

2023

BUSINESS IN 2022

WEEKLY WEBINAR SERIES

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Introduction and COVID Update



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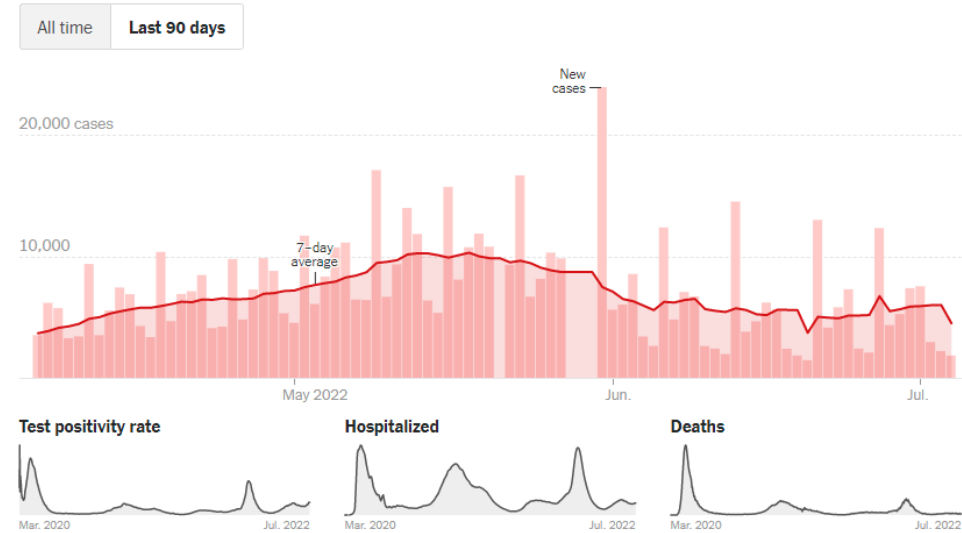
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Current COVID Data in New York – July 4, 2022

New reported cases



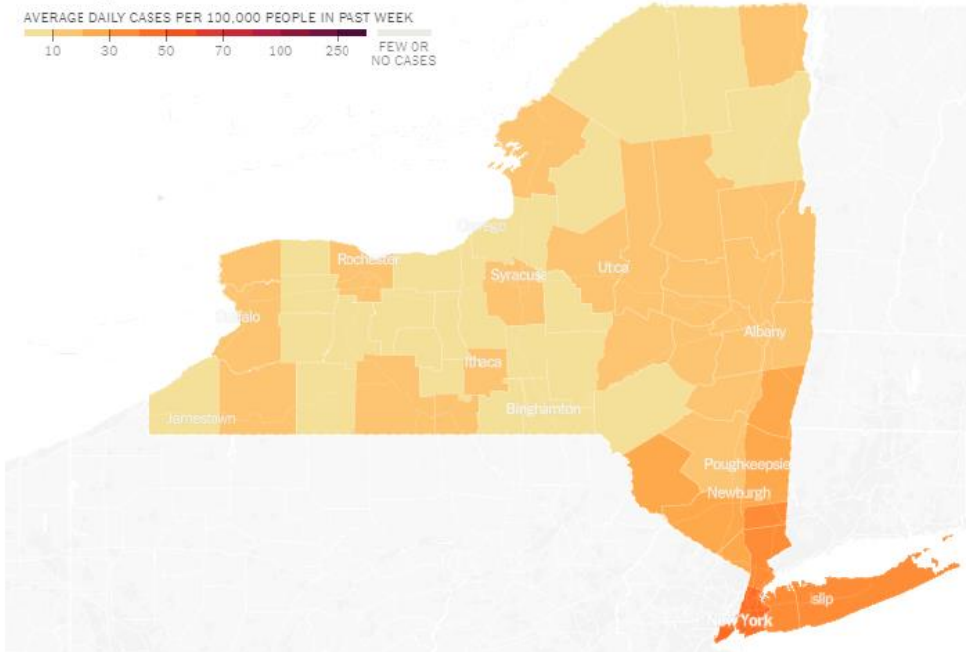
	DAILY AVG. ON JUL. 4	14-DAY CHANGE	TOTAL REPORTED
Cases	4,495	+21%	5,611,362
Test positivity	12%	—	—
Hospitalized	2,328	+6%	—
In I.C.U.s	228	-1%	—
Deaths	17	-29%	69,020

