

2024

BUSINESS IN 2023

WEEKLY WEBINAR SERIES

2022

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Your Host



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TODAY'S AGENDA

2022 YEAR IN REVIEW – PART 1

Gabe Oberfield – (12:00PM-12:05PM)

- Public Health

David Ferrara – (12:05PM-12:15PM)

- NYS Employment Law

John Godsoe – (12:15PM-12:25PM)

- Employee Benefits

Seth Gilbertson – (12:25PM-12:35PM)

- Higher Education (Part 1 of 2)

Rick Weber – (12:35PM-12:45PM)

- Adult Survivors Act

G. Oberfield – (12:45PM)

- Wrap Up

Not Out of the Woods, But Trying to Get There

- **Masking**
 - Masking requirements generally eliminated, except in healthcare delivery settings
 - New York City's public masking *recommendation* remains in place
- **Staffing**
 - Staffing emergency in NYS remains in place (although limited depending on healthcare setting)
- **COVID Sick Leave**
 - Policies remain in place and unchanged
- **Quarantine / Isolation**
 - Relaxation and NYS alignment with relatively more flexible Federal policy – particularly in healthcare domain
- **Vaccination**
 - Bivalent booster available; uptake variable



The Public Health Burden Remains Notable

Sources: New York Post & New York Times



- Risks of 'triple-demic' remain
 - Health system contending with seasonal flu, RSV & COVID-19...and strikes
 - New Omicron sub-variant circulating – XBB.1.5 present in c.70 percent of northeast diagnoses
- NYS Statewide COVID-19 Deaths
 - 915 deaths in NYS in December — about 30 a day —
 - 664 deaths in November
- NYS Statewide COVID-19 Hospitalizations
 - November 1, 2022
 - 2,846 patients hospitalized with COVID and 307 in the ICU
 - December 30, 2022
 - 3,960 hospitalizations and 413 ICU patients
 - January 5, 2023
 - 4,157 hospitalizations

Recap of 2022 Significant NYS Legislative Developments



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Labor Law 740 Amendment: Expanded Whistleblower Protections

- OLD LAW – Limited Coverage
 - Must first notify employer of the alleged violation
 - Claims limited to activity that:
 - Violates the law **AND**
 - Poses a substantial and specific danger to public health or safety;
OR
 - Constitutes health care fraud
 - Prohibits “personnel actions” in retaliation for protected activity (but not threats)

Labor Law 740 Amendment: Expanded Whistleblower Protections

- NEW LAW:
 - Employee need only make a “good faith effort” to inform the employer;
 - No “good faith effort” to notify if:
 - Imminent danger to public health or safety
 - Thinks the employer may destroy evidence
 - Thinks physical harm will result
 - Or if the employer is already aware of the activity and will not correct it

Labor Law 740 Amendment: Expanded Whistleblower Protections

- Activity protected if employee “reasonably believes”
 - Employer activity violates **ANY** “law, rule or regulation” OR
 - Poses a substantial and specific danger to public health and safety
- Longer time to file complaint: 2 years (was 1 year)
- Right to a jury trial

Labor Law 215 Amendment: No-Fault Attendance Policy Legislation

- Governor signed in November 2022
 - Effective February 19, 2023
- Targets no-fault attendance policies
- Retaliatory to assess:
 - “Demerit, occurrence, any other point”; or deductions from PTO. . .
 - For absences protected by any paid/unpaid time off required by federal/state law
 - Filing complaints alleging any Labor Law violation
 - Testifying in any proceeding involving alleged violations of Labor Law
 - 2-year statute limitations

Amendments to NYLL § 206-c

- **Dec. 9, 2022** – Gov. Hochul signed Senate Bill S4844B into law
 - Amendments to NYLL 206-c – Rights of Nursing Mothers Employees
- Employers must provide reasonable unpaid break time or permit employee to use paid break time or meal time to allow employee to express breast milk for nursing child *each time such employee has reasonable need to express breastmilk* for up to 3 years following child birth
- **Effective:** 180 days → **June 7, 2023**

Amendments to NYLL § 206-c

- Employer must designate room or location to be made available to nursing employee(s) upon request by such employee
- Must be in close proximity to work area; well lit; shielded from view; and free from intrusion from other persons in the workplace or public
- Cannot be restroom or toilet stall
- At a minimum must provide:
 - Chair
 - Working surface
 - Nearby access to clean running water
 - Electrical outlet (if workplace is supplied with electricity)
 - Must allow access to refrigerator for storage of breastmilk if employer provides refrigerator in workplace

Amendments to NYLL § 206-c

- NYSDOL to develop and implement written policy – Not issued to date
- New Written Policy Requirements:
 - Inform employees of rights under NYLL 206-c
 - Specify means by which employee can request room or location to express breastmilk
 - Employer must respond to such request within reasonable timeframe but not to exceed 5 business days
- Policy must be provided to employees:
 - Upon hire
 - Annually
 - Upon returning to work following birth of child
- Anti-retaliation provision for exercising their rights under NYLL 206-c

Amendments to the NYS Human Rights Law

March 2022 amendments to the Human Rights Law.

