



New York Employment Law Update:

A Look Back and What to Expect in the New Year

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Agenda

- 1 | Opening Remarks – Robert Whitman
- 2 | State of Play Regarding COVID Matters – Anne Dana
- 3 | Paid Sick Leave Updates – Joshua Seidman
- 4 | Remote Work Tax Issues – Michael Lobie
- 5 | New York City and State Developments – Daniel Small



State of Play Regarding COVID Matters

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NY - Continue Compliance with Industry Specific Guidance

1. Physical Distancing
2. Protective Equipment
3. Hygiene, Cleaning and Disinfection
4. Communication
5. Screening, Testing, & Return to Work
6. Workplace Exposure, Tracing & Reporting Positive Cases to DOH
7. Business Safety Plan

* Cluster Zone Strategy

Slight Modification of NY Quarantine Rules

- December 29, 2020 → Gov. Cuomo modified New York quarantine requirements.
- Who is impacted:
 - Close contacts
 - Travelers (who choose not to use the shorter time permitted through testing)
- Previous rule = quarantine for 14 days.
- Current rule = quarantine for 10 days (and monitor for symptoms after)
- Purpose = brings NY into better alignment with CDC recommendations
- Limited impact on mandatory screening questions



Further Modifications to Travel Rules

- Shorter Quarantine Time using Testing Option for NY
- International Travel
 - Effective January 26, 2021, all internationally arriving U.S. air passengers (ages 2 and above), including U.S. citizens and permanent residents (with minor exceptions) provide a negative COVID-19 viral test that was administered three days before travel upon entering the U.S.
 - Alternatively, passengers may provide results proving recovery from COVID-19 with a doctor or physician authorizing international travel.



COVID-19 Vaccines

- **Important Things To Know About COVID-19 Vaccines in the Workplace**
 1. Employers can require employees to get COVID-19 vaccines
 2. Employers can ask for proof of vaccination
 3. Employers can track vaccination status of employees
 4. EEO laws apply (e.g., disability or religion)
 5. Financial incentives for getting the vaccine are permissible in connection with voluntary wellness plans
 6. States are introducing laws to undercut employers' ability to require vaccines
 7. Each state has its own vaccination plan and process



COVID-19 Vaccines: New EEOC Guidance

- EEOC issued updated guidance concerning COVID-19 vaccines in relation to various EEO laws, including the ADA and the Rehabilitation Act, GINA, and Title VII, including the Pregnancy Discrimination Act.
- [EEOC-COVID-19-Guidance-12-16-20.pdf](#)
[\(workplaceclassaction.com\)](#)
- In sum, all employers **may** require mandatory vaccines as long the employer:
 - (i) allows employees to receive the vaccine from a third party that does not have a contract with the employer, and
 - (ii) follows accommodation requirements under the ADA and Title VII (disability and religion).

Federal Administrative Agency Policy Shift

- We predict that a Biden administration will cause many federal agencies to shift from a “compliance assistance” to an “enforcement” posture.
- Employers should keep abreast of agency guidance and comments by agency officials (EEOC, DOL, OSHA, etc.).
- Employers should implement changes to conform to latest agency guidance quickly.



Paid Sick Leave: Nationwide Overview

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Mandatory Paid Sick Leave (PSL) and PTO Laws

Total Mandates

- As of Dec. 2020:
69 TOTAL PSL & PTO Mandates in the U.S.
- Why? Several jurisdictions have enacted multiple mandates.
Ex) General PSL Law + COVID-19 Temporary PSL Law
But the number is constantly changing due to COVID PSL laws

Federal

- **Executive Order 13706**
PSL for many EEs of certain federal contractors
- **Families First Coronavirus Response Act**
Emergency PSL for EEs of certain sized ERs (sunset as of 12/31/2020)

15 States + DC

PSL:

