

2023

BUSINESS IN 2022

WEEKLY WEBINAR SERIES

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Introduction

COVID Update & Key Developments



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COVID Infection Trends

New Cases Confirmed Each Day in US (Johns Hopkins University of Medicine CRC)



State Overview

Filter by region

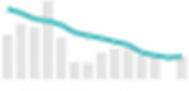
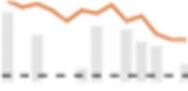
Northeast, PR and USVI ▾

How to read this graphic

Map view

Table view

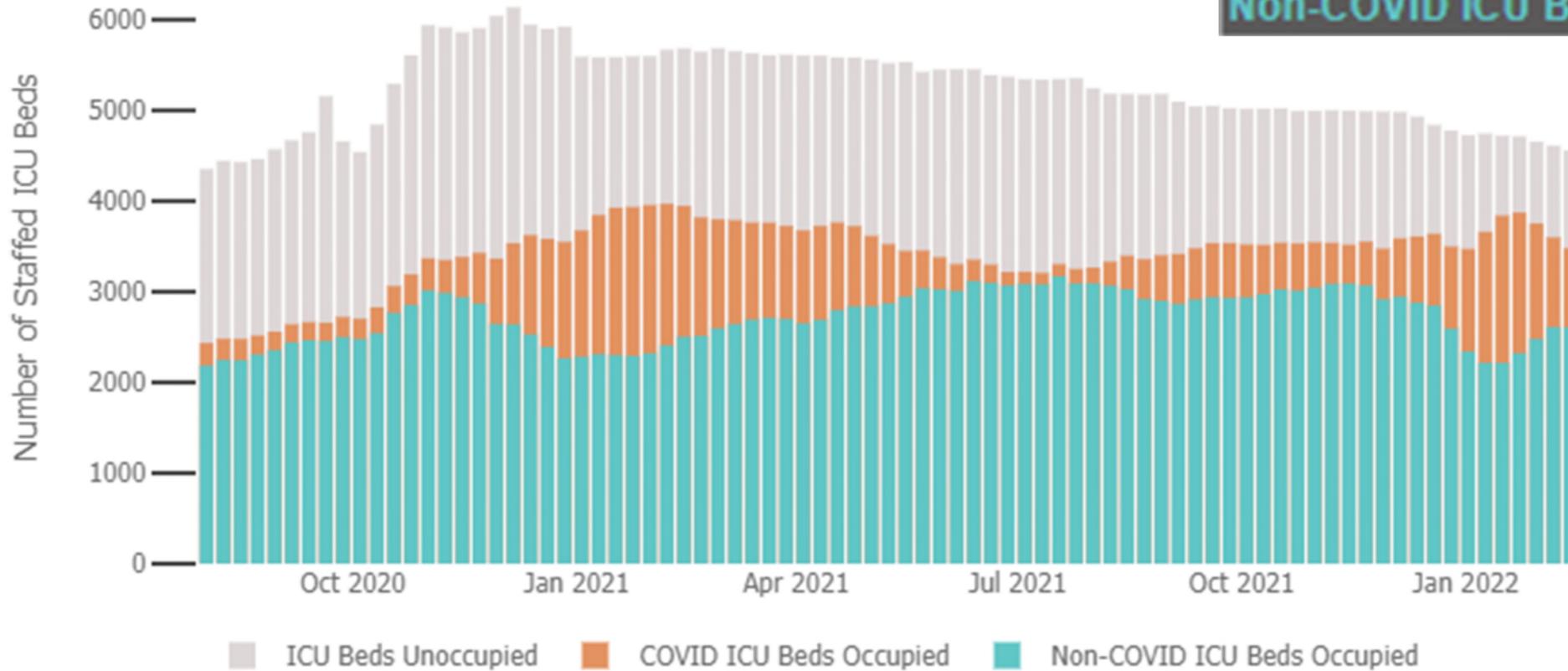
Positivity comparison

State ↑	New Cases ⓘ ↑		Tests per 100k people ↑		Percent Positive ⓘ ↑	
	New daily cases	Weekly trend	Daily Tests	Weekly trend	Daily % positive	Calc. method
New Jersey ▾	 -2,963 new	THIS WEEK LAST WEEK  	 84.8 tests per 100k	THIS WEEK LAST WEEK  	 32.1% positive	
New York ▾	 -3,795 new	THIS WEEK LAST WEEK  	 810.7 tests per 100k	THIS WEEK LAST WEEK  	 4.5% positive	
Puerto Rico ▾	 -262 new	THIS WEEK LAST WEEK  	 145.6 tests per 100k	THIS WEEK LAST WEEK  	 15.7% positive	

Data Sources: Case data from JHU CSSE. As of March 3, 2021, testing data is drawn from JHU CCI. Prior to that, the data source was the The COVID Tracking Project.

