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Introduction



Adam P. Mastroleo

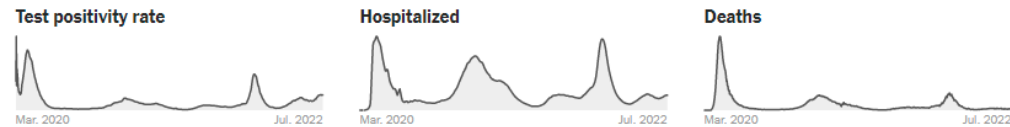
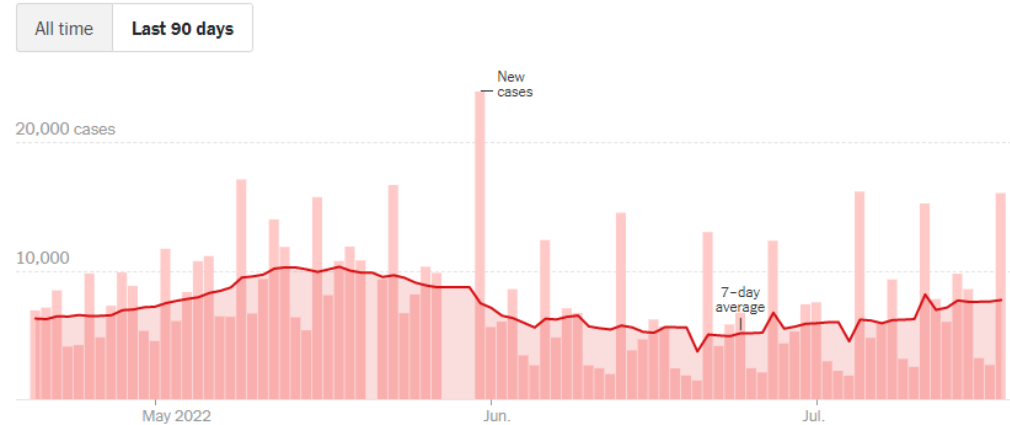
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Current COVID Data in New York

New reported cases



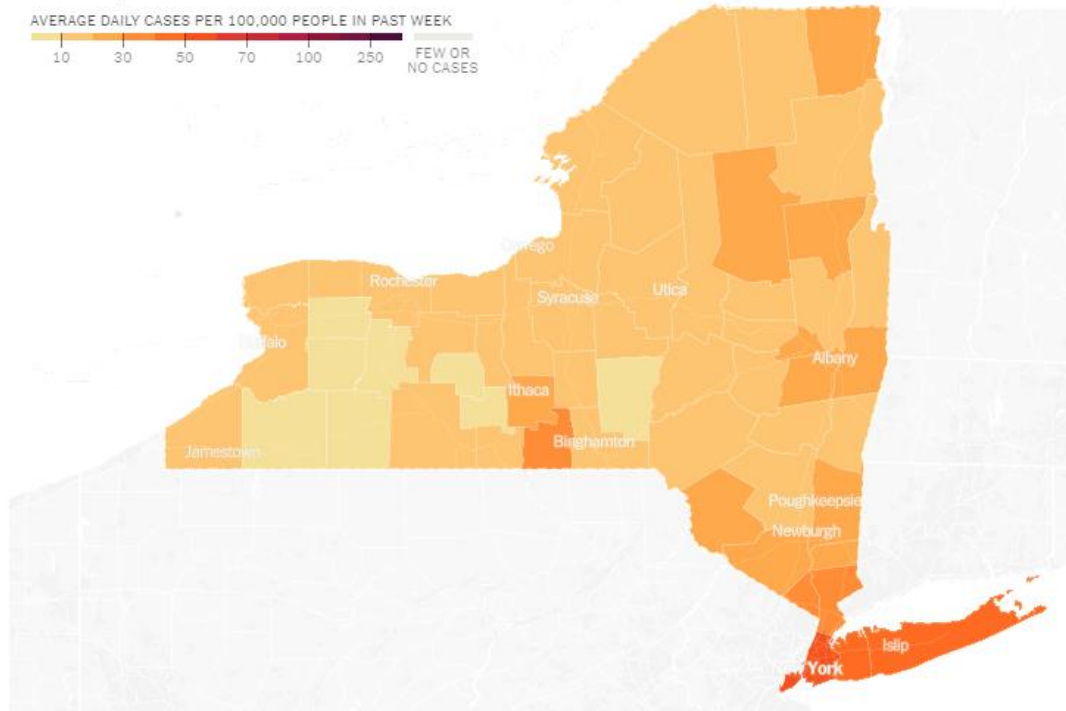
	DAILY AVG. ON JUL. 18	14-DAY CHANGE	TOTAL REPORTED
Cases	7,712	+72%	5,722,320
Test positivity	13%	—	—
Hospitalized	2,773	+17%	—
In I.C.U.s	248	+10%	—
Deaths	18	+5%	69,268

