

2023

BUSINESS IN 2022

WEEKLY WEBINAR SERIES

2021

2020

2019

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& KING ATTORNEYS

Introduction and COVID update



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Workplace Investigations

Thursday, June 9, 2022

DoubleTree by Hilton Hotel, Syracuse

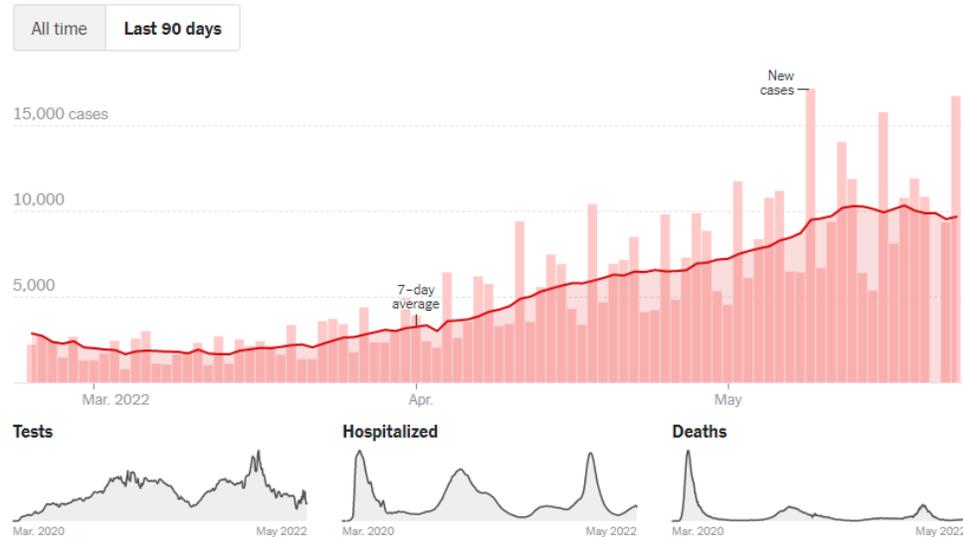
Register here: <https://t.co/L4wi3TS64N>

- When workplace investigations are recommended and how employers can protect against potential liability
- Selecting an appropriate investigator and developing an investigation plan
- Determining what evidence should be collected and what witnesses should be interviewed
- How to prepare for and conduct witness interviews
- Making determinations supported by investigation findings
- Documentation of findings and communication of investigation results

1.5 General HRCI Credits / 1.5 SHRM PDCs

Current COVID Data in New York

New reported cases



- No policy changes to date

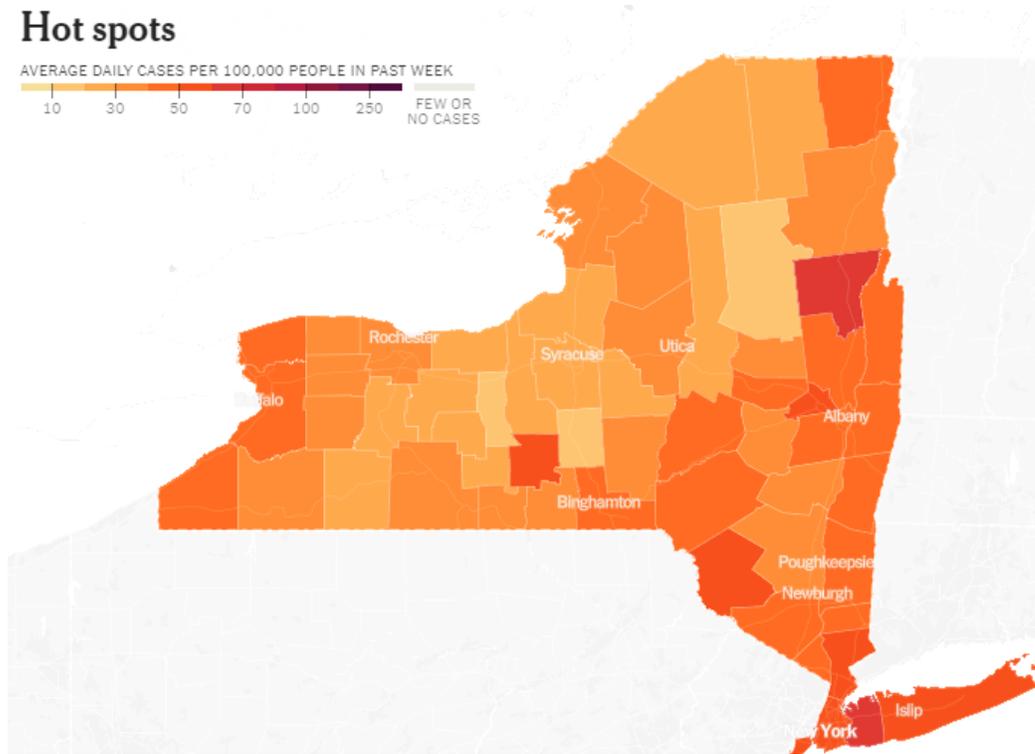
	DAILY AVG. ON MAY 23	14-DAY CHANGE	TOTAL REPORTED
Cases	9,640	+2%	5,369,376
Tests	66,271	-3%	—
Hospitalized	2,730	+6%	—
In I.C.U.s	249	+8%	—
Deaths	23	+28%	68,165

