

2024

# BUSINESS IN 2023

WEEKLY WEBINAR SERIES

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# Introduction



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# Call-In Pay, Split Shift Pay, and Spread of Hours Pay



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# Call-In Pay – Miscellaneous Industries and Occupations

- General rule
  - An employee who by request or permission of the employer reports for work on any day shall be paid for at least 4 hours, or the number of hours in the ***regularly scheduled shift***, whichever is less, at the ***basic minimum hourly wage***
- Regularly scheduled shift
  - NYSDOL looks at regularity and predictability of the shift
- Request or permission of the employer
  - If employee leaves early due to illness or personal reasons, no call-in pay obligation

# Call-In Pay – Miscellaneous Industries and Occupations

- Basic minimum hourly wage – computed on a weekly basis
  - Employee works in NYC and employee's regular hourly rate is \$18.00 per hour
  - Employee's regular shift is Monday through Friday 8:30 a.m. to 5:00 p.m. (with 30-minute unpaid meal period each day)
  - Employee is called in to work on Saturday from 8:30 a.m. to 10:30 a.m.
  - Employee is paid regular plus overtime compensation in the amount of \$774.00 [(\$18.00 x 40 hours) + (\$27.00 x 2 hours) = \$774.00]
- What about the call-in pay for requiring the employee to work only two hours on Saturday?

# Call-In Pay – Miscellaneous Industries and Occupations

- No extra call-in pay is owed for the work week
  - Employer is legally obligated to pay **minimum wage** for first 40 hours, one and a half times the **regular rate** for the 2 overtime hours, plus an extra 2 hours of call-in pay at the **basic minimum wage rate**
    - \$15.00 x 40 hours (straight time pay) = \$600.00
    - \$27.00 x 2 hours (overtime pay) = \$54.00
    - \$15.00 x 2 hours (call-in pay) = \$30.00
  - Employer is legally obligated to pay a total of \$684.00 for the work week
  - Employer has already exceeded this legal obligation by paying \$774.00

# Call-In Pay – Hospitality Industry

- General rule
  - An employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, must be paid at the ***applicable wage rate*** for the lesser of:
    - 3 hours for one shift or the number of hours in the regularly scheduled shift
    - 6 hours for two shifts totaling 6 hours or less or the number of hours in the regularly scheduled shift
    - 8 hours for three shifts totaling 8 hours or less or the number of hours in the regularly scheduled shift

# Call-In Pay – Hospitality Industry

- Regularly scheduled shift
  - Fixed, repeating shift that an employee normally works on the same day of each week
  - If total hours worked or hours scheduled to work change from week to week, there is no regularly scheduled shift



# Call-In Pay – Hospitality Industry

- Applicable wage rate
  - Payment for time of actual attendance ***calculated at the employee's regular or overtime rate of pay***, whichever is applicable, minus any customary and usual tip credit; and
  - Payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted
- Applies to all employees even if regular hourly rate exceeds the minimum wage rate

# Call-In Pay – Hospitality Industry

- Example:
  - Employee works as a server at a NYC restaurant, and employee's regular hourly rate is \$18.00 per hour
  - Employee's regular shift is Tuesday through Saturday 3:30 p.m. to midnight (with 30-minute unpaid meal period each day)
  - Employee is not ordinarily scheduled to work on Sunday, but is scheduled to assist with a lunch banquet on one Sunday for only 2 hours
  - Employee is paid regular plus overtime compensation in the amount of \$774.00 [(\$18.00 x 40 hours) + (\$27.00 x 2 hours) = \$774.00]
- What about the call-in pay for scheduling the employee to work a shift of only 2 hours on Sunday?

# Call-In Pay Hospitality Industry

- Extra call-in pay is owed for the work week
  - Not a regularly scheduled shift of 2 hours, so the 3-hour minimum pay requirement applies
  - Employer is legally obligated to pay **regular rate** for first 40 hours, one and a half times the **regular rate** for the 2 overtime hours, plus an extra 1 hour of call-in pay at the **basic minimum wage rate**
    - \$18.00 x 40 hours (straight time pay) = \$720.00
    - \$27.00 x 2 hours (overtime pay) = \$54.00
    - \$15.00 x 1 hour (call-in pay) = \$15.00
  - Employer is legally obligated to pay a total of \$789.00 for the work week
  - Employer has paid \$774.00, so an extra \$15.00 is owed for call-in pay

