

2023

# BUSINESS IN 2022

WEEKLY WEBINAR SERIES

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## Introduction



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# WORKPLACE 2022

## ANNUAL LABOR, EMPLOYMENT & HR CONFERENCE

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## Healthcare Worker Bonus Update



### Stephanie H. Fedorka

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## Yeshiva/Pride Alliance Ruling



### Seth F. Gilbertson

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## Background

- Yeshiva University
  - Private Orthodox Jewish university
  - Four campuses in NYC
  - Undergraduate curriculum Jewish studies with liberal arts and sciences courses
- Recognized student organizations
- New York City Human Rights Law prohibits discrimination based on sexual orientation and gender identity, among other things
  - Exemptions permitted, including for certain religious organizations



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## Issues Being Litigated

- Can the NYC HRL require YU to “recognize” a student group with values that are at odds with its religious beliefs?
  - Does this present a conflict with the First Amendment
    - Religious Freedom
    - Free Speech
- Does corporate status matter?
- Should there be an injunction?



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## Rulings So Far

- June 14 – the NYS Supreme Court ruled that YU must “immediately grant plaintiff YU Pride Alliance the full and equal accommodations, advantages, facilities, and privileges afforded to all other student groups”
  - YU not incorporated as a religious institution
  - Unlikely to find a conflict between the First Amendment and NYCHRL
- Sept. 9 – Temporary stay issued by Justice Sotomayor
- Sept 14 – SCOTUS denied YU’s application for a stay pending appeal of the permanent injunction NYS Supreme Court



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## Current Status

- YU suspended all student organization activities
- YU Pride Alliance offered to delay seeking recognition so that other student groups could continue
- Deep disagreement within YU community

## What To Watch For

- Next steps in NYS courts
  - Appeal to App. Div.
  - Appeal to Court of Appeals
- SCOTUS
  - May go to Second Circuit
  - Can go straight to SCOTUS from NY Court of Appeals
- Is this the latest religious freedom test for SCOTUS?

## NLRB Update



### Andrew D. Bobrek

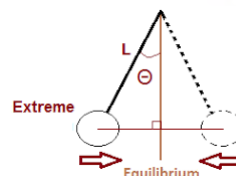
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## Notable NLRB Activity

- Union Election Petitions Up 58% During First 3 Qs of FY22
- 80% More Union Wins in FY22 So Far Than In FY21
- Union Victory Rate = 77% in FY22
- 71% of Americans Approve of Labor Unions (Gallup), but...
- ULP Filings Up 16% in FY22
- 16% Increase for FY23 Budget (Proposed)
- Focus on Starbucks, Tesla, Amazon and other "Big Name" Employers



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## Notable NLRB Activity: Joint Employment

- Notice of Proposed Rulemaking (Sept. 7, 2022)
  - Chiefly Reinstates Broad *Browning-Ferris* Standard
  - Makes Some Notable Adjustments
  - Key Provision: A business can be deemed the “joint employer” of another company’s employees, where it “share(s) or codetermine(s) those matters governing employees’ essential terms and conditions of employment.”
  - Open for Initial Public Comment Until Nov. 7, 2022



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## Notable NLRB Activity: Joint Employment

- Notice of Proposed Rulemaking (Sept. 7, 2022)
  - Broadly defines “essential terms and conditions” to also include:
    - Hours of Work & Scheduling
    - Workplace Health & Safety
    - Assignment
    - Supervision
    - Work Rules and Directions Governing the Manner, Means, or Methods of Work Performance
  - Merely “possessing the authority to control” or using “the power to control indirectly is sufficient to establish status as a joint employer”



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## Notable NLRB Activity: Joint Employment

- Takeaways on Notice of Proposed Rulemaking (Sept. 7, 2022)
  - Remember, status can have major consequences
  - Codifies that indirect or reserved (but not used) control is sufficient
  - List of “essential terms and conditions of employment” is not exhaustive
  - Consider the impact on your organization!
  - Do you have written agreements with contractors???



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## Notable NLRB Activity: *Tesla Case*

- Unlawful for Tesla to require employees to wear shirts with its logo
- “Implicitly” prohibited employees from substituting union attire
- **Holding:** “[W]hen an employer interferes *in any way* with its employees’ right to display union insignia, the employer must prove special circumstances that justify the interference.”