- Confidential hotline for complaints of workplace sexual harassment
- The State of New York and all public employers are subject to the provisions of NYSHRL
- Prohibits release of personnel files as a retaliatory action against employees

Confidential Hotline Announced

- On July 19, 2022, the Governor's office announced the launch of a sexual harassment hotline for employees
- It will be operative from 9:00 a.m. to 5:00 p.m., and is run by the Division of Human Rights.
- It is staffed by pro bono attorneys who can provide advise on legal rights and individual facts and circumstances.
- Posting requirements – Division updating model posting
- We recommend including in policies and any required posting

Reproductive Health Rights Notice

- New York Labor Law Section 203-e
 - Prohibits employers from discriminating or taking retaliatory action against employees based on their reproductive health decisions, including using or accessing a particular drug, device or medical service.
- Notice Requirement
 - The law also required employers to post a notice of these employee rights and remedies in their employee handbooks
 - Notice provision enjoined by federal court (decision does not invalidate Section 203-e's protections)

Notice to Employees of Electronic Monitoring

- Effective May 7, 2022
- New York Civil Rights Law Section 52-c
- Requires employers engaged in electronic monitoring of employee communications to notify employees
 - Notice and acknowledgement for new hires
 - Post notice for all employees

NYC Wage Transparency Law

- Effective November 1, 2022
- Requires covered employers to include minimum and maximum salary for any advertisement of a job, promotion, or transfer
- Employer must make “good faith” determination of salary levels
- Employers must comply with the law even if they only have one employee currently working in NYC (including remote workers)
- The law does not cover postings for positions which cannot be performed, at least in part, within NYC (postings for remote or hybrid positions must be in compliance)

NYS Wage Transparency Law

- Enacted in 2022, but not effective until September 17, 2023
- Basic concept: Job ads must include minimum and maximum salary or hourly range of compensation and job description if one exists
- Further discussion in our 2023 Look Forward webinar program later this month

Digital Workplace Postings

- Effective December 16, 2022
- New York Labor Law 201 now requires employers to make mandatory workplace postings available to applicants and employees electronically, meaning digital versions of federal and state notices must also be available to employees through the employer's website or by email
- Question – Employees only?

Minimum Wage/Salary Threshold Increases

- Effective December 31, 2022
- Minimum wage in Upstate NY increased by one dollar, up to \$14.20 per hour
- NYS plans to increase the minimum wage rate each year up to \$15.00/hr.
- Minimum wage for employees in New York City, and Nassau, Suffolk, and Westchester counties, and for fast food employees remains at \$15.00/hr. (no change)
- Salary threshold for employees classified as exempt under NY executive and administrative exemptions has increased to \$1,064.25;
- \$1,125.00 per week for employers in New York City, Nassau, Suffolk, and Westchester counties (no change)

New York Paid Family Leave

- In 2023, eligible workers can take up to 12 weeks of leave at 67% of pay, up to **\$1,131.08** per week
- Removal of 60-day cap on intermittent leave
 - Effective January 1, 2022
- Expanded definition of “family member” to include “siblings”
 - Effective January 1, 2023

Employee Benefits: A Look Back at 2022



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2022: Big Picture

- Court Decisions
 - Two United States Supreme Court cases impacted benefit administration
- Legislation
 - Implementation of Consolidated Appropriations Act, 2021 (“CAA”)
 - SECURE Act 2.0
- Enforcement
 - COVID-19 Impact
 - Inflation Reduction Act
- Costs
 - Benefit costs influenced personnel decisions and plan design considerations

COVID-19: Impact on Plans In 2022

- In March 2020, COVID-19 national emergency was declared
- The national emergency is still ongoing
- During the national emergency, the required time periods for certain plan administration requirements and participant election deadlines are delayed
- Will be reviewed by President Biden in February of 2023

Health and Welfare Plans

- *Dobbs v. Jackson Women's Health Org.*
 - Overturned *Roe v. Wade*, declaring no federal right to abortion under the U.S. Constitution
 - Many employers considered offering some form of abortion-related services in states where abortion is restricted or prohibited
- Affordable Care Act
- Implementation of CAA
 - Transparency and Disclosure
 - Price comparison tool
 - Machine readable files
 - Broker and consultant compensation disclosure requirements

Retirement Plans

- *Hughes v. Northwestern University*
 - Reminder of the importance of a prudent process
- Updated RMD rules
- Cryptocurrency
- SECURE Act 2.0
 - Builds on SECURE Act (2019)
 - Encourages retirement savings
 - Broad scope

Looking Forward / Looking Back

The 22-23 Higher Education Landscape



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Race in admissions/programing

