

A man and a woman are standing in a field of green plants. The man is holding a laptop and pointing at the screen while talking to the woman. They are both wearing plaid shirts. The background is a lush green field.

2020 GEORGIA AGRICULTURAL LABOR RELATIONS FORUM

Webinar Event Nov 5-19, 2020

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2020 GEORGIA
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NOVEMBER 5-19

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Forecasting & Take-Aways on Political Climate and Litigation

Thursday
November 5, 2020



**Political Outlook: How the
Current Political Climate May
Impact Ag Labor and Workforce**
Bob Redding, The Redding Firm,
Washington, DC



**Joint Employment and FSLA Ag
Overtime Exemption**
Marty Heller, Fisher Phillips,
Atlanta, GA

**2020 GEORGIA
AGRICULTURAL
LABOR RELATIONS FORUM**
NOVEMBER 5-19

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Waiting to view Liz Davis's screen
Talking: Liz Davis

Webinar Housekeeping

Organizer: Liz Davis | Presenter: Liz Davis

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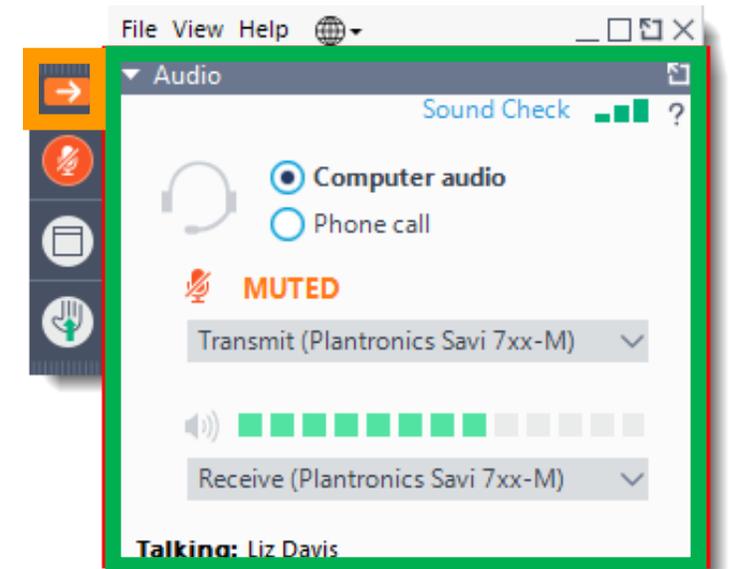
