

**BUSINESS IN**

**2022**

2023

**WEEKLY WEBINAR SERIES**

2021

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# Introduction



## Adam P. Mastroleo

Member

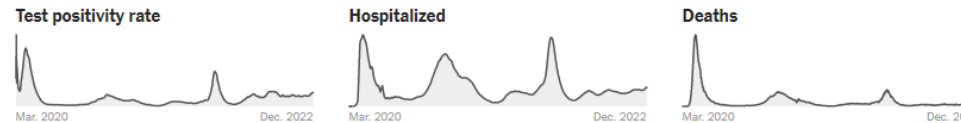
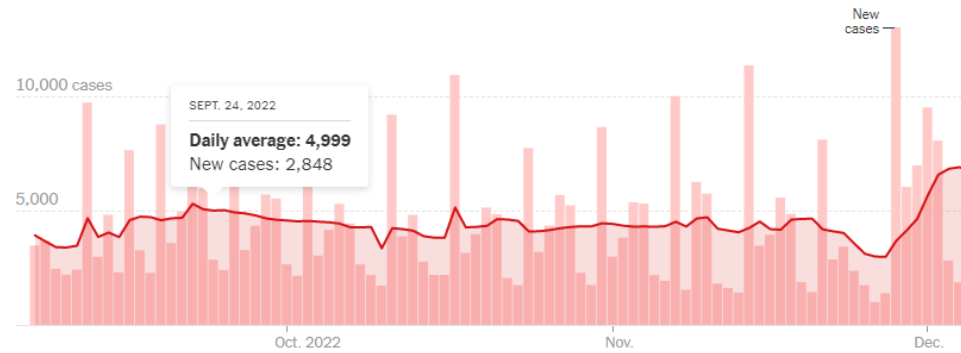
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Syracuse, NY

# Current COVID Data in New York

## New reported cases

All time **Last 90 days**



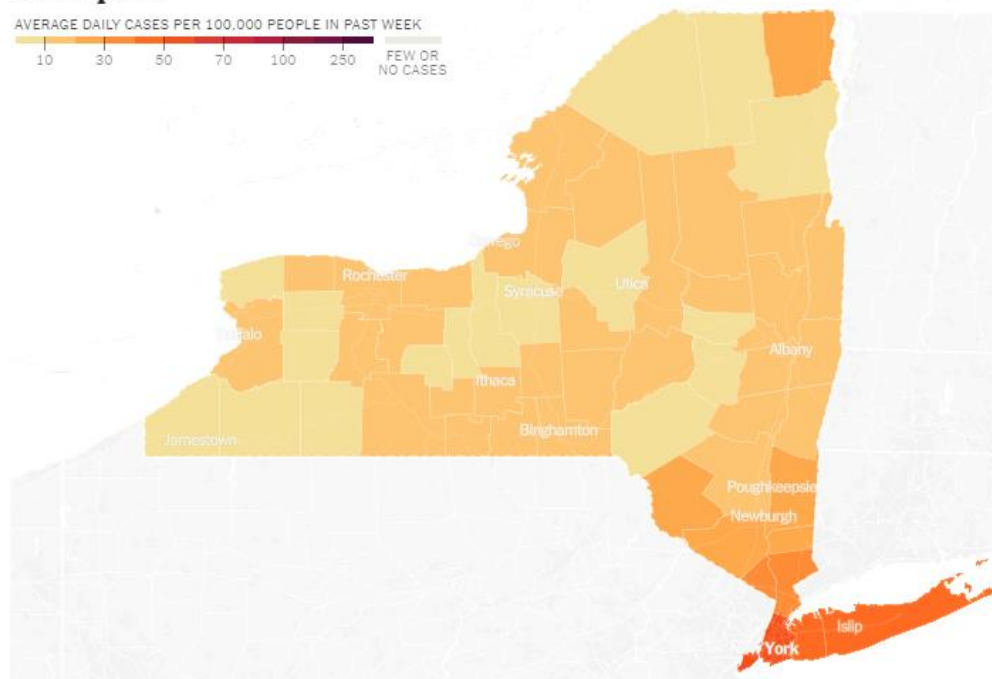
|                 | DAILY AVG. ON DEC. 5 | PER 100,000 | 14-DAY CHANGE |
|-----------------|----------------------|-------------|---------------|
| Cases           | 6,735                | 35          | +61%          |
| Test positivity | 12%                  | —           | +30%          |
| Hospitalized    | 3,597                | 18          | +16%          |
| In I.C.U.s      | 329                  | 2           | +9%           |
| Deaths          | 20                   | <1          | +6%           |