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	HOSPITALIZED AVG. PER 100,000	14-DAY CHANGE	DEATHS DAILY AVG.	PER 100,000
New York	9,640	50	+2%	14	+6%	23	0.12
Warren >	41	64	-9%	13	+94%	0	—
Nassau >	859	63	+7%	20	+24%	1.1	0.08
Schenectady >	93	60	-1%	10	+31%	0.3	0.2
Suffolk >	819	55	+16%	15	+83%	1.3	0.09
New York City >	4,583	55	+18%	11	+28%	7.1	0.09
Tompkins >	56	54	-28%	31	+53%	<0.1	0.08
Sullivan >	40	53	+48%	16	+49%	<0.1	0.11
Westchester >	490	51	+6%	14	+38%	0.9	0.09
Albany >	152	50	-8%	18	+34%	1	0.33
Saratoga >	113	49	-18%	13	+42%	0.6	0.25

New York's Freedom of Information Law

Withholding Documents Under the Federal/State Law Exemption and Personal Privacy Exceptions



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What is FOIL?

- FOIL requires governmental agencies, including school districts, to enact rules and regulations governing the availability of records; to maintain certain records; and to make all records available for public inspection and copying except those specifically defined in statutory exceptions.
- FOIL can be found in the New York Public Officers Law Sections 84-90.

What are Records?

- Under FOIL, a “record” is defined as “any information kept, held, filed, produced, or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever.”
- This can include, but is not limited to:
 - Letters/Emails
 - Text Messages
 - Personnel records
 - Vendor data, invoices, etc.
 - Voter Rolls
 - Audio Recordings of Meetings of the Governing Body

Exemptions

1. ***Exempt under other state/federal law***
2. ***Would constitute an unwarranted invasion of personal privacy***
3. Would impair present or imminent contract awards or collective bargaining negotiations
4. Trade secrets, or would cause substantial injury to the competitive position of the subject enterprise
5. Could endanger the life or safety of any person

Continued List of Exemptions

6. Inter-agency or intra-agency materials, which are not:
 - Statistical or factual tabulations or data
 - Instructions to staff that affect the public
 - Final agency policy or determinations
 - External audits
7. Compiled for law enforcement purposes which, if disclosed, would:
 - Deprive a person of a right to a fair trial or impartial adjudication
 - Identify a confidential source or disclose confidential info related to a criminal investigation
 - Reveal criminal investigative techniques or procedures
 - Interfere with law enforcement investigations or judicial proceedings

Examples of Records That May Be Exempt From Disclosure

- ADA/FMLA leave related records
- Non-final disciplinary records, such as counseling memos, investigation notes, warnings, etc.
- APPR observations, data or final scores
- Medical treatment records
- Home addresses/phone numbers/personal email addresses
- Workers Compensation records
- Parts of resumes/CVs that are unrelated to the position for which the public employee was hired such as college GPA, marital status, hobbies, etc.

