PEO INSIDER®

PUBLISHED BY THE NATIONAL ASSOCIATION OF PROFESSIONAL EMPLOYER ORGANIZATIONS®

THIS MONTH'S FOCUS

LEGAL & REGULATORY UPDATE

COVID Employment Litigation Trends & Predictions

COVID Legal Fallout

State Compliance

COVER STORY

BUILDING UPON THE LEGAL FOUNDATION OF THE PEO INDUSTRY

Amie Remington, Esq., 2020-2021 NAPEO LAC Chair, and Rod Jordan, Esq., 2018-2019 LAC Chair

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THIS MONTH'S FOCUS: LEGAL & REGULATORY UPDATE

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THE TRUE TEST OF LEADERSHIP

HOW WELL YOU FUNCTION IN A CRISIS

BY LEE C. YARBOROUGH

The recent cyber attack on PrismHR was a true testament to the integrity of our industry. We all have had sleepless nights worrying about cyber security, and no matter how detailed our emergency plans may be, no one really knows how these situations will play out. When word got out about the attack, all PEOs, whether Prism users or not, had a visceral reaction. This was the emergency we feared most, and it was happening.

Like other tragedies of our time, including 9/11 and the pandemic, PEOs stepped up and did what they had to do to ensure employees would be paid and clients' businesses would not be interrupted. As the chair of NAPEO, I had the unique vantage point of observing how our industry came together and survived this crisis. I was awestruck by the tenacity, selflessness, and fortitude displayed.

The number-one issue everyone rallied around was how to pay employees. PEOs were determined that employees should not have to suffer because of this crisis. Yes, it was a legal obligation, but observing the PEOs going through this, it was also a moral obligation. That was very clear.

Egos were set aside and competitors came together to figure out solutions. There was not an "us" versus "them" mentality and there was no time for finger-pointing. Everyone understood the task at hand and a forum was convened to coordinate a strategy. Resources were shared and teams were mobilized. NAPEO members, non-members, and industry specialists jumped in to provide their expertise, knowledge, and creative solutions to help those impacted by the incident.

Prism is used by a majority of NAPEO members, large and small. Therefore, our association was with the members every step of the way. NAPEO served as a convener, communicator, and a safe place to share feelings. NAPEO's main role was as a connector. The network our peers have made through our membership in NAPEO paid off during this crisis and allowed different PEOs to come together very quickly.

At the beginning of the week, an informal Prism user group emerged and Brent Tilson, CEO of Tilson HR, was the leader that everyone needed. He stepped up and led with calmness, intent, and compassion. He communicated with Prism, organized groups for crisis management, and kept everyone on task. His communications team, headed by Blair Mulzer, ensured that PEOs were unified in their messages and responses. Brent was an unselfish leader and used his skills to help everyone in this time of need.

Like other tragedies of our time, including 9/11 and the pandemic, PEOs stepped up and did what they had to do to ensure employees would be paid and clients' businesses would not be interrupted.

It was not just a moment, but a movement! Thank you, Brent! And thank you to everyone who worked tirelessly to get through the crisis. There was never a doubt that all employees would be paid and that PEOs would get through the situation, but what emerged was a true testament to the strength of our industry and the power of our leaders. ■

LEE C. YARBOROUGH
2020-2021 NAPEO Chair
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PAY DISRUPTION

COMPENSATION TRENDS DURING THE PANDEMIC

The salary levels of many employees whose jobs were disrupted due to COVID have not yet returned to pre-pandemic levels, according to a survey of 2,200 people in the U.S., Canada, and the U.K. conducted by Element Global Services. Findings include:

- 65 percent of Americans said their income stayed the same or fell in 2020;
- 55 percent with decreased income said it has not yet returned;
- 55 percent said they expect to make more money in 2021; and
- The top reasons income decreased in 2020 were:
  - Pay cut (39 percent);
  - Job loss (29 percent);
  - Income is variable (24 percent); and
  - New job with lower pay (8 percent).

BUSINESS REAL ESTATE UPDATE

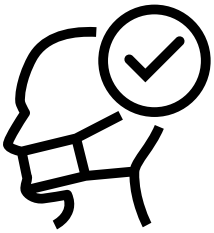
OFFICE USE DOWN, COLLABORATION UP

The opportunity for companies to redesign and rethink office space and their real estate footprints has increased due to COVID, according to data from VergeSense comparing space use efficiency in January 2020 with January 2021. Key findings include:

- On average, 83 percent of office space was allocated to individual work in January 2020—only 17 percent was dedicated to collaborative work;
- Pre-pandemic, collaborative spaces were 25 percent more used than spaces dedicated to individual work;
- The office of the past was designed for heads-down work, which is no longer a primary source of value—interest in agile seating is growing; and
- Even during the pandemic, there has been a 15 percent increase in use of office space for collaboration.

WORKPLACE HEALTH & SAFETY

OSHA NATIONAL EMPHASIS PROGRAM



The Occupational Safety and Health Administration (OSHA) released its National Emphasis Program (NEP) recently, which protects workers in industries at high risk for contracting COVID by using follow-up inspections of workplaces with high COVID fatalities, COVID exposure, and previous COVID safety violations. The healthcare industry is specifically flagged, along with industries in which workers have close contact with each other and the public, such as grocery stores and restaurants. The NEP also protects employees from retaliation for complaints about health and safety conditions.

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WORKFORCE MANAGEMENT

UPSKILLING & RESKILLING CRITICAL TALENT POOLS

Traditionally, job descriptions and titles defined how companies viewed work, set salaries, and made decisions. Today, this has evolved from jobs to skills. According to Mercer's 2021 Global Talent Trends survey, organizations are starting to use their talent pools more flexibly. The survey also found:

- More than 50 percent of organizations embarking on transformation are targeting workforce upskilling/reskilling toward critical talent pools;
- 44 percent of organizations surveyed have already made it easier to loan and/or share talent internally, with 26 percent planning to do so in the future; and
- Two in five HR professionals admitted they do not know what skills they have in their own organizations.

WORKFORCE UPDATE

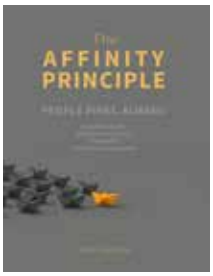
13 GROWING CAREERS

As the job market recovers, some industries are improving faster than others. According to FlexJobs, 13 career categories have seen flexible work job listings (jobs with remote, flexible schedule, part-time, or freelance components) grew more than 10 percent from January to March 2021. Listed from highest to lowest growth, these jobs/categories are:

1. Virtual administration;
2. HR and recruiting;
3. Nonprofit;
4. Search engine optimization/search engine marketing;
5. Bookkeeping;
6. Marketing;
7. Call center;
8. Bilingual;
9. Social media;
10. Writing;
11. Graphic design;
12. Advertising and PR; and
13. Project management.

BUSINESS READ

ACHIEVING BUSINESS SUCCESS: 'THE AFFINITY PRINCIPLE'



Business growth coach and author Grant Gamble's "The Affinity Principle" offers readers a formulaic approach to achieving business success with the practice of mindful leadership. Mindful leadership creates incredible team performance, which allows for a positive customer experience, which then yields generous financial results. Gamble asserts that when there is a strong focus on hiring, acclimating, and training team members, companies thrive, from the inside out.

FEDERAL LEGAL & REGULATORY CLIMATE

COVID EMPLOYMENT LITIGATION TRENDS & PREDICTIONS

BY JOHN M. POLSON, ESQ.

Employees and others around the country are filing legal claims related to COVID. It is a feeding frenzy. Insurance markets are stressed and PEO risk managers have full plates managing and mitigating claims. The future is uncertain; however, we have sufficient data to paint a decent picture of where we are today and attempt some predictions.

HOW MANY CLAIMS HAVE BEEN FILED?

Around 2,000 lawsuits have been filed in courts across the country related to COVID and the workplace.[1] The states with the highest claim volume are California (461), New Jersey (256), and Florida (146). Adjusted for population, New Jersey is the most active with approximately 29 cases per 1 million people, as compared with California, which has around 12 cases per million.

WHO IS GETTING SUED?

Small to mid-size businesses (SMBs) are taking the brunt of employment litigation. This is notable given the focus of the PEO industry on SMBs. Roughly one-third of all lawsuits are filed against employers with 50 or fewer employees.

WHAT INDUSTRY IS HARDEST HIT?

The healthcare industry is the hardest hit industry on a national basis, which is no surprise given the physical exposure and compliance complexities in that industry. There are some deviations in other industry concentration by state. In New York and New Jersey, for example, government employer groups saw the most claims. In most states, retail, manufacturing, and hospitality are among the hardest hit industries, along with healthcare.

IS THE VOLUME GOING UP OR DOWN?

COVID lawsuit volume spiked in the first quarter of 2021. More than one-fourth of all claims filed since the beginning of the pandemic were filed during the first quarter of the year, making the first quarter the most active yet. While the future is uncertain, lawsuit intensity may continue as the court system becomes more open and claimants approach deadlines to file their claims.

ARE THE CASES LINGERING OR CLOSING?

Many cases are lingering. Based on data through late January, approximately 29 percent of the COVID-related cases have closed. As we would expect to see with employment-related claims, most of those closed cases were resolved through settlement (77 percent).

WHAT ARE EMPLOYEES CLAIMING?

The most common claims are failure to grant leave or remote work. Many claims assert that employers failed to provide leaves of absence under pre-existing leave laws and leave laws specific to COVID, such as the Families First Coronavirus Response Act (FFCRA). The next most common claims are discrimination and retaliation.

Discrimination claims include disability discrimination based on alleged failure to accommodate and/or termination due to disability or association with a disabled person. One of the first COVID discrimination cases filed was based on an employee asserting termination because the employer believed a family member of the employee had COVID.

Many of the COVID failure-to-accommodate claims involve employees alleging that pre-existing health conditions required them to either take leave or work from home to avoid contracting COVID. These include claims by employees with compromised immune systems, heart conditions, lung conditions, and pregnancy. Employers sued in these cases generally will be called upon to demonstrate that they could not accommodate employee requests due to undue hardships on the business and that they had non-discriminatory reasons for making decisions.

Retaliation claims referencing COVID are mostly a combination of employees claiming they were terminated for reporting safety violations and employees claiming they were terminated in retaliation for attempting to take protected leave. Retaliation claims tend to be more difficult to defend than other employment claims due to the subjective nature of the allegations, especially in states with stringent anti-retaliation laws.

WHAT ABOUT WAGE & HOUR CLAIMS?

While these are not the most common lawsuits at this point, they are concerning due to the range of liability and limited insurance. Remote work environments and social isolation may heighten the risk of employees working off-the-clock during the pandemic by responding to emails, texts, and calls at all hours and throughout the weekend. These claims

SMBs are taking the brunt of employment litigation. This is notable given the focus of the PEO industry on SMBs. Roughly one-third of all lawsuits are filed against employers with 50 or fewer employees.

may carry longer statutes of limitations and this may lead to a slower evolution of wage and hour claims. In states with robust wage and hour laws, other concerns include unreimbursed home office expenses and lack of opportunity for meal and rest breaks while working from home.

ARE EMPLOYEES SUING BECAUSE THEY WERE INFECTED AT WORK?

Of course, there are many workers' compensation claims alleging work-related COVID infections. Those claims are processed through state workers' compensation systems. A small percentage of employees are also filing lawsuits in court, attempting to bypass the workers' compensation system. The remedies available in court are potentially much greater than standard workers' compensation benefits, hence the motive to get into court. The viability of court claims is tied to state law. In some states, there may be a viable theory for using "gross negligence" or "public nuisance" principles to pursue claims beyond a garden variety workers' compensation claim. Litigants relying on those theories often point to violations of state and local safety orders, such as failure to require masks or notify workers of positive tests in the workplace. It is too soon to judge how these claims will fare when challenged with exclusive remedy defenses, but some have been dismissed.

WHAT DOES THE FUTURE HOLD FOR PEOS?

A spike in litigation is not surprising, but it is a concern given the impact on claims. Focused claims management will be more important now than ever if litigation dockets continue to swell. Industry and state-specific PEO client monitoring and evaluation may be appropriate given the data. PEO client companies with employees who are still displaced from their normal workplaces could experience a spike in claims as they bring employees back to the workplace. Decisions about who comes back and who doesn't present potential allegations of discrimination and failure to accommodate. We also may see fluctuations in labor demands based on a surge in hiring in response to business rebounding, potentially followed by rounds of layoffs in response to business normalizing or contracting. This process could create litigation ripple effects and may lead to PEOs experiencing litigation spikes at varying times based on client mix, geography, and other PEO-specific factors. ■

1 All data in this article is based on the Fisher Phillips COVID-19 Employment Litigation Tracker, **www.fisherphillips.com/covid-19-litigation**, as of March 25, 2021. Due to inherent limitations in the availability of national litigation data, the data is comprehensive but not exhaustive.

