

BUSINESS IN

2022

WEEKLY WEBINAR SERIES

2023

2021

2020

2019



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Introduction



Adam P. Mastroleo

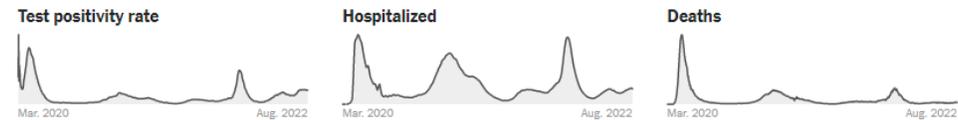
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Current COVID Data in New York

New reported cases



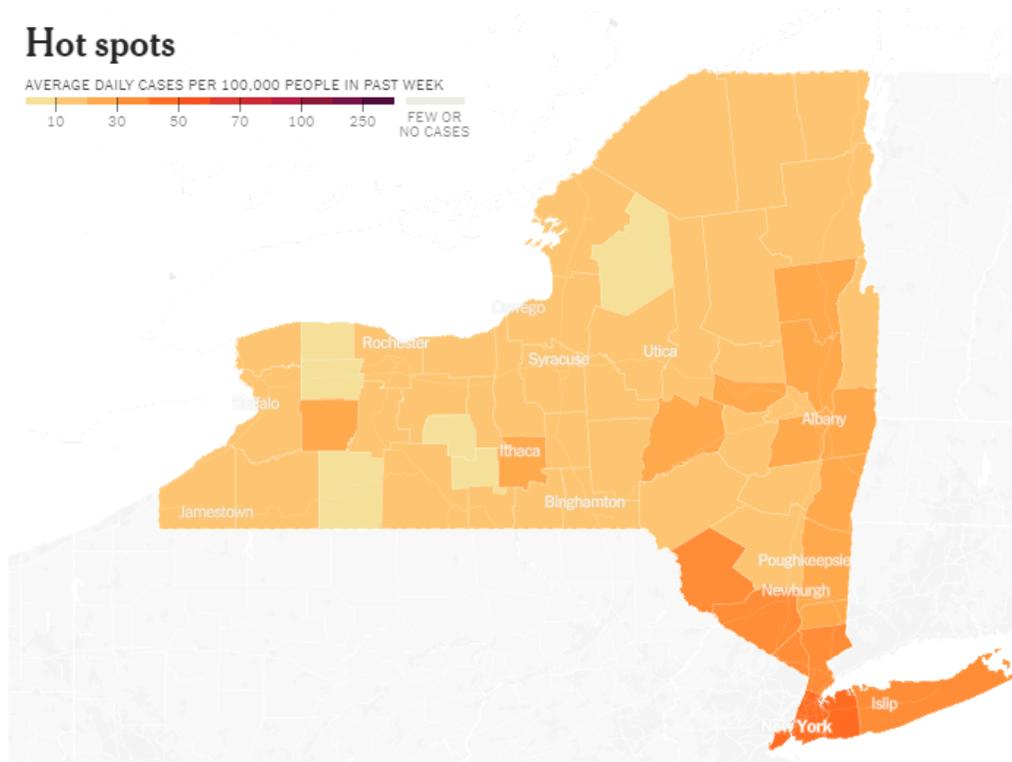
	DAILY AVG. ON AUG. 1	14-DAY CHANGE	TOTAL REPORTED
Cases	6,775	-12%	5,821,036
Test positivity	13%	—	—
Hospitalized	3,012	+4%	—
In I.C.U.s	289	+7%	—
Deaths	28	+52%	69,628

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	6,775	35	-12%	13%	15	+4%	27.6	0.14
New York City >	3,921	47	-18%	14%	20	+13%	16.7	0.20
Nassau >	557	41	-16%	15%	37	+11%	1.3	0.09
Suffolk >	557	38	-12%	13%	19	+10%	1.9	0.13
Sullivan >	26	34	+38%	15%	16	+20%	0	—
Orange >	130	34	+23%	14%	15	+47%	0.2	0.05
Westchester >	315	33	-11%	14%	17	-5%	0.6	0.06
Rockland >	102	31	-2%	10%	9	+35%	0.4	0.14
Putnam >	28	29	+13%	15%	11	+10%	0.1	0.15
Tompkins >	29	29	+41%	11%	16	+77%	0.1	0.14
Dutchess >	82	28	+10%	16%	10	-3%	0.3	0.10