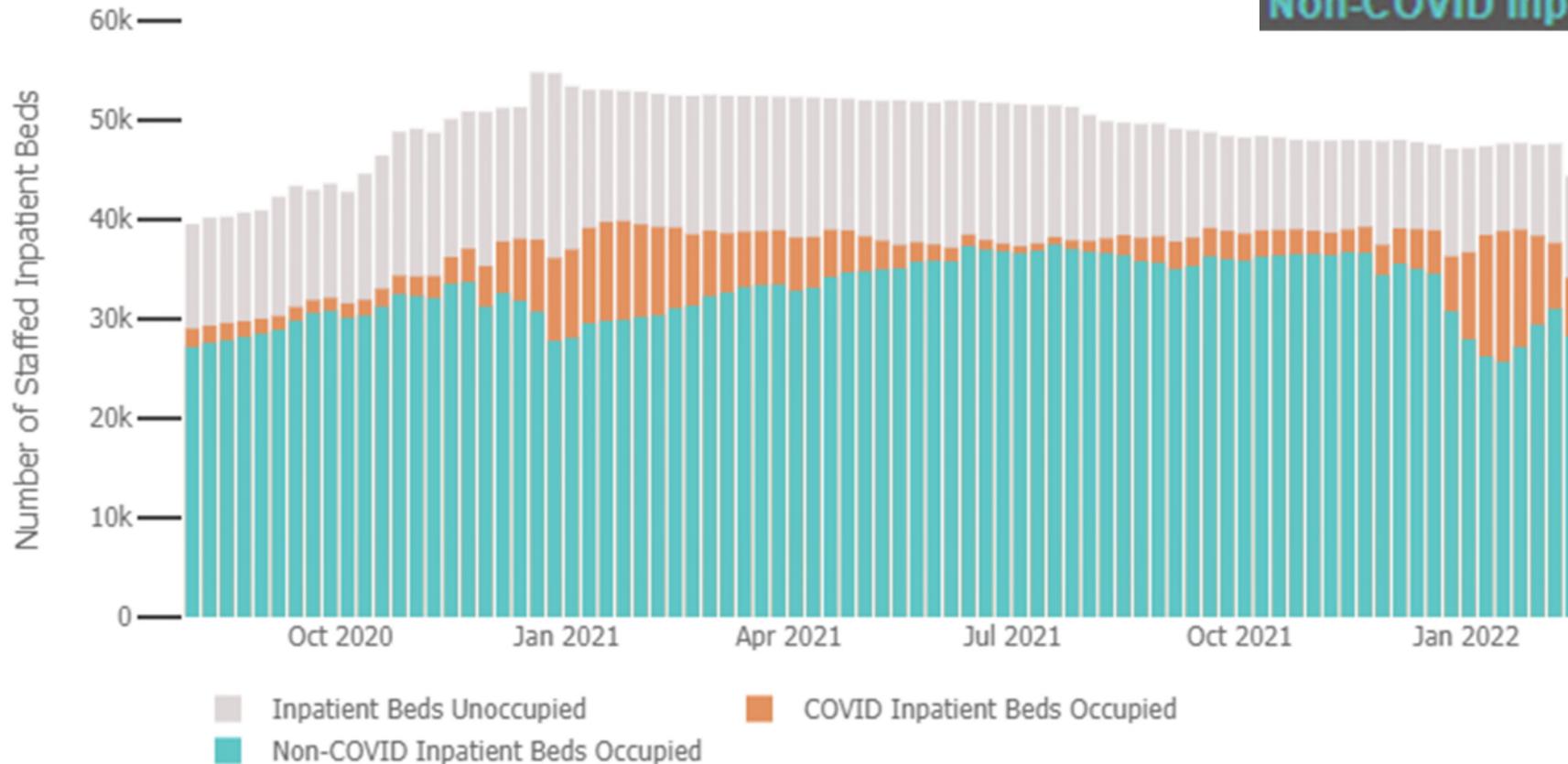
New York ICU Occupancy (Johns Hopkins University of Medicine CRC)