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THE PRO ACT

A PRIMER FOR PEOs

BY BENJAMIN M. EBBINK, ESQ.

The House of Representatives recently passed legislation designed to radically transform the labor relations landscape. The Protecting the Right to Organize Act of 2021, or PRO Act, passed the House on March 9 after an earlier version of the same bill failed to clear the Senate last year. However, now that both houses of Congress and the White House are controlled by the Democrats, this proposal stands closer than ever to becoming law.

What do PEOs and their clients—both unionized and non-unionized—need to know about this startling prospect?

THE PRO ACT: THE BASICS

The PRO Act would make it far easier for unions to organize, grant far more power to workers protesting working conditions, and create new burdens for unionized businesses, while undermining other longstanding employment models embedded within workplaces across the country.

Empowering Union Organizing

If passed, the PRO Act would transform the process of union organizing, favoring unions by altering critical steps in the organizing process:

- **Reinstalling 'quickie' elections.** The PRO Act would reinstate controversial rules substantially reducing the period of time between a petition for representation and the ensuing election is held.
- **Creating a national gag rule.** The proposed law would for the first time prohibit all businesses from convening mandatory "captive audience" meetings for purposes of sharing facts about third-party representation, effectively gagging them from using their free speech rights in a group setting.
- **A return to 'micro' units.** The PRO Act would effectively bar employers from challenging petitions for smaller, gerrymandered groupings of employees within departments or shifts that may be more sympathetic to union interests—representing a stark reversal of gains achieved by employers through the National Labor Relation Board's (NLRB's) 2017 decision in *PCC Structurals*.
- **Expanding pool of potential union members.** The proposed bill would substantially narrow the statutory definition of "supervisor," thereby expanding the base of workers who could organize into unions and engage in other "concerted" activities protected by the National Labor Relations Act (NLRA).
- **Permitting workers to use company equipment.** The PRO Act would also restrict employer rights to control their own computers, equipment, and related electronic communications systems by establishing statutory employee rights to use them on premises for protected activities, absent compelling business considerations.
- **Permitting secondary boycotts.** Breaking from 85 years of established legal authority, the PRO Act would allow unions to extend economic pressure to ensnare companies that are not otherwise involved with them in a primary labor dispute. The law would eliminate the longstanding prohibition on secondary boycotts and allow unions to apply such pressure through protests, pickets, and related activities.

Constraining Unionized Employers
Further, the proposed law would restrict the rights of unionized employers when it comes to several activities. Among other things, the PRO Act would prohibit employers from using permanent replacements, prohibit "offensive" and pre-strike lockouts, and force union contracts on employers if the parties fail to reach an agreement within 120 days.

Shattering Commonplace Workplace Standards for All Employers
The PRO Act wouldn't just impact unionized workplaces. It would completely transform workplace law for unionized and non-union businesses alike by invalidating arrangements that have become commonplace over the last several decades:

- **Broadening misclassification law.** The PRO Act would significantly expand the definition of "employee" to capture workers who are currently independent contractors, making it difficult for businesses to properly classify workers as such. In bringing California's ABC test to the national stage, the bill would require businesses to prove:
  - o The individual is free from the employer's control;
  - o The service performed is outside the usual course of the employer's business; and
  - o The individual is engaged in the same trade or business as called upon to perform.
- **Expanding joint employment.** The PRO Act would also codify the extremely broad joint-employer standard previously established by the Obama NLRB by virtue of its decision in *Browning Ferris Industries*, exposing employers to liability for workplaces they don't control and workers they don't employ. Under this standard, courts and government agencies would be free to consider the exercise of control over employment terms that are either direct or indirect and actual or potential, leading to a potential joint-employer finding merely by establishing that a business has "reserved" such authority. PEOs in particular should pay attention to changes in the NLRB's joint-employer rules, which could have far-reaching impacts for PEOs and their clients.
- **Prohibiting arbitration agreements.** The PRO Act would ban pre-dispute arbitration agreements in all workplace settings, effectively overturning the Supreme Court's landmark decision in *Epic Systems* upholding use of class waivers.

> The PRO Act would make it far easier for unions to organize, grant far more power to workers protesting working conditions, & create new burdens for unionized businesses, while undermining other longstanding employment models embedded within workplaces across the country.

REAL-WORLD IMPACT FOR PEOS

Should the PRO Act be enacted into law, PEOs can expect:

- To need to update worksite employee policies and handbooks;
- Unionized prospects and clients to present new operational challenges;
- More prospective and current clients to have unions; and
- A potential uptick in NLRB charges, implicating exposure for PEOs and possibly their employment practices liability insurance (EPLI) programs.

WHAT'S NEXT?

It's worth noting that although it enjoys the support of the new administration, the bill faces a number of hurdles before it becomes law. Even within the democratic side of the aisle, the bill could generate opposition from some of its own moderate members; therefore, passage in the Senate is far from certain.

However, even if the bill ultimately stalls over the coming months, its progress bears watching, as agencies such as the NLRB and the Department of Labor (DOL) could attempt to implement some of its components through exercise of their rulemaking or decision-making authority. ■

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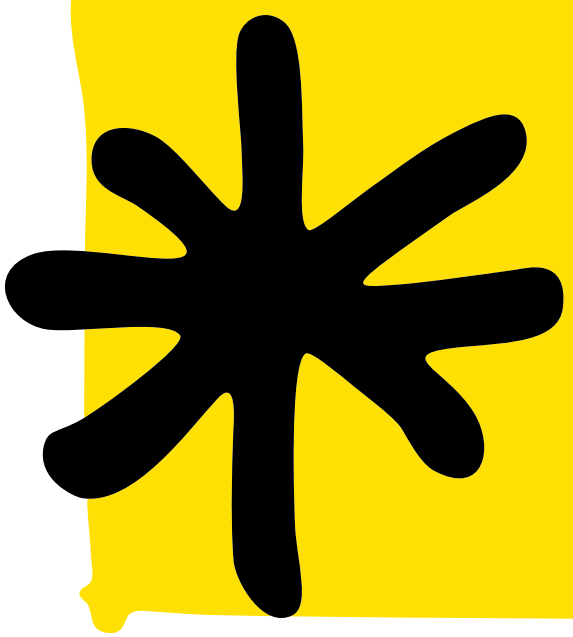
EMPLOYEE RETENTION TAX CREDIT UPDATES

BY COURTNEY A. ZINTER, ESQ.



In the February 2021 issue of *PEO Insider*,® I described several changes that the Consolidated Appropriations Act (CAA) of December 2020 made to the employee retention tax credit (ERTC) that was created in March 2020 legislation. Less than three months after the CAA became law, Congress again modified the ERTC in the American Rescue Plan Act (ARPA). This quick succession of legislative action has required small businesses—and the PEOs that assist them—to sort through a whirlwind of ERTC changes with little guidance from the IRS, which has struggled to keep pace with the statutory changes.

This article provides an update on the ERTC following the additional changes made by the ARPA. It also reviews the limited guidance the IRS has issued on the ERTC since the December enactment of the CCA.

AMERICAN RESCUE PLAN ACT

The ARPA, which President Biden signed into law on March 11, 2021, extended the ERTC for an additional six months, so it is now available to eligible employers for qualified wages paid through December 31, 2021. Previously, the CAA had extended the ERTC through June 30, 2021.

The ERTC for the second half of 2021 is generally the same as the ERTC as it applies in the first half of 2021 following the changes made by the CAA. The ARPA does, however, make some modest expansions to the ERTC that apply in Q3 and Q4 2021 only:

- **Recovery startup business.** The ARPA adds a third category of "eligible employer" for purposes of the ERTC. Prior to the ARPA, an employer was eligible for the ERTC if it experienced a full or partial suspension of its operations due to a government order related to the pandemic, or if it experienced a substantial decline in gross receipts. Following the ARPA, in Q3 and Q4 2021, an employer that is a "recovery startup business" will also qualify as an eligible employer. A recovery startup business is generally defined as an employer that:
  - o Started business after February 15, 2020;
  - o Had average annual gross receipts for the three-taxable-year period ending with the taxable year that precedes the calendar quarter for which the ERTC is determined that did not exceed $1 million; and
  - o Is not otherwise an eligible employer for purposes of the ERTC.

  Employers that are eligible for the ERTC as recovery startup businesses are subject to an overall limit on the ERTC of $50,000 per quarter.
- **Severely financially distressed employers.** The ARPA enhances the ERTC for certain large businesses that are classified as "severely financially distressed employers." A business meets this definition if it had a decline in gross receipts of more than 90 percent for a quarter versus the applicable comparison period (generally, the corresponding quarter in 2019). For Q3 and Q4 2021, a large business that qualifies as a severely financially distressed employer is permitted to use the more generous definition of "qualified wages" that otherwise only applies to employers with 500 or fewer employees. Under that definition, an eligible employer is allowed to treat all wages paid to employees during a government suspension or period of decline in gross receipts as qualified wages, instead of only counting wages paid to employees not working.

Another change the ARPA makes to the ERTC is to restructure the credit as a credit against the employer's share of hospital insurance (HI) tax rather than Social Security tax. As a practical matter, this change is not expected to materially affect the amount of credit that can be claimed. Rather, Congress made this change because the ARPA was passed using the budget reconciliation process, and that process prohibits a reconciliation bill from including any provisions that affect Social Security. Changing the ERTC in this manner was simply a way for Congress to work around that limitation, although it is not yet clear whether the IRS will require any changes in reporting.

For PEOs, the ARPA extends into Q3 and Q4 2021 the same PEO and third party-related provisions that apply for Q1 and Q2 2021 following the CAA. That includes, for example, the requirement for Treasury guidance to "require" the customer of a PEO or certified PEO (CPEO) to be "responsible for the accounting of the [ERTC] and for any liability for improperly claimed credits." It also includes the requirement that Treasury guidance "require" a PEO or CPEO to "accurately report such tax credits based on the information provided by the customer."

ERTC

The ARPA, which President Biden signed into law on March 11, 2021, extended the ERTC for an additional six months, so it is now available to eligible employers for qualified wages paid through December 31, 2021.

NEW IRS GUIDANCE ON THE ERTC

After Congress substantially expanded and extended the ERTC in December 2020, PEOs, accountants, and small businesses across the country waited for IRS guidance on a range of issues, some of which depend on whether the credit is being claimed for qualified wages paid in 2020 or 2021. IRS guidance on the ERTC that has been issued since the enactment of the CAA includes:

- **Notice 2021-20.** Released on March 1, Notice 2021-20 primarily provides guidance in the form of questions and answers, many of which are based on FAQs that were previously posted on **www.IRS.gov**. Importantly, Notice 2021-20 only applies to the ERTC for 2020—the IRS stated that additional guidance on the ERTC for 2021 will be released in the future. Items in the notice that PEOs may want to pay particular attention to include the Q&As related to the interaction of Paycheck Protection Program (PPP) loans with the ERTC (page 73) and information about what records should be maintained to substantiate an employer's eligibility for the credit (page 100). Although the notice includes a section for employers that use PEOs and other third-party payors (page 93), much of the information in that section has previously been communicated by the IRS on **www.IRS.gov** and elsewhere.
- **Forms and instructions.** As the IRS updated various tax forms and instructions at the outset of 2021, some of those items, such as Form 941 and Form 7200, were updated to include brief descriptions of the ERTC as it applies for Q1 and Q2 2021. As of the time of this writing, those items offer the only guidance we have from the IRS so far on the ERTC for 2021.

OUTSTANDING ISSUE

A key outstanding issue for small businesses—including those that use PEOs—is how they can quickly and easily claim the ERTC for past quarters. This issue became particularly acute following the change made by the CAA that retroactively made the ERTC available to eligible employers that received PPP loans. Between that retroactive change and the complexity of the credit, many employers may not be able to determine their ERTC until after a Form 941 for a particular quarter has already been filed.

To date, the IRS has insisted that ERTC claims for past quarters must be made using the cumbersome paper-based Form 941-X process, which is expected to substantially delay small businesses' receipt of the much-needed ERTC relief. NAPEO, with the help of its members and others in the small business community, has been working diligently to impress upon the IRS the need for an alternative ERTC claims process. ■

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COVID LEGAL FALLOUT

RETURN-TO-WORK CONSIDERATIONS

HEALTH & SAFETY

BY GORDON M. BERGER, ESQ.