Current COVID Data in New York

May 9, 2022

	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	9,460	49	+46%	13	+31%	18	0.09
Tompkins >	77	76	+25%	27	+74%	0.1	0.14
Warren >	45	70	+110%	9	+30%	0.1	0.17
Erie >	641	70	+31%	17	+110%	1.9	0.2
Schenectady >	94	60	+59%	7	+43%	0.3	0.18
Tioga >	29	60	+3%	29	+76%	0.1	0.3
Saratoga >	138	60	+51%	11	+74%	0.2	0.08
Oneida >	135	59	-5%	16	+4%	0.6	0.27
Nassau >	800	59	+75%	17	+18%	0.6	0.05
Steuben >	54	57	+79%	12	+86%	0.3	0.3
Albany >	167	55	+44%	15	+41%	0.2	0.07

August 2, 2022

	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	6,775	35	-12%	13%	15	+4%	27.6	0.14
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Accommodations Related to Vaccine Mandates



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Accommodations Due to Vaccine Concerns

- General Principles
 - Reasonable accommodation of known disabilities under the ADA
 - Accommodation of sincerely held religious beliefs under Title VII
 - State law obligations in both areas should be examined as well
- Simple options – social distancing, masking, reduced workplace density, video calls instead of meeting
- More complicated options – work exclusively from home, changed job duties, requests that impact others

Vaccines Mandates

- Government mandates
- Employer mandates
- Requests for accommodation of medical conditions
 - Evaluate the condition
 - Determine if the vaccine is contraindicated by the condition
 - If so, examine accommodations – waiver, masking, testing, etc.
 - Evaluate if the condition may change and vaccine could be appropriate
- Requests for accommodation of religious conditions
 - De minimis burden standard
 - Sincerely held religious belief
 - If required, examine accommodations – waiver, masking, testing, etc.

New EEOC Testing Guidance

- Job Related and Consistent with Business Necessity Standard
- Standard to be evaluated “consistent with guidance from Centers for Disease Control and Prevention (CDC), Food and Drug Administration (FDA), and/or state/local public health authorities that is current at the time of testing”
- Factors to be considered:
 - the level of community transmission,
 - the vaccination status of employees,
 - the accuracy and speed of processing for different types of COVID-19 viral tests,
 - the degree to which breakthrough infections are possible for employees who are “up to date” on vaccinations,
 - the ease of transmissibility of the current variant(s),
 - the possible severity of illness from the current variant,
 - what types of contacts employees may have with others in the workplace or elsewhere that they are required to work (e.g., working with medically vulnerable individuals), and
 - the potential impact on operations if an employee enters the workplace with COVID-19.

Vaccines Approved by the FDA

- Johnson & Johnson/Jansen – viral vector (mRNA (no eggs, preservatives, latex, metals)
- Moderna -- mRNA (no eggs, preservatives, latex, metals)
- Pfizer-BioNTech (COMIRNATY) – mRNA (no eggs, preservatives, latex, metals)
- Novavax -- Protein subunit (no eggs, preservatives, latex, metals)

New York's School Vaccination Requirements: Update on Legal Challenges to 2019 Amendments