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	7,712	40	+72%	13%	14	+17%	18.1	0.09
New York City >	4,786	57	+32%	14%	18	+25%	9.4	0.11
Nassau >	666	49	+27%	16%	33	+23%	1.8	0.13
Suffolk >	633	43	+29%	13%	17	+13%	0.8	0.05
Westchester >	356	37	+7%	14%	18	+25%	0.9	0.09
Rockland >	104	32	+11%	10%	7	+24%	0.3	0.08
Tioga >	15	31	+316%	7%	6	-37%	0	—
Warren >	19	29	+56%	10%	7	+7%	0	—
Orange >	106	27	-7%	11%	10	+20%	0.6	0.14
Putnam >	25	26	-18%	14%	10	+66%	0	—
Dutchess >	75	25	+2%	17%	10	+42%	0.2	0.07

New York Gun Legislation and Its Impact on Employers



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New York's Regulation of Private Gun Ownership

- Since 1911, New York has prohibited the unlicensed possession of firearms
- To possess a firearm inside a home or business, individuals are required to demonstrate, among other things, that they are of good moral character, have no history of crime or mental illness, and that no good cause exists for denying them a license

New York's Regulation of Private Gun Ownership

- Until recently, to conceal and carry a firearm for self-defense outside their home or business, individuals were required to demonstrate “proper cause” for them to have such license
- “Proper cause” required a special need for self-protection different from that of members of the general public, such as specific threats, attacks, or other extraordinary dangers to personal safety
- Without “proper cause,” individuals could get a restricted license allowing them to publicly carry a firearm for specified reasons, such as hunting, target shooting or employment

New York State Rifle & Pistol Association, Inc. v. Bruen

- In *Bruen*, two Rensselaer County residents with a general interest in self-defense and who were denied “concealed carry” permits challenged New York’s “proper cause” standard
- SCOTUS held that the “proper cause” standard was an unconstitutional restriction on individuals’ Second Amendment rights
- Recognized that guns could be prohibited in certain “sensitive areas,” but declined to define what constitutes a sensitive area and cautioned that Manhattan could not categorically be defined as a sensitive area

New York's New Gun Control Legislation

- On July 1, 2022, Gov. Hochul signed new legislation in response to the *Bruen* decision
- The legislation prohibits individuals from carrying firearms in “sensitive locations”:
 - Government buildings, healthcare facilities, religious institutions, casinos, libraries, public parks, schools, or colleges, and on public transportation and anywhere licensed to serve alcohol or cannabis

New York's New Gun Control Legislation, cont.

- The law also prohibits the possession of a firearm in a “restricted area”:
 - Private property
 - Where the owner has not posted clear and conspicuous signage indicating that the possession of firearms is permitted
 - Or otherwise given express consent allowing the possession of firearms
- Certain individuals are exempt from this prohibition, including current and retired law enforcement officers, peace officers, security guards, with proper licensing, and active-duty servicemembers

Thoughts for Employers and Business Owners

- Review workplace violence policies and consider workplace violence training
- Consider reminding employees of workplace violence policies and policies regarding the possession of firearms in the workplace
- For businesses and property owners considering allowing the possession of firearms on the property, evaluate the potential risks and take appropriate actions to minimize them
- Watch for potential challenges to the law

New York Isolation and Quarantine Regulation Decision



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Updated EEOC Guidance Regarding COVID Testing



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Updated EEOC Guidance Regarding COVID-19 in the Workplace

- July 12, 2022 – EEOC updates several aspects of its “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” guidance
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Highlight most notable updates

COVID-19 Screening and Testing

- COVID-19 Viral Test is a “medical examination” within the meaning of the ADA → Employers may only require such screening or testing if it is “job-related and consistent with business necessity”
 - **Will satisfy business necessity if testing is done consistent with CDC, FDA, and/or state/local public health authorities guidance that is current at the time of testing**
 - Considerations to meet business necessity standard: *level of community transmission, vaccination status of employees, accuracy and speed of processing for different types of COVID-19 viral tests, degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations, ease of transmissibility of the current variant(s), possible severity of illness from the current variant, what types of contacts employees may have with others in the workplace or elsewhere they are required to work (e.g., working with medically vulnerable individuals), and potential impact on operations if an employee enters the workplace with COVID-19*
 - Encourages employers to check latest CDC, FDA, or state or local health agency guidance at time of testing