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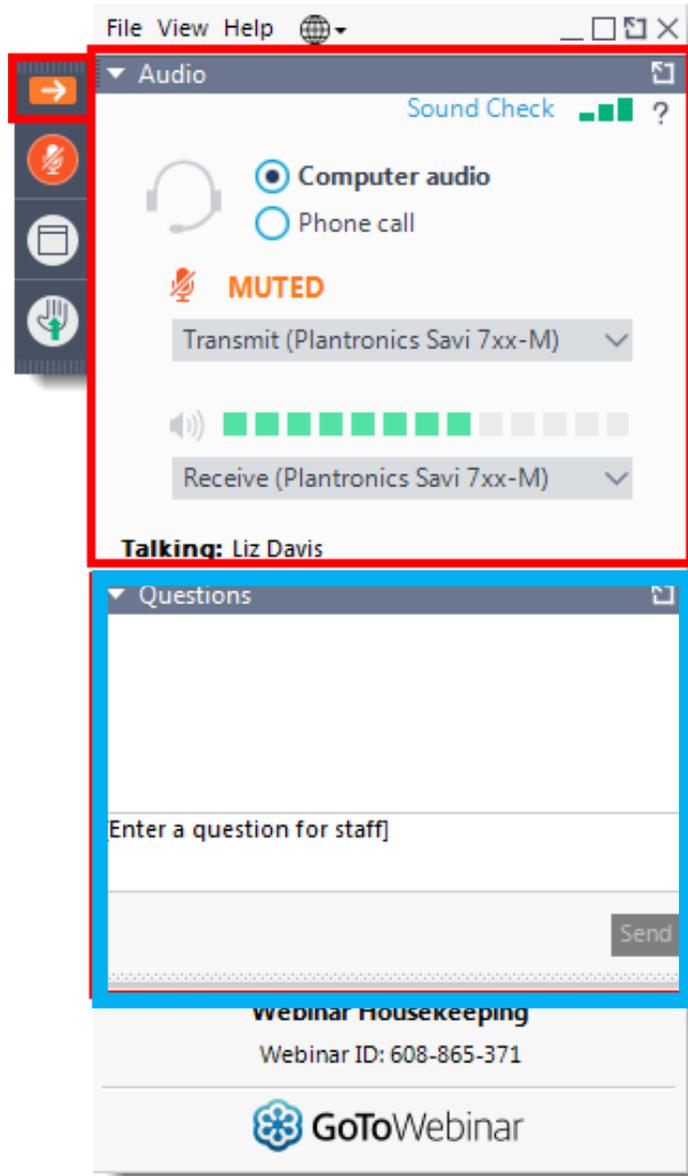
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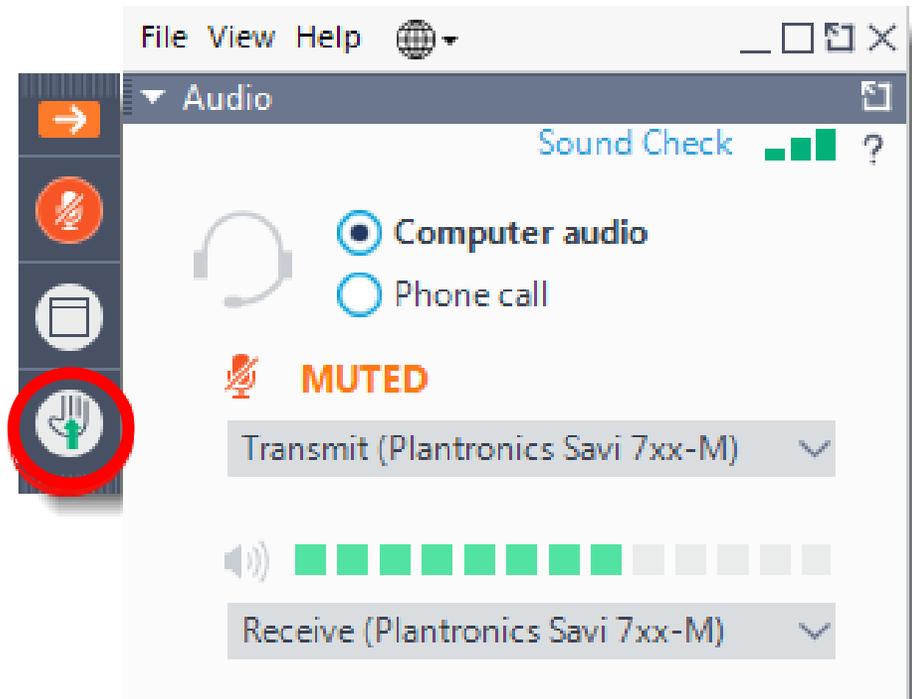
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Submit written questions and comments

anytime during the session via the Questions panel

* Click SEND to submit the question or comment

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Your Participation

- Please continue to **submit your text questions** and comments using the Questions panel
- **Raise your hand to be unmuted for verbal questions.** The moderator will prompt you to ask your question.

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Political Outlook: How the Current Political Climate May Impact Ag Labor and Workforce



Bob Redding

The Redding Firm, Washington, DC

A man wearing a cap and sunglasses is operating a red tractor in a field. The field is covered with rows of green crops, and a center pivot irrigation system is visible in the background, with multiple nozzles spraying water. The scene is set in a rural area with trees in the distance.