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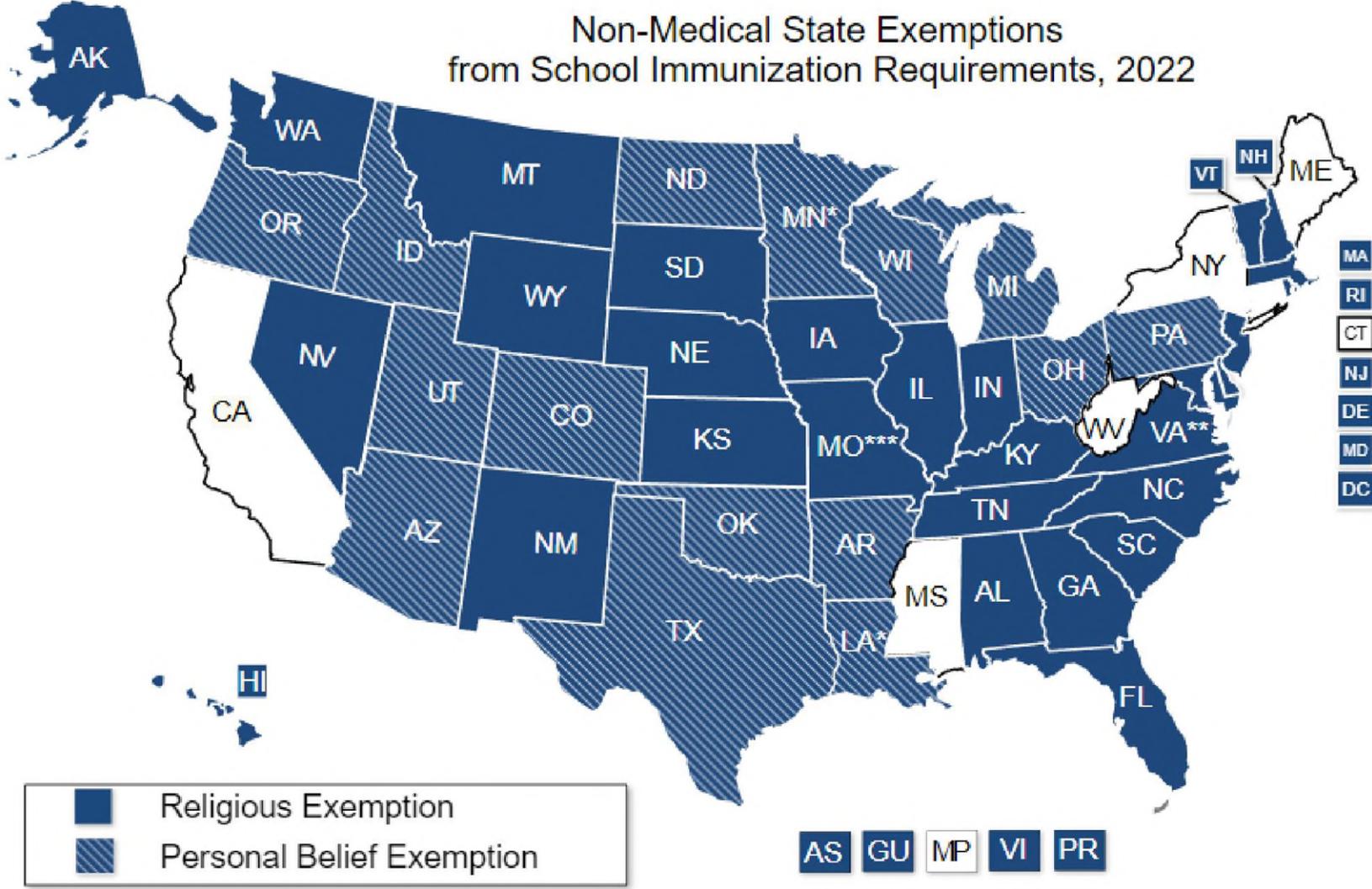
2019 Amendments to Vaccination Law

- Pre-2019 Statute:
 - Mandatory vaccinations for all students (2 months –18 yo) who attend schools (public, private, parochial, day care centers, nursery schools, etc.)
 - Two Exceptions:
 - Medical Exemptions: Physician submits signed written statement
 - Religious Exemptions: “Genuine and sincere religious beliefs”
- 2019 Statutory Amendments:
 - Intention and Impact: increase in number of vaccinated students:
 - Stricter criteria/process for Medical Exemptions
 - Eliminated Religious Exemptions

Legal Challenges: Religious Exemption

- Religious exemptions had been in place since 1966
- NY State and Federal Constitutional challenges in NY State Supreme Court
 - Religious discrimination
 - Free exercise clause of the First Amendment
- Court: free exercise does not mean a person can violate a valid and neutral law of general applicability:
 - U.S. Supreme Court (*Prince v. Mass.*, 1944): A parent “cannot claim freedom from compulsory vaccination...on religious grounds. The right to practice religion freely does not include liberty to expose the community or child to communicable diseases or...ill health or death.”
 - Second Circuit (*Phillips v. City of NY*, 2015): New York could require vaccines for all children, but “goes above and beyond” what the Constitution requires by allowing religious exemption.

