

BUSINESS IN

2022

WEEKLY WEBINAR SERIES

2023

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Introduction



Adam P. Mastroleo

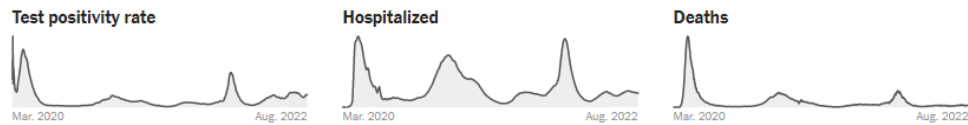
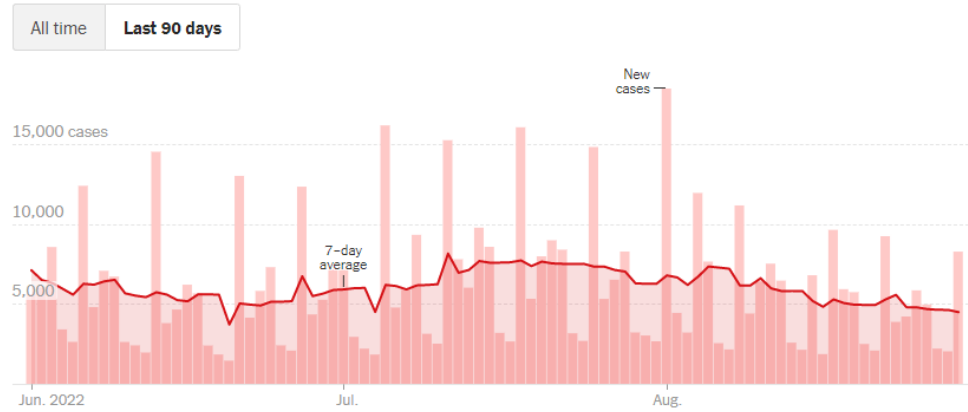
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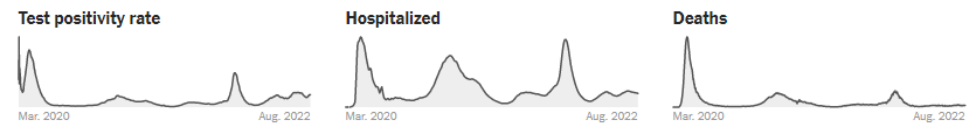
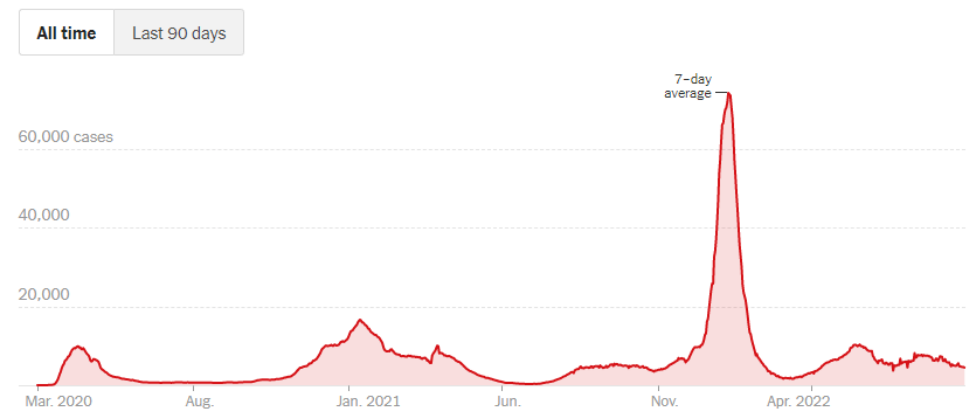
Current COVID Data in New York

New reported cases



	DAILY AVG. ON AUG. 29	14-DAY CHANGE	TOTAL REPORTED
Cases	4,482	-13%	5,968,639
Test positivity	11%	—	—
Hospitalized	2,676	-7%	—
In I.C.U.s	278	-2%	—
Deaths	24	-10%	70,330

