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COVID Update (What We Are Watching)

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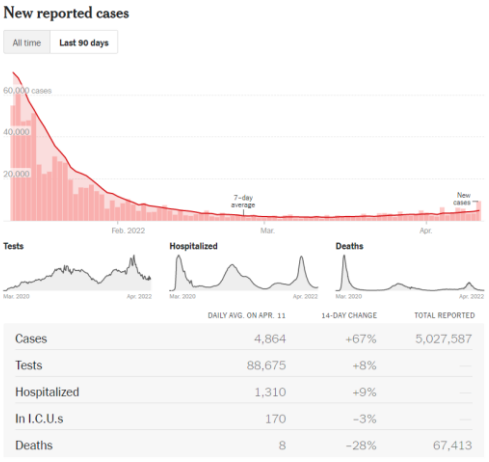
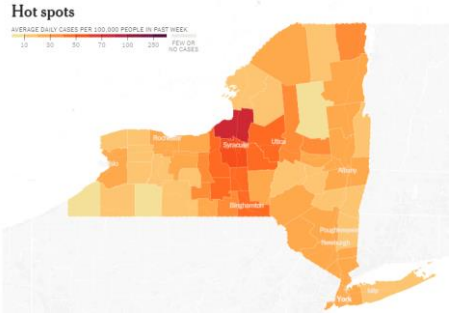
Current COVID Data in New York



	DAILY AVG. ON APR. 11	14-DAY CHANGE	TOTAL REPORTED
Cases	4,864	+67%	5,027,587
Tests	88,675	+8%	—
Hospitalized	1,310	+9%	—
In I.C.U.s	170	-3%	—
Deaths	8	-28%	67,413

- Case numbers increasing significantly
- No policy changes to date

Current COVID Data in New York



	CASES DAILY AVG.	PER 100,000	14-DAY CHANGE	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000	FULLY VACCINATED
New York	4,864	25	+67%	7	+9%	8.4	0.04	76%
Oswego ›	83	71	+56%	9	+10%	0.2	0.16	59%
Onondaga ›	238	52	-2%	10	+32%	0.6	0.12	73%
Cayuga ›	37	49	+30%	10	+36%	0.2	0.24	59%
Cortland ›	23	47	+58%	10	+28%	0	—	59%
Tompkins ›	47	46	-31%	9	+3%	<0.1	0.08	79%
Oneida ›	103	45	+137%	9	+29%	0.1	0.06	63%
Madison ›	31	44	+53%	9	+41%	<0.1	0.1	61%
Broome ›	82	43	+191%	10	+19%	0.1	0.07	64%
Seneca ›	13	38	+90%	10	+19%	0	—	54%
Fulton ›	20	37	+100%	2	-65%	0.2	0.31	54%

Show all About this data

New York Electronic Monitoring Law

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Notice of Electronic Monitoring

- Goes into effect May 7th
- Applies to employers who that "monitor or otherwise intercept" their employees' telephone calls, email or internet access or usage as defined under the law
- Employers must provide written notice to all employees upon hiring and post a notice of electronic monitoring in a "conspicuous place which is readily available for viewing" by affected employees
  - Note that the law does not require written notice/acknowledgment regarding current employees, but notice must still be posted in the workplace

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What does the notice require?

- The law requires that the written notice advise employees “that any and all telephone conversations or transmissions, electronic mail or transmissions, or internet access or usage by an employee by any electronic device or system, including but not limited to the use of a computer, telephone, wire, radio or electromagnetic, photoelectronic or photo-optical systems may be subject to monitoring at any and all times and by any lawful means”
- The law further requires that new employees acknowledge receipt of this notice either in writing or electronically

What does the notice not require/cover?

- The law does not, however, apply to processes where the monitoring activity (1) is designed to manage the type or volume of email, telephone or internet usage; (2) is not targeted to monitor a particular employee; and (3) is performed solely for the purpose of computer system maintenance and/or protection

Penalties

- The law does not provide for a private right of action but will be enforced by the New York State attorney general. Failure to comply with the new law could result in financial penalties of $500 for the first offense, $1,000 for the second offense and $3,000 for the third and each subsequent offense

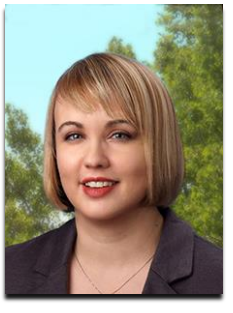
Other Notable Provisions

- Due to the law's broad definition, most employers in New York are likely impacted by the new restrictions and requirements. It is important to note that notice requirements under the law applies to Acceptable Use policies and Bring-Your-Own-Device (BYOD) programs and is not strictly limited to employees who are provided with employer-issued devices. Employers must provide notice to employees regardless of whether they participate in their employer's BYOD program or use a personal device to transmit email through a corporate email server or access the internet through the employer's internet connection

