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Introduction
COVID & NY HERO Act Update

Andrew D. Bobrek
Member
abobrek@bsk.com
Syracuse, NY

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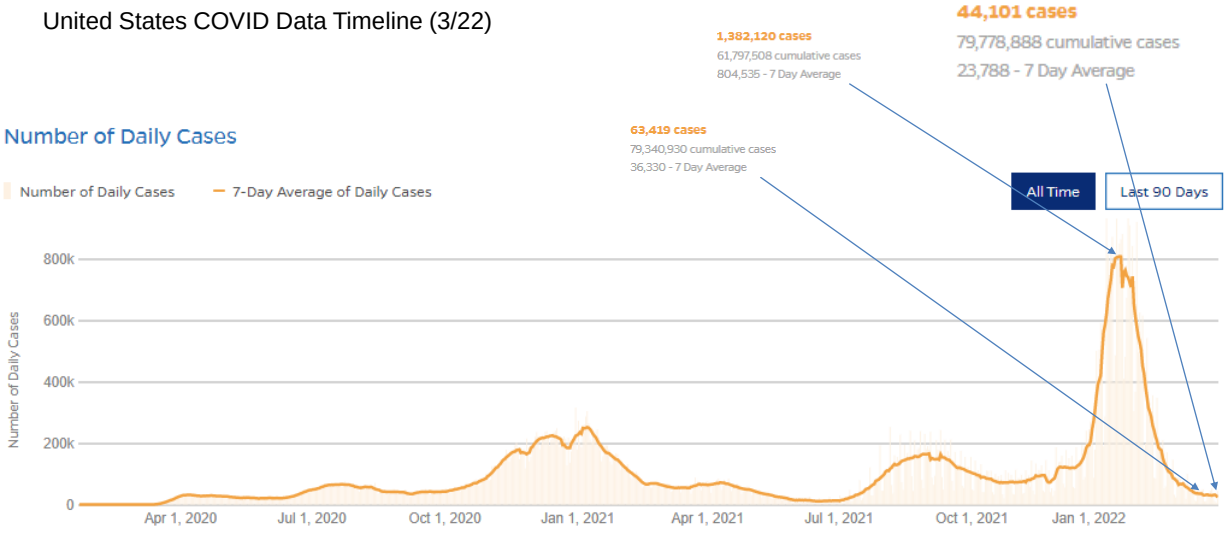
United States COVID Data Timeline (3/22)



Data Sources: Cases and deaths data from JHU CSSE; testing and vaccine data from JHU CCI; and hospitalization data from the U.S. Department of Health and Human Services.

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NYS ~~HERO~~ ACT

The New York Health and Essential Rights Act (NY HERO Act) was signed into law on May 5, 2021. The law mandates extensive new workplace health and safety protections in response to the COVID-19 pandemic. The purpose of the NY HERO Act is to protect employees against exposure and disease during a future airborne infectious disease outbreak.

Under this law, the New York State Department of Labor (NYS DOL), in consultation with the NYS Department of Health, has developed an Airborne Infectious Disease Exposure Prevention Standard, a Model Airborne Infectious Disease Exposure Prevention Plan, and various industry-specific model plans for the prevention of airborne infectious disease. Employers can choose to adopt the applicable policy template/plan provided by NYS DOL or establish an alternative plan that meets or exceeds the standard's minimum requirements.

The airborne infectious disease exposure prevention plans must go into effect when an airborne infectious disease is designated by the New York State Commissioner of Health as a highly contagious communicable disease that presents a serious risk of harm to the public health. When designated, employers are required to provide a copy of the adopted airborne infectious disease exposure prevention plan and post the same in a visible and prominent location within each worksite. Templates and resources are available below.

On March 17, 2022, the designation of COVID-19 as an airborne infectious disease that presents a serious risk of harm to the public health under the HERO Act ended. Private sector employers are no longer required to implement their workforce safety plans.

Inquiries about the HERO Act can be emailed to Airborne.Infectious.Diseases@labor.ny.gov.