New reported cases



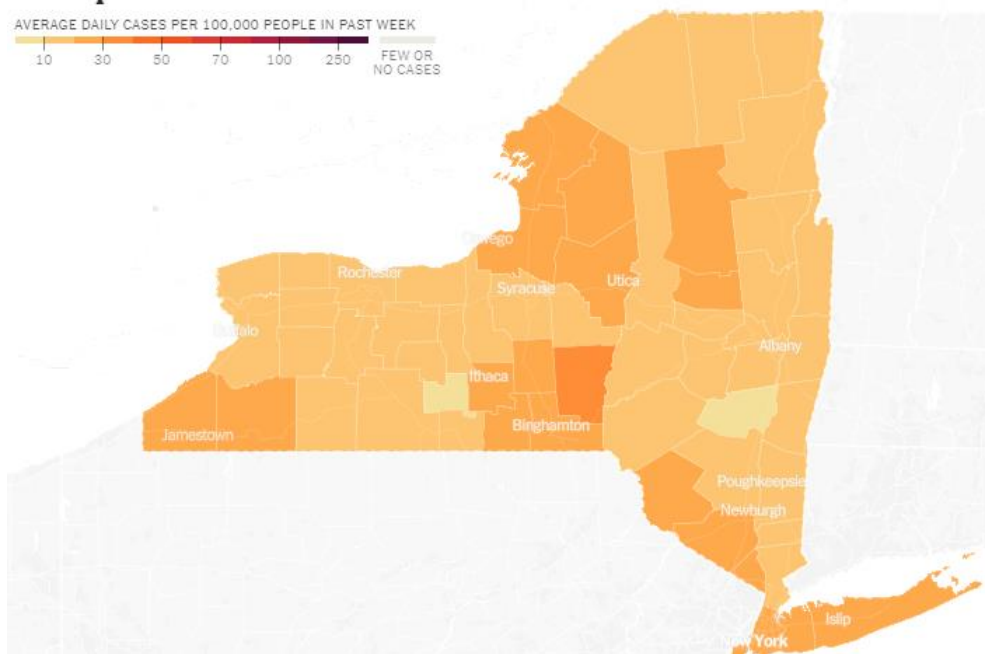
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Current COVID Data in New York

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	4,482	23	-13%	11%	14	-7%	24.0	0.12
Chenango >	16	34	+182%	17%	14	+6%	0	—
New York City >	2,260	27	-13%	11%	17	-7%	13.9	0.17
Sullivan >	20	27	-16%	14%	19	+26%	0.1	0.19
Suffolk >	388	26	-23%	11%	18	-9%	1.4	0.10
Jefferson >	28	26	+19%	13%	10	+39%	0.1	0.13
Tioga >	12	25	+77%	15%	16	+24%	0	—
Cattaraugus >	19	25	+23%	20%	9	+47%	0.1	0.19
Nassau >	336	25	-32%	12%	28	-15%	1.1	0.08
Fulton >	13	24	-34%	27%	7	-33%	0	—
Lewis >	6	22	+37%	13%	9	+39%	0	—

Back to School – Legal Issues and Update



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OFCCP Developments



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OFCCP Developments – OFCCP Plans to Disclose Employer EEO-1 Data

- The Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that federal contractors comply with laws and regulations that prohibit discrimination and, in some cases, mandate affirmative action.
- Employers with 100 or more employees are required under Title VII to file EEO-1 reports annually. In addition, employers with 50 or more employees that hold prime or first-tier federal contracts are also required to file EEO-1 reports annually even if they have less than 100 employees. The EEOC shares the latter reports with OFCCP. The EEO-1 report contains employee data for every employee company-wide by job category, including employees' sex and race.
- By law, the EEOC must keep EEO-1 reports confidential (EEOC personnel are subject to criminal sanctions for failing to do so), but no such legal mandate prohibits the OFCCP from making EEO-1 reports public.

