



Coronavirus:
Update and Discussion on Continuing Legal
and Practical Issues Related to COVID-19

 **BOND** SCHOENECK
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1

Introduction



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2

New York Paid Sick Leave



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3

Rightsizing, Downsizing and Furloughs



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4

Downsizings and Reorganizations



Voluntary Layoffs

Is it possible to ask for volunteers for temporary or permanent layoff?

- Yes.
- An employee who volunteers for layoff may remain qualified for unemployment insurance.
 - Labor Law Section 593.1: employee remains qualified for unemployment insurance if a voluntary layoff is pursuant to a collective bargaining agreement or written employer plan for a temporary period of layoff due to lack of work

Early Retirement Incentives

Is it lawful to offer an early retirement incentive?

- Yes **but** . . .
 - It must be voluntary;
 - It must be available for a reasonable period of time; and
 - It must not arbitrarily discriminate on the basis of age

Consult with counsel when considering and/or planning an early retirement incentive



7

Involuntary Reductions in Force

What are the primary considerations for an involuntary reduction in force?

- Determine scope of RIF and affected groups/areas
 - Company-wide?
 - Selected departments or positions?

- Determine how the identification of positions and individuals for elimination will be achieved
 - Selection criteria
 - Management personnel who will be the decision makers



8

Involuntary Reductions in Force

Are there legal concerns with a reduction in force?

- Involuntary layoffs may present significant legal liability if not done properly
 - Disparate treatment
 - Intentional discrimination against a person or group based on a protected characteristic
 - Disparate impact
 - Facially neutral policy or plan ends up negatively affecting those in a protected characteristic



9

Involuntary Reductions in Force

- Worker Adjustment and Retraining Notification Act (WARN) statutes
 - Federal and (some) states require advance notice of employment loss
 - 60 days (federal) or 90 days (NYS)
 - Employer coverage
 - NYS WARN: 50 or more employees
 - Federal WARN: 100 or more employees
 - Plant closings and mass layoffs
 - Very technical statutory definitions
 - Remedies for a violation of the WARN Act include:
 - back pay to the employee for the period the employee was deprived of notice
 - benefits to the employee for the period the employee was deprived of notice
 - civil penalties
 - attorneys fees



10

Severance Agreements

Does an employer have to offer a severance agreement in a downsizing?

- Generally, no.

- A severance agreement should be reviewed by counsel.
 - Some provisions may create legal liability or may be unenforceable.
 - Older Worker Benefit Protection Act (“OWBPA”) imposes special rules to waivers and releases of age discrimination claims
 - Special OWBPA rules apply to waivers and release provisions in a RIF
 - 45 days to consider and 7 days to revoke
 - Additional disclosure obligations



11

OSHA Update



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12

New York Travel, Return to Work and Cluster Developments



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13

Cluster Update

FOCUS ZONE	10/4 - 10/10 % Positive	10/11 - 10/17 % Positive	Current 7- day rolling average	Day Prior (10/23) % Positive	Yesterday (10/24)% Positive
Brooklyn red-zone focus area % positive	5.86%	5.29%	4.44%	4.23%	4.45%
Brooklyn yellow-zone focus area % positive	1.36%	1.93%	2.38%	2.07%	2.14%
Queens Kew Garden Hills/Forest Hills yellow-zone focus area % positive	2.27%	2.03%	2.40%	2.40%	2.93%
Queens Far Rockaway yellow-zone focus area % positive	2.71%	2.70%	2.00%	1.68%	2.55%
Rockland red-zone focus area % positive	9.77%	4.54%	3.65%	1.23%	2.78%

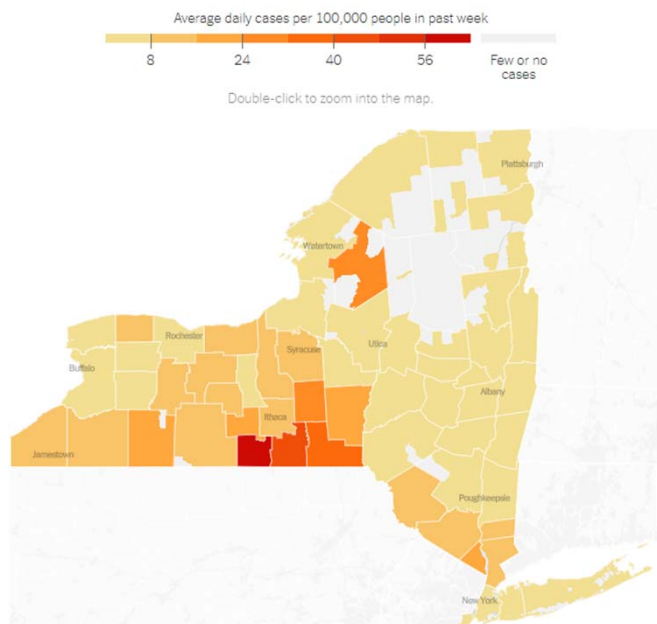


14

FOCUS ZONE	10/4 - 10/10 % Positive	10/11 - 10/17 % Positive	Current 7- day rolling average	Day Prior (10/23) % Positive	Yesterday (10/24)% Positive
Broome yellow-zone focus area % positive	3.63%	4.05%	6.39%	6.09%	3.81%
Steuben yellow-zone focus area % positive	7.82%	7.52%	4.42%	4.40%	6.02%
Chemung orange-zone focus area % positive	6.49%	7.12%	8.36%	4.61%	12.04%
Broome yellow-zone focus area % positive	3.63%	4.05%	6.39%	6.09%	3.81%
Steuben yellow-zone focus area % positive	7.82%	7.52%	4.42%	4.40%	6.02%



