classic” FMLA or ADA
- + Really think through the application of the health care provider or emergency responder exemption, and remember the small employer exemption is different
- + If the DOL comes to call, consult with G&A and your legal counsel immediately

But Even Without FFCRA...

- + Managing employee expectations—they are all watching the news every night, too
- + Rapid expansion of local leave laws (covering employers of all sizes, expanding existing protections, suspending eligibility requirements, saying you can't require basic documentation, new reasons for leave)
- + And some of this stuff will be covered by regular old FMLA and ADA...

So What Happened to Old-Fashioned FMLA and ADA

- + Never fear—they are still quite alive and well
- + Vulnerable workers with medical conditions
- + Leaves beyond FFCRA or applicable state, local or Company-provided leave
- + Accommodations for employees—at home and in the workplace
- + Flexibility with traditional documentation requirements—deadlines, telemedicine and more

Organizational Changes—Things You Still Need to Watch

- + Consider traditional non-discrimination and non-retaliation principles: people may not question that you had to make that change—but how did you decide who it would affect?
- + Watch for group health benefits implications for employees on reduced work schedules, non-FMLA/non-FFCRA leaves, furloughs, layoff and more
- + Watch federal and state law mini-WARN notification requirements: COVID-19 is not a free pass
- + Is there an obligation to pay out PTO/vacation in the jurisdiction based on the type of reduction you're doing?

But What if We Just Reduce their Pay?

- ⊕ Watch out for employment agreements and contracts (or CBAs)
- ⊕ Notice obligations in certain jurisdictions
- ⊕ Minimum wage and minimum salary requirements under federal, state or local law

Additional Pay Reduction Reminders

- ➕ Off the clock work and other challenges for nonexempt employees working from home
- ➕ Additional exempt employee issues
 - ➕ Full salary for any week in which work is performed (very few exceptions)
 - ➕ Changes in pay and hours for exempt employees—no good deed goes unpunished
- ➕ Triggering eligibility for unemployment?

Wage and Hour Issues

- + Is nothing sacred?
- + Expect (we are already seeing) a spike in threatened wage and hour litigation (improper pay cuts, failure to pay contractual amounts like commissions and incentives, timekeeping for nonexempt employees and resulting off the clock work, improper meal and rest, etc., employee expenses for telework, and more)

Unemployment

- + \$600 weekly extra benefits; waiving some normal eligibility requirements
<https://www.dol.gov/coronavirus/unemployment-insurance>
- + Don't make promises or commitments about how this will work—encourage employees to reach out to state agencies, read your own states' rules
- + Severance may not be an offset

The Re-Opening of the American Workplace

Readying Your Workplace

- + You must have a policy and protocols for what you are doing to ensure a healthy and safe workplace upon return—and your employees need to know about it
- + You must provide training to those who will help enforce those protocols
- + Monitor state and local requirements for distancing, masks, and the like

Screening Employees Upon Return to Work

- ⊕ To temperature check or not to check...that is the question (check state and local law, and make sure you are doing it consistent with the ADA and other guidance)
- ⊕ Questionnaires and attestations (confidentiality)
- ⊕ Fitness for duty requirements (and feasibility)

So Am I Supposed to Single Out My “Vulnerable Population?”

- + I know everyone is telling you to do it—but tread lightly (ADA and ADEA concerns abound)
- + **From the EEOC:** *“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 clear the steps you’ve taken to maximize safety—and open up the offer for employees to approach about vulnerabilities (consider tailored communication if you have employees who have affirmatively raised concerns in recent weeks/months)

Return to Work COVID-19 Testing

- + Diagnostic testing, antibody testing, and more
- + Labs popping up everywhere to do this testing
- + EEOC said just last week: employers may do COVID-19 testing prior to permitting a return to work under a direct threat standard (right now)—but employers must ensure testing is accurate and reliable
- + Practical challenges and the reality of what testing will tell us (and reasons why you may decide to do it anyway)
- + If you are going to do it, adhere to ADA principles (confidentiality, recordkeeping, scope of inquiry, use of inquiry, accommodation discussions, leave obligations and more)

“I Don’t Feel Safe...”