As the nation remains cautiously optimistic that the various vaccines being administered to the population will be effective against COVID, some states are relaxing restrictions and many businesses are considering or have already reopened their offices. This article addresses health and safety issues associated with returning to work.

CDC RETURN-TO-WORK GUIDELINES

The Centers for Disease Control and Prevention (CDC) encourages employees to prevent the spread of COVID. For instance, the CDC advises employees to:

- Stay home when needed;
- Monitor health;
- Wear masks;
- Social distance in shared spaces;
- Wash hands often;
- Cover coughs and sneezes; and
- Clean and disinfect frequently touched surfaces and objects.

What guidance does the CDC provide to employers?

- Look at increasing physical space between employees in work areas and between employees and customers, such as opening drive-throughs, building partitions, and marking floors to guide spacing at least six feet apart;
- At least once a day, clean and disinfect surfaces that are frequently touched by multiple people;
- Consider rotating employees assigned to clean and disinfect surfaces throughout the workplace;
- Consider scheduling handwashing breaks so employees can wash their hands with soap and water for at least 20 seconds—if soap and water are not available, use hand sanitizer that contains at least 60 percent alcohol;
- Consider scheduling a relief person to give cashiers and service desk employees opportunities to wash their hands;
- Evaluate building ventilation systems and consider upgrades or improvements; and

- Consider implementing flexible sick leave and supportive policies and practices.

In addition, the CDC has stated that so long as employees experience no symptoms and are fully vaccinated, they do not need to quarantine after COVID exposure, which means they can safely return to work. But, this does not necessary mean that employers can cease any mask mandates, social distancing, and other measures. The conservative approach would be to continue such practices for now.

The CDC's guidance does not supersede any state or local health and safety requirements. Some states (Texas, for example) have rolled back restrictions, while other states (such as Virginia) have kept many restrictions in place. Employers should first follow state and local health and safety requirements, and where not in conflict, may apply CDC guidelines.

OSHA CONSIDERATIONS

The Occupational Safety and Health Administration (OSHA) has put out guidance for employers deemed by local authorities as "non-essential businesses." In OSHA Phase 2 business reopening, businesses continue to make telework available if possible, but non-essential business travel can resume. Limitations on the number of people in the workplace can be eased, but employers should maintain moderate-to-strict social distancing practices, depending on the type of business. Employers should also continue to accommodate vulnerable workers as identified in Phase 1, meaning workers at higher risk of severe illness, including elderly workers and those with serious underlying health conditions.

OSHA recommends employers have formal reopening plans that include:

- Hazard assessment, including practices to determine when, where, how, and to what sources of COVID workers are likely to be exposed in the course of their job duties;
- Hygiene, including practices for hand hygiene, respiratory etiquette, and cleaning and disinfection;
- Social distancing—six feet of distance is a general rule of thumb, though social distancing practices may change as rates of community transmission of COVID and other criteria prompt communities to move through the reopening phases;
- Identification and isolation of sick employees, including practices for worker self-monitoring or screening, and isolating and excluding from the workplace any employees with signs or symptoms of COVID;
- Return to work after illness or exposure, including after workers recover from COVID or complete recommended self-quarantine after exposure to someone with COVID;
- Controls, including engineering and administrative controls, safe work practices, and personal protective equipment (PPE) selected as a result of an employer's hazard assessment;
- Workplace flexibility, including telework and sick leave;
- Practices to ensure employees receive training about the signs, symptoms, and risk factors associated with COVID; where, how, and to what sources of COVID employees might be exposed in the workplace; and how to prevent the spread of COVID at work; and
- Anti-retaliation, including practices for ensuring that no adverse or retaliatory action is taken against an employee who adheres to these guidelines or raises workplace safety and health concerns.

President Biden directed OSHA to issue a COVID emergency temporary standard by March 15, 2021, but it has yet to do so. However, on March 12, OSHA created a national emphasis program (NEP) targeting companies that put the most workers at serious risk of contracting COVID, including healthcare facilities, ambulance services, continuing care retirement facilities, and assisted living facilities. Other targeted industries include grocery stores, general warehousing and storage facilities, restaurants, and correctional institutions. OSHA also may look at essential businesses, which may include manufacturing and transit systems. The NEP also addresses employers that retaliate against workers for making complaints about unsafe or unhealthy conditions, or for exercising any other rights protected by federal law.

OSHA prefaces its guidance on the following: "Reopening should align with the lifting of stay-at-home or shelter-in-place orders and other specific requirements of the federal government and state, local, tribal, and/or territorial (SLTT) governments across the United States, as well as with public health recommendations from the CDC and other federal requirements or guidelines. Employers should continually monitor federal, state, territorial, tribal, and local government guidelines for updated information about ongoing community transmission and mitigation measures, as well as for evolving guidance on disinfection and other best practices for worker protection. Where applicable, these guidelines may supplement state- or locality-specific information and re-opening requirements."

NEP inspections will include some follow-up inspections of worksites inspected in 2020. The NEP will remain in effect for up to one year, though OSHA

may amend or cancel the program if the pandemic subsides.

STATE LIABILITY PROTECTIONS

Many states have passed employer immunity laws to shield employers from being sued for employees contracting COVID in the workplace, falling ill, or dying from receiving a COVID vaccine. Alabama, Indiana, Montana, West Virginia, and Wisconsin recently passed civil liability protections for COVID-related claims. Last year, similar laws were enacted by 14 states—Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio, Oklahoma, Tennessee, Utah, and Wyoming. Generally speaking, these immunity statutes sunset by the end of year and protect against claims to the extent that an employer complied with state or local health and safety requirements. However, most of these immunity statues do not protect employers in the case of gross negligence, reckless, willful, and wanton misconduct or intentional conduct. In some states, employers may create a rebuttable presumption of risk by posting a notice in certain locations (such as the entrance to a store) to put patrons and employees on notice of their assumption of the risk of COVID if they enter the premises (see Georgia's COVID-19 Pandemic Business Safety Act). Regardless of state liability protections, employers should continue to follow applicable safety procedures and protocols to minimize the risk of contracting and transmitting COVID.

Note: the information contained in this article was accurate as of press time but is subject to revision and update because the battle against COVID remains fluid. ■

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A YEAR INTO THE PANDEMIC

MANAGING EMPLOYMENT-RELATED RISKS

BY JENIFER M. BOLOGNA, ESQ., AND MATTHEW J. BASS, ESQ.

Just over a year ago, the COVID pandemic hit in full force. Shutdown orders were issued across the country, in-person work was limited to essential employees only, and new COVID-related laws were passed in rapid succession. As many businesses struggled to operate while complying with COVID health and safety orders, they were faced with leave and accommodation requests from employees due to COVID-related issues such as employees or their family members being at increased risk of severe illness, employees fearful of returning to the workplace, and working parents unable to work onsite because of school and childcare closings. Employers also saw requests for accommodations from employees unable or unwilling to comply with personal protective equipment (PPE) use, COVID testing, and, most recently, vaccination requirements. These leave and accommodation requests were in addition to employees needing time off to quarantine or isolate due to having COVID, experiencing symptoms, or exposure. Given the myriad new and evolving legal issues combined with a steep learning curve, it is no wonder even the most experienced human resources professionals required assistance to keep up.

As of the beginning of March 2021, there have been 1,723 COVID-related lawsuits filed. Using information from Jackson Lewis P.C.'s interactive COVID-19 Employment LitWatch (**https://bit.ly/3flug6L**) tool, we examine some COVID litigation trends and discuss the predominant questions facing employers as the pandemic continues into 2021.

HOW SHOULD WE RESPOND TO EMPLOYEES REQUESTING ACCOMMODATIONS DUE TO COVID-RELATED ISSUES?

Disability-related claims are the most common of all COVID cases—657 disability-related cases have been filed to date. That equates to 38 percent of all disability-related lawsuits. That trend is continuing as the percentage of COVID disability-related claims being filed in 2021 (172 cases to date) are increasing in frequency.

Employers have an obligation to provide reasonable accommodations to employees with disabilities unless doing so would create an undue hardship. Importantly, employers do not have that same obligation to offer reasonable accommodations if an employee's family member has a disability.

While it is unclear whether COVID itself is a disability, COVID complications most likely would be covered under the Americans with Disabilities Act (ADA). In addition to COVID complications themselves, employees' existing physical and mental impairments could require reasonable accommodation in light of COVID. Throughout the pandemic, employers received many telework requests from employees who had conditions that made them at increased risk of severe illness due to COVID or whose mental disability was exacerbated by COVID.

Reasonable accommodations are required if the disability limits the employee from performing essential job functions or otherwise enjoying the benefits of equal employment. The employer does not have to provide an accommodation that poses an undue hardship, nor is an employer obligated to provide the employee's accommodation of choice. Rather, employees are entitled only to an effective accommodation.

As with any accommodation request, if employees requests accommodations due to COVID, employer should engage in the interactive process to determine whether they have a legal obligation to provide the requested accommodations. In the COVID context, the most common request for accommodation is remote work. However, just because an employee wants to telework, that does not mean he or she automatically entitled to it. If there are reasonable accommodations that allow an employee safely to be on site, even if an employee's job duties can be performed remotely, an employer does not have to grant the work-from-home request. Potential workplace modifications to consider include moving an employee's workspace away from other employees, installing Plexiglas or other physical barriers around the workstation; or rearranging the employee's schedule so he or she can commute during a less busy time. Evaluating options that allow an employee to work on site is important,

particularly if an employer believes onsite work is required to fully perform the essential job functions of a position. Employers should be cognizant that the longer they permit employees to work remotely, the more difficult it may be to say employees need to be onsite to perform their essential job functions. Employers who are going beyond legal obligations and allowing employees to work remotely notwithstanding the fact they are unable to perform all their essential job functions remotely should document that fact in a communication with the employees.

AS MANY BUSINESSES STRUGGLED TO OPERATE WHILE COMPLYING WITH COVID HEALTH & SAFETY ORDERS, THEY WERE FACED WITH LEAVE & ACCOMMODATION REQUESTS FROM EMPLOYEES DUE TO COVID-RELATED ISSUES.

WHAT ABOUT OLDER PERSONS & OTHERS AT INCREASED RISK FOR SEVERE ILLNESS DUE TO COVID?

Out of all COVID cases filed to date, 113 cases involve age discrimination claims. The number of COVID-related age discrimination cases is on the rise in 2021. Thirty percent of all age discrimination cases filed since January 1, 2021, are related to COVID.

The Centers for Disease Control and Prevention (CDC) includes older adults as those at increased risk for severe illness due to COVID. However, the Age Discrimination in Employment Act (ADEA) and state and local human rights laws that prohibit age discrimination do not entitle employees to workplace accommodations. Nor does the Family and Medical Leave Act (FMLA) entitle employees to leave due to their age putting them at increased risk for more severe cases of COVID. The Department of Labor's (DOL's) COVID and FMLA guidance states that "[l]eave taken by an employee for the purpose of avoiding exposure to COVID-19 would not be protected under the FMLA."

Managing the employment-related risks associated with older and at-risk employees involves several considerations. To start with, is important to remember that an employer may not compel an employee to stay home simply because he or she falls into a high-risk category; doing so may result in a violation of anti-discrimination laws. The Equal Employment Opportunity Commission (EEOC) emphasized this point in its COVID-19 Technical Guidance in which it said that an employer is not allowed to exclude an employee solely because the employee is at higher risk for severe illness. If employees request leave or accommodation due to COVID, even if at increased risk based on age alone, employers should still consider providing these employees with the option to work from home, if available, and/or take leave. In some states, employers are required to provide employees who are at increased risk for serious illness due to COVID leave regardless of why they are at increased risk. Finally, employers who go beyond legal requirements in terms of accommodations and/or leaves should ensure all accommodations are implemented equally and consistently.

WHAT ABOUT REASONABLE ACCOMMODATIONS FOR EMPLOYEES UNABLE OR UNWILLING TO TAKE THE COVID VACCINE?

As the COVID vaccine is rolling out, many employers are looking to the vaccine to prevent workplace transmission and to return all employees onsite. While there are numerous considerations when determining whether to mandate it, if an employer chooses to mandate COVID vaccinations, among other considerations, it must explore reasonable accommodations for disabilities, deeply held religious beliefs, and pregnancy unless doing so would be an undue hardship. To date there have been two lawsuits filed over an employer's mandatory COVID vaccination requirement. In both lawsuits, employees are alleging that their employers are prohibited from mandating COVID vaccinations because the vaccine is in an Emergency Use Authorization status.

DO EMPLOYERS HAVE TO PROVIDE LEAVE FOR COVID-RELATED REASONS?

