

FEI Presentation

March 15, 2022



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Overview of Topics

- (1) COVID Workplace Requirements
 - COVID-specific employee leave
 - HERO Act considerations
 - Mask policies and vaccine policies
- (2) Economically Managing Employee Leave
 - FMLA, PFL, Paid Sick Leave, etc.
 - Managing “leave as an accommodation”
- (3) Remote and Hybrid Work Arrangements
 - Policies, costs, and risks
- (4) Overtime Rules and Payroll Timing Risks
 - Risks in “late” payments despite existing industry standards
- (5) Overhaul of N.Y. Whistleblower Law
 - Sea change in actionable employee complaints
- (6) On the horizon: The end of non-compete clauses?



Topic 1: The COVID Workplace

- Almost 2 years to the day from the start date of the pandemic.
- Laws and regulations have continuously shifted.
- Be wary of “final” decisions.



Topic 1: The COVID Workplace *Employee Leave Law Timeline*

- March 2020: NY COVID Leave Law and Federal Families First Coronavirus Response Act (“FFCRA”)
- December 31 2020: FFCRA expired as a “mandatory” leave law by end of 2020.
 - Continued as a “voluntary” option, with tax credits, through September 2021
- January 2021: NYS DOL issues “guidance” expanding the NY COVID Leave Law
- March 2021: NY enacts “Paid Vaccine Leave” law for receiving vaccinations
- ***In effect today: NY COVID Leave Law and NY Vaccine Leave Law.***



Topic 1: The COVID Workplace *NY COVID Leave Law Eligibility*

- By the text of the law, a “quarantine” is a government-ordered quarantine, such as an order from the State Department of Health or a local health board.
- February 2022: “self-attestation” of quarantine or isolation.
- Notes or orders from a treating health provider.
- Best practice...



Topic 1: The COVID Workplace *NY COVID Leave Law Length of Leave*

- Employee gets their regular pay, paid by their employer.
- These paid days are independent of any other leave “bank,” like PTO or vacation.
- Leave is “job-protected.”

Employer Size	Length of Leave
Small Employers (1-10 employees) with less than \$1 million in net annual income	Up to 5 days, <i>unpaid</i> .
Small Employers (1-10 employees) with more than \$1 million in net annual income	Up to 5 days, <i>paid</i> .
Medium Employers (11-99 employees)	Up to 5 days, <i>paid</i> .
Large Employers (100+ employees)	Up to 14 days, <i>paid</i> .
Public Employers (regardless of size)	Up to 14 days, <i>paid</i> .



Topic 1: The COVID Workplace

NY COVID Leave Law Amount of Benefits

- For small and medium private-sector employers (less than 100 employees): after the 5 days are up, the employee may apply for PFL/Disability benefits.
 - Employers with more than 100 employees are not covered.
- Employees utilizing PFL/Disability for their own quarantine may receive:
 - Up to \$840.70 per week in PFL benefits and up to \$2,043.92 per week in Disability benefits, **for a total of \$2,884.62** per week, paid by the employer's PFL/Disability insurance carrier.



Topic 1: The COVID Workplace

NY COVID Leave Law and Family

- If an employee's minor dependent child is subject to an official quarantine, the employee may take Paid Family Leave.
- Eligibility is not dependent on employer size.
- Max benefit of \$1,068.36 per week in 2022.
- Usual "standard" PFL rules apply.
- ***Paid by company's disability carrier.***
- Same for "Family Care" leave for a family member that contracts COVID-19.





Topic 1: The COVID Workplace *NY COVID Leave Law Common Questions*

- Can we require employees to use PTO or sick leave instead?
- How many times can an employee take leave?
- What if the employee is vaccinated?
- What if the employee has been exposed, but isn't under an order of quarantine?



Topic 1: The COVID Workplace *NY COVID Vaccine Leave*

- Still in effect through end of 2022.
- Four hours of paid time off “per vaccine injection.”
- Can request proof of vaccination.
- Covers booster shots.