# 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<br>DAILY AVG. | PER<br>100,000 | 14-DAY<br>CHANGE | TEST<br>POSITIVITY | HOSPITALIZED<br>AVG. PER 100,000 | 14-DAY<br>CHANGE | DEATHS<br>DAILY AVG. | PER<br>100,000 | FULLY<br>VACCINATED |
|-----------------|---------------------|----------------|------------------|--------------------|----------------------------------|------------------|----------------------|----------------|---------------------|
| New York        | 6,735               | 35             | +61%             | 12%                | 18                               | +16%             | 20.0                 | 0.10           | 79%                 |
| New York City > | 4,182               | 50             | +65%             | 15%                | 22                               | +20%             | 14.7                 | 0.18           | 82%                 |
| Nassau >        | 595                 | 44             | +65%             | 12%                | 45                               | +28%             | 2.1                  | 0.15           | 85%                 |
| Suffolk >       | 609                 | 41             | +85%             | 12%                | 24                               | +39%             | 2.2                  | 0.15           | 78%                 |
| Rockland >      | 103                 | 32             | +53%             | 13%                | 12                               | +37%             | 0.3                  | 0.09           | 67%                 |
| Westchester >   | 300                 | 31             | +57%             | 12%                | 20                               | +15%             | 0.9                  | 0.10           | 85%                 |
| Putnam >        | 27                  | 28             | +37%             | 13%                | 12                               | +21%             | 0.1                  | 0.12           | 76%                 |
| Orange >        | 101                 | 26             | +57%             | 11%                | 14                               | +17%             | 0.4                  | 0.10           | 67%                 |
| Dutchess >      | 74                  | 25             | +79%             | 15%                | 11                               | +16%             | 0.3                  | 0.10           | 72%                 |
| Sullivan >      | 16                  | 21             | -13%             | 9%                 | 12                               | -18%             | 0.1                  | 0.17           | 63%                 |
| Clinton >       | 16                  | 20             | +81%             | 11%                | 25                               | -32%             | 0.3                  | 0.39           | 74%                 |

# Independent Contractor vs. Employee Classification



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# Employee vs. Independent Contractor

- Why does it matter?
  - Wage and hour issues
  - Union organizing
  - Tax withholding
  - Employee benefits
  - Statutory benefits
  - Workers comp v. tort liability
- Control over the work and worker
- Liability to the worker and for the worker's actions

# NLRA Independent Contractor Classification

- Under the NLRA, only “employees” can unionize and only their “employers” can be forced to negotiate with their unions
- NLRB’s General Counsel has indicated that she wants to broaden the definition of “employee” to encompass more individuals who may traditionally be classified as an independent contractor
- One outcome of that would be more employees eligible to organize

# NLRA Independent Contractor Classification

- In December 2021, the Board invited parties to brief whether the Board should reconsider its standard for determining independent contractor status that was previously set forth in 2014
  - Invitation related to a union organizing drive for workers who provided makeup and hairstyle services to the Atlanta Opera
- 2019 *SuperShuttle* decision
  - Applied a common law test for independent contractor status using a non-exhaustive list of common law factors, focusing on entrepreneurial opportunity and employer control