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Uniformed Services Employment & Reemployment Rights Act (USERRA)

Mara D. Afzali
Associate
mafzali@bsk.com
Albany, NY

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USERRA Overview

- **What is it?**
  - USERRA - federal law protecting civilian employment and reemployment of service members
  - New York Military Law – state law equivalent

- **Purpose**
  - Encourage/support military service by:
    - Prohibiting employment discrimination against service members
    - Minimize disadvantages of serving/impact on civilian careers
    - Minimize disruption for **service members and their civilian employers**

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USERRA – Applicability

- **Who does it cover?**
  - Employers
    - Both public and private employers, foreign employers in US/territories
    - Regardless of size
  - Employees
    - Activated under federal AND state law (January 2021), training, drills, special assignments, medical examinations, etc.
    - Voluntary or involuntary

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USSERA Protections

- **Employee Rights/Responsibilities**
  - Right to be free from discrimination and retaliation (motivating factor)
  - Health insurance/pension plan coverage
  - Prompt reemployment to position employee "would have attained" (seniority, status, pay), subject to ***5 criteria***
    - *Leave for uniformed service*
    - *Advance notice (with exceptions)*
    - *Five years or less of cumulative military service with that employer*
    - *No dishonorable discharge/punitive conditions of service*
    - *Timely request for reemployment*
- **Employer Rights/Responsibilities**
  - Notice of Rights (USERRA Poster)
  - Provide training/skill refresher
  - Protected by ***5 criteria***

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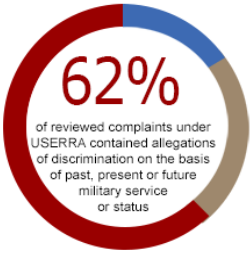
USERRA Enforcement (non-federal)

- **Department of Labor Veterans Employment & Training Service (DOL-VETS) Complaint**
  - Investigation
  - Possible mediation? (ESGR)
  - Referral for DOJ representation
  - Average 1,000 per year



15% of the complaints involved allegations of improper reinstatement into civilian jobs following military service

917 unique USERRA complaint cases in FY 2018

- **State/Federal Court Action**
  - Private right of action
  - No exhaustion requirements
  - Compliance order, lost pay/benefits, double damages for "willful" violations

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Resources

- **Department of Labor**
  - Guides and fact sheets

- **Employer Support of the Guard and Reserve (ESGR)**
  - Resources, events, mediation services, customer service center

- **Recognitions and Awards**
  - DOL - "Hire Vets Medallion Award"
  - ESGR – "Supportive Employers List"
  - ESGR – "Extraordinary Employer Award"
    "Freedom Award"

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COVID Litigation & Workers' Compensation Exclusivity

Stephanie H. Fedorka
Associate
sfedorka@bsk.com
Syracuse, NY

David M. Ferrara
Member
dferrara@bsk.com
Syracuse, NY

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Legal Theories – COVID-19 Related Injuries

- We have seen:
  - Tort – Negligence
  - Breach of Contract
  - Public Nuisance
- Failure to follow local, state, federal guidance regarding COVID-19
- Measures taken to protect employees inadequate

NEW YORK STATE Department of Health

CDC
CENTERS FOR DISEASE CONTROL AND PREVENTION

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Workers' Compensation – The Exclusive Remedy

- State specific workers' compensation laws
- **General Rule**: The exclusive remedy for work-related illness or injury is workers' compensation benefit
  - **Work related** – "arising out of and in the course of employment"
  - Quid Pro Quo bargain for wage and medical expense paid to individual employee
- **Exception(s): Vary from state to state**
  - Failure to obtain and maintain workers' compensation insurance
  - Intentional acts/intentional torts
  - Dual Capacity
  - Fraudulent Concealment

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Exceptions to Exclusivity in NY

- New York "when it has been determined that a plaintiff's injury is the result of an **intentional** and **deliberate** act by the defendant or someone acting on his behalf, the defendant is not entitled to such immunity" but "the conduct must be engaged in with desire to bring about the consequences of the act; mere knowledge and appreciation for risk is not the same as the intent to cause injury"

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Case Law to Date

Palmer v. Amazon Case (New York)

- Group of employees sued Amazon for failure to follow local, state, and federal public health guidance during COVID-19 pandemic which caused injuries and death to employees and employees' family members under NY Labor Law Section 200
  - NYLL 200 – Codification of common law duty to provide workers with safe work environment
  - Similar to OSHA General Duty Clause
- Eastern District of New York (federal court) dismissed case in November 2020
  - Claims preempted by workers' compensation law (exclusive remedy)
  - Also held **primary jurisdiction doctrine** applied
- Appealed to Second Circuit (pending)