Disability Related Inquiries and Medical Examinations

- Employer can ask employees returning to work for note from employee's doctor that it is safe for them to return to work and employee is able to perform job duties, but employers can also follow CDC guidance regarding whether it is safe for employee to return to work without confirmation from medical professional
- Employers cannot require antibody tests to return to work/screening because they will not meet the “business necessity” standard
 - Not determinative of whether employee has current infection or not

Hiring and Onboarding

- Employer can screen applicants for symptoms of COVID-19 after making conditional offer as long as it does so for all employees entering same type of job
 - **Added clarification:** if employer screens everyone in worksite prior to entering (employees, contractors, applicants) and applicant must be in worksite as part of application process, applicant may be screened as well
 - Employer cannot go beyond this screening as that will be unlawful pre-employment medical examination

Hiring and Onboarding

- **May an employer withdraw a job offer when it needs an applicant to start working immediately, whether at the worksite or in the physical presence of others outside of the worksite, because the individual has tested positive for the virus that causes COVID-19, has symptoms of COVID-19, or has been exposed recently to someone with COVID-19?**
 - Employer should consult CDC guidance that explains when and how it would be safe for individual with COVID-19, symptoms of COVID-19, or exposure to COVID-19 to end isolation or quarantine and thus enter the workplace in the physical presence of others
 - **Employer who follows CDC guidance may withdraw the job offer if:**
 - Job requires immediate start date
 - CDC guidance recommends that person not be in proximity to others; **and**
 - Job requires such proximity to others, whether at the workplace or elsewhere
 - Note that some individuals may only require short period of isolation/quarantine and employers may be able to adjust start date or permit telework

Hiring and Onboarding

- **May an employer postpone the start date or withdraw a job offer because of the employer’s concern that the individual is older, pregnant, or has an underlying medical condition that puts the individual at increased risk from COVID-19?**
 - No– concern for well-being of the individual is not basis for discrimination on basis of age, pregnancy, disability, etc.
 - If an underlying medical condition is a disability the employer must determine whether the individual’s disability poses a “direct threat” by starting work immediate, and if so, if there is a reasonable accommodation that can be provided to sufficiently lessen or eliminate any risks without causing undue hardship

Age

- ADEA prohibits employers from discriminating against employees on the basis of age (40+)
- Employer cannot involuntarily exclude older worker because they believe to be protecting them due to higher risk of severe illness from COVID-19
- Notably, guidance provides that ADEA does not include right to reasonable accommodation due to age, but employers are free to provide flexibility to older workers “even if it results in younger workers being treated less favorably”
 - NOTE: NYS age discrimination prohibition applies to 18+

Delays in Interactive Process

- **Pandemic might result in excusable delays during interactive process but...**
 - A lot of issues initially created by pandemic that delayed interactive process no longer exist
 - Acknowledging that circumstances can still change as pandemic evolves
 - Reopening workplace may bring higher number of requests for reasonable accommodation
 - Employer must show specific pandemic related circumstances that justified the delay in providing reasonable accommodation that employee was legally entitled to
 - Employers encouraged to use interim solutions to enable employees to continue working as much as possible

Return to the Workplace

- **Can employer require PPE?**
 - Yes, in most instances, EEO laws permit employer to require employees to wear PPE and observe other infection control practices
 - **Added: some requirements may be necessary to comply with OSHA regulations; OSHA regs do not prohibit use of reasonable accommodations under EEO as long as the accommodations do not violate OSHA regs**
 - Regardless of reason employer requires PPE, employer must engage in interactive process to evaluate requests for accommodation to use of PPE (whether for medical or sincerely held religious beliefs, observations, or practices) and if it does not cause an undue hardship o the operations of the employer's business under the ADA or Title VII, it must provide the accommodation