- California
- DC
- Massachusetts
- Connecticut
- Oregon
- Vermont
- Arizona
- Washington
- Rhode Island
- Maryland
- New Jersey
- Michigan
- **New York**
- Colorado

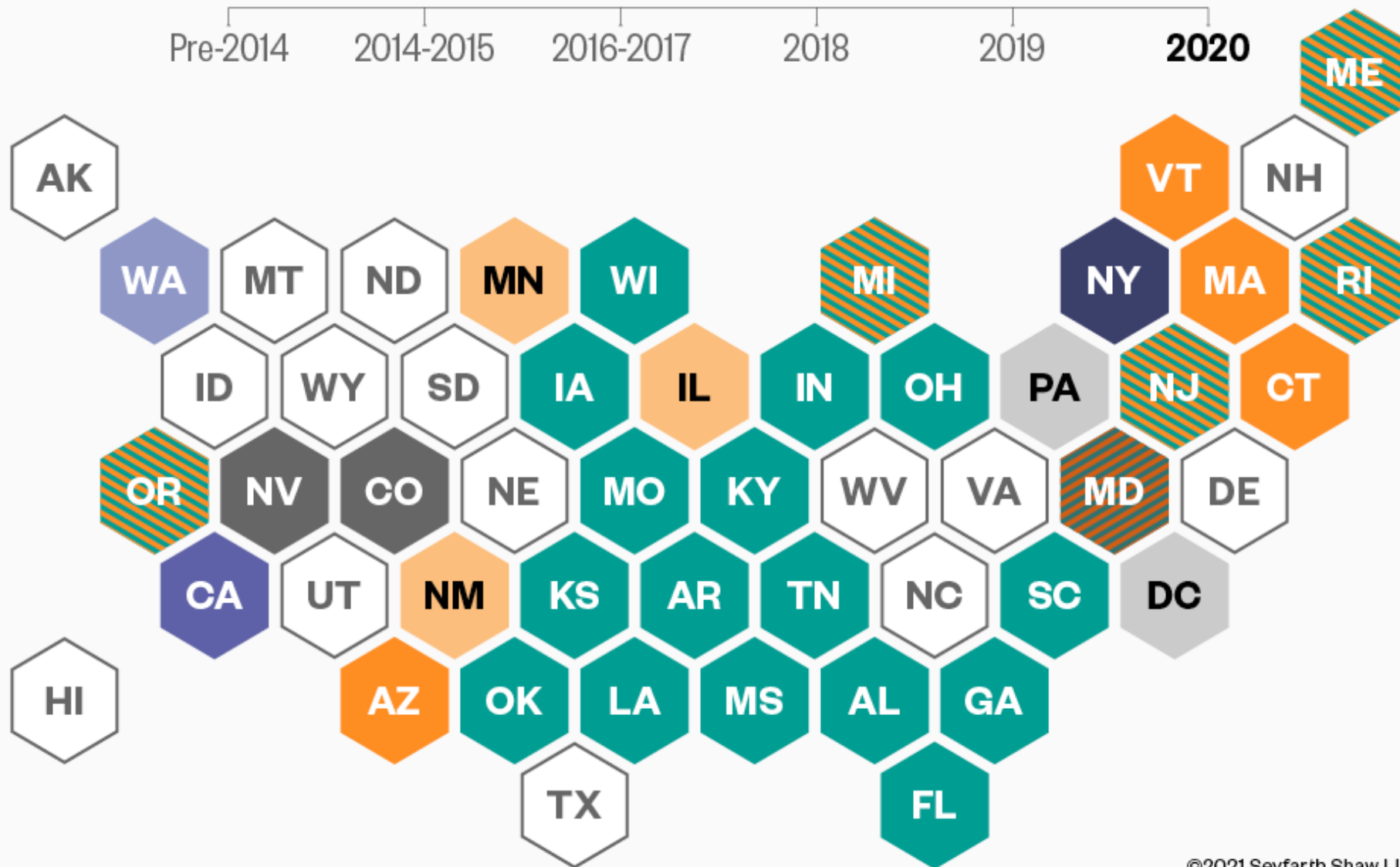
PTO:

- Maine
- Nevada

32 Municipalities

(1) San Francisco, CA; (2) Seattle, WA; (3) Long Beach, CA; (4) SeaTac, WA; (5) **New York City, NY**; (6) Los Angeles City, CA; (7) Los Angeles County, CA; (8) Oakland, CA; (9) Philadelphia, PA; (10) Tacoma, WA; (11) Emeryville, CA; (12) Montgomery County, MD; (13) Pittsburgh, PA; (14) Santa Monica, CA; (15) Minneapolis, MN; (16) San Diego, CA; (17) Chicago, IL; (18) Berkeley, CA; (19) Saint Paul, MN; (20) Cook County, IL; (21) **Austin, TX**; (22) Duluth, MN; (23) **San Antonio, TX**; (24) **Dallas, TX**; (25) **Westchester County, NY (2 laws – sick time law and safe time law)**; (26) Bernalillo County, NM (PTO law); (27) San Jose, CA; (28) Sacramento City, CA; (29) Sacramento County, CA; (30) San Mateo County, CA; (31) Santa Rosa, CA; (32) Sonoma County, CA

The Spread of Sick/Personal Leave & Anti-Local Leave Laws



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New York State and Local Paid Sick and Safe Leave Laws Overview

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NYS Paid Sick Leave Law



Legal Requirements	New York State Paid Sick Leave
Accrual Rate	1 hour of sick leave for every 30 hours worked.
Accrual Cap	40 or 56 hours of <u>paid or unpaid</u> sick leave, depending on employer size
Usage Cap	<u>ER with Fewer than 100 EEs</u> : Up to 40 hours of sick leave per year (paid or unpaid varies on employer size) <u>ER with 100+ EEs</u> : Up to 56 hours of paid sick leave per year
Usage Waiting Period	No waiting period
Year-End Carryover	No carryover cap.
Frontloading	Permitted. Unclear if frontloading gets rid of an employer's carry over obligations.

NYC Earned Safe and Sick Time Act

(Follow NYS if More Generous)



Legal Requirements	New York City Paid Sick Leave
Accrual Rate	1 hour of sick leave for every 30 hours worked.
Accrual Cap	40 or 56 hours of paid or unpaid sick leave, depending on employer size
Usage Cap	<u>ER with Fewer than 100 EEs</u> : Up to 40 hours of sick leave per year (paid or unpaid varies on employer size) <u>ER with 100+ EEs</u> : Up to 56 hours of paid sick leave per year
Usage Waiting Period	No waiting period
Year-End Carryover	Law provides that employees can carry over up to 40 or 56 hours, depending on employer size; however, there is uncertainty regarding this topic.
Frontloading	Likely permitted. Unclear if frontloading gets rid of an employer's carry over obligations.

NYS Paid Sick Leave Law



Legal Requirements	New York State Paid Sick Leave
Increments of Use	Reasonable minimum increment for the use of sick leave which shall <u>not</u> exceed 4 hours.
Notice to Employer	Employer <u>must</u> provide leave for the permitted purposes upon oral or written request of an employee.
Documentation	<u>No standard</u> BUT law does restrict employers from disclosing confidential information. <u>Proposed regulations</u> suggest forthcoming standard.

NYC Earned Safe and Sick Time Act

(Follow NYS if More Generous)



Legal Requirements	New York City Paid Sick Leave
Increments of Use	Initial reasonable increment not to exceed 4 hours; thereafter in increments of 30 minutes.
Notice to Employer	<u>Foreseeable Absences</u> : Cannot require more than 7 days' advance notice. <u>Unforeseeable Absences</u> : As soon as practicable.
Documentation	For an absence of more than 3 consecutive workdays for sick or safe time, an employer may require reasonable documentation.