2020 Agricultural Labor Relations Forum

November 5, 2020

Today's Discussion

- What just happened? Is it over yet?
- Political Outlook: How the Current Political Climate May Impact Ag Labor and Workforce
- Future Ag Labor Legislation
- What's Next?

116th Congress Wrap-up

- 5th COVID Economic Stimulus Legislation
- Finalize Fiscal Year 2021 Appropriations Legislation
- USMCA Labor Concerns

U.S. Senate 117th Congress

- Election Recap
- What's the make-up of key Committees?

U.S. House of Representatives 117th Congress

- Election Recap
- What's the make-up of key Committees?

Administration

- Trump Administration
- or
- Biden Administration

What's Preventing Major AG Labor Reform?

- Too Many Organizations
- Regional Differences
- Partisan Division
- Controversial Legislation
 - Stand-alone Legislation
- Election Cycles

What's Next?

➤ Administration

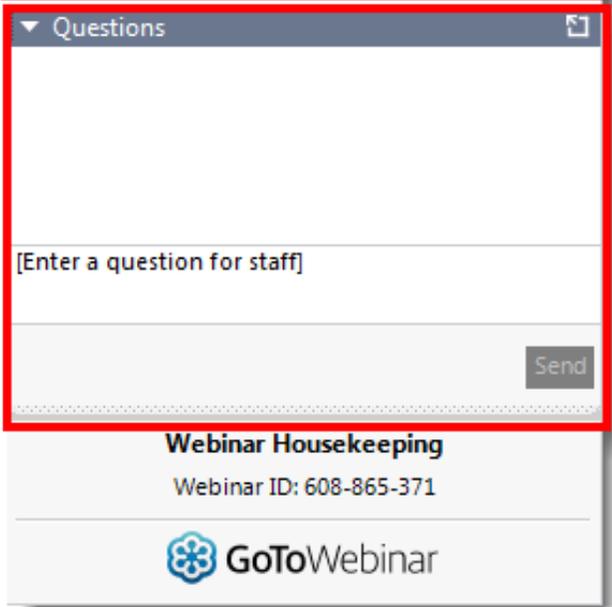
➤ U.S. Congress

THANK YOU!

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Questions

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 GoToWebinar

Joint Employment and FSLA Ag Overtime Exemption



Marty Heller
Fisher Phillips, Atlanta, GA

WAGE AND HOUR UPDATE

What You Need To Know About DOL's New Rules And Response to COVID

Presented by:

Marty Heller

Phone: (404) 240-4146

Email: mheller@fisherphillips.com

Why You Should Care About the FLSA

FLSA Claims – Up, Down, Indifferent?

- FLSA claims increased exponentially from 2000 until reaching a plateau in 2017
- Are things really better?
 - State law / hybrid filings
 - Suits brought under other federal laws –
Nature of Suit
 - DOL investigations and settlements
 - Private pre-suit settlements

Causes of Increase

- Availability of Information – Google FLSA violations
- Aggressive Marketing – For The People...
- Structure of Damages
- No Intent Required
- Collective Action Standards
- Aggressive Department of Labor
- Widespread violations – Complexity of Compliance

Betting the Company?

- 90% - employment class action lawsuits that involve wage and hour claims
- Unique national geographic scope
- Potential Individual Liability
- Damage award history with juries
- Cannot buy-off named Plaintiff

Why It Matters

You are a mid-sized employer with approximately 150 hourly, non-exempt employees earning \$10.00 per hour and regularly scheduled to work 40 hours per week.

What happens if you do not count certain time (travel, on-call, e-mails, training) as compensable work time?