# NLRA Independent Contractor Classification

- Under a new test, the Board could make it more difficult for a worker to be classified as an independent contractor
- ABC Test:
  - The worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact;
  - The worker performs work that is outside the usual course of the hiring entity's business; and
  - The worker is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed

# NLRA Independent Contractor Analysis

- What happens if this test is adopted?
  - It will target “gig” workers such as Uber and Lyft drivers and consider them to be employees for purposes of the NLRA
- What about other statutes?
  - Definitions of independent contractor for purposes of FLSA and NY Labor Law would remain untouched as those are not controlled by NLRB decisional law

# NLRA Independent Contractor Analysis

- Employer Takeaways
  - For now, employers should be keeping a close eye on the NLRB's decisions with respect to this issue
  - Work with counsel when classifying workers as independent contractors, particularly where you may have a large group of workers who would be susceptible to unionization
  - Evaluate the degree of control and supervision the employer is exercising, as well as whether the nature of the work is integral to the employer's business

# DOL Notice of Proposed Rulemaking

- Align with courts' FLSA interpretation -- the economic reality test
- Restore the multifactor, totality-of-the-circumstances analysis
- All factors analyzed without assigning predetermined weight to a particular factor or set of factors
- Revert economic reality factors
  - Investment
  - control and opportunity for profit or loss factors
  - integral factor is the work is integral to the employer's business
- Rescind the 2021 Independent Contractor Rule.

# Practical Considerations

- Analyze the use of contractors
- Consider the use of staffing agencies
  - Joint employer considerations
- Why are you entering the IC relationship?
- Outsourcing vs. internal use of contractors
- Gig economy model
- Consider the pendulum at the regulatory agencies

# New York City Earned Safe and Sick Time Act



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# Proposal Overview

- Introduced on August 11, 2022
- Broadens the ESSTA's definition of “*employee*” to include certain independent contractors
- Analyzes an individual's employment status under one of two distinct categories:
  - Category 1: Individuals Providing Non-Professional Services
  - Category 2: Individuals Providing Professional Services

# Category 1: Individuals Providing Non-Professional Services



# Presumption of Employment

- TWO ways to overcome this presumption:
  - (1) A hiring entity may show that an individual is an **independent contractor** OR
  - (2) A hiring entity could demonstrate that an individual is considered a **separate business entity**

# Independent Contractor

- (1) The individual is free from control and direction in performing the job, both under his or her contract and in fact;
- (2) The service must be performed outside the usual course of business for which the service is performed; AND
- (3) The individual is customarily engaged in an independently established trade, occupation, profession or business that is similar to the service at issue.

# Separate Business Entity

- A hiring entity must prove the existence of twelve factors
- Separate business entity = hiring entity independently subject to the Proposal

# Category 2: Individuals Providing Professional Services

# Professional Services

- (1) Writers;
- (2) Graphic designers;
- (3) Webpage and digital designers;
- (4) Animators, illustrators, industrial product designers, interior designers, or fashion designers;
- (5) Fine artists;
- (6) Photographers
- (7) Journalists, freelance digital media workers, videographers or audio/podcast producers;
- (8) Software engineers; or
- (9) Musicians and other persons otherwise engaged in the performing arts.

# Proving Employment Status

- **NO presumption of employment!!**
- A hiring entity attempting to show that an individual providing professional services is an independent contractor still must:
  - Step 1: Prove the existence of six enumerated criteria.
  - Step 2: Engage in an analysis eleven independent factors, none of which are determinative.