Current COVID Data in New York – July 4, 2022

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	4,495	23	+21%	12%	12	+6%	17.3	0.09
New York City >	3,616	43	+19%	12%	14	+14%	10.6	0.13
Nassau >	525	39	+12%	12%	27	+6%	1.4	0.11
Westchester >	332	34	+20%	12%	15	+11%	0.6	0.06
Suffolk >	490	33	+19%	10%	15	+6%	1.1	0.08
Putnam >	31	31	+30%	14%	6	-15%	0	—
Orange >	113	29	+34%	12%	9	-14%	0.2	0.05
Rockland >	94	29	+15%	6%	5	-3%	0.2	0.05
Sullivan >	19	26	+35%	9%	11	+12%	0	—
Dutchess >	73	25	+25%	14%	7	+3%	0.2	0.08
Columbia >	15	25	+55%	15%	14	-8%	0.2	0.37

SCOTUS Changes Landscape for Mandatory Arbitration Agreements with Individual Employees



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Badgerow v. Walters, 142 S.Ct. 1310 (March 31, 2022)

- Scope of jurisdiction over cases arising under the Federal Arbitration Act (“FAA”)
 - “look-through approach” versus strict interpretation of the FAA
 - Practical Impact:
 - Employer can bring a motion to compel arbitration in federal court under Sec. 4 of the FAA
 - **BUT**, Employer **cannot** bring a motion to vacate or enforce an arbitration award in federal court under Sec. 9 or Sec. 10 of the FAA.

Southwest Airlines v. Saxon, 142 S.Ct. 1783 (June 6, 2022)

- Scope of FAA's exemption for "seamen, railroad employees and any other class of workers engaged in foreign or interstate commerce"
- Plaintiff was a ramp supervisor who physically loaded and unloaded cargo planes at Chicago Midway Airport
- Issue: Is the employee a "transportation worker" who plays a "direct and necessary role in the free flow of goods across borders"?

Southwest Airlines v. Saxon, 142 S.Ct. 1783 (June 6, 2022)

- Southwest’s argument: employee needed to fly with the goods across state lines to be and exempt “transportation worker”
- Plaintiff’s argument: any employee “who carries out the customary work of an airline”
- SCOTUS rejected both arguments
- Practical impact: There is no bright line delineating who is or is not an exempted “transportation worker”

Viking River Cruises, Inc. v. Moriana, 142 S.Ct. 1906 (June 15, 2022)

- Question was whether CA Private Attorney General Act (“PAGA”) claims were subject to mandatory arbitration.
- California Supreme Court decided PAGA claims could not be subject to pre-suit mandatory arbitration.
- SCOTUS disagreed: CA rule preempted by FAA

Employee Benefits Implications Following Dobbs



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Considerations

- Some employers are responding to the *Dobbs* decision by considering whether to make certain benefits available to employees in states in which abortion is now illegal to assist in obtaining abortion-related care.
- Factors to consider to determine what, if any, benefits can be offered:
 - Whether the employer's group health plan is self-funded or fully insured
 - Potential self-funded benefit integrated with a fully insured plan
 - Applicable state law
 - Applicable benefits and tax legal requirements
 - Third-parties to consult regarding the administration of any such benefits
- Examples of potential benefits that may be offered

Post-COVID Absenteeism Issues



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Post-COVID Absenteeism Issues

- Hypothetical: John Jones started working for XYZ Corp. three weeks ago. He has already called in sick six times. Last week, he called out of work for three days because he was experiencing COVID-like symptoms. What can XYZ Corp. do?