Why It Matters

- Back Wages = \$1,950
 - 10 minutes per day x 5 days per week = 50 minutes per week
 - 50 minutes per week x \$15.00 per OT hour = \$12.50 OT per week
 - \$12.50 OT per week x 52 weeks = \$650 OT per year
 - \$650 OT per year x 3 years = \$1,950
- Liquidated Damages = \$1,950
- Class/Collective Action Claims = \$585,000
 - \$1,950 Back Wages + \$1,950 Liquidated Damages = \$3,900
 - \$3,900 x 150 non-exempt employees = \$585,000
- Attorneys' Fees and Costs = \$200,000

Fisher
Phillips



FUTURE OF THE DOL - OVERTIME RULE & BEYOND

FLSA Final Overtime Rule

- **Effective since 1/1/2020**
- **Increased minimum salary for “administrative, executive, and professional” exemptions to \$684 per week (\$35,568 annually)**
- **10% can be bonuses/commissions**
- **Increased minimum total compensation for “highly compensated” exemption to \$107,432 (must meet salary test)**

Joint Employment – Final Rule

When are entities considered “joint employers” of an employee?

If “joint employer” → liability under FLSA

Proposed Four-Factor Test – whether the potential joint employer “actually exercises the power” to:

- (1) Hire or fire the employee;
- (2) Supervise and control the employee’s work schedules or conditions of employment;
- (3) Determine the employee’s rate and method of payment; and
- (4) Maintain the employee’s employment records.

Joint Employment – Cont'd

Rule has a catch-all that could permit relying upon almost any factor – if actual control is exercised.

Proposed factors that will no longer be relevant:

- (1) Franchise Model**
- (2) Providing a sample handbook to a franchisee**
- (3) Allowing an employer to operate a facility on the company's grounds**
- (4) Participating with an employer in an apprenticeship program**
- (5) Offering an association health or retirement plan to an employer or participating in a plan with the employer**
- (6) Requiring a business partner to pay specific minimum wages and adopt policies addressing safety, harassment or other issues**

New York District Court Decision

- Found no rational basis for changing FLSA's approach to joint employment
- Left in place only horizontal joint employment rule – relatively unchanged by final rule
- Struck down vertical joint employment – found it to be too limiting
- What does this mean going forward?
 - Short answer – we don't know

Independent Contractor Analysis

- Late September – USDOL proposed new rule
- 30 day comment period expires this week
- Focus is on economic reality of workplace relationship
- Key –
 - Is worker in business for themselves, or are they economically dependent upon another hiring entity, which can make them an employee?

Proposed Factors for IC analysis

- Five Factors (first two are the “core factors”)
 - Extent of control exercised over key aspects of work
 - Opportunity for profit or loss
 - Amount of skill required for the work
 - Degree of permanence of the working relationship
 - Whether work is part of an integrated unit of production
- Proposed rule – if first two factors lean towards IC / EE status, the remaining factors may not be relevant

Where Are We Now - DOL's Current View

- Nature and Degree of Control
- Permanency of Relationship
- Investment in Business
- Skill, Initiative and Judgment
- Opportunity for Profit / Loss
- Integration of Services
 - Independent Organization and Operation



AGRICULTURE BASED EXEMPTIONS

Complete Exemption (Agriculture)



Farmer Relative

- Parent, spouse, child, or other immediate family members of Farmer-Employer



Partial Exemption (13)(b)(12) Primary Agriculture (OT ONLY)



Employee in “Primary” Agriculture

- Tilling Soil, Planting, Cultivating, Weeding, Irrigating, Fertilizing, Pruning, Spraying, etc.
- Fruits, Vegetables, Nursery Products
- Employer need not be Farmer



Partial Exemption (13)(b)(12) Secondary Agriculture (OT ONLY)



- Employees in non-agricultural jobs (driver, mechanic, clerk)
- Employed by farmer AND engaged only in that farmer's farming operations (even if off the farm)

OR

- Employed on a farm AND engaged only in that farm's farming operations (even if employer not a farmer)



Partial Exemption (13)(b)(16) Agriculture Transportation (OT ONLY)



TYPE 1

- Engaged in transportation or preparation for transportation
- Of fruits or vegetables (not nursery goods)
- To first place of processing or marketing in same state
- Zero Tolerance non-exempt work
- Employer need not be farmer