NYS Paid Sick Leave Law



Legal Requirements	New York State Paid Sick Leave
Available Balance Notice	<p><i>Upon the oral or written request of an employee</i>, an employer <u>must</u> provide a summary of the amounts of sick leave accrued <u>and</u> used by such employee in the current calendar year <u>and/or</u> any previous calendar year.</p> <p>Must be provided <i>within 3 business days of such request.</i></p>
Notice and Posting	No provision
Written Policy Mandate	Yes.

NYC Earned Safe and Sick Time Act

(Follow NYS if More Generous)



Legal Requirements	New York State Paid Sick Leave
Available Balance Notice	(a) Amount of safe/sick time accrued <u>and</u> used during a pay period <u>and</u> (b) an employee's total safe/sick time <u>must</u> be included on a pay statement <u>or</u> other form of written documentation provided to the employee each pay period.
Notice and Posting	Notice: written notice EE rights under the amended law. Must be provided at the commencement of employment or within 30 days of the amendments' effective date (BUT NYC website says by 1/1/2021). Posting: Must conspicuously post at ERs place of business in an area accessible to EEs (NYC website says by 1/1/2021)
Written Policy Mandate	Yes.

Westchester County, NY – Status of Sick and Safe Time Mandates

- **Two separate** ordinances – (a) Earned Sick Leave Law (Effective April 2019), (b) Safe Time Leave Law (“STLL”) (Effective October 2019)
- Earned Sick Leave Law - appears to have **sunset** in light of NYS PSL
- Safe time leave was **in addition to** sick leave provided for under the Westchester County, NY Earned Sick Leave Law
- STLL does **not** contain accrual or carryover provisions.
- Employees are entitled to take up to 40 hours of paid safe time leave in a year.
- Employees who are victims of domestic violence or victims of human trafficking are entitled to take up to 40 hours of paid leave in order to:
 - (1) attend/testify in criminal and/or civil court proceedings relating to domestic violence or human trafficking; and/or
 - (2) move to a safe location.
- The STLL also contains a number of other requirements and obligations, including, but not limited to, usage increments, payment of STLL, notice, posting, etc.

NYS COVID-19 Paid Leave Law

- **Effective Date:** Went into effect March 2020; No sunset date
- **Benefits:** Amount and type of benefits depend on ER size
 - **ERs with 10 or fewer EEs *and* net income of \$1M or less:** (A) *unpaid* sick leave for quarantine or isolation + eligible for expanded (B) paid family leave (PFL) and (C) state disability benefits (DB)
 - **ERs with 10 or fewer EEs *and* a net income greater than \$1M OR ERs with 11 to 99 EEs:** (A) At least 5 days of PSL + (B) unpaid leave for remainder of quarantine or isolation + after exhausting PSL, eligible for (C) PFL and (D) DB.
 - **ERs with 100 or more EEs:** (A) At least 14 days of PSL + most likely (B) PFL to care for child
- **Covered Absences:** EE must be “*subject to mandatory or precautionary orders of quarantine or isolation*” issued by state of New York, department of health, local board of health, or any governmental entity related to COVID-19.
- **Coordination of Benefits:** MUST provide PSL separate from any existing PSL or other paid time off accruals

NYS COVID-19 Paid Leave

- **1/20/2021 NYS DOL Guidance (Non-Binding):** Clarifies and expands several aspects of NYS COVID-19 PSL mandate.
- **Initial Takeaways:**
 - NYS COVID-19 PSL may be available to EEs subject to **multiple** mandatory or precautionary orders of quarantine or isolation. ***But there are limits.***
 - EE can receive NYS COVID-19 PSL for a maximum of 3 orders of quarantine or isolation in the following situations: **(a)** EE is absent for a mandatory quarantine or isolation, returns to work, and then tests positive for COVID-19, **or (b)** EE was subject to an order or quarantine or isolation and continues to test positive after initial quarantine or isolation period ends.
 - In these situations and while not completely clear, it appears EE can receive a new set of NYS COVID PSL for each covered order.
- **Other Topics Addressed Include:** (a) employer obligations when it sends EE home due to exposure or potential exposure; (b) documentation; (c) how to treat EEs returning to work after period of mandatory quarantine or isolation