- + Some employees may resist a return to work—respond with: “We are operating a safe workplace in accordance with state and local safety and health guidelines. There currently is no recognized health or safety hazard in our workplace.”
- + But then what? In general, you don’t want people who are uncomfortable at work—they are distracted, less efficient, and may be unsafe themselves
- + Carefully vet refusals to return to work for individualized, protected considerations (eligible for leave or accommodations under FFCRA, 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 do not have to pay them, and it may disqualify them for unemployment
- + But—consider PR and employee morale issues—and what about Section 7 rights under the NLRA for even non-union workplaces (protected, concerted activity?)

Working from Home—What Should We Expect?

- + Everybody thought they'd love it, but lots of people...don't
- + Are we ever going back?
 - + Considering issues on a case-by-case basis
 - + Recognizing the potential impact on future defenses to failure to accommodate claims
 - + Documenting extended work-from-home agreements for employees who cannot perform all essential functions remotely

What if an Employee Gets COVID-19 from the Workplace?

- + OSHA's General Duty clause—did you do what the CDC told you to do RE: sanitizing, distancing, monitoring for symptoms, providing necessary PPE, etc.)?
- + You must respond to employee concerns about how this is all working (or not)
- + Workers' compensation questions abound (and more than a dozen states have already changed their laws)

One More Little Nugget of Reality Before We Move On...

- + Employment claims—charges, litigation and government investigations—are not slowing down, and are already happening
- + The plaintiffs' bar is actively pursuing COVID-19-related failures—and even mistakes—and advertising for their services abounds
- + Basic blocking and tackling—do the stuff you know to do, how you know to do it—COVID-19 didn't change those rules

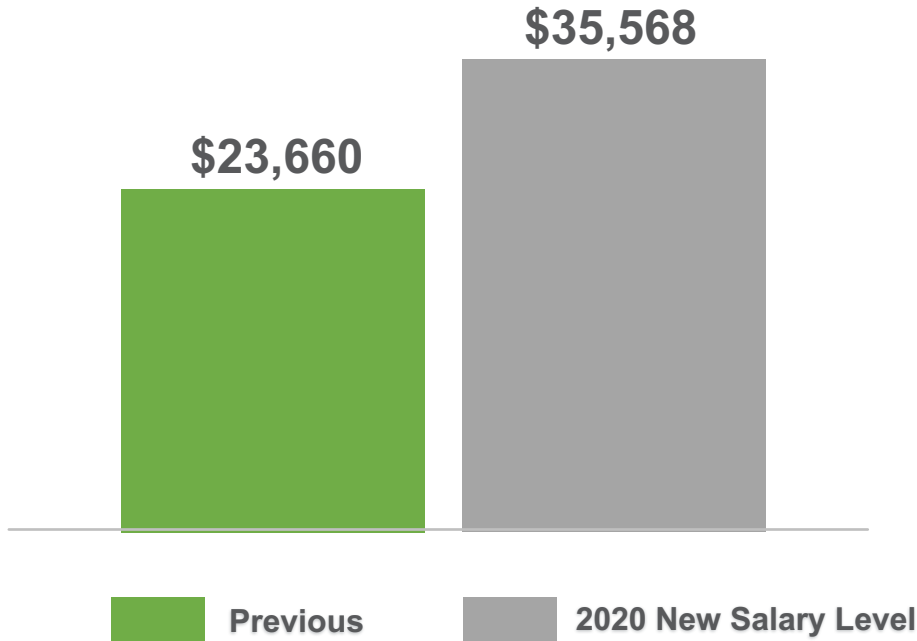
Life Before COVID-19

A sampling of other labor and employment
issues to occupy your free time

The Final Rule on “Overtime”

- + U.S. Department of Labor unveiled its long-awaited final rule on the overtime “white collar” exemptions on September 24, 2019
- + Regulations were last updated in 2004, when the DOL increased the minimum salary level for exemption from \$150 to \$455 per week
- + Took effect January 1, 2020
- + Remember, various state pay levels exceed federal rate
- + Still have to meet the duties test, as well (pay is just part of the equation)