Week: Feb 7, 2022 - Feb 13, 2022
ICU Beds Occupied: 76%
Total ICU Beds: 4,556
ICU Beds Unoccupied: 1,077
COVID ICU Beds Occupied: 874
Non-COVID ICU Beds Occupied: 2,605



New York In-Patient Occupancy (Johns Hopkins University of Medicine CRC)

Week: Feb 7, 2022 - Feb 13, 2022
Inpatient Beds Occupied: 77%
Total Inpatient Beds: 44,368
Inpatient Beds Unoccupied: 10,220
COVID Inpatient Beds Occupied: 5,881
Non-COVID Inpatient Beds Occupied: 28,267



COVID Developments

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Index No. 616124/2021
DECISION AND ORDER

-----X

MICHAEL DEMETRIOU as p/n/g of C.D. and on behalf of himself and all other persons similarly situated; ADRIANNA ALBRITTON as p/n/g/ of C.M., BRENDAN CURLEY as p/n/g/ of M.C ., KAREN FERRARO as p/n/g/ of H.L., CATHERINE GRIMES as p/n/g/ of C. G., CHRISTINE BOCHAT-SMITH as p/n/g/ of G. S., CHRISTINE ENGLISH as p/n/g/ of R.E., DANIELE SHIPANO as p/n/g/ of J. S., ELIZABETH CUTLER as p/n/g/ of C.S.C., JENNIFER SAIA as p/n/g/ of V.S., KRISTEN DOUKAS as p/n/g/ of D.D., MARIA VASSEL as p/n/g/ of N.P., MYSTIE MCNEILL as p/n/g/ of A.B., KATHY TELEC as p/n/g/ of L.T., all on behalf of persons similarly situated.

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF HEALTH, PUBLIC HEALTH AND HEALTH PLANNING COUNCIL, MARY T. BASSETT in her official capacity as the Commissioner of Health for the State of New York, KATHLEEN C. HOCHUL, in her official capacity as the Governor of the State of New York,

Respondents

-----X



NY AG James ✓
@NewYorkStateAG



We're appealing last night's decision that struck down the mask mandate in New York.

We will continue to do everything in our power to protect New Yorkers from [#COVID19](#).

8:56 AM · Jan 25, 2022



♥ 2.1K



See the latest COVID-19 information on Twitter

STATE

Hochul expected to end masks for businesses, maybe not for schools

Universal masking in New York's schools would continue as neighboring states have ended those mandates

Joshua Solomon, Brendan J. Lyons

Feb. 7, 2022 | Updated: Feb. 7, 2022 7:41 p.m.



From “Paid Leave for COVID-19” Main Page:

COVID-19 SICK LEAVE

Some employers in New York State are required to provide at least 5 or 14 days of job protected, paid COVID-19 sick leave to employees who need to take leave because they are under a mandatory or precautionary order of quarantine or isolation due to COVID-19. The amount of COVID-19 sick leave an employer is required to provide depends on the number of employees they have and the employer’s net annual income.

If your employer does not provide the required COVID-19 sick leave, you may [file a complaint](#) with the NYS Department of Labor.

[View new guidance on the use of New York State Paid Sick Leave for COVID-19 vaccine recovery \(5/28/21\).](#)

From FAQs:

Is there a limit to the number of times that an employee is eligible for COVID-19 sick leave?

In no event shall an employee qualify for sick leave under New York’s COVID-19 sick leave law for more than three orders of quarantine or isolation. The second and third orders must be based on a positive COVID-19 test and the employee must submit documentation from a licensed medical provider or testing facility attesting that the employee has tested positive for COVID-19. The employee does not need to submit documentation of a positive result if the employee’s employer gave the employee the test for COVID-19 that showed the positive result.