It depends on the reason the employee is requesting leave. With schools and childcare facilities closed or on hybrid schedules, many working parents either needed leave or to work from home this past year. Five percent of all COVID claims involved an employer's failure to accommodate these employee requests for leave or work-at-home arrangements due to lack of childcare.

In 2020, the federal Families First Coronavirus Response Act (FFCRA) required employers with fewer than 500 employees to provide their employees paid leave for various COVID-related reasons, including school or childcare closings. While the FFCRA, as of December 31, 2020, is no longer mandatory, employers can still offer leave to employees and receive tax credits for doing so. Several similar state and local laws also were passed, and existing paid sick and family and medical leave laws modified to allow leave for COVID-related reasons that apply to employers of all sizes. Many of these laws remain in effect and new ones continue to be passed, including laws that require employers to provide paid leave to employees for COVID vaccinations and/or complications from the vaccinations. For example, New York just passed a law that requires employers to provide up to four hours of paid leave per vaccination dose.

Given the multitude of leave laws in play, employers must be cognizant of employee leave rights in the jurisdictions where they operate.

WHAT IS THE BEST WAY TO ADDRESS PANDEMIC FATIGUE?

The conditions and length of the pandemic have been stressful for everyone and its impact is not lost within the workplace. However, it is important for employers to stay vigilant in enforcing their COVID-related rules. Employee concerns about lack of workplace adherence to health and safety protocols and/or anxiety or stress resulting from the workplace account for about 8 percent of all COVID lawsuits filed. As the vaccine is being rolled out, there is a growing question of whether workplace protocols can be relaxed. In its recent COVID-19 Vaccination in the Workplace guidance, the CDC recommends continued preventive measures such as wearing masks and social distancing be maintained in work settings. As more businesses return to the workplace, adherence to these standards will be as important as ever. ■

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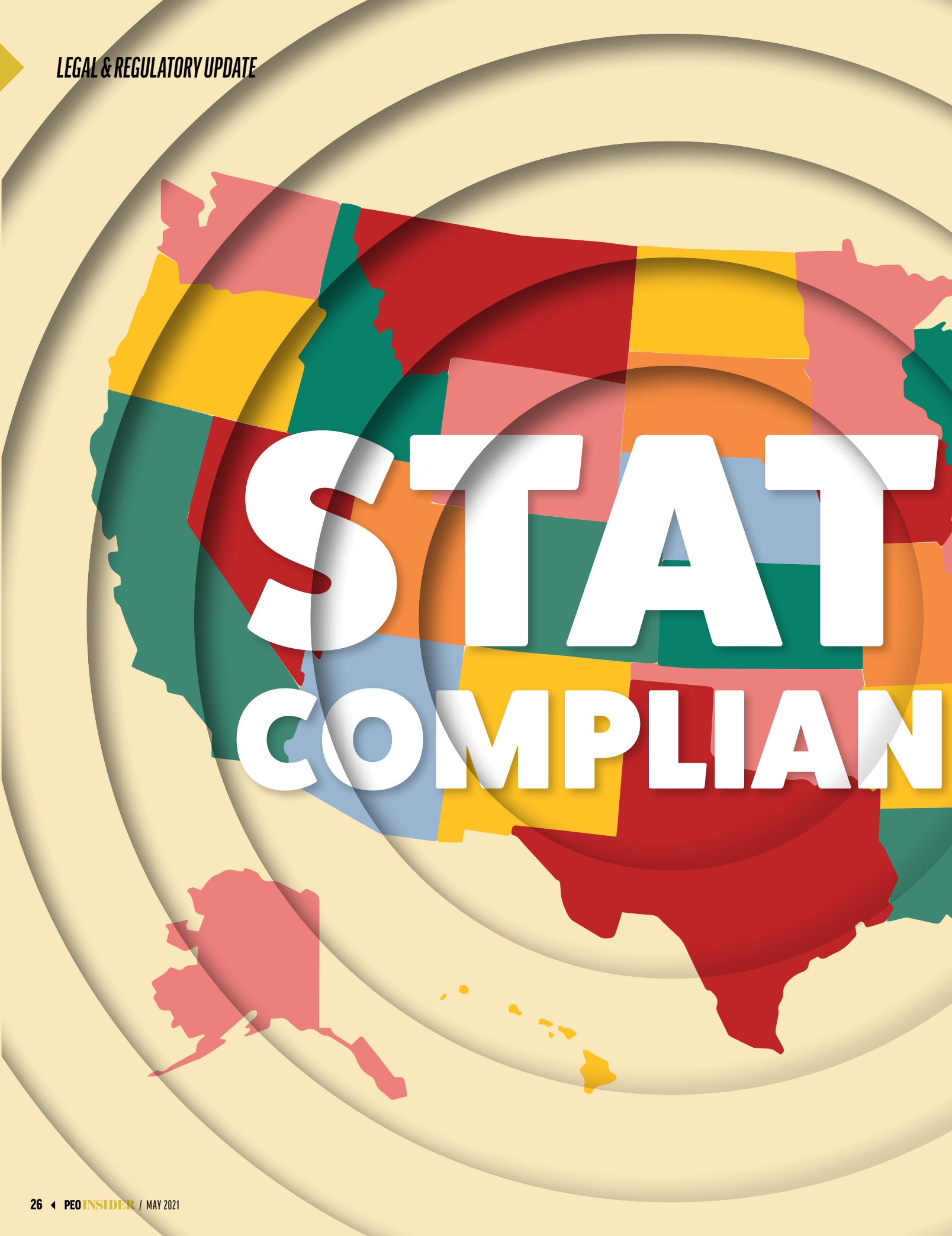
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EMPLOYMENT LAW TRENDS FOR 2021

WANDERING WORKERS & LOCAL COMPLIANCE

BY CLAIRE B. DEASON, ESQ. AND WILLIAM HAYS WEISSMAN, ESQ.

Everyone knows 2020 was a unique year, given a contentious presidential election combined with a (hopefully) once-in-a-century pandemic. As some may have felt that the federal government was not doing enough, many state and local governments stepped in to fill the breach. The result? An explosion of state and local laws that make being an employer even harder than it already was. Most prominent: mandatory telework for employees able to do their jobs remotely.

Coinciding with this explosion of remote work, the American economy faces unprecedented changes. Affordable interest rates, a booming real estate market, and increased attention to space and comfort at home is inspiring millions of Americans to relocate, while continuing to work remotely.

THE WANDERING WORKER

This is a perfect storm of legal compliance challenges for employers. Why? Applicable law changes with the geography of the employee: The law that applies to a worker in California is different from the law that applies to a worker in Texas. What's an employer to do when an employee moves from Texas to California? Require the worker to return, figure out the newly applicable laws, or something else?

STATE-LAW RULES KEEP CHANGING WHILE WORKERS KEEP RELOCATING. THAT IS THE STATE OF EMPLOYMENT LAW AFTER A YEAR OF PANDEMIC REMOTE WORK.

As a result of the shifting workplaces created by mobile employees, many employers find themselves caught off guard about whether they need to register to do business in new states, which state or local government's income tax withholding rules apply, where they must report the employees for unemployment insurance and other state payroll tax purposes, and other jurisdictional issues.

Add to this problem a new wrinkle: State-law rules keep changing while workers keep relocating. That is the state of employment law after a year of pandemic remote work.

As workers fan out across America and the globe, state and local governments continue to impose new laws upon employers. Over the past four years, states and major cities enacted more than 1,000 new labor and employment laws—and political transitions have hastened those changes. The flood of state and local mandates on various topics has always created a compliance challenge for employers operating in multiple jurisdictions, but the increase in remote-worker relocation exacerbates this challenge exponentially.

This is particularly true when dealing with laws that vary in application and execution. Among the trickiest, which show no sign of slowing down, and are not the only local laws that apply to employees, are minimum wage, paid leave, and notice requirements.

Minimum Wage

In addition to federal and state minimum wage rates, there are currently more than 50 different local (city or county) minimum wage rates in the United States; the applicable minimum wage depends on the location of the employee, the size of the employer, and the nature of the work. What happens when an employee works in multiple jurisdictions with different minimum wage rates? Unless the employee is already paid at the highest minimum wage, employers will have to carefully track where wages are earned to avoid violating the law.

Paid Leave

There are currently more than 30 different state and municipal laws requiring some form of paid leave for employees in the United States. Some, but not all, are only applicable if an employee has worked in a particular jurisdiction for a defined period of time; others confer rights to the employee immediately. Each has its own covered uses; an employee may be entitled to paid time off for one reason in one city, and not entitled to the same if he or she moves elsewhere—or vice versa.

Notice Requirements

Ten jurisdictions in the U.S. require specific written notice of changes to the terms of an employee's employment, and 12 cities and states require a particular duration of advanced notice to employees of changes to their pay.

LOCATION, LOCATION, LOCATION

The result of all these new rules and changes are that employers now must pay careful attention to where employees are actually working.

Consider the following scenario: A Fair Labor Standards Act (FLSA) exempt IT employee relocates from Houston to work remotely in Los Angeles, where his parents live, and stays for nine months. What should the Texas employer know? First, is this IT employee paid enough under California law to be exempt? Further, California has its own IT exemption that has specific job duties. Will the employee satisfy those? If not, this once-exempt employee has suddenly become non-exempt, entitled to daily overtime in California.

Los Angeles has a paid sick leave law—Texas does not. Has the employer properly tracked the time spent in Los Angeles? Did the employer withhold California income taxes, even though the employee would not pay income taxes to Texas? Where should the employee be

reported for unemployment insurance tax purposes? The wage statement requirements in California differ from those in Texas as well. Are the employer's wage statements compliant with California law? More importantly, need they be if the employee is only there temporarily?

Some of these questions do not have clear answers under existing law. For example, an employee is reported for unemployment tax purposes to a state if services are localized to that state. If the employee left Texas in March and returned in January, were services localized to California even if the employer already had paid such taxes to Texas from January to March? In other words, when should that decision be made? The law does not clearly say. And there lies the rub for employers faced with deciding which law to apply: The law is often silent about what to do when employees are working remotely from different locations for varying periods of time.

As remote work gains popularity, compliance will get much harder for PEOs and employers generally, as state and local governments continue to expand their employment laws and reach to temporary visitors in 2021 and beyond. Careful planning and knowledge of where and how long employees are working (and wandering!) are now critical to compliance. ■

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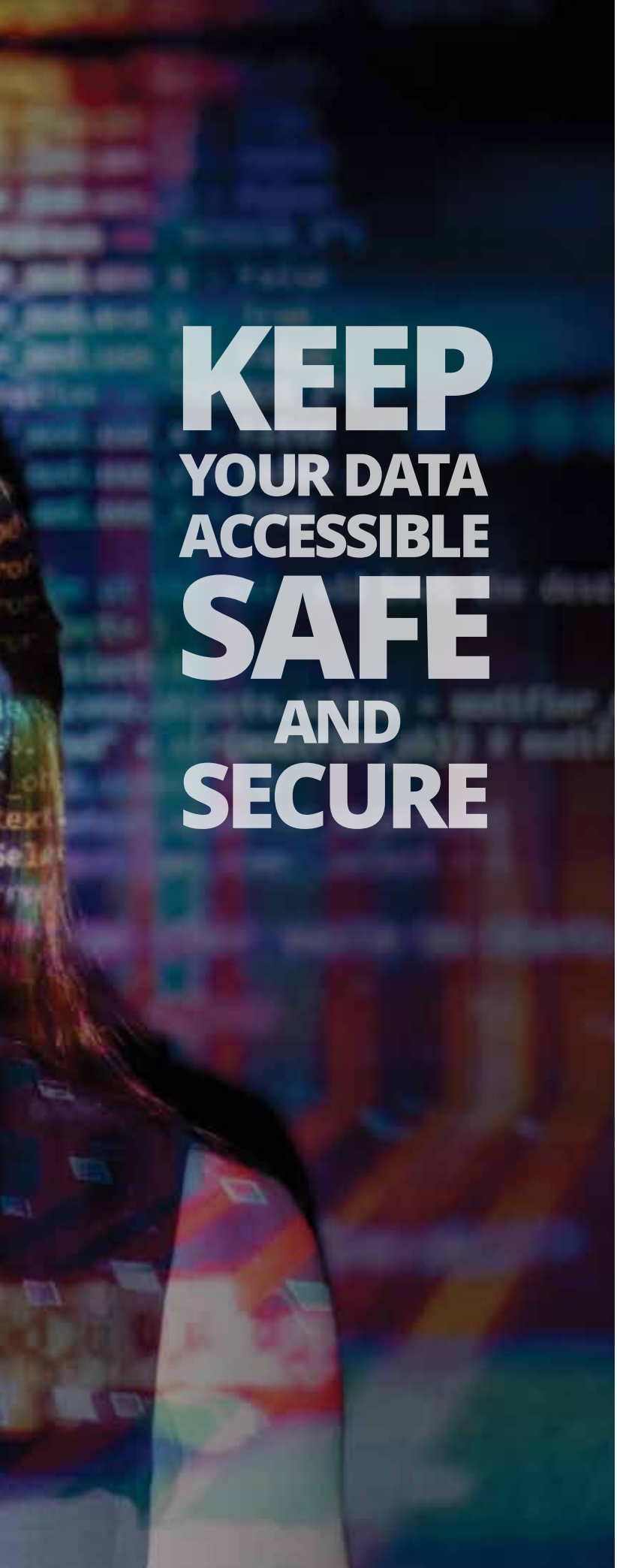

