

**BUSINESS IN**

**2022**

**WEEKLY WEBINAR SERIES**

2023

2021

2020

2019



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# Introduction



## Adam P. Mastroleo

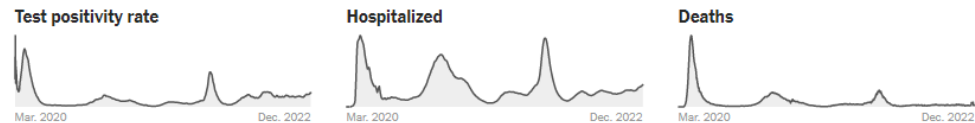
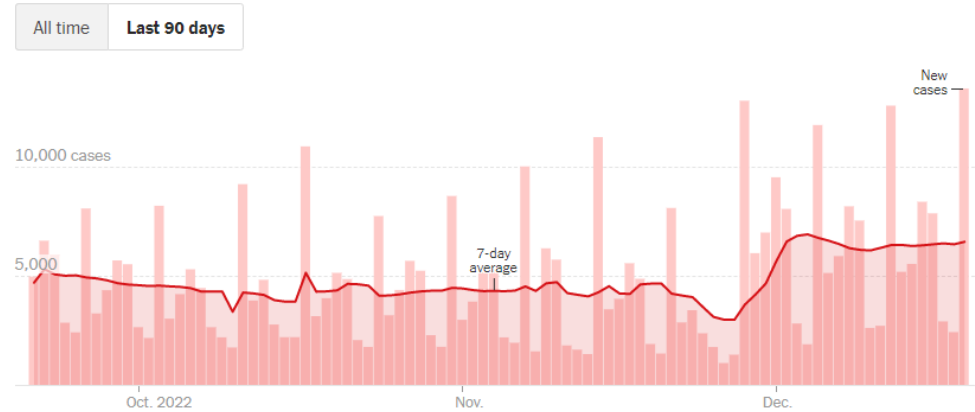
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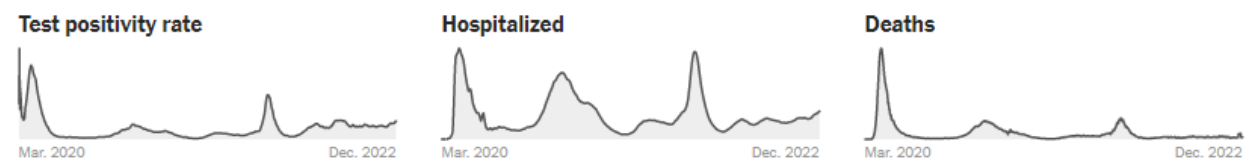
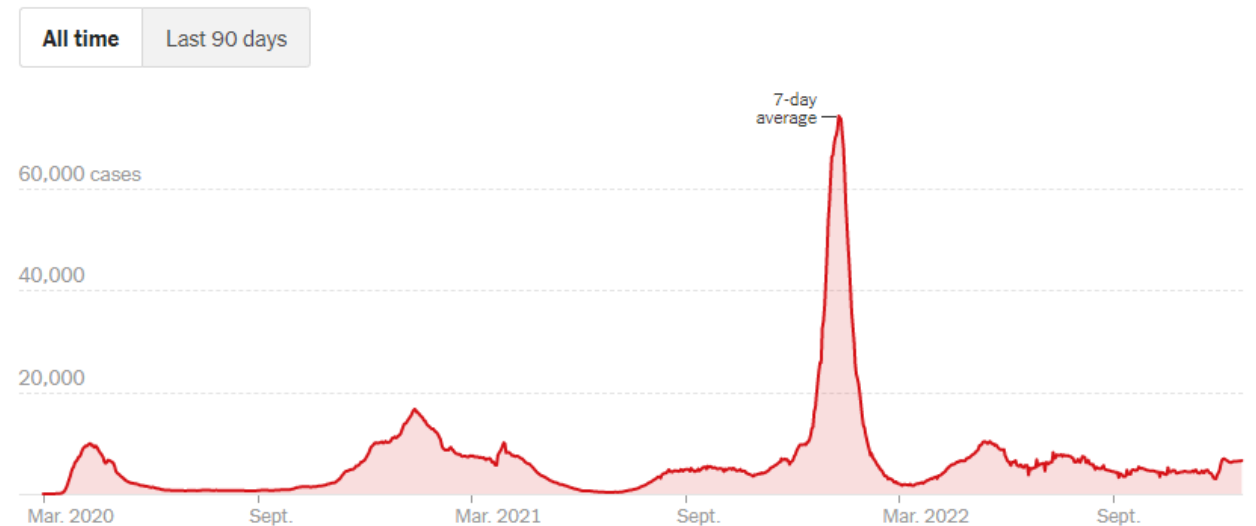
# Current COVID Data in New York

