

2024

# BUSINESS IN 2023

WEEKLY WEBINAR SERIES

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# Introduction



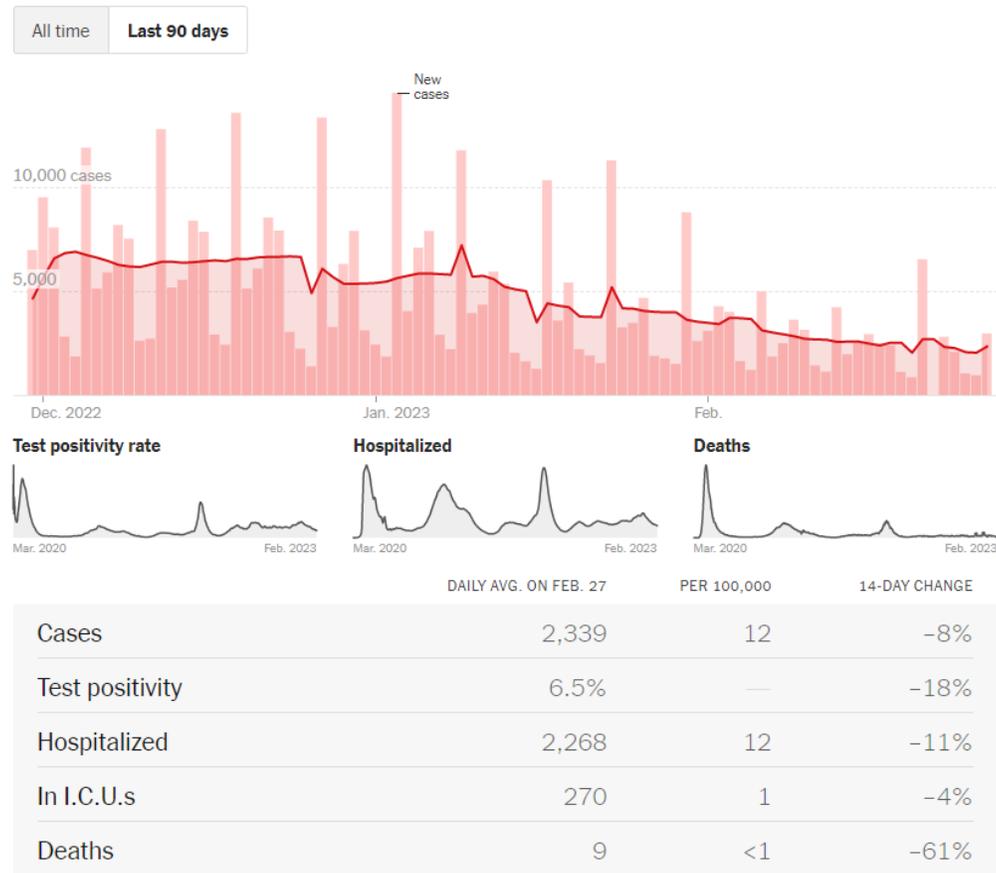
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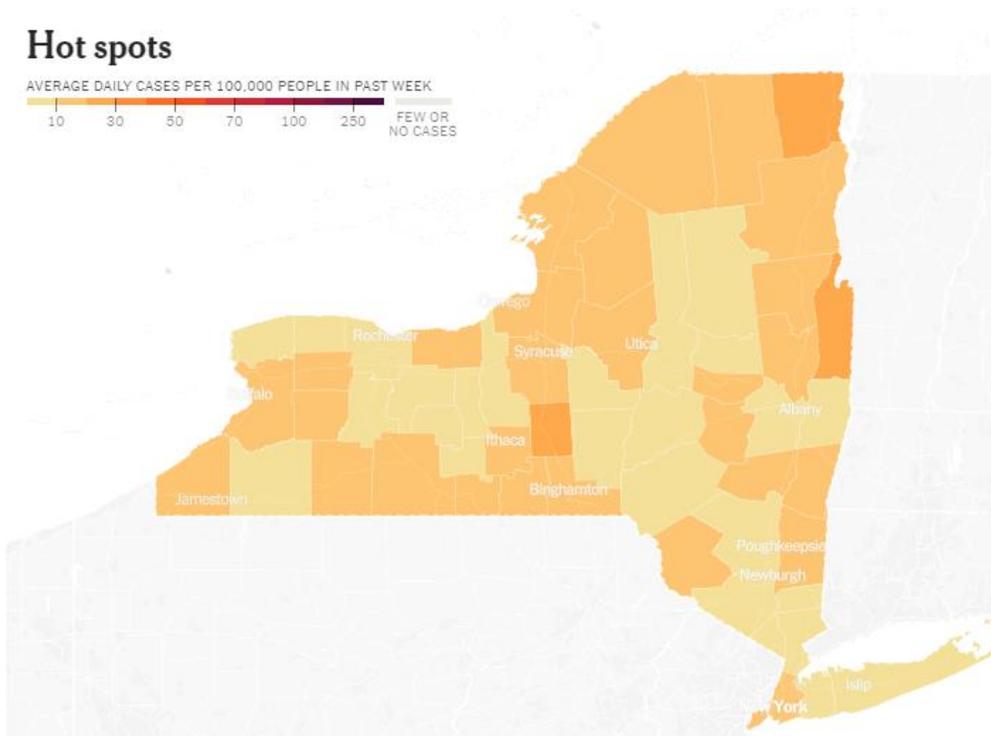
# Current COVID Data in New York