Seyfarth Paid Sick Leave Resources



If you're struggling with NY PSL or the country's Paid Sick Leave "Patchwork" here are some ways Seyfarth can help:

(A) **PSL Survey**: Seyfarth maintains a ***comprehensive PSL survey*** breaking down the specific requirements of ***each*** existing mandatory PSL, COVID-19 PSL, and PTO law.

For more information contact:

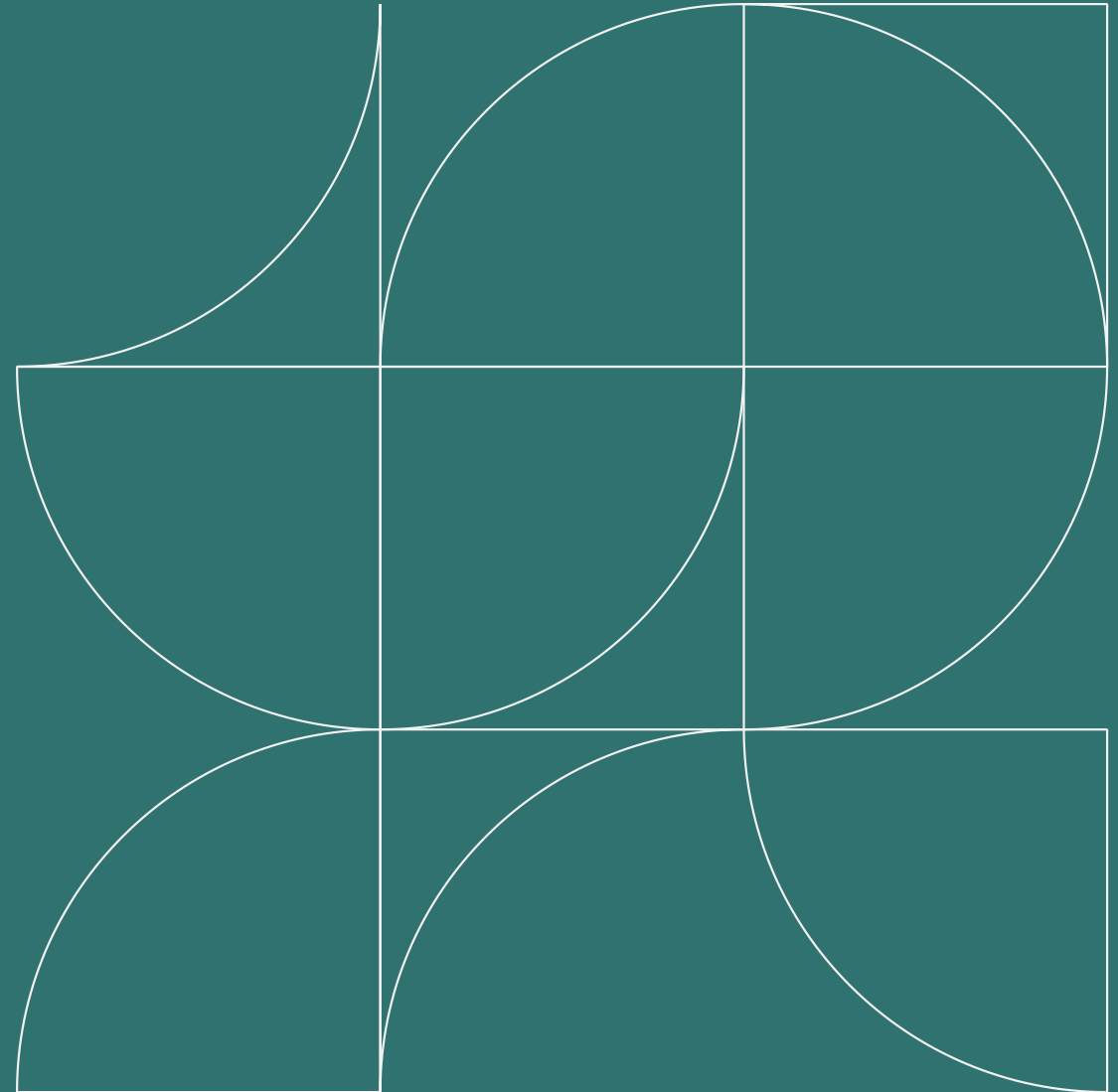
paidleave@seyfarth.com

(B) **PSL Mailing List**: Seyfarth regularly publishes Legal Updates and Blog Posts on PSL law developments.

You can sign up here:

<https://connect.seyfarth.com/9/7/landing-pages/subscription.asp>

Remote Work Tax Issues



Biggest Takeaway from 2020

The COVID-19 pandemic has sharpened our focus on remote work tax issues

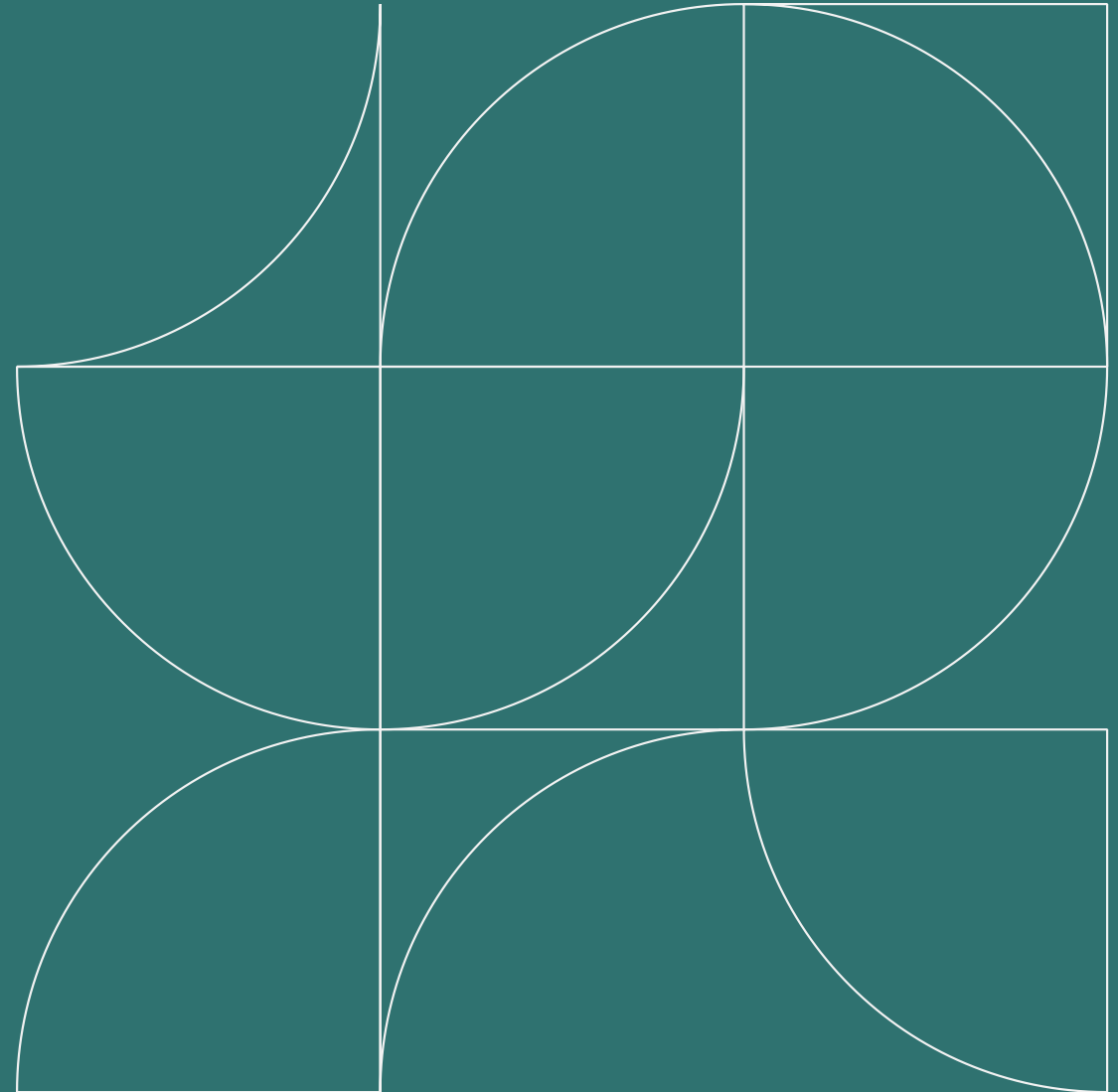
- **Whenever an employee lives and works in different states, there are at least two tax issues relevant to his/her employer**
 - The employer may need to withhold income taxes from the employee's wages for more than one state
 - The employee's presence working from their home state may create corporate income tax nexus for the employer (*i.e.*, may make the employer subject to corporate income tax in that state)
- **Remote work has created tax issues for a while**
 - Most people were not aware of these issues because remote work was not common
 - But the shutdown orders have made it widespread
- **Income tax is an important source of revenue for states (and some cities), so they are getting aggressive in pursuing it**
 - The COVID-19 pandemic has made them more desperate
 - States sue each other over who has the right to tax an employee's wages (*e.g.*, CT v. NY; NH v. MA)
 - Some states are not willing to back off because of shutdown orders (*e.g.*, NY; MA)