Post-COVID Absenteeism Issues

- Handbook/Policies
- Statutory Concerns
- Handling Issues

Handbook/Policies

- Probationary Period?
- Sick Leave
 - NY Paid Sick Leave Law
 - Is leave frontloaded?
- PTO Policy
- Other Leave Policies

Statutory Concerns

- Family Medical Leave Act (FMLA)
 - Eligibility
 - Worked for employer for at least 12 months; and
 - Worked for employer for at least 1,250 hours in the 12 months before taking leave; and
 - Work at a location where employer has at least 50 employees with 75 miles of worksite

Statutory Concerns

- FMLA Continued

- Basis for Leave

- Birth of child or care of newborn child;
 - Placement of son or daughter for adoption or foster care;
 - Care for spouse, child or parent with serious health condition;
 - A serious health condition that makes you unable to do your job;
 - Any urgent need from the fact that your spouse, child or parent in the Armed Forces is on active duty or has been notified of an upcoming call to active duty

Statutory Concerns

- FMLA Continued
 - Benefits available
 - Up to 12 weeks of unpaid, job protected leave
 - Does not have to be taken in one block

Statutory Concerns

- Americans with Disabilities Act (ADA)
 - Eligibility
 - Employer must provide a **reasonable accommodation** to **qualified individuals** with **disabilities** who are employees or applicants for employment, unless to do so would cause **undue hardship**

Statutory Concerns

- ADA Continued

- An individual with a disability is a person who:

- has a physical or mental impairment that substantially limits one or more of his/her major life activities;

- has a record of such an impairment; or

- is regarded/perceived as having such an impairment

Statutory Concerns

- ADA Continued
 - Duty to make reasonable accommodations
 - The ADA requires reasonable accommodations to the known physical or mental limitations of a qualified applicant or employee as a means of overcoming unnecessary barriers that prevent or restrict employment opportunities for otherwise qualified individuals with disabilities, unless it is shown that the accommodations would impose an undue hardship

Statutory Concerns

- ADA Continued

- The interactive process

- The ADA requires an interactive process whereby employers and employees work together to assess whether an employee's disability can be reasonably accommodated
- Can ask for documentation if the disability or need for accommodation is not obvious
- Can only require the documentation that is needed to establish:
 - That the individual has a disability; and
 - That the disability requires an accommodation

Statutory Concerns

- New York Human Rights Law (NYHRL)
 - Also requires accommodation of “disability” or “pregnancy-related condition”
 - More broad definition of disability than the ADA
 - Specific regulation regarding accommodation of “temporary disabilities”

Statutory Concerns

- New York COVID Leave Law

- Public and private employers
- Employers must provide up to 14 days of paid leave, depending on size
- Employees subject to a mandatory or precautionary order of isolation OR quarantine issued by the State of NY, Department of Health, or any governmental entity authorized to issue a quarantine order
- Job protection
- Cannot be charged against other leave, including sick leave
- Amount the worker would have otherwise received during period (5 or 14 days)
- No expiration

Statutory Concerns

- New York COVID Leave Law Continued
 - Leave available up to 3 times
 - Second and Third must be due to positive test
 - *If employer mandates an employee who is not otherwise subject to a mandatory or precautionary order of quarantine to remain out of work due to exposure or potential exposure, employer must continue to pay regular rate of pay UNTIL the employer permits the employee to return to work or the employee becomes subject to a quarantine order. Employer must then pay for the full amount required during the order

Hypothetical

- FMLA – Not applicable
- NY COVID Leave Law – Not applicable
- Policy/NY Paid Sick Leave Law
 - Accrual method for first year?
- ADA/NYHRL – possible need to accommodate.
Gather more information

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Employee Benefits Implications Following Dobbs

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Post-COVID Absenteeism Issues

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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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