

BUSINESS IN

2022

WEEKLY WEBINAR SERIES

2023

2021

2020

2019



BOND

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& KING** ATTORNEYS

Introduction



Adam P. Mastroleo

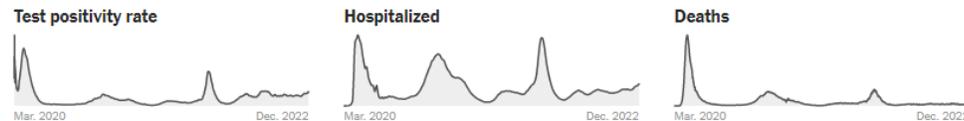
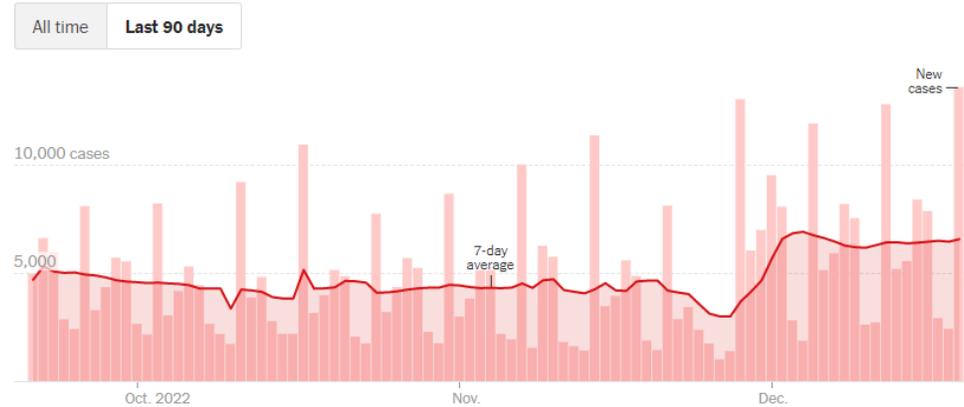
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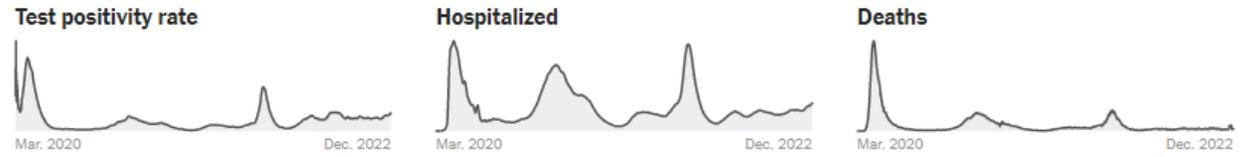
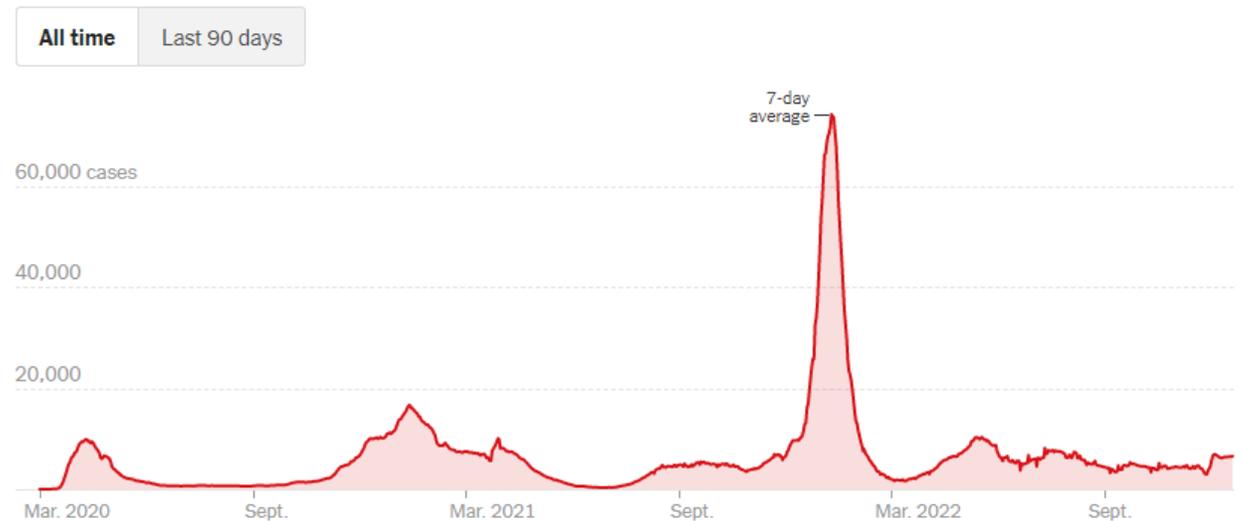
Current COVID Data in New York

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

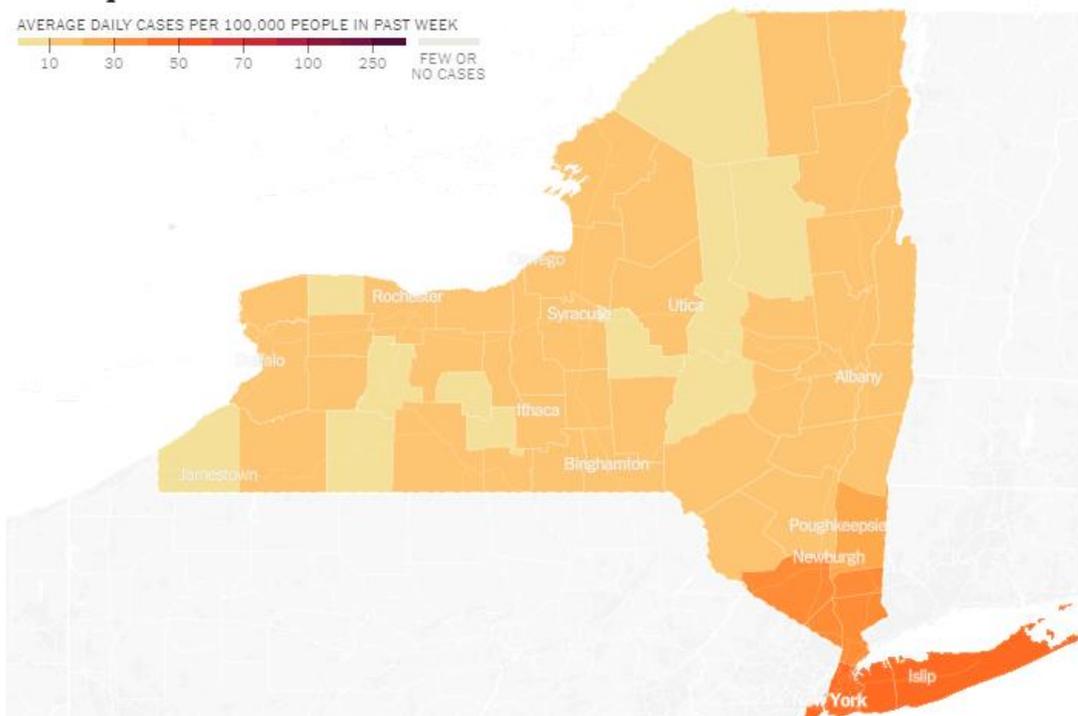


Current COVID Data in New York

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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It is not to be considered as legal advice.
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