OFCCP Plans to Disclose Employer EEO-1 Data

- On August 19, 2022, OFCCP published a notice in the Federal Register advising employers that, in response to a Freedom of Information Act (FOIA) request, it may produce their EEO-1 data, specifically 2016-2020 “Type 2” Consolidated EEO-1 data.
- Employers have until September 19, 2022 to file written objections in an attempt to convince the OFCCP not to disclose their EEO-1 reports.
 - Written objections should be submitted either by mail, via an online web portal (found on OFCCP’s website) or via email at OFCCPSubmitterResponse@dol.gov.
- Under FOIA, Exemption 4 protects confidential commercial information from being disclosed.

OFCCP Plans to Disclose Employer EEO-1 Data

- Employers concerned about the potential disclosure of their EEO-1 data may contact OFCCP to: 1) inquire whether its EEO-1 data is included in the planned disclosure, 2) request a copy of the information OFCCP plans to disclose, and/or 3) submit written objections to the disclosure of the EEO1-data.
- Employers who have voluntarily published their EEO-1 reports do not have grounds to object to OFCCP's release of that same data.
- Note for Non-Government Contractors: OFCCP is believed to have EEO-1 reports for many non-government contractors, which it likely intends to release under the FOIA request despite the fact that the law would otherwise prohibit such reports from public disclosure. Non-government contractors will have independent grounds for objection beyond Exemption 4.

OFCCP Developments – New Construction Contractor Award Portal

- On August 26, 2022, OFCCP launched a new online platform for federal construction contractors and subcontractors to use for required notices that must be sent to OFCCP about construction contract awards.
- The portal is referred to as the Notification of Construction Contract Award Portal (NCAP). OFCCP launched a webpage dedicated to NCAP (<https://www.dol.gov/agencies/ofccp/ncap>)
- NCAP provides contractors an electronic means to submit a notice to OFCCP within 10 working days of an award of a federal or federally assisted construction contract or subcontract that exceeds \$10,000. This notice requirement is in OFCCP's construction regulations at 41 CFR 60–4.2.

OFCCP Developments – New Construction Contractor Award Portal

- OFCCP noted that it intends to use the award information submitted on NCAP for more quickly determining jurisdiction and scheduling construction contractors and subcontractors for compliance evaluations.
- OFCCP launched a Federal Contractor Portal earlier this year to monitor contractors' annual AAP compliance. Contractors that are only construction contractors (and not also supply and service contractors) are not required (at least not yet) to certify compliance on OFCCP's Contractor Portal.

OFCCP Developments - OFCCP's Controversial Pay Equity Directive

- In March, we covered OFCCP's Directive 2022-01 that indicated, for the first time, that federal contractors are required to conduct statistical pay equity audits on an annual basis. In response to pushback from the contractor community, OFCCP issued a new, "revised" directive on August 18, 2022.
- OFCCP clarified that the compensation analysis that its regulations require contractors to perform is not necessarily a statistical regression analysis. The revised directive replaces the term "pay equity audit" with "compensation analysis".
 - The revised directive states that, at a minimum, information must describe when the analysis was conducted, the number of employees included and number and categories of any employees excluded from the analysis, what forms of compensation the contractor analyzed and how different types of compensation were separated or combined for analysis, a confirmation that compensation was analyzed by gender, race, and ethnicity, and the method of analysis used by the contractor.

OFCCP Developments - OFCCP's Controversial Pay Equity Directive

- OFCCP's revised directive also abandoned its prior position that it would seek "a complete copy" of a contractor's pay equity audits and that such audits are, by definition, not privileged. OFCCP's revised directive allows for disclosure of a redacted version that removes privileged material or a detailed affidavit describing the contractor's efforts.
- Despite walking back on certain points, the new directive makes clear that OFCCP is not relaxing its focus on pay equity.