# Split Shift and Spread of Hours Pay – Miscellaneous Industries and Occupations

- General rule
  - An employee shall receive 1 hour's pay at the ***basic minimum hourly wage rate***, in addition to the minimum wage, for any day in which:
    - The spread of hours exceeds 10 hours;
    - There is a split shift; or
    - Both situations occur
- Also computed on a weekly basis

# Split Shift and Spread of Hours Pay – Miscellaneous Industries and Occupations

- Split shift
  - Working hours are not consecutive
  - Unpaid meal period of one hour or less is not considered an interruption of consecutive hours
- Spread of hours
  - Interval between the beginning and end of an employee's workday, including unpaid meal periods and intervals off duty
  - Examples:
    - Continuous shift from 8:00 a.m. to 6:30 p.m.
    - Shift from 8:00 a.m. to 12:00 p.m., and another shift from 2:30 p.m. to 6:30 p.m.

# Spread of Hours Pay – Hospitality Industry

- General rule
  - On each day in which the spread of hours exceeds 10, an employee in a restaurant or all-year hotel shall receive 1 additional hour of pay at the basic minimum hourly rate
  - Applies to all employees in restaurants and all-year hotels, even if regular hourly rate exceeds the minimum wage rate
- Same definition of spread of hours
- No separate split shift pay requirement in the hospitality industry

# Fundamentals of Collective Bargaining



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# A Ban for Some, But Not All: Exceptions to the FTC's Proposed Non-Compete Ban



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# President Biden's July 2021 Executive Order

- On July 9, 2021, President Biden issued an Executive Order on the use of non-compete agreements.
  - It *encouraged* the Federal Trade Commission (“FTC”) to *curtail* the *unfair* use of non-competes and related covenants.
  - It did not contain any language supporting a broad prohibition on the use of non-compete agreements to protect an employer’s legitimate business interests.
  - Most states, New York included, enforce non-competes when they are reasonable in scope and no broader than necessary to protect legitimate interests, such as confidential/trade secret information and customer relationships.

# FTC's Proposed Rule Banning Non-Competes

- FTC released its proposed rule on January 5, 2023.
- The proposed rule may go into effect as soon as March of 2023.
- The proposed rule declares that all non-compete agreements involving “workers” constitute “an unfair method of competition.”
- “Worker” is defined broadly to include employees, independent contractors, interns, volunteers, apprentices, and others.
- The proposed rule also applies to “de facto” non-competes.

# Exempt Industries

- The FTC has jurisdiction “to prevent persons, partnerships, or corporations” from using unfair methods of competition.
- The FTC Act expressly excludes certain industries from its purview, including:
  - Banks
  - Savings and loan institutions
  - Federal Credit Unions;
  - Common carriers; and
  - Air carriers.
- These industries appear to be exempt from the non-compete ban.

# Exempt Industries

- The FTC Act only applies to for profit corporations, and not true nonprofits.
- Whether you qualify as a true nonprofit is fact specific and depends on how the nonprofit uses and distributes profits and whether it attempts to use its nonprofit status for the benefit of others seeking monetary gain.
- Some examples of nonprofits which may be exempt from the proposed rule:
  - Hospitals;
  - Museums;
  - Charities;
  - Volunteer services organizations; and
  - Research institutions.

# Rule for Exempt Organizations

- This does not mean that your non-competes are enforceable.
- Exempt organizations must still satisfy applicable state law:
  - Reasonable in time and geographic scope;
  - No broader than necessary to protect a legitimate interest;
  - Cannot impose an undue burden on employees; and
  - Cannot violate public policy.