Topic 1: The COVID Workplace *The N.Y. HERO Act*

- “Health & Essential Rights” Act.
- Law is “activated” if/when the Department of Health “designates” a particular illness as presenting a serious harm to the public health.
- Requires adopting a “Workplace Prevention Plan.”
 - Sample plans on DOH website. Encompasses several “new normal” measures (social distancing, masks when necessary, enhanced air filtration, etc.).
- ***To be reviewed March 17, 2022.***



Topic 1: The COVID Workplace *Are masks still required?*

- Under the current HERO Act prevention plans: **recommended, not required.**
- Can we *require* masks?
- Can we *prohibit* masks?
- Do we have to *provide* masks?





Topic 1: The COVID Workplace

What are the rules on vaccination now?

- Federal “vaccine mandate,” through OSHA, was withdrawn in January after Supreme Court ruled against OSHA on January 13.
- Currently no state-law mandate for the general workforce.
- Can an employer or business set their own vaccine mandate?
 - Yes, but...



Topic 2: Economically Managing Employee Leave

- Required leave-from-work is an obvious friction point between business operations and personnel management.
- Operational cost on one hand; personnel cost on the other.
- Ways to structure leave to minimize economic cost.
- Litigation cost?



Topic 2: Managing Employee Leave

Relevant Laws

- FMLA (Family & Medical Leave Act): Federal law, generally covers employers with 50 or more employees.
 - Up to 12 weeks of leave.
- New York Paid Family Leave (“PFL”): all private employers with at least 1 employee.
 - Up to 12 weeks of leave.
- New York Paid Sick Leave: all private employers with at least 1 employee.
 - Up to 56 hours per year (employers with 100+ employees)
 - Up to 40 hours per year (employers with less than 100 employees)
- Americans with Disabilities Act (“ADA”) and N.Y. Human Rights Law (“HRL”): require “reasonable accommodations” for employees with disabilities
 - Temporary leave from work can be an accommodation.



Topic 2: Managing Employee Leave

Who pays?

- FMLA (Family & Medical Leave Act):
 - default is “unpaid,” but, employer can require PTO or other accrual usage.
- New York Paid Family Leave (“PFL”):
 - default is paid by employer’s disability insurer, but, employer can pay and get a tradeoff...
- New York Paid Sick Leave:
 - paid by employer.
- Americans with Disabilities Act (“ADA”) and N.Y. Human Rights Law (“HRL”):
 - default unpaid.



Topic 2: Managing Employee Leave

Run leave concurrently

- Some leave can run “concurrently.”
- Example: PFL and FMLA share multiple qualifying reasons for leave:
 - (1) leave to care for a family member with a health condition
 - (2) leave to bond with a new child following birth (e.g., parental leave)
 - (3) leave to assist family if family member deployed for military service
- FMLA and PFL leave can run “concurrently” in many scenarios.
- Rather than 12 weeks of FMLA...and *then* 12 weeks of PFL...total leave time could be capped at 12 weeks.
- Action item: ensure HR and/or managers understand logistics of identifying and approving concurrent leave.



Topic 2: Managing Employee Leave

Run leave concurrently (part 2)

- Combine PFL and employer-provided accrued time, such as vacation, PTO, etc.
- Employees on PFL leave receive only 67% of their weekly pay, up to a cap of \$1,068.36 per week.
- If the employer allows it and employees chooses it: employee can use their accrued time (PTO, vacation, etc.) during PFL.
- Benefit to employee:
 - Gets their full pay (rather than 67%)
 - Still job-protected.
- Benefit to employer:
 - More scheduling certainty.
 - Employee uses their other accrued time.
 - **Employer gets partially reimbursed by the disability carrier.**



Topic 2: Managing Employee Leave

Leave as an accommodation

- If an employee has exhausted available leave (FMLA, PFL, Sick Leave, etc.) and has a disability or medical condition: does the employer have to provide more leave?
 - **Maybe.**
- The ADA and the N.Y. HRL require “reasonable accommodations.” Accommodation is not required where it would pose “undue hardship.”
- A couple days off here and there...reasonable?
- A couple *weeks* off...
- A couple *months* off...