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BUILDING UPON THE LEGAL FOUNDATION OF THE PEO INDUSTRY

Both Amie Remington, Esq. and Rod Jordan, Esq. were introduced to NAPEO at the very outset of their careers with their respective PEOs. Amie, 2020-2021 Legal Advisory Council (LAC) chair, is general counsel for LandrumHR, based in Pensacola, Florida. She started with LandrumHR on September 5, 2005, at NAPEO's Annual Conference & Marketplace in Dallas, Texas. That is where she attended her first NAPEO LAC meeting, and she has been involved ever since, serving as chair for two years prior to 2010. Rod, senior vice president HR, general counsel, and secretary of the TLC Companies, based in Brooklyn Center, Minnesota, was the 2018-2019 chair of the LAC. He first became involved with it in the mid-2000s after being encouraged by an associate member company. Both Amie and Rod joined to learn about the PEO industry and its legal challenges, both continue to be involved to help improve the PEO operating environment, and both share their insights into the work of the LAC, legal issues facing the PEO industry, and the future legal climate in this Q&A.

WHAT IS THE MISSION & PURPOSE OF NAPEO'S LEGAL ADVISORY COUNCIL (LAC)?

AMIE REMINGTON: The overarching purpose of the LAC is to educate and improve PEOs nationwide. We do this by evaluating existing or pending state and federal legislation and regulations that impact the PEO industry and providing that information to members and other NAPEO committees, such as the State and Federal Government Affairs committees. None of this would be possible without the active participation and collaboration of every member of the LAC.

ROD JORDAN: The LAC also develops the legal educational content of and provides speakers for NAPEO's annual PEO Capitol Summit, an annual multi-day forum that, before COVID, also gave participants the opportunity to meet with their congressional representatives to advocate for legislation helpful to PEOs. Members of the LAC also deliver webinars on important topics, act as presenters for NAPEO's PEO University, and author articles for *PEO Insider.*®

WHAT ARE THE MOST IMPORTANT ISSUES THE LAC IS WORKING ON RIGHT NOW?

AMIE: 2020 brought with it more new laws and complex regulations than any other year I can think of. The Coronavirus Aid, Relief, and Economic Security (CARES) Act, the Families First Coronavirus Response Act (FFCRA) with the Payroll Protection Plan (PPP), the Consolidated Appropriations Act (CAA), and the American Rescue Plan Act (ARPA) are all complex and overlapping laws that directly affect PEO clients in a variety of industries throughout the nation. Following these developments and educating members about the evolution and impact of these laws is the LAC's 2021 priority. I suspect that will be a full-time job in 2021, as it was in 2020.

ROD: Providing timely guidance to both our committee members and NAPEO members has kept the LAC vigilant and busy. The LAC continues to work on helping the IRS improve the administration of the Certified PEO (CPEO) program. The LAC also continues to work on important issues involving the states. For example, in Florida we are actively working to educate state representatives about the provision of workers' compensation coverage to the people PEOs co-employ.

HOW DOES THE LAC IDENTIFY ISSUES IMPORTANT TO THE PEO INDUSTRY?

AMIE: The LAC is made up of active members of the NAPEO community. Many have areas of specialty—some are litigation experts, some are Employment Retirement Income Security Act (ERISA) gurus, and some are exceptionally well-versed in state laws. We ask our

Amie Remington and Rod Jordan

subject-area experts to share information they believe is timely and relevant to the industry. LAC members are incredibly generous with their time and talent. These bright attorneys are willing to share their knowledge collaboratively. This benefits every member of the PEO industry, and, by extension our clients and worksite employees.

ROD: The NAPEO Board of Directors and NAPEO members often identify important issues for us to work on. NAPEO associate members often raise issues and become advocates for the industry. LAC members regularly bring up issues that arise from their work with clients.

CAN YOU DESCRIBE A KEY SUCCESS FOR THE INDUSTRY?

AMIE: The Certified PEO (CPEO) legislation was a topic of discussion by the LAC for years before it came to fruition. Along with other NAPEO members, staff, and lobbyists, LAC members worked with Members of Congress to bring the law to fruition and give the entire industry credibility with the IRS.

ROD: This IRS certification provides important assurances and protections to clients of PEOs. The IRS CPEO program is the direct result of advocating for enabling legislation by hired lobbyists, NAPEO's Federal Government Affairs Committee members, and members of the LAC. The initiative was a multi-year effort. Members of the LAC met with their congressional representatives to educate them about the business of PEOs and the advantages and benefits that would derive from CPEO legislation.

WHAT DO YOU THINK IS THE MOST CHALLENGING LEGAL ISSUE PEOS HAVE FACED IN THE PAST?

ROD: In the early days of the industry, PEOs struggled to convince the workers' compensation insurance markets that PEOs were a viable employer. Co-employment was a foreign concept. PEOs had to structure their service agreements to demonstrate this. The language used in those early service agreements was often confusing to prospects and other third parties. This was especially true when litigation resulted from the negligence of a worksite employer and having to explain the PEO concept to plaintiff's counsel. The confusion among prospects and plaintiff's counsel remains a challenge today, even with the emergence of legal certainty for PEOs through state licensing requirements and the federal Certified PEO program.

HOW HAS THE LEGAL LANDSCAPE FOR PEOS CHANGED OVER THE YEARS? HOW DO YOU SEE IT CHANGING IN THE FUTURE?

ROD: In my view, the early legal focus for the industry had three prongs:

- Solidifying the PEO industry's ability to pass workers' compensation exclusive remedy protection to both the client and the PEO;
- Gaining legal certainty through state licensing statutes and a federal certification program; and
- Keeping the PEO industry informed about the myriad legal issues that affect their clients as employers.

Given the rapid growth of PEOs, combined with PEOs having achieved legal certainty at the federal level and in 30-plus states, the industry will become a target of third parties who:

- Believe PEOs have deep pockets;
- Believe PEOs have a higher duty to co-employees and the public given what they do and their level of expertise, and
- Perceive PEOs as a competitive threat to their revenue streams. Legislative efforts to shift work comp insurance fraud risks to PEOs in Florida and newly informed plaintiff's attorneys, including attorneys general who will knowingly sue PEOs for damages, are but two recent examples.

WHAT ARE THE EMERGING LEGAL ISSUES THAT YOU SEE ON THE HORIZON?

AMIE: The most pressing emerging issue for PEOs is the continued

evolution of the federal legislation that began in March 2020. In the past year, beginning with the Coronavirus Preparedness and Response Supplemental Appropriations Act and continuing—most recently with the American Rescue Plan Act—there have been half a dozen major pieces of legislation, each more complicated than the last. Helping clients understand their employees' leave rights, employer safety obligations, PPP loan availability, and opportunities for tax credits has made PEO services more valuable than ever. Every time a state or federal administration changes, new relationships must be developed. This is challenging but creates an opportunity for us to continue teaching legislators and leaders about the PEO model and the consistency and assurances we offer.

WHAT WOULD YOU LIKE NAPEO MEMBERS TO KNOW ABOUT THE WORK THE LAC DOES?

AMIE: Two things: First, although the results of the LAC benefit PEOs nationwide, the members who do the work to generate these results often do so quietly and without any expectation of reward. Second, the LAC has always had exceptional and dedicated leaders on the NAPEO staff. Bill Shilling, Farrah Fielder, and Nick Kapiotis, NAPEO's current general counsel, all deserve recognition for providing direction, guidance, and support to LAC members. Without these great coaches, our team would not be successful.

ROD: The LAC has proved to be an effective advocate for the PEO industry. The LAC provides continuing education opportunities to NAPEO members and proactively monitors and responds to legal and regulatory matters that impact the industry. It also provides important support to NAPEO and NAPEO's general counsel. LAC members are not compensated for their committee work. They work without any expectation of remuneration or recognition. NAPEO's legal and legislative agenda could not advance cost-effectively without the volunteer work of these dedicated committee members. To reiterate what Amie said, the LAC depends on the support it receives from NAPEO's exceptional leadership and dedicated staff to do its work. Nick Kapiotis and his predecessors, Bill Shilling and Farrah Fielder, have been the important links to NAPEO's leadership, NAPEO's Board of Directors, and other NAPEO committees. Their guidance is critical in setting the LAC's agenda for action. ■

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HOW COVID HAS CHANGED ADVOCACY

BY THAD INGE

Over the course of the past year, the volume and rapid pace of legislative and regulatory change has been enough to overwhelm even the largest of organizations, much less small and mid-size businesses who might not have resources dedicated to navigating the complexities brought on by COVID. PEOs offer a unique solution to this problem for small businesses, providing the regulatory expertise of a large business at an affordable cost, along with the ability to advocate for the needs of small businesses with policymakers. However, advocating for small businesses and the PEO industry on Capitol Hill can be a tall task, made even more challenging by the current virtual environment. Below I present my insights on educating legislators on the needs of business owners, advocating for the priorities of PEOs, and adapting to the newly remote world.

THE IMPORTANCE OF ADVOCACY

With all the changes in the past year because of COVID, plus the new environment and the sheer volume of legal and regulatory changes happening, working with the government is more important than ever.

The decisions that policymakers are making because of COVID on the federal, state, and local levels have touched almost every aspect of the business landscape. Among the most impactful have been the Paycheck Protection Program (PPP) and various new tax credits—all aimed at helping businesses and their employees survive the economic challenges brought on by COVID. There have also been numerous changes related to health and retirement benefits, paid leave, unemployment insurance, and more, translating to a series of new regulations for businesses to track and comply with. In addition, the policy decisions that are being made directly because of COVID—whether regarding business shutdowns, state travel bans, vaccination distribution, or others—cannot be understated. Government bodies are making decisions every hour that impact the operation of businesses and their ability to survive economically. As a result, the importance of communicating with policymakers is paramount. Whether it is articulating specific needs, seeking clarity around a new law or regulation, or educating them about an unintended consequence of a policy decision, it is important that the business community and PEOs provide clear and direct input into the policymaking process. While policies are usually well-intentioned, the on-the-ground implications are not always clear when the policies are first drafted and implemented, especially when considering how policies will impact the PEO industry.

Advocating for small businesses and the PEO industry on Capitol Hill can be a tall task, made even more challenging by the current virtual environment.

ADAPTING TO THE VIRTUAL ENVIRONMENT

Not every PEO has government affairs staff, but many PEOs are active in government affairs on the state and federal levels. Like many during the pandemic, PEOs working with policymakers have had to adapt how they work. As a government relations professional at my PEO, I have had to adapt my basic protocols and procedures over the last year because of COVID.

The most obvious example of this is the lack of in-person meetings. Congress has been largely restricting external meetings since last March, and it is expected to remain that way for the foreseeable future. While hearings and committee work are taking place, you can no longer go in person. Trade associations have moved their meetings to Zoom and

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conferences have largely gone virtual. As a result, in-person dialogue and the opportunity to bump into someone on the Hill to have a discussion have not been options. However, with so much policy being made, many staffers have been anxious to be in contact with key stakeholders and get technical feedback and explore new ideas. This has opened up new lines of communication and allowed meetings to happen in a more efficient manner. The legislative and regulatory policies related to COVID have often been a 24/7 effort, meaning late night and weekend communications with Hill staffers have become much more the norm (particularly in those early months last spring). We have also been in regular contact with associations, including NAPEO, whose federal and state government relations staffs do a great job of sharing important information and identifying areas where more industry attention is needed.

