

# CORONAVIRUS

WEEKLY WEBINAR SERIES



February 2, 2021



1

## Introduction



### **Peter A. Jones**

Deputy Chair, Labor & Employment  
pjones@bsk.com  
Syracuse, NY



2

## Leases and Contracts – COVID Related Issues



### **Charles J. Sullivan**

Member  
csullivan@bsk.com  
Syracuse, NY



3

## Litigation Update – New NYS State Court Rules



### **Mara D. Afzali**

Associate  
mafzali@bsk.com  
Albany, NY



4

## Amendments to Supreme and County Court Uniform Rules

- Administrative Order 270/2020
  - Dated Dec. 29, 2020
  - Goes into effect Feb. 1, 2021 (yesterday!)
- Adopts 29 Commercial Division Rules
  - Federal v. State Court
- Impact of COVID-19
- Significant Rules
- Interaction with Other Rules
- Best Practices



5

## New OSHA Guidance



### **Patrick V. Melfi**

Member  
pmelfi@bsk.com  
Syracuse, NY



6

## Update from Albany



### Caitlin A. Anderson

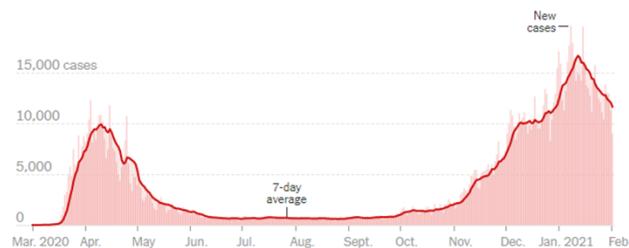
Associate  
canderson@bsk.com  
Albany, NY



7

## New York Coronavirus Map and Case Count

Updated February 2, 2021, 7:54 A.M. E.T.



The New York Times

	TOTAL REPORTED	ON FEB. 1	14-DAY CHANGE
<b>Cases</b>	1.4 million+	8,932	-24% ↘
<b>Deaths</b>	43,354	176	-6% →
<b>Hospitalized</b>		8,003	-5% →

Hospitalization data from the Covid Tracking Project; 14-day change trends use 7-day averages.



8

## Vaccine Update

- MORE GOOD NEWS! Long term efficacy of **all** vaccines ~100%
- Johnson & Johnson – “complete protection against COVID-related hospitalization and death, 28 days post vaccination”
- Novavax – very promising data, looks like its long-term efficacy is very high.
  
- Worldwide: > 101 million doses administered
- US: 32.8 million
- NY: 1.9 million



9

## Testing Update

- DOD and HHS have awarded \$231 million contract to Ellume, who produces an at-home COVID-19 test.
  - Will construct US manufacturing plant to produce >500K tests/day.
  - Test uses short nasal swab; sends results to smart phone in 15 minutes.



10

## Microclusters

- All but five remain (Bronx – East and West, Manhattan, Queens, Newburg).
- Remember – if you have left a cluster, the regular COVID rules apply.
  - Gatherings – 50 people maximum, indoor and outdoor dining no longer have 4 people/table maximum (except in NYC)



11

## Other Updates

- NYC: indoor dining may resume on Feb. 14 at 25% capacity.
- Statewide: wedding receptions with up to 150 people or 50% of the reception's venue capacity (whichever is smaller) will be allowed beginning March 15. All guests must be tested for COVID-19 beforehand.



12

## S.1197/A.2001-A Signed by the Governor

- Legislation prohibits, for one year, increases to an employer's experience rated tax rate for unemployment insurance because of workforce reductions due to COVID-19
  - Translation: State cannot change an employer's "experience rating" because of COVID-19 impacts. Changes usually happen when there are mass layoffs.
  - Purpose: prevent severe spike in unemployment insurance premiums this year because of layoffs due to COVID-19.



13

## Unemployment Update



### **Paul J. Buehler, III**

Associate  
pbuehler@bsk.com  
Albany, NY



14

## Discipline Considerations for Off Duty Conduct



### Jane M. Sovern

Member  
jsovern@bsk.com  
New York, NY



15

## Controversial off-duty conduct

Employer learns of employee off-duty conduct via:

- Social media postings
- News reports
- Complaints/petitions
- Law enforcement or employee directly

**How to respond?**

16



16

## No One-Size-Fits-All Approach

Situations will be fact specific, depending on:

- Employee's off-duty conduct and job duties and
- Mission, culture and policies of your organization.

Individualized determination is critical.

This is a brief overview of how to approach and relevant issues to look for and consider.

17



17

## Threshold Questions

- Public or private employer?
- Unionized or non-unionized workforce?
- Mission and culture of your organization
- Relevant policies and contracts, such as:
  - Collective bargaining agreement
  - Disciplinary policies
  - Computer use policies
  - Social media policies
  - Non-discrimination policies
  - Remote work policies

18



18

## Investigation

1. Careful, prompt and fair investigation (investigator with no axe to grind)
2. Employee's role
  - Job duties, including supervision of others
  - Public-facing responsibilities
3. Was conduct actually off-duty?
  - Were employer resources used? (devices, servers, work time)
  - Consider remote work, employee schedule
4. Evidence of employee's actions
  - Social media posts/news reports
  - Information from employee or law enforcement
  - Employer records

19



19

## Investigation and Determination

5. Was activity protected by law?
  - NY Off-Duty Conduct Law
  - NLRA concerted activity
  - Speech pursuant to 1<sup>st</sup> Amendment (public employer) or policies
6. Do any exceptions to these protections apply?
7. **Key question: Is the conduct reasonably related to the employee's duties and/or the business?**
8. Is proposed discipline proportionate? Could it be discriminatory?