Topic 2: Managing Employee Leave

Leave as an accommodation

- When is leave a “reasonable accommodation”?
 - Leave will permit the employee to perform the “essential functions” of the job when they return.
 - The leave is not “indefinite.”
- Signs of an “indefinite” leave:
 - Multiple “return-to-work” dates
 - Uncertainty whether additional leave will be needed after returning to work
- Signs of an “undue hardship”
 - Substantial disruption to operations or finances based on absence.
 - Case-by-case.





Topic 2: Managing Employee Leave *Litigation pitfalls*

- Poor documentation.
 - Medical notes not requested;
 - return-to-work dates not requested;
 - “verbal” communication only.
 - *“It’s not what you know. It’s what you can prove.”*
- Manager unfamiliarity with law
 - Get HR involved to manage leave.
 - When in doubt, managers should avoid blanket “no’s.”
- Failing to have the “bite the bullet” conversation: temporary leave, or potentially protracted litigation?



Topic 3: Remote Work Issues

- Remote work here to stay in some capacity.
- Time to standardize rules and norms if company has not done so already.
- Cost considerations and risks: eligibility, time entry, supplies.



Topic 3: Remote Work Issues

Basics of Remote Work Arrangements

- *Clear expectations, clear rules.*
- Develop a written “Remote Work Policy” with an acknowledgement from the employee. Can be part of a handbook.
- Evaluate whether remote work eligibility and whether eligibility will create “pockets” of employees.
- Security of sensitive or proprietary information.
- Strategic, long-term planning: use of office-space?



Topic 3: Remote Work Issues

Out-of-State Employees and Tax

- Are employees who work for a New York entity – but out-of-state – subject to New York tax withholdings?
- Among other things, depends on at least the following:
 - Does the employee work *in* New York State at all? (14 days or more)?
 - Does the employee only take “training” courses or similar assignments while in NY?
 - Is the employee’s out-of-state location considered a “bona fide” or “primary office” location?
- Beware of other states’ tax requirements.
 - Related: incorporation requirements, licensing requirements, insurance requirements.



Topic 3: Remote Work Issues

Employee Time and Task Recording

- For non-exempt or hourly workers: time spent working remotely must be tracked accurately.
 - All time worked is “compensable.”
 - Example: employee habitually checking email out of working hours.
- Knowledge that an employee has “worked” → Requirement that employee is paid.
- Establish a procedure that requires time entry by a particular time.
- If a procedure is in place, employers generally do not have to go “hunting” to find other hours worked.



Topic 3: Remote Work Issues

Risks in Poor Time Recording

- Class-action exposure.
- COVID-related workplace changes have already sparked class actions against employers that did not compensate for time “worked”:
 - A case out of California, alleging a grocery chain failed to pay employees for time spent filling out its health screening questionnaire
 - Another case out of New Jersey, alleging similar allegations at a major online retailer warehouse
- Bottom-line: instruct employees to record all time worked, and establish a uniform practice for it.





Topic 3: Remote Work Issues

Remote Work and Disability Accommodations

- Remote work could be a “reasonable accommodation” under the right circumstances.
 - Example: employee at higher risk of serious disease or hospitalization due to COVID
- HR and/or related managers should engage in the “interactive process” to determine if remote work is feasible.
- Consider the costs (tools, supplies, tech, etc) needed for remote work.
 - Providing those supplies might be part of the accommodation.



Topic 3: Remote Work Issues

Remote Work and Supplies

- General rule: companies do not have to reimburse employees for items necessary to perform their work unless the expense brings pay below minimum wage, or, cuts into overtime wages.
- That said: be wary of large expenses that could bring even high-wage earners technically below minimum wage or into overtime problems.
 - Laptops, tablets, data plans or work-specific internet service (VPNs paid for by employee), software, etc.
- Review whether employees need supplies to continue working from home.