Return to the Workplace

- **CDC identifies a number of medical conditions that are more likely to cause people to get severely ill if they get COVID-19. An employer knows that an employee has one of these conditions and is concerned that the employee's health will be jeopardized upon returning to the workplace, but the employee has not requested accommodation. How does the ADA apply to this situation?**
- ADA does not require employer to take action if the employee has not requested a reasonable accommodation// employee must request accommodation (or a third party on their behalf like their doctor) → triggers interactive process obligations
 - Duty to provide reasonable accommodation only applies if the employee has an actual disability or a record of a disability as defined in the ADA
 - **Not every individual with one of the medical conditions will automatically satisfy the ADA definition of disability**
 - Assuming employee has disability, employer cannot exclude employee or take adverse action because the employee has a disability that the CDC identifies as potentially placing employee at higher risk for severe illness from COVID-19 (even if employer means well and is concerned about well-being of employee)
 - **Direct threat analysis – high standard** that requires employer to show that the individual has a disability that poses a significant risk of substantial harm to the employee's own health or safety, or that of others in the workplace.
 - This cannot be met based solely on the disability being identified by CDC guidance
 - Must be individualized assessment based on reasonable medical judgment about this particular employee's disability (not the disability in general) using the most current medical knowledge and/or best available objective evidence
 - Consider: duration of risk, nature and severity of potential harm, likelihood potential harm will occur, and imminence of potential harm
 - Also consider: severity of the pandemic in that particular area, employee's own health, and employee's particular job duties, whether employee is "up to date" on vaccinations, likelihood employee would be exposed to virus at work
 - Even if employer determines there is a direct threat, employer must still consider whether a reasonable accommodation can be provided, and the answer to this must be no, before excluding employee or taking other adverse action

Return to the Workplace

- **Examples of reasonable accommodation that, absent undue hardship, may eliminate (or reduce to an acceptable level) a direct threat to self or others?**
 - *Additional or enhanced PPE (protective gowns, masks, gloves, or other gear beyond what is normally provided)*
 - *HEP filtration systems/units or other enhanced air filtration measures*
 - *Barriers for separation between employee and co-workers/public*
 - *Social distancing/spacing between employee and others*
 - *Elimination or substitution of marginal functions*
 - *Telework, modification of work schedules (that would decrease contact with co-workers/public when on duty or commuting)*
 - *Moving location of where employee performs work*

COVID-19 Vaccinations

- Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees to be vaccinated against COVID-19?
- Federal EEO laws do not prevent an employer from requiring all employees to be vaccinated against COVID-19 subject to reasonable accommodation provisions (disability and sincerely held religious beliefs)
 - If employer requires vaccinations, EEO laws do not prevent employers from requiring documentation or other confirmation that employees are **up to date** on their vaccinations (but some exceptions may be required for some employees based on ADA/Title VII)
 - Noting that employers should be mindful of allegations or impact that the vaccination requirement has a disparate impact or disproportionately excludes employees based on protected classes (race, color, religion, sex, national origin, age, etc.); employers should keep in mind that because some individuals or demographic groups may face barriers to receiving a COVID-19 vaccine, some employees may be more likely to be negatively impacted by a vaccination requirement
 - It would also be unlawful to apply vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation, and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason

The ADA and COVID-19 Vaccinations

- **Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?**
- Yes, ADA requires employer to maintain employee medical information confidential
 - EEO laws do not prevent employers from requiring employees to provide documentation or other confirmation of vaccination, but information must be kept confidential and stored separately from employee's personnel file
 - Employer may share confidential medical information (such as vaccination status or COVID-19 test results) with employees who need it to perform job duties
 - **Examples provided:**
 - Administrative employee assigned to perform recordkeeping of employee vaccination information may receive needed access to this information, but must keep this information confidential
 - Employee assigned to permit building entry only by employees who are in compliance with work restriction (e.g., COVID-19 vaccination, testing, masking) can receive list of employees who are permitted or not permitted to enter, but not any medical information about why they are on the list
 - Employee tasked with ensuring compliance with testing requirement for employees would need to review testing documentation but must keep that information confidential

The ADA and COVID-19 Vaccinations

- **May an employer require an employee to comply with a COVID-19 vaccination requirement applicable to all employees entering the workplace if that employee has sought an exemption based on disability?**
 - Employer may require individual with a disability to meet a qualification standard applied to all employees, such as a safety related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity as applied to that employee.
 - Employer does not have show that a qualification standard in general (as applied to all employees) meets the business necessity standard; under the ADA it must satisfy this standard only as applied to an employee who informs the employer that a disability prevents compliance. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others while performing their job.
 - Two step process: (1) determine whether there is a direct threat (significant risk of substantial harm) and, if yes, (2) assess whether a reasonable accommodation would reduce or eliminate that threat