- SCOTUS last considered affirmative action in 2016
 - *Fisher v. University of Texas*
 - 4-3 decision
 - Only one member of majority remains on court
- Two cases currently before SCOTUS
 - Harvard & University of North Carolina
- Likely Outcome: Admissions policies cannot take race into account under Title IV and/or the U.S. Constitution
 - Downstream affects on hiring and corporate boards

New Title IX regulations (again)

- Second major overhaul of regulations in four years
 - Likely to go into effect this summer
- New regulations will have significant impacts on:
 - Expanded definition of sexual harassment
 - Broader definition of “report”
 - Many more employees will have obligations to act
 - Codifies protections for sexual orientation and gender identity
 - Revamped grievance procedures
 - More flexibility for institutions
 - Many obligations

Remote/hybrid models becoming a permanent fixture

- Students
 - Changes to the campus environment
 - Effects on recruitment and enrollment
 - Remote attendance/study as an accommodation
 - Redefining the nature of some academic programs
 - Licensure and accreditation considerations
- Employees
 - Multi-jurisdiction employment
 - Remote & hybrid work policies
 - Remote & hybrid work as an accommodation

Uncertainty in the student loan landscape

- 45 million Americans owe a collective 1.6 trillion
 - Roughly the GDP of Brazil or Australia
- Cost of college outpacing inflation
- Less government support
- New federal programs
 - Forgiveness
 - 20k per borrower
 - Pause on payments
 - Challenged in courts
 - Injunction in effect
 - Heading to SCOTUS
 - Revamped REPAYE

Speech issues, politics on campus, and social media

- Students generally less tolerant of opposing views, particularly anything they view as discriminatory
- Some politicians and political groups less tolerant of academic freedom and the teaching of lessons or viewpoints with which they disagree
- Social media and the “outrage economy” exacerbates divisions and turns campus debates into national news
- Colleges and universities caught in the middle

Defending Free Speech Policies; Complying with New Laws; Enforcing Nondiscrimination Policies; Managing Campus Protests; Preventing Online Harassment; Student Conduct; Employee Discipline

The Adult Survivors Act: Quick Review and UPDATE



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Adult Survivors Act

Key Points:

- The new law created a one-year “revival window” for claims of sexual abuse that would otherwise be barred by applicable statute(s) of limitations
- Effective date = **November 24, 2022** – November 23, 2023
- Similar to the Child Victims Act (which generated nearly 11,000 lawsuits throughout the state) . . .
- . . . But this law is *not* limited to youth-focused organizations
- The new law is *not a criminal* statute: It opens a window for civil lawsuits for monetary compensation related to sexual abuse offenses committed against individuals who were eighteen (18) or older at the time of the alleged assault

Adult Survivors Act

Key Points:

- The new law is *not* limited to the *intentional* acts of the *individual* abuser: the alleged victim may pursue claims against third-parties (such as employers, business owners and property owners) under theories such as negligent hiring, negligent supervision, negligent retention, negligent training, etc...)
- The new law allows recovery for “physical, psychological or other injury or condition” resulting from “conduct which would constitute a sexual offense . . . or incest”
- The new law incorporates criminal law terms (from Penal Law 130) concerning specific conduct that falls within the scope of the “revival” statute: rape, criminal sexual act, forcible touching, etc...

Adult Survivors Act

Key Points:

- **What is “Forcible Touching”?:**
 - A person is guilty of Forcible Touching when he or she intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person or for the purpose of gratifying the actor’s sexual desire.
 - Includes conduct such as grabbing, pinching, rubbing, squeezing, etc.
- Claims of “Facilitating a Sex Offense with a Controlled Substance” – i.e. “Date Rape Drug Claims” – are also revived

Adult Survivors Act

Key Points:

- NO limit on the “age” of claims that may arise as a result of the new law.
- For a potential defendant, early identification of potential insurance coverage (i.e. old policies) and internal documentation (termination papers, investigative reports, etc.) are key
- Potential defenses to claims include lack of notice and “consensual” conduct

Adult Survivors Act

Claims filed to date include:

- New claims against individuals such as Donald Trump, Bill Cosby, Ed Henry (former Fox News host), Robert Hadden (former prominent physician at Columbia University and NY Presbyterian) and government officials (such as former chief of staff of New York Attorney General's office)
- Lawsuits against Estates (the *Estate* of Jeffrey Epstein)
- Lawsuits against New York agencies – Office of Attorney General (related to actions of former Chief of Staff) and New York State prison system (Bedford Hills)

Your Questions



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Public Health Year in Review

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The Adult Survivors Act: Quick Review and UPDATE

Rick Weber, rweber@bsk.com

New York Employment Law: The Essential Guide

NYS Bar Association Members can buy the book from the bar [here](#).

Non-NYS Bar Association Members can purchase through Amazon [here](#).

Thank You

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It is not to be considered as legal advice.
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