Topic 4: Payroll Changes

- Overtime exemption changes?
- “Frequency of pay” claims on the rise.



Topic 4: Payroll Changes

Updated Salary Thresholds for OT Exemptions?

- “Exempt” employees are exempt from overtime.
 - Executive, Administrative, Professional exemptions → most common exemptions.
- Employee must meet **minimum salary threshold** to claim the exemption.
- NY and Federal law have separate salary thresholds.



Topic 4: Payroll Changes

Current Salary Thresholds

- Rules of thumb for Executive and Administrative exemptions:
 - Executive: managers who oversee at least 2 other employees, and/or manage a department
 - Administrative: employees who “run” the business (accounting, HR, marketing, benefit management, payroll)
 - **\$990 per week for “upstate” (\$51,480 per year)**
 - **\$1,125 per week for “downstate” (Nassau, Suffolk, Westchester, and NYC) (\$58,500 per year)**
 - Thresholds are based on New York law.
- Professional
 - “Learned” professional: someone with an advanced degree in a field of “science or learning”
 - “Creative” professional: writers, musicians, novelists, painters, composers
 - **\$684 per week**
 - Threshold is based on Federal law



Topic 4: Payroll Changes

Update to Salary Thresholds Coming?

- In fall 2021, U.S. Department of Labor quietly announced they will “review” the minimum salary thresholds.
- Update is targeted for April 2022.
 - Thresholds will probably not exceed New York thresholds.
- But: review “professional” employees salaries...



Topic 4: Payroll Changes

“Frequency of Pay” Claims

- N.Y. Labor Law § 191: employees must be paid at certain intervals or “frequency”
- Growing trend in New York of cases alleging employees were not paid on proper frequency.
- Common in many industries to pay employees bi-weekly.
- **“Manual” workers must be paid weekly.**
 - Anybody who spends more than 25% of their working time engaged in physical labor.
 - Light-to-medium lifting.



Topic 4: Payroll Changes

“Frequency of Pay” Claims (cont’d)

- Law has been on the books for decades but was not a priority of either the DOL or plaintiffs’ lawyers.
- Changed in 2019 following a decision from a state appellate court.
 - Employees have “private right of action” under the law
 - Damages available even if employee received all of their pay.
- *Damages could double the pay the employee actually received.*
 - Even if employee received all their pay, courts will find the employee was damaged by the bi-weekly payment.





Topic 4: Payroll Changes

Steps to Mitigate Risk of Frequency of Pay Claims

- Review current payroll practices:
 - Are all employees paid bi-weekly?
 - Are some employees “manual” workers?
- Review risk, if any:
 - Total exposure
 - Possible defenses
- Evaluate changing payroll timing, if needed.
 - *Cautiously.*



Topic 5: Change in N.Y. Whistleblower Law

- Sea change in what constitutes an actionable internal complaint from an employee.
- Not just limited to harassment, discrimination, and other HR-related practices...



Topic 5: Whistleblower Law Update

Expansion of Law

- **N.Y. Labor Law § 740**
- Previously, prohibited employers from “retaliating” against employees who disclosed dangers to *public health or safety*.
- Now: prohibits “retaliating” against employees who “reasonably believe” their employer has committed an act in “*violation of any law, rule, or regulation.*”
- “Retaliating” = discharge, suspension, demotion, actions or threats impacting current or future employment.



Topic 5: Whistleblower Law Update

Expansion of Law (cont'd)

- Employee does not need to allege an actual violation.
 - Only needs a “reasonable belief” that there was a violation.
- Employee must make a “good faith effort” to notify their employer.
 - Unless employee believes (among other reasons) reporting would result in destruction of evidence, concealment, or other harm to employee, or,
 - Unless employee believes supervisors are condoning behavior to begin with.