EDUCATING NEW MEMBERS OF CONGRESS

Industry advocates now need to educate new Members of Congress about the PEO industry remotely. When new Members of Congress are elected, introducing your issues and educating new staff always presents a challenge. This requires proactive outreach and lots of time (which can be hard to come by for everyone). However, it is paramount as various allies of the industry retire or move on that we develop champions among the newer members. I think this is one area where NAPEO plays a huge role and where its PEO Capitol Summit has been instrumental in the past. Getting PEO operators in front of their elected representatives to communicate the value they bring to small businesses across the country is an effective way to tell the industry's story. While many of us prefer to do these meetings in-person, they can also be done very effectively over Zoom. Now, more than ever, it is important for leaders in the PEO space to tell their story. ■

NAPEO ADVOCACY

NAPEO's government affairs mission is to create and cultivate a legislative and regulatory climate at the federal level and in all 50 states that recognizes the key role PEOs play in supporting small and mid-size businesses and positions the PEO industry for continued growth. Find out more at **www.napeo.org/advocacy**.

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FEDERAL ENGAGEMENT FOCUS

THE SURVIVAL OF SMALL BUSINESSES

BY THOM STOHLER

Much has changed since the arrival of the Coronavirus more than a year ago. This holds true for government relations and public policy, and it is especially true for the PEO industry.

Prior to COVID, NAPEO's federal engagement model was almost entirely focused on PEO-specific issues, such as the Certified PEO (CPEO) program and the tax treatment of PEO clients who are pass-through entities. Upon the enactment of the Coronavirus Aid, Relief, and Economic Security (CARES) Act and the Families First Coronavirus Response Act (FFCRA), the focus of PEO federal engagement became the survival of small businesses.

AREAS OF ENGAGEMENT

The first—and most important of these engagements—was the need for Forms 941 for Payroll Protection Program (PPP) loans. As an industry, we used virtually every contact we had in the federal government to make sure that the small business clients of PEOs could qualify for PPP loans. The result of that effort is FAQ 10 in the PPP loan instructions, which makes clear that payroll information provided by PEOs is adequate for meeting the eligibility requirements of PPP loans. Our successful lobbying efforts resulted in PEO clients being able to obtain $23 billion in PPP loans.

Another area where the industry has been engaged is tax credits. Typically, tax credits were applied against the income of businesses. Starting in 2015 with the R&D tax credit, Congress began to apply the credit against payroll taxes. With PEOs filing consolidated 941s, such arrangements are, at best, complicated. If a client misapplies or is otherwise not eligible for a credit, it could inadvertently create a tax liability for the PEO. NAPEO, and especially member PEO Insperity, have successfully lobbied on the CARES Act and subsequent COVID relief bills to ensure that PEOs are not held liable for clients that defer their payroll taxes or claim the Employee Retention Tax Credit (ERTC).

The biggest change in NAPEO's lobbying efforts caused by COVID has been to support legislation that provides direct aid to small businesses. NAPEO was part of broader business coalitions that successfully fought to extend the PPP program, expand it to cover certain non-profits, and to make the expenses paid by PPP loans tax deductible. NAPEO also supported legislation to protect small businesses, healthcare providers, and first responders from frivolous COVID lawsuits. Finally, NAPEO activated grassroots activities to lobby Congress in support of providing additional funding for PPP loans. This tactical change has benefited the PEO industry. When PEO industry priorities were promoted within the framework of helping small businesses survive, we found a far more receptive audience on the Hill and in the agencies. I do not see that changing any time soon. Simply put, PEO industry priorities, when possible, should promote small business growth.

> *Upon the enactment of the CARES Act and the FFCRA, the focus of PEO federal engagement became the survival of small businesses.*

EXPANDING NAPEO'S REACH & JOINING COALITIONS

One of the outcomes of these efforts to support the small business sector has been to expand the reach and visibility of the PEO industry to regulators, Members of Congress and their staffs, and the broader business lobbying community in Washington, D.C. It is fair to say that there are many more regulators in the Small Business Administration (SBA) and the

NAPEO FEDERAL GOVERNMENT AFFAIRS

The mission of NAPEO's federal government affairs effort is to create and cultivate a favorable federal legislative and regulatory climate that supports the growth and success of the PEO industry. Learn more at **www.napeo.org/fedaffairs**.

Department of the Treasury (Treasury) who know there is a PEO industry and have a basic understanding of the industry's business model. We would not have been able to obtain FAQ 10 without the support of the U.S. Chamber of Commerce, which weighed into then-Treasury Secretary Steven Mnuchin's office on our behalf. Our work on small business assistance issues led to NAPEO joining a coalition with the American Institute of CPAs and the Payroll Consortium to promote these issues—both groups we had never worked with before. NAPEO signed at least a dozen coalition letters in support of various pieces of small business assistance legislation and participated in numerous coalition meetings to support these bills.

While the flurry of COVID assistance bills is likely over with the passage of the American Rescue Plan, I do not expect NAPEO's lobbying efforts to slow. The creation of so many small business assistance programs in a short period of time is likely to cause issues down the road. We are seeing that with the ERTC and the PPP programs. As they reopen and/or expand operations, small businesses will want to take advantage of all the various assistance programs available to them. Tax credits for previous years will need to be processed against 941s. The SBA and IRS will be auditing loans and tax credits for years.

BUILD & MAINTAIN STRONG RELATIONSHIPS

While the industry had many successes in 2020, they came with a price. As mentioned previously, we used every political chit we had to make sure PEO small business clients did not need 941s to qualify for PPP loans. While we are very fortunate to have NAPEO members who have strong relationships with their elected officials, such as Brent Tilson of Tilson HR has with Sen. Todd Young (R-IN), we need more industry champions for the next industry crisis. That relationship was not built overnight. Brent met with then Rep. Young in 2014 to educate him about the Affordable Care Act (ACA) and continued to stay in touch with him over the next six years. That effort made it possible to enlist Sen. Young's assistance in obtaining guidance that made PEO clients eligible for PPP loans without 941s.

The good news is that NAPEO has the template for you to become more engaged with your representative and senators, and with the advent of Zoom, it has become far easier to contact them and their staffs to build those relationships. We also have a great story to tell the Hill and federal regulators as PEOs worked closely with their small business clients to navigate through the various leave requirements, tax credits, and loan programs to ensure small businesses not only complied with these new laws, but were also able to take advantage of the assistance made available.

This year has already been quite active on the federal legislative and regulatory front—and it shows no signs of slowing down. NAPEO will continue to promote the PEO industry's interests, especially as they support the growth of small business. We will be asking you to get involved: To write/email/message representatives and senators, and in some cases, to have your clients engage in grassroots activities. We do not know when the next existential crisis will hit the PEO industry, but we do know we will need every contact and friend we have when it does happen. ■

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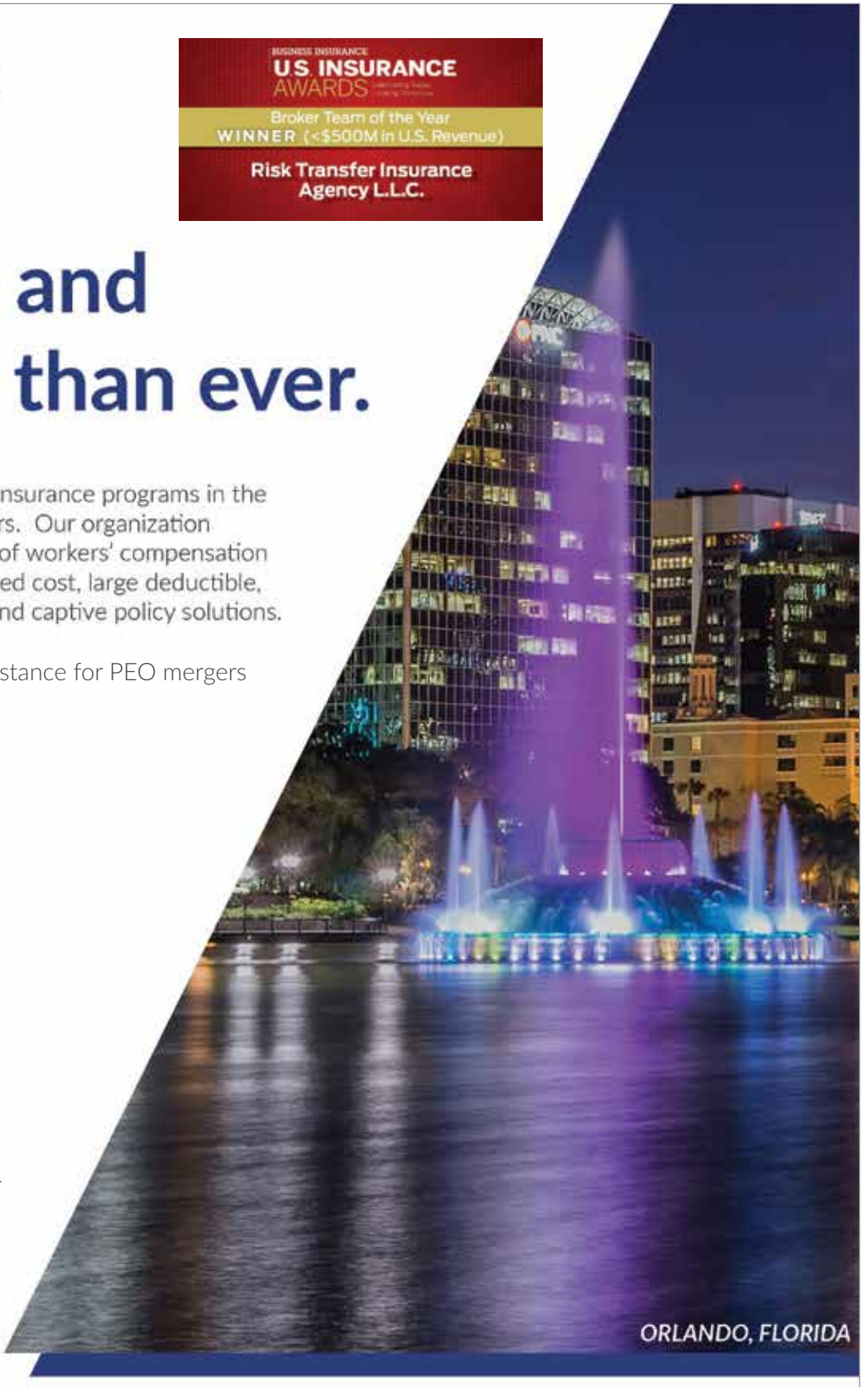

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CHALLENGES OF EMPLOYEES RELOCATING OUTSIDE THE U.S.

BY WILLIAM D. WRIGHT, ESQ.

The impact of the coronavirus pandemic on the workplace has been dramatic. As employees continue to work remotely, employers are being confronted with new employment challenges. One such challenge involves situations in which valuable employees are relocating to work from locations outside the U.S. This brings many complications to the employment relationship, as the laws of the jurisdiction will apply in most circumstances. In addition to employment-related compliance concerns, employers must also consider the tax and benefits implications of such an arrangement. With the prospect of this work arrangement continuing into the foreseeable future, many PEO clients are turning to their PEOs for assistance with international employees. What do you need to know if you are considering expanding your PEO offerings to cover internationally based employees?

The PEO model in the U.S. serves as a highly effective solution to managing payroll, benefits, workers' compensation, and unemployment-related obligations. Outside of the U.S., employers seek the assistance of PEOs for the more limited purpose of ensuring compliance with international employment laws and taxes, given that benefits, workers' compensation, and unemployment generally are government functions. However, even with that narrower focus, the demand for PEO coverage of international workers is increasing due to the pandemic's international compliance concerns caused by the international dispersion of workers who are compensated through U.S. PEOs.

CONSIDERATIONS

Before considering offering services to internationally based employees, it must be understood that, on a predominantly worldwide basis, the laws of the jurisdiction where services of the employee are being performed will likely prevail. Consequently, the choice of law provisions drafted into an employment agreement,[1] the location of payroll processing (or assignment), the citizenship of the employee, whether the employee has a U.S. bank account or home, the tax residency of the employee, among many other similar factors, will not necessarily influence the outcome of any compliance obligations imposed by the local jurisdiction.

PEOs seeking to service their customers' international workers should also understand the inherent risks created by the novelty of a co-employment model outside the U.S. In many jurisdictions around the world, third-party employment is not necessarily completely understood or addressed under existing law. Any relationship that may be created, regardless of how it is contractually defined, may still be considered by a particular jurisdiction to be one in which the PEO assumes more employer-related risks than a PEO generally is accustomed to absorbing. The consequences of this risk should not be underestimated. PEOs with global employees should consider the specific employment-related compliance obligations that may apply, regardless of the assessment or position that the PEO is not liable under U.S. law. Carefully crafted indemnities for related

WORKDAY FACTS FROM AROUND THE WORLD

Workers in Nigeria have the longest commute, three hours each way for a total commute of six hours, according to a survey of 65 countries by Printerland.co.uk, as reported on the Insider (not to be confused with *PEO Insider*®) website. Other findings include:

- They may not have the longest travel time to work, but commuters in Japan are often stuffed into trains—often pushed in by conductors—for their two-hour round trips each day.
- Finland and Canada tie for the shortest workday found in the survey: just six hours and 45 minutes.
- Workers in Italy and China get two-hour lunch breaks and often prepare meals at home before returning to work for the afternoon.