# Current COVID Data in New York

## Hot spots

AVERAGE DAILY CASES PER 100,000 PEOPLE IN PAST WEEK



	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	2,339	12	-8%	6%	12	-11%	9.0	0.05
Cortland >	11	24	+11%	19%	15	+9%	<0.1	0.12
Clinton >	17	21	-9%	15%	30	-13%	0.2	0.20
Washington >	12	20	+34%	10%	8	+9%	0.2	0.31
Essex >	7	19	+61%	14%	17	+6%	0.1	0.29
Broome >	31	16	+26%	12%	15	+17%	0.3	0.14
Chemung >	13	16	+33%	12%	16	+24%	<0.1	0.11
Lewis >	4	15	+40%	17%	10	-7%	<0.1	0.25
Steuben >	14	15	+90%	12%	10	+89%	0.2	0.19
Tioga >	7	14	+2%	14%	15	+10%	<0.1	0.19
St. Lawrence >	15	14	-1%	11%	10	+86%	<0.1	0.05

# NLRB Decision Regarding Settlement Agreements



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# Employment Contract Drafting Tips



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# Overview

- Deferred Compensation Considerations
- Common Employee Benefits Issues
- Proper Tax Treatment of Fringe Benefits

# Deferred Compensation Considerations

- Internal Revenue Code Section 409A
  - Additional considerations for tax-exempt entities.
    - Code Section 457(f)
    - Code Section 4960
  - Definition of Deferred Compensation: A legally binding right in one taxable year to compensation that is or may be payable in a subsequent taxable year.
  - Consequences of Code Section 409A Noncompliance
    - Immediate inclusion in gross income
    - Additional 20% tax
    - Interest penalty

# Deferred Compensation Considerations Ctd.

- Common Section 409A Issues in Employment Agreements:
  - Bonuses
  - Severance Payment Arrangements
- Potential Exceptions from Section 409A:
  - Short-Term Deferral Exception
    - Tied to substantial risk of forfeiture
  - Separation Pay Exception
    - Involuntary separation from service
    - Two years, two times compensation

# Common Employee Benefits Issues & Proper Tax Treatment of Fringe Benefits

- Common Employee Benefits Issues
  - Health and Welfare Plan Discrimination in Favor of Highly Compensated Employees
    - Self-Funded
    - Fully Insured
  - Employer Payment Plans
    - ACA
- Proper Tax Treatment of Fringe Benefits
  - Housing Allowance
  - Vehicle Allowance
  - Educational Assistance

# Supreme Courts Limits Highly Compensated Employees Exemption under the FLSA



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## Question Presented: *Hewitt v. Helix Energy Sols. Grp. Inc.*

- On February 23, 2022 SCOTUS *Decided Hewitt v. Helix Energy Sols. Grp. Inc.*
- Question Presented: Is a supervisor, who makes \$200,000 annually, calculated on a daily rate, considered a “Highly Compensated Employee” (“HCE”) who is overtime exempt under the Fair Labor Standards Act (“FLSA”)?
- Decision: Not an HCE, Not Exempt

# Brief Facts

- Helix Energy Solutions Group Inc. (Petitioner/Employer)
  - Oil and gas services company that provides offshore well services through vessels
  - Each vessel has crews to maintain proper working order and operations
- Michael Hewitt (Respondent/Employee)
  - “Tool Pusher” or Second-in-Command
  - Supervises 12 to 14 employees
  - Ensures safety and conducts pre-tour meetings
  - Makes at least \$963 per day or over \$200,000 per year



# Unique Aspects of Oil Industry

- 28 Day “Hitch”
  - 7 days a week, 12 hours per day
- Days Off?
  - Golfing?