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See's Candies Case (California)

- Plaintiffs filed state court complaint December 30, 2020
  - Employer operated candy assembly and packing line
  - During COVID-19 crises, employees complained through Union rep. and directly to Employer about close proximity of work and requested safety mitigation efforts to prevent spread of COVID-19
  - Plaintiffs argued that Employer knew and should have known that work created foreseeable and high risk of viral infection and transmission to other workers, and that failure to take appropriate and necessary safety mitigation efforts would increase known and foreseeable risk that workers would become infected in course of work and infect one or more family members
  - Generally not following OSHA, CDC, State Health Guidance

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See's Candies

- Plaintiff alleged that sometime in early March 2020, she was working without appropriate and necessary social distancing on packing line, using restrooms and breakrooms in close proximity to other workers, some other co-workers were coughing/sneezing, and she and other workers became infected with COVID-19
- Plaintiff Mrs. Ek, unable to work goes home where she resides with husband and one of her daughters
  - Within few days, her husband and daughter become infected with COVID-19
  - Mr. Ek (husband) ultimately dies

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See's Candies

- Plaintiff asserted two claims
  - General Negligence
  - Premises Liability
  - Sought damages for wrongful death of Mr. Ek (including "loss of consortium" type of claim– loss of love, care, comfort, society)
- Defendants argued that claims were preempted by workers' compensation act under the "derivative injury doctrine"
- Trial court ruled derivative injury doctrine did not apply here
- Defendants appealed
- Appellate court gave greenlight for lawsuit to proceed

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Derivative Injury Doctrine – Trial Court's Analysis

- General Rule = workers' compensation is exclusive remedy for work-related injuries/illness
- Derivative Injury Doctrine = Workers' compensation exclusive remedy extends to injuries collateral to or derivative of the compensable workplace injury.
  - Not separate distinct injury (e.g., loss of income/loss of consortium claims)
- Derivative Injury Doctrine only applies where no separate injury claimed.

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What does *See's Candies* really mean…?

- Case was not decided on the merits
  - Open question if workers' compensation is the exclusive remedy for COVID-19 claims
  - Did not address employer's duty of care to third parties (non-employees)
  - Did not address causal connection between any alleged negligence of employer and the husband (Mr. Ek)'s contraction of COVID-19
- Derivative injury doctrine did not apply in this case
  - Relied on former asbestos case
  - Allowed separate tort claim to proceed

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Other Obligations To Keep In Mind

- OSHA General Duty Clause
- NY HERO Act – Airborne Infectious Disease Exposu Plan
  - Creates private right of action for violation of plan if violation creates "substantial probability that death or serious physical harm could result to the employee"
  - But designation no longer in effect
- Whistleblower Protection Laws – no injury necessary
  - Retaliation for expressing concern of violation of law
  - State and federal protections (OSHA)
  - Recent expansion in NY

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Practical Tips

1. COVID isn't over (yet)!!
2. Stay Up to Date - Continue to monitor and comply with federal, state, and local guidance
3. Follow the guidance – Enforce the guidance
4. Communicate with GL insurance carrier
   - Understand what is covered
   - When to contact carrier when claim is filed

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Only Time Will Tell…

- We will definitely see further litigation on these issues in coming year(s)
  - Unclear what the outcome(s) will be
  - Outcome of *Palmer v. Amazon* case has potential biggest impact if Second Circuit opens any crack in Exclusivity defense.

- Long-term consequences of COVID remains to be seen as well
  - Latent claims of illness.