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liabilities should be considered and included in client service agreements (CSAs) in which there are international employees involved.

One of the more important considerations for employment-related obligations is understanding the various contractual obligations that employment relationships might impose on the employer, which may very well be the PEO and not its client in certain jurisdictions. Unlike the U.S., most jurisdictions around the world view employment relationships to be bilateral or contractual and not "at will." Thus, an employment relationship, regardless of the level of the employee, is subject to contract. Most jurisdictions impose specific minimum standards that must be included in these agreements. Among these standards are usually time periods of required advanced notice in the event of termination, mandatory leaves, holidays, and severance obligations.

FOR EXAMPLE

Consider a case involving the Canadian provinces. Each province of Canada generally has an employment standards act with specified minimum statutory notice provisions. Employment agreements—which can be more generous—must include these minimum standards. Defects in drafting such agreements could lead to even greater notice obligations under the applicable common law. Similarly, tax withholding and other related enforcement

> *The demand for PEO coverage of international workers is increasing due to the pandemic's international compliance concerns caused by the international dispersion of workers who are compensated through U.S. PEOs.*

from the Canadian Revenue Authority or other government agencies may be of concern to the PEO. CSA terms alone may not protect the PEO from claims brought by either the Canadian government entities or the employee against the PEO for employment-related claims. Take great care to include and account for these risks, in consultation with counsel familiar with Canadian provincial employment laws.

PEOs may find other unique employment-related situations beyond international borders. There is increasing interest in expansion of services to Puerto Rico, the U.S. Virgin Islands, Guam, and other territories. While U.S. federal laws (such as Title VII) will generally apply in these jurisdictions, there are similar state-level laws in these jurisdictions as well. Most of the U.S. territories do not apply at-will employment doctrines and have views similar to the contractual-type positions applied around the world.

Another example of a situation in which a PEO may find itself facing new challenges is the now more frequent occurrence of suddenly learning that a client's employee has relocated abroad. This triggers unexpected risks related to tax and employment compliance. More important, however, is to understand that such ignorance is not likely to be a basis upon which the related liabilities can be avoided.

While there is no denying the pandemic has driven new opportunities for PEOs to expand their service offerings abroad, it is critical to understand the complexities of taking on international clients. PEOs should consult with their legal counsel to carefully consider the risks and legal obligations before entering into a new international market. ■

1 Most jurisdictions around the world require an employment agreement for every employee. Some require one in writing, others do it by statute. Irrespective of the PEO arrangement, there is likely a need for a contract between the employee *and someone*—and the answer to that will depend on the circumstances.

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PEO STRATEGIES FOR A HARDENING INSURANCE MARKET

BY DAVID E. CAROTHERS, CSP, ARM

COVID and other factors have resulted in a hardening insurance market for PEOs and their client companies. While COVID is a recent phenomenon, longer-term issues are also contributing to the current market shift. This article will consider the impact on several PEO-sensitive insurance coverage lines and potential risk mitigation strategies.

MACRO TRENDS

While carriers selectively participate in the PEO insurance space, PEOs are still subject to broader market trends. Consider the following macro trends in the insurance industry that are impacting the market, as stated in a recent report from the Beyond Insurance Global Network.

Industry Surplus

This is the cushion that allows carriers to make up for imbalances from an asset or liability perspective when they take on substantial risks. Over the last decade, the surplus within the insurance industry has grown from $550 billion to approximately $870 billion as of Q3 2020. That is approximately a 60 percent gain. In short, the industry has a lot of capital to take on more substantial risks.

Premium Growth

Across the industry, net premium growth has gone from $425 billion to $660 billion over the last decade. With substantial growth like this, when supported by the industry surplus mentioned above, there is still additional room for the industry to take on greater/more risks and be able to absorb those losses should claims occur. Insurers have not been able to write new business at the same rate that the industry has been developing a financial cushion.

Underwriter Profitability

The U.S. property and casualty (P&C) market has only generated an underwriting gain in nine of the past 17 years. Prior to 2004, the last underwriting gain was at least 30 years earlier. While this shows enhanced underwriter discipline, it also highlights the challenges carriers have faced as a result of several underwriting challenges.[1]

CHALLENGES DURING 2020

Several key carrier underwriting challenges emerged during 2020 that will continue to negatively impact 2021. Primary challenges include catastrophic losses, the rise of social inflation, COVID, and interest rates. COVID and social inflation will specifically impact PEOs and their clients.

While carriers selectively participate in the PEO insurance space, PEOs are still subject to broader market trends.

Employment Practices Liability Insurance

Beazley, a long-standing leader in employment practices liability insurance (EPLI) for the PEO industry, identified the following evolving healthcare-related exposures as a result of COVID (many of which are shared exposures with PEO client companies):

- Increased potential for employment retaliation or wrongful termination claims resulting from an employee's complaint about the safety of patients or employees due to a lack of personal protective equipment (PPE);
- Retaliation against an employee for comments to, or interaction with, the press or social media that an employee feels is justified;
- Employees making reasonable requests of their employers about the conditions under which they return to work and having them turned down;
- High-risk employees who refuse to return to work and are subsequently dismissed may pursue claims for discrimination based on disability;

RISK MANAGEMENT RESOURCES

NAPEO provides several risk management resources for members, including:

- Risk Management Town Halls, moderated discussions hosted by subject-matter experts about key issues;
- Risk Management Community Conversations, where members can connect, network, and learn from industry peers; and
- Cybersecurity Webinar Series, covering planning for a cyber event, top cyber threats, legal issues, communications plans, and more, available in NAPEO's webinar archives.

Visit **www.napeo.org/events** for the dates of upcoming events.

- Departments that are deemed "non-essential" in the fight against COVID having staff numbers reduced or funding cut due to financial constraints, subsequently leading to claims;
- Claims for discrimination arising over how employees were selected for inclusion in groups that were furloughed or whose pay was reduced; and
- In the instance of a labor pool having been created for furloughed employees, claims may be brought by those who are either reluctant to return to work when selected or resentful that they have not been selected to return.[2]

The result of these evolving exposures may be coverage exclusions, specific client exclusions, increased self-insured retentions, increased premiums, or all of these. In today's market, the floor for self-insured retentions has increased, as have annual premiums.

Social inflation is the term used to describe increased litigation, plaintiff-friendly decisions, and larger jury awards. Plaintiff litigation expense risk is reduced through the creative use of third-party litigation financiers. Litigation financiers become participants in potential settlement discussions to protect their expected rate of return—thus increasing not only litigation volume but also litigation expenses.

Directors & Officers Liability Insurance

Directors and officers insurance (D&O) is also under COVID-related pressure. Common allegations pertain to the business impact of COVID on financial performance or business operations. Other allegations could include privacy concerns, data security, ability to service debt, bankruptcy, or overly optimistic proxy statements. The Securities and Exchange Commission (SEC)

has also initiated enforcement actions. Buyers can expect increasing retentions, premiums, and certain coverage exclusions.

WHAT CAN BE DONE?

While your PEO cannot control the broader market, you can focus on controlling your exposures and performance. The following are some key areas to address.

Use best practices.

- From a risk-control perspective, undertake best practices. Many firms offer assessments that will help PEOs quantify their current practices compared to best practices. The assessment should not only provide a numerical score, but also identify key areas for improvement. This assessment coupled with a quantifiable action plan will demonstrate your commitment to risk control to the insurance carrier's underwriter.
- Evaluate prospective clients for suitability prior to adding them to your EPLI platform. If unsuitable, assist them in obtaining an individual EPLI policy.
- Review your current book of business for clients that should be removed from your master EPLI program and placed on individual policies.

Quantify and explain your performance.

- Demonstrate your history of using your carrier's loss control resources, whether online or using a resource desk.
- Review loss runs and reserves for accuracy.
- Know your one-, three-, and five-year loss ratios.
- Know the details behind each client and claim.

Engage your carrier's underwriter.

- Not all risks are equal in exposure or performance. Build a relationship with your carrier's underwriter that will differentiate you during the renewal process.

Unfortunately, it appears difficult market conditions will remain for a while. The market drivers and mitigation techniques outlined in this article can be applied to most insurance coverage lines afforded to PEOs. Now more than ever, focused attention on risk management is a critical success factor. ■

1 "Hard Market Report." Beyond Insurance Global Network. February 2021.
2 "The COVID effect: What's happening to EPL claims in the U.S. healthcare sector?" Kelly Webster and Greg Staron, June 25, 2020.

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WHO HAS RESPONSIBILITY FOR I-9S IN A REMOTE WORLD?

BY CARLOS ZUMPANO, ESQ. AND JOSEPH RUIZ, ESQ.

Many PEOs provide I-9 and E-Verify-related services to their client companies. Generally, if the client company employee is assigned under the PEO relationship, the U.S. Citizenship and Immigration Services (USCIS) allows the flexibility to split up the process between the PEO and the client company, but either company may be penalized for non-compliance.

USCIS requires that when completing Form I-9, the employer or an authorized representative must physically examine—with the employee being physically present—each document presented to determine if it reasonably appears to be genuine and relates to the employee presenting it. Historically, reviewing or examining documents via video conference was explicitly not permissible.

Long before the COVID pandemic expanded remote work, employers struggled with how to verify remote workers' authorization documents within the required three-day deadline because verification must be done with the employee and the documents physically present.

Due to the COVID pandemic, a temporary exemption to the in-person rules was created to allow employers to inspect I-9 documents remotely in certain COVID-related situations. This was limited to employers and workplaces operating entirely remotely. When an employer's onsite operations resumed, all employees who used remote verification were required to report to the employer within three business days for in-person verification. The restrictions limited the utility of this temporary exemption, and there does not appear to be a push to make this exemption permanent.

In the past, some PEOs and client employers have taken to designating either an attorney or a notary public to be their authorized representatives for this purpose; however, some states have laws that restrict who can complete I-9s on a company's behalf. If the client employer hires a notary public and such practice is allowed, the notary public is acting as an authorized representative of the client employer, not as a notary. The attorney or notary public must perform the same required actions as an authorized representative, such as determining if the documents appear genuine. When acting as an authorized representative, a notary public should not provide a notary seal on the Form I-9.

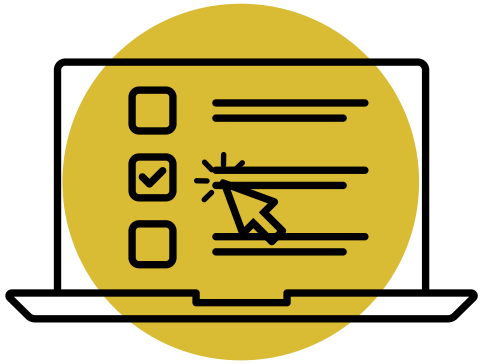
Going forward, unless there is a change to the in-person requirements of I-9 compliance, PEOs and their client companies should be mindful of the in-person requirements. The PEO and its client companies should work together to find a solution that works best for each remote worker, while also being mindful of the current state of legal requirements.

HOW SHOULD THE PEO HANDLE MISMATCHED SSNS?

Beginning in March of 2019, the Social Security Administration (SSA) began mailing out Employer Correction Request (ECR) notices to employers that had at least one name and Social Security number (SSN) combination submitted on a Form W-2 that did not match their records. The SSA was clear that there where many possible reasons for the discrepancies, including typographical errors and unreported name changes. The ECR notices themselves do not include a list of each name/SSA mismatch. Instead, it refers employers to SSA's Business Services Online (BSO) application, which will provide the names and the last four digits of the SSNs for the mismatches.

ALL ABOUT I-9S

The U.S. Citizenship and Immigration Services website, **www.uscis.gov/i-9**, provides forms, filing guidance, filing fees, and form updates for Form I-9, Employment Eligibility Verification. The site also includes an A-Z index, a glossary, and a section about scams and fraud.



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The PEO, as the reporting entity, is ultimately responsible for investigating the SSN and name mismatch error. Upon receiving an ECR notice, the PEO should promptly use the BSO system to identify which client employees have mismatch errors. For each error, the PEO and the client company should perform these steps:

- Compare the SSN and/or name with your employment records for any typographical error;
- If no error is found, ask the subject client employee to check his or her Social Security card and inform of any difference between the records and the card; and
- If no difference is found, ask the client employee to check with a local SSA office to resolve the issue and inform you of any changes.