# An Overview of the FLSA

- Enacted in 1938 after the Great Depression
- Intent was to protect “blue collar” workers from “substandard wages and oppressive working hours”
- General rule: Hourly employee + work hours > 40 in a 7-day workweek = time and one-half overtime compensation
- Exemptions

## FLSA (29 U.S.C. § 213(a)(1))

- “Any employee employed in a bona fide executive, administrative, or professional capacity [is exempt].”
- Overview of DOL regulations to follow...

# What is the HCE Exemption?

- 29 C.F.R. § 541.601
  - (1) Total compensation of \$100,000 per year (now \$107,432 as per January 1, 2020)
  - (2) Total compensation includes at least \$455 (now \$684) per workweek paid on a “salary basis”
  - (3) Perform any of several enumerated supervisory executive duties
    - Managerial duties, direct 2 or more employees, non-manual work
- 29 C.F.R. § 541.601(c)
  - “A high level of compensation is a strong indicator of an employee’s exempt status”

## “Salary Basis” Test (29 C.F.R. § 541.602(a))

- “[T]he employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee’s compensation”

## “Reasonable Relationship Test” (29 C.F.R. § 541.604(b))

- “[E]arnings may be computed on a hourly, a daily or a shift basis [and still be a salary basis] if...”
- (1) Employee is guaranteed at least the minimum weekly required amount paid on a salary basis (\$455) regardless of the number of hours, days or shifts worked **AND**
- (2) A reasonable relationship exists between the guaranteed amount and the amount actually earned.

# Procedural History: District Court (Texas)

- **Helix wins**
- Court found:
  - (1) Hewitt was paid on a “salary basis” because his pay never fell below \$455 during any week regardless of days work; and
  - (2) qualifies for “executive” and “HCE” exemptions because he makes at least \$100,000 and directs 2 or more employees.
    - Executive exemption = “salary basis” + managerial duties

# Procedural History: Circuit Court (5th Cir.)

- **Hewitt Wins**
- Sitting *en banc*
- 541.601 incorporates 541.602 & 541.604(b)
- Court found:
  - (1) Hewitt gets 541.604(b) test because he's paid on "daily or shift basis; and
  - (2) he fails "salary basis" because he is not guaranteed a predetermined amount and there is not reasonable relationship between minimum and his pay

# And the Winner Is...

- **Hewitt**
- 6-3 Decision, Justice Kagan writes majority opinion
  - Essentially, the same exact reasoning as 5<sup>th</sup> Cir.
  - 541.601 incorporates 541.602(a) & 541.604(b)
  - Hewitt fails 541.602(a) “salary basis” test and would fail the 541.604(b) “reasonable relationship test”
  - Isn’t 541.604(b) only for employees that are not HCEs?
    - SCOTUS says no

# Dissent: Justice Kavanaugh

- Joined by Justice Alito
- This is straight-forward
  - (1) Performs executive duties;
  - (2) Makes about \$200,000 per year; and
  - (3) Receives predetermined salary of at least \$963
- 541.604(b) only applies when not an HCE

# Dissent: Justice Kavanaugh

- Will this have larger implications?
- Administrative Law 101:
  - Congress passes statute, Administrative agency passes regulations for implementing statute; Administrative agency enforces compliance
    - FLSA, DOL passes regulations, WHD of DOL enforces compliance
    - Separation of powers?
    - Too broad?

## Example: *West Virginia v. EPA*

- Decided June 30, 2022
- Clear Air Act authorized EPA to regulate power plants by setting a “standard of performance” for emissions of certain pollutants
- Must reflect the “best system of emission reduction”
- EPA passed regulation said the “best system” is to **require** a reduction of electricity or subsidize by natural gas, wind, or solar sources
- “Major Questions Doctrine”
  - Admin. Agency must be able to cite “clear congressional authorization” on issues of “vast economic or political significance”

# So what about the FLSA...

- FLSA “[a]ny employee employed in a bona fide executive, administrative, or professional capacity [is exempt].”
  - This focuses on their duties
- DOL then placed salary requirements for exemptions like the “executive” and “HCE”
  - Can the DOL do this?
  - Right now, yes. Maybe in the future no?

# Final Thoughts

- (1) More difficult for employees to qualify as an HCE
- (2) Need to clearly establish how highly compensated employees are paid
- (3) Interesting considerations for the future of Administrative Law

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## Supreme Courts Limits Highly Compensated Employees Exemption under the FLSA

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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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