Partial Exemption (13)(b)(16) Agriculture Transportation (OT ONLY)



TYPE 2

- Engaged in transportation
- Between the farm and any other place within the same state
- Of persons employed in harvesting of fruits or vegetables
- Employer need not be farmer



What You Can Do Prevention & Compliance



Office Audits

- Spot check the records in the office
- Fix any problems carefully but quickly



What You Can Do Prevention & Compliance



- Review your policies
- Train your managers
- Audit time records
- Interview people in the field
- Fix any problem carefully, but quickly



Complete Exemption (Agriculture)

Local 13-week Season

- Commute Daily from Permanent Residence
- Hand Harvest
- Under 13 Weeks/Year
- Paid Piece Rates
- Operation Pays Piece in Region



Complete Exemption (Agriculture)

Livestock

- Principally Engaged
- Range Production



Complete Exemption (Agriculture)



Hand Harvesting Minors

- Not Local
- Under 17
- Same Piece Rates Paid Adults
- Same Farm as Parents
- Hand Harvesting





SURVIVING AN AUDIT

WHAT TRIGGERS an AUDIT?



Why **Me**?

- Employee complaints
- Programmed for industry and specific programs-H-2A
- Media reports
- Private litigation
- Referrals from other agencies, advocacy groups
- Random

Essential points:

- Plan in advance who will be present at the opening and closing conferences.
- Have an attorney contact you can reach in the event of a “surprise” on-site
- Record the identity and contact information for the DOL officials.
- Keep and organize records/copies of all documents requested by and provided to the DOL investigators. Mark confidential documents, “confidential.”
- Confirm your understanding in writing if the investigator does not provide you a written list of requested documents and timetable for presentation.
- Date EVERYTHING and establish to whom all documents were provided.

More essentials

- Whoever has first contact with the DOL – in the office or in the field must:
 - Inform the senior designated management official before any investigation is started;
 - Senior management:
 - Designate who will be DOL liaison
 - Contact attorney
 - Have a “records” contact available as needed
 - Shadow DOL to the extent permissible – keep detailed notes of where they go and what they ask
 - Cannot sit in on everything – be reasonable from the beginning.

Does DOL have authority to conduct an investigation?

- Yes, DOL has FLSA, MSPA, OSHA, H-2A and other investigation authority by statute.
- H-2A investigations require employers to allow investigators to enter and inspect land, housing, vehicles, housing and records pursuant to 29 CFR 501.6.
- Investigators will typically want to interview workers privately.
- You have a right to continue to operate your business and avoid shutdown of operations.
- DOL expects you to be able to provide basic records within 72 hours of a request.

Employee interviews

- Where should employee interviews be held: in the fields or in housing - in connection with meal breaks and/or at the beginning or end of the workday?
- Employer representatives may participate in and be present for management employee interviews

Documents DOL may want that you may not have to provide

- DOL will want to establish FLSA coverage and that the employer engages in interstate commerce.
 - Did the enterprise have an annual gross volume of sales made or business done of not under \$500,000.
- Rather than provide your farm's tax returns, you may offer to stipulate to coverage under MSPA and the FLSA.



Stipulations

- You should be able to stipulate to at least the dollar volume to establish coverage without disclosing your tax returns and that your employees are engaged in interstate commerce without having to disclose who the customers of your farm are.

Trends:

- Wage and Hour arrives on site with OSHA – reports of COVID outbreak...not providing much information.
 - Investigations not limited to COVID issues – key considerations:
 - Scope
 - Privacy of medical information
 - Basis of information sought
- We are seeing Wage-Hour investigators examine the basics of Family and Medical Leave Act (FMLA) coverage and compliance.

Beware cont'd

- If you or another employee is asked to sign a statement, be sure you get an ironclad commitment that you will be provided a copy of the statement *on the spot— not when the investigator is back at the office*. Even wait to sign the document until you are near a photocopier.
- The same may be true with respect to any other documents that you provide to DOL.