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New York's Automatic Renewal Law

Anna W. Richards
Member
arichards@bsk.com
Syracuse, NY

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N.Y. General Business Law §§ 527 and 527-a

- Effective date: February 9, 2021
- Applies to any “subscription or purchasing agreement” that is “automatically renewed” or one that “continues until the consumer cancels the service”
- Only applies to contracts with “consumers” – those who enter into contracts for “personal, family or household purposes”
- Exceptions: security system alarm operators; service contract sellers; banks, financial institutions and businesses regulated by the NYDFS; entities doing business pursuant to a franchise issued by a state agency

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Key Requirements

- Automatic renewal offer terms must be displayed in a more “clear and conspicuous” type than the surrounding text
- Automatic renewal terms must include certain required disclosures
- Must first obtain the consumer’s affirmative consent to the automatic renewal offer terms prior to charging the consumer’s credit or debit card
- Must provide a post-purchase acknowledgment that includes the automatic renewal terms, cancellation policy and information regarding how to cancel
- To effectuate cancellations, a business must provide an easy-to-use, cost-effective mechanism for cancellations

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Violations

- New York Attorney General may seek an injunction and an order for restitution
- Courts may impose civil penalties of $100 per violation, or up to $500 per “knowing” violation, or up to $1,000 for multiple violations resulting from a single act/incident.
- Good faith defense: Business must show by a preponderance of the evidence that the violation was "unintentional" and resulted from a “bona fide” error that resulted despite the business' having “reasonably adopted” procedures in place to avoid such errors.

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Business Insurance Coverage in the Time of COVID

Kevin G. Cope
Associate
kcope@bsk.com
Buffalo, NY

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Are business losses caused by Covid-19 covered under business insurance policies?

- Short Answer: No
- Longer Answer: It Depends

Business Losses Not Covered

- Many business insurance clauses contain limiting language to reduce or eliminate coverage
- Two typical business insurance clauses:
  - 1) Business interruption clauses
  - 2) “Civil Authority” clauses

Business Interruption Clauses

- Typical language covers:
  - Additional business expenses caused by loss or damage to real or personal property
  - General interruption of business caused by loss or damage to real or personal property
- Both covered expenses require direct physical loss
- New York Courts have been unanimous – without direct physical loss, there can be no claims for business interruption insurance due to government shutdowns in the wake of Covid-19

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Business Interruption Clauses – Rational for Denial

- No direct physical loss due to Covid-19
  - Presence of Covid-19 can be eliminated by "routine cleaning and disinfecting"
- Business interruption caused by "precautionary measures" resulting from state action to prevent spread
  - Precautionary measures do not equate to physical losses
- Some policies contain an express virus exclusion clauses
  - Makes the analysis more straightforward
  - Absence of virus exclusion clause does not create coverage

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“Civil Authority” Clauses

- Triggered when a civil authority (governmental entity) prohibits access to the insured’s property based upon a covered loss to the property in the immediate area of the insured’s property
- Like with business interruption clauses, the typical language for “Civil Authority” clauses requires direct physical loss to the property or surrounding area

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“Civil Authority” Clauses Continued

- Covid-19 Orders have not prohibited access to business properties
  - Limited access to businesses
  - Even if a business shut down as a result of Covid-19 Orders, business losses may still not be covered
  - Coverage does not exist where the business “could have continued to operate … under a ‘limitation’” *Mangia Restaurant Corp. v. Utica First Ins. Co.*, 72 Misc. 3d 408 (Sup. Ct. Queens County 2021)

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Statistics

- Within New York State (State and Federal Court)
  - 95.5% of all business insurance claims resulting from Covid-19 have been dismissed
  - As of March 2022 – 3 out of 66 cases
- Nationally (State and Federal Court)
  - 91.2% of all business insurance claims resulting from Covid-19 have been dismissed
  - As of March 2022 – 67 of 756 cases
- See https://cclt.law.upenn.edu/judicial-rulings/

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Long Answer - It Depends

- Insurance Policies are contracts
  - Coverage depends on language of the policy
- *New York Botanical Garden*
  - Policy reduced recovery "to the extent that the insured can resume operation"
  - Language implied coverage exists even with access to property – claim reduced by amount of access afforded to property
  - Motion to dismiss denied

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Conclusion

- Uphill Battle
  - Not lost as a matter of course
  - Requires an analysis of the interplay of various provisions and language within the policy
- Always best practice to have experienced counsel review insurance policy to see what arguments exist for coverage
- Act quickly
  - For any claim – policy language may limit the time you have to file a claim

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Andy Bobrek, abobrek@bsk.com

Uniformed Services Employment & Reemployment Rights Act (USERRA)

Mara Afzali, mafzali@bsk.com

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Kevin Cope, kcope@bsk.com

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