Topic 5: Whistleblower Law Update

Possible Damages

- Front pay
 - Reinstatement
 - Attorneys' fees
 - Back pay
 - Civil penalties
 - Punitive damages
-
- Statute of limitations: 2 years



Topic 5: Whistleblower Law Update

To Do:

- Internal whistleblower hotlines and policies should be updated.
- Post mandated “notice” of new law.
- Instruct appropriate manager levels of new requirement.
- Note well: *broad range of new law.*





Topic 6: The End of Non-Compete Clauses?

- Federal and State initiatives aimed at non-compete clauses.
- Considerations for entering into new non-competes.



Topic 6: The End of Non-Compete Clauses? *Federal and State Proposals*

- Proposals currently pending in Congress and in State Legislature that could severely modify how non-compete clauses are enforced.
- Focus point for administrative enforcement too. (Federal Trade Commission).
- At least moderate bi-partisan support (for now).



Topic 6: The End of Non-Compete Clauses? *Federal Proposals*

- “Workforce Mobility Act” – in Congress
 - Would prohibit non-compete agreements, with limited exceptions for senior executives subject to severance provisions and in situations involving the sale of a business.
- “Freedom to Compete Act” – in Congress
 - Would prohibit non-compete agreements for non-exempt workers.
- FTC Strategic Plan: FTC objective to identify and take action against anticompetitive practices, including, “restricting the use of non-compete provisions.”



Topic 6: The End of Non-Compete Clauses? *State Proposals*

- Quote from Governor’s agenda for 2022: “legislation to eliminate non-compete agreements for workers making below the median wage in New York State and to explicitly ban all ‘no-poach’ agreements under State antitrust law.”
- Current legislative proposal in state budget bill. Would require, at minimum:
 - At least 10 days to consider a non-compete agreement.
 - Restriction cannot pose “undue hardship” on the employee.
 - **Voidable if the employer cannot demonstrate a continued willingness to employ the employee.**
 - Invalid for anybody making less than the “median wage in New York state as determined” annually by the Department of Labor.





Topic 6: The End of Non-Compete Clauses? *Considerations for New Contracts*

- Identify whether median-wage workers are subject to non-compete clauses.
- Language addressing applicability of clause in event of confusion on new law's applicability to existing contracts.
- Heightened emphasis on limiting the duration of a non-compete.
- Shifting focus to non-solicits?



Questions?



Commercial Contracts – *Force Majeure* Clauses

- *Force majeure* clauses added to contracts to eliminate liability arising from natural and unavoidable catastrophes that inevitably interrupt the ordinary course of business and prevent parties from fulfilling contract obligations
- Expand and clarify clauses to eliminate liability specifically arising from epidemics and pandemics



Post-COVID Force Majeure Clause Example

- No party shall be liable or responsible to the other party, or be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement, when and to the extent such failure or delay is caused by or results from acts beyond the impacted party's reasonable control, including, without limitation, the following force majeure events:
 - (a) acts of God;
 - (b) flood, fire, earthquake, **epidemic (including without limitation the covid-19 pandemic)** or explosion;
 - (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest;
 - (d) government order, law, or actions;
 - (e) embargoes or blockades in effect on or after the date of this Agreement;
 - (f) national or regional emergency;
 - (g) strikes, labor stoppages or slowdowns, or other industrial disturbances;
 - (h) telecommunication breakdowns, power outages or shortages, lack of warehouse or storage space, inadequate transportation services, or inability or delay in obtaining supplies of adequate or suitable materials; and
 - (i) **other similar events or disasters beyond the reasonable control of the impacted party.**





Insurance Coverage

- Many businesses have been unable to file successful insurance claims due to specific requirements of their coverage, i.e.:
 - Business Interruption insurance coverage requires “direct physical loss or damage” that is not readily apparent in a pandemic scenario
 - Some policies have explicit coverage exceptions for virus outbreaks
 - In many cases, the magnitude of the interruption was not significant enough
- Insurance carriers have responded by offering endorsements for communicable diseases, including COVID-19