2022 Budget Bill Update for Employers



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FY 2023 – NYS Executive Budget (Proposed)

- January 18, 2022 – Gov. Hochul announced \$216.3 billion budget proposal
 - Education, Labor and Family Assistance Article VII Legislation

Ban on Non-Compete & No-Poach Agreements

- Proposes new Section 202-m of NY Labor Law
 - Prohibit non-compete agreements for any employee or prospective employee earning less than the median wage in NYS (“covered employees” and “prospective covered employees”)
 - Prohibit employers from seeking, requiring, demanding, or accepting a non-compete agreement from any employee earning about the median wage unless the agreement meets certain requirements limiting application
- Would apply to any private employer
 - Explicitly excludes “governmental agencies”
- Effective: 180 days after enactment

Prohibition and Limitation on Non-Compete Agreements

- Proposed New NYLL § 202-m
- “Non-compete agreement” defined as an agreement or contract that prohibits, discourages, or otherwise restricts an employee from obtaining employment in any specified geographic area for a specific period of time or with any particular employer or in any particular industry

What is prohibited?

1. Total prohibition on non-competes with employees or prospective employees who earn less than NY median wage

What is prohibited?

2. Limitation on “permissible” non-compete agreements
 - Employees other than “covered employees”
 - Employers cannot seek, require, demand or accept a non-compete agreement from any employee unless the agreement meets the following requirements...

Limitations for “Permissible” Non-Competes

- Be strictly limited to be no more expansive than as required for the protection of the legitimate interest of the employer;
- Not impose undue hardship on the employee;
- Not be injurious to the public;
- Be disclosed in a written offer of employment or in a written offer of a promotion at least 10 days before the effective date of such employment or promotion;
- Be written in the primary language identified by the employee;
- Be written at a reading comprehension level not exceeding that of the employee;
- Not contain a term of more than 1 year after employment has ended;
- Not require that an employee adjudicate, including, litigation or arbitration, outside of the state of NY a claim arising in the state of NY;
- Be maintained by the employer for a period of not less than 6 years from the end of the agreement;
- Be voidable at the option of the employee if the employer cannot demonstrate continued willingness to employ the employee;
- Not deprive an employee of the substantive protection of NY law with respect to a controversy arising in the state of NY.

Exceptions

- This would not apply to:
 - Enforcement of covenant not to disclose trade secrets;
 - Employees under NYLL Section 202-k (broadcast employees)
 - Agreements between bona fide owners or partners of a business.

Other Notable Provisions

- Copy of the contract/agreement must be open and inspection and copies must be provided “promptly” to the Commissioner of Labor upon request
- Violations: Damages, attorneys’ fees and costs and other penalties arising under NYLL §§ 218 and 219
- Choice of Law: Specifics about NY law governing disputes

Prohibition Against No-Poach Agreements

- Proposed Amendment to Gen. Bus. Law § 340
- Prohibit any employer from entering into a restrictive employment agreement that prohibits or restricts an employer's ability to solicit or hire another employer's current or former employees
 - Make it unlawful for any entity to enter into such a restrictive employment agreement
 - Make it unlawful to enforce or threaten to enforce such a restrictive employment agreement
- Effective: 180 days after enactment

Increased Criminal Penalties for Wage Theft

- Proposes to amend Section 198-a and Section 213 of NY Labor Law
 - Increase penalties for employers who knowingly engage in wage theft
 - Correspond with specified amounts of wage theft per employee
- Effective: Immediately (upon enactment)

Current NYLL § 198-a

- First offense:
 - Misdemeanor
 - \$500 - \$20,000 fine or up to 1 year imprisonment
- Second/Subsequent offense within 6 years
 - Felony
 - \$500 - \$20,000 fine or up to 1 year and 1 day imprisonment or both for each offense

Proposed Amendment to NYLL § 198-a

- Increased criminal penalties:
 - Class A misdemeanor for failure to pay single employee less than \$1,000 or less than \$25,000 for more than one employee
 - Class E felony for failure to pay a single employee greater than \$1,000 or greater than \$25,000 for more than one employee
 - Class D felony for failure to pay a single employee greater than \$3,000 or \$100,000 to more than one employee
 - Class C felony for failure to pay a single employee greater than \$50,000 or greater than \$500,000 to more than one employee
- Restitution: Court may order restitution of wages in amount of underpayment together with the amounts provided for by NYLL 218