If you have already sent a Form W-2 with an incorrect name and/or SSN, then submit a Form W-2c (Corrected Wage and Tax Statement) to correct the mismatch. There is no direct requirement to correct mismatches if you are unable to contact the client employee or if the client employee is unable to provide a valid SSN; however, you should document your efforts to obtain the correct information and retain it for three years.

> *Long before the COVID pandemic expanded remote work, employers struggled with how to verify remote workers' authorization documents within the required three-day deadline.*

Regardless of the reason for the mismatch, adverse action against a client employee should not be taken solely because the ECR notice identifies a mismatch between the name and SSN, as those actions could violate state or federal law.

WHAT ARE THE POSTING REQUIREMENTS FOR REMOTE WORKPLACES?

The Wage and Hour Division (WHD) of the Department of Labor (DOL) issued a field assistance bulletin (FSB) in December 2020 on the topic of "posting" notices in remote workplaces. Notably, electronic notices mainly supplement, but do not replace, the statutory and regulatory requirements that client employers post hard-copy notices.

If a notice is required to be continuously posted at a worksite, the WHD will only consider electronic posting an acceptable substitute for the continuous posting requirement when:

- All client employees exclusively work remotely;
- All client employees customarily receive information from the client employer via electronic means; and
- All client employees have readily available access to the electronic posting at all times.

When a client employer seeks to meet a worksite posting requirement through electronic means solely, client employers may use an intranet site, Internet website, or shared network drive or file system posting; however, the electronic notice must be considered as effective as a hard copy posting. Further, the client employer must take steps to inform its employees of where and how to access the notices electronically to comply with the posting requirement. ■

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HR'S ROLE IN PEO & CLIENT BUSINESS AGILITY

BY ROB CANNON

Unprecedented times. Flatten the curve. Social distancing. We've heard (and used) the buzzwords ad nauseam, but the one that has been most overused and yet remains elusive is this notion of "the new normal."

The COVID pandemic has been challenging for everyone. Many companies with solid business continuity plans (BCP)s were able to adapt quickly and almost seamlessly to the changes that became necessary. While some that didn't have BCPs were still able to launch new and innovative ways to operate, others were forced into layoffs and had to take a crash-course in furloughs.

Human nature has some business leaders earnestly striving to settle into a new normal right now. We want that comfort zone, that feeling that we've got everything figured out and under control. Just beware: In the context of workplace operations, the idea of the new normal can be detrimental if taken to the extreme of complacency.

More change is coming, and the most successful leaders have known—well before 2020—what the rest of the business world is now being compelled to accept: Businesses must remain agile.

Strategic HR continues to be critical in leading change management with redesigning work and guiding the process to re-examine business operations. Every business has been disrupted by the pandemic in significant ways. This is a wakeup call and the perfect opportunity to identify processes, systems, and policies that are antiquated, unscalable, or otherwise in need of being overhauled.

HR leaders are needed to do more than simply communicate changes. Pushing out new processes or standard operating procedures (SOPs) that have been designed by the inner circle is not enough. HR leaders can be instrumental in harnessing the influence of early adopters, explaining and demonstrating the value and vision, and providing the tools needed for successful change. Continuing to reinforce change is also an important step—one often overlooked.

Clients are often attracted to PEOs because they have experienced HR business partners who will keep them apprised of coming changes, thus enabling them to focus on driving the results of their businesses. HR business partners provide services and expertise that help organizations remain agile and compliant. Consider the benefits described below for your PEO as well as your clients.

ASYNCHRONOUS WORK

Successful companies value a collaborative culture, and many have resisted remote work for fear of diminishing the effectiveness of collaboration. At the onset of the pandemic in 2020, many businesses found that the benefits of remote work outweighed the drawbacks. Furthermore, they learned that effective collaboration is still possible through creative and innovative means.

Finding ways to work together and without depending as much on real-time communication has enabled companies to work more effectively in a remote environment.

KEEPING EMPLOYEES ENGAGED IN A REMOTE WORKING ENVIRONMENT

Employers cannot allow "out of sight, out of mind" to become a reality if they are allowing employees to work remotely. One-on-one meetings and maintaining consistent communication are always critical components, but there needs to be added intentional effort with remote employees.

Current technology makes holding remote team meetings and virtual face-to-face meetings easier than ever. Remember the personal challenges that employees face in a remote environment. Some are balancing work with their child's at-home schooling, while others are struggling without as much in-person interaction. Acknowledge these challenges and help employees navigate toward solutions. Don't overlook recognition for exemplary work or going above and beyond.

HEALTH & WELLNESS INITIATIVES

Healthy employees are happy employees. Encouraging wellness will lead to higher productivity, reduced absenteeism, and lower health benefits costs. Don't forget about mental health. The U.S. Centers for Disease Control and Prevention (CDC) reported that in June 2020, 40 percent of U.S. adults reportedly struggled with mental health or substance abuse. HR business partners are integral in implementing and maintaining effective wellness programs that incorporate physical and mental wellness initiatives.

MAINTAINING A CULTURE THAT ENCOURAGES IDEAS

Employees who are down in the trenches taking care of the day-to-day functions of the business are an invaluable source of ideas for making processes better. Extracting these ideas needs to be about more than just adding a suggestion box. Do employees feel safe sharing their ideas or do they fear that because they are not in leadership their ideas won't be taken seriously? Ideas can be personal, and there is some vulnerability in sharing them.

As with all aspects of culture, creating and maintaining an environment that encourages the sharing of ideas starts at the top. HR business partners can help by advocating for top leaders to ask employees for input, celebrate successful ideas, and recognize those who contributed. Leadership must also help employees feel safe in unsuccessful attempts.

If there really is a new normal, it is getting on board with the rapidly changing environment that can—and will—flip priorities without warning. HR is ready with their tools and experience to provide the necessary guidance. PEOs do it for their clients, and they should do it for themselves as well. ■

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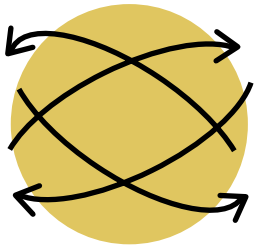

BUSINESS AGILITY

While businesses have always *wanted* to be agile, the COVID pandemic and accompanying business shutdowns taught us that businesses *need* to be agile. According to an article on the Betterteam website, agile organizations have these traits:

- They focus on serving customer needs instead of processes and profits, thereby creating value for customers and increasing profits;
- While they have an executive structure, the bulk of the companies are made up of networked teams;
- They have a shared purpose, strong community, and inspiring leadership;
- Their communication style is open, transparent, and fast;
- They make changes and improvements constantly and therefore learn and develop products and services quickly; and
- They integrate technology with their processes and operation seamlessly.

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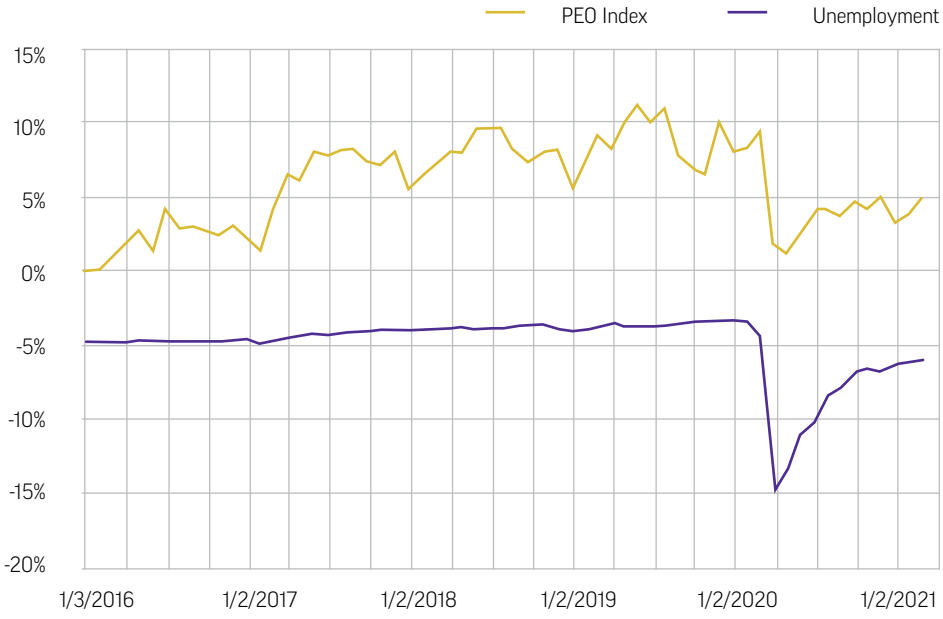
PANDEMIC ECONOMY ACCELERATED WORKPLACE TRENDS

BY JOHN J. SLAVIC

Arguably, the pandemic shutdown has had the most dramatic effect on the economy in modern times, especially small and mid-size businesses. The PEO Index quantitatively indicates what we already anecdotally observed: PEOs substantially helped SMBs navigate through the uncharted and treacherous waters of the shutdown. Not only did many SMBs survive this period, but some thrived in the unique economics of the last year. This unprecedented environment accelerated many office and work trends that were in an embryonic state before, such as remote work and tele-meetings, but are now firmly established in the emerging workplace.

FIGURE 1. THE PEO INDEX VERSUS UNEMPLOYMENT.



The PEO Employment Index is based on the census data of 9,000 PEO worksites, 160,000 worksite employees, and a cross-section of 125 PEOs. This data is collected weekly, compiled quarterly, and then weighted and processed to create the index. Wage, retention, and hiring and firing data are measured worksite-by-worksite, creating a gauge by which the strength of PEO client companies is measured.

The PEO Index suggests that PEO client companies held on to their employees and hence are positioned well for a potentially robust economy in the period ahead prompted by pent-up demand from consumers.

The question is, will the PEO model adapt accordingly? We must wait for the next edition of the PEO Index for the answer to that question.

Further, the PEO Index suggests that PEO client companies held on to their employees and hence are positioned well for a potentially robust economy in the period ahead prompted by pent-up demand from consumers. The gross domestic product (GDP) has recovered substantially given the monetary and fiscal stimulus applied to the economy. This stimulus, combined with pent-up demand, will likely propel the PEO Index and accordingly the PEO industry to much higher levels in the months to come. ■

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AD INDEX

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PEOS: THE FRONT LINES BEHIND THE FRONT LINES

BY PAT CLEARY

During the recent cyberattack that hit our industry in early March, I was watching carefully as our member PEOs somehow managed to work through this enormous wrench thrown into the works. How on Earth can PEOs operate without access to their data? But they did. Everyone pivoted. These were the cards they were dealt, and so they just had to figure out how to get paychecks and benefits to their clients. And they did.

And that got me thinking. To say that the last year was extraordinary is an understatement. All over the country—the world, really—people were thrown off kilter. Suddenly, everyone found themselves not working, or working remotely. Working from home brought its own challenges, especially to those with kids at home. Balancing work and family in real time—and on camera—is daunting. And yes, I know this impacted dads, but the truth is that it impacted working moms a lot more because, well, because it did. What I thought about is, with all that uncertainty swirling among clients, all the turmoil that the pandemic has brought them, PEOs were the rock, the anchor. Through it all, clients could rely on their PEOs: for their paychecks, their benefits, for answers to the stream of Talmudic questions that the Payroll Protection Program (PPP), the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and the rest of the alphabet soup of legislation brought. There was no pulling back or letting go.

Throughout the pandemic, so much has been written about front-line workers. Of course, we owe them all a debt of gratitude: health workers, public safety personnel, public-facing workers in grocery stores, and in food service. So many of them relied on another front-line worker: the PEO that was there for them, that supported them every step of the way, that answered every text, every panicked phone call: "Am I going to get paid?" "How do I file for my PPP loan?" Indeed, "How am I going to survive?"

> *Through cyberattacks, natural disasters, and now, a pandemic, the PEO is the North Star, the one constant, the unshakeable resource for all of these businesses.*

I just wanted you all to take a minute to reflect on this. Through cyberattacks, natural disasters, and now, a pandemic, the PEO is the North Star, the one constant, the unshakeable resource for all of these businesses—including the front-line workers. Behind all of those front-line workers is another front line: of PEOs.

I have to keep the caveat that this thing isn't over yet, but it feels like maybe we're turning the corner. It sure feels that way, and we are hopeful. When the history of the pandemic is written, the great untold story will be of how PEOs got the job done, like they always do. Calm, solid, reliable, immutable. Hats off to you all. ■

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Coming in 2021

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