Looking Forward to 2021

Employers must account for tax issues when setting policy

- **Creating a flexible work-from-home policy may create a withholding and/or income tax obligation**
 - Employers need to do a state-by-state review of tax rules to know what obligations might result from an employee working in a state
 - Certain states have provided limited relief during the COVID-19 pandemic (about one third), but most are silent or impose their normal tax rules despite their shutdown orders
 - States are likely to return to normal tax rules post-pandemic
- **For New York employers, generally continue to withhold NY/NYC income taxes from employees' wages even if they are working from home in other states**
 - New York has said that they will treat employees working from home in another state as doing so for their own convenience rather than for the “convenience of the employer” despite shutdown orders, so employees assigned to a New York office will generally be treated as working in New York even when they work from home
 - Expect New York to be aggressive (as it always has been) to make up for lost tax revenue resulting from business closures

New York City and State Developments



May 2020 Failed Legislation: Essential Worker Premium Pay & Just Cause Termination



- NYC Essential Workers Bill of Rights
 - Premiums for essential workers
 - “Just cause” rights for essential workers
 - Paid sick leave for gig workers
- Never passed

December 2020: Fast-Food Just Cause Requirements



- At-Will No More for Fast-Food Chains
 - Just Cause Termination
 - Progressive Discipline Policies
 - Mandatory Arbitration
 - Justification for Economic-based Termination
- Passed → Effective July 4, 2021