## New reported cases



	DAILY AVG. ON DEC. 19	PER 100,000	14-DAY CHANGE
Cases	6,552	34	-3%
Test positivity	13%	—	+13%
Hospitalized	4,212	22	+14%
In I.C.U.s	396	2	+17%
Deaths	22	<1	+8%

## New reported cases

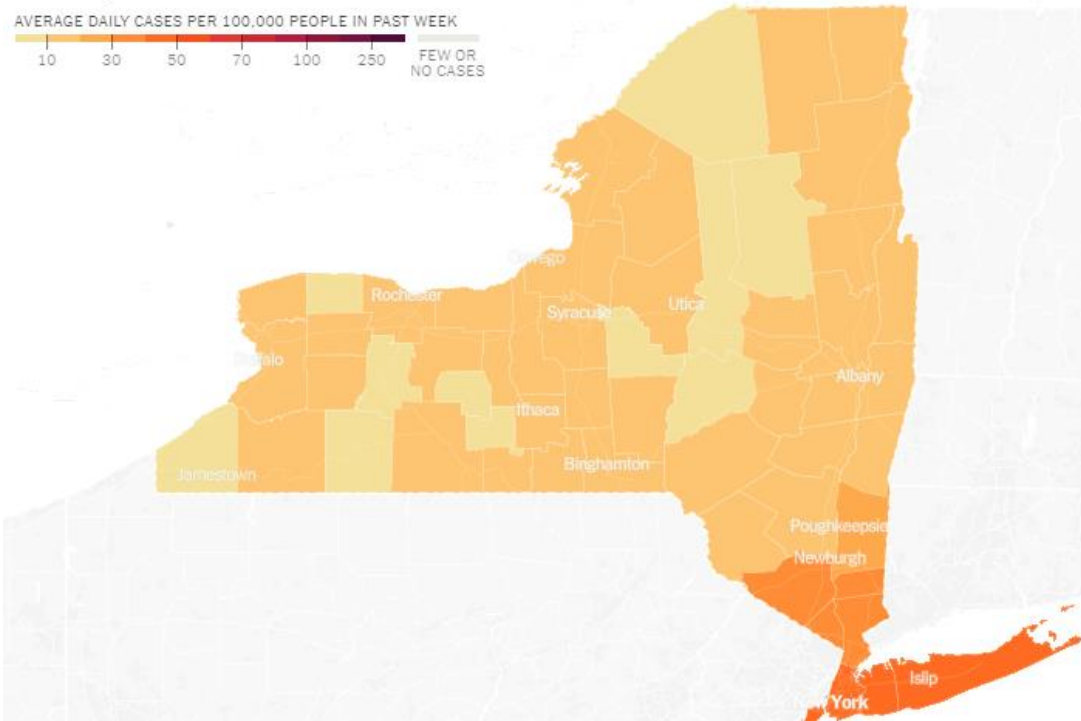


# Current COVID Data in New York

## 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	6,552	34	-3%	13%	22	+14%	21.6	0.11
Nassau >	623	46	+5%	14%	51	+13%	1.3	0.10
New York City >	3,816	46	-9%	14%	25	+18%	17.2	0.21
Suffolk >	671	45	+10%	14%	31	+28%	1.2	0.08
Rockland >	110	34	+8%	10%	15	+22%	0.4	0.11
Putnam >	31	31	+14%	13%	15	+26%	<0.1	0.05
Westchester >	301	31	Flat	13%	22	+10%	0.9	0.10
Orange >	118	31	+17%	10%	20	+46%	0.5	0.14
Dutchess >	68	23	-8%	14%	12	+12%	0.2	0.05
Sullivan >	14	19	-11%	7%	21	+81%	0.1	0.17
Warren >	12	19	Flat	9%	13	+1%	0.1	0.22

# Recent NLRB Decisions



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# Significant NLRB Activity

## The National Labor Relations Board

- 5 member Board that sets federal labor policy
- December 2022 activity as Board Member John Ring's (R) term ends
- NLRB decisions impact private sector employers
  - unionized and non-unionized workforces
- Several highly significant cases in the past week