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## Notable NLRB Activity: *Tesla Case*

Team Wear: It is mandatory that all Production Associates and Leads wear the assigned team wear.

- On occasion, team wear may be substituted with all black clothing if approved by supervisor.
- Alternative clothing must be mutilation free, work appropriate and pose no safety risks (no zippers, yoga pants, hoodies with hood up, etc.).<sup>9</sup>
- “Team Wear” = Black cotton shirts with Tesla’s logo, and black cotton pants with no buttons, rivets, or exposed zippers
- Employees receive 2 pairs of pants, two short-sleeve shirts, two long-sleeve shirts, and a sweater
- In 2017, employees began wearing black cotton shirts including logo with union campaign slogan “Driving a Fair Future at Tesla” on front, and “UAW” on back
- Employees threatened with discipline for wearing union shirts, but expressly allowed to wear union stickers



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## Notable NLRB Activity: *Tesla Case*

- Applied “special circumstances” test to uniform policy (not just union buttons, pins and stickers)
- Board refused to apply Trump-era *Boeing* balancing test to facially-neutral policy
- Board rejected Tesla’s safety and other arguments (no “special circumstances”)
- Tesla’s “team wear” policy unlawfully interferes with employees’ Section 7 right to display union insignia



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## Takeaways on *Tesla* Case

- Current NLRB will aggressively pursue cases
- Any limitation of display of union insignia presumptively unlawful?
- Prior to 2017, Tesla did not strictly enforce “team wear” policy
  - Employees wore shirts that were not black or had other logos or emblems
  - Spring 2017: Employees start wearing union shirts
  - August 2017: Tesla enforced “team wear” policy
- Review current uniform policy with legal counsel



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## COVID and Quarantine Guidance



### Peter A. Jones

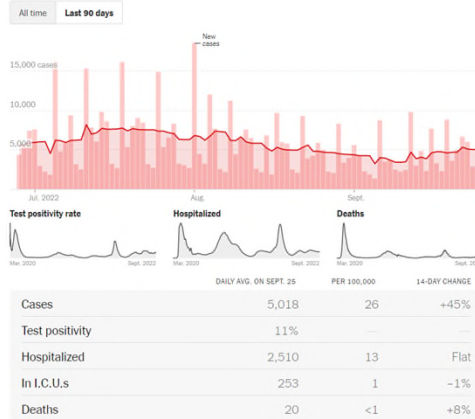
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# Current COVID Data in New York

## New reported cases

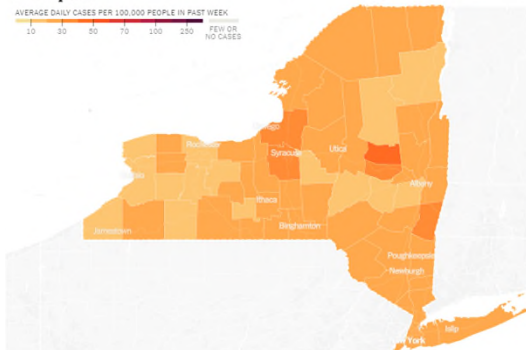


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# Current COVID Data in New York

