



**stanton law**

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# Who is Responsible?

Legal Pitfalls When  
Working with PEOs and  
Payroll Processing  
Companies

# Mission of Pro Bono Partnership of Atlanta

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To provide free legal assistance to community-based nonprofits that serve low-income or disadvantaged individuals.

We match eligible organizations with volunteer lawyers from the leading corporations and law firms in Atlanta who can assist nonprofits with their business law matters.

# Client Criteria

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In order to be a client of Pro Bono Partnership of Atlanta, an organization must:

- Be a 501(c)(3) nonprofit.
- Be located in or serve the greater Atlanta area.
- Serve low-income or disadvantaged individuals.
- Be unable to afford legal services.

Visit our website at [www.pbpatl.org](http://www.pbpatl.org) to apply.

# PBPA Learning Center for Georgia Nonprofits

[www.pbpatl.org/resources](http://www.pbpatl.org/resources)

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# Legal Information

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This webinar presents general guidelines for Georgia nonprofit organizations and should not be construed as legal advice. Always consult an attorney to address your particular situation.

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# Agenda

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- PEO's, Payroll Processors, EORs
  - Who is the employer?
    - IRS and Taxes
  - Employment Liabilities
- Fair Labor Standards Act
  - Most Common Issues
  - Practical Suggestions

# PEOs, Payroll Processors, and EORs: The Basics

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- Payroll Processing Companies
  - Generally, just payroll
  - But some take on PEO functions
- PEOs: Professional Employer Organizations
  - Different models: outsourced HR vs. staffing
  - Payroll
  - Benefits
  - Human resources functions
  - Tax administration
  - Regulatory compliance assistance
  - “Co-employ” your employees by becoming the “employer of record for tax purposes.”

# Payroll Processing Companies





# EOR: Employer of Record

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- Acts as your employees' full legal employer.
- Under this arrangement, your employees technically sign their employment contracts with the EOR instead of your company.
- Handles much of your employer's administrative work, but it doesn't exert control over your day-to-day affairs.
- Yield all liability in employee affairs to the EOR.
- Popular for smaller companies with national or international labor

## PEO

- Replaces your HR department
- Typically requires you to have a minimum of 5-10 employees before it provides services
- Requires you to roll all employees under its services
- Requires you to register in each state where you have employees
- Unemployment and workers compensation claims will typically be processed under your company

**Takes on HR  
functions for  
client company**

## EOR

- Lets you outsource a portion of your HR functions
- Allows more flexibility, as you can outsource the employment of a portion of your workforce
- Allows for a fluctuating workforce
- Lets you employ workers in states where your company isn't registered because the EOR is the legal employer
- Covers all applicable insurance and coverage bases, including professional or general liability, workers compensation, and unemployment

[Source: Headway Workforce Solutions, Employer of Record \(EOR\) - Everything You Need to Know - Headway Workforce Solutions \(headwaywfs.com\)](https://headwaywfs.com)

# So, Who Is the Employer?

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- Why does it matter?
  - Employer is:
    - Responsible for compliance with laws and rules
    - Liable for actions of employees
- Example:
  - CEO: I hired the PEO and then “didn’t think anything else about it.”
  - Court:
    - Admission of negligence
    - CEO and company responsible for overtime
    - Award of double damages of half a million dollars.
    - Parks v. Central USA Wireless LLC, SD Ohio, Sept. 2019

# IRS and Taxes

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- PEO is employer for tax liability and compliance
- No such thing as co-employer
- If PEO handles all aspects of payroll, filing are under the PEO's EIN
- Voluntary Certification Program for Professional Employer Organizations
  - If you hire an IRS certified PEP, you are off the hook if the PEO fails to fulfill its obligations to remit or file taxes
  - Companies should consider using a vendor that is certified

# Discrimination and ERISA

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- Primary Factors:
  - Skills required
  - Source of instrumentalities and tools
  - Location of work
  - Duration of relationship
  - Whether they have the right to assign additional projects
  - Discretion of employee
  - Method of payment
- PEO is not generally deemed the employer unless it performs or has the authority to perform more than mere payroll processing and benefits administration function
- The nonprofit is on the hook for liabilities
- Both PEO and nonprofit can be liable (New Jersey case)
- PEO's EPLI insurance is usually not enough

# Common Law: Right to Control

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- Financial Control, Behavioral Control, Relationship of Parties
  1. Level of instruction
  2. Skills and training
  3. Business integration
  4. Personal accomplishment of tasks
  5. Control of assistants
  6. Continuous relationship
  7. Working hours
  8. Full day of work
  9. Company premises
  10. Employer demand of order by which task accomplished
  11. Work-related reports
  12. Payment method
  13. Travel expenses
  14. Provision of tools and materials
  15. Facilities
  16. Present amount
  17. Multiple bosses
  18. Availability to general public
  19. Worker discharge
  20. Right of termination by worker