20



20

## Related Laws: NY Labor Law 201-d/Off-Duty Conduct

- Employer cannot discharge or discriminate against employee due to specific off-duty activity:
    - Political activities (narrowly defined)
    - Legal use of consumable products
    - Legal recreational activities
- Applies to all employers: public or private, unionized or non-unionized.

21



21

## Related Laws: Exceptions to NY Labor Law 201-d

- Activity “creates a material conflict of interest related to the employer’s trade secrets, proprietary information or other proprietary or business interest;”
- Public employee restrictions on outside activity;
- Activity prohibited by CBA;
- Employer believes its disciplinary action is required by statute;
- Employer’s action is pursuant to established substance abuse/alcohol program or policy;
- Employer deems employee’s actions “illegal or to constitute habitually poor performance, incompetency or misconduct;”
- Professional services contract for unique services that includes limitation on off-duty conduct.

22



22

## Related Laws: NLRA Rights

NLRA protects employee's right to exercise "protected concerted activity":

- bringing group complaints to employer's attention,
- trying to induce group action, or
- seeking to prepare for group action (Sec. 7)

Applies to all employers and employment agencies, regardless of size.

23



23

## Related Laws: NLRA rights

- NLRA prohibits employers from taking employment action that would reasonably have chilling effect on employees' exercise of Sec. 7 rights (Sec. 8(a)(1))
- Applies to both unionized and non-unionized employees
- Expect further strengthening of prohibition under Biden administration

### ***Federal Labor Agency Says Google Wrongly Fired 2 Employees***

*December 2, 2020*

The workers were involved in labor organizing at the company and participated in walkouts last year.

### **NLRB Further Clarifies Impact of Social Media Policies on NLRA Rights in Bemis Co., Inc. Decision**

*August 7, 2020*

24



24

## Related Laws: NYS/NYC Laws on Conviction/Arrest Records

- NYS Human Rights Law and NYS Correction Law prohibit disciplining employee for prior criminal acts or convictions.
- NYC Human Rights Law (“Fair Chance Act”) prohibits employment actions against employees based on prior criminal acts or convictions.
- These currently do not protect individuals with **pending** arrests or criminal accusations (NYC law amended to cover pending matters, effective July 29, 2021).

25



25

## Analysis and Next Steps

- **Key question: what is the nexus between conduct and employee’s job and the employer’s business?**
- If discipline is appropriate, what is proportionate, and could it be discriminatory – compare to others similarly situated; does punishment fit the conduct?
- Non-disciplinary steps (instead of or in addition)
  - For offensive or hurtful conduct or speech - take steps to reinforce your values:
  - OK to express disagreement with employee’s offensive actions and words.

26



26

## After Determination, Additional Steps

In addition to addressing the specific employee, consider responding to your workforce and others:

- Acknowledge and respond to employees and others who bring petitions, complaints. Consider meeting with stakeholders to listen and respond to concerns, if appropriate.
- Express your organization's values.
- Don't let individuals or groups "weaponize" the employer's complaint process to fight political or other battles.

27



27

## What Can You Do Now, Before an Incident?

Establish and maintain good HR practices:

- Ensure job descriptions are accurate and complete.
- Periodically review and modify policies and handbooks to ensure they are clear, current, and effective (including policies on computer use, social media, remote working, etc.).
- Regularly remind and train employees and managers about key policies and why policies and standards of behavior are important to the employer.

28



28

## Questions?

- These issues can be complex, and are always highly fact-specific. We encourage you to consult counsel when you are considering discipline for off-duty conduct.

29



29

### Leases and Contracts – COVID Related Issues

Charlie Sullivan, [csullivan@bsk.com](mailto:csullivan@bsk.com)

### Litigation Update – New NYS State Court Rules

Mara Afzali, [mafzali@bsk.com](mailto:mafzali@bsk.com)

### New OSHA Guidance

Pat Melfi, [pmelfi@bsk.com](mailto:pmelfi@bsk.com)

### Update from Albany

Caiti Anderson, [canderson@bsk.com](mailto:canderson@bsk.com)

### Unemployment Update

Paul Buehler, [pbuehler@bsk.com](mailto:pbuehler@bsk.com)

### Discipline Considerations for Off Duty Conduct

Jane Sovern, [jsovern@bsk.com](mailto:jsovern@bsk.com)



30

The information in this presentation is intended as general background. It is not to be considered as legal advice. Laws change often and information becomes rapidly outdated.

All rights reserved. This presentation may not be reprinted or duplicated in any form, without the written authorization of Bond, Schoeneck & King PLLC.