# Off-duty Employee Access to Employer Property

- Long history of litigation over employees' Section 7 rights to unionize and engage in concerted protected activity, and the employer's right to control access and use of its property
- Current scenario: Off-duty employees of Company A who regularly work on the property of Company B seek access  
Examples: a employees of a restaurant in a hotel; employees of a tenant in an office building; employees of a subcontractor on a project
- Prior standard: treated as non-employees subject to exclusion unless no alternative means to communicate
- New standard: off-duty employees **only excludable** if employer shows their activity "significantly interferes" with property use or interferes with production or discipline
- Implications: expanded access  less control & more disruption to operations

## “Make Whole” Relief

- When the NLRB concludes that an employer’s conduct was unlawful, it can order the employer to take “such affirmative action ... as will effectuate the policies of the [NLRA]”
- In the context of unlawful discrimination and other loss of employment, the remedy frequently includes reinstatement and backpay.
- GC Abruzzo’s position: remedy should include “consequential damages” – not adopted by NLRB
- NLRB decision: “Make whole” relief to include all direct and reasonably foreseeable pecuniary harms suffered by the employee
- Implication: Together with GC’s “full relief” position on settlement, risk of an NLRA violation becomes more expensive and time-consuming



# NLRB Asserts Employment Protections for Student-Athletes

- The NLRB General Counsel has issued a complaint against the University of Southern California (USC), the Pac-12 Conference and the NCAA claiming that certain USC student-athletes are employees under the NLRA
- The complaint also asserts that the conference and the NCAA, along with the university, can be held jointly responsible as employers for the treatment of those students
- Allegation that the term “student-athletes” is *per se* unlawful
- NCAA involvement → National implications

# NLRB Restores Obama-Era Bargaining Unit Test



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# Recent NLRB Decision on Test for Recognizing Bargaining Units

- December 14, 2022 NLRB decision: *American Steel Construction, Inc.*
- This (again) modifies standard for bargaining-unit determination cases – it's a return to the standard from 2011 to 2017.
- Decision will make it easier for unions to organize sub-groups of employees – sometimes referred to as “micro units.”

# When Does *American Steel* Come into Play?

- A labor union seeks to represent a unit that contains some, but not all, of the job classifications at a particular workplace.
- Example of *American Steel*:
  - Proposed unit: journeymen and apprentice field ironworkers
  - Employer: unit should also contain painters, drivers, and inside fabricators
- At stake: how difficult (or easy) to form a “micro unit.”
- How does NLRB resolve this? Where’s the right balance?

## 2011-2017 Test: *Specialty Healthcare*

- Employer had burden
- Had to demonstrate an “overwhelming community of interest” between the petitioned-for employees and excluded employees
  - Difficult standard; was a boon for union organizing
- Unusual “micro units” formed
  - One example: cosmetic and fragrance counter employees at a Macy’s department store.

# 2017- Dec 2022 Test: *PCC Structural*s and *Boeing*

- 2017 *PCC Structural*s overruled *Specialty Healthcare*.
- Balancing test of “interests of those within the proposed unit and the shared and distinct interests of those excluded from that unit.”
- Removed burden from party challenging unit (employer)
- No longer started with deference to composition of proposed unit
- Employers had far greater ability to challenge.

## Current Test: *American Steel*

- Complete return to *Specialty Healthcare and* “overwhelming community of interest” standard.
- Means only “minimal differences, from the perspective of collective bargaining”; “no rational basis” for the exclusion.
- If proposed unit is clearly identifiable group of employees with a shared “community of interest,” Board will presume to be appropriate.

# Takeaways

- Unions and employees again empowered to organize along narrower lines of job classification.
- Unions will again likely focus on “micro units” as a path to organizing.
- Employers may have to prepare to face the prospect of multiple distinct bargaining units among their employees.



# New York State Pay Transparency Law



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# Where Are We?

- Delivered to Governor – Dec. 12, 2022
- Governor has 10 days (not including Sundays) to sign, veto, or take no action
- If Governor takes no action within 10 days - automatically becomes law
- Vetoed bill - two-thirds of each house can vote to override
- Effective Date: 270 days after becoming law
- Would amend NYS Labor Law

# Who is a Covered Employer?

- Employers, employment agencies, and employees and agents thereof
- Employer = broadly defined
  - (1) any person, corporation, LLC, association, labor organization, or entity employing four or more employees in any occupation, industry, trade, business, or service, or any agent thereof; and
  - (2) any person, corporation, LLC, association or entity acting as an employment agent or recruiter, or otherwise connecting applicants with employers.
  - Temporary Help Firms, as defined under §916(5) of the New York State Labor Law are exempt from the law.