# COVID-19 Updates



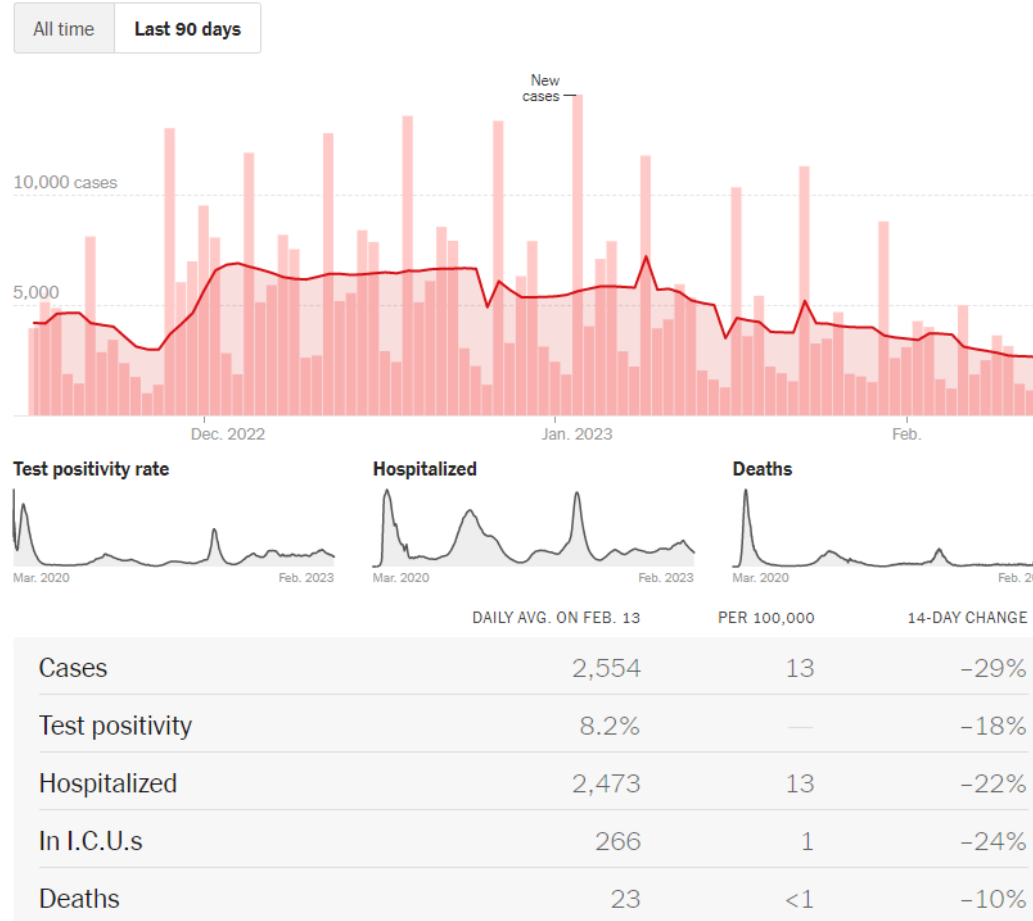
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# Current COVID Data in New York