Best Practices

- Begin drafting a sample notice for the workplace/new hires before the law goes into effect/post the notice goes into effect
- Incorporate proving the notice with new hire paperwork
- Include a reference to electronic monitoring in employee handbooks with the language that must be included with the notice
- Provide notice to all employees, if practicable

Proposed Cannabis Retail Dispensary Regulations



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Marijuana Regulation and Taxation Act

- Former New York Governor Andrew Cuomo signed the Marijuana Regulation and Taxation Act (the "MRTA") into law on March 31, 2021.
- The MRTA legalized the production, distribution, sale and use of adult-use cannabis in New York.
- The MRTA also created the Office of Cannabis Management ("OCM") to issue licenses and develop regulations addressing individual and business participation in the cannabis industry.

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The MRTA and Social Equity

- The MRTA sought to address the issue of criminalization of communities of color and low-income areas by:
  - Removing marijuana from the New York Controlled Substances Act;
  - Creating a process for addressing past marijuana-related convictions;
  - Directing that 50% of tax revenue from the sale of adult-use cannabis be used to establish a source of funding for community-based projects, including re-entry services, expansion of afterschool programs and job training; and
  - **Proposing to issue the first retail dispensary licenses to individuals adversely affected by marijuana-related convictions**

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The Proposed Regulations

- On March 10, the Cannabis Control Board and OCM proposed adult-use conditional retail dispensary regulations and posted them on the OCM's website.
- The proposed regulations are subject to a public comment period which ends on May 31, 2022.
- These regulations, once effective, will create and govern the Conditional Adult-Use Retail Dispensary Licenses (the "Licenses").

The Licenses

- Reserved for individuals disproportionately impacted by the war on drugs.
- According to public statements by OCM officials, those individuals will receive the first 100-200 licenses.
- OCM expects these licenses to become available during 2022.

Eligibility for the Licenses

- According to the proposed regulations, each applicant for the Licenses must demonstrate:
  1. It has a significant presence in New York State;
  2. At least one individual is "justice-involved";
  3. It holds or held, for a minimum of 2 years, at least a 10% ownership interest in, and had control of, a business that had net profit for at least 2 years of its operation
- 501(c)(3) entities may also apply for the Licenses if they have at least 5 full-time employees, have "justice-involved" individuals on its board or as officers, and meet certain other justice-related conditions

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A Justice-Involved Individual

- Was convicted of a marijuana-related offense in New York prior to March 31, 2021
  - Possession
  - Sale
  - Loitering while in possession of a controlled substance
- Had a parent, legal guardian, child, spouse or dependent convicted of a marijuana-related offense; or
- Was a dependent of an individual convicted of a marijuana-related offense

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Ownership and Control Requirements

- Applicants for the Licenses must meet certain ownership requirements as well:
  - At least 51% of an applicant must be owned in the aggregate by one or more "justice-involved" individuals; and
  - At least one "justice-involved" individual must own at least 30% and exercise sole control of the applicant
- The percentage of ownership has to be proportionate to the individual's interest in the capital, assets, profits, and losses

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Other criteria that will be considered

- Regarding the justice involved individuals:
  - If they themselves were convicted
  - Primary residence at time of conviction relative to:
    - Areas with high rates of marijuana-related offenses
    - Historically low median income
    - Public housing availability
- Regarding the qualifying business:
  - Number of employees
  - Number of years in operation
  - Profitability
  - Type of business, and if it was retail
  - If it had a physical location
  - If it received any fines or violations

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Other Considerations Regarding the Licenses

- Effective for 4 years (the “Conditional Period”)
- Licensee must commence operations no later than 12 months from the date the License is granted
- Licensee must only acquire cannabis products from entities authorized to distribute cannabis products in New York
- For the duration of the Conditional Period, the Licensee must maintain the minimum standards for ownership and control
- After the Conditional Period, licensees may apply to transition to an adult-use retail dispensary license
- Must enter into various agreements approved by the Cannabis Control Board
  - Labor peace agreement with a bona fide labor organization

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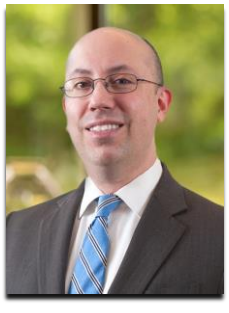
Drafting Enforceable Restrictive Covenants



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What Is a Restrictive Covenant?