Examples of Records That May Be Exempt From Disclosure cont'd

- Application materials for unsuccessful job candidates
- Individualized Education Programs

What Is An Unwarranted Invasion of Personal Privacy?

- Under New York Public Officers Law §89(2), an unwarranted invasion of personal privacy includes, but shall not be limited to:
 - Disclosure of employment, medical or credit histories or personal references of applicants for employment;
 - Disclosure of items involving the medical or personal records of a client or patient in a medical facility;
 - Sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes;
 - Disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it

What Is An Unwarranted Invasion of Personal Privacy? Cont'd

- Information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law;
- Disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or
- disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.

Drug and Alcohol Policies – Recap and Tips



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Drug and Alcohol Policy Considerations

- Considerations:
 - Safety
 - Efficiency of Operations
 - Federal Drug Free Workplace Act
 - Federal contractor/grantee obligations
 - US DOT Drug and Alcohol Testing Regulations (“Part 40”)
 - FMCSA
 - FAA
 - FRA
 - FTA
 - PHMSA
 - USCG
- Drug-Free Schools and Communities (Campuses) Act

Alcohol and Drug Policies – Tips

- Understand what requirements apply to you
 - What do those requirements mean/actually require?
 - What action must actually be taken?
 - Do you need a written policy? Does the policy need to include specific information?
 - Do you need to do training? What does the training need to entail?
 - Any other information that must be provided?
 - Administration of policy– are there other requirements?
 - Ex: US DOT FMCSA Clearinghouse reporting/checking; reporting of drug convictions to contracting agency/officer; etc.
- Zero Tolerance versus no tolerance
- Drug/alcohol testing
- Caution: Be mindful of disability discrimination
 - Employees who take prescription medications or over-the-counter medications or use medical marijuana
 - Reasonable accommodation obligations
 - Individuals in recovery

Marijuana

- May 10, 2020 – NYC Law passed prohibiting drug testing for marijuana or THC as a condition of employment
 - Several exceptions in the law and guidance
- March 31, 2021 – Marijuana Regulation and Taxation Act passed
 - Legalized adult (21+) recreational use of cannabis/marijuana
 - NYLL 201-d – protections for lawful off duty use
 - Applies to public and private employers of all sizes



New York Labor Law 201-d

- Employers are generally prohibited from discriminating against an employee because of the employee's use of cannabis outside of the workplace, during non-working hours, and without use of employer's equipment or property
- Employers may take action or prohibit conduct:
 - Where required by state or federal law, regulation, ordinance, mandate
 - Where employer would lose federal contract or federal funding
 - Where employer would violate federal law
 - Where employee manifests “articulable symptoms” of impairment while working that decrease or lessen the employee's performance of their tasks or duties
 - Where employee manifests “articulable symptoms” of impairment while working that interfere with employer's obligation to provide safe and healthy workplace

NYSDOL Issues Guidance

- October 8, 2021 – NYSDOL issues guidance
 - **Testing** – Test cannot be basis for employer’s conclusion that employee was impaired by cannabis
 - Employers cannot test for cannabis unless otherwise required to do so by other federal or state law or as otherwise “permitted” by NYLL 201-d(4-a)
 - E.g., Pre-employment and random testing for marijuana presumably no longer lawful under NY (unless otherwise **required** by federal or state law)
 - **“Articulate symptoms”** – No “dispositive” or complete list but they must be objectively observable indications that the employee’s performance of the duties are decreased or lessened
 - Smell of cannabis/odor not sufficient on its own of “articulate symptoms”

From the Bond Lawyers Who (*Literally*) Wrote the Book on New York Employment Law...



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COVID Update

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New York Employment Law: The Essential Guide

Bar Association Members can buy the book from the bar [here](#).

Non-Bar Association Members can purchase through Amazon [here](#).

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