Non-Medical State Exemptions from School Immunization Requirements, 2022



2019 Medical Exemption Requirements

- State licensed physician certifies that a child has a medical contraindication or precaution to a specific vaccination
- Request must “contain sufficient information to identify a medical contraindication to a specific immunization and specify the length of time the immunization is medically contraindicated”
- Specific form must be used by physician
- Must follow guidelines of Advisory Committee on Immunization Practices (“ACIP”) (falls under the CDC) or “other nationally recognized evidence-based standards of care”

Immunization Requirements for School Attendance Medical Exemption Statement for Children 0-18 Years of Age

NOTE: THIS EXEMPTION FORM APPLIES ONLY TO IMMUNIZATIONS REQUIRED FOR SCHOOL ATTENDANCE

Instructions:

1. Complete information (name, DOB etc).
2. Indicate which vaccine(s) the medical exemption is referring to.
3. Complete contraindication/precaution information.
4. Complete date exemption ends, if applicable.
5. Complete medical provider information. Retain copy for file. Return original to facility or person requesting form.

-
1. Patient's Name _____
 2. Patient's Date of Birth _____
 3. Patient's Address _____
 4. Name of Educational Institution _____
-

Guidance for medical exemptions for vaccination can be obtained from the contraindications, indications, and precautions described in the vaccine manufacturers' package insert and by the most recent recommendations of the Advisory Committee on Immunization Practices (ACIP) available in the Centers for Disease Control and Prevention publication, Guide to Vaccine Contraindications and Precautions. This guide can be found at the following website: <http://www.cdc.gov/vaccines/recs/vac-admin/contraindications.htm>.

Please indicate which vaccine(s) the medical exemption is referring to:

- | | |
|---|---|
| <input type="checkbox"/> Haemophilus Influenzae type b (Hib) | <input type="checkbox"/> Measles, Mumps, and Rubella (MMR) |
| <input type="checkbox"/> Polio (IPV or OPV) | <input type="checkbox"/> Varicella (Chickenpox) |
| <input type="checkbox"/> Hepatitis B (Hep B) | <input type="checkbox"/> Pneumococcal Conjugate Vaccine (PCV) |
| <input type="checkbox"/> Tetanus, Diphtheria, Pertussis (DTaP, DTP, Tdap) | <input type="checkbox"/> Meningococcal Vaccine (MenACWY) |

Please describe the patient's contraindication(s)/precaution(s) here: _____

Date exemption ends (if applicable) _____

A New York State licensed physician must complete this medical exemption statement and provide their information below:

Name (print) _____ NYS Medical License # _____

Address _____

Telephone _____

Signature _____ Date _____

For Institution Use ONLY: Medical Exemption Status Accepted Not Accepted Date: _____

ACIP Definitions

- **Contraindication:**
 - A condition that “increases the risk for a serious adverse reaction”
 - Examples:
 - Being severely immunocompromised
 - Having an immunodeficiency disease
 - Severe allergic reaction after previous dose
- **Precaution:**
 - A condition that “might increase the risk for a serious adverse reaction, might cause diagnostic confusion, or might compromise the ability of the vaccine to produce immunity”
 - Examples:
 - Moderate or severe acute illness
 - Personal or family history of seizures

Legal Challenges: Medical Exemption

- Requests that were denied by school officials because:
 - Lacked sufficient detail
 - Did not meet ACIP guidelines
 - Submitted on wrong form
- U.S. District Court Claims:
 - Fourteenth Amendment (Due Process):
 - Substantive due process rights
 - “Liberty interest in parenting”
 - “Liberty interest in informed consent”
 - “Burdening minor’s right to pursue education”
 - Rehabilitation Act (Disability Discrimination)
- District Court granted defendants’ motion to dismiss
- Second Circuit reviewed “*de novo*” and affirmed District Court’s decision:
Goe v. Zucker, 2022 WL 3007919, July 29, 2022

Due Process Holdings

- Right to education is not a fundamental right
- Court rejected parents' argument that there is a "fundamental right to seek a medical exemption...based solely on the recommendation – or say – so" – of physician
- New regulations narrow availability of exemption, but still allow for medical exemption (but clarify *when* an exemption is appropriate (ACIP) and *how* parents may seek exemption (form))
- Regulations "seek to ensure that the risk of harm to a child from a vaccine is genuine"
- Affirmed school officials' "broad discretion" to enforce health laws (and parent can appeal to Commissioner or bring Article 78)