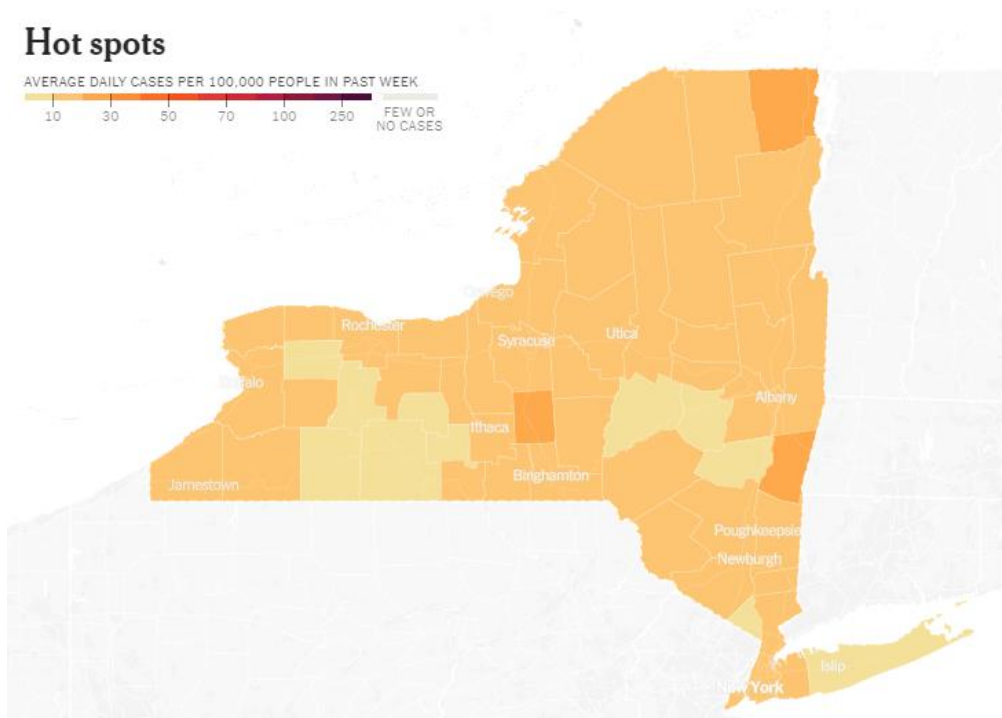


# Current COVID Data in New York

## Hot spots

AVERAGE DAILY CASES PER 100,000 PEOPLE IN PAST WEEK

10 30 50 70 100 250 FEW OR NO CASES



	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	TEST POSITIVITY	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000
New York	2,554	13	-29%	8%	13	-22%	23.1	0.12
Clinton ›	18	23	+59%	13%	35	+4%	0.2	0.22
Columbia ›	13	21	+44%	24%	19	+7%	0.2	0.29
Cortland ›	10	21	+15%	13%	13	-6%	<0.1	0.12
Tompkins ›	19	18	+90%	12%	13	+5%	<0.1	0.06
Orleans ›	7	17	+2%	11%	6	-26%	<0.1	0.18
Warren ›	11	17	+9%	7%	7	-38%	0.2	0.32
Oneida ›	38	17	-4%	13%	13	-11%	0.3	0.12
Jefferson ›	18	17	-26%	9%	6	-5%	<0.1	0.07
Sullivan ›	12	16	-34%	10%	17	-17%	0.1	0.13
Orange ›	60	15	-32%	11%	15	-28%	0.3	0.09



# COVID-19 Check-up: Where are we?

- [CDC Guidance on Isolation](#) (NY follows CDC recommendations)
  - Isolate for 5 days following positive test
  - Isolation can end after day 5 if:
    - Fever free for 24 hours (without the use of fever-reducing medication); and
    - Symptoms are improving
  - If symptoms are “moderate” (shortness of breath or difficulty breathing), isolate for 10 days
  - If symptoms are “severe” (hospitalization), isolate for 10 days and consult with doctor before ending isolation
  - Regardless of when isolation ends, wear a mask through day 10
  - \*\*No quarantine requirement following exposure (although masking and testing recommended) – See [Exposure Guidance](#)

# COVID-19 Check-up: Where are we?

- New York COVID-19 Paid Leave - [FAQs](#)
  - Still in effect
  - Up to three periods of paid leave available
  - Amount of leave dependent on size of employer
  - Guidance states that 2<sup>nd</sup> and 3<sup>rd</sup> periods of leave must be based on positive 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.”

# COVID-19 Check-up: Where are we?

- New York COVID-19 Vaccination Time
  - Still in effect (through December 31, 2023)
  - Up to four hours of paid leave per injection
  - Includes boosters
- Vaccination Recovery Time
  - Can use sick time

# COVID-19 Check-up : Where are we?

- Federal National Emergency Declaration
  - Declaration made at the beginning of the pandemic
  - Continued consistently since
  - White House issued statement that the President intends to terminate the national emergency concerning COVID-19 on May 11, 2023
  - Practical Impact:
    - Elimination of free COVID-19 tests
    - Changes to insurance reimbursement for COVID related expenses

# COVID-19 Check-up : Where are we?

- New York State – Face Coverings in Healthcare Facilities
  - February 10, 2023 "[Dear Administrator](#)" letter from DOH
  - Applicable to all healthcare settings – hospitals, nursing homes, home healthcare, physician offices, dental offices
  - Effective February 12, 2023
  - Recommends following CDC guidance
  - Advises facilities to develop and implement policies for personnel and visitor masking based on CDC guidance
  - Does not mean that personnel, patients and visitors do not have to wear masks – will vary by facility and location

# COVID-19 Check-up : Where are we?

- New York State – Healthcare Vaccine Mandate
  - Conflicting cases regarding enforceability of the DOH Vaccine mandate
    - Albany County Supreme Court vs. Onondaga County Supreme Court
    - Onondaga County Supreme Court decision currently on appeal
    - Motion for stay of Onondaga County Supreme Court decision still pending – Wait and see
  - CMS Vaccine Mandate
    - Similar requirement for healthcare employers to ensure vaccination of employees
    - \*\*Medical and Religious exemption requests must be considered

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## COVID-19 Updates

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### **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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