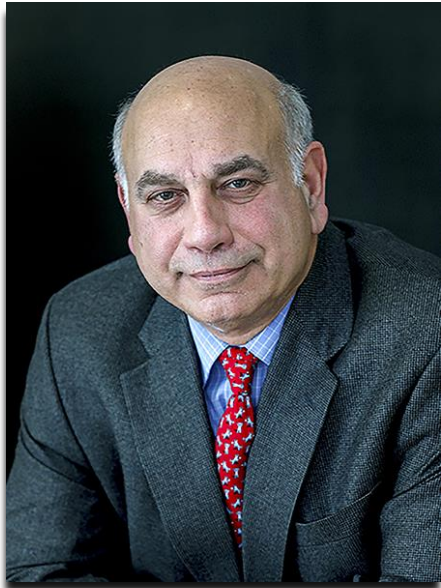
Continued... Direct Threat Analysis

- *To determine if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an **individualized** assessment of the employee’s present ability to safely perform the essential functions of the job. The factors that make up this assessment are:
 - (1) *the duration of the risk;*
 - (2) *the nature and severity of the potential harm;*
 - (3) *the likelihood that the potential harm will occur; and*
 - (4) *the imminence of the potential harm.**
- *The determination that a particular employee poses a direct threat should be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Such medical knowledge may include, for example, the level of community spread at the time of the assessment. Statements from the CDC provide an important source of current medical knowledge about COVID-19, and the employee’s health care provider, with the employee’s consent, also may provide useful information about the employee.*
- *Assessment of direct threat should take account of the type of work environment, such as:*
 - *whether the employee works alone or with others or works inside or outside;*
 - *available ventilation;*
 - *frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees;*
 - *number of partially or fully vaccinated individuals already in the workplace;*
 - *whether other employees are wearing masks or undergoing routine screening testing; and*
 - *the space available for social distancing.*

Employer Incentives for COVID-19 Voluntary Vaccinations Under ADA and GINA

- ADA does not limit employer incentives for voluntary vaccination (which includes both rewards and penalties) an employer may offer to encourage employees to voluntarily receive a COVID-19 vaccination, or to provide confirmation of vaccination, if the health care provider administering a COVID-19 vaccine is not the employer or its agent.
 - By contrast, if an employer offers an incentive to employees to voluntarily receive a vaccination administered by the employer or its agent, the ADA's rules on disability-related inquiries apply and the value of the incentive may not be so substantial as to be coercive.

The Faithless Servant Doctrine



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Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine”
 - One who owes a duty of loyalty to a principal and who is faithless in the performance of his/her services for such principal is generally not entitled to be compensated for his services even if the principal “suffered no provable damage as a result of the breach.” *Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 928-29 (1977)
 - Common law doctrine derives from 1886 New York Court of Appeals decision

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - Useful in the private and public sector
 - Doctrine requires that an employee forfeit the compensation paid by an employer during the period when the employee was disloyal to the employer
 - Forfeiture includes salary and even health/life insurance benefits (including into retirement)
 - Early court decisions limited the scope of forfeiture to not only the period of disloyalty, but also to specific acts of disloyalty

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - *William Floyd Union Free School District v. Wright*, 61 A.D.3d 856 (2d Dep’t 2009)
 - 2 former employees (Asst. to the Superintendent for Business and Asst. Superintendent of Business) steal upwards of \$1 million from the District
 - Employees engage in fraudulent transactions with District funds, including, literally, writing checks to themselves
 - Both individuals pled guilty to criminal charges, including grand larceny

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - Pursuant to employments contracts, both employees were to receive life and health insurance into retirement
 - The District’s obligation to pay these benefits for individuals who stole offended all notions of fairness and justice!
 - BS&K filed a complaint in Supreme Court – Suffolk County seeking recovery of not just the stolen funds, but also of all salary and benefits paid to the former employees after the initial thefts and all post-retirement benefits they would have been entitled to under their employment contracts

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - BS&K and the District partially prevailed at the Supreme Court level on summary judgment, but the District did not give up and appealed to the Second Department
 - The Second Department decision resulted in a complete victory for the District and is believed to be the first time the Doctrine was extended to forfeiture of post-retirement benefits

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - The Second Department held that because the employees had engaged in repeated acts of disloyalty, a “complete and permanent forfeiture” of their compensation, including post-retirement benefits, was warranted
 - As a result, the employees forfeited compensation as of the first act of disloyalty and all health/life insurance into retirement
 - Total judgment for District = approx. \$1.6 million

Faithless Servant Doctrine

- New York’s “Faithless Servant Doctrine” (cont.)
 - The Doctrine since *William Floyd UFSD v. Wright*
 - *Astra USA, Inc. v. Bildman*, 455 Mass. 116 (2009)
 - Former CEO engaged in repeated sexual harassment of employees which resulted in numerous charges and settlements during his tenure
 - Astra, Inc. sues former CEO for fraud, breach of fiduciary duty, and breach of duty of good-faith and loyalty, and invoked the Doctrine.
 - Case goes to Supreme Judicial Court (highest court in Massachusetts), using New York law, and Astra, Inc. prevails
 - Court cites *Williams Floyd UFSD v. Wright*, holding that complete forfeiture of compensation was warranted for repeated acts of disloyalty

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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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