Proposed Amendment to NYLL § 213

- Law currently provides that “any person” who violates or does not comply with “any provision” of the labor law, any rule, regulation, or lawful order of the commissioner (of labor) or the board, and the officers and agents of any corporation who knowingly permit the corporation to violate such provisions would be guilty of a misdemeanor
 - Amendment would increase penalty/clarify that first time offense is Class A misdemeanor, and subsequent/second offense committed within 6 years of date of conviction of prior offense would be Class E felony

Discrimination Against Victims of Domestic Violence

- Law currently protects employees from discrimination on the basis of being a victim of domestic violence in employment
- Proposes to amend Section 296 of the Executive Law to expand protections for victims of domestic violence to all jurisdictional areas including public accommodations, private and publicly assisted housing, education and credit.
- Effective: Immediately (upon enactment)

Discrimination on Basis of Citizenship and Immigration Status

- Proposes to make explicit that discrimination on the basis of citizenship and immigration status is unlawful by amending Section 296 of the NY Executive Law to all jurisdictional areas including in employment, housing, places of public accommodation, etc.
 - Currently, NYDHR practice is to investigate/enforce this under “national origin” protected class, so this would further clarify this as its own protected class
- Effective: Immediately (upon enactment)

Immigration and Citizenship Status

- Defines “citizenship or immigration status” as the citizenship of any person or the immigration status of any person who is not a citizen of the United States
- Nothing precludes verification of citizenship or immigration status where required by law
- Adverse action based on such verification of citizenship or immigration status will not be prohibited where such adverse action is required by law

What's Next...

- New York State Constitution requires that the Budget Bill be approved by April 1
- Stay tuned, we will monitor for any changes or developments!

Hughes v. Northwestern University and ERISA Fiduciaries



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Hughes v. Northwestern University - Background

- The case at hand involved participants in the Northwestern University retirement plans – the Northwestern University Retirement Plan and the Northwestern University Voluntary Savings Plan (collectively, the Plans).
 - The Plans are 403(b) plans, defined contribution retirement plans, permitting participants to defer compensation into individual investment accounts and invest those contributions into an array of specific investment options.
 - Fees are charged primarily fall into two (2) categories:
 - investment services (i.e., fees that compensate funds for designing and maintaining the investment); and
 - recordkeeping (i.e., fees for tracking account balances, providing account statements, and offering informational and accessibility services to participants).
- The petitioners brought suit against Northwestern University, its retirement investment committee, and those individuals who administer the Plans, arguing that they, as fiduciaries, breached their fiduciary duty of prudence under ERISA by:
 - failing to monitor and control recordkeeping fees, compared to peer schools with similarly-sized plans;
 - offering retail class funds, with higher fees, rather than institutional class funds, with lower fees; and
 - offering an excessive number of investment options (over 400 in total), causing confusion and contributing to poor investment decisions.

Hughes v. Northwestern University – Procedural History

- Seventh Circuit / District Court Decision
 - Held that the Plans met their fiduciary burden because they were able to choose from a wide variety of different investments (including those preferred by the participants) and therefore could avoid those funds alleged to be undesirable
 - Participants were not forced to stomach those alleged poor investment choices.
 - Affirmed prior dismissal by the US District Court
- Supreme Court Decision
 - Seventh Circuit erred by holding plaintiffs cannot state a plausible claim against plan fiduciaries based on the inclusion of a few imprudent investment options if the investment lineup offered to plan participants is diverse and contains prudent investment options.
 - Seventh Circuit only focused on one aspect of prudence – offering a diverse menu of investment options.
 - Seventh Circuit failed to address fiduciaries' obligation to continuously review plan investments and recordkeeping expenses and remove imprudent ones.
 - Fiduciaries must systematically consider all investments and expenses at regular intervals to ensure they remain appropriate and timely remove imprudent investments or recordkeepers within a reasonable time

Hughes v. Northwestern University - Analysis

- Duty of Prudence
 - Fiduciaries must act ‘with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.
- “Context-Specific Inquiry”
 - To determine if a fiduciary has breached the duty of prudence, must look at the circumstances prevailing at the time the fiduciary acts.
- “Difficult Tradeoffs”
 - When making a decision, fiduciaries may face difficult tradeoffs
 - Courts must consider the range of potential reasonable judgements, taking into account the fiduciary’s experience and expertise.