Lessons Learned and What's On the Horizon at the State Level



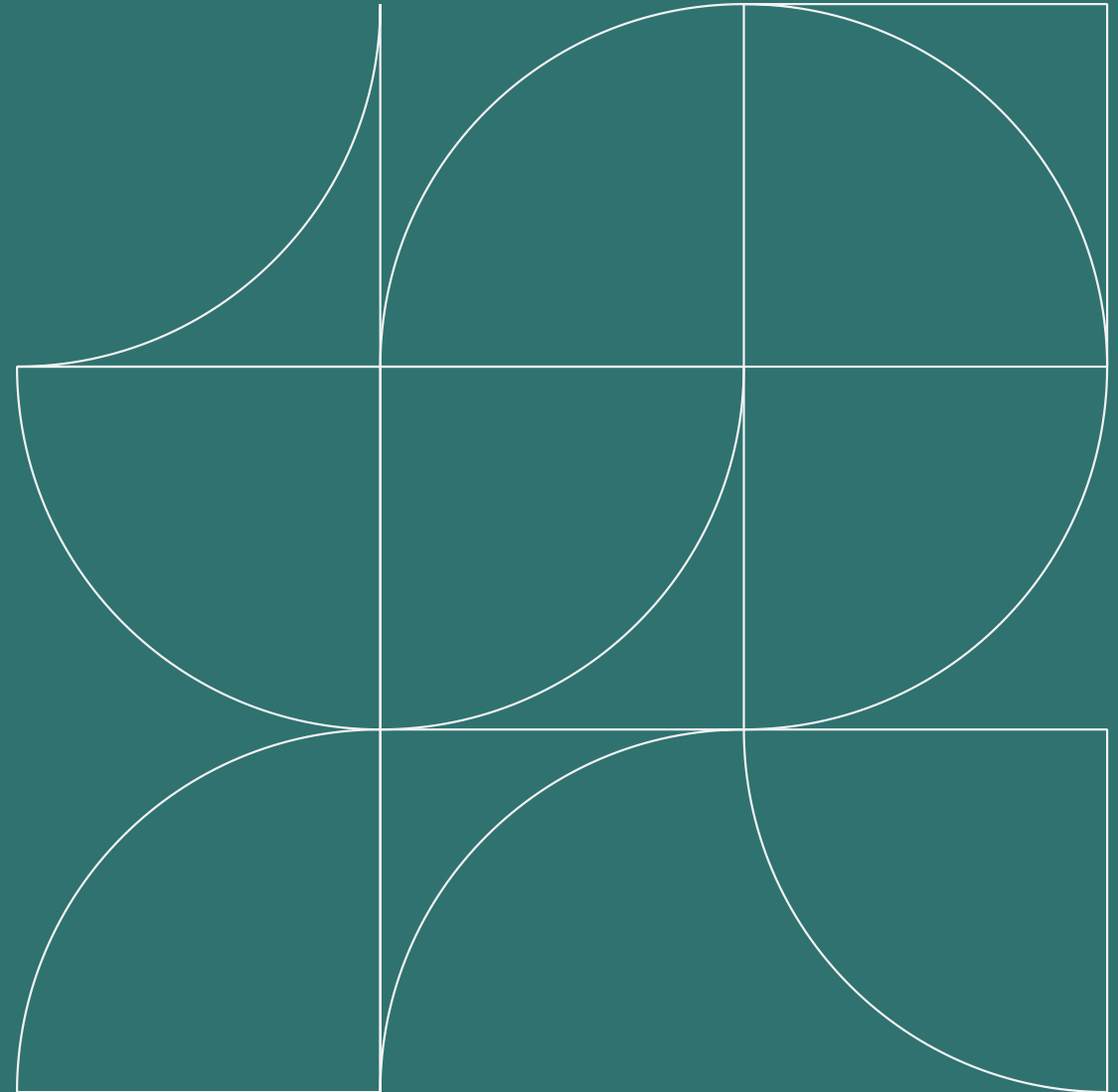
Lessons Learned

- Expansion of At-Will
 - Retail?
 - Hospitality?
 - Smaller Restaurant Chains?
 - Front-line Workers?
- Power of Management's Lobbying

NYS Legislature Activity

- Pending Legislation
 - Hazard Pay + Predictive Scheduling
- Passed Legislation
 - Part-time Employees Eligible for Unemployment

Q&A



Thank You!

Please contact us with any questions:

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