- Restrictive covenant: a contract that prevents a former employee from competing with their former employer in some way. Typically included in an agreement upon hiring or accompanying a promotion or benefit.
- The legitimate purpose of a restrictive covenant is to prevent *unfair* competition.
- Non-compete: Former employee cannot engage in competitive business. Hardest to enforce.
- Customer non-solicit: Former employee cannot solicit customers of their former employer. Easier to enforce than a non-compete, but still requires careful drafting and a limited scope.
- Employee non-solicit ("non-raid"): Former employee cannot solicit employees of their former employer. Easiest to enforce if targeted to key employees.

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Do You Need a Restrictive Covenant?

- Without a restrictive covenant, there is no prohibition against a former employee's competition or solicitation of your customers and employees (unless an exception applies).
- A restrictive covenant can set terms for a severance or option agreement in which the employee forfeits benefits if they compete (employee choice doctrine).
- Exception: An employee can't misappropriate your trade secrets (Defend Trade Secrets Act, unfair competition). A restrictive covenant can clarify what information constitutes your trade secrets.
- Exception: An employee can't compete while still your employee (faithless servant, breach of fiduciary duty). A restrictive covenant can clarify what constitutes an unacceptable use of your time and resources.
- Exception: The law imposes a customer non-solicit on the seller of a business (*Mohawk Maintenance* doctrine). A court is more likely to enforce a restrictive covenant against a seller than a former employee.

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Careful Drafting Is Essential

- In a lawsuit over a restrictive covenant, a court decides if the covenant complies with New York law. Many do not.
- In the 1999 case *BDO Seidman v. Hirshberg*, the New York Court of Appeals set rules for restrictive covenants. Since then, New York courts have clarified *BDO Seidman* to make litigation more predictable.
- Restrictive covenants require specific language and limitations to be enforceable. "Blanket" prohibitions against competition and solicitation are unenforceable.
- The longer the duration and broader the geographic area of a restrictive covenant, the less likely a court will enforce it. Courts usually won't enforce a covenant that drives the employee out of their region.

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Courts Don't Permit Loopholes in Restrictive Covenants

- The court may refuse to impose a different state's law as "truly obnoxious to New York public policy" (*Brown & Brown, Inc. v. Johnson* – refusing to apply Florida law).
- The court may find that language meant to benefit the employer actually shows the employer's unfairness and "anticompetitive overreaching."
- Without reviewing the cases, it is impossible to know what pro-employer language is helpful or harmful to the employer in restrictive covenant litigation.

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Restrictive Covenant Litigation Is High Stakes

- Employers typically want orders at the beginning of litigation that force the employee to stop competing or soliciting for the duration of the lawsuit (temporary restraining order ["TRO"] and preliminary injunction).
- Seeking a TRO and preliminary injunction requires compelling and substantiated affidavits from employer witnesses.
- The employer must prove the restrictive covenant is enforceable and its breach poses irreparable harm: an injury so serious that the payment of money is not adequate compensation, such as a massive loss of customers.
- The Court's decision to grant or deny a TRO and preliminary injunction often has the effect of resolving the lawsuit. The Court will decide whether it is likely or unlikely that the employer can enforce its restrictive covenant.

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It's Time to Review Your Restrictive Covenants

- If you have not revised your restrictive covenant recently, there is a good chance that a court will refuse to enforce it the way it is written.
- If a court won't enforce your restrictive covenant as written, it will decide whether to narrow (or "blue pencil") your restrictive covenant to a specific class of competition or solicitation (such as prohibiting solicitation of a particular customer).
- Employers should presume a court will *not* narrow an overbroad restrictive covenant and will instead refuse to enforce it at all. Courts expect employers to have revised their restrictive covenants in compliance with the 1999 *BDO Seidman* case.
- Guidance from experienced attorneys is essential to drafting effective restrictive covenants and enforcing them in court.

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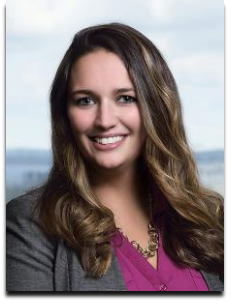
Public Performance of Copyrighted Works



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Copyright Act

- Section 106(4) grants copyright owners the exclusive right "to **perform** the copyrighted work **publicly**."
- Applies only to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures or other audiovisual works."
- Does not apply to "pictorial, graphic and sculptural works" and "sound recordings."

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What is a public performance?

- To perform or display a work "**publicly**" means:
  - to **perform** or display the work at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintance is gathered; or
  - to **transmit** or otherwise communicate a performance or display of the work to a place open to the public or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

Exemptions

- Certain face to face teaching activities
- Nonprofit performances
- Places of worship
- Certain establishments

Best Practices

- Only play items that are in the public domain
- Obtain appropriate licenses
- Use a proper business service provider
- Monitor compliance with applicable copyright law
- Adopt a written copyright policy
- Educate employees who make decisions related to copyrighted works

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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.