COVID-19 Litigation

- Now well over 500 Employment Lawsuits
- Many (but not all) FFCRA cases
 - Denial of paid leave
 - Experiencing symptoms (expanded CDC list) and seeking diagnosis
- Layoffs/RIFs and Recall lawsuits
 - Race, Sex, Age Discrimination claims
 - WARN Act claims (including state law mini-WARN)
- Wage/Hour claims
 - Off-the-clock work while on furlough status
 - Failure to accurately track time while WFH
 - Exemption/misclassification issues
 - Other wage/hour issues may be discovered by plaintiff's attorneys

COVID-19 Employment Litigation Tracker

COVID-19 EMPLOYMENT LITIGATION TRACKER

This COVID-19 Employment Litigation Tracker includes cases that were a direct result of the COVID-19 pandemic and are traditional employee vs. employer cases - both individual plaintiff and class actions. This should be considered a comprehensive, but not exhaustive, dataset.

Total Complaints 471	Most New Cases Last 7 Days New Jersey - 5 New Mexico - 2 Texas - 4	Most Common Case Type Remote Work/Leave Conflicts
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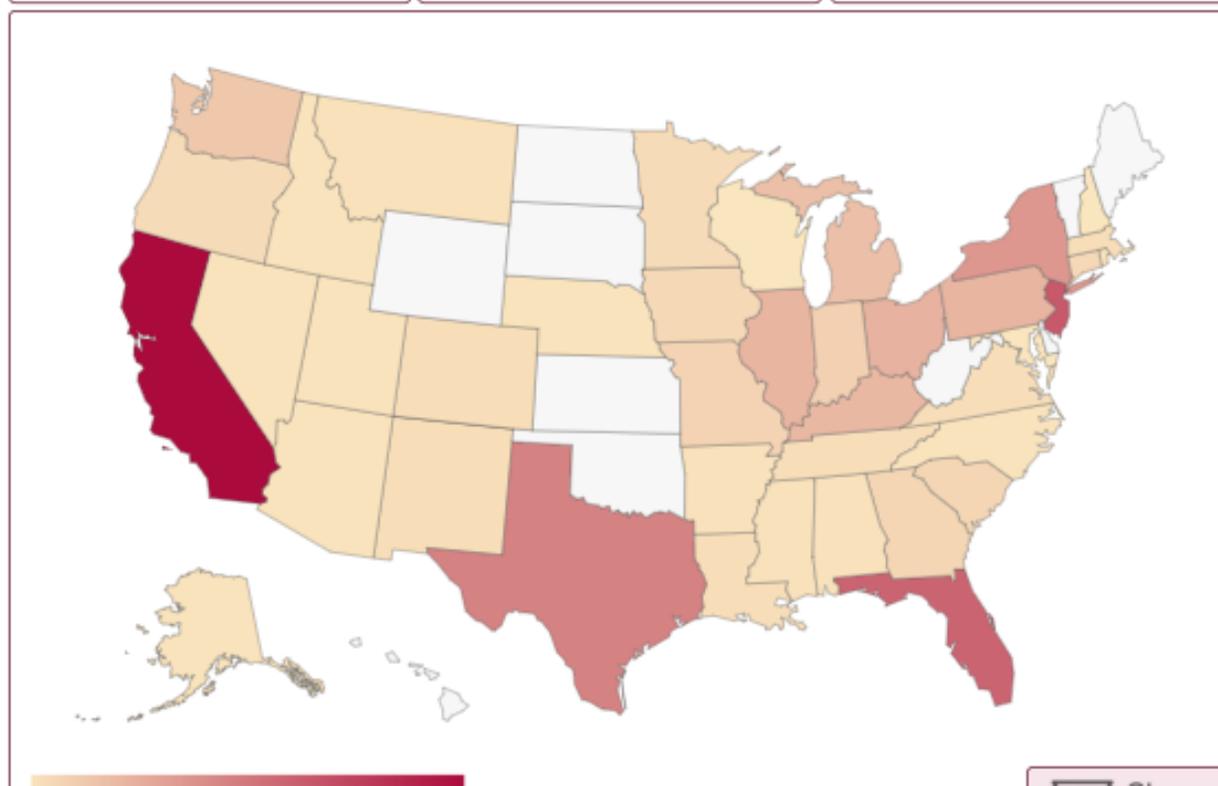


Last Updated on: August 12, 2020

Questions? We can help!