New Minimum Salary Level



Final Rule

- \$684 per week
- \$35,568 annualized

Image provided by Littler Mendelson

Workplace Harassment and More #MeToo

- ⊕ EEOC: continued, steady increase in harassment claims and lawsuits over prior years
- ⊕ Federal and state legislation aimed at reducing harassment and encouraging reporting
- ⊕ New training requirements in multiple states

State Action to Combat Sexual Harassment

- + Numerous states and localities now have mandatory training and policy requirements for employers
 - + Required anti-harassment training (CA, CT, DC, DE, IL, ME, NY, NYC, WA)
 - + Required anti-harassment policies (IL, NY, OR, VT, WA)
 - + Required notice of employee rights (CA, CT, DE, IL, LA, NY, NYC, OR, VT)
- + Other state and local statutory efforts include:
 - + Extending statute of limitations for filing harassment claims
 - + Limiting or prohibiting NDAs as condition of employment or part of settlement agreements related to sex harassment claims
 - + Expanding workplace protections to independent contractors, interns and graduate students

Title III of the ADA

- + Current trend: Demand letters to companies claiming websites and apps are places of public accommodation under Title III of the ADA and are inaccessible to individuals with disabilities
- + Vision and hearing impairments and other physical issues are common claims related to inaccessibility
- + Newest trend is claims against company gift cards that are not offered in Braille!
- + Web Content Accessibility Guidelines (WCAG 2.0) can help employers in making websites more accessible

Title I of the ADA: It's a New Day Service and Comfort Animals

- Title I (employment) versus Title III (public access)
- Service v. comfort—what's the difference?
- Exponential increase in EEOC charges, employee requests, and lawsuits
- Treat like other accommodation requests—no blanket prohibitions



Image source: chihuahuawardrobe.com

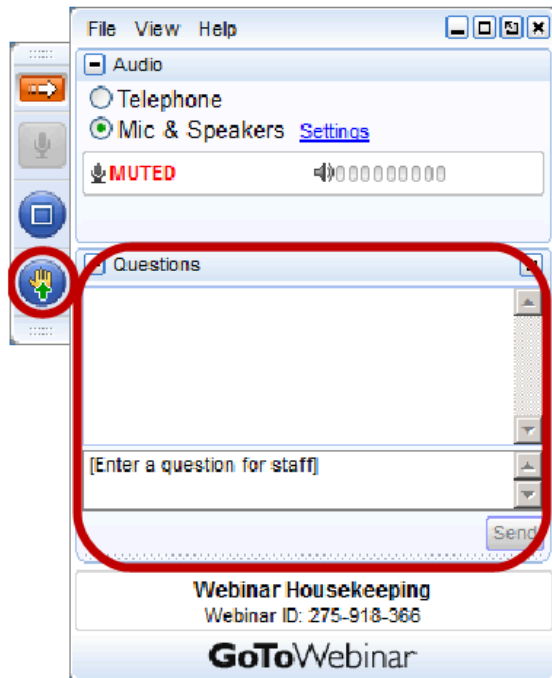
Marijuana in the Workplace

- + Recreational marijuana now legal in at least 12 states and medical use permitted in over 30
- + Still illegal under federal law
- + Case law confusion—according to several courts, being illegal under federal law does NOT bar a discrimination claim based on conduct protected by marijuana laws! Wait—what?
- + Obligations to accommodate
- + The answers just aren't as obvious as they may seem—consult with your PEO/counsel

What You Should be Doing Now

- + Plug into resources more than ever—G&A Partners, your labor and employment counsel, online resources you trust, and get cozy with websites you never thought you'd peruse—i.e., www.CDC.gov
- + Err on the side of over-communicating with your employees right now—tell them, and tell them again
- + Find the areas where you can demonstrate flexibility—that means something right now
- + Preserve documentation of why you are making the decisions you are making—even if they are fast and furious—the claims are coming—so let's minimize them
- + Give yourself some grace and freedom to tell someone “I don't know, I'll have to find out.” No one has ever done this before.

Questions



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Resources

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