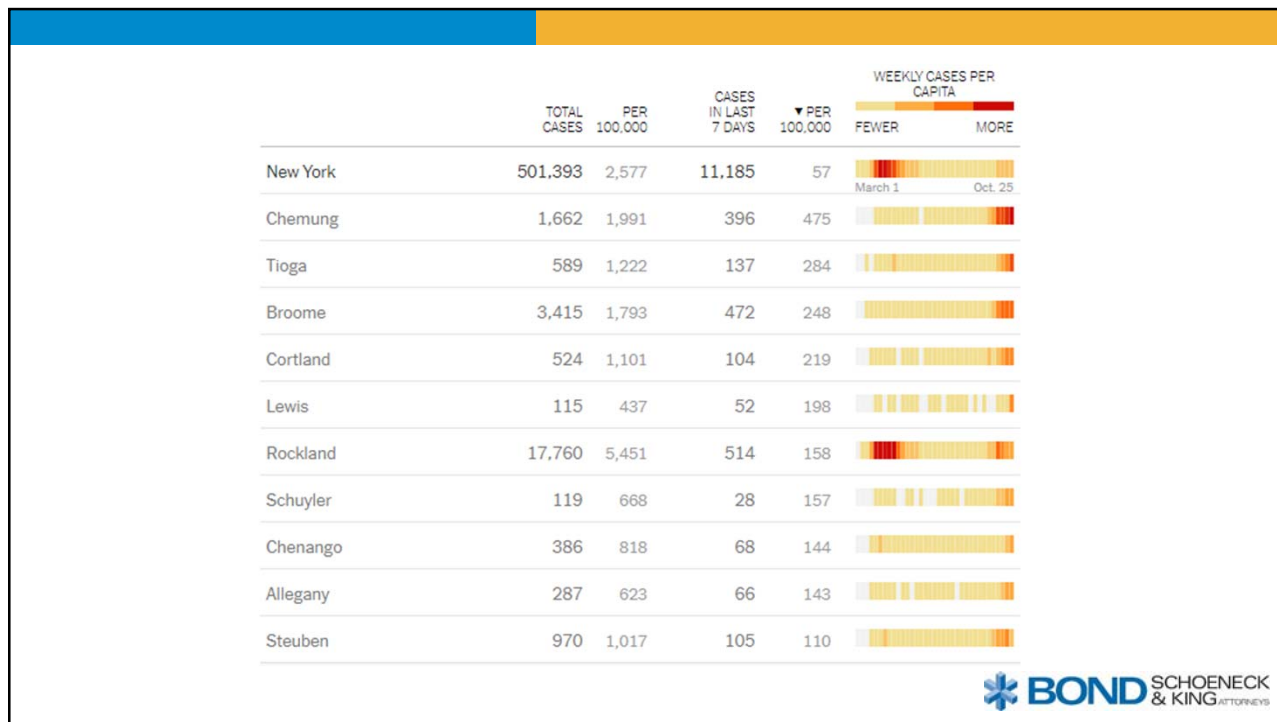
15



The New York Times




16



17

Geographic Area	Yellow Zone Metrics	Orange Zone Metrics	Red Zone Metrics
<p>Tier 1 Geographic area (ZIP, census tract, etc.) is located within a county of 900,000 or more people or located within city of 90,000 or more people.</p> <p>Tier 1 areas: N.Y.C. boroughs; Nassau, Suffolk, Westchester, Erie counties; cities of Buffalo, Rochester, Syracuse, Albany, Yonkers</p>	<p>Geographic area has 7-day rolling average positivity > 2.5% for 10 days <u>AND</u> Geographic area has 10 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 3% for 10 days <u>AND</u> Geographic area has 10 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 4% for 10 days <u>AND</u> Geographic area has 10 or more new daily cases per 100,000 residents on 7-day average</p>



18

Geographic Area	Yellow Zone Metrics	Orange Zone Metrics	Red Zone Metrics
<p>Tier 2 Geographic area (ZIP, census tract, etc.) is located within a county of 150,000 or more people (and jurisdiction is not included in Tier 1).</p> <p>Tier 2 counties: Monroe; Onondaga; Orange; Rockland; Albany; Dutchess; Saratoga; Oneida; Niagara; Broome; Ulster; Rensselaer; and Schenectady</p>	<p>Geographic area has 7-day rolling average positivity > 3% for 10 days <u>AND</u> Geographic area has 12 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 4% for 10 days <u>AND</u> Geographic area has 12 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 5% for 10 days <u>AND</u> Geographic area has 12 or more new daily cases per 100,000 residents on 7-day average</p>