Rehabilitation Act Holdings

- Plaintiffs argued disparate treatment, disparate impact, and failure to make a reasonable accommodation
- Court found complaint failed to allege exclusion from federally funded program "solely by reason of...disability"
 - All students must comply; not just disabled students
 - New regulations do not bar students from school because of their disabilities because students with actual medical need will be granted exemption
 - Here, students were excluded, not because of their disability, but because their parents failed to comply with new procedures

Discipline and Discharge Overview



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New York's Employment-At-Will Doctrine

- General Rule:
 - Absent an employment contract for a definite duration or a collective bargaining agreement, an employer may terminate an employee for any reason or for no reason

New York's Employment-At-Will Doctrine

- Exception:
 - An employer may terminate an employee for any reason or for no reason, as long as it is not an illegal reason

New York's Employment-At-Will Doctrine

- Illegal Reasons Include:

Age (ADEA, HRL)

Criminal History (HRL/EOL)

Disability (ADA, HRL)

Marital Status (HRL)

National Origin (Title VII, HRL)

Race/Color (Title VII, HRL)

Religion/Creed (Title VII, HRL)

Sex/Pregnancy (Title VII, PDA, HRL)

Sexual Orientation (Title VII, HRL)

Outside Political Activities

Other Lawful Outside Activities

Retaliation for:

Union support/activity (NLRA)

Other concerted activity (NLRA)

Whistleblowing (Federal/State)

Alleging Discrimination (ADA, ADEA)

Family/Medical Leave (FMLA)

Workers' Compensation (WCL)

Disability Benefits Leave (DBL)

Paid Family Leave (PFL)

Protecting The At-Will Relationship

- Employment-at-Will Disclaimer
 - (1) State that policies, handbooks, and manuals are general guidelines only and do not constitute a contract;
 - (2) Reserve the right to supplement, modify, or abolish any policies as a matter of employer discretion and without notice;
 - (3) State that employees are employed at-will and may terminate their employment or be terminated at any time for any reason with or without notice
 - (4) State that no other agreement or assurances have been made during the recruiting or hiring process (no one can alter except President of the company)

Discipline and Discharge

- When faced with a discrimination/retaliation claim following discipline or discharge, the best defense is that you adhered to the “just cause” standard
- Seven Tests of Just Cause

Discipline and Discharge

1. Notice: Did the Employer put the employee on notice of the rule and the possible consequences for violating the rule?
2. Reasonable Rule: Was the Employer's rule or work order reasonably related to the orderly, efficient and safe operation of the business, and the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before imposing discipline, make an effort to discover whether the employee did in fact violate a rule or commit misconduct?

Discipline and Discharge

4. Fair & Objective: Was the Employer's investigation conducted fairly and objectively?
5. Proof: Did the investigation produce substantial evidence that the employee was guilty of misconduct?
6. Equal Treatment: Has the Employer applied its rules and penalties evenhandedly, treating similarly situated employees in a similar manner?
7. Appropriate Penalty: Did the penalty fit the crime -- was the level of discipline reasonably related to the seriousness of the offense and the employee's past record?

Discipline and Discharge

Make the Corrective Action Fit the Offense

- Nature of the offense
- Prior disciplinary record
- Length of service
- Exacerbating/Mitigating circumstances
- Past Practice
- Employee handbook/Work rules/Policy Provisions

Progressive Discipline

- **Progressive Discipline**
 - Verbal Warning (document in file)
 - Written Warning
 - Final Written Warning/Suspension
 - Discharge
- **Why is Progressive Discipline Important?**
 - Means to correct the employee's problem
 - Message to co-workers if problem is not corrected
 - Supervisors' credibility
 - Defending legal actions against the Company

Progressive Discipline

- **Variables:**
 - number of verbal warnings, written warnings
 - length, number of suspensions
 - related offenses versus unrelated offenses
 - disregarding old disciplinary actions

Why is Progressive Discipline Important?

- Means to correct employee's problem
- Message to coworkers if problem is not corrected
- Impact on supervisor's credibility
- Defending legal actions against company

Discipline and Discharge

- **Documentation is Key**
 - Performance Evaluations
 - Performance Issues
 - Discipline Documents
 - Investigation Reports

Introduction

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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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It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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