## What postings are covered?

- Advertisement not defined
- Any job, promotion, or transfer opportunity which can or will be performed, at least in part, in NYS

# What must be disclosed?

- Compensation or “Range of Compensation” = “min. and max. annual salary or hourly range of compensation. . .that the employer in good faith believes to be accurate at the time of the posting of an advertisement for such opportunity.”
- Job description for such opportunity, if one exists.
- Advertisements for jobs, promotions, or transfer opportunities which are paid solely on commission must make a general written disclosure that the position is commission-based.

# What else does the law require employers do?

- Record Keeping requirement: Must keep and maintain records in connection to this law, including but not limited to:
  - History of compensation ranges for each job, promotion, or transfer opportunity and
  - Job descriptions for these positions, if such job descriptions exist.

## What else does the law prohibit?

- Retaliation: Employers may not refuse to interview, hire, promote, employ, or otherwise retaliate against an applicant or current employee for exercising any rights under this new law.

# Enforcement/Penalties

- Any person claiming to be aggrieved under this new law may file a complaint with the Commissioner of the New York State Department of Labor.
- Civil penalties, under §218 of NYS Labor Law, of up to \$3,000 for any employer who violates this law or any related regulations which will be promulgated.



# Preemption

- Shall not be construed or interpreted to supersede or preempt any local law, rules, or regulation.

# Wage and Hour Basics: New York Frequency of Pay Requirements



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# New York Frequency of Pay Requirements

- Manual Workers
  - Must be paid weekly, within 7 calendar days after the end of the work week
  - Exceptions
    - Not-for-profit organizations
    - Large employers who have obtained a permit from the Commissioner of Labor
- Clerical and Other Workers
  - Must be paid at least semi-monthly
- Commissioned Salespersons
  - Must be paid in accordance with agreement
  - Not less frequently than monthly

# Definition of Manual Worker

- Labor Law Section 190
  - Manual worker means a mechanic, workingman, or laborer
- NYSDOL's Broad Interpretation
  - Employees who spend more than 25% of their working time performing physical labor

# Examples of Manual Workers From NYSDOL Opinions

- Truck drivers
- Warehouse workers
- Construction workers
- Wait staff and cooks at restaurants
- Chauffeurs
- Cashiers
- Hairdressers
- Supermarket and department store employees
- Janitors

# Enforcement Prior to September 10, 2019

- Courts generally held there was no private cause of action
  - Only administrative complaint to NYSDOL
- Not considered to be a claim for unpaid wages
  - No back wages or interest due
  - No liquidated damages in the amount of 100% of unpaid wages
  - No attorneys' fees
- Remedy limited to a civil penalty payable to the NYSDOL
  - Up to \$1,000 for first violation
  - Up to \$2,000 for second violation
  - Up to \$3,000 for third and subsequent violations

# Vega v. CM & Assoc. Constr. Mgt., LLC

- First Department Appellate Division decision September 10, 2019
  - Late payment of wages = underpayment of wages
  - A manual worker can assert a private cause of action in court for employer's failure to pay weekly
  - A manual worker is entitled to 100% liquidated damages for all wages paid late
  - Attorneys' fees are recoverable

## Example of Vega Application

- A manual worker's hourly wage is \$15.00 per hour, and is paid \$1,200.00 on a bi-weekly basis for 40 hours of work each week for a period of 6 years
  - The compensation for the first week in each bi-weekly payroll period is paid more than 7 days after the end of the work week
  - \$600.00 per pay period x 26 pay periods per year x 6 years = \$93,600.00
- The employee can recover \$93,600.00 in liquidated damages ***even though the employee was paid in full for all work hours***
- If there were 100 manual workers during the entire 6-year period, potential liability for the entire class would be \$9,360,000.00



# Rise in Section 191 Lawsuits

- Over 100 lawsuits filed since the Vega decision
- Many other threatened lawsuits likely have been settled before being filed
- Plaintiffs' attorneys have an incentive to file these claims as class actions

# A Glimmer of Hope: Besante Fitzgerald Grant v. Global Aircraft Dispatch, Inc.

- Supreme Court, Queens County decision (April 20, 2021)
  - Violation of frequency of pay law ≠ underpayment or failure to pay wages
  - No private cause of action
  - No liquidated damages
  - No attorneys' fees
- Appeal pending before the Second Department Appellate Division
- New York Court of Appeals (highest court) has not addressed the issue . . . yet

# General Advice

- Potential liability for paying manual workers less frequently than weekly is enormous under the Vega decision
- If you pay on a bi-weekly or semi-monthly basis, evaluate if you have manual workers who should be paid weekly
- If in doubt, assume an employee is a manual worker and change to weekly payroll
- Even if the Court of Appeals eventually holds that Vega was incorrect, compliance with Section 191 is still a good idea

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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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