19

Geographic Area	Yellow Zone Metrics	Orange Zone Metrics	Red Zone Metrics
<p>Tier 3 Geographic area (ZIP, census tract, etc.) is located within a county of 50,000 or more people.</p> <p>Tier 3 Counties: Chautauqua; Oswego; Jefferson; Ontario; St. Lawrence; Tompkins; Putnam; Steuben; Wayne; Chemung; Clinton; Cayuga; Cattaraugus; Sullivan; Madison; Warren; Livingston; Herkimer; Washington; Otsego; Columbia; Genesee; Fulton; Franklin</p>	<p>Geographic area has 7-day rolling average positivity > 3.5% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 4.5% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 5.5% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>



20

Geographic Area	Yellow Zone Metrics	Orange Zone Metrics	Red Zone Metrics
<p>Tier 4 Geographic area (ZIP, census tract, etc.) is located within a county of less than 50,000 people</p> <p>Tier 4 Counties: Montgomery; Tioga; Cortland; Chenango; Greene; Allegany; Delaware; Orleans; Wyoming; Essex; Seneca; Schoharie; Lewis; Yates; Schuyler; Hamilton</p>	<p>Geographic area has 7-day rolling average positivity > 4% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 5% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>	<p>Geographic area has 7-day rolling average positivity > 6% for 10 days <u>AND</u> Geographic area has 15 or more new daily cases per 100,000 residents on 7-day average</p>



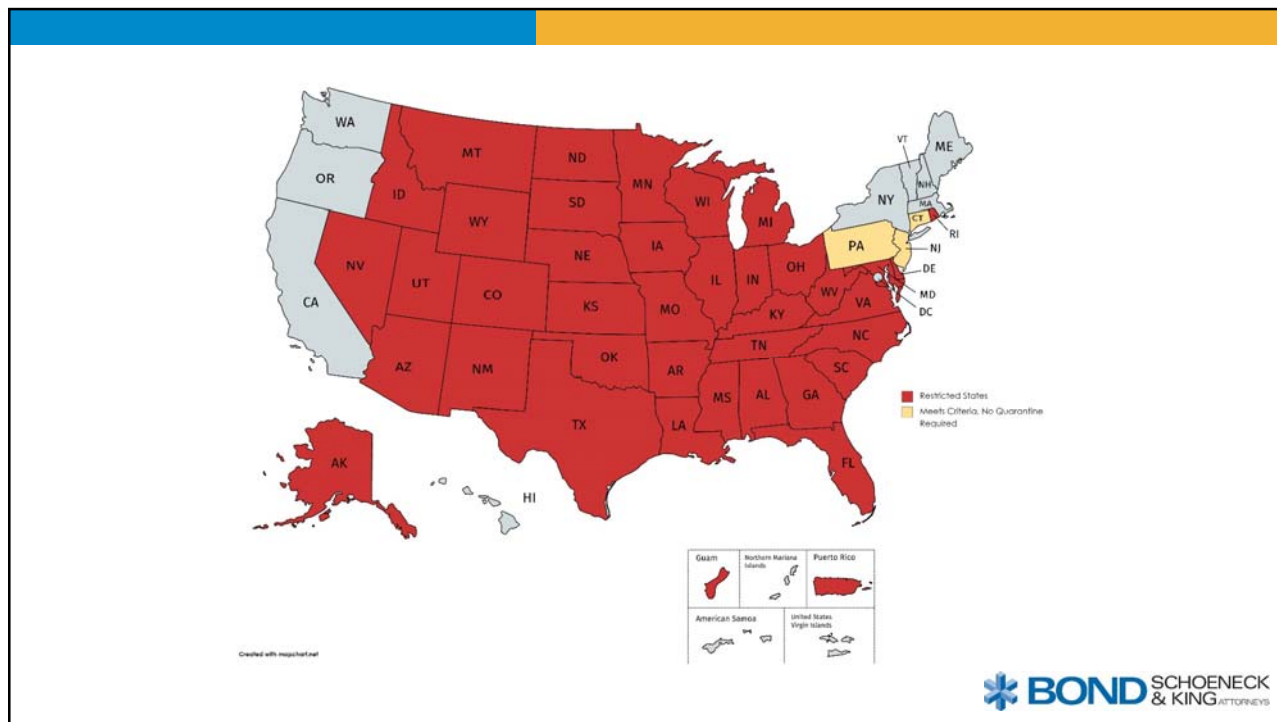
21

Cluster Update

- Other factors:
 - Whether the geographic area has a minimum of 5 new cases per day on 7-day average for geographic areas with 10,000 or more residents or a minimum of 3 new cases on 7-day average per day for areas with less than 10,000 residents;
 - Whether the increase in positive cases or positivity reflect community spread and cannot be mostly explained by a cluster in a single institution;
 - Whether DOH finds that based on the above listed metrics, and other epidemiological factors, including an upward trend in total and daily hospital admissions, that a zone designation is appropriate.



22



23

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OSHA Update
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24

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