Insurance Coverage

- Federal and state legislation has also been introduced to require insurance companies to honor claims for ongoing COVID-19 losses and prospective losses from future events
 - Federal
 - The Business Interruption Relief Act of 2020 (voluntary – fed. reimburses participating carriers)
 - The Business Interruption Insurance Coverage Act of 2020 (for ongoing COVID-19 losses)
 - The Never Again Small Business Protection Act (prospective losses)
 - The Pandemic Risk Insurance Act (prospective losses)
 - New York
 - See supplemental materials





Mergers and Acquisitions

- Buyers should conduct a careful review/investigation of how COVID-19 has impacted the target company in diligence
 - Impact of travel restrictions
 - Federal, State and Local Government mandates
 - Insurance coverage in connection with COVID-19
 - Supply chain risks
 - Workforce risks
 - Impact of COVID-19 on material contracts and debt documents



Mergers and Acquisitions

- Identify financing challenges due to COVID-19
- Purchase Agreement Drafting Considerations:
 - Factor in COVID-19 liabilities when negotiating purchase price and potential earn outs.
 - Determine whether COVID-19 constitutes a Material Adverse Effect (MAE)
 - Incorporate COVID-19 concerns into representations and warranties (e.g. MAE, compliance with laws) and indemnification obligations



Securities Offerings – Required Disclosures

- Public and private offerings are required to identify and disclose material risks facing the issuer
- The issuer should identify all risks and how such risks could effect the issuer

Firm Specific Issues	Industry Specific Issues	National/Global Issues
Employment Issues Supply Chain <ul style="list-style-type: none"> • From suppliers • Customer demand Change in local environment	Changing trends <ul style="list-style-type: none"> • Increase in working and shopping from home • Built-in uncertainty of current conditions • Change in tastes Supply Chain <ul style="list-style-type: none"> • Temporary bottlenecks • Permeant contractions Changing regulation	Inflation Labor and Employment <ul style="list-style-type: none"> • The “Great Resignation” High Housing Costs <ul style="list-style-type: none"> • Geographic Relocation New COVID Variant? Geopolitics



Securities Offerings – Required Disclosures

- Disclosure Example (generic)
 - ***Our business, results of operations and financial condition may be materially adversely impacted by pandemics, other outbreaks of infectious diseases and other public health concerns, such as the COVID-19 outbreak.***
 - The global spread of the coronavirus (COVID-19) and the various attempts to contain it have created significant volatility, uncertainty and economic disruption. In response to government mandates, health care advisories and otherwise responding to employee and vendor concerns, companies across the globe have altered certain aspects of their operations, including social distancing protocols and work-from-home measures. Beverage production activities nationwide have experienced suspensions or alterations. While beverage production activities have resumed following initial cessations or suspensions, our activities could be subject to numerous issues, including without limitation, regulatory restrictions on activities, work stoppages or slowdowns and decreased consumer spending, any of which could have a material adverse effect on our business. Further, economic disruption related to the pandemic could cause some of our potential customers go out of business or reduce spending, resulting in increased costs or delays to our operations. In addition, a weakened global economy could impact our customers' ability and willingness to pay.
 - The full extent to which the COVID-19 pandemic and the various responses to it will impact our business, operations and financial results will depend on numerous evolving factors that we may not be able to accurately predict, including without limitation:
 - the duration and scope of the pandemic;
 - governmental, business and individuals' actions that have been and continue to be taken in response to the pandemic;
 - the availability and cost to access the capital markets;
 - the effect on our customers and customer demand for our products;
 - disruptions or restrictions on our ability to work and travel;
 - interruptions or restrictions related to the production of our products, including impacts on our suppliers' delivery of their products and our delivery of our products; and
 - any stoppages, disruptions or increased costs associated with our development, production, marketing and distribution of our products.