Updates to New York's Healthcare Worker Bonus Program



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Correction to Employer Eligibility Clarification

- Under paragraph (2)(b) of SOS § 367-w(2)(b), an employer is subject to the HWB Program if they meet all of the **four** following criteria:
 1. They are a Medicaid enrolled provider
 2. They bill for Medicaid services (either through FFS, managed care, or 1915(c) waiver)
 3. They employ at least one eligible employee
 4. A. Are included in the list of provider and facility types in the statute, **OR**
B. Subject to a certificate of need (CON) process, **OR**
C. **The Employer serves at least 20% Medicaid Enrollees**

Contract Employees *Can Be Eligible*

- Contract staff in eligible titles may receive the HWB
 - Qualified Employers that have engaged in staffing arrangements to obtain workforce services (PEOs, and other third-parties)
 - Employees engaged in frontline hands-on health care services in eligible employee titles
- Who submits the bonus claim?
- Maintenance of Records

Management and Supervisory Roles

- The Department clarified that Management and supervisors that also work under an eligible title and otherwise meet all criteria for eligibility may be eligible for the bonus.
- Management and supervisory responsibility alone do not disqualify an employee from eligibility.

Former Employees

Separation Facts	Employee is Eligible	Employee is NOT Eligible
The employee vested, was employed at the time of the claim, and the employee continues to be employed when the employer receives the bonus payment	✓	
The employee vested, was employed at the time of the claim, and stays with the employer for at least 30 days after the employer received the bonus payment. The employer fails to pay the bonus within 30 days of receipt, then the employee leaves.	✓	
The employee vested and before the employer submits a claim the employee is terminated by the employer	✓	

Former Employees (cont'd)

Separation Facts	Employee is Eligible	Employee is NOT Eligible
The employee vested, was employed at the time of the claim, and then the employee is terminated by the employer.	✓	
The employee vested but the employee quits the employer prior to the bonus being claimed.		✓
The employee vested, was employed at the time of the claim but the employee left before the employer receives the bonus payment.		✓
The employee vested, was employed at the time of the claim and when the employer received the payment, but the employee leaves less than 30 days after the employer received the payment.		✓

Update on Submission Deadline (Grace Period!)

- For vesting Period 1 employers *will* be able to submit claims for Vesting Period 1 during Vesting Period 2 (October)
 - Make every attempt to submit as soon as eligible
 - Employers must validate that employee is qualified in respective vesting period
 - HWB Portal closes September 3, 2022 – September 30, 2022
 - Extension to submit for Vesting Period 1 limited to *only* the submission close date for Vesting Period 2 (October 31).

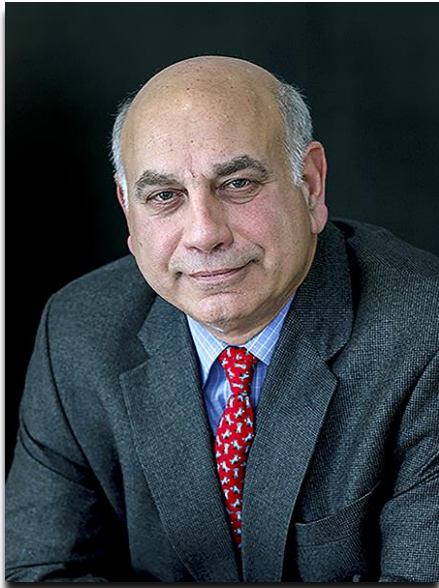
Enforcement

- Will the employer's determination of employee eligibility be subject to review?
 - Yes – see SOS § 367-w(3)(d)
- What if I am a Qualified Employer but do not apply for the bonus on behalf of my eligible employee?
 - Sanctions up to and including exclusion from the Medicaid program.
 - May be subject to penalty.

Enforcement/Penalties

- The Department clarified what happens if an employer does not submit a claim for an eligible employee and if they improperly claim and pay a bonus to an ineligible employee.
 - Employer that applied for an employee that is not qualified or applies for a larger bonus value than the employee should have received → that bonus amount must be returned to the Department.
 - Employer fails to pay a HWB claimed and received on behalf of employee → employer remains liable to pay that bonus regardless of any sanction or penalty imposed by OMIG.

Defamation in the Workplace



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Introduction

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OFCCP Developments

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HWB Program Updated Guidance

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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.
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