## Hot spots

AVERAGE DAILY CASES PER 100,000 PEOPLE IN PAST WEEK  
0 10 20 30 40 50 60 70 80 90 100 110 120 130 140 150 160 170 180 190 200 210 220 230 240 250 260 270 280 290 300 310 320 330 340 350 360 370 380 390 400 410 420 430 440 450 460 470 480 490 500 510 520 530 540 550 560 570 580 590 600 610 620 630 640 650 660 670 680 690 700 710 720 730 740 750 760 770 780 790 800 810 820 830 840 850 860 870 880 890 900 910 920 930 940 950 960 970 980 990 1000  
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 | TOTALLY VACCINATED |
|--------------|------------------|-------------|---------------|-----------------|-------------------------------|---------------|-------------------|-------------|--------------------|
| New York     | 5,018            | 26          | +45%          | 11%             | 13                            | Flat          | 20.0              | 0.10        | 79%                |
| Fulton >     | 23               | 44          | +105%         | 27%             | 6                             | -11%          | 0                 | —           | 55%                |
| Montgomery > | 19               | 39          | +148%         | 33%             | 6                             | +8%           | 0.1               | 0.29        | 68%                |
| Columbia >   | 23               | 38          | +137%         | 17%             | 13                            | -14%          | 0.1               | 0.24        | 76%                |
| Oswego >     | 40               | 35          | +67%          | 16%             | 11                            | -9%           | 0.4               | 0.31        | 61%                |
| Onondaga >   | 147              | 32          | +74%          | 15%             | 11                            | -13%          | 0.1               | 0.03        | 75%                |
| Cortland >   | 14               | 30          | +8%           | 16%             | 15                            | +10%          | 0                 | —           | 60%                |
| Nassau >     | 403              | 30          | +33%          | 11%             | 24                            | -10%          | 1.1               | 0.08        | 84%                |
| Suffolk >    | 434              | 29          | +29%          | 11%             | 16                            | -9%           | 1.6               | 0.11        | 78%                |
| Jefferson >  | 30               | 28          | +49%          | 9%              | 7                             | -24%          | 0                 | —           | 76%                |
| Warren >     | 18               | 28          | +57%          | 10%             | 11                            | +52%          | <0.1              | 0.12        | 79%                |



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## New York State Adopts the CDC's COVID-19 Quarantine and Isolation Guidance

- On Sept. 14, 2022, the New York State Department of Health (NYSDOH) issued updated COVID-19 quarantine and isolation guidance
- Replaces the guidance from May 31, 2022
- NYSDOH will now follow the Centers for Disease Control and Prevention's (CDC) guidelines on quarantine and isolation



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## New York State (CDC) COVID-19 Quarantine and Isolation Guidance

- Under the CDC guidance, asymptomatic individuals exposed to COVID-19 need not quarantine regardless of vaccination status.
- Those exposed to COVID-19 should wear a high-quality mask for 10 days and be tested on day 5. Those who test positive should isolate per the isolation rules.
- Discontinues its prior approach of establishing different quarantine periods for vaccinated and unvaccinated individuals.
- CDC's guidance also states that screening asymptomatic individuals without known exposure to COVID-19 will no longer be recommended in most community settings.



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## New York State (CDC) COVID-19 Quarantine and Isolation Guidance

- Isolation requirement for individuals who test positive for COVID-19 must isolate has not changed under the current guidance.
- When to Isolate?
  - Individuals who test positive for COVID-19 must isolate regardless of vaccination status.
  - Individuals awaiting test results must also isolate if experiencing symptoms of COVID-19. Those who test negative, may end isolation. Those who test positive, should isolate for a minimum of 5 days depending on the severity of their symptoms.



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## New York State (CDC) COVID-19 Quarantine and Isolation Guidance

- Symptomatic Individuals should isolate for at least 5 days, with day 0 being the day of testing.
- If after day 5, one's symptoms are improving, their isolation may end as long as they are fever free for at least 24 hours without the aid of fever suppressing medication.
- If after day 5, an individual's symptoms are not improving, they should continue to isolate until their symptoms begin to improve and they are fever free for at least 24 hours without the aid of fever suppressing medication.
- Individuals who experienced moderate illness (shortness of breath or difficulty breathing), should isolate through day 10. Those with more severe symptoms or who were hospitalized should isolate for at least 10 days and consult with a doctor before ending isolation.



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## New York State (CDC) COVID-19 Quarantine and Isolation Guidance

- Asymptomatic Individuals should isolate for 5 days.
- Symptomatic and asymptomatic individuals who experience worsening symptoms after the end of their initial isolation period, should restart isolation at day 0.



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## New York State (CDC) COVID-19 Quarantine and Isolation Guidance

- Post-Isolation Recommendations -- regardless of when one's isolation ended, those who tested positive for COVID-19 should take the following precautionary measures until at least day 11:
  - Avoid being in close proximity to those likely to experience severe illness if they become infected with COVID-19;
  - Continue to wear a high-quality mask in indoor spaces; and
  - Avoid public transportation and other public places if wearing a mask is not possible.



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### **New York Employment Law: The Essential Guide**

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