Hughes v. Northwestern University – Takeaways

- Key Takeaway – Defined contribution plan fiduciaries will not be able to avoid liability from offering imprudent investments solely because they provide a variety of investment options.
 - Regular monitoring to ensure a prudent investment lineup and removal of imprudent fund options
 - Review internal monitoring and decision-making processes and procedures – especially when it comes to evaluating plan fees, investments, and service providers (including recordkeepers)
- No bright line rule on what constitutes prudence

Updated (Feb 4, 2022) Quarantine & Isolation Guidance from New York



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New York State Department of Health Isolation and Quarantine Guidance

- January 14, 2022 Guidance – The Framework
 - Provided extensive guidance on quarantine and isolation requirements
 - Quarantine: applies to exposure to a person with COVID-19
 - Isolation: applies to people with confirmed or suspected COVID-19 (positive test or symptoms)
- February 4, 2022 Guidance – Most Recent Modifications
 - Retains the basics of January 14 Guidance for most circumstances
 - New guidance in three areas:
 - “Ongoing Exposure”
 - Participation in before/after-school care and child care programs
 - Travel

January 14 Guidance – Brief Overview/Recap

- Quarantine
 - Main question is “up-to-date” or “not up-to-date”
 - Up-to-date: received all CDC recommended vaccine doses, including boosters if eligible, and additional primary shots for immunocompromised people. This group not required to quarantine following exposure.
 - Also no quarantine if confirmed positive in last 90 days
 - Not up-to-date: Eligible for booster, but not yet received. This group generally must quarantine for 5 days.
- Isolation
 - Generally, 5 days, if fever-free for 24 hours without use of medication and other symptoms “have improved.”

February 4 Revisions – “Ongoing Exposure”

- “Ongoing exposure” – quarantined person cannot separate from infected person. Usually means same household where care is required.
- If not subject to quarantine (fully up-to-date on vaccination)
 - Mask around others (including infected person at home) during isolation and 10 days after it ends
 - Test 5 days after exposure, and again 5 days after end of isolation
- If subject to quarantine (not fully up-to-date on vaccination)
 - Quarantine for entire isolation period and 5 days beyond last day infected person in isolation
 - Likely means 10-15 days of quarantine

February 4 Revisions – School and Child Care

- Exceptions to quarantine requirements for students, teachers and staff:
 - Not fully vaccinated (have not completed primary vaccine series):
 - Can only attend if participating in a “test to stay” program
 - Vaccinated but not fully up-to-date (received primary vaccine, but not booster (though eligible)):
 - Can attend work at K-12 school and eligible childcare programs during quarantine period
 - Participate in test-to-stay program; if none, “strongly encouraged” to test at day 2-3 and 5
 - Both groups must continue quarantine outside school
- **Extracurricular Activities:**
 - Can attend only if they do not involve students from other schools and “appropriate” mitigation measures in place
- **Childcare Programs for School Age Children**
 - Can attend, regardless of whether program includes students from multiple schools and whether they are located at school or off-site, as long as “appropriate” mitigation measures in place

February 4 Revisions – Travel

- People who do not have to quarantine (fully up-to-date)
 - “Should” test at day 5 after exposure; only travel if negative and symptom free
 - Mask around others for 10 days; if can’t wear mask, don’t travel for 10 days following exposure
- People who have to quarantine (not fully up-to-date)
 - Do not travel during 5-day quarantine
 - Test at day 5 after exposure (not “should”); only travel if negative and symptom free. If test not available, do not travel for 10 days following exposure
 - Mask around others for 10 days; if can’t wear mask, don’t travel for 10 days following exposure
- Isolation: no travel for 10 days following symptoms or positive test

February 4 Revisions - Links

- Revised Updated Isolation and Quarantine Guidance:
 - https://coronavirus.health.ny.gov/system/files/documents/2022/02/quarantine-and-isolation-guidance-20220205_0.pdf
- Isolation and Quarantine Tables
 - https://coronavirus.health.ny.gov/system/files/documents/2022/02/quarantine-and-isolation-tables-20220205_0.pdf

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