Contact Us



Select Filing Dates: 1/1/2020, 12/31/2021, All

Select Case Type: All

State Name	Complaints
Alabama	3
Alaska	2
Arizona	2
Arkansas	3
California	85
Colorado	4
Connecticut	6
D.C.	3
Florida	49
Georgia	7
Idaho	2
Illinois	20
Indiana	9
Iowa	6
Kentucky	18
Louisiana	4
Maryland	1

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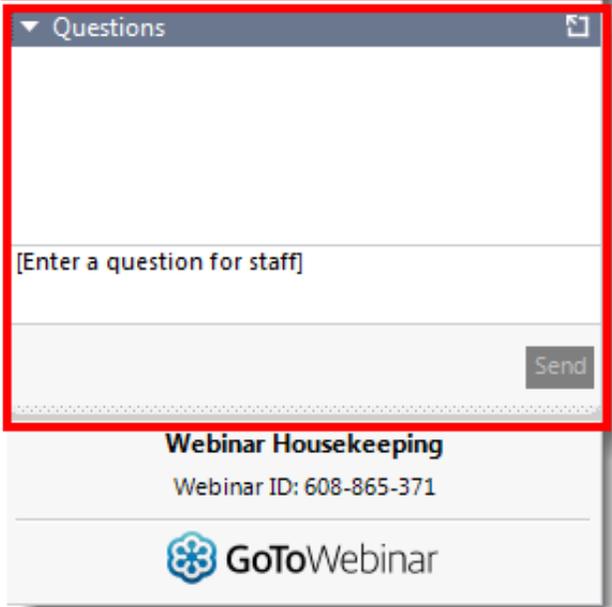
Thank You



Presented by:
Marty Heller
Phone: (404) 240-4146
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2020 GA Ag Labor Relations Forum

This five-part webinar series will be held 9:00 - 11:00 a.m. Eastern Time on each date. Each webinar will be presented live, recorded then available for on-demand access and viewing for all registered attendees.

THURSDAY, NOVEMBER 5

FORECASTING AND TAKE-AWAYS ON POLITICAL CLIMATE AND LITIGATION

- Political Outlook: How the Current Political Climate May Impact Ag Labor and Workforce
- Joint Employment and FSLA Ag Overtime Exemption

TUESDAY, NOVEMBER 10

AG LABOR AND COVID-19

- GA Dept of Public Health Guidance to Manage COVID-19 with Ag Employees
- Preserving Your Company's Brand: Your Business During a Pandemic

THURSDAY, NOVEMBER 12

H-2A AND US DOL

- Issues and Updates from the Office of Foreign Labor Certifications (OFLC)
- Wage and Hour Audit Overview – An Investigator's Perspective

TUESDAY, NOVEMBER 17

H-2A TOOLKIT AND ANSWERS

- How can the H2A Program Work for My Operation
- H2A Panel Discussion to Answer Your Questions

THURSDAY, NOVEMBER 19

MIGRANT SEASONAL PROTECTION ACT (MSPA) AND FARM LABOR CONTRACTORS

- Migrant Seasonal Protection Act (MSPA) is Alive and Well
- What Every Farmer Should Know about working with a Farm Labor Contractor (FLC)

Questions or Comments?

The Georgia Fruit and Vegetable Growers Association
(706) 845-8200



Political Outlook: How the Current Political Climate May Impact Ag Labor and Workforce

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