# Concluding Thoughts:

- Expands the Act's definition of "employee"
  - Harder to prove that an individual is an independent contractor exempt from ESSTA benefits
- Employer Actions:
  - Update employee handbooks and collective bargaining agreements

# Faculty Diversity Plan Update



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# Background

- The New York State Fiscal Year 2023 State Budget (S8003/A9003) included a provision that independent colleges and universities must submit a plan to improve faculty diversity to NYSED in order to be eligible for a Bundy Aid payment in the 2022-2023 academic year
- Faculty diversity plans included three measurable goals and a schedule of reporting on progress toward meeting such goals
- Colleges and universities also had to submit a table of data that would be used to measure progress toward goals

# Update

- New York State Higher Education Data System (HEDS) Instruction Manual was updated on November 21, 2022
- New Language states that:
  - If a goal is based on data already provided in the table, enter *“Please see the Faculty Diversity Plan – Data table for the data/information informing the goal”* into the “Data/information informing the goal” section.
  - **If a goal is not based on the data listed in the data table, the institution must submit data/information related to the goal in the “Data/information informing the goal” section.**

# Action Items

- Create revised plan now
- For any goals that rely on data from your data table, just say: “Please see the Faculty Diversity Plan – Data table”

| Goal 2                              |   |
|-------------------------------------|---|
| Measurable Goal                     | Increase representation of full-time faculty who identify as female |
| Data/information informing the goal | Please see the Faculty Diversity Plan – Data table                  |

# Action Items

- Do not resubmit plan, unless asked by SED
- Clearly document baseline data that will be used to evaluate progress toward unique goals
  - Keep record of data collection strategy and process
- For any goals that are not based on the data listed in the data table, the institution must identify that data now

# Sample Current Plan/Goals

| Goal 3                              |  |
|-------------------------------------|--|
| Measurable Goal                     | Increase proportion of faculty with military service |
| Data/information informing the goal | U.S. Armed Forces Veterans 2021-2022: 3              |

| Goal 3                              |  |
|-------------------------------------|--|
| Measurable Goal                     | Increase proportion of faculty who were first in their family to get college degree                    |
| Data/information informing the goal | Faculty members who were first generation college graduates 2021-2022: Data collection began 2022-2023 |

# New York Paid Sick Leave Review



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## Review of the Basics

- NYPSL requirements are based on the size/income level of the employer:

| Private Employer Size                                      | PSL Required                         |
|--|--------------------------------------|
| 4 or fewer employees (net income \$1M or less)             | 40 hours of <u>un</u> paid sick time |
| 4 or fewer employees (net income <u>greater than</u> \$1M) | 40 hours of paid sick time           |
| 5-99 employees   | 40 hours of paid sick time           |
| 100 or more employees                                      | 56 hours of paid sick time           |

- Determine number of employees by counting the highest total number employed concurrently, nationwide, at any point during the year.

# Existing PTO Policies

- An employer is not required to provide additional sick leave under the new law “if the employer has adopted a sick leave policy or time off policy that provides employees with an amount of leave which meets or exceeds the requirements of this section, and satisfies the accrual, carryover, and use requirements.”
- Employers can therefore modify existing PTO and sick leave policies to conform to NYPSL requirements, with special attention paid to accrual, carryover and use



# The Question of Carryover

- The NY PSL guidance states:
  - “Sick leave that is unused by an employee over the course of the year must be carried over to the next calendar year. However, employers may limit employee use to the number of hours that the employee is entitled to use within any calendar year (i.e., 56 hours for employers with 100 or more employees and 40 hours for employers with 99 or fewer employees). This may result in an employee maintaining a leave balance in excess of the amount they are permitted to use in any calendar year.”
- Guidance also states: “An employer who front-loads fewer than 40 hours must allow employees to carry over up to 40 hours of unused sick leave into the new calendar year, in addition to front-loading the amount of time the employer expects the employee to earn in the new calendar year.”

# Important Points

- Employers may not impose a waiting period for accrual or use of PSL.
- Seasonal employees who “maintain an ongoing relationship with their employer maintain their leave accruals through such breaks in employment.”
- Employers may have a policy that allows employees to donate leave to other employees, as long as making the donations is voluntary.

# Important Points

- PSL does not need to be paid out at termination (but your policy on this must be explicit).
- Employers can frontload leave for part-time employees, but still have to track hours.
- Employers can only require medical documentation after an employee has been out for 3 days.

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## New York Paid Sick Leave Update

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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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