# Fair Labor Standards Act: Economic Realities

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- Whether, as a matter of economic reality, the worker is reliant on the hiring party to earn a living (employee) or is self-reliant and independent (contractor).
- Factors:
  - The extent to which the services rendered are an integral part of the principal's business.
  - The permanency of the relationship.
  - The amount of the alleged contractor's investment in facilities and equipment.
  - The nature and degree of control by the principal.
  - The alleged contractor's opportunities for profit and loss.
  - The amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent contractor.
  - The degree of independent business organization and operation.
- Agreements make no difference, among other factors
- Outsourcing of staffing, employee management, and the administration of human resources to a third-party entity, such as a PEO, may no longer shield employers from liability exposure

# FLSA: A Cautionary Tail

CO.	FILE	DEPT.	CLOCK	VCHR. NO.	046
LV3	000342	000300		0000651284	2

Business Name Here  
Business Address Here  
APT # Street Name  
City State Zip-code

Taxable Marital Status: Single  
Exemptions/Allowances:  
Federal: Tax Exempt  
State:

## Earnings Statement



Period Beginning: 11/16/2019  
Period Ending: 11/30/2019  
Pay Date: 11/29/2019

Place Your Name Here  
Place Your Address Here  
City, State Zip-Code

Earnings	rate	salary/hours	this period	year to date
Regular	1420.84	86.67	1,420.84	28,933.42
Sick		8.00		
<b>Gross Pay</b>			<b>\$1,420.84</b>	28,933.42

Other Benefits and Information	this period	total to date
Sick	88.00	
Vacation	120.00	

Deductions	Statutory		
	Social Security Tax	-88.09	1,793.87
	Medicare Tax	-20.60	419.53
	State Income Tax	-99.76	1,869.10
	State SUI/SDI Tax		27.00
<b>Net Pay</b>		<b>\$1,212.39</b>	
Checking 1		-1,212.39	
<b>Net Check</b>		<b>\$0.00</b>	

### Important Notes

COMPANY PH :- 730-497-4267

BASIS OF PAY: SALARY



Company Code      Loc/Dept      Number      Page

[REDACTED]

## Earnings Statement



Period Starting: 08/26/2020  
 Period Ending: 09/08/2020  
 Pay Date: 09/30/2020

Taxable Filing Status: [REDACTED]  
 Exemptions/Allowances:

Federal: Std W/H Table  
 State: 0  
 Local: 0

Tax Override:

Federal: 0.00 Flat  
 State: 98.46 Flat  
 Local:

Social Security Number: XXX-XX-XXXX

[REDACTED]

Earnings	rate	hours/units	this period	year to date
Regular	22.2200	80.00	1777.60	28713.94
Overtime	33.3300	9.68	322.63	1342.19
<b>Gross Pay</b>			<b>\$2,100.23</b>	<b>\$32,256.02</b>

Other Benefits and Information	this period	year to date
Total Hours Worked	89.68	633.84

Statutory Deductions	this period	year to date
Federal Income	0.00	0.00
Social Security	-130.22	1863.49
Medicare	-30.45	435.81
Georgia State Income	-98.46	1271.76

Voluntary Deductions	this period	year to date
CREDITOR	0.00	222.16

Net Pay Adjustments	this period	year to date
*Misc reimbursement	300.00	300.00

**Net Pay**      **\$2,141.10**

### Important Notes

Basis of pay: Hourly

# State Laws

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- Contract provisions
- Written notice of the PEO to employees affected by the PEO relationship
- Financial capability by the PEO
- Whether the PEO is deemed an employer in specific instances
- Licensing and registration requirements.

## Georgia

- Defined as an employee leasing company that does all the following:
  - Establishes a co-employment relationship with another employer.
  - Pays the wages of the employees of the co-employer.
  - Reserves the right to direct and control the employees of the co-employer.
  - Assumes responsibility for the withholding and payment of payroll taxes of the co-employer.
- The PEO is the employer of the employees covered by the co-employment relationship

# What Should You Do?

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- Review the agreement carefully
- When in doubt, ask the PEO
- Check the PEO's EPLI policy
- Check indemnity provisions
- Hire CPEO certified PEO
- Ask whether the PEO is an individual from National Association of Professional Employer Organizations (NAPEO) and licensed by the Employee Services Assurance Corporation (ESAC)

# Questions?

# Pro Bono Partnership of Atlanta

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